ANALYSIS OF THE POSSIBLE ENTITLEMENT TO SERVICE PENSION OF MEMBERS OF THE BRITISH COMMONWEALTH OCCUPATION FORCE

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PURPOSE

1. The purpose of this Paper is to analyse the available evidence about the possible entitlement of members of the British Commonwealth Occupation Force ("BCOF") to service pension, to provide a critique of the contentions of the Department of Defence ("Defence") and the Department of Veterans' Affairs ("DVA") on this issue, and (if possible) to express an opinion on the issue in contention, based on an independent consideration of the available evidence.

2. This Paper has been commissioned by the Department of Veterans' Affairs, however the Department has asked me to prepare an independent analysis and opinion, based on the available evidence.

SOURCES FOR THIS PAPER

3. In preparing this Paper, I have generally relied on the extensive research of primary and secondary material conducted by DVA and by Defence, particularly in the past three years. In addition, I have relied on the research undertaken by Justice Toose and his team in preparation for his key report in 1975 on the repatriation system - the *Independent Enquiry into the Repatriation System* ("the Toose Report").

4. I have supplemented this research by a personal review of some selected primary and secondary sources including amendments to the *Australian Soldiers Repatriation Act 1920* made between 1940 and 1954, *VeRBosity*, and the many reviews of the repatriation system and the *Veterans' Entitlements Act 1986* ("the VEA") and its predecessor repatriation legislation conducted between 1975 (Toose) and the present day.

5. The main source materials which I have examined, or upon which I have relied, are set out in Attachment A - References.

BACKGROUND INFORMATION

British Commonwealth Occupation Force (BCOF)

6. On 19 September 1945, War Cabinet decided to participate with an Australian component in a British Commonwealth Force to take part in the occupation of Japan. The main body of the Australian contingent did not arrive in Japan until 21 February 1946.

7. The Report of the Clarke Review (2003) included a concise Historical Overview of the BCOF:

> BCOF comprised elements drawn from the armed forces of Australia, the United Kingdom, New Zealand and India. This was the first time that Australians were involved in the military occupation of a sovereign nation that Australia had defeated in war.
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> The initial area allocated to BCOF covered the prefectures of Hiroshima and Yamaguchi. This was subsequently expanded to include the prefectures of Shimane, Tottori and Okayama on the island of Honshu and those of Kagawa, Ehime, Kochi and Tokushima on Shikoku.
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> The primary objective of BCOF was to enforce the terms of the unconditional surrender that had ended the war in September 1945. BCOF was required to maintain military control, and to supervise the demilitarisation of the country and the dismantling of the remnants of Japan's war infrastructure.
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> The main body of Australian troops arrived in Japan on 21 February 1946, some seven months after the atomic bombs were dropped on Hiroshima and Nagasaki. The Australian contingent of BCOF was made up of members of the Australian Imperial Force, the Permanent Defence Force and the Interim Forces. The Army was responsible for the Hiroshima Prefecture, while the Air Force element was stationed at Bofu in the Yamaguchi Prefecture. The naval shore establishment was located at the former Japanese naval base at Kure.
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> From June 1947, BCOF numbers began to decline from a peak of over 40,000 service personnel from the four Commonwealth countries. By the end of 1948, BCOF was composed entirely of Australians. The force was effectively dismantled during 1951, as responsibilities in Japan were handed over to the British Commonwealth Forces Korea.
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> There is no consistent information available showing the exact number of Australians who served in BCOF, but current estimates by the Department of Veterans Affairs (DVA) indicate that about 17,000 were involved.
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> Seventy-seven deaths were recorded among the Australian contingent. There was, however, no loss of life as a result of a direct hostile action by Japanese forces. One death was listed as due to an "explosion on ammunition barge", while two were attributed to "mine explosion". One third of the deaths were due to motor vehicle accidents. The remainder were attributed to various other causes. (p 362)

8. On its arrival in Japan in February 1946, the Australian component of BCOF comprised 9,155 military and 2,185 RAAF personnel as well as two RAN ships. In August 1946, the BCOF reached a peak strength of 40,000. (BCOF ECA 2002) In October 1946, there were approximately 2,040 RAAF personnel in Japan and 350 shore-based RAN members. When the Fleet was in, there were 4,000 - 5,000 sailors in port for 10 days to a fortnight. (NAA: MP513/1/1 A782)

9. The Australian component of BCOF was a mix of World War 2 veterans and newly recruited soldiers. For example, in Robert Leiston's Platoon in 67 Battalion in 1949-50, one third of the Platoon had seen service during World War 2 (with an average age of 29), one third were under the age of 20, and one third were in their very early twenties. (Leiston 1989, p 54) In 1946-47, the proportion of those with WW2 service is likely to have been substantially higher. All of those WW2 veterans who had overseas service during the war would have become entitled to age service pension at age 60, based on their WW2 service. The issue under examination in this Paper involves those members of the Australian BCOF contingent who served wholly in Australia during WW2 and those who volunteered for and entered BCOF service before 30 June 1947.

The Prime Minister's Commitment to "Full Benefits" for BCOF Members

10. On 13 February 1946, the Prime Minister made a public statement:

> Members of the Interim Forces (including members of the occupation force in Japan) who enlist in these forces before the legally determined date of the end of a state of war will be entitled to full benefits under the Australian Soldiers' Repatriation Act and the Re-establishment and Employment Act. (DVA 2009, p 1)

11. The DVA Summary of Research notes that other Ministerial statements and media advertisements in 1946 and 1947 also made representations about receipt of "full benefits" or "all existing benefit". For example, Mr Forde, Minister of the Army, stated that "members of the occupation force will receive the same rehabilitation services on their return to Australia as a service personnel now being discharged". (DVA 2009, p 1)

12. The core issue in contention is whether this commitment to "full benefits" for BCOF members should include automatic qualification for service pension, or whether each male member should have to meet a necessary criteria for service pension at the time, namely that he "served in a theatre of war", as defined in s 23 of the Repatriation Act.

