

DHAAT Appeal

1. This is an appeal against the decision of the Department of Defence through the Directorate of Honours and Awards not to award me the AASM for my service with Rifle Company Butterworth (RCB) in Malaysia February – May 1979. My application was lodged on 28 March 2019 (Ref No. MOA) and the delegate, S J O'Brien, wrote to me on 20 May 2019 advising that my application was rejected because I do not qualify for the award (Attachment A).¹
2. I contend, and shall demonstrate below, that the Department of Defence's (Defence) position that RCB service between 1970 and 1989 (including my period of service) is *peacetime* service is contrary to law and not supported by the evidence. As a result, the Minister has made an *unlawful* decision by not awarding *warlike* service to RCB service and determining it to be *peacetime* service instead, thereby denying me medallic recognition commensurate with my service and the law.
3. Defence maintains that service in RCB 1970-1989 "...is appropriately classified as peacetime service."² That is that my service was in no way, shape or form operational. To support this claim, Defence relies on assertions that are either factually wrong or contrary to law, and on selective use of official documents whilst ignoring others that conflict with their views.
4. Defence, through the Nature of Service Branch (NOSB)³, correctly states that "All nature of service reviews are considered in the context of the legislation and policies at the time of the activity or operation under review."⁴ For RCB these are the *Repatriation (Special Overseas Service) Act 1962* (SOS Act), which was in force until 22 May 1986 when it was repealed and replaced by the *Veterans' Entitlements Act 1986* (VEA). Before considering RCB service under these two Acts, it is worth reviewing what Clarke J said in his *Report of the Review of Veterans' Entitlements 2003* (Clarke Review) regarding the changing legislation and concurrent definitions relating to veteran entitlements. He said:

"13.11 The Government appears to have had no difficulty in providing qualifying service entitlements for service in Korea and the most intense period of the Malayan Emergency between 1950 and 1957. However, it was not until 1968 that qualifying service benefits were extended to those allotted for special duty in a special area under the SOS Act that covered operations in Vietnam, the Malay-Thailand border, the Malay Peninsula, Singapore and areas of Borneo during Confrontation. The principal reason for this service not being accorded qualifying service status at the time of those operations was that the risk to personnel involved was not initially assessed to be as great as that experienced in earlier wars. The comparison of this type of service with that rendered in the two World Wars illustrates an attempt, however flawed, to adopt consistent criteria in determining what service would provide access to service pension benefits.

13.12 The next, and better, attempt to adopt a principle consistent with that which applied in World Wars I and II in conferring qualifying service benefits is illustrated in the

¹ O'Brien, SJ, Letter to Mr R Fulcher, 20 May 2019, Ref No – BN594320.

² Cooper, J, Ministerial Correspondence, *Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 11.

³ Redesignated as Nature of Service Directorate.

⁴ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 108.

second reading speech by the Minister for Repatriation, Senator McKellar, for the 1968 SOS Bill, in which he said:

The second amendment that the Bill proposes is to extend eligibility for service pensions to those who have served on special service under the Repatriation (Special Overseas Service) Act. The government believes that the nature of the special service, which is similar to theatre of war service in earlier wars, justifies the recognition of its intangible effects in the future.”

5. That is, a consistency of meaning and application from WWI onwards whether the legislation says ‘theatre of war’, ‘allotment for duty’, or ‘warlike’ is what was intended. It follows that legal precedent set in relation to those earlier definitions remains applicable when determining the nature of service today under either of the relevant Acts.
6. Defence contends that RCB service does not meet the “essential criteria for classification as *special duty*, as *warlike* or *non-warlike* service, or as *hazardous service*”.⁵ That is, that RCB does not satisfy any of the criteria under the SOS Act or the VEA.

The Repatriation (Special Overseas Service) Act 1962 – Legal and Factual Errors by Defence

7. Defence contends that:

“Special overseas service (which is equivalent to *warlike* service) was achieved when three conditions were met:

- that a special area has been prescribed;
- that the personnel were serving in the special area; and
- that personnel were allotted for special duty within the special area.

Special duty is defined in the Act as:

“...duty relating directly to the warlike operations or state of disturbance by reason of which the declaration in respect of the areas was made...”⁶

8. It is uncontested that there was no prescribed area and that RCB personnel were not allotted for special duty within the special area. I contend that *that* is not the end of the matter as Defence seems to believe. The question to be asked is not ‘*does* RCB service meet these three administrative criteria’ but rather ‘*should* RCB service have been prescribed and its personnel allotted at the time, given the facts revealed since’. As Mohr J said in the *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*:

There has been no single topic which has affected so many possible anomalies as the matter of “allotted” or “not allotted”.

I am fully conscious of the provisions governing the award of medals, qualifying service, etc, in Warrants, Acts and guidelines. The point is however, that so many members of the ADF served in South-East Asia during the period of the Review had no idea of the necessity for themselves or their unit to have been ‘allotted’ before they received qualification for a medal or repatriation entitlements and now find themselves disadvantaged years later because those who ordered them to do their duty, which they did, took no steps to ensure

⁵ Ibid., para 159(d).

⁶ Ibid., paras 109-110.

that the required allotment procedures were attended to when quite clearly they should have been.

There is a procedure available for retrospective allotment but this appears not to have been followed in many cases.

It seems unfair that members of the ADF in this situation should be denied the opportunity to put forward for consideration the nature of their service, which would in many cases, amount to operational and/or qualifying service because of this action, or rather lack of action, of their superiors.⁷

9. The reason for non-allotment at the time was not an oversight or lack of knowledge as Mohr J alludes to above. Rather it was deliberate policy arising from diplomatic and domestic sensitivities that Defence has never addressed. Documents of the time speak of the sensitivities of the Malaysians to the presence and activity of foreign forces at Butterworth. For instance, in a 1972 paper discussing security improvements at Butterworth it was said that:

“Taking into account Malaysian sensitivities, our security measures should be relatively unobtrusive. To meet the situation security should be based on:

- a. effective local security which includes good observation; and
- b. a quick reaction capability.”⁸

10. In his book *Kampong Australia: The RAAF at Butterworth*⁹, author Matthew Radcliffe sheds light on what those sensitivities were. Radcliffe points to Malay sensitivity to the presence of foreign troops in a recently independent country and the lengths to which the Australian government would go to protect the Malaysian government from resultant domestic criticism. He discusses the “3rd Campism” of the Malay population in the context of the Cold War and perceived alliance with either West or East. He highlights the popular mistrust of organisations such as SEATO which were viewed by Malays as simply promoting western imperial aspirations and the more pragmatic view of the Malaysian government who understood the necessity of SEATO and their own inability to provide defence of their new nation. The Anglo Malayan Defence Agreement (AMDA – the Commonwealth plan to stop China at the narrows of the Malay peninsula in event of war), Radcliffe says, was “worded to accommodate domestic opinion in both Britain and Malaya...” and “...amounted to a mutually acceptable vagueness”.¹⁰ Radcliffe highlights the popular view by citing a Malay journalist from 1955:

“The independence we shall soon attain will be useless if such foreign troops still remain in our country... Our political independence will have no meaning at all if that independence does not include independence in ... defence.”¹¹

11. This attitude of the Malay population almost boiled over around AMDA and its perceived (correctly) delegation of “responsibility for external defence” to foreign forces.¹² The government had to intervene, effectively threatening to resign over the matter in order to restore some calm. Radcliffe

⁷ Mohr, R.F., *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, 2000, p7.

⁸ Commander ANZUK Force, *Security of Air Base Butterworth*, ANZUK 007/3001/1/OPS, 15 March 1972, para. 8.

⁹ Radcliffe, M, *Kampong Australia: The RAAF at Butterworth*, New South Publishing, 2017.

¹⁰ *Ibid.*, p38.

¹¹ *Ibid.*, 32.

¹² *Ibid.*, p39.

further argues that the government's and country's very stability now "...depended upon successfully managing the public's perception of the Commonwealth forces."¹³

12. Nor were these concerns limited in time to the very early days of Malaysian independence but rather continued into the period of RCB deployment as described by Australia's High Commissioner to Malaysia in a message to Canberra:

"The concept of an integrated ANZUK presence continues to be something of a spectre with Zaiton."¹⁴

13. Domestically, the Whitlam government had been elected on a platform of withdrawal of all Australian combat forces from South East Asia, replacing 'Forward Defence' with 'Fortress Australia' and so any continuing presence of Australian ground combat forces in the region could potentially embarrass the government. This was confirmed by the Vice Chief of the Defence Force (VCDF) in a letter to Ms Cathy McGowan, AO, MP dated 26 April 2019. The VCDF advised Ms McGowan:

"Due to the sensitivities at the time in relation to the deployment of Australian land forces overseas for the purposes of forward defence of Australia, the Minutes state that the deployment of the infantry unit could be presented publicly as being for training purposes."¹⁵

14. However, due to Australia's commitment to the Five Power Defence Arrangement (FPDA) and its primary role in the Integrated Air Defence System, we were not able to withdraw the RAAF presence from Butterworth and had to provide security to the base. This is highlighted by concerns discussed at the time which highlight that although the Malaysians had nominal responsibility for defence of Butterworth, their actual capacity to do so was lacking. This elevated the importance of providing an Australian infantry company to bolster the defence capability of the base:

"Capacity of Butterworth to meet the Threat

Cognizance has been taken of the statement that "...there is a significant deficiency in the capability at Air Base Butterworth to oppose or even contain any attack or sabotage attempt." ...

