

1. Defence contend that Cabinet Directive 1048¹ which gave direction to the Services on when to allot personnel for special duty under the Repatriation (Special Overseas Service) Act 1962 (SOS Act) required that a host country must first request Australian assistance before ADF personnel could be considered to be giving 'warlike' service.

2. Directive 1048 stated:

"...that the Services be directed that allotment for "special duty" should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces or dissident elements; in the present circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to Indonesian infiltrators or communist terrorists in circumstances where there has been a specific request for the assistance of Australian forces and where the task has been clearly defined..."²

3. In 2007, Defence argued that this directive meant that:

"In essence, allotment was only to be made where the host nation had requested assistance and Australian troops were called out to conduct operations against Indonesian infiltrators or communist terrorists."³

4. Defence consider that this request is the *essential* criteria under the SOS Act for the *entire* period of its operation from 1962-1986. For example, in relation to Rifle Company Butterworth 1970-1989 (RCB), Defence refer to the lack of an invitation by the host country on numerous occasions:

"There does not appear to be any specific request from the Malaysian authorities for the RCB to conduct operations against CT operating in the area of the Butterworth Airbase..."⁴

"While Australian forces remained in Malaysia following the Confrontation ceasefire on 11 August 1966, the Malaysian government made no further requests for assistance in security operations. Accordingly, Australian forces were not engaged in any operations against hostile forces or dissident elements."⁵

"As the Malaysian Government made no requests to the Australian Government for assistance in operations against communist terrorists, ADF

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

² Cabinet Minute, Decision No, 1048, Submission No. 834, *Principles on which Eligibility for War Service Homes Loans is determined and the Consequences of their continued application on the Demand for Loans – Examination and Report by Inter-departmental Committee*, Melbourne, 7 July 1965, Recommendation 1.

³ R.J. Gillespie, VCDF, Minute, *Request for Nature of Service Review of Rifle Company Butterworth (RCB) Service 1970 to 1989*, Ref: B660823, 28 August 2007, Attachment A, *Background to Review of Rifle Company Butterworth Nature of Service*, para 16.

⁴ *Ibid.*, para 34.

⁵ Cooper, J, Ministerial Correspondence, *Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 10.

personnel were not engaged in duty relating to warlike operations, or the state of disturbance in Malaysia between 1970 and 1989.”⁶

5. Defence consider that the first part of Directive 1048, essentially the incurred danger test, could *only* be activated after an invitation from a host nation between 1962 and 1986, and, if Defence were being consistent, presumably *only* if the enemy faced by that host nation were either Indonesian infiltrators or communist terrorists.

Cabinet’s Grasp of English

6. Defence’s interpretation of Cabinet Directive 1048 is not supported by the documentary evidence and context of the directive’s implementation. A recent FOI release from Defence provided several documents (attached) related to the creation of Cabinet Directive 1048 which demonstrate that Defence’s interpretation of the directive is not supportable.⁷
7. Cabinet was advised that:

“...while there is no need to amend the relevant legislation to express more clearly Parliament’s intention as to the kind of service which should be designated as “special duty” there is a need for a clear directive from Cabinet regarding the ingredients to be taken into account...”⁸
8. Defence’s interpretation of Cabinet Directive 1048 is only possible if Cabinet can be said to have intended to give a *clear directive* by using unnecessarily oblique language. That is, for Defence’s interpretation to hold they would need to show that when Cabinet said “in the present circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to Indonesian infiltrators or communist terrorists...” what they *actually* meant was “at all times, regardless of circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to an enemy of any description”.
9. But this goes against Cabinet’s intention to give a *clear directive*. Had Cabinet meant to say ‘at all times and any enemy’ they would have said it, they did not. As the rest of Cabinet Directive 1048, and its accompanying document are in plain English it is clear that when Cabinet said “in the present circumstances” they meant “in the present circumstances”. That is, exactly the circumstances then pertaining and no others.

⁶ Cooper, J., *Meeting Brief: MINDP Meeting with Rifle Company Butterworth Research Group, 4.30pm Tuesday 27 November, Ministerial Talking Points*, 21 November 2019, dot point 7.

