CHAPTER NINE

INTRODUCTION TO VOLUME TWO

9

9.1 The terms of reference require the Committee to 'review and make recommendations on the current policy relating to eligibility for access to *Veterans' Entitlements Act 1986* (VEA) benefits and qualifying service under the VEA'. The Review is to:

- consider the historical context and current interpretation of the provisions for qualifying service, having regard to relevant parliamentary statements and the position reached by the courts;
- consider perceived anomalies with eligibility for access to VEA benefits and qualifying service that might be raised by some World War II veterans, veterans of the British Commonwealth Forces in Japan (BCOF), Australian participants in British atomic testing in Australia, Australian service personnel engaged in counter-terrorist and special recovery training, and other interested parties; and
- recommend possible changes to address any anomalies and to facilitate the equitable and efficient administration of the VEA.

9.2 This volume addresses these parts of the terms of reference. The issues raised in submissions have been grouped into categories, with each category the subject of a separate chapter. Each chapter gives the background to the issue, provides a history of legislation pertaining to the issue, identifies the issues raised in submissions, provides the Committee's considerations and conclusions, and makes recommendations. The following paragraphs give a brief description of each chapter in this volume.

9.3 Chapter 10 provides information on eligibility for the disability and service pensions under the VEA. The chapter includes details of the key definitions used in the VEA, which are important for an understanding of the

issues discussed in subsequent chapters; it also summarises the types of service required for eligibility.

9.4 The next two chapters discuss eligibility for qualifying service for Australian armed services veterans of World War II. Chapter 11 considers the historical context and the current interpretation of qualifying service and Chapter 12 discusses perceived anomalies in eligibility for VEA benefits raised in submissions. A total of 1022 submissions referred to eligibility for qualifying service of veterans who remained in Australia during World War II. A further 132 submissions raised matters specifically relating to service by women in that conflict and 21 submissions discussed matters relating to post-war minesweeping operations. Of all authors of submissions, 1251 identified themselves as having served in World War II in some capacity.

9.5 Repatriation benefits for operations involving the armed forces of Australia since World War II have not been provided on the same basis as for operations in World Wars I and II. Chapter 13 outlines the development of the legislative framework, including the terms that have governed the provision of repatriation benefits since World War II, and provides important background information in discussing perceived anomalies for service after World War II.

9.6 In submissions relating to conflicts since World War II, authors sought extension of the relevant period of conflict and/or the area of operations, or acceptance of particular service as eligible or qualifying service for the purposes of the VEA. Other claims related to particular service activities during peacetime and sought acceptance of that service as eligible or qualifying service. Chapter 14 deals with submissions relating to eligibility for qualifying service and access to VEA benefits for service in the Korean War, the Malayan Emergency, the Far East Strategic Reserve, the Malay–Thai border region, the Indonesian Confrontation, north-eastern Thailand, the Vietnam War, and South-East Asia since Confrontation; the reclassification of certain operational service as warlike; access to the VEA for specific peacetime service; and the extension of defence service, as defined in the VEA, to all peacetime service. Of all submissions, 119 concerned service in Vietnam or were from veterans who had served in Vietnam, 31 concerned service in Korea or were from veterans who had served there, and 99 concerned service in Asia since World War II or were from veterans who had so served.

9.7 To deal with all claimed post-World War II eligibility anomalies, the Committee needed a way to assess the nature of service for the particular circumstances that was prospective, consistent and equitable. The current processes used by the Department of Defence were examined, and a framework for assessment that met the Committee's needs was developed. Chapter 14 outlines the framework used by the Committee.

9.8 Other claimed post-World War II eligibility anomalies relating to BCOF, atomic testing in Australia and counter-terrorism training are addressed in Chapters 15, 16 and 17 respectively. Of the submissions received, 180 addressed BCOF service, 113 addressed atomic testing in Australia and 23 addressed counter-terrorism training.

9.9 Chapter 18 examines potential anomalies arising from the $25,000 ex-gratia payment to World War II prisoners of war of the Japanese. The chapter discusses the major issues raised in submissions, and examines potential anomalies in suggested similar compensation payments to prisoners of war in Europe during World War II and in Korea. This issue was specifically mentioned in 22 submissions.

9.10 Chapter 19 examines issues raised in submissions relating to access to the war and defence widow/er's pension (the adequacy of this pension and the income support supplement are discussed in Chapters 29 and 30 of Volume 3). The Committee received 169 submissions relating to the war widow/er's pension.

9.11 Civilian groups have made claims for access to VEA benefits on the basis that they assisted Australia in its efforts during wars or warlike conflicts (21 submissions). Members of some of these groups worked overseas, in areas of conflict where Australian forces were deployed. The Commonwealth Government employed most, but not all of these people. Chapter 20 discusses issues raised in connection with the entitlements of civilians under the VEA.

9.12 Chapter 21 considers perceived anomalies in eligibility for access to benefits under the VEA raised by veterans and World War II mariners of British, Commonwealth and allied (BCAL) countries (268 submissions). The main issues raised were the extension of the Repatriation Health Card — For All Conditions (Gold Card); extension of the disability pension and associated compensatory benefits; removal of the strictures of the domicile test, which prevents some BCAL veterans who were minors at the time of their enlistment from being considered as Australian veterans; and extension of qualifying service benefits to several groups of BCAL veterans currently ineligible.

9.13 Submissions to the Review clearly show that the single most sought-after benefit under the VEA is access to the Gold Card. Out of a total of 2742 submissions (excluding supplementary submissions), 1353 raised this matter either alone or in conjunction with other issues. Chapter 22 examines submissions in support of the extension of the Gold Card.

9.14 Over many years, there have been calls by particular groups of service personnel and civilians who have argued that their service or employment should be recognised as eligible war or defence service and/or qualifying

service under the VEA. Some of these groups are not currently covered by the VEA, while some already have VEA entitlements but not qualifying service, and so are seeking the extension of qualifying service to enable access to the service pension and Gold Card. This volume responds to the concerns expressed by the veteran community, and meets the requirement in the terms of reference to review eligibility for access to VEA benefits.

9.15 A summary of the Committee's recommendations and the financial implications of those recommendations forms Appendices 9 and 10 at the end of this volume.

CHAPTER TEN

CURRENT ELIGIBILITY REQUIREMENTS

10

INTRODUCTION

10.1 Under the *Veterans' Entitlements Act 1986* (VEA) there are two major pensions for eligible persons:

- the disability pension, which is compensation for war or service related injury or disease; and
- the service pension, which is broadly equivalent to the social security age and disability support pensions.

10.2 This chapter provides an overview of the eligibility requirements for access to the disability and service pensions under the VEA.

ELIGIBILITY CRITERIA FOR DISABILITY PENSION

10.3 To be eligible for compensation payments under the VEA a person must first qualify as a **'veteran'** (s.5C), a **'member of the Forces'** (s.68 (1)) or a **'member of a Peacekeeping Force'** (s.68 (1)). Certain civilians also have access to the VEA, generally by virtue of a determination made under s.5R.

10.4 A **'veteran'** is defined in s.5C of the VEA as a person who:

- has rendered 'eligible war service';
- was a member of the Australian armed services forces who, after 31 July 1962, was engaged in warlike operations against hostile forces outside Australia but not on 'operational service' in an operational area and was injured, contracted a disease or died due to action of hostile forces; or

- is a 'Commonwealth veteran', 'allied veteran' or 'allied mariner' (for service pension, Repatriation Pharmaceutical Benefits Card and Commonwealth Seniors Health Card purposes only).

10.5 **'Eligible war service'** is defined in s.7 of the VEA and includes:

- 'operational service';
- continuous full-time service (CFTS) in the Australian armed services in World War I;
- CFTS in World War II in the Australian armed services (enlistment before 1 July 1947);
- CFTS service as a member of the Australian Interim Forces after 1 July 1947; and
- service in World War II by Australian mariners.

10.6 **'Operational service'** is defined in ss.6A–F of the VEA. Operational service is in effect a subset of eligible war service. It has two purposes. It defines the means for basic eligibility for veterans with post-World War II service. It is also a criterion for attracting the generous 'reverse criminal' standard of proof for compensation claims. In that regard it is also specifically defined for some service in World Wars I and II. The standard of proof is relevant in determining the link between a veteran's service and an injury, disease or death. Where a veteran has eligible war service but not operational service, the standard of proof that applies is the civil 'balance of probabilities' test (s.120 (4)).

10.7 'Operational service' includes:

- s.6A — CFTS in the Australian armed services during World War I outside Australia;
- s.6A — World War II:
  - CFTS in the Australian armed services outside Australia;
  - CFTS in the Australian armed services for three months or more in the Northern Territory north of parallel 14.5 degrees south, from 19 February 1942 to 12 November 1943 inclusive (this is the period during which this area was subject to Japanese air raids);[22]
  - CFTS in the Australian armed services by those who enlisted in the Torres Strait Islands and served there for three months or more between 14 March 1942 and 18 June 1943;[23]

[22] Includes any CFTS in Australia during World War II immediately before or after the period of operational service.
[23] *Ibid.*

  - CFTS in the Australian armed services considered by the Repatriation Commission to be service in actual combat against the enemy;
  - service as a member of the forces of a Commonwealth or allied country where the person was domiciled in Australia or an external territory immediately before enlistment in those forces and served outside the country of enlistment or within that country and the service is considered by the Repatriation Commission to be service in actual combat against the enemy;
  - civilians while employed on a special mission by the Australian Government outside Australia;
  - certain civilians killed during the invasion of Papua New Guinea as a result of enemy action;
  - certain civilians detained by the enemy; and
  - CFTS by a member of the Australian armed services serving in Australia for the period he was injured or contracted disease due to enemy action;
- s.6A — service in the Australian armed services with the British Commonwealth Occupation Force in Japan;
- s.6B — Australian mariners in World War II;
- s.6C — post-World War II:
  - service in the Australian armed services in an operational area defined in Schedule 2 of the VEA while 'allotted for duty' in that operational area, which generally covers service in the Korean War, Malayan Emergency, Indonesian Confrontation and later periods of operational service such as Namibia, the Gulf War, Cambodia, Somalia and the former Yugoslavia; and
  - service as a member of the forces of a Commonwealth or allied country where the person was domiciled in Australia or an external territory immediately before enlistment in those forces and rendered CFTS in an operational area;
- s.6D — service in the Australian armed services:
  - while assigned for service in Singapore from 29 June 1950 to 31 August 1957;
  - while assigned for service in Japan from 28 April 1952 to 19 April 1956;
  - while assigned for service in north-east Thailand from 31 May 1962 to 24 June 1965; and

  - in Singapore or the country then known as the Federation of Malaya from 1 August 1960 to 27 May 1963;
- s.6E — service in the Australian armed services while assigned for service:
  - in the Korean demilitarised zone after 18 April 1956; and
  - on HMAS Vampire or HMAS Quickmatch in Vietnam during the period 25–29 January 1962; and
- s.6F — 'warlike' and 'non-warlike service'.

10.8 **'Warlike** and **non-warlike service**' are terms the Australian Defence Force (ADF) has used since 1994 to classify service for the purposes of pay and conditions. In 1997, definitions of warlike and non-warlike service were inserted into the VEA by the *Veterans' Affairs Legislation (Budget and Compensation Measures) Act 1997* effective from 13 May 1997.

10.9 **'Warlike service'** under the VEA is defined in s.5C (1) as service in the ADF of a kind determined in writing by the Minister for Defence to be warlike service. A declaration of warlike service gives access to compensatory payments such as the disability pension. It is also qualifying service for service pension purposes under the VEA. In 1993, Cabinet agreed that 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. These operations encompass but are not limited to:

- a state of declared war;
- conventional combat operations against an armed adversary; and
- peace enforcement operations that are military operations in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and may be engaged in combat activities (normally, peace enforcement operations will be conducted under Chapter VII of the United Nations Charter, and in these cases the application of all necessary force is authorised to restore peace and security).

10.10 **'Non-warlike service'** under the VEA is defined in s.5C (1) as service in the ADF of a kind determined in writing by the Minister for Defence to be non-warlike service. A declaration of non-warlike service gives access to compensatory payments such as the disability pension, but is not qualifying service for service pension purposes. Cabinet agreed in 1993 that non-warlike service covers those activities short of warlike operations where there is a risk associated with the assigned tasks and where the application of force is limited to self-defence. Casualties could occur but are not expected. These operations encompass but are not limited to:

- **Hazardous operations** — activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty. These can include mine avoidance and clearance, and weapons inspections and destruction. Also covered are defence force aid to the civil power, service-protected or service-assisted evacuations, other operations requiring the application of minimum force to protect personnel or property, and similar activities.
- **Peacekeeping operations** — operations involving military personnel, without powers of enforcement, to help restore and maintain peace in an area of conflict with the consent of all parties. These operations can encompass but are not limited to:
  - activities short of peace enforcement where the authorisation of the application of force is normally limited to the minimum force necessary for self-defence;
  - activities, such as the enforcement of sanctions in a relatively benign environment, that expose individuals or units to 'hazards' as described above;
  - military observer activities associated with the tasks of monitoring cease-fires, redirecting and alleviating cease-fire tensions, providing 'good offices' for negotiations and the impartial verification of assistance or cease-fire agreements, and other like activities; and
  - activities that would normally involve the provision of humanitarian relief (humanitarian relief does not include normal peacetime operations such as cyclone or earthquake relief flights or assistance).