The Malaysian lack of capacity to effectively provide for their role in the security of Air Base Butterworth is a cause for serious concern, and is prejudicial to the security of ANZUK installations and equipment."¹⁶

"A recent report from Air Base Butterworth indicates that the security arrangements at the Base are less than adequate."¹⁷

"Local authorities have stated that no Malaysian Security Force contingency plan exists for the reinforcement of Air Base Butterworth. It is not known if such a plan exists at the Ministry of Defence. A locally known plan, which has been implemented once in 1975,

¹³ Ibid., p40.

¹⁴ High Commissioner, Kuala Lumpur, *Five Power Defence: Butterworth Company*, 6 January 1972.

¹⁵ Johnson, D., VCDF, *Letter to Ms Cathy McGowan AO, MP*, PDR ID: EC19-002341, 26 April 2019.

¹⁶ Commander ANZUK Force, *Security of Air Base Butterworth*, ANZUK 007/3001/1/OPS, 15 March 1972, para. 5.

¹⁷ Royston, R.S., *Security Situation – Air Base Butterworth Report No 34*, INT 8/10/3 (150), 4 August 1975, para 6.

allows for the deployment of troops from HQ 6MIB at the request of OC RMAF Butterworth. Troops from 6 MIB are fairly heavily committed on the Thai/Malaysian border and the size of the force that could be sent to Butterworth depends largely on this commitment. The nearest artillery units to Butterworth are at Taiping.”¹⁸

15. Fortunately for the government of the time the Defence Committee in 1973 provided them with a solution that would allay Malaysian sensitivities and neutralise the potential for uncomfortable domestic questions. At its 11 January 1973 meeting, the Committee proposed that:

“When the Australian Battalion is withdrawn from Singapore the requirement for a company for security duties at Butterworth will be met by providing the unit on a rotational basis from Australia. This could be presented publically as being for training purposes”¹⁹

16. This was not the first time that Defence has seen the value in camouflaging the presence of Australian troops at Butterworth. In a Letter from A. H. Tange, Secretary, Department of Defence, to the Secretary, Department of Air, regarding ‘*Security at Butterworth*’ he says:

“... In addition, Malaysian reluctance having been overcome, the ANZUK force will now provide one infantry company on rotation through Butterworth on a full-time basis, ostensibly for training, flag-showing and a change of scene. The presence of this company will provide the Commander with a ready-reaction force which he can use inter alia to supplement elements available to him under the joint Malaysian-RAAF Plan...”²⁰

17. The Vice Chief of the General Staff visited Butterworth in 1973. His briefing included the advice that:

“The deployment of the company to Butterworth has in recent years assumed a real importance because of the somewhat increased concern about possible threat to base security. Although Malaysia may be expected to have assumed that this is the case, publicly and privately the position is maintained on both sides that the deployment is for exercise purposes.”²¹

18. The Australian High Commissioner in Malaysia advised the government that the Malaysians themselves urged the use of the ‘training camouflage’ for the company:

“Zaiton muttered about the presentational difficulties and maintained that the only *raison d’être* could be the furthering of training.”²²

19. The refrain is the same, that the deployment of an infantry company to Butterworth was for base security but that needed to be camouflaged and the Malaysians were in on the subterfuge for their own reasons. Defence has never examined the implications of this evidence on *why* RCB was not allotted to a prescribed area. It would have been impossible to maintain the necessary camouflage had the proper

¹⁸ Royston, R.S., *Security Situation – Air Base Butterworth Report No 34*, INT 8/10/3 (150), 4 August 1975, para 7.

¹⁹ Defence Committee Minute, *Five Power and ANZUK Arrangements and Withdrawal of Australian Battalion and Battery*, Minute No. 2/1973, 11 January 1973.

²⁰ Tange, A.H., *Security at Butterworth*, Ref. 71/3160, 2 March 1972.

²¹ Defence Planning Division, AWM 209-H-2 Folio 140, *VCGS Visit to Malaysia: The Butterworth Company*, 11 October 1973, para 3.

²² High Commissioner, Kuala Lumpur, *Five Power Defence: Butterworth Company*, 6 January 1972.

administrative procedures been followed so that the troops met the three administrative criteria for special overseas service under the SOS Act.

20. Defence has recently attempted to simply dismiss the passage cited at para 15 as not actually a deception because RCB rotations did undertake some training,²³ as all military formations do regardless of whether in peacetime or war. Defence's contention is that RCB were sent to Butterworth for "security duties", but because of "sensitivities" in Australia about overseas deployment for "forward defence" this deployment was "presented publicly as being for training purposes".²⁴ No reasonable person could claim this as anything but deceptive. But defence baldly claim that it is not because as well as conducting "security duties" that were called "training", the companies also did some actual training so therefore calling "security duties" "training" is not deceptive.
21. It must be said that Defence does not just rely on the administrative "conditions" contained in the SOS Act to claim that RCB service was not "special duty". They refer to Cabinet Directive 1048 of 7 July 1965²⁵ which sought to clarify for the ADF how the SOS Act was to be implemented, it said:

"...that the Services be directed that allotment for "special duty" should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces or dissident elements; in the present circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to Indonesian infiltrators or communist terrorists in circumstances where there has been a specific request for the assistance of Australian forces and where the task has been clearly defined..."²⁶

22. Defence go on to say that:

"ADF service at RAAF Butterworth from the end of confrontation in 1966 to the end of the infantry rifle company's quick-reaction role in December 1989 does not meet the essential criteria for allotment for special duty in a prescribed area for the purposes of the Act. There were no requests from the Malaysian Government to the Australian Government for military assistance after 14 September 1966."²⁷

23. Defence has further contended that:

"While Australian forces remained in Malaysia following the Confrontation ceasefire on 11 August 1966, the Malaysian government made no further requests for assistance in security operations. Accordingly, Australian forces were not engaged in any operations against hostile forces or dissident elements."²⁸

and

²³ Johnson, D., VCDF, *Letter to Ms Cathy McGowan AO, MP*, PDR ID: EC19-002341, 26 April 2019.

²⁴ Ibid.

²⁵ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 111.

²⁶ Cabinet Minute, Decision No, 1048, Submission No. 834, *Principles on which Eligibility for War Service Homes Loans is determined and the Consequences of their continued application on the Demand for Loans – Examination and Report by Inter-departmental Committee*, Melbourne, 7 July 1965, Recommendation 1.

²⁷ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 112.

²⁸ Cooper, J, Ministerial Correspondence, *Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 10.

“Because no state of war or emergency existed in Malaysia after the end of confrontation on 11 August 1966 and because the Malaysian government made no request to the Australian government for military assistance after this date, ADF personnel were not engaged in duty relating to warlike operations or a state of disturbance in Malaysia between 1970 and 1989. As a result, ADF service, including those at Butterworth, cannot be considered to be the special service under this act at the time, the Repatriation (Special Overseas Service) Act 1962.”²⁹

24. With respect, these examples of the approach taken by Defence set Cabinet Directive 1048 on its head. It elevates the subordinate clause dealing with a particular situation (“in the present circumstances”), that occurred well before RCB deployments, above the directive on how “allotment for ‘special duty’ should ... be made” under the Act. It raises the subordinate clause to the level of the governing principle of when allotment can be made. This was clearly not the intent of the Cabinet. Nor was it the view of Clarke J who said:

13.9 “The type of service required for allotment is explained in a 1965 Cabinet decision, which stated:

That the Services be directed that allotment for “special duty” should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces or dissident elements...

13.10 This direction was made by Cabinet as a consequence of its adoption of a recommendation made by an interdepartmental committee, comprising representatives of the Prime Minister’s Department, the Treasury and the Departments of Housing and Repatriation, set up to examine the principles on which eligibility for war service home loans was determined. The interdepartmental committee considered that there was a need for a clear directive from Cabinet about the factors to be taken into account by the armed services in making allotments for special duty if uniformity was to be maintained between the services.”³⁰

25. Thus, Clarke J correctly identified the core principle for applying the SOS Act and does not mention the subordinate clause. The principle identified by Clarke J was essentially a re-statement of the ‘incurred danger’ test.

26. Furthermore, although Defence makes much of the ‘Malaysian request’ scenario, a simple examination of the historical background to RCB deployment would show that it was unnecessary for Malaysia to request Australian troops to guard the air base as they were already doing so. And were doing so under the auspices of the Five Power Defence Arrangement and the Exchange of Notes between Malaysia and Australia.³¹

27. Accordingly, the question that Defence should be asking is not ‘was the correct paper work done’ or ‘did Malaysia request our presence’ but rather ‘were RCB troops exposed to potential risk by reason of

²⁹ Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.

³⁰ Clarke J, *Report of the Review of Veterans’ Entitlements*, 2003, paras 13.9-13.10.

³¹ National Archives of Australia, *Five Power Defence Arrangements – Exchange of Notes constituting an Agreement Between the Government of Australia and the Government of Malaysia Regarding External Defence*, Barcode 30156205, 1 December 1971.

the fact that there was a continuing danger from activities of hostile forces or dissident elements' in accordance with Cabinet Directive 1048.