⁷ McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965; Bury, L.E.H. & McKellar, G.C., *Principles on which Eligibility for War Service Homes Loans is Determined and the Consequences of their Continued Application on the Demand for Loans – Examination and Report by the Interdepartmental Committee*, Submission No. 834, June 1965; Prime Minister’s Department, Notes on Cabinet Submissions Nos. 833 & 834, 6 July 1965; Cabinet Minute, Decision No. 1042, 7 July 1965; Daffy, R.J.P., et. al., *Report of Inter-Departmental Committee Appointed to Examine the Principles Relating to Eligibility for War Service Homes and Repatriation Benefits and the Consequences of their Continued Application on the Demand for Loans*, 27 May 1965; Cabinet Minute, Decision No. 1048, 7 July 1965.

⁸ Bury, L.E.H. & McKellar, G.C., *Principles on which Eligibility for War Service Homes Loans is Determined and the Consequences of their Continued Application on the Demand for Loans – Examination and Report by the Interdepartmental Committee*, Submission No. 834, June 1965, para 8(a).

10. Cabinet meant precisely what it said in plain English, without the need for interpretation or extrapolation. To do otherwise would be to defeat their own purpose of *clarity*, as they were aware of:

“...the difficulty facing the Services in making precise comparisons in the varying circumstances of service, both in respect of their own Service and in respect of comparable service in the other Services...”⁹

11. The phrase ‘in the present circumstances’ is a common enough expression so that Cabinet would have known that it was referring to a time-limited and particular set of conditions. For instance, the Macquarie Dictionary defines ‘*present*’ as “being, existing, or occurring at this time or now” and ‘*circumstances*’ as “the existing condition or state of affairs surrounding and affecting an agent”.¹⁰ It is clear that in using this particular formulation that Cabinet did not intend the second part of its directive to survive beyond the expiration of the circumstances it refers to.

12. It is necessary therefore to determine what those “present circumstances” were. Fortunately, they are provided in some detail within the documents relating to Cabinet Directive 1048.

Konfrontasi

13. Australia was reluctant to become involved in the Indonesian Confrontation due in part to fears that the conflict could spread to the Papua New Guinea border. Despite repeated requests over two years from the British and Malaysian governments, Australia did not consent to involvement until January 1965.¹¹

14. At the time:

“...an area in Malaya along the Thai frontier...and the areas, including 50 miles seaward, of Sarawak, Sabah and Brunei [East Malaysia] have been declared special areas...”¹²

15. Cabinet then determined that:

“the whole of the Malayan Peninsula (including Singapore) and adjacent waters be declared a special area...”¹³

16. Eligibility for repatriation benefits for those serving in the newly expanded special area was to be confined to personnel:

“...specifically allotted for special duty in relation to Communist terrorists in the border areas already prescribed and Indonesian infiltrators.”¹⁴

⁹ Daffy, R.J.P., et. al., *Report of Inter-Departmental Committee Appointed to Examine the Principles Relating to Eligibility for War Service Homes and Repatriation Benefits and the Consequences of their Continued Application on the Demand for Loans*, 27 May 1965, para 10.

¹⁰ Macquarie Concise Dictionary, Seventh Edition, 2017.

¹¹ Australian War Memorial, *Indonesian Confrontation 1963-1966*, <https://www.awm.gov.au/articles/event/indonesian-confrontation>

¹² McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965, para 1.

¹³ Cabinet Minute, Decision No. 1042, 7 July 1965, para (a).

¹⁴ *Ibid.*, para (b).

17. Most of Malaysia was unaffected by either Communist terrorists on the Thai border or Indonesian infiltrators who were almost exclusively confined to East Malaysia. Having declared the entire Malaysian peninsula a special area (presumably to account for any escalation of the conflict beyond the border areas), Cabinet had to ensure that repatriation benefits were targeted at those personnel who incurred real danger. Hence, Cabinet's direction to limit benefits to those engaged in areas where there was a known enemy presence – the Thai border, East Malaysia and wherever else Indonesian infiltrators operated. In the event, there were two minor incursions into West Malaysia by Indonesian forces in September and October 1964, against which Australian troops operated.¹⁵
18. The inter-departmental committee that recommended the wording of what became Cabinet Decision 1048 was clear on what was to be achieved when it said that:
- “...an important ingredient is that there should be a real element of present danger from hostile forces. In this regard it noted that in providing for similar circumstances in the Repatriation Act, the definition ‘theatre of war’ contains a direct reference to ‘time of danger’”¹⁶
19. The definition in the Repatriation Act cited approvingly by the Committee is reproduced in Attachment B of the report and states:
- “‘Served in a theatre of war’ means served at sea, in the field or in the air, in naval, military or aerial operations against the enemy in an area, or on an aircraft or ship of war, at a time when danger from hostile forces of the enemy was incurred in that area or on that aircraft or ship of war by the person so serving.”¹⁷
20. It is clear then that both the Interdepartmental Committee and the Cabinet were concerned with ensuring that repatriation benefits were allocated to those facing a real danger. This was understandable as Cabinet had made the entire Malaysian peninsula and Singapore a special area. However, with 90% of Malaysia at peace and unaffected by hostile forces, Cabinet needed to ensure that only those who actually incurred danger received the entitlements.
21. These are the “present circumstances” referred to in Cabinet Directive 1048 and why it confines allotment to “duty in relation to Indonesian infiltrators or Communist terrorists”, as these were the hostile forces in Malaysia at the time capable of endangering Australian forces. That is, the remnants of Chin Peng's communists confined to the Thai border area and Indonesian forces operating in East Malaysia but with the possibility of either to expand.
22. The requirement for a “...specific request for the assistance of Australian forces and where the task has been clearly defined”¹⁸ must also be seen in the light of the “present circumstances”. Having become reluctantly involved, Australia was there to

