

Lake War Memorials Forum

Joint Standing Committee on the National Capital and External Territories

Inquiry into the administration of the National Memorials Ordinance 1928

Submission

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Summary

Introduction

The submission proposes:

- *principles* to govern the approach to future National Memorials in Canberra;
- *reforms* involving amendments to the National Memorials Ordinance, development of a Strategy for National Memorials and administrative protocols deriving from the Strategy.

The submission argues that a reworked section 6(2) should effectively be the centre-piece of the amended Ordinance.

Membership

The essential *formal* features of the Canberra National Memorials Committee (CNMC) have been:

- bipartisan representation from the Parliament;
- a majority of parliamentarians; and
- representation from the responsible Minister and the relevant Department.

The most notable feature of the CNMC's membership history *in practice*, however, has been the reprehensible failure of successive governments since 1953 to fill the two positions for A.C.T. residents.

Attendance at CNMC meetings March 2007-March 2010 failed to reflect the legislation in other ways, as well.

- Parliamentary members of the CNMC, from the Prime Minister down, neglected the CNMC.
- The CNMC was only able to function because of creative use of the discretionary membership and quorum provisions of the Ordinance.
- The CNMC became a convenient administrative tool of the National Capital Authority (NCA) rather than a bipartisan instrument of the Parliament.

The CNMC of the future should have:

- a membership *representing* the Government, the Parliament and the people;
- a membership with a *demonstrated interest* in Canberra as the National Capital;
- access to relevant *expertise*;
- a membership with *time* to deal adequately with its business; and
- majority and quorum arrangements to prevent *capture* by a single constituency.

Three membership options are proposed and tested against the above principles: Option A: JSCNCET* overlap; Option B: experts advising Minister; Option C: augmented CNMC.

(* Joint Standing Committee on the National Capital and External Territories.)

Decision-making

Decision-making at CNMC meetings March 2007-March 2010 had the following features.

- Proceedings of the CNMC probably flouted the provisions of the Ordinance.
- Key decisions seem to have been remade to remove defects.
- Key decisions were made on the basis of inadequate consideration of evidence.
- One key decision flouted the NCA's own mandatory guidelines.
- Deciding the location of the lakeside memorials separately from their "character" left key design decisions to middle level officials in cooperation with the memorials' proponents.
- One participant in key meetings had a conflict of interest.
- Public exposure of the proposed lakeside memorials was almost non-existent until the launch of the winning design in February 2009.
- Meetings were perfunctory and hurried.
- NCA records relating to key decisions cannot be found.

The CNMC of the future should have:

- clear and public *criteria* against which decisions are made regarding National Memorials;
- *maximum accountability and transparency*, consistent with decision-making autonomy, administrative efficiency, parliamentary oversight and public participation; and
- *ministerial intervention* under section 6(2) of the Ordinance only as a last resort.

Some reform elements would not need to be explicitly in the Ordinance but could be developed by the CNMC and made by the Minister as Regulations under the Ordinance or as Amendments to the National Capital Plan. Regardless of the instrument used, reform should address the following.

- *Criteria*, expressed in a Strategy for National Memorials, written into the Ordinance but drawing upon the NCA's *Guidelines for commemorative works in the National Capital (2002)* and addressing key aspects of decision-making on National Memorials.
- *Accountability and transparency*, by requiring that decisions be made in accordance with the Strategy, that the process be accessible to the public and that there be no move towards conducting CNMC business by circulating papers.
- *Ministerial intervention*, by retaining ministerial power under section 6(2) of the Ordinance to rescind CNMC decisions, subject to a public consultation period, the Minister fully disclosing reasons for intervention, and further consideration by the CNMC.

The secretariat function for the CNMC should reside in the responsible Department, not in the NCA, as should the function of calling meetings of the CNMC.

The submission considers an issues paper prepared by the Attorney-General's Department for the CNMC in June 2010. The paper was made available by the Department of Regional Australia, Regional Development and Local Government under Freedom of Information.

The issues paper considers possible amendments to the Ordinance relating to out-of-session consideration by the CNMC, the possible channelling of all CNMC business through the Minister, whether the CNMC has been legally constituted since 1953 (because of the A.C.T. resident vacancies), how past mistakes made by the CNMC might be corrected and other possible amendments.

While the paper's current status is uncertain it contains useful discussion about issues of efficiency, validation of past faulty decisions and the balance of power on the CNMC between officials and others. The Forum draws the paper to the attention of the Joint Standing Committee, although the Forum supports only a few of the paper's conclusions.

If nothing else, the issues paper confirms, in its low-key way, the Forum's view of the state of decision-making on National Memorials. Specifically, it leaves open the possibility that all decisions of the CNMC since 1953 have not been legally made.

Independent, expert advice

In relation to experts and the CNMC, the threshold question is whether experts should be actual members of the CNMC or simply be accessible. There are arguments in both directions.

A Strategy for National Memorials could support protocols for obtaining independent, expert advice, regardless of whether experts were appointed as members of the CNMC.

Transparency

Transparency of decision-making beyond the CNMC would be assisted by extending the opportunities for public participation and by wide exposure of relevant material.

Parliamentary oversight

Parliamentary oversight is best assured by taking advantage of existing mechanisms, notably the JSCNCET, and by strengthening relevant provisions of the Ordinance.

Public participation

Section 6 of the Ordinance is also potentially an important means of enabling public participation in decision-making on National Memorials.

Current proposals

Concerns about retrospectivity should not inhibit correcting defects in current projects and stopping them altogether where this is justified.

The flawed process outlined in this submission is an overwhelming argument against the lakeside war memorials. A wide range of people have also opposed the memorials because they damage crucial landscape perspectives and existing land use and threaten the role of the Australian War Memorial (AWM).

The lack of a firm official view from the AWM Council has been a notable – and disappointing – feature of the lakeside memorials debate, especially when the memorials are clearly designed with a commemorative role in mind and thus inevitably raise the issue of competition with the AWM.

The Forum’s stand against the lakeside memorials has been strengthened by the delays and prevarication of the memorials’ proponents. There is a strong impression that the lakeside memorials project is now a faltering enterprise “waiting for something to turn up”.

The memorials should no longer be allowed to maintain their claim to National Land at the Rond Terraces. A project that should never have been allowed to commence should not now be allowed to continue.

Accordingly, the Forum’s preferred option is that

- the Minister should exercise his power under section 6(2) of the Ordinance to recommend to the CNMC that all previous decisions on the lakeside memorials be rescinded;
- the decisions having been rescinded by the CNMC, the Minister make a rescission determination under the Ordinance accordingly.

Alternatively, as a next best option, all current and future National Memorials projects should be put on hold and considered against reformed arrangements, including the Strategy for National Memorials.

Project slippage

The submission notes that the site reservation for the lakeside memorials was extended for three years from 2010, at a time when the project was clearly in difficulty. In future, site reservations should not be granted except in exceptional circumstances and not as a response to funding difficulties. Timing disciplines should be placed on projects.

Privately funded projects

The submission looks at ways of managing privately funded projects. It notes that the cost of the lakeside memorials has blown out from \$A6 million to \$A25 million and proposes that privately funded projects should, in future, be rare and subject to commercial disciplines and time limitations. The provision for anonymous donations to the lakeside memorials is problematic; donations to private projects should be fully disclosed in future.

Conclusion

The Forum believes the Committee and the Government have the opportunity, not only to put right the mistakes of the lakeside memorials story, but also to reform the National Memorials process so that such stories do not occur again.

Recommendations

Introduction

Recommendation I: That the Joint Standing Committee note the widespread public opposition to the proposed lakeside memorials, opposition which is now expressed in a desire for reform of the arrangements for National Memorials in Canberra.

Membership

Recommendation II: That the Canberra National Memorials Committee must include representation of A.C.T. residents and that these position(s) must be filled.

Recommendation III: That the Canberra National Memorials Committee must have a membership which is representative, interested, has access to expertise, and has time to devote to its business, and that the Committee should not be subject to capture by a single constituency.

Decision-making

Recommendation IV: That decision-making on National Memorials be guided by clear and public criteria and be supported by arrangements that ensure maximum accountability and transparency, consistent with decision-making autonomy, administrative efficiency, parliamentary oversight and public participation.

Recommendation V: That ministerial intervention in National Memorials decision-making occur only as a last resort.

Recommendation VI: That the National Memorials Ordinance 1928 be amended to include a Strategy for National Memorials, covering the elements outlined in paragraph 34 of this submission.

Recommendation VII: That the National Memorials Ordinance 1928 be amended along the lines of paragraph 34 in this submission to ensure that the meetings of the Canberra National Memorials Committee are accountable and transparent.

Recommendation VIII: That section 6(2) of the National Memorials Ordinance 1928 be amended to support and clarify the Minister's intervention powers.

Recommendation IX: That the National Memorials Ordinance 1928 be amended to require that the secretariat function of the Canberra National Memorials Committee be lodged in the Department.

Recommendation X: That there be no move towards conducting Canberra National Memorials Committee business by circulating papers or electronically (thus reducing the need for formal meetings) although all efforts should be made to circulate papers well in advance of meetings and under the transparency arrangements outlined in paragraph 34 of this submission.

Recommendation XI: That the National Memorials Ordinance 1928 be amended to require that the function of calling meetings of the Canberra National Memorials Committee be lodged with the Minister.

Recommendation XII: That there be no move to amend the National Memorials Ordinance 1928 so that all business of the Canberra National Memorials Committee is channelled through the Minister.

Recommendation XIII: That the National Memorials Ordinance 1928 be amended to ensure that the Acts Interpretation Act 1901 applies to the Ordinance and that legal consideration be given to the status of decisions of the CNMC since 1953 as to whether they have been made legally made.

Recommendation XIV: That government ensure that, where National Memorials have already been built, decisions relating to them are validated.

Recommendation XV: That government note other suggestions made in the Attorney-General's Department issues paper of June 2010.

Independent, expert advice

Recommendation XVI: That protocols be developed under the Strategy for National Memorials, and along the lines of paragraph 61 of this submission, to enable the provision of independent, expert advice to the Canberra National Memorials Committee.

Transparency

Recommendation XVII: That protocols be developed under the Strategy for National Memorials, and along the lines of paragraph 63 of this submission, to ensure the transparency of the work of the Canberra National Memorials Committee and National Memorials projects.