28. Fortunately, Defence has answered that question in the affirmative many times over, both during the deployment and more recently during various reviews, but unfortunately without comprehending the import of their findings.

29. I present a small sample gleaned from documents at the time of the RCB deployments that demonstrate that RCB troops were indeed 'exposed to potential risk by reason of the fact that there was a continuing danger from activities of hostile forces or dissident elements':

- There is a potential threat to the base from the Communist Party of Malaya (CPM), the Communist Terrorist Organisation (CTO), and related communist subversive organisations, whose aim is the establishment of a communist state in Malaysia Singapore, ultimately by "armed struggle"- widespread guerrilla/military action- and who have an estimated 1,800 to 2,000 terrorists in the Thai Malaysia border area. Of these some 300 are estimated to be within West Malaysia, with some 60, assumed to be armed with rifles, machine guns and explosives, in the Kulim and nearby forest areas approximately 15 to 25 miles from the base.³²
- ... there is definitely a risk that one or more CTs or members of subversive groups known to be operating in the vicinity, could, regardless of CPM/CTO policy and/or acting on their own initiative, attempt an isolated attack on or within the base at any time.³³
- We assess that advanced warning of any form of attempted attack (other than by a large group of CTs which we assess as unlikely) would most probably not be received whether the attack be by CTs or members of subversive groups.³⁴
- Although we assume that Australian aircraft would not be deployed from Butterworth in an anti-terrorist role, the use of the Base by RMAF units for anti-terrorist air operations might prompt a CTO reaction.³⁵
- Mortar 'or other indirect weapon attack' by up to 10 men 'located in the surrounding ricefield/kampong areas' was considered 'likely if the CTs acquired a mortar capability'.³⁶
- There has been a marked increase in recent months in the use of modern weapons by the CTO including M16 rifles, 7.62 SLR, 9 mm sub-machine guns, and M79 grenade launchers. There is also evidence of 81/82 mm mortars.³⁷

³² *The Threat to Air Base Butterworth to the End of 1972*, (ANZUK Intelligence Group, 1971), para 54. (b).

³³ *Ibid.*, para 54 (e).

³⁴ *Ibid.*, para 56.

³⁵ Joint Intelligence Organisation, *The Security of Air Base Butterworth*, October 1975, para 46.

³⁶ *The Threat to Air Base Butterworth to the End of 1972*, (ANZUK Intelligence Group, 1971), para 57, [paraphrased].

³⁷ JIO, 2 October 1975, *JIO Assessment of Threat and Likely Method of Attack*, 554/9/33(87), as Annex A to: Rowland, 7 October 1975, *Security of Butterworth*, addressed to 'Minister', para 7.

- OC Butterworth had advised that rocket attacks have taken place at RMAF Base Sempang (Kuala Lumpur) and a military installation at Penang on 31 March and 1 April 1975. The RMAF has also advised of possible threats to Butterworth.³⁸
- The recent intelligence information concerning possible CTO intentions to launch rocket attacks on bases in Malaysia increases our concern regarding the security of areas around the base. Intelligence sources consider there is a possibility that CTs have or are able to obtain 81/82mm mortars to supplement their known supplies of 3.5 inch rockets. Mortars are crew served weapons which are accurate area weapons of considerable destructive force against targets at maximum ranges of 4,700 metres. The attached map shows that at a range of 3000 metres from the Butterworth Base, a perimeter of 16,000 metres is formed. To compound the problem of defence, the area within the perimeter includes a large number of Malaysian houses, a network of roads and several hectares of padi-fields, all of which offer CTO assembly and firing bases.³⁹
- ...the obvious and immediate effects from rocket mortar and other forms of attack... [would be] the death and injury to personnel and families.⁴⁰
- The split in Oct 74 of the CPM into three factions ... has resulted in some inter-factional conflict, but it seems also to encourage the groups to compete with each other for success against security forces. This is an important factor to be considered in assessing the likelihood of terrorist activity against military establishments such as Butterworth. Defence Adviser Kuala Lumpur reports that recent developments – including the upgrading in training and military status of the CTO – represents a significant diversification of, and increase in, the forces available with a capability of launching an attack against Air Base Butterworth. In the Kulim area, 20-30 kms from the Base, there are believed to be 62 members of the Assault Unit, with 15-20 of these considered to be ‘hard-core’ terrorists.⁴¹
- The CTO has demonstrated his capacity to mount operations against security forces during the past year. Based on these incidents, there is an increased likelihood of attack on Air Base Butterworth – probably by use of 3.5 inch rockets. There is a lesser probability of an attack using mortars.⁴²
- The threat of mortars and rockets presents a problem of providing adequate passive defence arrangements to prevent or mitigate the effects of attack by these weapons. In April 1975 following the rocket attack on Minden Barracks, Mirage aircraft were dispersed, but as this practice exacerbated the problems of patrolling and security lighting the aircraft lines, the practice ceased within a month.⁴³
- The only real protection for aircraft against mortars and rockets is to provide hardened roofed over revetments at costs of about \$100,000 each. Open roofed revetments or

³⁸ Rowland, J.A, AM, CAS, 3 April 1975, Department of Defence (Air Office) Minute 418/4/12, *Butterworth Base Security*.

³⁹ Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam*, addressed to ‘Minister’, Para 2.

⁴⁰ Department of Air, *Brief for DCAS Concerning Security of Butterworth*, 564/8/28, October 1975, Para 12.

⁴¹ JIO, 2 October 1975, *JIO Assessment of Threat and Likely Method of Attack*, 554/9/33(87), as Annex A to: Rowland, 7 October 1975, *Security of Butterworth*, addressed to ‘Minister’, para 4.

⁴² *Ibid*, para 16 .

⁴³ Department of Air, *Brief for DCAS Concerning Security of Butterworth*, 564/8/28 (undated but internal evidence verifies October 1975), Para 24.

dividing blast walls are reasonably effective against rockets, but less effective against the more accurate mortar.⁴⁴

- On-base security arrangements to protect against sabotage or to react quickly to any attempted incursions by CT groups are satisfactory. An ARA Company on three monthly rotation provides a quick reaction force against attacks on the base, but are currently prevented from operations off the base ...⁴⁵

30. It would be necessary to ignore this evidence in order to argue that RCB troops did not face a “potential risk” from “hostile forces or dissident elements”.

31. More recently Defence has also confirmed the potential risk to RCB personnel from hostile forces and dissident elements, again, a small sample:

- Defence has referred to Security Assessments of the time and have noted that while there was no external threat to Malaysia “...there was a potential threat to the Base from the Communist Party of Malaysia (CPM), the Communist Terrorist Organisation (CTO) and other related subversive organisations.”⁴⁶
- “The communist terrorist threat was proven to be real with recorded clashes on a number of occasions within its borders until Chin Peng, the Communist Leader, signed a peace accord in 1989.”⁴⁷
- “The RCB was established in 1970 as a quick-reaction force to provide protection for Australian assets within the perimeter of the Royal Malaysian Air Force Base Butterworth due to the continued threat of armed Communist terrorism within its borders.”⁴⁸
- “Besides securing protection for the two jet squadrons within the perimeter of the Air Base, the role of the RCB was to provide a quick-reaction force to meet the communist terrorist threat, and be responsible for internal security within Air Base Butterworth.”⁴⁹
- “No attempt has been made by Defence to conceal the fact that there was a level of threat to RAAF Butterworth, but the level of threat was assessed as low.”⁵⁰

32. This last comment by then Minister Robert highlights the Defence approach of continually minimising the threat posed to the base in order to justify a peacetime categorisation. Other examples include:

- “There was never an attack on RAAF Base Butterworth by communist terrorists.”⁵¹
- Defence was provided with evidence from the Commanding Officer’s Reports for Base Squadron – Air Base Butterworth, that the Ground Defence Operations Centre (GDOC) at Butterworth was activated and manned due to “possible ground threat” and other reasons.

⁴⁴ Ibid, para 25. Open roofed revetments were installed at Butterworth by 1977.

⁴⁵ Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam*, addressed to ‘Minister’, Para 4.

⁴⁶ Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 28.

⁴⁷ Barrie, C.A., ADML CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, 10 April 2001, Ref. CDF 249/01.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.

⁵¹ Ibid.

The GDOC was established to manage all types of emergencies at the air base, including security related emergencies and was an integral part of the defence of the base under the Shared Defence Plan. Defence dismisses the activation of the GDOC for “possible ground threat” thus:

- “It is reasonable that an operations centre would be manned in instances of possible threat to the base.
- Note that the manning was on the basis of 'possible ground threat' and not 'expected attack'.”⁵²
- “Defence contends that, in order to ensure that training conducted at Butterworth was as realistic as possible, the likelihood of hostile action may well have been overstated to the soldiers and this could explain the misconception about the role of the infantry company and the hazards faced.”⁵³

33. The last dot point in para 32 is unbelievable in its lack of understanding of the safety requirements in relation to Army training. Defence’s contention is that infantry soldiers were placed in an allied country currently fighting an insurgency, on an active air base adjacent to the main north-south road, next to civilian habitation, given live ammunition and permission to use it as there was a threat to the base. All to enhance training.