10.11 **'Member of the Forces'** is defined in s.68 of the VEA. It includes a person who has rendered **'defence service'** or **'hazardous service'** in the ADF.

10.12 **'Defence service'** encompasses peacetime service of three years or more (or less if discharged on medical grounds) in the Australian armed forces between 7 December 1972 and the commencement of the *Military Compensation Act 1994* on 7 April 1994. However, members of the Australian armed services who enlisted before the commencement of the VEA are covered for service after 7 April 1994 as long as the period of service was unbroken. Defence service gives access to VEA compensation benefits but is not qualifying service for the service pension and associated benefits. Compensation claims by veterans with defence service only are determined on the balance of probabilities, unless the veteran has peacekeeping service or hazardous service, in which case the generous 'reverse criminal' standard of proof applies. Defence service also covers national servicemen who completed a period of service after 6 December 1972 or were discharged on medical grounds after that date, and covers hazardous service since 7 December 1972.

10.13 **'Hazardous service'** is defined in s.120 (7) of the VEA as service in the ADF of a kind determined by the Minister for Defence, by instrument in writing, to be hazardous service. There is no guidance in the VEA as to the meaning of hazardous service. To date, hazardous service has been declared for service overseas where aggressive armed forces were present, such as in the Persian Gulf, Haiti, Namibia and the former Yugoslavia, but has not been declared for any service in Australia. A declaration of hazardous service can only have effect for service since 1972. Members of the ADF with hazardous service have their disability pension claims determined subject to the 'reverse criminal' standard of proof, but hazardous service is not qualifying service for the purposes of the service pension and associated benefits. Since 1997, any service that would be classed as hazardous service would now be declared as non-warlike service.

10.14 A member of a peacekeeping force is defined in s.68 (1) of the VEA as a person who has served as an Australian member, or as a member of an Australian contingent, of a **'Peacekeeping Force'** outside Australia. **'Peacekeeping Force'** is defined in s.68 (1) of the VEA as a force raised for peacekeeping, observing or monitoring that as been designated by the Minister for Defence as a peacekeeping force. Peacekeeping forces covered by the VEA date from 1947. Service by Australian police in designated peacekeeping forces (e.g. Cyprus) is covered, in addition to service in the ADF on peacekeeping missions. Under the VEA, peacekeeping service in a peacekeeping force gives access to the VEA disability pension and associated allowances subject to the reverse criminal standard of proof, but it is not qualifying service for the purposes of the service pension and associated benefits.

ELIGIBILITY REQUIREMENTS FOR THE SERVICE PENSION

10.15 To be eligible for the service pension, a person must first be a **'veteran'** and have **'qualifying service'** (s.7A). Service pension may also be available to Australian mariners of World War II. Additionally, it is available to British, Commonwealth and allied (BCAL) veterans and BCAL mariners of World War II with qualifying service in a war or warlike conflict in which Australian forces were engaged. Eligibility is subject to residency provisions.

10.16 **'Qualifying service'** relates to eligibility for the service pension (under Part III of the VEA), the Repatriation Health Card — For All Conditions (Gold Card) for veterans of the Australian armed services and World War II Australian mariners who are 70 years of age or over (s.85), the Commonwealth Seniors Health Card (s.118V) and the Repatriation Pharmaceutical Benefits Card for World War I and World War II BCAL veterans and mariners aged 70 years or more (under Part VA). Qualifying service is the threshold requirement for access

to the service pension and associated benefits but does not of itself give access to these benefits:

- Under s.7A (1)(a)(i), qualifying service for veterans of the Australian armed services during **World Wars I and II** requires service, during the relevant defined period of hostilities, in operations against the enemy at a time when the person incurred danger from hostile forces of the enemy. The definition of period of hostilities is contained in s.5B (1) of the VEA. Paragraph (a) defines the period of hostilities for World War I as being from 4 August 1914 to 11 November 1918. Paragraph (b) defines the period of hostilities for World War II as being from 3 September 1939 to 29 October 1945.
- Under s.7A (1)(a)(ii), a veteran may also have qualifying service for service in certain **minesweeping and bomb clearance operations** after the cessation of hostilities in World War II. While Australian service personnel were involved in such operations well into the 1950s and 1960s, qualifying service is restricted to those who are eligible for a Naval General Service Medal or a General Service Medal (Army and Air Force) with certain minesweeping or bomb clearance clasps.
- Under s.7A (1)(a)(iii), service in the Australian armed services in post-World War II operations is qualifying service where the veteran served outside Australia in an operational area described in Schedule 2 while **allotted for duty** in that area.
- Under s.7A (1)(a)(iv), a veteran who rendered **warlike service** has qualifying service. For the definition of warlike service see 10.9, above.
- Under s.7A (1)(b), members of the defence force established by a **Commonwealth country** other than Australia have qualifying service if they served during a specified period of hostilities in a war or warlike operations in which Australian forces were engaged. In addition, they must either have served outside the country in whose forces they enlisted, at a time when they incurred danger from hostile forces of the enemy in that area, or served within that country and received or were eligible for a campaign medal specified in s.7A (2) for that service.
- Under s.7A (1)(c), members of the defence force of an **allied country** have qualifying service if they served during a period of hostilities in a war or warlike operations in which Australian forces were engaged. The periods of hostilities are the same as for Commonwealth veterans. In addition, they must have served outside or within the country in whose forces they enlisted, at a time when they incurred danger from hostile forces of the enemy. A person is not regarded as an allied veteran if they served at any time in the forces of a country at war with Australia, or engaged in warlike

operations against Australian forces or in forces engaged in assisting or supporting such forces.

- Under s.7A (1)(d), civilians employed by the Commonwealth on a **special mission** outside Australia in World War I or World War II have qualifying service.
- Under s.7A (1)(e), **certain civilians** killed or detained by the enemy in World War II have qualifying service.
- Under s.7A (1)(f), qualifying service can be certain service by a member of the Australian armed services suffering from a condition that resulted from action by hostile forces or while the person was engaged in warlike operations against hostile forces after 31 July 1962 outside Australia but not while on operational service.
- Under s.7A (1)(g), **Australian mariners** must have incurred danger from hostile forces of the enemy. The definition of 'Australian mariner' is in s.5C (1) and applies only to those who served in World War II before 29 October 1945.
- Under s.7A (1)(h), **BCAL mariners** have qualifying service if they were detained by the enemy, or if they incurred danger from hostile enemy forces and would have been awarded a campaign medal if they had been a member of the Australian armed services.

SUMMARY OF SERVICE REQUIRED FOR ELIGIBILITY FOR DISABILITY AND SERVICE PENSIONS

10.17 Table 10.1 summarises the service required for eligibility for the disability and service pensions for veterans of the Australian armed services and World War II Australian mariners.

Table 10.1 Required service

(a) World War I

	From	To	Disability pension	Service pension
Outside Australia	4 Aug 18	1 Sept 21	Yes	Only if incurred danger until 11 Nov 18
Home service	4 Aug 18	1 Sep 21	Yes	No

(b) World War II

	From	To	Disability pension	Service pension[a,b]
Outside Australia (enlistment before 1 Jul 47)	3 Sep 39	1 Jul 51 (3 Jan 49 if permanent)	Yes	Only if incurred danger until 29 Oct 45
Within Australia and coastal waters (enlistment before 1 Jul 47)	3 Sep 39	1 Jul 51 (3 Jan 49 if permanent)	Yes	Only if incurred danger until 29 Oct 45
Australian mariners	3 Sep 39	29 Oct 45	Yes	Only if incurred danger.
Interim Forces	1 Jul 47	30 Jun 49	Yes (if overseas)	No

[a] The VEA requires a veteran to have served in operations against the enemy and incurred danger from hostile forces of the enemy to qualify. Further detail is provided in Chapters 11 and 12.

[b] Minesweeping and bomb or mine clearance service after 29 Oct 45 is qualifying service if a veteran is awarded an appropriate medal for that service.

(c) BCOF — Japan

From	To	Disability pension	Service pension
Feb 46	1 Jul 51	Yes	No

(d) Post-World War II — allotted for duty in operational area

	From	To	Disability pension	Service pension
Korea	27 Jun 50	19 Apr 56	Yes	Yes
Malaya	29 Jun 50	31 Aug 57	Yes	Yes
Malaya and Singapore	1 Sep 57	31 Jul 60	Yes	Yes
Thai–Malay border	1 Aug 60	16 Aug 64	Yes	Yes
Borneo (Brunei, Sabah, Sarawak)	8 Dec 62	16 Aug 64	Yes	Yes
Singapore, Malaysia, Brunei	17 Aug 64	30 Sep 67	Yes	Yes
Vietnam	31 Jul 62	11 Jan 73	Yes	Yes
Namibia	18 Feb 89	10 Apr 90	Yes	Yes
Persian Gulf	2 Aug 90	9 Jun 91	Yes	Yes
Iraq/Kuwait	23 Feb 91	9 Jun 91	Yes	Yes
Cambodia, Laos and Thailand	20 Oct 91	7 Oct 93	Yes	Yes
Former Republic of Yugoslavia	12 Jan 92	24 Jan 97	Yes	Yes
Somalia	20 Oct 92	30 Nov 97	Yes	Yes

(e) Post-World War II — assigned for service in operational area

	From	To	Disability pension	Service pension
Singapore	29 Jun 50	31 Aug 57	Yes	No
Japan	28 Apr 52	19 Apr 56	Yes	No
North-east Thailand including Ubon	31 May 62	24 Jun 65	Yes	No
Korean demilitarised zone	18 Apr 56	Ongoing	Yes	No
Malaya and Singapore	1 Aug 60	27 May 63	Yes	No
Vietnam — HMAS Vampire and HMAS Quickmatch	25 Jan 62	29 Jan 62	Yes	No

(f) Other post-World War II overseas service — not allotted for duty in an operational area

	From	To	Disability pension	Service pension
Injured or died due to hostile enemy action or engagement in warlike operations	31 Jul 62	11 Jan 73	Yes	Yes

(g) Warlike service

	From	To	Disability pension	Service pension
North-east Thailand including Ubon	25 Jun 65	31 Aug 68	Yes	Yes
Vietnam	12 Jan 73	29 Apr 75	Yes	Yes
East Timor — OP FABER and STABILISE	16 Sep 99	23 Oct 00	Yes	Yes
East Timor — OP WARDEN	16 Sep 99	10 Apr 00	Yes	Yes
East Timor — OP TANAGER	20 Feb 00	Ongoing	Yes	Yes
Afghanistan — OP SLIPPER	7 Dec 01	Ongoing	Yes	Yes

(h) Non-warlike service

	From	To	Disability pension	Service pension
Cambodia — OP BANNER	8 Oct 93	4 Oct 99	Yes	No
Cambodia — OP VISTA	5 Jul 97	14 Jul 97	Yes	No
Guatemala — UN Observer Mission	13 Feb 97	12 May 97	Yes	No
Gabon and Congo — Technical Survey Team	25 Jul 97	7 Aug 97	Yes	No
Bougainville — Truce Monitoring Group	20 Nov 97	30 Apr 98	Yes	No
Bougainville — Peace Monitoring Group — OP BEL ISI II	1 May 98	Ongoing	Yes	No

(h) Non-warlike service (continued)

	From	To	Disability pension	Service pension
Yugoslavia — OP AGRICOLA	25 Feb 99	10 Jun 99	Yes	No
Yugoslavia — OP ALLIED FORCE	15 Apr 99	3 Jun 99	Yes	No
Yugoslavia — OP GUARDIAN	11 Jun 99	Ongoing	Yes	No
Gulf — OP POLLARD	17 Feb 98	1 Oct 01	Yes	No
Gulf — OP DAMASK	18 Mar 99	Ongoing	Yes	No
Iraq, Saudi Arabia, Kuwait — OP BOLTON	13 May 99	Ongoing	Yes	No
Iraq, Saudi Arabia, Kuwait — OP SOUTHERN WATCH	29 Sep 99	Ongoing	Yes	No
East Timor — OP FABER	19 Jun 99	15 Sep 99	Yes	No
East Timor — OP SPITFIRE	6 Sep 99	19 Sep 99	Yes	No
Solomon Is — OP PLUMBOB	8 Jun 00	24 Jun 00	Yes	No
Solomon Is — OP TREK	4 Nov 00	Ongoing	Yes	No
Ethiopia and Eritrea — OP POMELO	15 Jan 01	Ongoing	Yes	No
Sierra Leone — OP HUSKY	15 Jan 01	Ongoing	Yes	No

