

Lake War Memorials Forum

Joint Standing Committee on the National Capital and External Territories

Inquiry into the administration of the National Memorials Ordinance 1928

Supplementary submission

Contents

Recommendations.....	2
How heritage aspects might be addressed in future decision-making on National Memorials	3
Background	3
Principles.....	3
Reforms.....	4
Comments on other submissions to the Inquiry	4
Submission 30: National Capital Authority	4
Submission 36: Australian War Memorial	5
Other submissions	5
Aspects of the Memoranda of Understanding that the National Capital Authority has with private proponents	6
Funding aspects of the proposed lakeside war memorials.....	8
Conflicting opinions about past decisions of the Canberra National Memorials Committee.....	9

Recommendations

Recommendation I: That heritage aspects of future decision-making on National Memorials be addressed by implementing reforms along the lines of paragraph 5 of this submission, taking account of the principles in paragraph 4 of this submission.

Recommendation II: That the Inquiry recommend that the form of Memoranda of Understanding struck by the National Capital Authority be reviewed by the Attorney-General's Department to ensure that the NCA's MOUs accord with best practice and serve the best interests of the Commonwealth.

Recommendation III: That the Inquiry seek from the Department of Regional Australia, Regional Development and Local Government a copy of any legal advice received by the Department concerning the validity of decisions made by the Canberra National Memorials Committee on the proposed World War I and World War II memorials and the associated determinations.

How heritage aspects might be addressed in future decision-making on National Memorials

Background

1. This section of the Forum's supplementary submission expands upon the material at paragraph 34 of the Forum's [original submission to the Inquiry](#).
2. Australia has had national heritage legislation since 1975, with the introduction of the *Australian Heritage Commission Act 1975* (AHC Act) and the establishment of the Register of the National Estate (RNE). The AHC Act was superseded by amendments made to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in 2003 to cover Commonwealth and National Heritage obligations.
3. The National Heritage List is for places of outstanding national value. Those places in the RNE on Commonwealth Land were transferred to the Commonwealth Heritage List. There are several heritage-listed places that include buildings and landscapes in the national and central areas of Canberra.¹

Principles

4. The following principles are suggested in relation to heritage aspects of future decision-making on National Memorials.
 - Any proposed memorial needs to consider impacts on the listed heritage values of these places, whether the memorials proposed are within a listed area, near a listed place or even some distance from a listed place.
 - A revised National Memorials Ordinance needs to ensure that heritage is a mandatory consideration in a memorial proposal.
 - New arrangements need to avoid the situation where memorial proposals may go through design and planning work but still be rejected under the formal referral process.
 - Under the provisions of the EPBC Act, referrals on impacts of proposed developments are made to the Minister responsible for heritage.
 - Conservation management plans (CMPs) are prepared for heritage-listed places to direct management and future changes but a CMP may not cover all the impact possibilities that some development proposals may create.

¹ The central area of Canberra has four places listed in the National Heritage List: Old Parliament House and Curtilage, the High Court-National Gallery Precinct, the Australian War Memorial and Memorial (Anzac) Parade, and the Academy of Science. Parliament House and Surrounds has been assessed but not listed. There are places nominated to the NHL and under assessment that include two nominations for Central Canberra, including its inner hills.

There are several places in Central Canberra in the Commonwealth Heritage List, including those noted above and the Parliament House Vista (PHV) and the Russell Heritage Precinct. The PHV covers the area bounded by the northern alignment of State Circle, the western alignment of Kings Avenue, the southern alignment of Parkes Way and the eastern alignment of Commonwealth Avenue; the whole of Anzac Parade and Anzac Park; the whole of Section 39, Campbell.

Reforms

5. To implement the above principles, the following reforms could be implemented.
 - The proponent of a National Memorial to prepare a heritage impact statement (HIS) report, relevant to the location and character of the proposed memorial.
 - o The report to include advice and preliminary comment from the Heritage Division of the Department of Sustainability, Environment, Water, Population and Communities, the ACT National Trust, the ACT Heritage Council, the ACT Historical Society, the Walter Burley Griffin Society, and the community.
 - o The HIS report to be reviewed by the Canberra National Memorials Committee (CNMC) before it agrees to proceed with a memorial's detailed design concept and design competition development, prior to the final formal heritage referral to the Minister responsible for heritage.
 - The CNMC to develop a template of questions relating to the impacts on heritage that could be determined from the memorial character and location and that the HIS report would need to address.
 - Heritage expertise be available to the CNMC, either through direct membership of the Committee or through easily accessible external advice. (See three CNMC membership options at paragraphs 20-30 of the Forum's [original submission to the Inquiry](#).)