"Served in a theatre of war"

13. In 1946, s 23 of the Repatriation Act included a definition of "served in a theatre of war":

> "Served in a theatre of war" means served at sea, in the field or in the air, in naval, military or aerial operations against the enemy in an area, or on an aircraft or ship of war, at a time when danger from hostile forces of the enemy was incurred in that area or on that aircraft or ship of war by the person so serving;

14. There are two, very well credentialed, opinions on the interpretation of "served in a theatre of war" in the 1940s. In 1944, Mr GJ O'Sullivan discussed the phrase in his short book "War Pensions Entitlements Appeals". O'Sullivan was a soldier in World War 1, an experienced lawyer, and a Chairman of a War Pensions Entitlement Appeals Tribunal. The Foreword to the book was penned by the Right Hon. Dr HV Evatt, KC, MP, Attorney- General and Minister for External Affairs. O'Sullivan discussed "served in a theatre of war" in the following terms:

> The definition covers the expression wherever it appears in the Act. It is used in s 37(3), which covers certain cases of pulmonary tuberculosis, and in s 83, Service Pensions, as well as in ss 102 and 107. ...
>
> The proper construction of the definition is a question of law. Whether a given set of circumstances falls within it is a question of fact. The language used in the definition responds rather better to analysis and illustration than to paraphrase. (p 11)
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> "At a Time when Danger from Hostile Forces of the Enemy was Incurred in that Area, or on that Aircraft or Ship of War by the Person so Serving." - Danger from hostile forces must have been incurred. *Danger* means liability or exposure to harm, risk or peril (of one's life or of death or other evil). *Incurred* means, literally, to run into, or become involved in. So that when a member of the Forces, otherwise fulfilling the requirements of the definition, has served at any time and in any place where he was exposed to, or ran into, or became involved in harm, risk or peril to his physical (or mental) health, or the risk or peril of death, he falls within the category of a person who has served in a theatre of war. No geographical limits can be marked out in advance to serve the purposes of this definition. Whether a person served in a theatre of war within the definition is a question of fact, not merely one of geography.
>
> Take for example, the case of any member of the Forces who, whilst serving as such member, proceeds from Australia on an ordinary troopship overseas, say, to England, or Egypt, or New Guinea—or, for that matter, almost anywhere else on the open sea. Such a voyage invariably involves operations (either defensive or offensive, or both) against, and risk or peril from, hostile U-boats, aircraft, mines and surface raiders. The ship takes extraordinary precautions by arming herself, proceeding in convoy and without lights, zigzagging and so forth to avoid disaster at the instance of such hostile forces: and every person on board is likewise armed, drilled, on guard, or otherwise ready for any eventuality on every mile of the way. It is notorious, of course, that we have suffered tragic losses both in shipping and personnel on such sea routes—even unarmed hospital ships not escaping within a few miles of the Australian coast. That being so, it is impossible to escape the conclusion that a member of the Forces, in the circumstances mentioned, comes precisely and fairly within the definition. Illustrations might be multiplied and then not be exhaustive. It is not possible to envisage in advance every conceivable set of circumstances which might bring a case within the four corners of the definition. Each case must turn on its own facts and merits. But it is again emphasized that the test is not only geographical but factual; and a person might well find himself within the definition in almost any part of the globe, especially during the present (1939) War.

15. Bruce Topperwien (2011) refers to an undated opinion (most likely from the mid-1940s) provided to the Repatriation Commission by Richard Windeyer KC, an eminent lawyer who also served as an acting Justice of the NSW Supreme Court and lectured at Sydney University. Windeyer discussed the interpretation of "served in a theatre of war" in the following terms:

> The phrase to be interpreted is "Theatre of War". The language of the definition of this phrase in section 23 of the Act itself requires an examination of its words:- "served", "area", "danger", "hostile forces".

"Served" means – was on service with one of the armed forces of the Crown.

"Area" means any portion of the earth's surface.

"Danger" means, in my opinion, the immediate possibility reasonably conceived of the happening of injury, as the situation is judged at the time.

"Hostile forces" means agencies of the enemy.

The word which creates most difficulty is "danger", and it cannot be considered without regard to the primary phrase "theatre of war". According to Webster's Dictionary the word "danger" may connote risk, jeopardy or peril, suggesting various degrees of danger. The benefit or alleviation contemplated by s 37(3)(a) should be regarded as some reward for a man who, while serving, has been in a situation calling for bravery and self-devotion. If therefore, at any time when a man was serving, there was a real physical possibility of injury from enemy action and it was reasonable to regard it as possibly imminent at any moment – that, in my opinion, is the situation connoted by the word "danger" where used.

I am of the opinion that having proved a risk possible the onus would NOT lie on the claimant to prove that at a particular time the enemy was in a position to inflict injury, so that the risk was in that sense probable. If in a particular area, say the Indian Ocean, it was proved that the "Emden" was destroyed, it would not be necessary to show that there were other raiders about. To put it another way, the claimant would not be defeated because knowledge obtained later showed that the enemy had no more raiders.

I am therefore of the opinion that a claimant is entitled to the benefit of s 37(3)(a) if he can proved (sic) that he was on service in some place on sea or land where injury from hostile action was conceivable and might reasonably have been regarded as an existing risk, this is irrespective of proof whether the enemy at that particular time was or was not capable of inflicting injury at that spot.'

16. Both O'Sullivan and Windeyer agreed that the definition has a wide geographic coverage, that the operations must be directed against enemy agencies, and not against any other body, and that the danger must be from hostile forces of that enemy. There are, however, nuanced differences in their approach to "danger" "was incurred". O'Sullivan describes a purely objective test, requiring the member to be exposed to, or run into, or become involved in harm, risk or peril to his physical or mental health, or the risk or peril of death. Windeyer also describes an objective test of risk, jeopardy or peril, but allows that danger was incurred if there was "the immediate possibility reasonably conceived of the happening of injury, as the situation is judged at the time". There is some allowance for reasonable perception of risk, rather than actual risk, in a test which looks to whether "injury from hostile action was conceivable and might reasonably be regarded as an existing risk".