Parliamentary oversight

Recommendation XVIII: That reforms along the lines of paragraph 65 of this submission be implemented to support parliamentary oversight of the work of the Canberra National Memorials Committee and National Memorials projects.

Public participation

Recommendation XIX: That reforms along the lines of paragraph 68 of this submission be implemented to support public participation in the work of the Canberra National Memorials Committee and National Memorials projects.

Recommendation XX: That section 6(2) of the National Memorials Ordinance 1928 be amended to support and clarify the role of public participation in the work of the Canberra National Memorials Committee.

Current proposals

Recommendation XXI: That the Minister recommend to the Canberra National Memorials Committee that all previous decisions on the lakeside memorials be rescinded and, the Canberra National Memorials Committee having made a rescission decision, that the Minister make a rescission determination under section 7(2) of the National Memorials Ordinance 1928.

Recommendation XXII: Alternatively to Recommendation XXI, that the Minister determine that the lakeside memorials project be suspended and reconsidered under the reformed arrangements proposed in this submission, and that a moratorium on future National Memorials projects be imposed until a Strategy for National Memorials (as outlined in this submission) is in place, with future proposed memorials to be considered against that strategy.

Project slippage

Recommendation XXIII: That protocols under the Strategy for National Memorials, and along the lines of those in paragraph 89 of this submission, should be put in place to deal with National Memorials project slippage.

Privately funded projects

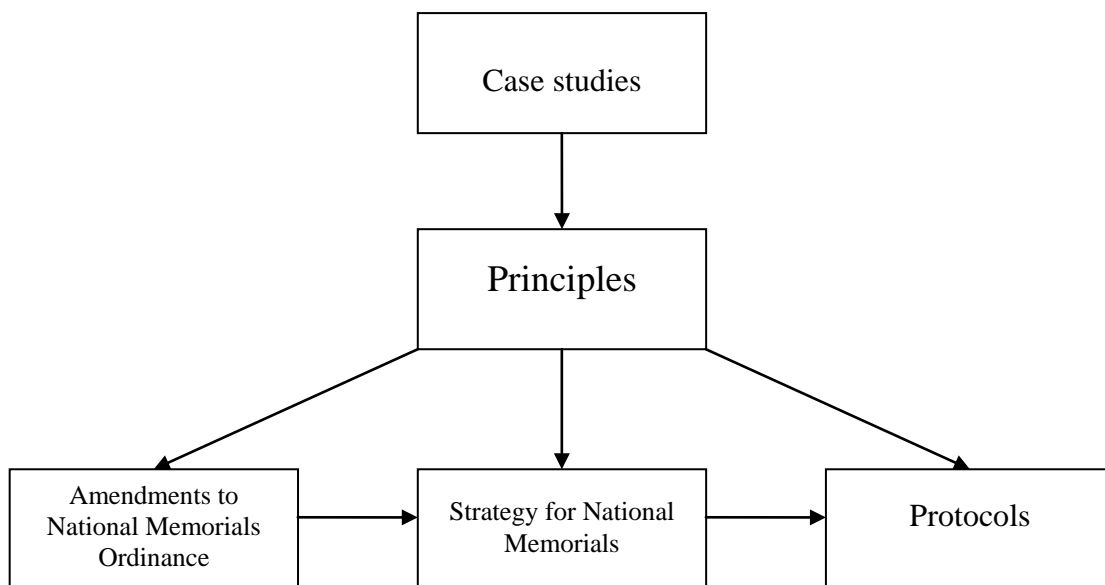
Recommendation XXIV: That principles relating to privately funded projects be included in the Strategy for National Memorials, these principles to be along the lines of those in paragraph 92 of this submission.

Introduction

1. The Lake War Memorials Forum (the Forum) welcomes this inquiry. It notes that the long-overdue examination of the *National Memorials Ordinance 1928* (the Ordinance) has been triggered by the deeply flawed process associated with the proposed memorials to World Wars I and II (the lakeside memorials).
2. Background information on the Forum is at [Attachment A](#), including a list of some distinguished opponents of the lakeside memorials and a link to the Forum website, which includes much relevant material. The website reports two public meetings organised by the Forum, the second one attended by some three hundred people, who voted unanimously against the lakeside memorials. The Forum has the names of well over two hundred people on its distribution lists. The website also records the views of dozens of residents of Canberra and elsewhere.

Recommendation 1: That the Joint Standing Committee note the widespread public opposition to the proposed lakeside memorials, opposition which is now expressed in a desire for reform of the arrangements for National Memorials in Canberra.

3. This submission responds against the terms of reference for the Inquiry, using case studies from the lakeside memorials process. The submission proposes:
 - *principles* to govern the approach to future National Memorials in Canberra;
 - *reforms* involving amendments to the Ordinance, development of a Strategy for National Memorials (the Strategy) and administrative protocols deriving from the Strategy.
4. The general concept of the submission is thus:



Reform

5. Note also:

- The terms of reference overlap at some points and the submission takes account of this.
- The terms of reference do not address parts of the Ordinance referring to Canberra suburb and street nomenclature; nor does the submission.
- The submission draws upon material obtained under Freedom of Information (FOI) from the National Capital Authority (the NCA) in March and April 2011 and the Department of Regional Australia, Regional Development and Local Government (the Department) in April and September 2011. (Copies of this material are available to the Inquiry on request.)
- The terms of reference seem to assume the continuing existence of the Canberra National Memorials Committee (the CNMC); so does the submission.
- The submission assumes the continuing existence of the NCA with its current powers, although the Forum recognises that the Government's response to the Hawke Report may affect both of these aspects.
 - For example, the role of managing National Memorials on National Land could pass to another organisation.
- The Inquiry's terms of reference are quite narrow and do not directly address the issue of what Australians want to commemorate and how commemoration can shape our view of ourselves and others' views of us.
- The submission includes a number of Attachments giving background or further exploring issues raised in the text. There are footnotes.
- The submission makes a number of recommendations.

1. The administration of the National Memorials Ordinance 1928

General

6. The Ordinance is made under the *Seat of Government (Administration) Act 1910*. The legislative history of the Ordinance since 1928 is at [Attachment B](#).
7. Compared with some long-standing legislation, the Ordinance has remained almost unchanged since it was first made. Thus, it is still largely a creature of its time.
 - The role of the Prime Minister as nominal chair of the CNMC dates from a time when the Prime Minister's job was considerably less time-consuming than it is in 2011.
 - Naming the suburbs and streets of the new capital seems to have been a higher priority in those early days than making rules for National Memorials.¹
 - The drafting of the Ordinance is inconsistent and jumbled. For example:
 - there is provision for parliamentary disallowance of ministerial determinations on nomenclature (sections 7(3), 8) but not on National Memorials;
 - section 6 on the Minister's powers and functions would have been much clearer had it been broken into more sub-sections; and
 - while section 6(2) refers to the CNMC considering the "location *or* character" (emphasis added) of National Memorials, it is only an assumption that the section allows the two aspects to be considered together or sequentially.²
8. Canberra in 1928 had less than ten thousand people; Canberra today is home to forty times that number. The paddocks of 1928 have become the landscaped lakes and avenues of 2011. Those changes alone point to the incongruity of an ordinance that has barely altered.

¹ Indeed, Prime Minister Bruce seems to have seen both monuments and nomenclature as sub-sets of memorialising. See **Attachment C**.

² The following is the interpretation of the Department of Transport and Regional Services (DOTARS, the then responsible Department) when briefing Canberra National Memorials Committee (CNMC) member, department Secretary, Mike Taylor, for the CNMC meeting of March 2007: "[T]he Ordinance makes no requirement for the Committee to separately approve the characteristics of a memorial once the location has been decided. However, the Committee could agree to meet again to approve the characteristics of the memorials after plans have been drawn up for them, to ensure that the approval of the memorials *in toto* is robust." (FOI material.) All that the CNMC did, however, was to agree the very general "design intent" in August 2007, look at the three short-listed designs in May 2008 (two members provided brief comments on the designs out of session) and agree the "character" of the winning design in November 2008. "Characteristics" is clearly more demanding than "character".

a. The membership of the Canberra National Memorials Committee

9. The CNMC predates the Ordinance. The original 1927 membership of the CNMC, the changes since then and the current membership are summarised at [Attachment C](#). The essential *formal* features since 1928 have been:
- bipartisan representation from the Parliament;
 - a majority of parliamentarians; and
 - representation from the responsible Minister of the day and the relevant Department.
10. The membership provisions in the Ordinance have not, however, been reflected in reality. The most notable feature of the CNMC's membership history in practice has been the reprehensible failure of successive governments since 1953 to fill the two positions for A.C.T. residents. (Replacing two historians with two residents was one of only two significant amendments in the Ordinance's history; the other, in 1933, gave the Minister the power to appoint a member. See [Attachment B](#).) This failure has:
- thwarted the will of the Parliament;
 - denied the residents of the national capital a voice in how their city looks and how parts of it are named; and
 - deprived the CNMC of local knowledge and commitment that might have improved the quality of its decisions and made it more difficult for it to function as an instrument of the executive.
11. This last point has been particularly important, given the evidence from the lake memorials case studies in this submission that some of the CNMC members who *did* attend its meetings lacked the interest and the time that its deliberations required. By contrast, others used the Committee to advance their organisation's agendas or the agendas of outside groups to which they had made commitments. In the absence of commitment from some members, interested and informed officials – or officials doubling as members – took the initiative.
12. Any future CNMC *must* include accountable representation on the CNMC of the people who live in and love our national capital. After 58 years of neglect, anything less should be unconscionable.
13. Not everyone has this view. The June 2010 meeting of the CNMC had before it a document prepared by the then responsible Department, Attorney-General's, for the then responsible Minister, Mr O'Connor. (The responsible division, Territories, is now located in the Department of Regional Australia, Regional Development and Local Government.)
- The document was titled *Issues paper – Possible amendments to the National Memorials Ordinance 1928*. It included as a possible amendment the following: "Consider removing the provision that stipulates that two ACT residents must be appointed to the Committee".
 - The issues paper said removing the requirement for A.C.T. resident members "focuses Committee membership on its operational core and is directed at

increasing the operational ease of the Committee”. (This is presumably code for “allows officials to get through business as quickly as possible without distractions from difficult private citizens”.)

- On the other hand, the paper supported adding to the Ordinance a “mechanism for public objections”. Other options suggested in relation to membership were making the Governor-General’s power to appoint A.C.T. residents discretionary, rather than mandatory, or empowering the Minister to appoint members, which might include A.C.T. residents. The paper also briefly discussed lengths of appointment of members, including of A.C.T. residents.