34. Defence looks with hindsight on events and situations to give them a more benign air than was perceived by authorities at the time. A case in point is the cutting of holes in the base’s perimeter wire in the mid-late 70s. Defence says that:

“Instances of the perimeter fence being cut were not attributed at the time to communist terrorists, but considered to be done for the purpose of petty theft.”⁵⁴

35. It is true that these breaches in the base perimeter fence were eventually put down to theft. However, the initial response of authorities at the time was not so blasé, and given the threat environment an appropriate response was mandated to meet “suspected attempted entry to Air Base Butterworth” and a concurrent increase of Communist Party activity in the area:

“Reaction patrol combed area to ensure no entry had been made.”

“Increased security consisting of 5 standing patrols of half section strength deployed during hours of darkness, one section picket of aircraft lines and AIRMOV area and normal ready reaction section will continue until at least 8 August.”⁵⁵

36. As an example of how these standing patrols operated see the statutory declaration and photograph at Attachment B.

⁵² Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014

⁵³ Cooper, J, *Ministerial Correspondence, Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 13.

⁵⁴ Robert, S., MP, *Official Committee Hansard, House of Representatives Standing Committee on Petitions, Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.

⁵⁵ Cipher message, HQBUT to DEFAIR Canberra 65 GL section, DCR 005/05, August 1975.

37. The law, while not simple, is well established and does not require a high level of threat, or for an attack to occur, or even be imminent, for the threat to meet the threshold. As the Defence Honours and Awards Appeals Tribunal (DHAAT) has previously summarised:

“Both the Clarke Review and repatriation law provide ample interpretation of the notion of incurred danger. Various courts and tribunals have ruled that no attempt is made to indicate how much, how close, how long or how intense the incurred danger must be before it meets the requirements of the legislation or relevant policy. Indeed, it is strongly arguable that the belief of authorities that an enemy poses a significant threat to a particular part of Australia (leading, for example, to the Government sending forces to defend that area, or to conduct operations in that area) provides strong evidence that the forces sent in response to that threat have been sent into harm’s way and therefore have incurred danger. In fact, the danger need only be possible, not probable, nor does it have to eventuate.”⁵⁶

38. In relation to Defence’s contention that “hostile action may well have been overstated” (note, not “fabricated” but “overstated” – even here Defence concedes that there *was* a threat) I refer you to Mohr J:

“On the assumption we are dealing with rational people in a disciplined armed service (i.e. both the person perceiving danger and those in authority at the time), then if a serviceman is told there is an enemy and that he will be in danger, then that member will not only perceive danger, but to him it will be an objective danger on rational and reasonable grounds. If called upon, the member will face that objective danger.

It seems to me that proving that danger has been incurred is a matter to be undertaken irrespective of whether or not the danger is perceived at the time of the incident under consideration. The question must always be, did an objective danger exist? That question must be determined as an objective fact, existing at the relevant time, bearing in mind both the real state of affairs on the ground, and on the warnings given by those in authority when the task was assigned to the persons involved.”⁵⁷

39. Personnel at Butterworth *were* given warnings “by those in authority” as exemplified in Commanding Officer Reports for Base Squadron Air Base Butterworth, for example:

“FLGOFF G.R. Penney GRDEFO briefed new arrivals on the security situation in the country, current threat to the Air Base Butterworth and ground defence organization of RAAF Butterworth...”⁵⁸

40. Headquarters Field Force Command issued instructions on the conduct of the RCB. An example from 1979 details the “Pre-Deployment Security Training” to be conducted by the company, including training that would need to be done at Butterworth itself, including:

“c. appreciation of the enemy threat and likely approaches;”⁵⁹

⁵⁶ DHAAT, *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, 22 December 2009, para 81.

⁵⁷ Mohr R.F., *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, February 2000, p9.

⁵⁸ *Commanding Officer’s Report – Base Squadron Air Base Butterworth*, July 1980.

⁵⁹ HQ Field Force Command, *Annex B to HQ FF Comd Staff Instr 2/79*, 6 July 1979, para 2c.

41. Examples of training and briefing packages presented to each incoming company are at Attachment C. They demonstrate that updates on the “security situation” and “threat” were given to the arriving companies.

42. In the briefing for my tour in 1979 as a 21-year-old Infantryman we were told that the Communists had been known to use mortars and that these could pose a serious threat to the base. Three years earlier government departments were discussing the withdrawal of the RAAF from Butterworth. The Department of Foreign Affairs said of the base:

“We also have concerns about the security of the Butterworth base area and the possibility that it might become in time the subject of hit and run mortar or rocket attack by Communist guerrillas.”⁶⁰

43. Although Foreign Affairs believed that this possibility was “remote at present” they were not prepared to “rule out this risk altogether looking ahead”.⁶¹ As can be seen from para 29 above, Foreign Affairs were not the only agency concerned about such attacks.

44. RCB faced potential risk from armed Communist Terrorists in Malaysia up until the signing of the peace accord between the Communist Party and the Malaysian government in December 1989, which coincidentally was when RCB’s Quick Reaction Force (QRF) role ended. Defence concedes as much and as such they must comply with the law which, although complex, may at times be simple to determine:

“To establish whether or not an ‘objective danger’ existed at any given time, it is necessary to examine the facts as they existed at the time the danger was faced. Sometimes this will be a relatively simple question of fact. For example, where an armed enemy will be clearly proved to have been present.”⁶²

45. Defence knows full well of the hostile threat to the base and that RCB did in fact encounter those belligerents on a number of occasions. This was confirmed in an email exchange between an RCB veteran and the Secretary of the Department of Defence in 2000:

Question – “Is it true that land forces carried live ammunition due to the threat of Communist Terrorist (CT) attack during this period?”

Answer – “Yes”.

Question – “Is it true that Australian intelligence reports (currently held in archives) indicate several incidents involving CT and Australian troops?”

Answer – “Yes”.⁶³

46. RCB met the criteria for “special duty” set down by the government in Cabinet Directive 1048 of July 1965. RCB faced a “potential risk” due to the danger posed by communist terrorists and other dissident elements. All that remains is for the proper paperwork to be completed.

⁶⁰ Fernandez, R.R., Acting Deputy Secretary, *RAAF Presence in Butterworth: FAD/28*, File No. 696/6/4/5, para 3.

⁶¹ Ibid.

⁶² Mohr R.F., *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, February 2000, p9.

⁶³ Duffield, C.J, *Secretary Site feedback*, email, 11 August 2000; and Hawke, A., *Secretary Site feedback*, email, 4 September 2000.

Veterans' Entitlements Act 1986 – Warlike Classification

47. Under the VEA 1986 "warlike service" means service in the Defence Force of a kind determined in writing by the Defence Minister to be warlike service.⁶⁴ This is simply an administrative provision much like the SOS Act's "special area" and "allotment". Just as the Cabinet saw the need in July 1965 to provide guidance on when that Act should be applied, so too the Cabinet in May 1993 saw the need to provide guidance for the term "warlike" under the VEA. The Cabinet provided a conditions of service framework to provide guidance to the Minister on determining whether operational service was warlike or non-warlike.⁶⁵ Cabinet provided that:

- a. "warlike service refers to those military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties."⁶⁶

48. Defence contends that RCB service does not meet these criteria, but that does not stand up to scrutiny.

RCB's military activities and objectives

49. RCB was definitely involved in 'military activities' that had 'specific military objectives'. Securing the air base to "protect against sabotage or to react quickly to any attempted incursions by CT groups",⁶⁷ protection of Australian assets,⁶⁸ protection of vital points and shared facilities and supporting "the operational function of Air Base Butterworth"⁶⁹ (the base was operating against Communist Terrorists), and 'meeting the communist terrorist threat'⁷⁰ are all military objectives.

RCB's use of force

50. Application of force was authorised at least by the Rules of Engagement (ROEs) and the Shared Defence Plan⁷¹. Defence asserts that the ROEs for RCB were "...defensive in nature and to be applied within the air base only."⁷² They also claim that the ROEs were "...defensive (peacetime) only..." and simply reflected ADF personnel's "...inherent right to use force in self defence including within bases in Australia..."⁷³ But that does not reflect the full extent of the force available to ADF personnel at Butterworth either in the ROEs themselves or through other authorisations to use force. Nor does it reflect the 'inherent right to use force' in Australia, for which no ROEs are necessary and the use of excessive force (such as shooting trespassers) is unlawful.

⁶⁴ *Veterans' Entitlements Act 1986*, s5C(1).

⁶⁵ Cabinet Decision 1691, 17 May 1993.

⁶⁶ Clarke J, *Report of the Review of Veterans' Entitlements*, 2003, paras 10.9.

⁶⁷ Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam*, addressed to 'Minister'.

⁶⁸ Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 43.

⁶⁹ Joint Intelligence Organisation, *Malaysia: The Threat to Air Base Butterworth*, August 1975, para 7.

⁷⁰ Barrie, C.A., ADML CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, 10 April 2001, Ref. CDF 249/01.

⁷¹ Parker, I.S., Air Cdre, *Shared Defence of Air Base Butterworth: Operation Order No. 1/71*, 8 September 1971.

⁷² Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 54.