¹⁵ Australian War Memorial, *Indonesian Confrontation 1963-1966*, <https://www.awm.gov.au/articles/event/indonesian-confrontation>

¹⁶ Daffy, R.J.P., et. al., *Report of Inter-Departmental Committee Appointed to Examine the Principles Relating to Eligibility for War Service Homes and Repatriation Benefits and the Consequences of their Continued Application on the Demand for Loans*, 27 May 1965, para 10.

¹⁷ *Ibid.*, Attachment B.

¹⁸ Cabinet Minute, Decision No. 1048, 7 July 1965, Recommendation 1.

assist the Malaysians as required. They were not to plan their own overall campaigns against the hostile forces but aid the Malaysians in areas where the Malaysians required that assistance. Who better to know where that help was needed than the Malaysians themselves, hence the requirement for a specific request.

23. So, the interdepartmental committee and the Cabinet, crafted a document to ensure that in a country largely at peace the Australian Services could readily identify when personnel would definitely incur danger within the special area and so be eligible for repatriation benefits.

24. But neither the committee nor the Cabinet left the matter there.

The Primacy of Incurred Danger

25. It is clear from the documents that neither the committee nor Cabinet considered “a specific request for ... assistance”, nor even “allotment”, as the fundamental element in their consideration of this issue. Rather, they considered that whether ADF personnel had in fact “incurred danger” was the paramount question to be answered. Defences’ contention that a request MUST be made before warlike service could be made out did not hold true even in 1965.

26. In 1965 Defence considered that:

“...personnel engaged in operational tasks outside Australia including those in Malaya or any other prescribed ‘special area’ not specifically allotted for ‘special duty’ who become involved in warlike operations or a state of disturbance, should be eligible for repatriation benefits, as if they were engaged on ‘special duty’ in a ‘special area’...”¹⁹

27. Senator McKellar, Minister for Repatriation at the time, was clear that the primary concern was that ADF personnel who incurred danger from hostile forces should be recognised regardless of a declaration of a ‘special area’. Though he considered the SOS Act, in general, to be a “satisfactory and workable machinery”, Senator McKellar also considered that it did not “adequately cover all the situations which can arise”:²⁰

“...it does not provide for the contingency that an action (e.g., on the Thai frontier) may spill over beyond the declared area, or that personnel may become casualties from hostile action whilst going to or from a declared area...Crews of R.A.N. warships and support craft stationed in the Malayan area may also become involved in operations outside declared areas. Further, there is the real possibility that personnel of all three Services not allotted for special duty, whether they are within a special area or not, may unexpectedly become involved in isolated incidents.”²¹

28. The Senator went on to support a proposal to extend the SOS Act to “...cover personnel who in fact become involved in warlike operations and suffer death or incapacity in consequence, though not at the time allotted for special duty in a declared special area...”²²

¹⁹ McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965, para 2(c).

²⁰ *Ibid.*, para 4.

²¹ *Ibid.*

²² *Ibid.*, para 8.