Recommendation II: That the Canberra National Memorials Committee must include representation of A.C.T. residents and that these position(s) must be filled.

Case study: lakeside memorials³

14. Attendance at CNMC meetings has failed to reflect the legislation in other ways, as well. Under section 3 of the Ordinance, the CNMC currently has nine members: the Prime Minister as Chair; the responsible Minister; the Leader of the Government in the Senate; the Leaders of the Opposition in the House and the Senate; the Secretary of the responsible Department; an officer appointed by the responsible Minister; two other members appointed by the Governor-General from among A.C.T. residents. (As noted above, these last two positions have never been filled.)
15. If all members attend CNMC meetings, parliamentarians have a majority. The quorum is three members.
16. The FOI material made available by the NCA and the Department in March-April 2011 covers five meetings of the CNMC between March 2007 and March 2010. These meetings also dealt with other memorials besides the lakeside memorials. Dates, attendance (including observers and advisers), agenda items and durations of these meetings are at [Attachment D](#).
17. The FOI material shows the following features of these meetings.
 - Parliamentary members of the CNMC, from the Prime Minister down, neglected the CNMC.
 - Neither Prime Minister Howard nor Rudd attended a meeting in this period, although Mr Howard sent a “no objection” letter to the March 2007 meeting, which decided the site of the lakeside memorials.⁴
 - Parliamentarians were never in a majority at any meeting.

³ This section draws upon David Stephens, “Conspicuous commemoration”, *Inside Story*, 22 May 2011, <http://inside.org.au/conspicuous-commemoration>. See also the letter from Brett Odgers at **Attachment I**. The *Inside Story* article was reprinted in the *Canberra Times (Public Sector Informant)* on 7 June 2011, unfortunately with sub-editing errors.

⁴ FOI material. Annabelle Pegrum, Chief Executive, National Capital Authority (NCA), wrote letters to the lakeside memorials’ proponents after the meetings of March and August 2007. The letters implied that Prime Minister Howard was present at both meetings when he was not. For example: “On 1 March 2007, the Canberra National Memorials Committee (CNMC), which is chaired by the Prime Minister, considered...” The letters were reproduced on the proponents’ website (<http://mdc.org.au>, under “News”) and were presumably used as evidence of Mr Howard’s support for the project.

- Only one meeting (March 2007) was bipartisan, with Senator Chris Evans in the chair and Minister Lloyd attending for part of the meeting.
- The CNMC was only able to function because of creative use of the discretionary membership and quorum provisions of the Ordinance. (The discretionary membership amendment in 1933 may well have been introduced because of quorum difficulties at that time. See paragraph 10 above.)
 - Minister Lloyd used the ministerial appointee provision to appoint then NCA Chief Executive, Annabelle Pegrum, to the CNMC. She attended three meetings in 2007-08, where she participated in decisions on matters which she had supervised at the NCA.
 - Minister Debus used the same provision to appoint the Secretary of the Department of Veterans' Affairs (DVA), Ian Campbell, to the CNMC. Mr Campbell attended two meetings in 2008 and 2010; his appointment ensured a quorum at the November 2008 meeting, the meeting having been postponed twice for lack of a quorum. (The appointment of the Secretary of DVA risked introducing both a bias in favour of memorials with an ex-service theme *and* a conflict of interest, given the responsibility of the Veterans' Affairs portfolio for the Australian War Memorial. On the other hand, there were a number of military-themed memorials on the CNMC's agenda. See [Attachment D](#).)
 - In four out of five meetings, only a bare quorum of three members attended and at the other meeting (March 2007) four members were present for only part of the meeting.
- As a result of the above, what should have been the business of the CNMC was left instead to officials and the Minister.
 - The CNMC became a convenient administrative tool of the NCA rather than a bipartisan instrument of the Parliament.

18. Despite the above facts, the NCA in recent public statements has presented a myth of the CNMC as a powerful and engaged committee. For example, in November 2010, current NCA Chief Executive, Gary Rake, listed the CNMC's "full membership" but said nothing about who actually attended its meetings. He also said the Committee was "bipartisan," "heavy hitting" and "a representation of the most senior levels of our elected representatives".⁵

Principles for CNMC membership

19. The CNMC of the future should have:

- a membership *representing* the Government, the Parliament and the people;
- a membership with a *demonstrated interest* in Canberra as the National Capital;

⁵ Joint Standing Committee on the National Capital and External Territories, *Proof Committee Hansard: Reference: National Capital Authority, Wednesday, 17 November 2010*, <http://www.aph.gov.au/hansard/joint/commtee/J13376.pdf>, pp. NCET 10, 12.

- access to relevant *expertise*;
- a membership with *time* to deal adequately with its business; and
- majority and quorum arrangements to prevent *capture* by a single constituency.

Recommendation III: That the Canberra National Memorials Committee must have a membership which is representative, interested, has access to expertise, and has time to devote to its business, and that the Committee should not be subject to capture by a single constituency.

Reform of CNMC membership

20. The following options take account of the above principles. Each option would be implemented by amending section 3 of the Ordinance. A table comparing the options against the above principles is at [Attachment E](#).

Option A: JSCNCET overlap

21. This option links the CNMC with the committee purpose-built by the Parliament to investigate and report on matters relating to Canberra, the Joint Standing Committee on the National Capital and External Territories (JSCNCET). Under this option:

- the CNMC has five members;
- the quorum is four members (with the Chair or Acting Chair having both a deliberative vote and a casting vote in the event of equality of voting); and
- the CNMC is the decision-maker on National Memorials, subject only to ministerial intervention under section 6(2) of the Ordinance.

22. Members under Option A are as follows:

- The responsible Minister (Chair). (The Secretary of the responsible Department to be a proxy member for the Minister but not to Chair.)⁶
- The Chair of the JSCNCET (Deputy Chair of the CNMC and Acting Chair in the absence of the Minister).
- Another member of the JSCNCET, elected by its members.
- Two residents of the A.C.T. (one nominated by the Minister, one by the JSCNCET).

23. Comparing this option with the above principles:

- The Government, the Parliament and the people are *represented* through the Minister, the members of the JSCNCET and the A.C.T. residents.
- All members would have a *demonstrated interest*, deriving from their responsibilities, their other committee memberships or their place of residence.
- *Expertise* would be accessed through calls for public submissions and through occasional consultancies.

⁶ The Attorney-General's Department issues paper put to the June 2010 CNMC meeting on possible amendments to the Ordinance canvassed a number of options for members to have "deputies" or "alternates".

- Having *time* available would be an issue for the Minister (hence, the proxy provision) but, in the case of other members, time pressures would be counterbalanced by their interest in the subject matter. (In the absence of the Minister, the casting vote would devolve to the Acting Chair.)
- The diverse base of the representation and the demanding quorum provision would preclude *capture* by a single constituency.

Option B: experts advising Minister

24. This option stresses the principles of expertise and interest to ensure that the Minister's final decision is well-informed. Under this option:

- the CNMC has five members;
- the Chair is elected by the members;
- the quorum is four members (with the Chair having both a deliberative vote and a casting vote in the event of equality of voting); and
- the CNMC provides advice to the Minister, who is the decision-maker on National Memorials. (The Ordinance would need to be amended to provide this.)

25. Members under Option B are as follows:

- The Chair of the Australian Council of National Trusts (*ex officio*).
- The President of the Planning Institute of Australia (*ex officio*).
- A representative of the Walter Burley Griffin Society (nominated by the Society).
- Two A.C.T. residents (nominated by community organisations and appointed by the Minister).

26. Comparing this option with the above principles:

- *Representation* of the Government and the Parliament are de-emphasised, recognising the long-standing lack of interest in National Memorials from these constituencies; the people are represented through the A.C.T. resident appointments.
- The recognition of *demonstrated interest* and *expertise* are the keys to this option. The three expert members would be knowledgeable about Canberra's history and plan, technical matters and the philosophy of National Memorials. Additional expertise would be accessed through calls for public submissions and through occasional consultancies.
- Having interest and expertise would predispose members under this option to making *time* available for the work of the CNMC.
- While this committee would lack diversity, the consequences of *capture* at the CNMC level would be avoided by the demanding quorum provision and by lodging decision-making with the Minister.

Option C: augmented CNMC

27. This option combines the spirit of Options A and B, enshrining the role of the Parliament through the JSCNCET, while providing direct access to expertise case-by-case.
28. Under Option C:
- the CNMC has six or seven members;
 - the quorum is four members (with the Chair or Acting Chair having both a deliberative vote and a casting vote in the event of equality of voting); and
 - the CNMC is the decision-maker on National Memorials, subject only to ministerial intervention under section 6(2) of the Ordinance.
29. Members under Option C are as follows:
- The responsible Minister (Chair). (The Secretary of the responsible Department to be a proxy member for the Minister but not to Chair.)
 - The Chair of the JSCNCET (Deputy Chair of the CNMC and Acting Chair in the absence of the Minister).
 - Another member of the JSCNCET, elected by its members.
 - Two residents of the A.C.T. (one nominated by the Minister, one by the JSCNCET).
 - Up to two temporary members with appropriate expertise, appointed by the Minister, depending on the areas of expertise (e.g. environment, heritage, planning, history, war service) appropriate to the memorial under consideration.
30. Comparing this option with the above principles:
- The Government, the Parliament and the people are *represented* through the Minister, the members of the JSCNCET and the A.C.T. residents.
 - All members would have a *demonstrated interest*, based on their responsibilities, their other committee memberships, their place of residence or their expertise.
 - *Expertise* would be accessed through the appointment of temporary members with knowledge appropriate to the memorial under consideration. Additional expertise would be accessed through calls for public submissions and through occasional consultancies.
 - Having *time* available would be an issue for the Minister (hence, the proxy provision) but, in the case of other members, would be counterbalanced by their interest in the subject matter. (In the absence of the Minister, the casting vote would devolve to the Acting Chair.)
 - The diverse base of the representation and the demanding quorum provision would preclude *capture* by a single constituency.