17. The defined term "served in a theatre of war" is used in s 84(1) in relation to grant of service pension:

84(1) Subject to this Act, the Commission may grant a service pension to a member of the Forces who -

(a) in the case of a man - has served in a theatre of war and has reached the age of 60 years;

(b) in the case of a woman - has served in a theatre of war or served abroad or embarked for service abroad and has reached the age of 55 years; ...

18. I note that female members of the Forces were entitled to service pension if they "served abroad or embarked for service abroad", a statutory criteria which would have been satisfied by all female members who actually commenced their BCOF deployment. DVA is unable to provide any detail of the number of female BCOF veterans and is unable to identify whether they received service pension at age 55 in the 1960s and 1970s because DVA pension data does not distinguish between WW2 and BCOF service. This may be worthy of further exploration.

Chronology - Access to Service Pension for BCOF Members

19. Set out below is a chronology of relevant dates concerning access to service pension for BCOF members:

1936	Service pension was introduced, with an eligibility criteria for men that the member had "served in a theatre of war", as well as an age or permanently unemployable criteria.
1 April 1943	The Repatriation Act was extensively amended and renumbered, including extension of the "served in a theatre of war" service pension eligibility criteria to servicewomen. This extension was necessary to ensure that service women who faced actual danger from Japanese forces while serving in Australia were eligible for service pension.

5 May 1943	The Repatriation Commission issued a Circular Letter describing theatres of war for the purposes of the 1939 War.
2 September 1945	Cessation of actual hostilities with Japan. Some mopping up operations continued after this date.
29 October 1945	End of the "period of hostilities" for World War 2, as later defined in the VEA in 1986.
19 September 1945	Cabinet made a decision to provide an Australian Occupation Force for Japan.
13 February 1946	Prime Minister Chifley made a commitment to "full benefits" for BCOF members.
21 February 1946	BCOF commenced operations in Japan.
17 December 1946	The Repatriation Commissions issued Circular Letter No 386 deeming "served in a theatre of war" for several categories of World War 2 service.
26 May 1947	Cabinet approved the Recommendations in Addendum No 1241C.
1 July 1947	New legislation commenced covering the Interim Forces and prescribing a lesser set of repatriation and re-establishment entitlements, including cessation of any possible eligibility for service pension for those enlisting after 1 July 1947.
8 September 1951	Peace Treaty with Japan signed, marking the official end of World War 2.
1967 - 1987	Period during which the majority of male BCOF members would turn 60 years of age.
June 1975	Toose Report published.
1984	Last possible year for a female pre-1 July 1947 BCOF member to reach age service pension age.
22 May 1986	VEA commenced
1989	Last possible year for a male pre-1 July 1947 BCOF member to reach age service pension age.
1999	Amendments to the VEA providing Gold Card eligibility for World War 2 veterans aged 70 and over with "qualifying service" (service pension).
January 2003	Clarke Review recommended that BCOF service should be declared "warlike".
March 2004	Howard Government responded to the Clarke Review, including rejection of the recommendation for declaration of BCOF service as "warlike".
September 2008	Minister Griffin called for submissions for reconsideration of Clarke Review recommendations not accepted by the Howard Government.
11 May 2010	Minister Griffin announced that the nature of service of BCOF members was one of a number of Clarke recommendations that would be deferred for further consideration.

AGREED POLICY APPROACH

20. "It is Defence policy to examine nature of service anomalies in the context of the legislation and policy extant at the time of the service being reviewed; in this case in the period 1946-47. It is also vital that the military, political and social context in which BCOF service was performed be examined in order to more accurately determine the intention of the political decision makers at the time." (Defence 2010, para 3)

21. DVA agrees that the Defence approach is the appropriate methodology for reviewing the nature of service relating to past operations and notes that it has been the consistent approach for a long period of time. (DVA 2011a, p 2)

CONTENTIONS OF THE PARTIES

22. The core issue in contention is whether the Prime Minister's commitment to "full benefits" for BCOF members should include automatic qualification to service pension, or whether each male member should have to meet a necessary criteria for service pension at the time, namely that he "served in a theatre of war", as defined in s 23 of the Repatriation Act.

23. For members who served overseas in World War 2, automatic satisfaction of the "served in a theatre of war" criteria was deemed by the Repatriation Commission in a processing policy document, Circular Letter No 386 of 17 December 1946. The Repatriation Commission did not deem service by BCOF members in a similar way.

Department of Defence

24. The Defence Submission to the Review of Service in Japan (Defence 2010) sets out the contentions which led to the Defence recommendation that BCOF personnel who served in Japan up to and including 30 June 1947 be admitted to qualifying service eligibility without any further delay".

25. These Defence contentions are summarised below at [25(a)]-[25(p)].

(a) The key to the policy applied to BCOF Repatriation benefits is encapsulated in a decisive press release by the Prime Minister on 13 February 1946 which stated BCOF members "would be entitled to full benefits under the Repatriation Act ..."; in effect a public pledge which sits at the core of the BCOF submission. This intent for "full benefits" was confirmed by the Acting Minister for Defence who committed to "all existing benefits prescribed by the Repatriation Act ...".

(b) There were options open to Government to restrict Repatriation benefits had they intended to do so, eg. to set a cut-off date for World War 2 of the date of surrender or the date of cessation of hostilities, or to have excluded Division 5 (service pension) benefits after those dates rather than the chosen date of 30 June 1947. "None of these options were chosen suggesting that the Government's intention was to admit to full eligibility those personnel who served overseas with BCOF in Japan prior to 1 July 1947". (para 9)

(c) "... no evidence has been located either by Defence or DVA that states that the Government's intention was that BCOF not be eligible for the service pension. Had the Government intended that BCOF not be eligible for the service pension Defence believes this would have been made clear at the time." (para 10)

(d) "Opposition to the BCOF veterans' case rests on narrowly framed legalistic arguments. ... This means that members of the BCOF, while entitled to 'full benefits' under the Act including the service pension, still had to meet the criteria of having served in a theatre of war. According to this prescriptive interpretation therefore, all individuals have to prove that they incurred danger from enemy forces on a case-by-case basis. In short, eligibility for entitlements must derive from verifiable incurred danger." (para 11)