29. Cabinet agreed and declared that:

“other personnel engaged in operational tasks outside Australia including those in Malaya or any other prescribed ‘special area’ not specifically allotted for ‘special duty’ who become involved in warlike operations or a state of disturbance should be eligible for repatriation benefits if they are incapacitated or killed in any area outside Australia as the result of action by an enemy or in combating an enemy.”²³

30. That Cabinet had ‘incurred danger’ uppermost in mind and considered that personnel who were engaged in like actions should receive like recognition regardless of “allotment” or “request” is evident from Cabinet’s handling of Recommendation 3 of the interdepartmental committee’s report.

31. Recommendation 3 was an attempt to align war service home loans entitlements with repatriation benefits for situations identified in Senator McKellar’s submission, where service outside Australia, whilst not “allotted” was “...operational service against hostile forces...”²⁴ and so attracted repatriation benefits.

32. Cabinet resolved to set aside Recommendation 3 for further examination because:

“...Cabinet saw the possibility that this would exclude some cases which if felt had strong claims to be considered eligible for war service homes. It considered, by way of illustration, the cases of two servicemen who were engaged in the same action; one being allotted for ‘special duty’, the other being ‘on operational service against hostile forces’. In the event that neither suffered death or incapacity, the former would be eligible for repatriation benefits and a war service home while the latter would be eligible for repatriation benefits but not for a war service home.”²⁵

33. These documents reveal three important aspects of the government’s intent in 1965:

1. The concept of Theatre of War and the incurred danger test were paramount and to be applied to the SOS Act.
2. Where the incurred danger test was satisfied it overrode any requirement for allotment or ‘request’.
3. Actual circumstances ultimately determined qualifying service, not a policy document meant to guide prospective rather than retrospective determinations of service.

34. It is clear that neither the inter-departmental committee nor the Cabinet of 1965 were as inflexible on the question of recognition of service as those currently tasked with reviewing past service are. The obdurate approach of Defence, with its inflexible application of what it mistakenly insists to be the policy of the time renders it

²³ Cabinet Minute, Decision No. 1042, 7 July 1965, para (b).

²⁴ Bury, L.E.H. & McKellar, G.C., *Principles on which Eligibility for War Service Homes Loans is Determined and the Consequences of their Continued Application on the Demand for Loans – Examination and Report by the Interdepartmental Committee*, Submission No. 834, June 1965, para 9.

²⁵ Cabinet Minute, Decision No. 1048, 7 July 1965, para 2.

incapable of dealing with what Senator McKellar described as the “novel problems”²⁶ of the nature of service for ADF personnel in South-East Asia during that period.

Cabinet Directive 1048 After Confrontation

35. Cabinet’s intent of giving *clear* direction to the Services in Cabinet Directive 1048 cannot be ignored. The first half of the directive is unambiguous as to when ADF personnel should be allotted under the SOS Act, it can be applied to *any* deployment under the Act at *any* time. The second half is linked to a particular set of “present circumstances” clearly articulated in the directive: Indonesian infiltrators and communist terrorists, the latter being then confined to the Thai border area.
36. These were not the circumstances that RCB confronted at the time of its ongoing deployment to Butterworth. Indonesian infiltrators had not been an issue since 1966 and Chin Peng’s communist terrorist forces were no longer confined to the Thai border. Attacks had occurred throughout the peninsula, including in Kuala Lumpur and at military bases, 1975 saw rocket attacks on Kuala Lumpur airbase and Minden barracks Penang, mines and booby traps were ubiquitous throughout the peninsula, the communist 8th Assault Unit was within striking distance of Butterworth, communist attacks had occurred in close proximity to the base and Malaysian forces had conducted operations in the area.
37. For Defence to contend that the second part of Cabinet Directive 1048 survived the circumstances it was meant to address denies Cabinet’s *clear* intent to limit it to a particular set of circumstances, and therefore time, with its wording of “in the present circumstances”.
38. All that was required for RCB to operate in defence of Butterworth was either the invitation or consent of the Malaysian Government.²⁷ This was provided with an Exchange of Notes in 1971 and previous treaties and agreements between Australia and Malaysia and, at times, other nations.
39. A government department is not empowered to reinterpret the clear wording of government decisions. Defence’s reliance on its interpretation of the second half of Cabinet Directive 1048 to deny the claims of RCB veterans cannot therefore stand. That leaves only the first half of the directive, essentially the incurred danger test, to determine RCB’s nature of service, and on that matter Defence have repeatedly confirmed that RCB did incur danger from hostile forces or dissident elements.

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²⁶ McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965, para 3.

²⁷ Southeast Asia Collective Defense Treaty (Manila Pact); September 8, 1954, Article IV para 3.