(i) Hazardous service

	From	Disability pension	Service pension
Gulf — Gulfs of Iran and Oman	28 Feb 86	Yes	No
Kurdish refugees	10 Jun 91	Yes	No
Gulf — sea area	8 Jun 91	Yes	No
Gulf — sea area	1 Apr 96	Yes	No
UN — Iran	22 Oct 91	Yes	No
UN — Afghanistan— UNOC UNMCTT	8 Jun 91	Yes	No
UN — Mozambique	12 Jul 94	Yes	No
UN — Rwanda	25 Jul 94	Yes	No
UN — Haiti	27 Sep 94	Yes	No
UN — Yugoslavia	24 Jan 97	Yes	No

(j) Peacekeeping service

	From	Disability pension	Service pension
Security Council — Balkans	29 Jan 47	Yes	No
Committee of Good Offices	25 Aug 47	Yes	No
UN Special Commission — Balkans	26 Nov 47	Yes	No
UN Commission — Korea	1 Jan 49	Yes	No
UN Military Observer Group — India and Pakistan	1 Jan 49	Yes	No
UN Commission — Indonesia	28 Jan 49	Yes	No
UN Truce Supervision Organisation	1 Jun 56	Yes	No
UN Operations — Congo	1 Aug 60	Yes	No
UN Observation Mission — Yemen	1 Jan 63	Yes	No
UN Force— Cyprus	14 May 64	Yes	No
UN Observation Mission — India and Pakistan	20 Sep 65	Yes	No
UN Disengagement Observer Force	1 Jan 74	Yes	No
UN Emergency Force 2	1 Jul 76	Yes	No
UN Interim Force — Lebanon	23 Mar 78	Yes	No
Commonwealth Monitoring Force — Zimbabwe	24 Dec 79	Yes	No
Multinational Force and Observers — Sinai	18 Feb 82	Yes	No
UN Military Observer Group — Iran/Iraq	11 Aug 88	Yes	No
UN Border Relief — Cambodia	1 Feb 89	Yes	No
UN Transitional Advisory Group — Namibia	18 Feb 89	Yes	No
UN Mission for the Referendum — Western Sahara	27 Jun 91	Yes	No
UN Transitional Authority — Cambodia — Australian Police Contingent	18 May 92	Yes	No
UN — Mozambique — Australian Police Contingent	27 Mar 94	Yes	No
Australian Defence Support to Pacific Peacekeeping Force — Bougainville	21 Sep 94	Yes	No
Australian Police Contingent Multi-National Force — Haiti	10 Oct 94	Yes	No
UNAMET — East Timor (Australian Police)	11 Jun 99	Yes	No
UNTAET — East Timor (Australian Police)	25 Oct 99	Yes	No

(k) Defence service

Category	From	To	Disability pension	Service pension
ADF full-time service — after completion of 3 years or earlier if discharged on medical grounds	7 Dec 72	7 Apr 94 (later if enlisted before VEA enacted on 22 May 86)	Yes	No
National servicemen completing period of national service	7 Dec 72	Completion of period of national service	Yes	No

CHAPTER ELEVEN

QUALIFYING SERVICE — WORLD WAR II HISTORICAL PERSPECTIVE

11

INTRODUCTION

11.1 The terms of reference require that the Committee consider the historical context and the current interpretation of qualifying service, having regard to parliamentary statements and the positions reached by the courts. In this chapter, the Committee undertakes that task with respect to service by World War II veterans of the Australian armed services.

11.2 The term 'qualifying service' was first used in repatriation legislation in 1986 with the advent of the *Veterans' Entitlements Act* (VEA). It replaced the term 'served in a theatre of war', which had been introduced in 1936 as the service requirement for access to the service pension. Understanding the current interpretation of the qualifying service provisions, therefore, requires an examination of the intent and historical context of the service pension.

PURPOSE OF THE SERVICE PENSION

11.3 The service pension was introduced by an amendment in 1935 to the *Australian Soldiers' Repatriation Act 1920*. The amendment took effect from 1 January 1936.

11.4 This legislation was the Government's response to concerns originally raised in the 1920s, that the stresses and strains of war service on many veterans who had returned from combat had caused premature ageing, had shortened their life expectancy and had affected their capacity to work. The 'burnt-out

digger' syndrome had also been observed in other countries. In 1930, for example, the Canadian Government had introduced a pension, which was available 10 years earlier than the civilian age pension, for 'worn out soldiers' who were 'needy and unemployable' (Toose 1975, p. 386). The British Government, too, had found that veterans were suffering from general symptoms of debility that could not be traced directly to war service. Although it had no equivalent of a service pension, it paid pensions to these veterans (Lloyd and Rees 1994, p. 251). The government of New Zealand was also, in the 1930s, proposing to pay special allowances to veterans in similar circumstances.

11.5 In introducing the service pension and its linkage to service in a theatre of war, the Prime Minister, the Hon J Lyons, stated that:

> The Government, therefore, contemplates making provision for a pension at 60 years of age for those soldiers, and at 55 years of age for those nurses, who served in a theatre of war as defined, and whose experiences and hardships may reasonably be presumed to have aged them prematurely. It is proposed, also, to assist those who, although not having reached the ages mentioned, are in a physical or mental condition which renders them permanently unemployable.[24]

11.6 The purpose of the pension was clearly spelt out by Mr Francis MP, Member for Moreton, who said that the service pension was:

> … an acknowledgment of the fact that the rigours of war and the privations endured have prematurely aged a great many nurses and ex-soldiers. There is also provision for the granting of a pension to soldiers whose war experiences have worn them down to such an extent that they are unemployable. These men have been 'burnt out'...[25]

11.7 The pension was essentially an income support payment payable subject to a means test, and was available on three grounds:

- age — it was available five years earlier than the age pension in recognition of premature ageing;
- permanent unemployability at any age, regardless of whether the conditions from which the veteran suffered had been accepted as war related; or
- pulmonary tuberculosis at any age, in recognition of the high incidence amongst veterans of tuberculosis that could not be linked with service.

[24] Australia, House of Representatives 1935, *Debates,* vol. HR148, p. 1814.
[25] Australia, House of Representatives 1935, *Debates,* vol. HR148, pp. 2244-2245.

SERVICE IN A THEATRE OF WAR

Legislative Provisions

11.8 The 1935 legislation defined service in a theatre of war as:

> … 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.[26]

11.9 This definition required that an inquiry be conducted into each claim for the service pension to determine whether the veteran had served in a theatre of war. The Repatriation Commission must have seen that a case-by-case examination would create an administrative nightmare, and in late 1935 developed a policy that deemed service in specified areas between specified dates as service in a theatre of war.

11.10 There was a statutory exception to the rule that the grant of a service pension depended on service in a theatre of war, which applied in the cases of veterans who were suffering from pulmonary tuberculosis. There have, however, been no new grants of this type since 1978, when the tuberculosis provisions were repealed.

11.11 In 1936, the legislation was amended to provide more generous eligibility criteria for female veterans who had served in World War I. This amendment extended eligibility beyond female veterans who had served in a theatre of war to those who had served abroad or embarked for service abroad.

11.12 In 1943, the service pension was extended to those World War II veterans who met the theatre of war test in the legislation (see paragraph 11.8). Similarly, the more generous conditions for female veterans were continued for World War II service and remained until the enactment of the VEA in 1986.

Repatriation Commission Policy

Outside Australia

11.13 Before 1946, the Repatriation Commission's policy on what service would be regarded as service in a theatre of war was more restrictive than subsequent policy on this issue. The policy prior to 1946 set out in detail the times and places when theatre of war service might be conceded in World Wars I and II. It defined service in a theatre of war by geographic area, dividing areas of conflict overseas into theatres for the armed forces, and provided

[26] *Australian Soldiers' Repatriation Act*, No. 58 of 1935.

guidance on what was to be regarded as 'service at sea', 'on a ship of war' and 'in the air'. The Commission's policy also enabled veterans who considered that they satisfied the legislative provisions, but had not served within the defined areas at the times specified in the policy, to have their claims for theatre of war service considered on their merits.

11.14 The cessation of hostilities in World War II saw the first major review, in late 1945 and in 1946, of the theatre of war policy for World Wars I and II. In the context of the review, the Repatriation Commission collected information about enemy activity involving Australian forces both overseas and in Australia during World War II. While the review was proceeding, the Repatriation Commission received a copy of a legal opinion from Mr Wilbur Ham KC, dated 31 March 1944 and provided at the request of the Federated TB Sailors and Soldiers Association, which strongly coloured the new guidelines on this issue. The opinion was provided in support of claims for the disability pension from sufferers of pulmonary tuberculosis. In 1943, the *Australian Soldiers' Repatriation Act 1920* had been amended to enable World War II veterans suffering from the disease to receive the disability pension at 100 per cent of the general rate, provided that the veteran served in a theatre of war. Ham advocated a wide construction of the theatre of war provisions. He considered that actual combat or an actual attack by hostile enemy forces was not required for a veteran to meet the statutory definition of service in a theatre of war, and that only danger was required. Ham did not define 'danger', although the opinion intimates that the possibility of harm was sufficient to meet the legislative requirement. The Federated TB Sailors and Soldiers Association also provided a legal opinion from Mr R Windeyer KC, who had a similar view. Windeyer argued that the danger test was met as long as danger was conceivable and might reasonably have been regarded as an existing risk.[27]

11.15 There was a debate both in the Repatriation Commission and in the Attorney-General's Department about Ham's view. The Commission held the view that the effect of Ham's interpretation would be that theatre of war service would have to be conceded for all service outside Australia, which was not the intent of the legislation. The Commission stressed that, for male veterans, the legislation required something more than simply having left Australia. However, the Attorney-General believed that the advice of Ham was sound and should be followed. While the Commission retained its original view, in November 1946 it sought and obtained the Minister's agreement to adopt Ham's opinion.

11.16 Following the Minister's decision, the Repatriation Commission decided in November 1946 that a veteran should be deemed to have served in a theatre

[27] Legal opinion of R Windeyer KC (undated).

of war if the veteran had served outside Australia's territorial waters or more than three miles from the coast between 3 September 1939 and 3 September 1945. By this time also, the Commission adopted a policy of conceding service in a theatre of war for service in what was described as the 'Australasian Theatre', which included New Britain, New Guinea and Papua after 7 December 1941.

Within Australia and in the Coastal Waters of Australia

11.17 Before 1945, it appears that the practice adopted in determining whether a veteran had service in a theatre of war within Australia and its coastal waters was to consider each case on its merits, having regard to the statutory test. However, in the mid-1940s and the 1960s, the Repatriation Commission made several decisions that gave blanket theatre of war coverage for certain service in certain areas at certain times within Australia, its offshore islands and its coastal waters. Details of these decisions are given below.

11.18 In 1945, theatre of war service began to be conceded in any case where a veteran served in the Northern Territory north of latitude 14.5 degrees south, or any of the islands contiguous to that part of the Northern Territory, between 19 February 1942 and 12 November 1943, provided that the veteran served in that area for a period of three months or more in the stated period. The dates were those of the first and last enemy air attacks in the area. This policy was embodied in an instruction issued by the Repatriation Commission in December 1946, following its decisions on service outside Australia (see paragraph 11.16 above). The adoption of a policy whereby certain service in the Northern Territory would be deemed service in a theatre of war appears to have coincided with the Commission's decision, in early 1945, to use its statutory power to deem service in that area during that period as service in actual combat against the enemy for the purpose of conferring active service. Active service gave a veteran more generous treatment of disability pension claims, in that any condition resulting from an occurrence on service by a veteran with active service could be accepted as service-related.

11.19 In 1963, the Repatriation Commission also deemed certain service in the Torres Strait Islands to be active service and service in a theatre of war. This decision meant that a veteran was regarded as having active and also theatre of war service if the veteran served:

- on a Torres Strait Island on or after 14 March 1942 and before 19 June 1943 (these were the dates of the first and last of the eight enemy air raids on Horn Island, and related to those who enlisted and served only on the particular island); or
- outside the three-mile limits of the Torres Strait Islands on or after 3 September 1939 and before 3 September 1945 (these dates corresponded

with the existing policy for service outside Australia; while the Torres Strait Islands were part of Australia, it was considered that service more than three miles from such an island was service outside Australia).

11.20 The policy for service in the Torres Strait Islands was modified in 1965, following a major review of the Repatriation Commission's theatre of war policy (see paragraphs 11.21 to 11.26). The policy modification meant that a veteran would be regarded as having served in a theatre of war if the veteran enlisted at a place other than the Torres Strait and served on the Torres Strait Islands on or after 3 September 1939 and before 16 September 1943. These dates corresponded to the dates set in the coastal waters policy for service in the coastal waters extending from Sydney to Thursday Island. For those who enlisted and served only on the Torres Strait Islands, a three-month minimum time limit was applied.

Coastal Waters Policy

11.21 The main difficulty in applying the same theatre of war definition to World War II as had been applied to World War I was in dealing with service in Australia and its coastal waters, given the attacks by the enemy in certain parts of Australia and the presence of enemy shipping in the coastal waters. In the Repatriation Commission's decision of 1946, one of its members expressed concern that the policy on service 'outside Australia' would mean that Tasmanian defence force members brought to the mainland across Bass Strait would have theatre of war service as a result of this travel, because some of the strait formed international waters outside Australia. By the late 1940s, questions were also being asked about whether Rottnest Island was outside Australia; at the time, this was considered to be the case.