(e) "The language used by the Prime Minister in his press release could reasonably be construed, as argued by the BCOF claimants, as 'full benefits' meaning the same benefits as those extended to personnel serving outside Australia or overseas between 1939 and 1945. If it was not intended that BCOF personnel be admitted to eligibility for the service pension, Defence is of the view that the Government would have made this clear to the BCOF contingent." (para 13)

(f) Japan was still an American theatre of war until at least 31 December 1946. The Term "theatre of war" in the Repatriation Act was intended to describe, in a general sense, an area(s) in which military operations were taking place. "In 1950, the notion of an area of operations (AO) was formalised in legislation and AOs were declared on the basis of advice from Defence." (para 15)

(g) There was no end date for World War 2 service until the treaty of peace with Japan on 20 March 1952. However Cabinet did establish a cut-off date for full benefits" of 30 June 1947. In making the decision in Cabinet Addendum 1241C on 27 May 1947, "in full knowledge of what BCOF had endured during its 15 months as an occupation force, Defence believes the Government was acknowledging the hazards and hardships associated with the disbanding and disarming of the 6.5 million strong Japanese military organisation." (para 19)

(h) Based on materials from the 1970s and later, Defence concluded that "it is clear that deployed forces need only be exposed to the possibility of danger and that the amount of danger need only be more than a mere fanciful danger. Defence is of the view that at the time of their deployment to Japan in February 1946, the general situation facing the Australian contingent of BCOF clearly satisfies the criteria." (para 21)

(i) Justice Clarke's conclusions on the BCOF matter are "instructive" and "an important contribution" (paras 23, 24) however Defence "does not support the application of the contemporary test for warlike service to events of the past" (para 24).

(j) "Those serving overseas during time of war have always been treated differently to those who served entirely within Australia." (para 25) This is evidenced in various ways including a Ministerial statement in 1940 (in respect of disability pension) and the Repatriation Commission's Circular Letter No 386 of 17 December 1946.

(k) "Defence does not believe that it was the intention of the Government (as distinct from the Repatriation Commission) that members of the forces who serve in occupation of a foreign country with whom Australia was at war during the period of 'full benefits' were to be individually tested against the criteria within the definition of served in a theatre of war. ... It is again highly unlikely that such measures [case by case testing of the evidence of danger incurred] were contemplated by Government in deciding on the most appropriate benefits for BCOF service." (para 27)

(l) The appropriate inference to be drawn from Repatriation Commission Circular Letter No 386 is that "the approach at the time was not to consider and apply the so called 'incurred danger' test to those serving overseas on operations involving an enemy on a case-by-case basis. The incurred danger test was, therefore, reserved for those personnel serving in the Australasian Theatre." (para 30)

(m) "...it could be argued that the Prime Minister's intent in his statement of 13 February 1946 was not facilitated by those responsible for the administration of the Government directive." (para 31)

(m) A relevant precedent is that members who had post-Armistice service in Korea received service pension, possibly for reasons related more to the need to maintain a presence in Korea than the nature of the service rendered.

(n) An inequity exists between those who gained service pension because they were awarded the Navy General Service Medal with Clasp "Mine Sweeping" for the period 1945-51 and those BCOF members who cleared mines and munitions in Japan.

(o) There is a "psychological contract" between members of Forces and their senior uniformed leaders and political masters, which must be based on mutual trust. The BCOF case represents a perceived breach of this trust, "which has resulted in lingering and undiminished resentment over a period of more than sixty years." (para 38)

(p) "Arguments against the BCOF requests are narrowly focused on the fine print in Repatriation law, in particular the notion of 'served in a theatre of war'. Defence believes that the final decision should be a Ministerial decision that takes into account the broader military, social and political context, as well as the overarching spirit of the legislation, and therefore, should not be determined on a strictly legal basis" (para 45)

26. It is relevant to note that the Defence position in 2010 has changed from that taken in 1997 when Defence considered that BCOF members did not fulfil the requirements for qualifying service and was more concerned to rectify an anomaly affecting members of the Permanent Forces serving with BCOF between 3 January 1949 and 30 June 1951. This anomaly was later rectified by legislative amendment. In a Review of Service Entitlement Anomalies, Defence stated:

> 17. Service in Japan with BCOF does not fulfil the requirements for qualifying service. Occurring after the formal surrender of Japan and facing no opposition to their presence in the country, the occupation forces did not incur danger from hostile forces of the enemy. It is also questionable whether such service could be considered operational service. While the Treaty of Peace with Japan was not to come into force until 28 April 1952, it is questionable whether this period could be considered a time of war. Certainly the operations undertaken by the occupational forces in Japan were not warlike in nature. The application of force was not authorised to pursue specific military objectives and there was no expectation of casualties. (Defence 1997, para 17)

BCOF Executive Council of Australia Inc.

27. The BCOF Executive Council of Australia Inc. ("BCOF ECA") prepared a substantial submission to the Clarke Review in 2002 arguing their case for recognition of "qualifying service" for BCOF members.

28. The ECA Submission raised several contentions, summarised below at [28(a)]-[28(g)]:

(a) "The possibility of hostilities was clearly provided for in the composition of the Force which, in addition to the three Infantry Battalions, included Armour, Artillery, Engineers, Signals and Air and Naval units equipped for warfare conditions NOT civilian policing." (BCOF ECA 2002, folio 97)

(b) BCOF members endured arduous and hazardous conditions, including extremely cold weather without appropriate uniforms and barracks, the risk of exposure to disease and radiation contamination in Hiroshima and widespread use of DDT.

(c) "From 1946 an intensive Press campaign was undertaken to encourage volunteers to join the WARTIME AIF for a period of two years with the option of also volunteering for service With B.C.O.F." (BCOF ECA 2002, folio 117)

(d) The BCOF was required to supervise the demilitarization and disposal of Japanese military installations and armaments, including huge stocks of war material. In particular, caches of small arms and high explosives had to be located and destroyed, this being the most dangerous of BCOF operations.