⁷³ Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014.

51. Air Base Butterworth was a protected place under Malaysia's *Protected Areas and Protected Places Act 1959*.⁷⁴ As such the rules of engagement authorised more than the level of self-defence that applies in peacetime:

“If any person either enters the wire surrounding the Protected Place or is seen by you to be attempting to make his way through, over or under the wire or is in an area in which you suspect his presence to be unauthorised or is acting in a manner to arouse suspicion of unauthorised presence...”⁷⁵

52. Sentries or patrols could fire on that person if they did not stop after three challenges.⁷⁶ Persons apprehended could also be shot if attempting to escape and after being challenged to stop twice.⁷⁷ That is, that a person could be shot even though they posed no immediate threat to either the sentry, property or other people. This is not ‘defensive’ in the sense that NOSB implies. It is standard procedure for conventional combat when in a defensive position to first challenge unknown persons approaching your position before shooting.

53. It must be remembered that the *Protected Areas and Protected Places Act 1959* was enacted by Malaysia because of the Malayan Emergency to protect certain places from infiltration and sabotage by Communist Terrorists. As such, any person exercising powers under this Act, as RCB did at Butterworth, was conducting operations against the enemy. Nor is it surprising that the ROEs authorised under that Act were nothing like the free-fire zones of Vietnam. Butterworth was located in a built-up area with the main north-south road running adjacent to the base. Kampongs were situated abutting the wire and rice paddies were nearby. Authorities were clearly cognisant of the need to constrain the use of force in such civilian-rich environments during less intense periods. None of this detracts from the fact that the ROEs authorised the “application of force”, which is all that is required under the Act.

54. Defence’s insistence that the ROEs were only “defensive” and could “be applied within the air base only” is not only wrong – they could be applied off base as well as part of the Family Protection Plan – they also imply that only ‘offensive’ action can constitute pursuit of “specific military objectives”. This is reinforced by Defence’s assertion that RCB could not “...be employed in operations outside the gazetted area of the air base.”⁷⁸ Thereby implying that only offensive actions count and that a defensive operation cannot be an operation against the enemy. This is not the view of the Federal Court. In *David Norman Ahrenfeld v Repatriation Commission* [1990] FCA 319 the court reviewed a decision of the Administrative Appeals Tribunal (AAT) that was claimed under the *Repatriation Act 1920*, but determined under the *Veterans’ Entitlement (Transitional) Act 1986*. In that decision Einfeld J said:

“The Tribunal's reasoning (p 5) was that 'actual combat' means 'offensive action' as opposed to 'passive defence' and that the applicant's service fell within the latter category. It seems to me, however, that the activities of armed forces personnel do not easily lend themselves to such a distinction. What in fact exists is a host of different activities, each of which

⁷⁴ Parker, I.S., Air Cdre, *Shared Defence of Air Base Butterworth: Operation Order No. 1/71*, 8 September 1971, para 5.

⁷⁵ Parker, I.S., Appendix 5 to Annex C to Air Base Butterworth Op Order No 1/71, 8 September 1971, para 14.

⁷⁶ Ibid.

⁷⁷ Ibid., para 15.

⁷⁸ Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 54.

contribute to the 'war effort', with varying degrees of proximity to defeating or frustrating the enemy."⁷⁹

55. Einfeld J went on to say:

"In my view, the correct definition of 'actual combat against the enemy' in the context of this Act is 'integral participation in or in activity directly intended for an encounter with the enemy'."⁸⁰

56. Einfeld J further said that relying on a distinction "...between 'offensive action' and 'passive defence' seems to me clearly to involve an error of law"⁸¹

57. RCB also had the role of counter-penetration and counter-attack throughout the period of service. These were offensive tasks designed to first contain and then destroy any communist terrorist forces that penetrated the base. They were an authorised use of force that cannot be described as "defensive only". A secret Department of Air briefing in 1975 described the role thus:

"Ground defence and security of assets are achieved by a combination of military and police action:

- a. on-base ground defence arrangements are required to provide close defence of assets when attack is imminent and a specialist ground defence (or infantry) force capable of responding quickly to an attack, to relieve an over-run position and counter attack any groups which occupy positions on the base".⁸²

58. The tasks of RCB, particularly in its QRF and counter penetration/counter attack roles, to "protect against sabotage or to react quickly to any attempted incursions by CT groups",⁸³ or to "...meet the communist terrorist threat"⁸⁴ are clearly activities "...directly intended for an encounter with the enemy" and as such RCB was engaged in the 'specific military objective' of securing Butterworth from these threats.

Expectation of casualties

59. Defence has consistently claimed that there was "...definitely no expectation of any casualties"⁸⁵ during RCB's deployment. It has been difficult to find where Defence has given their reasoning for this finding. It is certainly not in any public document I have examined. However, a document recently obtained under FOI sheds some light on Defence's reasoning that led to this error.

60. In background information to email advice the Nature of Service Directorate states that:

"Expectation of Casualties

⁷⁹ *David Norman Ahrenfeld v Repatriation Commission* [1990] FCA 319, para 33.

⁸⁰ *Ibid.*, para 47.

⁸¹ *Ibid.*, para 46.

⁸² Department of Air, Brief for DCAS Concerning Security of Butterworth, undated, Ref 564/8/28, para 16.

⁸³ Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam*, addressed to 'Minister'.

⁸⁴ Barrie, C.A., ADML CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, 10 April 2001, Ref. CDF 249/01.

⁸⁵ Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.

An attack on Air Base Butterworth was considered by the threat assessments to be unlikely. The overall level of threat was considered to be LOW. As such, there was no expectation of casualties.”⁸⁶

and

“There was no expectation of an attack. Threat assessments concluded that, while an attack was possible it was unlikely.”⁸⁷

61. This is an interesting turn of phrase by Defence – “while an attack was possible it was unlikely”. This very situation was considered by the Federal Court in *Repatriation Commission v Mitchell*. In a scenario not unlike that of RCB. Approving the decision and reasoning of the Administrative Appeals Tribunal (AAT) the court said that:

“It has found that Higgins Field was an operational airfield used for conducting aerial operations against the enemy in Papua New Guinea, and at that time against the enemy in Rabaul, and further that it provided refuelling facilities for allied bombing fleets operating north and north west of the Cape coming from or going to Townsville. The Ack Ack anti-aircraft unit was part of the defence system to defend the operations at Higgins Field from hostile aerial attack, as much as the use of sentries and roving piquets were part of the defence of the facility from hostile incursions by Japanese landing parties from the sea.”⁸⁸

62. The court further approved the AAT determination that “possible but unlikely” attack satisfied the requirements for qualifying service:

“The actions of Command at Higgins Field in dispersing aircraft, maintaining anti-aircraft guns in position, and protecting the installations and equipment with armed sentries and roving picquets are I believe consonant not only with sensible precautions, but with the understanding of perhaps unlikely, but always possible, raids launched from aircraft or from submarine landings, or surface carriage of small parties.”⁸⁹

63. As can be seen above at para 29, “LOW” is not the only adjective applied to the level of threat and likelihood of attack. I submit that the approach of NOSB is an attempt to reintroduce “adverbs and adjectives” that diminish the principle of incurred danger. This is contrary to law as expounded by the Full Court of the Federal Court:

“In applying such a provision, therefore, it is desirable to eschew the use of adverbs and adjectives, that is to say, not to read into the provision words which are not there. In referring to the word “danger”, Administrative Appeals Tribunals have used adjectives such as “real”, “actual” and “substantial”. But the word “danger” stands for itself. If a serviceman incurs danger from hostile enemy forces, that circumstance is sufficient to satisfy the statutory requirement. It is indeed the specified requirement. No adjective can enlighten that concept. When applying the word “incurred”, some Administrative Appeals Tribunals have used the expression “reasonable expectation”. But, again, the word “incurred” is an

⁸⁶ Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014.

⁸⁷ Ibid.

⁸⁸ Cooper J, *Repatriation Commission v Mitchell* [2002] FCA 1177, para 25.

⁸⁹ Ibid., para 15.

ordinary word of the English language. It has a dictionary meaning and is used in that sense. Other words should not be substituted for it.”⁹⁰

64. The Macquarie dictionary contains a number of definitions for ‘expectation’. Probably the best one for our purposes is “the degree of probability of the occurrence of something”.⁹¹ Referring back to the definition of “*warlike*”, the government set the condition of “...and there is an expectation of casualties.”⁹² Note that the government did not set a certain level of ‘probability’ to meet this criteria. It did not say a ‘high expectation of casualties’ or a ‘medium expectation of casualties’ nor even a ‘low expectation of casualties’. Their use of the word ‘expectation’ by itself implies that any level of probability of casualties beyond zero meets the requirement. So a LOW threat for instance, being still a threat, will indicate a LOW degree of probability of casualties, therefore a low *expectation* of casualties, and so meets the criteria expounded by Cabinet. This approach accords with the “incurred danger” test espoused by the Federal Court⁹³ and summarised by the DHAAT⁹⁴ itself.