11.22 The question of how to deal with service in the coastal waters did not, however, come to a head until the mid-1960s, when a major review was undertaken of the Repatriation Commission's theatre of war policy guidelines for World War II. The review was prompted by anomalies that had arisen in the application of the 1946 policy. A major issue was whether travel in Australia's coastal waters could be regarded as theatre of war service if it had been beyond three miles from the coast, or whether service in these waters could only be regarded as service in the theatre of war if there had been actual or potential danger from hostile forces of the enemy. The main areas of service that were of concern were Rottnest Island and travel between Tasmania and the mainland.

11.23 On 28 June 1965, the Repatriation Commission published its decision, in which it set out the areas and times in respect of which service overseas and within Australia would be regarded as qualifying service. The decision was based on research into enemy activity, and enunciated what became known as

the 'coastal waters' policy. Acting on the assumption that danger from enemy forces had existed, or could reasonably have been expected to exist, in the areas and waters identified during particular times, the policy deemed service in those areas and waters at the stated times to be service in a theatre of war. It also provided that service in areas that did not fall clearly within those defined in the policy, such as Rottnest Island, should be submitted to the Repatriation Commission for determination.

11.24 Following this decision, the Minister for Repatriation presented a submission to Cabinet on the coastal waters policy. In it he said that, since the previous submission (in 1964), the Repatriation Commission had dealt with a number of claims in regard to coastal waters and offshore islands and had restricted eligibility to periods from the commencement of hostilities to three months after the last known enemy action in those waters or adjacent waters. Further, in the case of offshore islands, the Commission required not less than three months continuous service in that period.

11.25 This policy received Cabinet agreement on 7 July 1965, but was never entrenched in legislative provisions.[28] In the Cabinet submission of July 1965, the Minister for Repatriation, Senator the Hon G Colin McKellar, stated that the 1946 policy to concede theatre of war service for travel more than three miles from the coast had, in a number of cases:

> … not been strictly in accordance with the legislation, which requires that 'danger from hostile forces of the enemy' should have been 'incurred'. The principal difficulty concerns service on certain Australian offshore islands, in particular Rottnest Island off Fremantle.[29]

11.26 The policy applied to new claims only, because of perceived practical and political difficulties in changing established law and policy in this area.

11.27 The policy was refined on 10 November 1965 by extending the end date for travel between Albany and Sydney from 25 March 1944 to 25 March 1945. This decision was based on information provided by the Department of Navy concerning the correct movements of the German submarine U–862, which left Jakarta on 17 November 1944 en route to Australia and departed Australian waters at the end of January 1945. On 9 December 1944, U–862 attacked the Greek motor vessel Illosis off Kingston on the South Australian coast, and then sank the United States Liberty ship Robert J Walker 100 miles north of Gabo Island on 25 December 1944. Finally, the submarine sank the motor vessel US Peter Silvester in the Indian Ocean 1000 miles from Fremantle on 6 February 1945. Because the February attack on the Peter Silvester occurred so far out to sea, the cutoff date for service in the area from Exmouth Gulf to Albany was not

[28] Cabinet Decision No. 1035 of 7 July 1965.
[29] Cabinet Submission No. 853 of July 1965.

extended past 6 May 1944. Although the Department of Navy's information indicated that there was no known enemy activity in the coastal waters between the middle of 1943 and December 1944, no other amendment was made to exclude the application of the coastal waters policy during that period.

11.28 The 1965 decision about Rottnest Island was a compromise one that sought a balance between the 1946 policy, which treated the island and travel to the island as being outside Australia, and evidence that there was not at any time any danger there. In 1974, it was decided that travel to the island by sea should be regarded as service in a theatre of war, but this decision was reversed the following year. Subsequent events, and decisions discussed below, have led to the abandonment of the policy rulings in relation to Rottnest Island and to the coastal waters of Australia generally. All claims, therefore, must to be determined in accordance with the statute.

QUALIFYING SERVICE

Legislative Provisions

11.29 The enactment of the VEA in 1986 led to the replacement of the theatre of war test with that of qualifying service as the primary condition for the grant of the service pension. Qualifying service was defined, for service in the period of hostilities, as follows:

> … a person has rendered qualifying service —
>
> a. if the person has, as a member of the Defence Force —
>
> i) rendered service, during a period of hostilities specified in paragraph (a) or (b) of the definition of 'period of hostilities'… 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 the person incurred danger from hostile forces of the enemy in that area or on that aircraft or ship.

11.30 Aside from minor drafting changes, this definition has persisted to this day.

11.31 The period of hostilities for World War II extended from 3 September 1939 to 29 October 1945. The period extended beyond the date of the Japanese surrender to take into account local surrenders taking place in the Pacific area, the last of which occurred in northern Borneo. Apart from the introduction of the period of hostilities into the VEA definition and some rearrangement of words, the *Repatriation Act 1920* and the VEA appear to treat the concept of qualifying service much the same. Changes in expression have not affected the substantive meaning of qualifying service, although they may partly explain the

different approaches to the provisions by the lawyers in 1944 and by the courts in recent years.

11.32 The VEA also conceded as qualifying service certain minesweeping and bomb/mine clearance service after the cessation of hostilities in World War II . Eligibility is now dependent on the award of a Naval General Service Medal or General Service Medal (Army and Royal Air Force) with Minesweeping 1945–51 Clasp, the Bomb–Mine Clearance 1945–53 Clasp, the Bomb and Mine Clearance 1945–49 Clasp or the Bomb and Mine Clearance 1945–56 Clasp. Provision in the VEA to include certain minesweeping and bomb/mine clearance service as qualifying service was on the basis that enemy mines were an extension of the enemy and danger from hostile forces of the enemy (that is, the mines) therefore existed.

Repatriation Commission Policy

11.33 Following the enactment of the VEA in 1986, the Repatriation Commission, in effect, continued the policy in relation to qualifying service that had prevailed under the *Repatriation Act 1920*. Veterans who had served outside Australia were to be deemed to have qualifying service, without any investigation into whether they had incurred danger, if they served in:

- any area other than the West Pacific area between 3 September 1939 and 5 May 1945 (inclusive);
- the West Pacific area[30] (except Papua and New Guinea before 7 December 1941) from 3 September 1939 to 15 August 1945;
- Papua or New Guinea, including New Britain, between 7 December 1941 and 15 August 1945; or
- an aircraft engaged in operations against hostile forces of the enemy or on reconnaissance or patrol duty over land occupied by hostile forces of the enemy.

11.34 Claims for service outside Australia after these dates and before the cessation of hostilities on 29 October 1945 were to be determined using the statutory test. In so far as service in Australia (including the coastal waters and Rottnest Island) was concerned, the Repatriation Commission decided that the previous policy was to apply but would be subject to any review that became necessary as a result of guidance from courts interpreting the provisions of the VEA.

[30] Defined by latitude and longitude.

Interpretation by the Courts and the Administrative Appeals Tribunal

11.35 The question of whether a particular veteran had qualifying service has since come before the Administrative Appeals Tribunal (AAT) and the Federal Court on a number of occasions. The issue that appears to have excited some division in the AAT, and upon which there has not been an authoritative ruling from the Federal Court, concerns the validity of the coastal waters policy in the light of the VEA, and in particular the definition of qualifying service for World War II veterans of the Australian armed services contained in the VEA. For instance, in *Tiplady and the Repatriation Commission*, the Hon Sir William Prentice, the Senior Member, observed:

> … general orders had been issued as a no doubt sensible matter of practicality, by which commission delegates guide their decisions in applications of this kind. But such orders cannot allow this tribunal to shirk the application of the legislative provisions in question.[31]

11.36 More recently, in *Bastow and the Repatriation Commission,* the AAT stated that the Repatriation Commission's policy guidelines:

> … cannot validly operate so as to deem a statutory requirement to be satisfied when the requirement cannot, on the facts, be satisfied, because that would be to allow the policy, in effect, to override the statutory provisions. If the policy guidelines are necessarily inconsistent with the statutory provisions, the latter will, of course, prevail and the policy guidelines will be invalid. If, however, the policy guidelines can be read down so as to avoid necessary inconsistency with statutory provisions they may be validly applied on that basis.[32]

11.37 To similar effect was the decision in *Townsend and the Repatriation Commission*, although in that case the AAT expressed the opinion that the policy was not necessarily invalid.[33]

11.38 On the other hand, the AAT expressed the opinion in *Floyd and the Repatriation Commission* that the incurred danger test was subsumed by the policy relating to coastal waters,[34] though no reasons were given to support this conclusion. Not surprisingly, the decision led to an appeal by the Commission to the Federal Court. The appeal was allowed by consent and the matter referred back to the AAT for reconsideration according to the law. At this stage Mr Floyd withdrew.

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[31] (1987) 12 ALD 670.
[32] (2001) AATA 6.
[33] AATA 211.
[34] AATA 519.

11.39 In 2001, the Commission sought legal advice on the standing of the policy from Mr Dermott Ryan SC. He advised, unsurprisingly, that the wording of the policy was incompatible with the VEA and that the policy was, therefore, invalid. In the course of his advice he referred to the High Court decision in *Green v. Daniels*, which reiterated the well-established principle that policy guidelines could only be valid if consistent with the underlying legislation.[35]

DISCUSSION

11.40 The Committee accepts that the law is as expressed by Mr Ryan and that the coastal waters policy is invalid and of no effect. In the Committee's opinion, the Ryan advice makes it clear that no expression of policy can enable a decision maker to determine that a claimant has established qualifying service in circumstances where the statutory conditions are not satisfied. Indeed, Mr Ryan said just that when he stated:

> There is nothing in the Act to permit the Commission to override the requirements of section 7A(1)(a)(i). The wording of the policy purports to do so. The Commission has an inquisitorial role to play in the determination of claims made under the Act. It appears to me to be an abdication of that role to purport to have a mandatory answer to questions of entitlement based upon generalities rather than the particular circumstances of the Veteran.

11.41 It follows that under the current provisions of the VEA each claim must be considered individually by applying the tests laid down in s.7A.

11.42 It is obvious that this conclusion puts many present and future claimants at a significant disadvantage compared to many veterans who have been granted the service pension in the past. Previously, persons were considered to have qualifying service if they satisfied the conditions laid down in the Repatriation Commission's policy from time to time, even though they could not have satisfied the conditions in s.7A of the VEA. This suggests a need for a change in the legislative provisions if the equitable and efficient administration of the VEA is to be facilitated, as the terms of reference require. However, there is another, more fundamental reason to consider a change and this concerns the test imposed by s.7A of the Act.

11.43 It is necessary at this point to determine what, in broad terms, is required by s.7A. In essence, there are two conditions. Veterans must have:

- served in operations against the enemy; and

[35] (1977) 51 ALJR 463.

- served at sea, in the field or in the air in those operations at a time when they incurred danger from hostile forces of the enemy.

11.44 The first condition itself requires answers to two questions:

- whether the veteran rendered military service in an area where naval, military or aerial operations against the enemy occurred; and, if so,
- whether, in a practical way, the service of the veteran was an integral part of those naval, military or aerial operations, whether those operations were offensive or defensive.

11.45 Furthermore, the transportation of the veteran within and out of the area of operations is properly to be treated as part of the operations against the enemy.[36]

11.46 The Committee does not regard the conclusions expressed in paragraphs 11.44 and 11.45 above, which represent the findings of Cooper J in *Willcocks and the Repatriation Commission*[37] and *Repatriation Commission v. Mitchell*,[38] as controversial, and it accepts that the present law is as set out by him.

11.47 The second condition in paragraph 11.43, often described as the 'incurred danger test', is not so easily dealt with. The starting point for any consideration of the issue is the decision of the full bench of the Federal Court in *Repatriation Commission v. Thompson*, in which the Court, after referring to a High Court decision dealing with the word 'incurred' in the context of the principles of income taxation, said:

> The words 'incurred danger' therefore provide an objective, not a subjective test. A serviceman incurs danger when he encounters danger, or is in danger, or is endangered. He incurs danger from hostile forces when he is at risk or in peril of harm from hostile forces. A serviceman does not incur danger by merely perceiving or fearing that he may be in danger. The words 'incurred danger' do not encompass a situation where there is a mere liability to danger, that is to say, that there is a mere risk of danger. Danger is not incurred unless the serviceman is exposed, at risk of or in peril of harm or injury.[39]

[36] *Repatriation Commission v Mitchell* (2002) FCA 1177.
[37] (1992) FCR 49, 111 ALR 639, 28 ALD 646, 16 AAR 495.
[38] *Ibid.*
[39] (1988) 44 FCR 20, 82 ALR 352, 15 ALD 501.

11.48 This decision clearly establishes two propositions:

- that the test is an objective one and that a veteran's mere perception that he is in danger is not enough; and
- that 'incurs danger' is, in effect, synonymous with 'is exposed to or at risk of harm' from hostile forces of the enemy.