(e) Three members of the 10th Australian Bomb Disposal Platoon lost their lives while carrying out their duties. Fifty seven members of the Australian component of the BCOF lost their lives between 1946 and 1952 while serving in Japan.

(f) BCOF was not a peace keeping force. It was an occupation force occupying the homeland of a recently defeated enemy whose reaction to the occupation was unpredictable. Because of that uncertainty the 34th Infantry Brigade was deployed as a constantly combat ready force and the operations were clearly "warlike".

(g) "It is transparently obvious that the definition of qualifying service was always inequitable. Of the many hundreds of thousands who fell within that definition only a moderate percentage were directly 'in harms way'. It was properly seen that those who, through chance or location, did not personally encounter hostile fire were nevertheless 'potentially in harms way'. So also were those who volunteered for service with B.C.O.F. All of our training and briefing was designed to deal with 'potential' hostilities'." (BCOF ECA 2002, folio 340)

Department of Veterans' Affairs

29. DVA's key contention is that the Prime Minister's commitment to "full benefits" meant eligibility for full benefits under the Repatriation Act provided all statutory criteria are met. Being eligible for benefits under the Act does not automatically translate into entitlement[2] if there are additional specific statutory criteria which the claimant cannot meet.

30. The main statement of the DVA contentions is made in an Information Brief (2011a) and are summarised below at [30(a)]-[30(g)]:

(a) In the case of service pension, male members of the BCOF had to meet three main eligibility criteria in the Repatriation Act, namely that:

- they were a "member of the forces" as defined in s 100 (s 84(1));
- they had "served in a theatre of war" (s 23); and
- they had reached 60 years of age or were permanently unemployable (s 84).

(b) "Saying that someone is entitled to benefits under an Act does not automatically translate into eligibility if there are some specific criteria that apply. ... One example of the 'full benefits' under the *Repatriation Act* is a Totally & Permanently Incapacitated (TPI) pension. Eligibility for this pension arises where a person is severely disabled due to their service. A TPI pension is not awarded on the basis of enlistment or service at a certain point of time or with a certain formation. Not all BCOF members will receive a TPI pension, yet they are all entitled to apply for it as a benefit available under the Act." (p 1)

(c) Clarke's recommendation that BCOF service be classified as warlike service was incorrectly underpinned by the Warlike/Non-warlike construct which is accepted as applicable to service only since the relevant Cabinet decision in 1993. (p 1)

(d) "The primary focus of Cabinet Agendum 1241C was definition of the reduced levels of benefits that would be available to individuals who enlisted after 30 June 1947. The primary purpose of the Agendum was not the exhaustive specification of the benefits available to the pre-1 July 1947 cohort." (p 2)

(e) Neither DVA nor Defence has been able to locate definitive evidence of a Government intention to provide service pension for all pre 1-July 1947 BCOF members. The view that there was such an intention is difficult to support because it would have constituted a fundamental departure from the historical approach to the determination of repatriation benefits to the extent that the Government would certainly have been explicit and changed legislation accordingly. That this was not done strongly indicates the absence of intention.

(f) "The essence of this incurred danger test provides a common thread that can be found in service pension eligibility from its inception in 1935 through to today." (p 4) The concept of allotment for duty, either on an individual or a unit basis was not used during World War 2 and emerged as a way of establishing eligibility in 1950.

(g) There was no loss of life in the BCOF as a result of direct hostile action by Japanese forces and even before the Australian contingent arrived in Japan, and in the early months of the occupation, it was already clear that no organised or large-scale resistance requiring the application of force was likely to occur.

Consideration of the Contentions

31. In its Information Brief (2011a), DVA provided a detailed rebuttal of the Defence contentions in its 2010 Submission. Reading each of these documents, and the BCOF ECA submission, gives a reasonably comprehensive understanding of the overall issues, however I think some lack of clarity is caused by features common to each of the documents:

- some of the terms and language used has had different meanings on the past 70 years and later meanings are sometimes imported into discussion of the position extant at 1946-47. For example, considerable care has to be used in relation to the meaning of "active service", "operational service", "qualifying service", "member of the Forces" and "period of hostilities". In particular, it is important to focus on the Repatriation Act as it was in 1946-47 and not on the terms of the VEA in 1986 and subsequently; this only provides a statement of how World War 2 eligibility for benefit was determined 40 or more years after the event.
- on many occasions, subsequent events, legislation and policy are discussed and used to strengthen each party's contentions. Because of the agreed policy approach (see [20]-[21] above), I think discussion of these subsequent events, legislation and policy often distract focus from the core issues.

32. Because of these problems, I do not think it is necessary in this Paper to examine all the contentions of each party and state my opinion on each opposed view. Rather, I think it useful to clarify exactly what is in contention.

33. It is unfortunate that Defence has characterised the principal DVA contention as "legalistic" ([25(d)] and "narrowly focused on the fine print in Repatriation law" ([25(p)]. I am sure that both Departments fully recognise the need to comply with legislative requirements, and departure from this fundamental principle of administrative law would serve no one's interests. In this case, the Defence and DVA contentions can be framed in such a way that each is consistent with relevant legislation at the time, and what is in contention is the ultimate intention of the Government in 1946-47, as best as can be determined from available, unfortunately inadequate, evidence.

34. It is clear that the Repatriation Act in 1946-47 required male members of the BCOF to have "served in a theatre of war", if they were later to become eligible for service pension at age 60 (or upon becoming permanently unemployable). This statutory test incorporated several elements, including that "danger from hostile forces of the enemy" "was incurred" in the area of service. This test applied to all male claimants for service pension, whether they served overseas or in the Australasia Theatre during World War 2.

35. The important distinction between service overseas and service in Australasia was that the Repatriation Commission directed decision-makers to accept the criteria "served in a theatre of war" where the veteran had overseas service between 3 September 1939 and 1 September 1945. This was a policy processing rule of the Repatriation Commission made in accordance with legislative authority; it was not a statutory deeming of entitlement. This is discussed below at [45] below in my analysis of Repatriation Circular Letter No 386.

