Ray Fulcher's appeal to DHAAT regarding RCB service

On 4 June 2019 I submitted an appeal to the Defence Honours and Awards Appeals Tribunal (DHAAT) appealing the decision of Defence Honours and Awards that I was not eligible for award of the AASM. The full documents that form my appeal are attached. For those not wanting to read the full array of documents I have provided below a summary of the section of my original appeal that deals with the *Repatriation (Special Overseas Service) Act* 1962 (SOS Act) which was the Act that covered the bulk of our deployments. DHAAT has advised that there will be a hearing in early 2020.

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.

Defence, through the Nature of Service Branch (NOSB)[1], 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."[2] 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are the *Repatriation (Special Overseas Service) Act* 1962 (SOS Act), which was in force until 22 May 1986 when it was repealed and replaced by the *Veterans' Entitlements Act* 1986 (VEA).

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

Defence contends that:

> "Special overseas service (which is equivalent to *warlike* service) was achieved when three conditions were met:
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> - 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.
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> Special duty is defined in the Act as:
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> "…duty relating directly to the warlike operations or state of disturbance by reason of
>
> which the declaration in respect of the areas was made…"[3]

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*:

[1] Redesignated as Nature of Service Directorate.
[2] NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989,* 28 April 2014, para 108.
[3] Ibid., paras 109-110.

> "There has been no single topic which has affected so many possible anomalies as the matter of "allotted" or "not allotted"." [4]

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:
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> a. effective local security which includes good observation; and
> b. a quick reaction capability."[5]

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."[6]

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:

> 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."[7]

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

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[4] Mohr, R.F., *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, 2000, p7.
[5] Commander ANZUK Force, *Security of Air Base Butterworth*, ANZUK 007/3001/1/OPS, 15 March 1972, para. 8.
[6] Johnson, D., VCDF*, Letter to Ms Cathy McGowan AO, MP*, PDR ID: EC19-002341, 26 April 2019.
[7] Commander ANZUK Force, *Security of Air Base Butterworth*, ANZUK 007/3001/1/OPS, 15 March 1972, para. 5.

> rotational basis from Australia. This could be presented publically as being for training purposes"[8]

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'etre could be the furthering of training."[9]

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

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 1965[10] 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…"[11]

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."[12]

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

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

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

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

[11] 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.

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

intent of the Cabinet. Nor was it the view of Clarke J who does not mention the subordinate clause.

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

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, for example:

> "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."[13]

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. The Defence Honours and Awards Appeals Tribunal (DHAAT) has previously summarised this understanding in a 2009 inquiry into SAS counter-terrorism duties.[14]

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 coincidently 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."[15]

Conclusion

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,

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

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

[15] Mohr R.F., R*eview of* S*ervice* E*ntitlement* A*nomalies in* R*espect of* S*outh*-E*ast* A*sian* S*ervice 1955-75*, February 2000, p9.

and others, have been unlawfully and unfairly denied the award of the Australian Active Service Medal.