Recommendation 1: That heritage aspects of future decision-making on National Memorials be addressed by implementing reforms along the lines of paragraph 5 of this submission, taking account of the principles in paragraph 4 of this submission.

Comments on other submissions to the Inquiry

Submission 30: National Capital Authority

6. The NCA's proposals on membership of the CNMC do not sufficiently recognise either the lessons of history or the potentially conflicted role of the NCA itself.
7. In paragraph 31 of its submission, the NCA suggests that the Prime Minister, the Leader of the Opposition and the Leaders of the Government and Opposition in the Senate should all remain members of the CNMC.
 - This fails to recognise that these parliamentarians lack the time and interest to devote to National Memorials. (See paragraphs 14-18 of the Forum's [original submission to the Inquiry](#).)
8. In paragraph 32 of its submission, the NCA suggests that the ACT resident positions on the CNMC should be replaced with one position reserved for a parliamentarian who represents the ACT and a member nominated by the ACT Government. The NCA believes this change "will improve the strength of both local and parliamentary involvement in the CNMC".
 - The Forum takes the same view of this proposal as it took of the suggestion from the Attorney-General's Department in 2010 that the ACT residents' positions not be filled: the NCA's proposal seems to be motivated by a desire to allow officials and parliamentarians on the CNMC to get through business

as quickly as possible, without distractions from difficult private citizens. (See paragraph 13 of the Forum's [original submission to the Inquiry](#).)

- The NCA's discounting of the ACT residents' positions is not balanced by its relatively modest proposals for public consultation. (See paragraphs 72-74 of [the NCA submission](#).)
9. In paragraph 34 of its submission, the NCA says an NCA officer should be appointed as a member of the CNMC or should be designated as expert advisor to the CNMC.
- In paragraph 34 (under the note "Ministerial intervention") of the Forum's [original submission to the Inquiry](#), we set out the conflict of interest reasons why the NCA should not be the secretariat to the CNMC. These reasons apply even more strongly to the NCA providing a member of the Committee. This would not prevent the NCA providing expert advice to the Committee.

Submission 36: Australian War Memorial

10. The AWM's brief submission focuses on the need to avoid intrusions on the strong symbolic sight-line of the axis (the Land Axis Vista) and the Memorial at its head.
- The Forum believes the AWM submission needs to be read in conjunction with previous public statements by the Director of the AWM, questioning the need for the proposed lakeside war memorials. (See paragraphs 75-76 of the Forum's [original submission to the Inquiry](#).)
 - The Forum is surprised and disappointed that advice provided to the AWM Council about the potential for competition between the lakeside memorials and the AWM has not produced a more positive reaction from the Council but it notes that the Council has sought further assurances from the MDC in relation to competition and intrusion on sight-lines.²
 - On sight-lines, there is ample evidence already in the public domain that the lakeside memorials will interrupt the vista between the AWM and Parliament House. For example, in August 2008, the design competition jury's heritage adviser, Duncan Marshall, noted that "the pillars [of the new memorials] will be substantial new elements in the vista".³

Other submissions

11. The Forum understands that the Department of Regional Australia, Regional Development and Local Government intends to make a submission to the Inquiry.
- If time permits, the Forum may make a further supplementary submission commenting on the Department's submission. (See also paragraph 21 below.)

² GEN Peter Cosgrove, AWM Council Chairman, to David Stephens, Lake War Memorials Forum, 23 August 2011. Advice provided to the AWM Council is at Attachment J to the Forum's [original submission to the Inquiry](#).

³ See Attachment F to the Forum's [original submission to the Inquiry](#).