36. On this basis, I suggest that the primary contention should be expressed as being whether the Prime Minister's commitment to "full benefits" imported a commitment that the Repatriation Commission would make a processing policy for male BCOF members similar to the policy covering World War 2 members who served overseas. The Defence Submission contends that there was a commitment to automatic eligibility. DVA has always contended that the "full benefits" commitment did not mean benefits would be provided without meeting the criteria under the Act. was fulfilled by making BCOF members eligible for service pension when they reached the relevant age, however male members still had to meet the statutory "served in a theatre of war" criteria.

37. If my suggested basis for expression of the issue in contention is accepted, BCOF members were entitled to service pension in conformity with the Prime Minister's commitment, however they were not deemed "served in a theatre of war" in a manner similar to World War 2 veterans with overseas service and therefore few if any male BCOF members actually received age service pension because they were unable to meet the "incurred danger" test on a case by case basis.

38. The Defence Submission (at para 27, see [25(k)] above) contends that individually testing 17,000 personnel on a case by case basis was "largely impracticable" and that it was unlikely that such measures were contemplated by Government in deciding on the most appropriate benefits for BCOF service. This contention does not take into account the fact that claims would not be received by the Commission in any volume for more than 20 years after the BCOF deployment. It also, I believe, misstates the "criteria for "served in a theatre of war" by referring to a "*possibility* of something more than a *mere fanciful danger*". This is an arguable description of the statutory test, as discussed by courts and tribunals more than 30 years later, but it is not consistent with the interpretation of the statutory test by O'Sullivan and Windeyer in the mid-1940s (see [16] above).

39. The BCOF ECA submission provides a substantial amount of material on the dangers and difficulties which the BCOF was exposed to. In the end, I consider that this material is not very relevant as the available evidence shows clearly that BCOF members, while enduring arduous conditions, were not exposed to "danger from hostile forces of the enemy" in 1946-47. There was an apprehension that danger may be incurred in the deployment, particularly in September 1945 when Cabinet approved the establishment of an Australian component in an occupation force (BCOF ECA, folio 103). However, by March 1946, this apprehension had greatly eased because of the experience of US forces in Japan. One contemporary view of the level of apprehended danger was a statement by Mr Morgan (Hansard, 29 March 1946) who said that "little training is needed to guard unarmed Japanese and perform the routine duties of a garrison force" (DVA 2009). Nevertheless, the BCOF was constructed as a fully combat ready force in February 1946, because of the possibility that hostile Japanese action might emerge in the course of the occupation.

40. Some of the other contentions should be disregarded, for example:

- Reference to the Clarke Review is not useful as the basis for its recommendation was the retrospective application of a warlike/non-warlike framework. This is contrary to the agreed policy approach.
- References to the history of the "incurred danger" test, the subsequent allotment approach, anomalies in Korean or other service, the relevant "period of hostilities" and the date of the peace treaty with Japan do not advance resolution of the principal contention.

ANALYSIS OF THE EVIDENCE

Repatriation Commission Circular Letter No. 386 - Theatres of War - Definition

41. On 17 December 1946, the Chairman of the Repatriation Commission issued Circular Letter No 386 "Theatres of War - Definitions". The Circular Letter repealed Appendix 24 of Pensions General Orders and inserted new guidelines for deeming "served in a theatre of war", effective from 14 November 1946.

42. The Circular Letter essentially modified previous policy about World War 2 service, first expressed in 1943. In his paper "History of Nature of Service Law and Policy" (2011), Bruce Topperwien sets out the terms of a 1943 Repatriation Commission Circular Letter establishing what constituted a "theatre of war" for the purposes of the 1939 War. The 1943 Circular Letter enumerated various countries in the Middle East, Pacific and Australian Theatres as "theatres of war" for Army and Air service. Topperwien commented (at p 8) that the text of this Circular Letter was essentially reproduced in General Orders Pension in 1945.

43. Topperwien (2011) noted that these guidelines were necessary for administrative purposes:

> When service pension eligibility was extended to World War 2 veterans in 1943, it was anticipated that there would be only limited numbers of claims for the service pension based on World War 2 service for the first decade or two until most veterans reached 60 years of age. However, the 1943 legislation also provided for a disability pension to be paid at 100% of the general rate for anyone who had "served in a theatre of war" and who was suffering from pulmonary tuberculosis. There were significant numbers of such cases in the 1940s, and so it was very important for the Commission to establish policies regarding the meaning of "theatre of war". (p 7)
>
> ...

These guidelines were established by the Commission to enable quick processing of claims without having to consider the actual circumstances of a particular person's service unless the member did not fall neatly within the guidelines. Essentially, the Commission was conceding that if a member had served in those areas at the relevant times, they would have "incurred danger from hostile forces". If a person, for example, could not meet the three month minimum requirement for the Darwin area, then if they could provide evidence that they, in fact, did incur danger from the enemy, a claim could be accepted by the Commission in accordance with the "Note" to the [1946] Circular Letter. (p 8)

44. The 1946 Circular Letter No 386 included the following direction about the definition of "served in a theatre of war":

> (2) For the purpose of administration the foregoing definition is to be interpreted as follows -
>
> ...
>
> For 1939 War purposes
>
> A member shall be deemed to have served in a theatre of war if he served outside the territorial waters, or outside a limit of three miles from the coast, of the Commonwealth of Australia or the Dominion of enlistment between midnight 2nd-3rd September, 1939, and midnight 1st-2nd September, 1945.
>
> [Notes concerning service in the Australasian Theatre in New Britain, New Guinea, Papua and in the Northern Territory]
>
> General
>
> Where a case does not appear to strictly come within the provisions set out above but which, in the opinion of a Repatriation Board, has special merits, the facts of the case are to be submitted to the Commission with a recommendation from the Board.

45. Circular Letter No 386 had the effect of deeming all service outside the territorial waters of the Commonwealth as "served in a theatre of war", giving a broader geographic coverage for eligibility for service pension than the 1943 Circular Letter. The Commission referred to "discussions with the Minister and in the light of a legal opinion" as the basis for the repeal of the previous policy and insertion of the new deeming policy for overseas service in 1946. I do not know what the substance of this legal opinion was, however it could have been a response to external opinions that "served in a theatre of war" had a very wide geographic coverage, and that danger could be incurred while in transit to the enumerated countries in a Theatre of War or between Theatres of War.