11.49 The passage in which the expression 'mere risk of danger' is used draws a fine distinction, which the Committee believes tends to confuse, rather than clarify, the definite propositions for which the decision stands and which may, indeed, have been the cause of later inconsistent judgments of the AAT.

11.50 For its part, the Committee believes that it is helpful to focus on the question of whether the veteran was 'at risk or in peril of harm'. This raises an issue of fact that does not import notions of imminent or immediate harm. Indeed, in *Repatriation Commission v. Thompson*, the Court criticised the use of adjectives by the AAT.

11.51 *Repatriation Commission v. Thompson* does not, however, provide guidance on how a decision maker should approach the issue, which may well involve considerable complexity. In the result, there have been a number of cases decided by the AAT, most of which focus on the imminent risk of harm and some of which focus, for instance, on the period of an air raid. Indeed, in *Carlyon and the Repatriation Commission*, the AAT concentrated on the extent of a particular air raid and the distance from the claimant at which the nearest bomb fell.[40]

11.52 What should be emphasised is that the practice of focusing on 'imminent' risk of harm has led to inconsistency between decisions and reliance on fine points of distinction to justify decisions in cases where the factual circumstances are almost identical to those in an earlier case but the result is different. This problem is graphically illustrated in a series of cases that involved the shooting down of a Japanese reconnaissance aircraft in a dogfight near Truscott Airfield on 20 July 1944. Claims for qualifying service were considered in a number of cases, including *Re Kemp and Repatriation Commission*, *Re Lawrie and Repatriation Commission* and *Re Dennison and Repatriation Commission*[41] (in which the claims were rejected) and *Re Maller and Repatriation Commission*[42] (in which the claim was allowed). The points of distinction were extremely narrow and, in the Committee's opinion, were only relevant if the test was concerned with imminent harm.

[40] (1998) AAT 12957.
[41] AAT 11513, 5 November 1996, AAT 6359, 9 November 1990, AATA 830, 18 September 2000.
[42] AAT 8280, 16 September 1992.

11.53 In the opinion of the Committee, the approaches taken in many of these cases (which no doubt reflect the arguments presented) fail to perceive the full significance of the concept of an exposure to peril that is not limited to 'imminent' or 'immediate' peril. Some of the cases also appear to depend, to some degree, on the evidence of a historian about the locations of enemy aircraft, submarines, raiders or mines, and about what, in fact, happened many years before the case was heard. Not only is this evidence an expression of hindsight, but it, presumably accurately, reveals what was most certainly not known at the time to senior Defence authorities. If this is correct, there is, in the minds of the Committee, a real question as to its relevance. Although *Repatriation Commission v. Thompson* establishes that a veteran's perception of danger is not enough on its own to establish that the veteran incurred danger, there are authorities that support the proposition that subjective evidence going to apprehension of danger, particularly from commanding officers, may be a significant indicator of risk (*Re Macgregor and Repatriation Commission* and *Re Buckingham and Repatriation Commission*).[43] Hence, it is strongly arguable that the belief of Defence authorities that the enemy poses a significant threat to a particular part of Australia (leading, for example, to the sending of forces to defend that area, or to conduct offensive operations from that area) provides strong evidence that the forces sent in response to the threat 'incurred danger'.

11.54 These issues have not been debated in a senior court but it is helpful to refer to the advices of Ham KC and Windeyer KC, provided indirectly to the Government in 1945 and, as far as Ham is concerned, on which the Government acted. Ham stated in March 1944 that:

> The language of the sub-section … suggests by the words 'theatre of war' something very much wider than the field of battle. The definition emphasises [sic] by requiring the service to be in an area (including aircraft or ship of war) 'when danger from hostile forces of the enemy was incurred in that area.'… For instance, I should say that up to the date of this Opinion service in Victoria would not come within the definition, but service in Darwin would.

11.55 Windeyer stated that:

> 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 benefits or alleviation contemplated … 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

[43] (1992) 25 ALD 761 and (1992) 28 ALD 412, cited in Creyke and Sutherland (2000, pp. 122–3).

> regard it as possibly imminent at any moment — that, in my opinion, is the situation connoted by the word 'danger'…
>
> 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 '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 has [sic] no more raiders.
>
> I am therefore of the opinion that a claimant is entitled … if he can prove 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, and this is irrespective of proof whether the enemy at that particular time was or was not capable of inflicting injury at that spot.

11.56 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.

11.57 The problems in the application of the statutory test were clearly brought out in the Mohr Report (Mohr 2000, pp. 2–4), which stated:

> To establish whether or not '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. However, the matter cannot rest there.
>
> On the assumption that 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 he will be in danger, then that member will not only perceive danger, but to him or her it will be an objective danger on rational or reasonable grounds. If called upon, the member will face that objective danger. The member's experience of the objective danger at the time will not be removed by 'hindsight' showing that no actual enemy operations eventuated.
>
> All of the foregoing highlights the inherent difficulty with this concept of perceived and objective danger. It seems to me that proving that danger has been incurred is a matter to be undertaken irrespective of whether or not 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 the warnings given by those in authority when the task was assigned to the persons involved.

11.58 In this passage, two important and interrelated points are made. The first is that the concept of an objective danger is a complex one and that the difficulties are compounded by the suggestion in *Repatriation Commission v. Thompson* that the claimant's perception of danger was not enough to satisfy the test.

11.59 Because the term 'danger' connotes risk, or possibility, of harm or injury, there is necessarily an element of subjective belief involved. In a declared war, no one would doubt that to carry out operations against the enemy at a place under risk of attack exposes those in the operations to danger. Yet who at the time would actually know, rather than perceive, that the place is at risk? The enemy might have no intention of attacking there, but assessments have to be made, or beliefs formed, by military authorities as to whether the place is at risk and needs defence by armed forces.

11.60 If then, the military authorities consider that a particular area is vulnerable to attack and dispatch armed forces there, they are sending forces into harm's way, or danger. This was the second point made by Mohr — that veterans ordered to proceed to an area where they are endangered by the enemy will not only perceive danger, but to them the danger will be an objective one based on rational and reasonable grounds. In these circumstances, what the historian says he or she has learned since the war about the actual intention of the enemy is hardly relevant.

CONCLUSION

11.61 The Committee concludes that the first part of the qualifying service test for World War II, which requires a veteran to have been serving in operations against the enemy, is relatively straightforward and adequately understood. However, the second part of the test, which requires that the veteran must have incurred danger from hostile forces of the enemy, is ill understood and this lack of comprehension has led to considerable inconsistency in AAT decisions. In addition, the operation of the Repatriation Commission's policy in the past has led to veterans who served overseas or in Australia's coastal waters being greatly advantaged against those who are now required to satisfy the incurred danger test.

11.62 In these circumstances, the Committee believes that the question arises as to whether the test should be redefined. This will be discussed in Chapter 12.

CHAPTER TWELVE

WORLD WAR II ISSUES

12

INTRODUCTION

12.1 The terms of reference require the Committee to:

- consider perceived anomalies with eligibility for access to *Veterans' Entitlements Act 1986* (VEA) benefits and qualifying service benefits that might be raised by some World War II veterans; and
- recommend possible changes to address any anomalies and to facilitate the equitable and efficient administration of the VEA.

12.2 This chapter is confined to service in the Australian armed services and service by Australian mariners, and addresses qualifying service issues. Leaving aside those submissions that attack the existence of an incurred danger test (however expressed), submissions about qualifying service broadly concerned:

- objections to the use of the incurred danger test (however expressed) in determining eligibility for qualifying service benefits such as the service pension and Repatriation Health Card — For All Conditions (Gold Card);
- the narrow interpretation of the incurred danger test; and
- inconsistent decisions, particularly about claims arising out of service in Northern Australia.

12.3 Some submissions were received about the definition of 'Australian mariner', including the preclusion of some mariners who worked on trading ketches from access to the VEA. The Committee has not been able to deal with the submissions relating to the definition of Australian mariners but considers that they require further examination by the Department of Veterans' Affairs (DVA). Service in British, other Commonwealth or allied forces is considered in Chapter 21.

12.4 The submissions received by the Committee highlighted the problems with the qualifying service provisions and their interpretation that were apparent from the analysis of the World War II historical context undertaken in Chapter 11. In order to address some of the main anomalies that have occurred, this chapter details the test used by the Committee to determine qualifying service for veterans of the Australian armed services and Australian mariners who served in World War II, and then applies the test, as outlined below, to issues raised in submissions.

TEST FOR QUALIFYING SERVICE IN WORLD WAR II

Service Within the Period of Hostilities

General Comments

12.5 In Chapter 11, it was pointed out that the test for qualifying service in respect of the periods of hostilities in World Wars I and II has been substantially the same since 1936. The test requires that a veteran must have rendered service during the relevant period of hostilities in operations against the enemy in an area and at a time when danger from hostile forces of the enemy was incurred.

12.6 The test has been overwritten by Repatriation Commission policy for much of the time that it has been in use. In the past, the Commission has generally interpreted the statutory test widely for reasons of administrative expediency when handling a large influx of claims from retiring veterans. The wide interpretation of the legislative provisions was also an attempt to ensure that no genuine cases of veterans who had incurred danger were excluded. However, in the process, a number of veterans were considered to have qualifying service in the absence of any evidence that they actually incurred danger from hostile forces of the enemy, as is required by the legislation. For instance, the Repatriation Commission's policy meant that World War II veterans with service outside Australia during a specified period qualified, even if they were not actually exposed to danger from a hostile enemy force. Additionally, many veterans qualified by virtue of travel during certain periods in certain parts of Australian coastal waters, such as Bass Strait, even when there was no threat of enemy activity in those areas. As explained in Chapter 11, policies cannot override the provisions of the VEA by extending the qualifying service provisions further than the legislation allows. Any such policy would be invalid and of no force or effect. Consequently, all present and future claims need to be resolved case by case, in accordance with the statutory test.

12.7 On the other hand, some aspects of Repatriation Commission policy have been based on what the Committee believes is a narrow interpretation of

the statutory test. The Committee refers here to the policy for qualifying service in Northern Australia and the islands and waters of Australia contiguous to that area.

12.8 The Committee also indicated in Chapter 11 that the 'incurred danger' element of the statutory test has itself been applied very narrowly in case-by-case examinations of claims because it involves the difficult concept of objective danger. The narrow application of the incurred danger concept has led to a number of inconsistent decisions. In applying the incurred danger test, the Administrative Appeals Tribunal (AAT) appears to have considered only immediate or imminent threat and has failed to consider whether service personnel serving in operations in Australia were subject to a more general risk from Japanese forces, such as would have been identified by the military authorities at the time. These apparent problems have led the Committee to consider the statutory definition in s.7A of the VEA.

12.9 The question of whether to recommend a simplified test needs to be approached cautiously, for several reasons:

- the definition of qualifying service during the period of hostilities in World War II is long standing;
- the current test has considerable support amongst ex-service organisations;
- any new test, which must necessarily be based on the philosophy of the current test, may well lead to many new claims by veterans hoping that interpretations will be more generous; and
- there is a real risk that defining the test will lead to unforeseen consequences and further anomalies.

12.10 The Committee believes that any new test must conform to the basic philosophy underlying the current one; that is, that the service must be in operations against the enemy during which the veteran is exposed to a risk of harm, which might reasonably be regarded as a credible existing risk, from hostile action of the enemy.

12.11 The decision as to whether or not to recommend a new test involves balancing the risks involved in making that recommendation against the disadvantages of leaving the incurred danger test as it is.

12.12 The Committee has eventually concluded that the test should stand because of:

- the length of time that the test has stood;
- the fact that the test has been able to address most claims fairly, with only those in 'grey areas' being the subject of debate; and

- the Committee's opinion that the philosophy underlying the test is correct.

12.13 However, the Committee has decided there is sufficient evidence to recommend that some service in Northern Australia and the islands and waters of Australia contiguous to that area, while that area was under threat, should be deemed to be qualifying service under the VEA. This will necessitate consequential amendments to the definition of operational service. In the opinion of the Committee, this deeming provision will eliminate considerable past inequities. At the same time, the Committee considers that service outside Australia currently regarded as qualifying service by virtue of the Repatriation Commission's policy should be deemed qualifying service under the VEA.

12.14 The Committee's view is that the service rendered and the risk of harm in other areas and at other times was so varied that it is not possible to provide eligibility through a blanket deeming provision. Such service should therefore be considered case by case in the light of the statutory test. The Committee understands that this is the present practice. However, the Committee adds that, while it has no power to direct how the statute is to be interpreted, the relevant decision makers might wish to reconsider the narrow interpretation of 'incurred danger' in the light of the legal opinions of Ham and Windeyer in the 1940s, referred to in Chapter 11. As outlined in paragraphs 11.40 to 11.60, the Committee believes that a veteran would have incurred danger where there was a real risk of harm from the enemy, as assessed by the military authorities at the time. An example of how the Committee believes that the statutory test should apply is provided in paragraphs 12.68 to 12.72 below, in the discussion of submissions concerning the overly narrow interpretation of the statutory test.