65. The Australian Defence Force (ADF) Pay and Conditions Manual puts it this way:

“17.1.7 Warlike operation

1. **Warlike** service exposes ADF personnel to a direct risk of harm from hostile forces.
2. A **warlike** operation is an Australian Government authorised military operation where ADF personnel are exposed to the risk of harm from hostile forces that have been assessed by Defence as having the capability and an identified intent to directly target ADF personnel. ADF personnel are authorised to use force to pursue specific military objectives and there is an expectation of ADF casualties as a result.”⁹⁵

66. Note, “...a direct risk of harm from hostile forces”. There is no caveat that the risk needs to be high or cannot be LOW, it thereby accords with the ‘incurred danger’ test. The phrase “...having the capability and an identified intent to directly target ADF personnel” at first glance appears to give succour to the NOSB position that RCB was not a *warlike* deployment. However, RCB’s roles detailed above as an integral part of the defence of Butterworth, the fact that Communist Terrorists did attack Malaysian bases, and the security intelligence reports of the time combine to show an intent on the part of terrorists to target military bases and those who defended them. More significant though is the final sentence of Defence’s definition. Where ADF personnel are authorised to use force to achieve military objectives “...there is an expectation of ADF casualties *as a result*” [my italics]. That is, when you place personnel in harm’s way to pursue a military objective by force that situation *itself* creates the expectation of casualties. And is again in accord with the “incurred danger” test.

67. RCB meets the criteria of both the *Repatriation (Special Overseas Service) Act* 1962 and the *Veterans’ Entitlements Act* 1986 as determined by two separate Cabinet decisions. As such, veterans of the RCB 1970-1989 should be awarded the Australian Active Service Medal or the Australian Active Service

⁹⁰ Davies, Wilcox and Foster JJ, *Repatriation Commission v Walter Harold Thompson* [1988] FCA 212, para 8.

⁹¹ www.macquariedictionary.com.au

⁹² Clarke J, *Report of the Review of Veterans’ Entitlements*, 2003, paras 10.9.

⁹³ For instance: *Repatriation Commission v Walter Harold Thompson* [1988] FCA 212.

⁹⁴ DHAAT, *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, 22 December 2009.

⁹⁵ <http://www.defence.gov.au/payandconditions/adf/chapter-17/part-1/div-1.asp>

Medal 1945-1975 that their service entitles them to and as such I should be awarded the Australian Active Service Medal for my service there in 1979.

Other relevant issues

Official Documents

68. In denying the claim of RCB veterans, Defence places heavy reliance on official documents that purport to prove that RCB's deployment was for 'training purposes'. At the same time, they consider irrelevant any other official document that does not support the training proposition or indicates the *warlike* nature of the deployment. An example of the latter is that Defence has never referred to Defence Committee Minute 2/1973 which declared that RCB deployments could "be presented publically as being for training purposes".⁹⁶

69. The documents that Defence relies on can be seen in their Background Paper prepared by NOSB and dated 28 April 2014.⁹⁷ Documents relied on to prove the *peacetime* categorisation insisted on by Defence include:

- Plan Asbestos, which says:

"Under arrangements made between Australia and Malaysia, beginning in November, 1970 an Australian rifle company was deployed on monthly rotation from Singapore to Butterworth, with the purpose of providing an opportunity for training and developing further cooperation with the Malaysian forces and the elements of the RAAF at Butterworth."⁹⁸

and

"The new rotational plan accords with Australian national policy of deploying troops overseas for training exercises."⁹⁹

- Chief of the Defence Force Staff (CDFS) Directive:

"This CDFS Directive notes that the:

...company is deployed on a rotational basis to provide an opportunity for training and to develop cooperation between the Malaysian Armed Forces and the Australian Defence forces..."¹⁰⁰

⁹⁶ Defence Committee Minute, *Five Power and ANZUK Arrangements and Withdrawal of Australian Battalion and Battery*, Minute No. 2/1973, 11 January 1973.

⁹⁷ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014.

⁹⁸ Chiefs of Staff Committee, *Australian Joint Service Plan No. 1/1973 Plan Asbestos: Rotation of an Australian Rifle Company at Air Base Butterworth, Malaysia*, 14 August 1973, para 1.

⁹⁹ *Ibid.*, para 2.

¹⁰⁰ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 66.

70. The problem with relying on such 'official' documents to prove the case that RCB was in Malaysia primarily for training and cooperating with the Malaysian Armed Forces (MAF) is that it does not accord with the reality on the ground.
71. Defence's heavy reliance on Plan Asbestos to prove the 'training' scenario is further undermined by a Confidential – AUSTEO minute from 1974 which shows that the 'training' deception of Plan Asbestos did not accord with the reality on the ground. The minute states:

"On 10 Oct 74 I spoke with Maj Ray Le Roy, SO2 ..., DMO&P (Army) re the ARA rifle coy at BUT. He said that prior to Jul 74 the Army interpretation of AJSP 1/73 'Plan Asbestos' was that the coy was primarily in the area for training, incl training with the Malaysian Army. However, since that time the coy has had the security of Aust assets, property and persons at BUT as its primary task. But for political reasons it was not possible to state this in low security classification documents."¹⁰¹

72. Use of such official documents to prove that RCB deployment was for "training and cooperation" with the MAF is belied by correspondence originating at the Australian High Commission in Kuala Lumpur on precisely that point:

"The only problem which emerged is the one which we have expected for quite some time and have reported on separately to another area in the Department of Defence. At present there is no regular program for battalions or parts thereof to engage in formal training exercises in the sense that we understand them in Australia. MINDEF officers lamented that notwithstanding their efforts to have at least one battalion continuously under training they as yet have been unable to achieve this objective. Furthermore, they were unable to foresee when such an objective was likely to be realised."¹⁰²

"Brigadier-General Abdullah said he is quite happy to co-operate with the Company troops but he warned that he did not see much prospect at present of engaging in combined exercises. He said his forces were committed to operational tasks and have little if any time available for training."¹⁰³

"We continue to experience difficulty in having MINDEF place any real importance or priority in arranging significant training with the Malaysian Army for the Butterworth Company. In recent discussions with the Director of Training (COL Daud) he again drew attention to some of the problems: insecurity of most training areas, their preoccupation with operational commitments, and the fact that they carry out little unit training as such, and the fact that their available training areas are becoming fewer..."¹⁰⁴

73. There was ad-hoc training with Malaysian forces for a small number of RCBs throughout the period, but this usually took place before or after RCB duties were completed.

¹⁰¹ Brough, WgCmdr SRGD, *ARA Infantry Coy at BUT*, AUSTEO Minute Paper, 11 October 1974, para 1.

¹⁰² Hoare, L.G., Group Captain, Service Adviser, Australian High Commission Kuala Lumpur, *Australian Company at Butterworth*, Ref 207/5/2, 18 September 1973, para 3.

¹⁰³ Hoare, L.G., Group Captain, Service Adviser, Australian High Commission Kuala Lumpur, *Australian Company at Butterworth*, Ref 207/5/14, 4 October 1973, para 2.

¹⁰⁴ Australian High Commission, Kuala Lumpur, *Training for Butterworth Company*, 14 March 1974, para 1.

74. Despite this, there is another problem with Defence's reliance on 'official documents' and that was laid out by the DHAAT in a case virtually identical to RCB. The DHAAT said in relation to Ubon in Thailand:

"The Tribunal has seen ample indication in the mass of documents relating to No. 79 Squadron's assignment to Ubon that indicates that there was sensitivity in Thailand and Malaysia about the role of the Squadron. The Vietnam War was a point of considerable contention among South-East Asian countries and there was a strong desire by some of them to avoid any appearance of commitment to either side in the conflict. References are common to Thai concerns about the role of Ubon as a support base for the USAF air war over Vietnam, Laos and Cambodia. The Australian documentation reflects these concerns."¹⁰⁵

"Whatever might have been said in the formal decisions relating to the retention of No. 79 Squadron in Ubon, it is clear that the real purpose of its posting was to assist the USAF air campaign against North Vietnam. There was no other reason for the Squadron to be there. Thailand was not under independent threat. The proposal was that the Squadron be returned to Australia when the threat to Thailand came to an end in 1965. It was in response to US requests that the Squadron was left at Ubon."¹⁰⁶

"The question therefore is whether, after 45 years, it is now possible to confront the reality of No. 79 Squadron's involvement in the Vietnam War. In the Tribunal's view it is time for it to be recognised that the Squadron was making a significant contribution to the air campaign directed against North Vietnam. It provided the protection of an important base on behalf of the USAF. This is how the US viewed what the Squadron was doing and the Tribunal considers that it is the correct view of the Squadron's actions."¹⁰⁷

75. Malaysian sensitivity to the presence of 'foreign forces' has been outlined above, whatever might have been said in the formal decisions relating to RCB, its real purpose was to assist the MAF in its war against Communist Terrorists by providing protection of an important base on behalf of the MAF. After 49 years, Defence has still not confronted this reality. I hope that the DHAAT will.
76. The final thing to say about Defence's use of official documents and indeed to its entire approach to the RCB case is that it does not accord with the historical approach to veterans' matters, recently articulated in the *Australian Veterans' Recognition (Putting Veterans and their Families First) Bill 2019*. Section 7 of this Bill sets out the government's requirements of decision-makers under legislation pertaining to veterans to interpret that legislation to the benefit of veterans:

"The Commonwealth is committed to decision-makers interpreting a provision of the following legislation in a way that benefits veterans, or their families, where that interpretation is consistent with the purpose of that provision..."¹⁰⁸

and

¹⁰⁵ DHAAT, *Inquiry into Unresolved Recognition Issues for Royal Australian Air Force personnel who served at Ubon between 1965 and 1968*, 18 February 2011, para 52.