46. Defence contends that the that Circular Letter No 386 in 1946 was "a major adjustment to established policy" and that "the approach at the time was not to consider and apply the so called 'incurred danger' test to those serving overseas on operations involving an enemy on a case-by-case basis. The incurred danger test was, therefore, reserved for those personnel serving in the Australasian Theatre." (para 30)

47. I suggest that the 1946 Circular Letter was a development and refinement of policy first enunciated in 1943 and that its primary purpose was to reduce demands on claim processing resources and to enhance consistency of decision-making among delegates of the Repatriation Commission. The revision of policy in 1946 provided the Commission with an excellent opportunity to include BCOF and other Interim Force service within the scope of the deeming provision but it did not do so. It appears that the Commission was willing, at that time, to continue consideration of BCOF claims on a case by case basis, in the same way that claims in respect of "mopping up" operations in the South West Pacific after 2 September 1945 were considered.

48. Defence suggests that BCOF was not expressly mentioned in the Circular Letter "as it was clear that CABSUB 1241C dealing with their benefits was under active development at the time and to make reference to BCOF before their conditions of service had been approved formally by Government would have been inappropriate" ([25(f)]). As discussed below at [53]-[54], I consider that Cabinet Agendum No 1241C was focused on what benefits members of the Interim Forces who enlisted after a cut-off date of 30 June 1947 should receive and what benefits could be withdrawn from members of the Interim Forces given that actual hostilities had ceased in September 1945 and a formal, legal conclusion to the War with Japan was in prospect. The discussions leading up to the approval of the Agendum did not canvass the repatriation benefits of BCOF members in 1946 and early 1947; they were simply enumerated in documents for the purpose of examining which benefits could be removed, and which should be retained, for members of the Interim Forces after the cut-off date.

Cabinet Agendum 1241C - Re-establishment - Members of the Occupation and Interim Forces

49. On 26 May 1945, Cabinet approved Cabinet Agendum No 1241C "Re-establishment - Members of the Occupation and Interim Forces". Agendum 1241C was a development from Agendum 1241 (23 August 1946) and the Agendum 1241A (5 November 1946) which were discussed by Cabinet, but ultimately referred to Departments for further policy discussions. Agendum 1241C commenced by acknowledging the Prime Minister's commitment to "full benefits under the Repatriation Act and the Re-establishment and Employment Act", but its primary purpose was to establish a cut-off date when this commitment would cease to apply to members of the Interim Forces who enlisted after that date, and to establish the appropriate benefits for those enlisting after the cut-off date. The intention was to move the benefits and conditions of service of new members of the Interim Forces away from war benefits and towards normal peace-time benefit levels.

50. Cabinet Agendum 1241C stated that "the state of emergency which existed during hostilities and the personal hazard and risk attached to war service no longer exists. In short, service in the Armed Forces at present can be likened to peace-time employment except that a member may be called upon to serve abroad with a consequential interruption to his normal routine." (para 6) In the Agendum, Cabinet approved the limited set of benefits which would apply to members of the Interim Forces who enlisted after 30 June 1947. Cabinet stated that full benefits would continue for those who were already eligible and those who enlisted between 2 September 1945 and 30 June 1947, however the focus of the Agendum was not on explaining the ambit of "full benefits; rather it was explaining what the post- 30 June "limited benefits" would be.

51. Cabinet Agendum 1241C made only limited reference to repatriation benefits:

- In Part I it reported the Commission's recommendation that "all benefits under the Repatriation Act and regulations should be available to members within sub-paragraph one (a) and (b) of paragraph 9 of this submission [ie. those enlisted on or before 30 June 1947]. This would involve amendment of the Act to limit eligibility to members enlisting not later than 30th June, 1947."
- Recommendations Q-Y in Part II listed various repatriation benefits which were to be withdrawn including: "SERVICE PENSIONS - Division 5 of Part III. Certain classes of members, wives and children. COMMENT. It is considered that enlistees after 30th June, 1947, should be covered by Social Service provisions made for the community as a whole."
- The Summary (at pp 17-18) summarised Recommendations Q-Y.

52. Defence contends that Cabinet made the decision in Cabinet Agendum 1241C on 27 May 1947 "in full knowledge of what BCOF had endured during its 15 months as an occupation force". "Defence believes the Government was acknowledging the hazards and hardships associated with the disbanding and disarming of the 6.5 million strong Japanese military organisation" (see [25(g)] above).

53. I do not read the Cabinet Agendum in the way suggested by Defence. From my reading of the material, I consider that Agendum 1241C, its predecessor Agendums, and the inter-Departmental discussions that accompanied the iterations of the Agendum were strongly focused on what benefits members of the Interim Forces who enlisted after the cut-off date of 30 June 1947 should receive and what benefits could be withdrawn, given that actual hostilities had ceased in September 1945 and a formal, legal conclusion to the War with Japan was in prospect.

54. Cabinet Agendum 1241C acknowledged that eligibility for service pension was one of the repatriation benefits covered by the "all benefits" commitment. However it is completely silent on the key issue of whether members of BCOF were entitled to be deemed "served in a theatre of war", or whether their eligibility to service pension was subject to satisfaction of all eligibility criteria, including that they had met the factual test for "served in a theatre of war" (namely that they incurred danger from hostile forces of the enemy).

Government Files

55. The DVA Research Papers (2009 and 2009a) report on an extensive search of Government files from the 1940s, in particular NAA: CP567/1 52/301/317, "Interim Forces. Conditions of service", NAA: MP513/1 A782 Part 1, "Japan occupation force rehabilitation benefits policy file part 1" and NAA: MP513/1 A782 Part 2. The Research Papers quote from these files quite extensively and include quotations that shed some light on Government intentions in 1946-47. I reviewed each of these three files to form an independent view of their contents and possibly find additional documents relevant to the BCOF service pension issue.