b. The process for decision-making by the CNMC

Case study: lakeside memorials⁷

31. The following parts of the Ordinance are particularly relevant to the CNMC's decision-making. They express the original legislative intention that the CNMC should provide a mechanism for bipartisan endorsement of executive proposals for Canberra's nomenclature and memorials.
- Section 3(4): CNMC meetings are summoned by the Secretary of the responsible Department;
 - Section 6(2): the Minister may make proposals and recommendations to the CNMC;
 - Section 7(1): the CNMC may respond to the Minister's proposals or recommendations by approving them, approving them with alterations, rejecting them or returning them for further consideration.
32. The FOI material made available by the NCA and the Department covered the five meetings of the CNMC between March 2007 and March 2010. This material reveals the following features of these meetings.
- Proceedings of the CNMC probably flouted the provisions of the Ordinance.
 - The March 2007 meeting was summoned by the responsible Minister rather than by the Secretary of his department, as the Ordinance required.
 - Key decisions on the location (March 2007) and "design intent" (August 2007) of the lakeside memorials were made on motions by the Chief Executive of the NCA and the Secretary of the responsible Department (Transport and Regional Services, DOTARS), with no involvement from the Minister other than voting, whereas the Ordinance does not explicitly provide for members other than the Minister to submit business.
 - Key decisions seem to have been remade to remove defects.
 - The meeting of November 2008 approved the location (Rond Terraces) and character (as contained in the winning design in the design competition) of the lakeside memorials. This meeting and decision may have arisen from a realisation in the Attorney-General's Department (the responsible Department at the time) that the 2007 decisions were flawed.
 - Key decisions were made on the basis of inadequate consideration of evidence.
 - For example, the decision at the August 2007 meeting to endorse the design intent and "commemorative purpose" of the lakeside memorials was based on consideration of a one page document drafted primarily by the memorials' proponents; the discussion took approximately ten minutes.

⁷ This section draws upon Stephens, "Conspicuous commemoration".

- No-one in the CNMC or the NCA seriously questioned the proponents' key assertion that there was no memorial to the dead of the two world wars, despite the concrete commemorative evidence at the Australian War Memorial (AWM) and the historical record of the 1952 amendments to the AWM legislation.⁸
- One key decision flouted the NCA's own mandatory guidelines.
 - The NCA brief to the Minister for the March 2007 meeting said that the lakeside memorials proposal "is consistent with the criteria contained within the commemorative guidelines". The decision on location proceeded accordingly, even though the guidelines referred to include a "mandatory" criterion that a "commemorative proposal must not duplicate the themes or subject matter of an existing commemorative site"; the clash was never properly justified at the time.⁹
- Deciding the location of the lakeside memorials separately from their character left key design decisions to middle level officials in cooperation with the memorials' proponents.
 - Section 7 of the Ordinance allows the CNMC to consider "the location or character" of proposed memorials, although it does not seem to prevent the two aspects being considered together. The CNMC arguably had the power to consider them together, and the power to make location approval dependent on character, but did not exercise either power. (See paragraph 7 above and note 2.)
 - Deciding the location first (Rond Terraces, March 2007) and agreeing only very general design parameters (decision on "commemorative purpose" and "design intent", August 2007) guaranteed that the memorials would be large. In the absence of an authoritative and prescriptive decision on character, the *default* design parameter became the perception held by the proponents and their allies in the NCA that important wars required imposing memorials. ([Attachment F](#) is the text of a *Canberra Times* article which traces the design history of the memorials.)
- One participant in key meetings had a conflict of interest.
 - Then NCA Chief Executive, Annabelle Pegrum, was appointed by the Minister as a member of the CNMC, in which position at three meetings she moved and deliberated and voted upon motions relating to matters which she had overseen and promoted within the NCA.

⁸ Introducing the 1952 Bill broadening the Memorial's charter, Minister WS Kent Hughes said the "main purpose is to make the Australian War Memorial ... a memorial *not only* to the Australian servicemen who gave their lives in the 1914-18 war, as it is under the present act, *but also* to those Australian servicemen who were killed in the 1939-45 war *and* all other Australians who have given their lives on active service (emphasis added)." (House of Representatives, *Daily Hansard*, 6 May 1952, p. 21). The AWM is meant to be both a memorial to people who died in particular wars and to those who died in all wars.

⁹ NCA, *Guidelines for commemorative works in the National Capital* (2002), <http://downloads.nationalcapital.gov.au/corporate/publications/misc/CommemGuidelines.pdf>, p. 7. The issue of "mandatory guidelines" is discussed in Stephens, "Conspicuous Commemoration".

- Public exposure of the proposed lakeside memorials was almost non-existent until the launch of the winning design in February 2009, nearly four years after the project was first discussed between the proponents and the NCA.
- Meetings were perfunctory and hurried.
 - For example, as noted above, at the August 2007 meeting, in approximately ten minutes, the responsible Minister, the Secretary of the Department (DOTARS) and the Chief Executive of the NCA decided the character of the lakeside memorials on the basis of a one page document prepared primarily by the memorials' proponents.¹⁰ ([Attachment D](#) provides further details.)
- NCA records relating to key decisions cannot be found.
 - At two public meetings early in 2011, current NCA Chief Executive, Gary Rake, admitted the NCA's records did not contain a "rationale" for key decisions relating to the lakeside memorials.¹¹ It is not clear whether these records ever existed or whether they have disappeared.

Principles for CNMC decision-making

33. The CNMC of the future should have:

- clear and public *criteria* against which decisions are made regarding National Memorials;
- *maximum accountability and transparency*, consistent with decision-making autonomy, administrative efficiency, parliamentary oversight and public participation; and
- *ministerial intervention* under section 6(2) of the Ordinance only as a last resort.

These principles and the following two recommendations relate to each of the sub-headings under this term of reference.

Recommendation IV: That decision-making on National Memorials be guided by clear and public criteria and be supported by arrangements that ensure maximum accountability and transparency, consistent with decision-making autonomy, administrative efficiency, parliamentary oversight and public participation.

Recommendation V: That ministerial intervention in National Memorials decision-making occur only as a last resort.

¹⁰ Even then, there seems to have been some confusion as to what had been decided. When Ms Pegrum wrote to the proponents reporting the decision, she quoted the words on commemorative purpose as "approved by the CNMC" but not the words on design intent. (FOI material.) See **Attachment K**.

¹¹ Lake War Memorials Forum, *Summary of the meeting on 23 March 2011*, <http://lakewarmemorialsforum.org/23March.html> ; NCA, *Public forum 2011* [13 April 2011], http://www.nationalcapital.gov.au/downloads/corporate/Public_Forum_2011_Transcript.pdf .

Reform of CNMC decision-making

34. Some reform elements would not need to be explicitly in the Ordinance but could be developed by the CNMC and made by the Minister as Regulations under the Ordinance or as Amendments to the National Capital Plan.¹² The Strategy itself should be in the Ordinance. Reform should address the following.

Criteria

- A Strategy for National Memorials, drawing upon the NCA *Guidelines for commemorative works in the National Capital (2002)*¹³ and including, e.g.
 - aspects of Australian history and culture needing celebration, including what Australians want to commemorate and how commemoration can shape our view of ourselves and others' views of us;
 - criteria defining a National Memorial, including the possibility of non-tangible memorials, such as scholarships, funds and other forms of commemoration not involving “bricks and mortar”;
 - consideration of whether proposed National Memorials will duplicate other memorials around Australia;
 - planning aspects, including absorption capacity of central Canberra for memorials and commemorative structures, alternative sites outside central Canberra;
 - protocols for dealing with memorials donated by other countries;
 - circumstances under which privately proposed memorials are acceptable (including narrow guidelines for commercial confidentiality);
 - funding arrangements for privately proposed memorials; and
 - timing disciplines on projects.
- The Strategy should be set out in the Ordinance. The key is to make the criteria *binding*.
- It is worth noting that the current Ordinance lacks even a definition of “memorial” let alone of “National Memorial”.

Recommendation VI: That the National Memorials Ordinance 1928 be amended to include a Strategy for National Memorials, covering the elements outlined in paragraph 34 of this submission.

Accountability and transparency

- Require that proposals for National Memorials be considered against the Strategy for National Memorials.
- Minutes of CNMC meetings to record consideration and decisions against the Strategy.

¹² Section 12AD of the *Seat of Government (Administration) Act 1910* allows for Regulations to be made under Ordinances. Amendments to the National Capital Plan are made by a Legislative Instrument under the *Australian Capital Territory (Planning and Land Management) Act 1988*, which is a Commonwealth Act.

¹³ NCA, *Guidelines*.

- Where the CNMC considers location and character separately, location decisions to be provisional, subject to approval of memorials' character and an opportunity for public comment.
- Meeting agendas, summaries of agenda papers, Minutes and decisions to be published on an appropriate website.
- The CNMC to be master of its own business, e.g. Chair to call meetings, any member able to bring business to meetings and to move motions.
 - Current provisions seem to require key motions to be moved by Minister, which is unnecessarily restrictive.
- That ministerial determinations regarding National Memorials be subject to the same disallowance provisions that apply under sections 7(3) and 8 of the Ordinance to CNMC decisions regarding nomenclature (see paragraph 7 above).

Recommendation VII: That the National Memorials Ordinance 1928 be amended along the lines of paragraph 34 in this submission to ensure that the meetings of the Canberra National Memorials Committee are accountable and transparent.

Ministerial intervention

- Retain ministerial power to rescind CNMC decisions, subject to a public consultation period, the Minister fully disclosing reasons for intervention, and further consideration by the CNMC.
 - That is, retain the thrust of section 6(2) of the Ordinance. A reworked section 6(2) should effectively be the centre-piece of the amended Ordinance. A preliminary statement of the legal position regarding section 6(2) is at [Attachment G](#), which also includes material on the CNMC's decisions. [Attachment H](#) analyses the potential of section 6(2) to facilitate both public participation in the work of the CNMC and ministerial intervention as a last resort. See also paragraph 81 below.
- The secretariat function for the CNMC should reside in the responsible Minister's department, not in the NCA.
 - The NCA should be seen as an "institutionalised expert" and the potential manager of National Memorials and thus as having a conflict of interest in relation to decisions on them. It cannot successfully, or even ethically, play, simultaneously or successively, the roles of project initiator or partner, objective assessor, decision-maker and final custodian.¹⁴
 - The NCA, if it were to be secretariat to the CNMC, would be the "gatekeeper" of the CNMC's business, giving the NCA a potentially powerful position.
 - Even without the secretariat function, the NCA would play an important role in relation to National Memorials. The Minister would be briefed by

¹⁴ The Attorney-General's Department issues paper put to the June 2010 CNMC meeting on possible amendments to the Ordinance canvassed the creation of the defined role "expert advisor" to the CNMC, a role the paper suggested could be filled by the Chief Executive of the NCA. The issues paper also looked at inserting a conflict of interest provision into the Ordinance.

the NCA. The NCA would be available at CNMC meetings to answer questions. The NCA would also be the appropriate body to manage public participation and consultation, within parameters set by the Minister in accordance with the Strategy for National Memorials.