¹⁰⁶ *Ibid.*, para 63.

¹⁰⁷ *Ibid.*, para 66.

¹⁰⁸ *Australian Veterans' Recognition (Putting Veterans and their Families First) Bill 2019*, s7(1).

“The Commonwealth is committed to decision-makers deciding claims under that legislation:
(a) in a manner that is fair, just and consistent; and
...
(d) on the basis of only requiring evidence sufficient to meet the relevant standard of proof for the claims.”¹⁰⁹

77. The government’s Bill is not, however, the first time that the principles of “beneficial interpretation” and “fair, just and consistent” methodology have been articulated. It is essentially a restatement of governments’ intentions towards veterans and judicial interpretations of repatriation law that has stood for 100 years¹¹⁰:

“I believe that in making retrospective examinations on the nature of service many years after the event, as is now the case, the concepts and principles involved should be applied with an open mind to the interests of fairness and equity, especially if written historical material is unavailable for examination or is not clear on the facts. This is the approach that I have taken in addressing the anomalies put forward and to me, it accords with the general Defence classification principles and the benevolent nature of the Veterans’ Entitlements Act, and the general principles promoted therein.”¹¹¹

“Having regard to the context (that is, the risk of harm during war), and the undoubted beneficial nature of the legislation, it is the Committee’s opinion that Windeyer’s view, in particular, reflects more closely the statutory test, than does the approach evident in AAT decisions.”¹¹²

“This legislation provides very important social and welfare rights for persons such as the applicant. It reflects a will and determination by Parliament, and the decent compassionate society it represents, to carry out as generously as possible having regard to the nation's other pressures and priorities from time to time, an obligation to care for people who sacrificed their own priorities in the cause of protecting and saving the country and its people when they were under serious threat. Factual conclusions adverse to the carrying out of these acts of appreciation and gratitude should not be drawn lightly or on the basis of inadequate evidence unable to be fully tested because of the inevitable consequences of the lapse of time. The policy of the legislation and the public interest and will seem to me to demand that every reasonably available inference should be drawn in favour of the veteran.”¹¹³

“The absence, paucity or inadequacy of official records on the subject should not be held against the applicant...”¹¹⁴

¹⁰⁹ Ibid., s7(2).

¹¹⁰ See para 4 above.

¹¹¹ Mohr, R.F., *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, 2000, p10.

¹¹² Clarke J, *Report of the Review of Veterans’ Entitlements*, 2003, para 11.56.

¹¹³ *David Norman Ahrenfeld v Repatriation Commission* [1990] FCA 319, para 49.

¹¹⁴ Ibid., para 56.

78. To say that NOSB, for Defence, has not applied these principles in the case of RCB would be an understatement as can be seen from the above evidence. NOSB have not just failed to apply these principles, they have actively sought to undermine them, as is clear from the foregoing. Rather than using “every reasonably available inference ... in favour of the veteran”, NOSB has manipulated evidence to excuse their dismissal of the RCB claim. Perhaps the most egregious example of this is found in the 2014 NOSB Background paper to the Petitions Committee¹¹⁵:

“In December 1989, Chin Peng, the leader of the Malaysian Communist Party signed a peace accord with the Malaysian Government, bringing to an end what is sometimes called the Second Emergency and has been described as:

...a low-intensity campaign of subversion and counter-subversion in Singapore and sporadic jungle skirmishes in Malaysia.”¹¹⁶

79. NOSB draws their quote in italics from an article by Ong Weichong and Kumar Ramakrishna, Singaporean academics, titled *The Forgotten Insurgency That Failed*. They have not however been ‘fair, just or beneficial’ in doing so. This is made clear when the full article is examined and one finds:

“The ongoing debate over the historic role of Chin Peng, the recently deceased Communist Party of Malaya (CPM) Secretary General, has thus far tended to focus attention on his actions during the years 1948 to 1960, known as the Malayan Emergency. What has been less discussed is the CPM’s relaunched armed struggle in 1968.

This second phase, sometimes called the Second Emergency, dragged on till the final formal cessation of hostilities in 1989. The CPM’s revived armed struggle actually posed a serious security threat that required the combined efforts and resources of the Malaysian, Thai and Singapore governments to resolve. ... Between 1968 and 1973, CPM groups infiltrated back into Peninsular Malaysia and quietly re established an underground support network; 1974 then saw an upsurge in CPM terrorism, including assassinations, sabotage and bombings against government installations and personnel on both sides of the Causeway. Such action included the high profile assassination of Abdul Rahman Hashim, Inspector General of the Malaysian Police.

The Second Emergency gradually developed into a **low intensity campaign of subversion and countersubversion in Singapore and sporadic jungle skirmishes in Malaysia**. By 1988, the jungle war had gone against the CPM and its underground network had collapsed. Chin Peng agreed to a peace treaty to formally end the Second Emergency a year later.

...By August 1974, the party had sundered into three different factions that sought to outdo one another in open bloody battles with the Malaysian government and amongst themselves, destabilising its painstakingly built up support network in the process.”¹¹⁷

¹¹⁵ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014.

¹¹⁶ *Ibid.*, para 19.

¹¹⁷ Weichong, O and Ramakrishna, K, *The Forgotten Insurgency that Failed*, <https://www.malaymail.com/s/542997/the-forgotten-insurgency-that-failed-ong-weichong-and-kumar-ramakrishna>; Defence cites their source for this article as <themalaysianinsider.com/sideviews/article/the-forgotten-insurgency-that-failed-ong-weichong-and-kumar-ramakrishna> but that link is no longer functioning.

80. I have highlighted in bold in the above quote the portion that NOSB has excised to mask the true nature of the Second Emergency outlined in the full article, for its submission to Parliament.¹¹⁸ This approach is neither fair, just or beneficial. At best it may be described as intellectually dishonest.

War or Emergency?

81. Defence asserts that there was no war or Emergency in Malaysia during the period of RCB deployments 1970-1989:

“No state of ‘war’ or emergency has existed in the Federal States of Malaysia since the establishment of the need in 1970 to deploy a duty rifle company at BUTTERWORTH. Professor David Horner at the Australian National University agrees that no military threat against the national interests of Malaysia has emerged since the cessation of hostilities with Indonesia (since Confrontation ended on 11 Aug 66).¹¹⁹

“No state of war or emergency existed in Malaysia during the period 1970 to 1989.”¹²⁰

“Because no state of war or emergency existed in Malaysia after the end of confrontation on 11 August 1966 and because the Malaysian government made no request to the Australian Government for military assistance after this date, ADF personnel were not engaged in duty relating to warlike operations or a state of disturbance in Malaysia between 1970 and 1989.”¹²¹

“While the period of 1966 to 1989 has been referred to as the second emergency, this title appears to have been applied retrospectively – there is no historical record of the Malaysian government ever declaring a second emergency.”¹²²

82. Defence has maintained this position despite being provided with abundant evidence showing that both a war and an Emergency occurred, for example:

- The Malaysian Archives <http://www.arkib.gov.my/en/web/guest/darurat-angkara-komunis> which states that “This second armed rebellion forced a second state of Emergency in Malaysia from 1968 to 1978”. ... “The guerrilla warfare triggered by CPM [Communist Party of Malaya] dragged on for 21 years.”
- Books written by Malaysian government bodies about the war, the latest of which is *The Malaysian Army's battle against communist insurgency in Peninsula Malaysia, 1968-1989* by Sharom bin Hashim et al, published in 2001 by the Malaysian Ministry of Defence and available in the National Library of Australia: <https://trove.nla.gov.au/work/16959056?selectedversion=NBD24193292>
- The article by Ong Weichong and Kumar Ramarkrishna, *The Forgotten Insurgency That Failed*, cited above at para 76, as well as many other papers and books by Ong Weichong.

¹¹⁸ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014.

¹¹⁹ Ibid., para 81.

¹²⁰ Ibid., para 159(a).

¹²¹ Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.

¹²² Ibid.

- The UNHCR's *refworld* <http://www.refworld.org/docid/3ae6b5604.html> which is one source of the Malaysian legislation titled *Ordinance No. 1 of 1969, Emergency (Essential Powers) Ordinance* which was proclaimed on 15 May 1969 and stated in part "WHEREAS by reason of the existence of a grave emergency threatening the security of Malaysia, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong under Article 150 of the Constitution", it then goes on to give effect to a range of emergency powers.
- The 1969 Act was not allowed to simply tick along however but was renewed by the *Emergency (Essential Powers) Act 1979*, an example of which is at <MY_Emergency_Essential_Powers_Act.pdf> and states "WHEREAS a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong on 15 May 1969 under Article 150 of the Federal Constitution: AND WHEREAS Parliament by reason of the Emergency considers it necessary to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance 1969, and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after 20 February 1971, and for the validation of all acts and things done under the said Ordinance or under any subsidiary legislation made or purporting to have been made thereunder."
- A photograph of a Malaysian war memorial that lists the "Re-insurgency Period 1968-1990" is at Attachment D.