Service to be Deemed as Qualifying Service

12.15 The Committee notes that service outside Australia during World War II is deemed by Repatriation Commission policy to be qualifying service if it was:

- in any area other than the West Pacific area from 3 September 1939 to 5 May 1945 inclusive;
- in the West Pacific area (except Papua and New Guinea, and New Britain) from 3 September 1939 to 15 August 1945, as bounded by:
  - in the west, longitude 90 degrees east (the meridian intersecting the coast of modern Bangladesh);
  - in the east, longitude 165 degrees east;
  - in the south, latitude 10 degrees south (including Papua and New Guinea); and
  - in the north, by and including the eastern regions of the Asian continent;

- Papua and New Guinea, including New Britain, from 7 December 1941 to 15 August 1945; or
- in an aircraft engaged in operations against hostile forces or in patrols or reconnaissance over land occupied by hostile forces of the enemy in one of the areas above during the periods prescribed above.

12.16 The Committee notes that this policy has been long standing and is similar to that established for service in World War I. The Committee accepts that veterans sent to serve in areas overseas between these dates were serving in operations against the enemy. While the Committee considers that the risk of harm varied depending on when and where the veteran served, and that the policy has erred on the side of generosity, it understands that the vast majority of veterans with this type of service have already received qualifying service benefits. In the Committee's view, it is now too late to make a change. However, the Committee considers that these provisions should be entrenched in the VEA in order to leave no doubt about eligibility for service outside Australia. Entrenching the provisions in the VEA should do no more than validate the existing Repatriation Commission policy.

12.17 In relation to service within Australia, the Committee notes that the Repatriation Commission's policy deems as qualifying service, service of three continuous months or more in the Northern Territory north of latitude 14.5 degrees south and the islands contiguous to that part of the Northern Territory, between 19 February 1942 and 12 November 1943. The Commission's policy also deems service between these dates in the coastal waters from Exmouth Gulf to Thursday Island as qualifying service, without qualification as to the length of the service in that area. The Committee understands that the deeming of service in the Northern Territory area as theatre of war service occurred in 1945. This followed the Repatriation Commission's decision to use its statutory power under the *Repatriation Act 1920* to deem such service as active service because it was considered to be service in actual combat against the enemy. The commencing and concluding dates for the Northern Territory corresponded to the first and last enemy air attacks in the area, and latitude 14.5 degrees south runs through the town of Katherine, which was the farthest south that these attacks occurred. The deeming of service in operations against the enemy in the coastal waters from Exmouth Gulf to Thursday Island was an element of the Commission's coastal waters policy.

12.18 In regard to service in the Torres Strait Islands, the Committee notes that the Repatriation Commission policy provides blanket qualifying service coverage for those who enlisted and served there between the first and last dates of the eight enemy raids on Horn Island, which began on 14 March 1942 and ended on 18 June 1943, provided that this service was for three continuous months or more. The Commission's policy for service in the waters beyond the

islands was that, if the person travelled to the islands or served outside the three-mile limit of the islands between 3 September 1939 and 16 September 1943, he would be regarded as having qualifying service. These dates appear to be related to the policy regarding service in coastal waters from Sydney to Thursday Island.

12.19 The Committee considers that the qualifying service policy for service in the Northern Australia area is too restrictive. The policy does not take into account the real and credible risk of harm to those serving in operations against the enemy in other parts of Northern Australia and the waters and islands contiguous to this area during World War II, or the risk of harm that still existed, in the Committee's view, after the 64th and final raid on the Darwin area on 12 November 1943. The Committee has found support for this view in the 1983 *Report of the Advisory Committee on Repatriation Legislation Review* (Keys 1983, pp. 66, 69), which also considered that the whole of Northern Australia north of latitude 14.5 degrees south was under threat from hostile forces and made a recommendation to extend qualifying service to service in this area.

12.20 Regarding the policy proviso that the service must be of three continuous months or more within the prescribed period, the Committee notes that there is no minimum time period qualification in the VEA for any other service in World War II to be regarded as operational service; nor is there a minimum time period in the VEA for qualifying service during the period of hostilities. The Committee understands that the three-month time qualification used for the deeming of qualifying service still allows those veterans with less than three months service to qualify, if they can establish that they were serving in operations against the enemy and incurred danger. However, the Committee believes that there is enough information available on the risk of harm in the Northern Australia area for service of any length during the specified period to be considered qualifying service.

12.21 In relation to the actual period during which service should be deemed to be qualifying service, the Committee considers that the level of threat to the Northern Australia area after Japan's entry into the war was sufficient for the Committee to recommend a starting date of 7 December 1941, as has applied for claims for service outside Australia in the south-west Pacific area. The Committee notes that the 1983 Advisory Committee on Repatriation Legislation Review also recommended a starting date of 7 December 1941. Although the raids ceased on 12 November 1943, the threat to Northern Australia was still present, with Japanese reconnaissance aircraft continuing to survey the Northern Australia area. For instance, there are reports of a reconnaissance aircraft being shot down near Darwin as late as June 1944, and the last enemy aircraft shot down on Australian soil was on 20 July 1944 at Truscott air base in

Western Australia. The threat to the area was significant enough for the build-up of air defences to continue until July 1944 (Clayton 1986, p. 34).

12.22 By September 1944, however, the level of threat to Northern Australia from invasion had reduced significantly. General Blamey stated that:

> Air strength in the Northern Territory virtually precluded an enemy landing, but it was still necessary to retain some troops there …[44]

12.23 The Committee also notes that, by September 1944, the reduced risk of invasion by the Japanese and the need to release manpower resulted in consideration being given to reducing the army garrison in Darwin to a single brigade group (McKenzie-Smith 1995, p. 95). Several army units left the Northern Territory in September 1944 (McKenzie-Smith 1995, p. 178), and this was a trend that continued through to the closing stages of the war.

12.24 The Committee considers that the cut-off date for qualifying service in the Northern Australia area should be 7 September 1944 because, by that time, the level of threat to Northern Australia, as assessed by the military authorities at the time, could be considered to have been low enough to justify a reduction in the presence of armed forces in the area. The Committee notes that some submissions called for a cut-off date of 15 August 1945 to bring this into line with Repatriation Commission policy for service outside Australia in the West Pacific. However, it is clear to the Committee that the military assessment at the time was that there was no enemy threat or risk of harm to the armed forces in Northern Australia at any time in 1945, unlike the situation in some areas of the West Pacific.

12.25 The Committee concludes that service in Northern Australia north of latitude 14.5 degrees south and in the islands and waters of Australia contiguous to this area (including the Torres Strait Islands) should be regarded as qualifying service for the period 7 December 1941 to 7 September 1944 inclusive, because:

- service in the area during this period was service in operations against the enemy; and
- based on military assessments at the time, the level of threat from hostile forces of the enemy was sufficient for the service to be regarded as exposing members of the Australian armed forces to a risk of harm that was real and credible, and meets the incurred danger test.

[44] Advisory War Council Minute 1405 of 7 September 1944, cited in Odgers (1957, p. 293).

Claims to be Considered on a Case-by-case Basis

12.26 In relation to service outside Australia during the period of hostilities but after the dates prescribed above, the Committee accepts that those who were serving in operations against the enemy may still have been exposed to a risk of harm in some instances. The Committee therefore considers that service outside Australia in the areas mentioned in paragraph 12.15, after the concluding dates mentioned, should only be regarded as qualifying service if the service occurred up to 29 October 1945 and the veteran was serving in operations against the enemy during which he incurred danger from hostile forces of the enemy. The Committee understands that this is the current approach taken for this type of service.

12.27 In relation to service within Australia, which was during the period of hostilities but which was not in the Northern Australia area during the times mentioned in paragraph 12.25, the Committee notes that enemy attacks also occurred in such places as Townsville, Broome, Port Hedland, Wyndham, Derby, Sydney and Newcastle. There was also an outbreak of Japanese prisoners of war (POWs) at Cowra POW camp. These cases are currently considered case by case, by applying the two-part statutory test requiring service in operations against the enemy and incurred danger. The Committee believes that this approach should continue to apply.

12.28 Similarly, in relation to service in Australia's coastal waters and offshore islands, the Committee considers that a case-by-case examination using the statutory test should apply. The Committee considers that the circumstances under which members of the Australian armed services served in these places and the level of risk of harm differed so markedly that the coastal waters and offshore islands cannot be considered a homogeneous group for which a blanket deeming provision can apply, even if the more liberal interpretation of the incurred danger test advocated by the Committee in paragraph 12.14 is applied. This would include service on Rottnest Island, Norfolk Island, Garden Island and Magnetic Island, and in Bass Strait.

Service After the Cessation of the Period of Hostilities

12.29 In assessing whether service after the cessation of hostilities constitutes qualifying service, the Committee took into account the fact that such service was not service in operations against the enemy: there was no risk of harm from hostile forces of the enemy because the enemy forces had surrendered, with all local surrenders in the Pacific being completed by 29 October 1945. Additionally, if an assessment were made under the current system for classifying the nature of service, such service would be considered non-warlike because:

- there was no need to apply force to pursue a military objective; and

- battle casualties were not expected.

12.30 The Committee considers that the 29 October 1945 cut-off date for the cessation of hostilities is appropriate, as it takes into account local surrenders in the Pacific after the formal surrender was signed. Consequently, the Committee does not consider that any service after the cessation of the period of hostilities should be regarded as qualifying service.

12.31 The Committee notes, however, that service after the cessation of the period of hostilities in World War II in minesweeping and bomb/mine clearance activities, subject to the award of certain medals, constitutes qualifying service under the VEA. Eligibility depends on the award of a Naval General Service Medal or General Service Medal (Army and Royal Air Force) with Minesweeping 1945–51 Clasp, the Bomb–Mine Clearance 1945–53 Clasp, the Bomb and Mine Clearance 1945–49 Clasp or the Bomb and Mine Clearance 1945–56 Clasp. As mentioned in Chapter 11, provision to include certain minesweeping and bomb/mine clearance service as qualifying service was inserted into the VEA in 1986 on the basis that enemy mines were an extension of the enemy and danger from hostile forces of the enemy (i.e. the mines) therefore existed. While the Committee believes that such service was neither qualifying service according to the World War II test nor according to the current test of warlike service, it proposes no change to the provisions, which have already provided qualifying service benefits for this group.

Australian Mariners

12.32 The Committee notes that qualifying service for Australian mariners is virtually the same as for veterans of the Australian armed services, and believes that such provisions should continue to be applied. Most Australian mariners served outside Australia and have been deemed by the Repatriation Commission to have qualifying service. The Committee has recommended specifying in the VEA that certain service outside Australia is qualifying service, and is of the view that this should also apply to Australian mariners. Other claims for qualifying service should be considered, applying the existing statutory test in s.7A(g) of the VEA.

OPERATIONAL SERVICE IMPLICATIONS

12.33 The deeming of qualifying service proposed by the Committee in paragraph 12.25 above also highlights the need to make corresponding changes to the definition of operational service. An examination of the history of the operational service (formerly active service) provisions is provided below and, in the Committee's view, gives support for the proposal.

12.34 The term 'active service' was inserted in the *Repatriation Act 1920* in 1943[45] for the purpose of applying the occurrence liability provisions in respect of disability pension claims; it is akin to the current definition of operational service in s.6A of the VEA. For World War I, there was no need for a definition of active service because this provision simply applied to service outside Australia. In 1940, when the provisions of the Act were extended to cover service in World War II, it was considered adequate to apply the World War I provisions. However, when the entry of Japan into the war in December 1941 exposed Australia to the possibility of attack, it was considered necessary to extend the occurrence provisions to certain service within Australia.[46] Active service was defined as:

- service on a ship of war in sea-going operations beyond the territorial waters of Australia;
- service outside Australia;
- embarkation for service abroad on an aircraft or ship after the ship or aircraft proceeded outside Australia (encompassing sea and air travel outside Australia for service abroad); or
- within Australia:
  - in a prescribed combat area (none were prescribed, the provision being inserted in the event that combat occurred on Australian soil);
  - at any place where a veteran was injured or contracted a disease as a result of enemy action;
  - in actual combat against the enemy; or
  - service which, in the view of the Repatriation Commission, should be deemed as actual combat against the enemy.

12.35 For eligibility for the service pension, the definition of active service was not connected to theatre of war service, which was defined separately. Theatre of war service required that a veteran must have incurred danger from hostile forces of the enemy but this was not required for active service.

12.36 In May 1944, the Repatriation Commission used its power to deem certain service to be in actual combat against the enemy within Australia by deeming service in Australia north of latitude 14.5 degrees south during the period from 19 February 1942 to 12 November 1943 to be active service if it was for three months or more, which corresponded to the area and period of enemy attacks. Before this decision, cases of active service within Australia were

[45] *Australian Soldiers' Repatriation Act*, No. 22 of 1943, s.45AT.
[46] Second reading speech for the Australian Soldiers' Repatriation Bill 1943; Senate, *Debates*, 23 March 1943, pp. 2130–1.

considered case by case, taking into account the person's proximity to the bombing raids in that area. The Repatriation Commission decided to use its deeming power because:

- there were difficulties in obtaining documentation from the services as to where a person was on a particular day; and
- the Commission required administrative expediency to handle an increasing number of claims.