- While the NCA's recent commitment to greater public consultation is commendable, public consultation cannot prevent the abuse of an "insider" position, where individuals take unfair advantage of access to decision-making to advance narrow organisation or interest group agendas.

Recommendation VIII: That section 6(2) of the National Memorials Ordinance 1928 be amended to support and clarify the Minister's intervention powers.

Recommendation IX: That the National Memorials Ordinance 1928 be amended to require that the secretariat function of the Canberra National Memorials Committee be lodged in the Department.

Attorney-General's Department issues paper, June 2010

35. Paragraph 13 above referred to a document put before the June 2010 meeting of the CNMC. The document was titled *Issues paper – Possible amendments to the National Memorials Ordinance 1928*. Members of the CNMC were asked to comment upon the paper and respond by 27 August 2010 so that the then responsible Department, Attorney-General's, could prepare a paper and make recommendations for amendment for the CNMC's consideration before the end of 2010.
36. Events (general election, Machinery of Government change, creation of Department of Regional Australia, Regional Development and Local Government, with responsibility for the CNMC) intervened, however, and the work did not proceed. The CNMC has not met since June 2010.
37. The issues paper has been made available under FOI and the following points – as well as those raised at paragraph 13 above regarding CNMC membership¹⁵ – are extracted for the JSCNCET's information. There are cross-references to points made elsewhere in this submission. While the paper's current status is uncertain it contains useful discussion.

Out-of-session consideration of matters

38. The March 2010 meeting of the CNMC had agreed to seek the Governor-General's agreement to vary the Ordinance to allow CNMC decisions to be made by exchange of correspondence. The June issues paper proposed amendments to allow for participation by telephone, video conference and the like, as well as for resolutions by correspondence. Arguments for these changes were based on efficiency, reducing delays and taking account of other calls on the time of CNMC members ("high level members of Parliament and senior Commonwealth officers") and the need to "reflect modern business practices".¹⁶
39. While the Forum welcomes the drive for efficiency it notes that these proposed changes are not explicitly balanced in the issues paper by provision for significantly greater public consultation. Also, given the secretiveness of past

¹⁵ See also footnotes 6 and 14 above.

¹⁶ FOI material.

“face-to-face” CNMC decision-making, the Forum cannot support a move for more business “on the papers” or electronically. Such a move would risk producing more flawed decisions but leave even less trace. There is greater scope for improvement by pursuing the membership and decision-making reforms proposed elsewhere in this submission than by leaving CNMC membership unchanged and providing for decision-making by wire or on the papers.

Recommendation X: That there be no move towards conducting Canberra National Memorials Committee business by circulating papers or electronically (thus reducing the need for formal meetings) although all efforts should be made to circulate papers well in advance of meetings and under the transparency arrangements outlined in paragraph 34 of this submission.

CNMC procedures

40. The issues paper discusses matters of detail in relation to determining quorums, summoning meetings and the provision of secretariat services. The Forum’s view on quorums is at paragraph 19 above – quorums should be designed to prevent capture of the CNMC by any one constituency.
41. The Forum’s views on secretariat arrangements are at paragraph 34 above, under “Ministerial intervention”. The Forum does not have a strong preference between the Minister and the Secretary in regard to the calling of CNMC meetings but reiterates the view in Recommendation IX that the secretariat role should not reside in the NCA, whether directly or by delegation from the Minister. The same applies to the function of calling meetings.

Recommendation XI: That the National Memorials Ordinance 1928 be amended to require that the function of calling meetings of the Canberra National Memorials Committee be lodged with the Minister.

42. The June 2010 issues paper also proposed allowing “all Ordinance activities to be directed through the Minister who would have a discretion whether or not to refer matters to the Committee”, with an appropriate report. “This”, the paper says, “would streamline the process of receiving and evaluating proposals, remove the current double handling, and increase efficiency”.
43. The “double handling” mentioned refers to section 6 of the Ordinance which, as noted above, allows for “communications, representations and recommendations” to be directed *either* to the CNMC or the Minister. This submission considers section 6 extensively (see paragraph 34 above, under “Ministerial intervention”, paragraphs 69-70 and 80-83 below, [Attachment G](#), [Attachment H](#), [Attachment I](#)).
44. The Forum believes improving section 6 is the key to a better Ordinance. The obvious deficiencies of the section as currently drafted are not best addressed by consolidating power in the Minister, particularly since the history of the lakeside memorials shows instances of ministerial inattention leading to problems. Instead, section 6 should be preserved and clarified as a means of democratically facilitating a wide range of influences on decision-making regarding National Memorials.

Recommendation XII: That there be no move to amend the National Memorials Ordinance 1928 so that all business of the Canberra National Memorials Committee is channelled through the Minister.

Has the CNMC not been legally constituted since 1953?

45. The issues paper says it is “desirable” that the National Memorials Ordinance be amended so that it is interpreted in accordance with the *Acts Interpretation Act 1901*, rather than in accordance with the *Interpretation Ordinance 1967*. (The Interpretation Ordinance applies to the memorials Ordinance by virtue of the *Reserved Law (Interpretation) Ordinance 1989*.) This change will, the paper says, “ensure clarity, certainty and consistency in the interpretation of the Ordinance”.
46. The word “desirable” is something of an understatement. Elsewhere, the issues paper notes that the CNMC’s lack of A.C.T. resident members meant it was “possible that the Committee has not been legally constituted since 1953”.¹⁷ This seems to be because the Interpretation Ordinance does not protect the operations of bodies that have vacancies in their membership.
47. By contrast with the Interpretation Ordinance, section 33(2B) of the Acts Interpretation Act says, “Where an Act confers a power or function, or imposes a duty, on a body, whether incorporated or unincorporated, the exercise of the power or the performance of the function or duty is not affected **merely because of a vacancy or vacancies in the membership of the body.**” (Emphasis added.) In other words, the Act *protects* the decision-making of bodies that have vacancies in their membership.
48. If the CNMC’s lack of A.C.T. resident members means the Committee has not been legally constituted for 58 years, and if the exercise of the CNMC’s functions has not been protected over that period by the Acts Interpretation Act or the Interpretation Ordinance, then the CNMC’s decisions over that time may not have been legally made.
49. That such a situation has existed for so long underlines the carelessness with which successive governments have dealt with decision-making in relation to National Memorials. Clearly, past error needs to be rectified; there is no point in compounding laxity with uncertainty.

Recommendation XIII: That the National Memorials Ordinance 1928 be amended to ensure that the Acts Interpretation Act 1901 applies to the Ordinance and that legal consideration be given to the status of decisions of the CNMC since 1953 as to whether they have been made legally made.

Correcting the CNMC’s past mistakes

50. Many external critics of the lakeside memorials process would argue that the biggest mistake associated with it was the creation of real potential for competition with the AWM (see [Attachment J](#)). Officials, however, have been more concerned with procedural problems.
51. In March 2007, the then responsible DOTARS briefed Secretary Taylor for his attendance at the CNMC meeting. The brief reminded Mr Taylor that his department was “leading a project to review the [National Memorials] Ordinance and correct Committee decisions from previous years that may be invalid because they did not comply with the Ordinance’s procedures”.¹⁸

¹⁷ FOI material.

¹⁸ FOI material.

52. These mistakes may have related not just to convening meetings or operating with unfilled vacancies but to a range of actions that may not have been in accordance with the Ordinance. [Attachment K](#) to this submission asks questions in relation to the CNMC meetings of 2007-08. The November 2008 decision on the location and character of the lakeside memorials seems to have been a “remake” of the 2007 decisions which the Attorney General’s Department, as the newly responsible department, may have thought were not properly made (see paragraph 32 above).
53. FOI material made available to the Forum has not yet included documents relevant to the earlier years of the corrective project mentioned in Mr Taylor’s briefing note, but the early work seems to have led ultimately to the issues paper of June 2010. Under the heading “Validate previous decisions made by the Committee convened outside Ordinance requirements” the issues paper says:
- Proper procedure in relation to decisions on national memorials has not always been followed in terms of meeting Ordinance requirements relating to the convening of Committee meetings. As a consequence, it would be desirable if all previous national memorial decisions were confirmed by a duly constituted Committee.
54. To rectify the problem, the paper proposes two validation options:
- a ministerial determination under section 7(2) of the Ordinance, relating to *each* previous decision of the CNMC, in each case specifying the location or character of the memorial to which the decision related (this is along the lines of what Minister Debus did in November 2008 in relation to the 2007 decisions, although his determination covered both location *and* character; see copy of the determination at [Attachment K](#));
 - amend the Ordinance to allow the Minister to “deem” that previous decisions of the CNMC notified to previous Ministers have been determined in accordance with the approval of the Committee with respect to the location or character of memorials.
55. Under the second option, the amended Ordinance would include a Schedule that contains a list of the memorials considered to be national memorials and a statement that they meet the fundamental criteria in the Ordinance of being on National Land. The Ordinance would provide that, on the date the proposed amendments come into effect, all memorials listed in a Schedule are national memorials.
56. Unfortunately, the issues paper does not include a draft of the Schedule, to indicate which memorials are in question. (The breadth of the options proposed indeed suggests Attorney-General’s felt there were more problems than just those associated with the convening of meetings or the absence of A.C.T. resident members. The Department may well have foreseen a long list.) The proposed Schedule is reminiscent, however, of the famous saw about Parliament being able to declare that black is white or vice versa. On the other hand, it could itself serve as a memorial, a memorial to a sorry exercise in public administration lasting more than 80 years.

Recommendation XIV: That government ensure that, where National Memorials have already been built, decisions relating to them are validated.