Aspects of the Memoranda of Understanding that the National Capital Authority has with private proponents

12. The Forum received from the NCA under Freedom of Information a copy of the original October 2007 Memorandum of Understanding (MOU) that the Authority struck with the proponents of the lakeside war memorials, the Memorials Development Committee (MDC). With the agreement of the MDC, the Forum then received from the NCA a copy of the September 2010 revision of the MDC-NCA MOU.
13. The Forum understands that the NCA regularly strikes MOUs with its business partners. The Forum assumes that the MOUs with the MDC largely follow a standard model. The Forum has a number of concerns with the MDC-NCA MOUs and the NCA's MOU format generally.
 - The MOUs are open-ended, or at least very flexible as to time-frame.
 - o The MDC-NCA MOU continues "until such time the project is completed" (clause 11.1) although there is a dispute resolution clause (9.0) and a termination clause (10.1).
 - The MOUs may bear only a limited relation to what is actually happening at a given time.
 - o The 2007 MOU was revised in 2010, apparently to recognise that "due to the implementation of budget savings, the NCA is no longer able to provide project management services for the development of the [lakeside] memorials".⁴ The roles and responsibilities of the NCA were cut back considerably in the revised version.
 - o The impact of the budget savings had been felt in early 2008 but the MOU was not renewed until September 2010. In other words, most of the October 2007 MOU's text on the roles and responsibilities of the NCA were redundant within six months of the document being signed, although this was not reflected in the words of the MOU for another 2½ years.⁵
 - o Despite the changes in 2010, the "Background" section of the revised MOU still included the words, "The Authority will be responsible for the day to day management of all aspects of the design and construction of the Memorials".
 - The MOUs lack any commercial viability discipline on private proponents.
 - o The MDC-NCA MOU (clause 4.2) says the MDC is responsible for "fundraising for the project" and monitoring the project budget but there are no provisions for consultation on cost blowouts or project slippage, both of which have affected the lakeside memorials project. (See paragraphs 86-92 of the Forum's [original submission to the Inquiry](#).)
 - The MOUs do not sufficiently link the NCA's performance of its responsibilities to timely provision of funds by private proponents.

⁴ NCA Senate Estimates Brief, 13 March 2008, provided by the NCA under FOI.

⁵ A December 2009 email from the MDC to their architects, copied to the NCA, refers to the need to revise the MOU. (FOI material from the NCA.)

- o The MDC-NCA MOU (clause 7.0) says the MDC will make payments to the NCA in accordance with an agreed cash flow program and that the Authority will not enter into any contracts related to the design and construction of the Memorials until the MDC has transferred funding to the NCA to meet the estimated contract value.
- o Although there is a reference in material obtained under FOI to a proposed contract between the NCA and the lakeside memorials' architects, Richard Kirk Architects, to be signed in January 2010, as at September 2011 no such contract had been signed.⁶ The Forum assumes this is because the necessary money has not come from the MDC.⁷
- o This section of the MOU allows the NCA to do nothing in response to lack of performance by a proponent, whereas it should explicitly make lack of performance, including non-payment, a cause for termination of the project.
- The MOUs are not legally enforceable.
 - o The MDC-NCA MOU (clause 12.1) says the MOU "is not intended to be, and is not, a legally binding or enforceable document, however, the Authority and the Committee will act and co-operate in good faith in accordance with the terms of this MOU".
 - o The reader of such a disclaimer is entitled to ask the questions, "Why not?" and "Why bother?" This is particularly the case with the lakeside memorials, where the project has been characterised by slippage (delays since 2008), second chances (the site extension in March 2010), and the apparently open-ended tying up of a piece of National Land – none of which the MOU (or the NCA) has been able to prevent.
 - o Essentially, an MOU like this simply puts in writing a "gentleman's agreement" and has about as much weight as such arrangements usually do. The MOUs may be as much about the NCA giving comfort to what have been described as "rather hapless community groups"⁸ as they are about enjoining and ensuring performance by the parties.
 - o The lack of legal enforceability may help explain the careless drafting and lack of timeliness noted above.
- The MOUs contain no provision for joint review of project progress.
 - o In the MDC-NCA MOU, the termination clause (10.1) could have been greatly strengthened by the addition of grounds for termination, with "lack of progress, as revealed by a joint review" being given pride of place.
- The MOUs leave the NCA open to unforeseen costs – forever – for maintenance of the completed memorials.

⁶ See note 5 above.

⁷ Although the NCA has been holding since late 2010, \$198 000 (including GST) of MDC funds for the purposes of the MOU. (NCA advice, September 2011.)