56. My overall impression from these files is that there was little specific consideration of the Repatriation Act and Repatriation benefits in the files. There is relevant, general discussion about the meaning and scope of the "full benefits" commitment, but detailed discussions mainly focus on re-establishment benefits, war service homes and conditions of service such as taxation exemptions.

57. The Report of a Treasury Finance Committee "Interim Forces and Force for Occupation of Japan. Review of Pay and Allowances" dated 12 February 1946 discussed repatriation benefits as one element of a wider consideration of the Interim Forces:

> 16. Any members who enlist in the Forces during the war are eligible under the Repatriation Act for the benefits thereby provided. The end of the war has not yet been legally declared.
>
> The bases for eligibility for pension are:-
>
> Members whose service was confined to Australia -
>
> Disability arising out of or attributable to service.
>
> Members who served outside Australia -
>
> Disability arising from any occurrence during the overall period as a member of the Forces.
>
> Comment - It is considered that for those members already overseas, the "occurrence" basis should be continued until the date of discharge.
>
> For members who embark for service overseas in future it might be considered reasonable to restrict the "any occurrence" basis to the period of service abroad.
>
> There are other benefits which might be reasonably withdrawn, e.g., Service pensions, but these require detailed examination in conjunction with Repatriation representatives.
>
> Suggested decision - The provisions of the Repatriation Act should continue to apply while the Repatriation Act covers the members concerned. The question of conditions to apply to enlistments after the end of the war to be referred to a Committee including Repatriation Commission representatives, for report. (NAA: CP567/1 52/301/317, folio 48)

58. This Report clearly shows that service pension was one of the repatriation benefits for which BCOF members were eligible in 1946. However, it does not shed any light on the actual issue in contention, that is whether BCOF members should have had the eligibility criteria "served in a theatre of war" deemed, or whether they had to meet that eligibility criteria on a factual, case by case, basis.

59. A draft Memorandum to the Minister for Defence, written after Cabinet consideration of Agendum 1241A on 5 November 1946, included a relevant comment on the issue of danger and the intentions behind Agendum 1241C:

> At the time of drafting Agendum 1241, and which included the suggestion that limited benefits should apply to enlistments after 30th June 1947 ..., the further report to cover this suggestion was intended to leave the door open in case the Australian forces became engaged in active war operations in Japan. Some months now having passed and the unlikelihood of active service being no longer in doubt, enlistments after 30th June 1947 may reasonably be considered as not coming within the general scope of re-establishment in relation to the 1939-45 war. (NAA: MP513/1 A782 Part 2, folio 330)

OPINION

60. It is not possible to form a definitive view about the issue in contention. In the available material, there is no 1946-47 document which expressly discusses the application of the "served in a theatre of war" criteria to BCOF members, and it is now very unlikely that such a document will ever emerge. Both Defence and DVA have undertaken extensive research into the records without locating a "silver bullet" and Justice Toose, who was working 35 years closer to the 1940s, found no such material in his research.

61. Based on the material I have studied, my preferred view is that male BCOF members were not entitled to service pension based on their BCOF service alone. Many BCOF members would have received service pension based on their service abroad during World War 2. However those BCOF members who served only in Australia and had no exposure to danger from hostile forces of the enemy, and those members who newly enlisted for BCOF service before 30 June 1947, did not satisfy the "served in a theatre of war" criteria, as interpreted in 1946-47, and therefore could not become entitled to receive a service pension.

62. In my opinion, it is clear from the evidence that BCOF members were considered "eligible" for service pension up to 30 June 1947, because there are multiple documents discussing the possibility of removing eligibility for service pension for BCOF and Interim Forces members who enlisted after 30 June 1947.

63. In my opinion, it is also reasonably clear that the Repatriation Commission in 1946-47 considered that entitlement to service pension was conditional upon BCOF members meeting the statutory criteria "served in a theatre of war". I base this opinion on the Circular Letters in 1943 and 1946, the general tenor of the file material, the preparedness of the Commission to undertake case by case processing for the "mopping up" claims in the South West Pacific, and the consistency of the Commission's approach to the "incurred danger" test over several decades from 1935. Defence appears to concede this point in their 2010 Submission in their references to "the intention of the Government (as distinct from the Repatriation Commission)" ([25(k)]) and to a failure "by those responsible for the administration of the Government directive" ([25(m)]).

64. The commitment to "full benefits" can certainly be interpreted as a commitment by the Government that BCOF members would be deemed to have served in a theatre of war" in a similar manner to Australian troops serving overseas during the period of World War 2 hostilities. However, this is not my preferred view of the legislation, policy and intention of the Government in 1946-47. There is simply no material, created in 1946-47, which suggests that any part of Government held a view contrary to that of the Repatriation Commission. Rather, the material suggests that, after broad policy had been set, the details of repatriation policy were left to the Commission to implement, and that there was a general understanding across all Departments that the commitment to "full benefits" was subject to satisfaction of statutory criteria.

65. In relation to female BCOF members who embarked for Japan before 1 July 1947, I consider that they would have become entitled to receive service pension when they reached the female service pension age of 55 years (mostly in the 1960s and 1970s). The last female BCOF member eligible for service pension would have turned 55 in 1984, before the VEA commenced in 1986. The VEA had the effect of disentitling female BCOF members who claimed service pension because the definitions of "period of hostilities" (s 35) and "qualifying service" (s 36) removed the gendered differentiation in service criteria in former s 84(1) of the Repatriation Act. The VEA has no relevant transitional or savings provision.

66. It is possible that there is a small number of female BCOF members who did not claim age service at age 55 because they would be barred from receipt of the pension by the means test (which was based on their income and that of their husband). If they later met the means test, for example because of the retirement or death of their husband, it is unlikely that their late claim for service pension would have been successful.

Peter Sutherland
21 August 2011

ATTACHMENT A - REFERENCES

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ENDNOTES

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[2] There is some confusion in the use of "eligibility" and "entitlement" and some writers use each term with the opposite meaning. In this Paper, I have followed the meaning of the terms as used by Bruce Topperwien (2011), namely that a person is "eligible" to claim a benefit but only becomes "entitled" to it when they satisfy all applicable criteria.