Other possible amendments

57. The Attorney-General's Department issues paper also proposes:

- that CNMC members have remuneration determined by the Remuneration Tribunal (would not apply to full-time Commonwealth officers);
- possibly inserting in the Ordinance a reference to the *NCA Guidelines for commemorative works in the National Capital*, though not requiring adherence to them (the Forum's stronger view on criteria is at paragraph 34 above, under "Criteria" and "Accountability and transparency");
- reviewing the appeal process under the Ordinance, at the very least making decisions on National Memorials subject to the same disallowance provisions as decisions on nomenclature (the Forum's similar view on disallowance is at paragraph 34 above, under "Accountability and transparency");
- possibly making determinations on National Memorials subject to review by a body such as the Administrative Appeals Tribunal;
- allowing for members of the public to object in writing to decisions about National Memorials (the paper seems to recognise neither the need for public involvement at *each* stage of the decision-making process nor the potential of section 6(2) of the Ordinance as a means for public involvement: see the Forum's more far-reaching views at paragraph 34 above, under "Accountability and transparency", and paragraphs 67-70 below); and
- updating terminology in the Ordinance in line with modern legislative practice.

Recommendation XV: That government note other suggestions made in the Attorney-General's Department issues paper of June 2010.

c. Mechanisms for the CNMC to seek independent, expert advice

Threshold question regarding experts

58. This section relates to the three membership options discussed at paragraphs 19-30 above. The threshold question is whether experts should be actual *members* of the CNMC or not be members but be *accessible*. The two options are not mutually exclusive; there could be experts of both types.

Arguments regarding access to experts

59. The following are arguments *for* experts being members of the CNMC. (Conversely, they are arguments against experts just being non-members.) Having experts as members means:

- experts are at hand;
- experts are more likely to be interested in and have the time for the work of the CNMC than elected “ex officio” members, such as Ministers and parliamentarians;
- while there will have to be a choice between a range of experts (to keep numbers on the CNMC manageable) additional advice can always be accessed via consultancies or personal networks; and
- it is more difficult to ignore expert advice given “inside the tent” than advice from outside, which is perhaps selectively sourced or filtered.

60. The following are arguments *against* experts being members of the CNMC. (Conversely, they are arguments for experts just being non-members.) From this perspective, having experts as members means:

- the CNMC is more likely to be influenced – or even captured, depending on the balance of numbers – by the proponents of “pet projects” or people with idiosyncratic perceptions;
- having, for size reasons, to choose between expert members, which could cut the CNMC off from relevant expertise – it will tend to “make do” with its in-house expertise when more relevant sources may be available;
- relying too much on institutionalised expertise at the expense of the range of views that would come from public submissions, entrants in design competitions; and
- making experts less independent than they would be if they were at arms’ length.

Protocols regarding access to experts

61. A Strategy for National Memorials, as proposed above, could support protocols for obtaining independent, expert advice, regardless of whether experts were appointed as members of the CNMC. These protocols might include:

- a non-exclusive list of the areas of expertise likely to be relevant to National Memorials (e.g. heritage, landscape, architecture, history, indigenous, military, traffic);
- a non-exclusive list of the institutions and professional bodies likely to make worthwhile contributions to decisions on National Memorials; and
- circumstances under which consultancy contracts might be entered into to obtain additional advice.

Recommendation XVI: That protocols be developed under the Strategy for National Memorials, and along the lines of paragraph 61 of this submission, to enable the provision of independent, expert advice to the Canberra National Memorials Committee.

d. Opportunities for improving transparency in the administration of the Ordinance

Principles for improving transparency

62. The “principles for CNMC decision-making” set out above are relevant here also. The CNMC of the future should have:

- clear and public *criteria* against which decisions are made regarding National Memorials;
- *maximum transparency*, consistent with accountability, decision-making autonomy, administrative efficiency, parliamentary oversight and public participation; and
- *ministerial intervention* under section 6(2) of the Ordinance only as a last resort.

Reforms to improve transparency

63. The material above under “Reform of CNMC decision-making” is relevant here also, because it relates to the actual business of the CNMC. As well, transparency *beyond* the meetings of the CNMC could be improved by:

- public consultation and opportunity for submissions on location and character (design and concept);
- plans and public submissions thereon to be made available on an appropriate website;
- design competitions, with juries representing the CNMC, experts and, in the exceptional case of privately proposed memorials, proponents;
- short-listed designs to be made available on an appropriate website for public comment; and
- CNMC meeting agenda, summary of agenda papers, status of all memorials proposed and in progress, and Minutes to be published on an appropriate website.

Recommendation XVII: That protocols be developed under the Strategy for National Memorials, and along the lines of paragraph 63 of this submission, to ensure the transparency of the work of the Canberra National Memorials Committee and National Memorials projects.

e. The appropriate level of parliamentary oversight for proposed National Memorials

Principles for parliamentary oversight

64. Similar principles apply here to those proposed above for other elements of the CNMC's operations:

- *maximum accountability and transparency*, consistent with decision-making autonomy, administrative efficiency and public participation;
- *maintain the Ordinance* as the centre-piece of protecting the important role of the Parliament in decision-making on National Memorials; and
- *taking advantage of existing mechanisms* which are based on subject matter interest and availability of time.

Reforms to improve parliamentary oversight

65. The following reforms emphasise the role of the JSCNCET as an established oversight mechanism which could have its mission enhanced.

- Amend the Ordinance to provide for an annual report from the CNMC to the JSCNCET.
- Amend the Resolution of Appointment for the JSCNCET, giving it a new function to inquire into and report on annual reports from the CNMC.¹⁹
- Amend sections 7 and 8 of the Ordinance to provide for parliamentary disallowance of ministerial determinations on National Memorials.
- Ensure adequate time for consideration of National Memorials matters in the bi-annual appearances of the NCA before the JSCNCET.
- Ensure adequate time for National Memorials matters in Estimates Committees considerations of the Department's and the NCA's estimates.

Recommendation XVIII: That reforms along the lines of paragraph 65 of this submission be implemented to support parliamentary oversight of the work of the Canberra National Memorials Committee and National Memorials projects.

66. As well as these reforms, it should be noted that the above CNMC membership options, because they contain varying numbers of parliamentarians, have different implications for parliamentary oversight. Options A and C would give parliamentarians a better insight into National Memorials issues and thus enhance parliamentary oversight through other avenues.

¹⁹ The current Resolution of Appointment is at <http://www.aph.gov.au/house/committee/ncet/resolution.htm> . Minor amendments would be required to clauses 1. and 2.

f. The appropriate level of public participation in the development of proposed National Memorials

Principles for public participation

67. The only principles should be:

- *maximum public participation*, consistent with accountability, transparency, decision-making autonomy, administrative efficiency and parliamentary oversight;
- public participation to be possible *at every stage* of decision-making; and
- recognition of the *special need* for public participation in relation to decision-making on National Memorials, given the many facets of this work (need for community understanding and support, need to reflect community values, need to incorporate appropriate expertise).

Reform of public participation

68. This list consolidates improvements to public participation already proposed in this submission:

- A.C.T. representatives to be appointed to the CNMC.
- CNMC agendas, summaries of agenda papers, Minutes and decisions to be publicly accessible.
- Opportunities for early public consultation on memorials proposals.
- Opportunities for consultation and submissions at each stage of memorials development process.
- Plans, short-listed designs and public submissions thereon to be publicly accessible on an appropriate website.

Recommendation XIX: That reforms along the lines of paragraph 68 of this submission be implemented to support public participation in the work of the Canberra National Memorials Committee and National Memorials projects.

69. Section 6 of the Ordinance also contains – buried within its tangled drafting – important provisions for public participation in the CNMC and public submissions to the Minister. While the section also refers to “recommendations” received from the Minister’s department and perhaps the NCA, it also contains a number of channels for *public* submissions (“communications”, “representations”) to flow to the CNMC and to the Minister.

70. Section 6 should be retained, clarified and strengthened in any future version of the Ordinance. (One wonders whether the many submissions to the Minister on the lakeside memorials have been treated in accordance with section 6 as it stands.) [Attachment H](#) analyses section 6 in relation to both public participation and ministerial powers.

Recommendation XX: That section 6(2) of the National Memorials Ordinance 1928 be amended to support and clarify the role of public participation in the work of the Canberra National Memorials Committee.

2. Transition provisions for current proposals for memorials which have not yet been constructed

General

71. Regardless of how the CNMC and the Ordinance look in the future, it will be necessary to decide what happens in relation to current proposals for memorials. This is particularly important, given that the drive to reform the system has arisen because of the obvious flaws in current and recent projects.
72. Concerns about retrospectivity should not inhibit correcting defects in these projects and stopping them altogether, where this is justified. If the future is to be better, the future should start as soon as possible, particularly where there are no contractual inhibitions on change.²⁰

Case study: lakeside memorials

73. The Forum wrote to the Minister in May and June this year. Copies of these letters are at [Attachment I](#). In summary, the Forum asked the Minister to either initiate rescission of the decisions of the CNMC in relation to the lakeside memorials or to direct an inquiry by the JSCNCET, as has now happened. The letters focused sharply on the flawed process revealed by the FOI material. The FOI material also informed the article published in *Inside Story* on 22 May at <http://inside.org.au/conspicuous-commemoration> and reprinted in the *Canberra Times (Public Sector Informant)* on 7 June. (The *Public Sector Informant* version contains sub-editor's errors.) This article was extensively referenced by Senator Humphries in the JSCNCET's questioning of the NCA Chairman on 22 June.
74. Neither of the Forum's letters to the Minister had been answered at the time of lodging this submission. The Forum hopes that this Inquiry will help provide answers to these and many other similar representations made to the Minister.
75. The flawed process outlined earlier in this submission is an overwhelming argument against the lakeside memorials. A wide range of people have also opposed the memorials because they will damage crucial landscape perspectives and vistas, occupy space zoned for recreation, and threaten the role of the Australian War Memorial (AWM).
76. On the latter point, the lack of a firm official view from the AWM Council has been a notable – and disappointing – feature of the debate. (The AWM Director has questioned the need for the lakeside memorials.²¹) It should not be left to private citizens to defend the pre-eminent commemorative role of the AWM, especially when the lakeside memorials are clearly designed with a

²⁰ On contractual inhibitions, see **Attachment G**.

²¹ “[S]ome people think that the Australian War Memorial is behind the proposal that new First and Second World War memorials be established at the foot of ANZAC Parade in Canberra. This is not so. I am not a supporter. It is unconvincing to try to justify two expensive new memorials on the premise that nowhere is there proper commemoration.” Steve Gower, “Reflections”, *Wartime [Australian War Memorial]*, Issue 53 [2010], p. 5.

commemorative role in mind and, thus, inevitably raise the issue of competition with the AWM. [Attachment J](#) addresses this issue.