83. Although defence hold to their position of no war or emergency, it is not supported by research conducted under the auspices of the Australian War Memorial (AWM) and published in their journal *Wartime* this year. There, AWM historian Michael Kelly explains:

"Chin Peng fled to China, from where he would foment a second Malayan Emergency that broke out in the late 1960s. This second emergency lasted until 1989, at which point, with the collapse of communism in Russia and Europe, Chin Peng realised his dream of a communist Malaysia was over. A formal surrender by the communists was signed on 2 December 1989 at Hat Yai in Thailand."¹²³

84. The Vice Chief of the Defence Force (VCDF) wrote to Cathy McGowan AO, MP on 26 April 2019 in response to correspondence from her regarding my claim for *warlike* service.¹²⁴ In that letter the VCDF contradicts the Defence claim, maintained since 2004, that "No state of war or emergency existed in Malaysia during the period 1970 to 1989."¹²⁵ The VCDF instead acknowledges the declaration of a state of emergency on 15 May 1969, stating that it was in regard to "...Sino-Malay sectarian violence."¹²⁶ He then claims that "There was no use of emergency powers...in relation to communist terrorists or insurgents".¹²⁷

85. However, the VCDF's claim does not stand up to scrutiny when the historical record is examined, for instance:

¹²³ Kelly, M., *Saving a Domino*, AWM *Wartime* Issue 86, 2019, page 50.

¹²⁴ Johnston, D., Vice Chief of the Defence Force, Letter to Ms Cathy McGowan AO, MP regarding reclassification of Rifle Company Butterworth service for the period 1970-1989, PDR ID: EC19-002341, 26 April 2019.

¹²⁵ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 159(a).

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

“By October [1975], the Government had to revive the harsh emergency regulations to isolate the guerrillas: a “Home Guard” obliging all males from 18 to 55 to carry out local patrols, special courts for suspected terrorists with relaxed rules of evidence.”¹²⁸

“In September 1975 the Malaysian Prime Minister, Tun Razak, described the recent resurgence of communist guerrilla activity in Peninsular Malaysia as “The New Emergency”...”¹²⁹

“First it has gradually reintroduced counter-guerrilla measures that proved effective in the Emergency years....And, under the Essential (Community Self-Reliance) Regulations, 1975, security laws have been tightened and special courts set up to try suspected terrorists”.¹³⁰

Both the special courts¹³¹ and “Home Guard”¹³² regulations, for instance, were promulgated under the May 1969 State of Emergency legislation that Defence now acknowledges to exist, but claims wasn’t used against terrorists.

86. A group of RCB veterans, including myself, attended a meeting with Minister Chester’s defence advisor on 26 November 2018 in Parliament House, Canberra. At that meeting we were advised by the Minister’s advisor that “The government does not acknowledge that a war occurred”. With all due respect, it matters not what the government does or does not ‘acknowledge’. As the Federal Court has said, what must be determined is the *actual* situation at the time the service was given:

“Nor is the ascertainment of the existence of a state of war under municipal law or international law the relevant criterion for our purposes... However, the rules of international law in this area throw some light on the intended operation of our statutory definition. As Lord McNair and A.D. Watts (*The Legal Effects of War*, at p.2) remind us, being "at war" is a technical concept referring to a state or condition of affairs, not mere acts of force.”¹³³

“His Honour held, correctly, in our opinion, that the statutory definition of "theatre of war" is looking to practical, rather than juristic concepts. It clearly contemplates an actual, as distinct from a legal or theoretical, state of warfare.”¹³⁴

“Because the relevant inquiry is a practical one, one is concerned to see whether, in actual fact, the appellant "served . . . in . . . operations . . . against the enemy . . . in an area, at a time when danger from hostile forces of the enemy was incurred in that area ... ”¹³⁵

¹²⁸ Dyer, G., *The Malaysian Emergency: Act 2, Scene 1 begins*, The Canberra Times, 5 March 1976, p2. National Library of Australia <http://nla.gov.au/nla.news-article110806729>.

¹²⁹ Stubbs, R., *Peninsular Malaysia: The “New Emergency”*, Pacific Affairs, Vol 50, No 2 (Summer, 1977), p 249

¹³⁰ Ibid., p259.

¹³¹ Government of Malaysia, *Essential (Security Cases) Regulations 1975*, <https://www.refworld.org/docid/3ae6b5604.html>.

¹³² Government of Malaysia, *Essential (Community Self Reliance) Regulations 1975*, <https://www.refworld.org/docid/3ae6b5604.html>.

¹³³ *Thomas Joseph Marsh v the Repatriation Commission* [1987] FCA 303, para 28.

¹³⁴ Ibid., para 31.

¹³⁵ Ibid., para 33; followed in *Repatriation Commission v Walter Harold Thompson* [1988] FCA 212.

87. Throughout government documents, both at the time and recently, there is a description of the threat from Communist Terrorists and measures taken by Australian authorities to counter that threat. The government's refusal to now acknowledge the war and Emergency is curious given that they have already done so, including both explicitly and implicitly in recent documents and in their own words:

"In December 1989, Chin Peng, the leader of the Malaysian Communist Party signed a peace accord with the Malaysian Government, bringing to an end what is sometimes called the Second Emergency..."¹³⁶

"There was a communist insurgency..."¹³⁷

"In 1973 an Australian Army infantry company was established as Rifle Company Butterworth in Malaysia. This provided a protection and quick reaction force to assist our regional partners during a resurgence of the Communist Insurgency."¹³⁸

88. During the period, the government was supplied with quarterly security reports that made clear that Malaysia was conducting military operations against an armed enemy – a war. These reports appear to have been prepared in rotation by different allied embassies and include tallies of casualties both KIA and WIA, two examples are:

1. "On July 7 a second operation, Cahaya Bena II (CB-II), was initiated against sanctuaries of the Malay-based 10th Regiment of the CPM-CC in Weng District, bordering the Malaysian state of Kelantan, where anywhere from 450-600 armed elements led by veteran Malay CT Rashid Mydin reportedly were located".¹³⁹

Annex C of this report notes that Malaysian psywar experts believed that the CPM-CC:

"(a) is no longer engaged in "People's War";
(b) but is now engaged in "Guerrilla War"..."¹⁴⁰

2. "Peninsular Malaysia
SF Operations

...Pahang had been the scene of intense activity in previous months, but all became unusually quiet with few reported sightings and no activity from either the 67th Assault Unit or its associated assassination squad."¹⁴¹

89. Reports of Malaysian military actions against communist terrorists were regularly reported to Australian authorities. One example from 1975 demonstrates the active nature of Butterworth and reinforces the proximity of hostile forces to the base:

¹³⁶ NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 19.

¹³⁷ COL Thompson, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.

¹³⁸ Smith, S., *Minister for Defence – Address to the Australian Member Committee of the Council for Security Cooperation in the Asia Pacific*, 35th AUS-CSCAP Meeting, Curtin University, Perth, 10 November 2011.

¹³⁹ Australian High Commission, *Malaysia: Quarterly Security Report July-September 1977*, Ref 715/1/2; 726/1, Memorandum No. FA007, 29 November 1977.

¹⁴⁰ Ibid.

¹⁴¹ Australian High Commission, *Malaysia: Quarterly Security Report April-June 1977*, Ref 715/1/2; 726/1, 10 August 1977.

“Two airstrikes were launched from Butterworth against targets northwest of the Muda Dam during July. On 25 July four Tebuan aircraft each armed with 2 x 500lb bombs and 56 rockets struck a target 50 nautical miles 020° from Butterworth. The following day four Tebuans with minigun pods and rockets struck the same target. Four Sabre sorties were planned, but not flown.”¹⁴²

90. If the government acknowledges that there was a communist insurgency in Malaysia that was ended after 21 years with a peace accord how can they in the same breath say that there was no war? I submit that they are doing precisely what the Federal Court said not to do. They are looking to a ‘theoretical’ rather than an ‘actual’ explanation of events.
91. For a comparison of other deployments subsequently upgraded to active service after many years see Attachment E.

Conclusion

92. I have demonstrated that Defence, especially the Nature of Service Branch, has erred in both law and fact in determining the nature of service of RCB 1970-1989, including my service in 1979. I have shown that Rifle Company Butterworth service met the requirements (bar the administrative requirements) of both the *Repatriation (Special Overseas Service) Act 1962* and the *Veterans’ Entitlements Act 1986*. I have demonstrated that a war and emergency existed at the time that Australian rifle companies were sent to Butterworth to guard the air base and to “meet the communist terrorist threat”. Defence’s errors in both law and fact has meant that I, and others, have been unlawfully and unfairly denied the award of the Australian Active Service Medal.

Raymond Fulcher

Attachments

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| Attachment A | Letter to Mr R Fulcher |
| Attachment B | Statutory Declaration and photo of standing patrol |
| Attachment C | Training and briefing packages |
| Attachment D | Image of Malaysian War Memorial |
| Attachment E | Comparison of Operational Service Entitlements and Awards – RCB |

¹⁴² Royston, R.S., *Security Situation – Air Base Butterworth Report No 34*, INT 8/10/3 (150), 4 August 1975, para 5.