12.37 In February 1945, the Repatriation Commission issued an instruction rescinding its earlier decision to include Western Australia and Queensland north of latitude 14.5 degrees south. This decision was made after the Treasurer expressed concern that the deeming of the whole of Northern Australia was at odds with the prescribed area used to determine eligibility for the Returned from Active Service (RAS) Badge, which was confined to the Northern Territory north of latitude 14.5 degrees south. The Treasurer's concern was that the inclusion of service in other areas of Northern Australia as active service under the *Repatriation Act 1920* could mean that the Government would also need to consider the flow-on effects of the conferring of taxation exemptions, preference in employment and RAS Badges for that service. Consequently, only service for three months or more in the Northern Territory north of latitude 14.5 degrees south and islands contiguous to that area was deemed to be active service.

12.38 The decision was not based on operational considerations and, in the Committee's view, should not deny veterans the benefits provided to those veterans regarded as having operational service for service in Western Australia or Queensland north of latitude 14.5 degrees south during the period when the area was under threat. The Committee notes that the Advisory Committee on Repatriation Legislation Review (Keys 1983, pp. 27, 66) also commented that service in the whole of the Northern Australia area north of latitude 14.5 degrees south should be considered operational service because the level of enemy activity meant that many people were on alert for a considerable period of time.

12.39 As mentioned in Chapter 11, in the 1960s, the Repatriation Commission again used its statutory power to deem certain service in the Torres Strait Islands to be active service because it considered such service to be service in actual combat against the enemy. This related mainly to service on the islands for a period of three months or more during the bombing of the area between 14 March 1942 and 19 June 1943, or in the waters of the Torres Strait beyond three miles from the islands between 3 September 1939 and 16 September 1943.

12.40 The term 'active service' does not appear in the VEA. It was replaced by 'operational service'. Operational service gives veterans the benefits of the application of the more generous reverse criminal standard of proof and the occurrence liability provisions in consideration of their disability pension claims.

The definition of operational service for World War II is found in s.6A of the VEA and equates to the old active service definition, except that the areas and times where active service was deemed by the Repatriation Commission were specifically defined as operational areas (i.e. in the Northern Territory and the Torres Strait Islands for three months or longer). As with service outside Australia, a veteran with such service in the prescribed area of the Northern Territory, or one who enlisted and served on a Torres Strait island during the time of the bombings, is also regarded as having operational service for service immediately before or after the operational service prescribed.

12.41 The Repatriation Commission also retains the power under s.6A to deem other service within Australia to be operational service if it considers that the service was service in actual combat against the enemy, or where the veteran was injured or contracted disease, but only for the period during which such service took place. In ascertaining the current meaning of operational service, the Committee takes into account contemporary court decisions on the meaning of the term 'actual combat against the enemy'. In *Repatriation Commission v. Ahrenfeld*,[47] the full bench of the Federal Court adopted the interpretation of Einfeld J in the single-judge Federal Court decision, that the term meant 'integral participation in an activity directly intended for an encounter with the enemy', adding only that this could be offensive or defensive in character. When the matter was remitted to the AAT to consider Ahrenfeld's circumstances in the light of the Federal Court's findings on the meaning of the term, the AAT said that the term did not cover all service in wartime, that 'directly' indicated there must be a proximate connection between the activity intended for an encounter with the enemy and the conduct of the veteran, and that the conduct must be directly involved with acts of hostility.[48] Most subsequent cases appear to have adopted this reasoning (Creyke and Sutherland 2000, pp. 105–8).

12.42 It is clear to the Committee that what constitutes operational service for World War II is very similar to what constitutes qualifying service. The difference is that operational service does not specifically require that a veteran incur danger from hostile forces of the enemy, only that the task is to serve in operations against the enemy that are directly intended for an encounter with the enemy. Nevertheless, history shows that:

- there was a view in 1944 that service in the whole of Northern Australia north of latitude 14.5 degrees south should be regarded as active service between the dates of the bombings if it was for longer than three months;

[47] (1991) 101 ALR 93 cited in Creyke and Sutherland (2000, p. 104).
[48] *Re Ahrenfeld and Repatriation Commission* (1992) 28 ALD 921, cited in Creyke and Sutherland (2000, p. 105).

- the decision in 1945 to exclude areas of Queensland and Western Australia was a political decision and was not made on the basis of operational considerations; and
- there was a threat to the area of Northern Australia and the waters and islands contiguous to it, from the time of Japan's entry into the war until September 1944, which necessitated the build-up in the area of armed forces that were part of offensive or defensive operations directly intended for an encounter with the enemy.

12.43 The Committee therefore believes that service between 7 December 1941 and 7 September 1944 inclusive anywhere in Australia north of latitude 14.5 degrees south or the islands contiguous to that area, including the Torres Strait Islands, should be regarded as operational service. As with service outside Australia, service immediately before or after that period of service should also be regarded as operational service, with no three-month time qualification.

12.44 Additionally, the Committee considers that, for the purpose of efficient administration of the VEA, it is logical for the VEA to also be amended to deem a veteran to have operational service in World War II if the veteran is determined to have qualifying service. Consistent with the treatment of service overseas, the Committee also considers that operational service in these cases should cover service immediately before or after the period of operational service.

SUMMARY OF SUBMISSIONS

12.45 The Review received over 1150 submissions relating to qualifying service during World War II for veterans of the Australian armed services. Many of these submissions sought qualifying service so that veterans would become entitled to the Gold Card. The Gold Card issue is discussed in Chapter 22. As the Committee has not made a recommendation that the Gold Card be extended to all World War II veterans of the Australian armed services, having qualifying service will remain a determinant of Gold Card eligibility for these veterans. Other submissions have sought qualifying service to obtain the service pension because the disability pension is not counted as income in assessing the rate of service pension payable, but is counted as income for social security pension purposes and may reduce the amount of social security pension payable. This issue is addressed in Chapters 29 and 30, where a favourable recommendation has been made on this issue.

12.46 The submissions can be grouped into the following categories:

- those that argued for the extension of qualifying service benefits to all veterans regardless of the nature of their service in recognition of their advanced age and/or contribution to the war effort;
- those which argued that dangerous, arduous or stressful service had similar effects regardless of whether it involved operations directly against the enemy in which danger was incurred;
- those that argued for the extension of qualifying service benefits to all veterans whom the Governor-General deemed to be on active service, or all those with a Returned from Active Service Badge;
- those pointing to anomalies in the application of qualifying service policy;
- those which argued that the incurred danger test is too narrow, is based on hindsight, and ignores the realities in wartime Australia; and
- those that related to service after the cessation of hostilities.

ISSUES RAISED IN SUBMISSIONS

Qualifying Service Benefits for all World War II Veterans

12.47 A common theme in submissions arguing for the extension of qualifying service benefits to all World War II veterans was that the service of those veterans without qualifying service has not received appropriate recognition. Authors stated that they volunteered (or were called up) to serve anywhere, that they gave up their youth in service to the country and/or that their service in Australia in supporting the fighting forces or defending Australia from attack was important and necessary work. A further argument raised in these submissions was that the health of these veterans was declining with age and that qualifying service benefits, particularly the Gold Card, would provide reassurance that their health care needs would be met. Additionally, there was concern that a number of veterans without qualifying service who receive a disability pension and a social security pension were financially disadvantaged compared to service pensioners, because their disability pension was taken into account as income when determining the rate of social security pension payable.

Dangerous, Hazardous, Arduous or Stressful Service

12.48 Claims were made that the service of some World War II veterans without qualifying service was just as hazardous, arduous or dangerous as that of some who have qualifying service, and should not be treated differently from service involving danger from the enemy. Many of these veterans have also

sought qualifying service as recognition of the important part they played in the war effort. These groups include:

- Royal Australian Air Force members who were aircrew training instructors or in parachute battalions, because the work was dangerous and casualty rates were high;
- veterans who were involved in trials using mustard gas and who are concerned about the health effects of exposure to the gas and lack of records of injury suffered during service as a result of their participation in the trials;
- veterans involved in experiments with malaria who were concerned about the long-term health effects of being infected with malaria by mosquito or blood transfusion, as well as the effects of the administration of experimental antimalarial drugs;
- veterans who served in radar operations who were concerned about the long-term health effects of the conditions under which they worked, such as a possible link between exposure to radiation and cancer or miscarriages;
- veterans whose service was arduous because they were stationed in remote areas of Australia where climatic conditions were harsh and living conditions rudimentary;
- those whose work was stressful because they were unable to discuss their fears and concerns about their work on sensitive or secret issues and received no counselling on discharge; and
- those who considered that their work was stressful because it was so exacting that errors could result in casualty or loss of life.

Active Service Should be Regarded as Qualifying Service

12.49 Many veterans argued that they had active service and qualify for a Returned from Active Service Badge. They have equated active service with qualifying service. Some of these submissions claim that, in 1942, the Governor-General proclaimed that all Army members were to be regarded as on active service.

Anomalies in the Application of Qualifying Service Policy

12.50 Some submissions argued that current policy defining qualifying service in World War II has created anomalous results. Most submissions of this type pointed to the vagaries of the Repatriation Commission's coastal waters policy, which is discussed in Chapter 11, or its policy of according qualifying service for service outside Australia. In both cases, the central concern was that the Commission's policy has allowed some veterans to be regarded as having qualifying service without the need to establish that they incurred danger from

hostile forces of the enemy, whereas others with similar service have not been regarded as having qualifying service.

Narrow Interpretation of the Incurred Danger Test

12.51 Some veterans who served in Australia during the period of hostilities argued that they faced greater potential dangers than others did. Veterans with this type of service considered that they should be regarded as having qualifying service because, at the time, the apprehension of danger was as real to the veteran concerned as it would have been had he actually incurred danger. These submissions argue that the situation in which the veteran was placed should not be viewed in hindsight, because this prevents appreciation of the very real fears and anxieties, and uncertainty about whether attack by the enemy would occur, experienced at the time. Examples given in submissions of this type include:

- veterans defending Australia in areas most vulnerable to invasion, such as north-west Western Australia;
- veterans in Northern Australia after the Japanese bombing of the area ceased, who point to the shooting down of a Japanese reconnaissance aircraft at Truscott air base, the uncertainty about the intentions of such aircraft sighted in parts of Northern Australia and the continuing threat from Japanese bomber forces;
- veterans serving in radar units in remote areas, which were vulnerable and had no back-up support in the case of attack;
- veterans travelling through waters that were mined or were believed to be mined; and
- those who served in the Cowra area at the time of the Japanese POW breakout, and those in Sydney, Newcastle or Townsville when enemy activity occurred in those areas.

Service After the Cessation of Hostilities

Minesweeping and Bomb/Mine Clearance Service

12.52 Some veterans with minesweeping or bomb/mine clearance service do not have qualifying service because they did not have this type of service for the 180 days necessary to be awarded the relevant medal, on which qualifying service is based. These veterans argue that irrespective of how many days were spent on minesweeping or bomb and mine clearance, the service was dangerous and a time limit should not apply in determining qualifying service.

Guarding Japanese POWs

12.53 Submissions on this issue argued that members guarding Japanese POWs were in a potentially dangerous position because the intentions of the prisoners were not known.

Journeys through Mined Waters

12.54 A small number of submissions sought qualifying service for service after the cessation of hostilities, including travel by ship through areas where mines had been laid. The argument here was that the service was just as dangerous as that performed during the period of hostilities.

Dangers in Indonesia after the Cessation of Hostilities in World War II

12.55 A small number of submissions sought qualifying service for service during voyages to Indonesia in 1946 on the basis of danger from mines on the voyage and/or danger from the unrest in Indonesia as the then colony sought independence from the Netherlands.

DISCUSSION OF ISSUES AND CONCLUSIONS

Qualifying Service Benefits for all World War II Veterans

12.56 The Committee notes that the distinction between qualifying service and other service in World War II has been the cornerstone on which the service pension and related VEA benefits have always been based. There is considerable support for maintaining the distinction between veterans who suffered the rigours of service that exposed them to harm from enemy forces and those who did not. There is widespread belief that those veterans who were thus exposed have been affected by that service in ways not quantifiable and should be provided with additional assistance where they cannot work because of age or disability, and do not have sufficient resources to provide a standard of living comparable to community norms. The Committee firmly believes that this distinction should be maintained.

12.57 Thus, the Committee considers that qualifying service, and the benefits that flow from having rendered such service, should not be extended as a form of recognition of their service to all veterans of the Australian armed services who served in World War II.