77. Nothing that has happened since May-June has caused the Forum to change its stance in relation to the lakeside memorials. In fact, this stance has been reinforced by:
- the continuing delays in the lakeside memorials’ proponents lodging their heritage referral documentation with the Department of Sustainability, Environment, Water, Population and Communities – the proponents intended to lodge in June;²²
 - the proponents’ unwillingness to consult the public;²³
 - the proponents’ unwillingness to respond to sustained public criticism of the memorials project and process (accompanied by their willingness to disparage criticism as “exaggerated and emotive” or localised);²⁴
 - awareness of the proponents’ apparent difficulties in raising funds;²⁵
 - the lack of a contract between the proponents’ architects and the NCA, regarding the design of the memorials;²⁶
 - the lapsing more than 12 months ago of Deductible Gift Recipient status for donations to the memorials – although the proponents’ website still claims this status;²⁷ and
 - the proponents’ moribund website.²⁸
78. The above summary of the “state of play” gives the strong impression that the lakeside memorials project is now a faltering enterprise “waiting for something to turn up”. In February 2008, launching the design competition for the memorials, the proponents’ Chairman said, “In an ideal world and assuming the generosity of

²² Naomi Fallon, “New memorial processes fast-tracked”, *The Chronicle*, 19 April 2011, p. 2. Available at <http://lakewarmemorialsforum.org/docs/110419-chr-art1.jpg>.

²³ Analysis of an October 2010 workshop held by the proponents, including equivocal statements about further public consultation, is at <http://lakewarmemorialsforum.org/docs/War-memorials-workshop-record.html>.

²⁴ A search for statements from the proponents for the period since 1 July 2010 revealed only one opinion piece, one letter, one radio interview, one television interview and quoted remarks in two press articles. (Plus one letter from their architects.) This search took in the extensive records on the Forum’s website, the proponents’ own website <http://mdc.org.au> and the *Canberra Times*. For the proponents’ criticism of those opposing the memorials, see, for example, the article at note 22.

²⁵ The proponents’ financial statements to ASIC 2006-07 to 2009-10 show donations amounting to just \$198 372. This may overstate the amount actually “in the bank” since the notes to the accounts say, “Donations are recognised at the time the pledge is made”. However, “cash at bank” at 30 June 2010 stood at \$233 981. The NCA has been holding \$198 000 (inc GST) of the proponents’ funds since late 2010 for the purposes of the Memorandum of Understanding between the NCA and the proponents. (ASIC documents lodged by Memorial(s) Development Committee Ltd; NCA advice, September 2011.)

²⁶ NCA records obtained under FOI include an email dated 4 December 2009 from the proponents to the NCA, referring to a proposed contract between the proponents’ architects and the NCA, to be put in place January 2010 to progress the memorials’ design. The NCA advised in September 2011 that this contract had not been signed.

²⁷ <http://mdc.org.au>, under “Fundraising”.

²⁸ The most recent material on the website <http://mdc.org.au> is dated 9 November 2010.

industry and the nation we would like to build the memorials in 2009”.²⁹ Forty-two months later, there has been a winning design, considerable bombast, but very little else.

79. In all of these circumstances, the memorials should no longer be allowed to maintain their claim to National Land at the Rond Terraces. A project that should never have been allowed to commence should not now be allowed to continue.

Options for the lakeside memorials

Option A: rescind decisions

80. Accordingly, the Forum’s preferred option is that

- the Minister should exercise his power under section 6(2) of the Ordinance to recommend to the CNMC that all previous decisions on the lakeside memorials be rescinded;
- the decisions having been rescinded by the CNMC, the Minister make a rescission determination under the Ordinance accordingly.

Recommendation XXI: That the Minister recommend to the Canberra National Memorials Committee that all previous decisions on the lakeside memorials be rescinded and, the Canberra National Memorials Committee having made a rescission decision, that the Minister make a rescission determination under section 7(2) of the National Memorials Ordinance 1928.

81. The preliminary statement of the legal position at [Attachment G](#) and the analysis of section 6 at [Attachment H](#) both support this approach: see, for example, the reference to the lack of *functus officio* in [Attachment G](#) and the text in **bold type** in [Attachment H](#). [Attachment K](#) is a paper asking whether decisions of the CNMC were properly made. [Attachment L](#) is the paper to which [Attachment G](#) was an initial response. The Forum expects to obtain an extended statement of the legal position.

82. The importance of the *Interpretation Ordinance 1967* should also be noted. As the Attorney-General’s Department’s issues paper of June 2010 pointed out (see paragraph 45 above), the National Memorials Ordinance currently has to be interpreted in accordance with the Interpretation Ordinance. Section 27 of the Interpretation Ordinance explicitly provides for a rescission power, as follows:

Where an Ordinance confers on a person or authority a power to make, grant or issue any instrument (including rules, regulations or by-laws) that person or authority has, unless the contrary intention appears, the further power, exercisable in the like manner and subject to the like conditions (if any), to repeal, rescind, revoke, amend or vary such an instrument.

83. Section 27 is in substantially similar terms to section 33(3) of the Acts Interpretation Act. See also [Attachment G](#), which states that a determination under the Ordinance is arguably an “instrument”.³⁰

²⁹ *Chairman’s speech, 18 February 2008*, <http://mdc.org.au/CompetitionChairmansSpeech17Feb08.pdf> .

³⁰ Although the preliminary view in [Attachment G](#) was on the basis that the Acts Interpretation Act applied to the National Memorials Ordinance, the same view should apply in relation to the almost identical words in the Interpretation Ordinance.

Option B: delay and reconsider

84. Alternatively, as a next best option:

- the lakeside memorials project (and all other current National Memorials projects) should be put on hold and reconsidered under the reformed arrangements proposed in this submission (involving amendments to the Ordinance); and
- similarly, a moratorium on future National Memorials projects should be imposed until a Strategy for National Memorials as outlined above is in place, future proposed memorials to be considered against that strategy.

Recommendation XXII: Alternatively to Recommendation XX, that the Minister determine that the lakeside memorials project be suspended and reconsidered under the reformed arrangements proposed in this submission, and that a moratorium on future National Memorials projects be imposed until a Strategy for National Memorials (as outlined in this submission) is in place, with future proposed memorials to be considered against that strategy.

85. Obviously, this option would delay the lakeside memorials for a period of time dependent upon, among other factors, the legislative timetable. But there are a number of other National Memorials projects “in the pipeline” (some of them with timing constraints) and other potential CNMC agenda items. There may be a case to progress some of these projects, provided that, if there is any pressing need to convene a CNMC meeting before the JSCNCET reports, any such meeting is conducted along the lines set out in this submission, that is, providing for maximum public participation, transparency and parliamentary oversight.

Project slippage

Principles relating to project slippage

86. As noted above, effluxion of time is one reason why the lakeside memorials project should not continue. The following principles are suggested.
- Slippage, for whatever reason, should not be without consequences, particularly when it involves National Land, as is the case with the lakeside memorials.
 - Failure to progress a project should be anticipated and procedures put in place accordingly.

Dealing with project slippage

87. The CNMC’s original site reservation for the lakeside memorials ran from the Minister’s determination, dated 20 April 2007, to 30 June 2010.³¹ At its meeting of 15 March 2010, the CNMC extended the site reservation to 31 December 2013. This was done (with minimal discussion) to give the proponents “sufficient certainty to continue with fundraising and design efforts”.³² To 30 June 2009, the lakeside memorials’ proponents had raised just \$43 352.³³

³¹ The determination is reproduced in **Attachment K**.

³² FOI material. Extensions were granted also for the Peacekeeping and Boer War memorials.

³³ ASIC documents lodged by Memorial(s) Development Committee Ltd.

88. The effect of the March 2010 extension was to eke out the life of a project which was already in difficulty. An opportunity was lost to impose some discipline on the project by, for example, limiting the reservation extension to 12 months. Instead, the CNMC handed out three further years. The Committee's agenda paper (presumably prepared by the then responsible Department, Attorney-General's) even suggested that "[i]f the project is delayed, the Committee could consider whether a further extension of the site reservation is necessary in 2013".³⁴
89. To deal with problems like those outlined above, protocols (linked to the Strategy for National Memorials) should be put in place to ensure that:
- site reservation extensions for National Memorials should be granted only in exceptional circumstances and for strictly limited periods;
 - reservations should not be extended as a response to funding difficulties for a privately funded project; and
 - timing disciplines should be placed on projects when they are commenced. (One obvious discipline would be to require heritage approval documentation to be submitted to the Department of Sustainability, Environment, Water, Population and Communities within a set deadline.)

Recommendation XXIII: That protocols under the Strategy for National Memorials, and along the lines of those in paragraph 89 of this submission, should be put in place to deal with National Memorials project slippage.

Privately funded projects

90. The links between private funding difficulties and project delays point to a broader issue. Apart from private funding having the effect of building delays into projects, it also seems to be associated with cost increases, leading in turn to further delays. The estimated cost of the lakeside memorials has blown out from approximately \$A6 million to approximately \$A25 million, making fundraising more difficult and extending the period that the National Land at Rond Terraces is tied up, without a project.³⁵
91. Private funding is also likely to be provided under different conditions to public funding. For example, the proponents of the lakeside memorials offer anonymity to donors.³⁶ This obviously would not occur in the case of a publicly funded project. Given that the proponents are on record in 2008 as seeking funding from

³⁴ FOI material. The agenda paper said: "The project schedule allows for ongoing fundraising activities throughout 2010 and 2011, with construction to be completed in 2013. It is possible that the effects of the global financial crisis and tougher donation and fundraising environment will extend the project schedule. However, the MDC considers that construction will be completed in time for the centenary of ANZAC celebrations in 2015." The agenda paper included as an attachment a progress report prepared by the proponents (the MDC). This attachment was missing from the FOI material supplied by the Department but is being sought from the Department.

³⁵ In July 2005, NCA staff briefing to the Authority meeting said the proponents "have a fundraising target of \$6 to \$8 million". (FOI material.) In April 2011, NCA briefing to a public forum said, "The value of the project is estimated to be \$20-25 million": NCA, *Public forum information pack, 13 April 2011*, p. 18.