⁸ Submission to the Inquiry from Walter Burley Griffin Society (Sydney), <http://www.apf.gov.au/house/committee/ncet/memorials/subs/sub32.pdf> , paragraph 3.25.

- o “Once the Memorials are completed, they will become administered assets of the NCA to maintain on behalf of the Commonwealth. There is no automatic funding for the maintenance of such new assets.”⁹
- o The MDC-NCA MOU (clause 7.0) says the NCA will retain unexpended money paid to it by the MDC, up to \$100 000 (excluding GST), to pay for “ongoing maintenance” of the lakeside memorials. Any future maintenance costs over \$100 000 will come from the NCA.
- o Given that the lakeside memorials are designed to cater for large crowds, it is difficult to see even \$100 000 going very far towards paying for ongoing maintenance, let alone for associated capital works, such as car parking, which might become necessary after the memorials are built.
- o The large size of the memorials is partly the result of the NCA’s insistence during the development process that the memorials should match the significance of the wars being commemorated. (See Attachment F in the Forum’s [original submission to the Inquiry](#).) The MDC, its architects and the design competition jury obliged by delivering two huge monoliths, a wide granite apron and other features between the monoliths. Large size will itself mean large maintenance costs. Yet, even after the NCA saw the final design of the memorials, it made no attempt in the revised MOU, two years later, to increase even the token amount (“up to \$100 000”) set aside for future maintenance.
- The MOUs are not public documents.
 - o Publicity of the MDC-NCA MOU would have brought to light the defects outlined above and might have led to tighter, legally significant documentation, preferably a contract rather than an MOU.

14. The Forum will provide copies of both the 2007 and 2010 MOUs to the Inquiry.

Recommendation II: That the Inquiry recommend that the form of Memoranda of Understanding struck by the National Capital Authority be reviewed by the Attorney-General’s Department to ensure that the NCA’s MOUs accord with best practice and serve the best interests of the Commonwealth.

Funding aspects of the proposed lakeside war memorials

15. Paragraph 91 of the Forum’s [original submission to the Inquiry](#) noted that the proponents of the lakeside memorials offer anonymity to donors and that this has created problems. An article expanding on this and related issues has now been published and can be found [here](#).
16. The article provides further support for the principles in paragraph 92 of the original submission, relating to privately funded projects for National Memorials, particularly the principle that all donors and the amounts of their donations should be disclosed, with an undertaking to this effect to be given in advance by the proponents.

⁹ See note 4 above.

Conflicting opinions about past decisions of the Canberra National Memorials Committee

17. Paragraphs 45-56 of the Forum's [original submission to the Inquiry](#) analyse an issues paper prepared by the Attorney-General's Department for the June 2010 meeting of the Canberra National Memorials Committee. The Forum has provided a copy of the issues paper to the Inquiry.
18. Among other things, the issues paper considered the possibility that the CNMC had not been legally constituted since 1953. It proposed options for correcting past mistakes made by the CNMC – essentially, options to “deem”, as National Memorials, memorials that had been constructed following decisions of the CNMC that may not have been legally made.
19. On the other hand, the Forum has received a letter, dated 14 September 2011, from the Minister for Regional Australia, Regional Development and Local Government, which says that the Minister's Department has received legal advice “that decisions made by the CNMC concerning the proposed World War I and World War II Memorials, and the associated determinations, are valid”.
20. The Forum is intrigued by the apparent contradiction between the views of the Attorney-General's Department in 2010 and the legal advice referred to in the Minister's letter, particularly as Territories Division, which prepared those views, is now part of the Minister's department.
21. The Forum has asked the Department for a copy of the legal advice or, alternatively, that the advice be included in the Department's submission to the Inquiry. If the Department does not provide this advice, the Forum strongly urges the Joint Standing Committee to seek a copy of the advice from the Department.

Recommendation III: That the Inquiry seek from the Department of Regional Australia, Regional Development and Local Government a copy of any legal advice received by the Department concerning the validity of decisions made by the Canberra National Memorials Committee on the proposed World War I and World War II memorials and the associated determinations.

Lake War Memorials Forum
5 October 2011

Contact officer

Dr David Stephens
Media and Political Liaison
Lake War Memorials Forum
02 6251 5842 or 0413 867 972

clamshred@ozemail.com.au