Dangerous, Hazardous, Arduous or Stressful Service

12.58 A significant number of submissions called for a limited extension of qualifying service to include those with dangerous, hazardous or arduous service. Service that is dangerous, arduous or hazardous is not necessarily qualifying service. Qualifying service must be assessed having regard to the task (service in operations against the enemy) and the risk of harm from enemy forces. Those who had dangerous, arduous or hazardous service, but who were not tasked to an offensive or defensive role that exposed them to danger from hostile forces of the enemy, do not meet the qualifying service requirements. The Committee accepts that many World War II veterans had service that was dangerous, hazardous or arduous. Provision is already made in the VEA for compensation, such as the disability pension and health care benefits, to be provided for any injury or disease related to such service. Unless these veterans had operational service outside Australia or in the prescribed area of the Northern Territory or the Torres Strait Islands, their disability pension claims are determined using the balance of probabilities standard of proof. As stated in paragraph 12.42, operational service requires that a veteran must have served in operations against the enemy that were directly intended for an encounter with the enemy. This was not the case for service by those groups that made submissions about dangerous arduous, hazardous or stressful service.

12.59 The Committee also notes that veterans involved in malaria or mustard gas experiments are concerned about whether there are adequate records of their involvement in the trials and the nature of the trials. The Committee understands that DVA has the names of most of those involved in the mustard gas trials, as well as information about the trials. Additionally, there are a number of conditions, including a number of respiratory and skin conditions, identified in the Statements of Principles (SOPs) as being linked to mustard gas exposure. Regarding the malaria experiments, the Committee understands that a nominal roll of participants has been compiled from information, obtained from the Central Army Records Office, that has been included in a book about the tests by Dr Anthony Sweeney titled *Malaria Front Line*, to be published in February 2003. In relation to the concerns about the long-term health effects of participation in the malaria experiments, the Committee understands that, in 1999, the Repatriation Medical Authority reviewed the conduct of the experiments and potential health effects that may have been suffered by participants, and concluded that there was no medicoscientific evidence necessitating a change to the SOPs.

Active Service Should be Regarded as Qualifying Service

The Governor-General's Proclamation

12.60 A number of submissions argued that a proclamation by the Governor-General in 1942 deemed all persons subject to military law in Australia to be on active service and that such service should therefore also be qualifying service.

12.61 On 14 April 1942, the Governor-General made a proclamation declaring that persons under military law serving in Australia and its territories were on active service. The proclamation was necessary under s.4 of the *Defence Act 1903* in order to place Army personnel serving anywhere in Australia on active service, whilst they were on war service, for the purpose of invoking increased powers of military discipline under the Imperial *Army Act 1881*. The Governor-General's proclamation did not confer eligibility for any benefits under repatriation legislation; nor was it an acknowledgment that all members of the Australian armed services with active service incurred danger from hostile forces of the enemy, as was required to accord service in a theatre of war under the *Repatriation Act 1920* or qualifying service under the VEA. It appears to the Committee that the declaration was a response to the uncertainties that existed in early 1942 as to the intentions of the Japanese forces in regard to Australia, and to the need for increased disciplinary powers if the Army had to fight on Australian soil.

12.62 The Committee therefore concludes that the fact that persons were regarded as on active service for the purposes of invoking increased disciplinary powers does not mean that those persons also have qualifying service for the purpose of obtaining the service pension and related qualifying service benefits under the VEA.

The Returned from Active Service Badge

12.63 The Review also received submissions arguing that all veterans with the Returned from Active Service Badge should be regarded as having qualifying service. The RAS Badge is awarded to members of the Australian armed services who embarked for service overseas or enlisted overseas between 3 September 1939 and 2 September 1945. It is also available to those who:

- served overseas from 3 September 1939;

- were stationed on full-time duty in a prescribed operational area within Australia and its territories, being:[49]
  - the mandated territory of New Guinea from 4 January 1942;
  - the territory of Papua from 2 February 1942;
  - the Northern Territory north of latitude 14.5 degrees south from 19 February 1942; and
  - the Torres Strait Islands from 14 March 1942.

12.64 It is clear that the eligibility criteria for the RAS Badge are much wider than for qualifying service under the VEA in respect of World War II, in that there is no requirement for the veteran to have incurred danger from hostile forces of the enemy and there is no cut-off date for eligibility that is based on the level of risk of harm. The Committee therefore concludes that eligibility for the RAS Badge should not be used as a basis for considering qualifying service eligibility.

Anomalies in the Application of Qualifying Service Policy

12.65 The Committee concluded in Chapter 11 that policy, as opposed to statute, has no place in determining qualifying service eligibility. The application of blanket policies, in which veterans have been regarded as having qualifying service even when they clearly did not experience any danger from hostile enemy forces, is not only invalid in law, but undermines the principle on which qualifying service benefits are based.

12.66 The policy that has come in for the most criticism is the coastal waters policy, which is no longer applied in the blanket way it was in the past. Understandably, the different interpretations of the legislative provisions have led to claims from veterans with no qualifying service that their service was no different from the service of some with qualifying service, and that this inequity could be remedied by according all World War II veterans qualifying service status. The Committee concludes that this is not a valid argument for extension of qualifying service benefits to all veterans. Qualifying service must only be accorded to those for whom it was originally intended. Extending the qualifying service provisions to World War II service in the Australian armed services, on the basis that others have been provided with it because of the application of policy that does not accord with the statutory definition, would devalue the service of veterans who have the type of service in respect of which the benefits

[49] A journey outside Australian territorial limits from one part of the country to another does not qualify. However, a journey by permanent staff of a ship or the crew of water transport that left on a voyage to a prescribed operational area but, owing to enemy attack, did not complete the voyage, is eligible service for the RAS Badge.

were originally intended, and would undermine the principle on which the benefits are based.

12.67 On the other hand, the Committee has already noted the over-restrictive policy regarding service in Northern Australia and has concluded that such service should be regarded as qualifying service during the period from 7 December 1941 to and including 7 September 1944 (see paragraphs 12.19 to 12.25 above).

Narrow Interpretation of the Incurred Danger Test

12.68 Submissions claiming that the incurred danger test has been interpreted very narrowly have caused the Committee considerable concern. As already discussed, the Committee agrees that the existing statutory test should continue to apply, requiring service in operations against the enemy during the period of hostilities in an area and at a time when the veteran incurred danger from hostile forces of the enemy. However, the Committee considers that the incurred danger element of the test has been applied by decision makers in an overly narrow manner because it is ill understood. This uncertainty about the meaning of the phrase 'incurred danger' has led to inconsistent decisions and hair-splitting.

12.69 Some inconsistent decisions relate to service in Northern Australia; for example, at Truscott air base. The Committee's conclusion that certain service in Northern Australia should be qualifying service should resolve the difficulties relating to inconsistent decisions about service in that part of Australia while it was subjected to enemy threat.

12.70 However, there are other areas in which submissions claim an overly narrow interpretation applies. As a guide to decision makers, it might be useful to use service at Cowra during the POW breakout of August 1944 to illustrate how the Committee's interpretation of 'incurred danger' can be applied. The Committee notes that there have been inconsistent decisions about this service. There appears to be acceptance that service by a veteran tasked with recapturing the POWs, or on perimeter patrol around the POW camp, was service in operations against the enemy. However, there appears to have been disagreement in the AAT about which veterans actually incurred danger from hostile forces of the enemy whilst performing these tasks.

12.71 In *Hawkins v. Repatriation Commission*, a member of a heavily armed patrol rounding up the POWs encountered two escapees who were unarmed

and gave themselves up.[50] The veteran was not regarded as having incurred danger in an objective sense and the AAT determined that subjective apprehension of danger was not sufficient. However, in *Richmond and Repatriation Commission*, the AAT found that another veteran who was part of a round-up patrol incurred danger when he and other members of the patrol encountered two armed escapees who acted aggressively but were outnumbered and disarmed.[51] The conclusion in *Richmond* was similar to that of *Saxton and Repatriation Commission*, where Saxton, a new recruit undergoing training at a recruit training centre three kilometres from the POW camp, apprehended an escapee whilst on perimeter patrol outside the training camp.[52] It was not clear at the time whether the escapee was armed but when the recruit grabbed him by the shoulder, the escapee struggled and pulled free but offered no further resistance. The recruit had been armed with a bayonet but had been instructed not to harm the escapees. The AAT found that Saxton had incurred danger when the escapee struggled and pulled free.

12.72 The Committee considers that whether an apprehended POW came peacefully or resisted with or without a weapon is immaterial, because the task itself involved a real risk of harm and the escapees constituted an enemy force that had planned and orchestrated the escape. The Committee is aware of the Army camp situated in the area at the time of the outbreak and some submissions have been received from those in the camp who were not engaged in the operation to round up the POWs. In the Committee's view, service by those veterans was not service in operations against the enemy because it was not service that was an integral part of offensive or defensive action in the operation to apprehend the escapees.

Service After the Cessation of Hostilities

Minesweeping and Bomb/Mine Clearance Service

12.73 As mentioned in paragraph 12.31, minesweeping and bomb or mine clearance work after the cessation of hostilities is qualifying service where a veteran is awarded an appropriate minesweeping or bomb/mine clearance medal for that service. There are, however, two small groups who performed such service and who do not have qualifying service. They are:

- those who had less than 180 days of minesweeping service and who still could have been exposed to danger from the mines; and

[50] (1997) AAT 11772, 7 March 1997.
[51] (1999) AATA 957, 16 December 1999.
[52] (1998) AATA 244, 9 April 1998.

- personnel (estimated at fewer than 50) with the appropriate medal who do not have qualifying service as they are not 'veterans' as defined in the VEA because minesweeping ended on 16 August 1948 but bomb and mine clearance by Army personnel continued well into the 1950s and 1960s.

12.74 Regarding minesweeping service of less than 180 days, the Committee understands why those without the 180 days required for eligibility for the medal used as a qualifier feel aggrieved. It agrees that whether veterans have qualifying service should not depend on how many days they performed such service.

12.75 However, the Committee considers that the conferring of qualifying service on those involved in minesweeping of any duration after the cessation of the period of hostilities is inconsistent with the intent of the qualifying service provisions. The Committee does not propose a change to the current provisions in order to extend qualifying service to minesweeping or bomb/mine clearance service of insufficient duration to qualify for the relevant medal, or to those medal holders who are not veterans (i.e. permanent members of Australia's armed forces engaged in bomb/mine disposal whose only service was after 3 January 1949), as this would exacerbate the anomaly that already exists.

Other Service after the Cessation of Hostilities

12.76 The Committee considers that there is no basis for extending qualifying service to service after the cessation of hostilities on 29 October 1945. In the Committee's view, service after that date, which involved guarding Japanese POWs, journeys through mined waters or voyages to Indonesia during the independence unrest, generally does not constitute qualifying service. Such service was neither service in operations against an enemy nor service in which danger from hostile forces of an enemy was incurred. The Committee is aware that there may be some concern about service after 29 October 1945 not being regarded as qualifying service when, at the same time, the Committee is making a recommendation in Chapter 15 that certain service with the British Commonwealth Occupation Force (BCOF) in Japan should be so regarded. The Committee believes that service with BCOF differed from service after 29 October 1945 in the West Pacific area. Whereas all Japanese forces had surrendered by that date and there was certainty that hostilities with Japan would not erupt again in the West Pacific, there was no such certainty for the Australian Government or for BCOF members regarding how the Japanese military and civilian population would react to the military occupation of their own country.

RECOMMENDATIONS

The Committee recommends that:

- there be no change to the statutory test of qualifying service for veterans of the Australian armed services or Australian mariners serving in World War II, but notes that the 'incurred danger' element of the test has been interpreted too narrowly, in that it does not take sufficient account of a credible risk of harm;
- the VEA be amended to deem the following service during World War II as qualifying service during the period of hostilities:

  Northern Australia:

  – north of latitude 14.5 degrees south and islands and waters contiguous to this area, including the Torres Strait Islands, for any period between 7 December 1941 and 7 September 1944 inclusive;

  Outside Australia:

  – any area other than the West Pacific area — 3 September 1939 to 5 May 1945;

  – West Pacific area (except Papua and New Guinea, and New Britain before 7 December 1941) — 3 September 1939 to 15 August 1945 — bounded by:

    - in the west, longitude 90 degrees east;
    - in the east, longitude 165 degrees east;
    - in the south, latitude 10 degrees south, including Papua and New Guinea; and
    - in the north, by and including the eastern regions of the Asian continent;

  – Papua and New Guinea, including New Britain — 7 December 1941 to 15 August 1945; and

  – in an aircraft engaged in operations against hostile forces or in patrols or reconnaissance over land occupied by hostile forces of the enemy in one of the areas above at the times prescribed above;
- service during the period of hostilities of World War II that is not deemed to be qualifying service under the VEA be regarded as being qualifying service only if it meets the statutory test;
- no change be made to the current provisions in relation to qualifying service after the cessation of hostilities in World War II;

- service in Australia north of latitude 14.5 degrees south and islands and waters contiguous to this area, including the Torres Strait Islands, for any period between 7 December 1941 and 7 September 1944 inclusive be regarded as operational service under the VEA. Operational service should also include service immediately before or after that period of service, as currently applies under s.6A of the VEA for service outside Australia; and
- where a veteran of the Australian armed services or an Australian mariner has qualifying service in World War II, that veteran or mariner also be regarded as having operational service. Operational service should also include service immediately before or after that period of service, as currently applies under s.6A of the VEA for veterans with service outside Australia and s.6B of the VEA for Australian mariners with service outside Australia.