³⁶ <http://mdc.org.au>, under "Disclaimer".

the defence industry, anonymity of donations in this case is especially problematic.³⁷

Principles relating to privately funded projects

92. Five principles are proposed for privately funded projects for National Memorials on National Land. These principles could be included in the Strategy for National Memorials.

- Privately funded proposals should be entertained rarely and only under strict conditions, agreed to in advance by the CNMC.
- Memoranda of Understanding between private proponents and the NCA should include a commercial viability element, the terms of which would be agreed by the CNMC, and a cap on costs.
- National Land should not be allocated indefinitely to a private company, subject only to the company's ability to raise funds.
- As far as possible, funding sources should be identified in advance.
- 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.

Recommendation XXIV: That principles relating to privately funded projects be included in the Strategy for National Memorials, these principles to be along the lines of those in paragraph 92 of this submission.

³⁷ The proponents' first priority for fundraising was to be contributions from "appropriate Australian and multinational companies, particularly those related to Defence industry": K.S. Inglis, *Sacred places: War memorials in the Australian landscape*, Melbourne University Press, 3rd edition, 2008, pp. 494-95. Professor Inglis was quoting from documents made available to him by the proponents.

Conclusion

93. This inquiry grew from the regrettable history of the lakeside memorials. It has been said elsewhere that the story of the memorials “involves the casual despoiling of our national capital by officials, appointees (and politicians, when they turn up) making unsound and perfunctory decisions to progress the misconceived agenda of a shadowy interest group”.³⁸ The problem is clear.
94. In April 1975, a meeting of the CNMC discussed changing the membership of the CNMC and how its business should be conducted.³⁹ Thirty-six years later, these issues are still live. The Committee and the Government have the opportunity, not only to put right the mistakes of the lakeside memorials story, but also to reform the National Memorials process so that such stories do not occur again. The opportunity should be grasped.

Lake War Memorials Forum
9 September 2011

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³⁸ Stephens, “Conspicuous commemoration”.

³⁹ David Headon, *The symbolic role of the National Capital: From colonial argument to 21st Century ideals*, NCA, Canberra, 2003, pp. 143-44.

Attachment A: Background information on the Lake War Memorials Forum

The Forum's website is at <http://lakewarmemorialsforum.org/index.html> . See particularly the sections on the public meeting at the Albert Hall, published articles and letters and longer arguments.

The Forum stands for:

- conservation of the Griffin vision for Canberra and the nation;
- conservation of Lake Burley Griffin and environs for recreation and aesthetic and peaceful enjoyment;
- continuation of the role of the Australian War Memorial as the premier memorial and museum;
- innovative (i.e. non-monumental) ways of commemorating our war dead;
- a balanced view of Australian history, as expressed in the things and people we commemorate;
- a review of memorials in Canberra and a rational plan for future memorials;
- a peaceful, non-militaristic future;
- proper process in public administration;
- honesty in public life; and
- public consultation in the early stages of development decisions.

Some opponents of the proposed lakeside memorials, June 2011

- Paul Barratt AO, former Secretary, Department of Defence
- Dr Frank Bongiorno, historian, Australian National University
- Dr Max Bourke AM, former Executive Director, Australian Heritage Commission
- Henry Burmester AO QC, former Chief General Counsel of the Commonwealth
- Professor Joseph Camilleri OAM, Centre for Dialogue, La Trobe University
- Dr Lenore Coltheart, historian
- Professor Bob Douglas AO, futurist
- Air Marshal David Evans AC, AFC, DSO, former Chief of Air Staff, former Chairman, National Capital Authority
- Dr Dianne Firth, head of landscape architecture, University of Canberra
- Professor Bill Gammage AM, historian
- Ian Gollings AM, former National Secretary, RSL
- Emeritus Professor Jack Golson AO, archaeologist
- Alan Gould, author
- General Peter Gratton AC, OBE, former Chief of the Australian Defence Force

- Dr John Gray OAM, former head of landscaping, National Capital Development Commission
- Marion Halligan AM, Canberra author
- Neil James, Executive Director, Australia Defence Association
- Brendan Kelson, former Director, Australian War Memorial
- Sir Richard Kingsland AO, DFC, OBE, former Secretary, Departments of the Interior and Veterans' Affairs
- Professor Marilyn Lake, Charles La Trobe Professor in History, La Trobe University, and President, Australian Historical Association
- Professor John Langmore, School of Social and Political Sciences, University of Melbourne
- Caroline le Couteur MLA, A.C.T. Legislative Assembly
- Emeritus Professor Isabel McBride, archaeologist and former member, Australian Heritage Commission
- Dr Michael McKernan, former Deputy Director, Australian War Memorial, and historian
- Dr Ann Moyal AM, historian
- Emeritus Professor John Mulvaney AO, CMG, archaeologist and former member, Australian Heritage Commission
- Geoff Page, Canberra poet
- Dr Michael Pearson, chair, A.C.T. Heritage Council
- Tony Powell AO, former commissioner, National Capital Development Commission
- Bishop Pat Power, Catholic Auxiliary Bishop of Canberra and Goulburn
- Geoff Pryor, former cartoonist and Associate Editor, Canberra Times
- Shane Rattenbury MLA, Speaker, A.C.T. Legislative Assembly
- Professor Stuart Rees AM, Sydney Peace Foundation
- Professor Henry Reynolds, historian
- Dr Peter Stanley, formerly principal historian at the Australian War Memorial
- Emeritus Professor Ken Taylor AM, urban geographer
- A.C.T. Heritage Council
- Canberra and District Historical Society
- Medical Association for the Prevention of War
- National Trust of Australia (A.C.T.)
- RSL (A.C.T. Branch) (resolved not to support the lakeside war memorials)
- Walter Burley Griffin Society

Attachment B: Legislative history of the National Memorials Ordinance since 1928

- *National Memorials Ordinance 1928*: principal legislation
- *Seat of Government (Administration) Ordinance 1930* as amended by *Seat of Government (Administration) Ordinance 1933*: minor definitional amendment
- *National Memorials Ordinance 1931*: minor procedural amendment
- *Seat of Government (Administration) Ordinance 1933*: provides for additional member, to be appointed by the Minister
- *National Memorials Ordinance 1937*: minor addition to ministerial power regarding contracts
- *National Memorials Ordinance 1952*: adds ministerial power over nomenclature in “public places”
- *National Memorials Ordinance 1953*: two places for people “recognized as authorities on Australian history” replaced with two places for “residents of the Australian Capital Territory”
- *Ordinances Revision Ordinance 1959*: minor definitional amendment
- *National Memorials Ordinance 1972*: minor definitional amendments
- *National Memorials (Amendment) Ordinance 1989*: minor procedural amendment

Source: A.C. T. Legislation Register <http://www.legislation.act.gov.au> ; Comlaw <http://www.comlaw.gov.au> .

Attachment C: Membership of the Canberra National Memorials Committee since 1927

The Canberra National Memorials Committee preceded the Ordinance. The original committee reported on nomenclature and tabled its report in Parliament. Prime Minister SM Bruce said: “In view of the historic interest attaching to the street nomenclature of Canberra, it is proposed to issue an ordinance to govern the matter and to set up a permanent body to review the proposals of the Federal Capital Commission [FCC] and determine all matters *connected with national or historical memorials, whether in the form of street names or monuments.*” (Australia. *Parliamentary Debates*, Vol. 117, 14 December 1927, p. 3173. Emphasis added.)

Period	Chair	Other party	Public service	Minist'l appointee	Aust. history experts	A.C.T. residents
1927-28 (5 members)	PM	1 (Minister)	1 (Chief Commr, FCC)	n.a.	2	n.a.
1928-33 (8 members)	PM	4 (Minister, Govt Senate Leader, Opp'n Leader, Opp'n Senate Leader)	1 (Chief Commr, FCC, then, from 1931, head of resp. dept)	n.a.	2	n.a.
1933-53 (9 members)	PM	4 (Minister, Govt Senate Leader, Opp'n Leader, Opp'n Senate Leader)	1 (head of resp. dept)	1	2	n.a.
1953-2011 (9 places, 2 vacant)	PM	4 (Minister, Govt Senate Leader, Opp'n Leader, Opp'n Senate Leader)	1 (head of resp. dept)	1	n.a.	2 (vacant)

**Attachment D: Canberra National Memorials Committee meetings
March 2007-March 2010**

Members	Observers	Advisers	Agenda	Duration
1 March 2007				
Sen Evans (Oppn) CHAIR Minister Lloyd (part of meeting) Secretary Taylor (DOTARS) Ms Pegrum* (Chief Exec, NCA)		A Smith NCA	Lakeside Mem'ls Peacekeeping Mem'l Ataturk Mem'l Boer War Mem'l Other	30 min
16 August 2007				
Minister Lloyd CHAIR Secretary Taylor Ms Pegrum*		A Smith NCA	Lakeside Peacekeeping	17 min
19 May 2008				
Minister Debus CHAIR Secretary Cornall (AGs) Ms Pegrum*	P Wales NCA	A Smith NCA T Rohl NCA	Lakeside Peacekeeping Other	1 hr
24 November 2008				
Minister Debus CHAIR Secretary Wilkins (AGs) Mr Campbell* (Secretary, DVA)	C Doogan NCA I Anderson AGs	A Smith NCA M Buick MDC** C Badelow MDC** J Rogers DVA	Lakeside Peacekeeping Aboriginal wars Other	1 hr 8 min

Members	Observers	Advisers	Agenda	Duration
15 March 2010				
Minister O'Connor CHAIR Secretary Wilkins Mr Campbell*	G Rake NCA M Higgle, Adviser to Opp'n Ldr	A Smith NCA M Buick MDC** C Badelow MDC** L Hawkins, Boer War Mem'l R Usher, Battle for Australia Mem'l J Phillips, Battle for Australia Mem'l	Site reservation extensions for Lakeside, Peacekeeping and Boer War Mem'ls Boer War Mem'l Battle for Australia Mem'l Other	25 min

* Member appointed by the Minister under section 3(2) of the Ordinance.

** Memorials Development Committee, proponents of the lakeside World War memorials

Note: The CNMC next met on 22 June 2010 but the lakeside memorials were not on the agenda. There have been no meetings since.

Source: FOI material.

Attachment E: Canberra National Memorials Committee membership options compared

The table matches the three membership options in the text against the principles set out in paragraph 19. The paragraph is reproduced below for ease of reference. (The distinction between experts as members and not members but accessible is at paragraph 58.)

	Option A: JSCNCET overlap	Option B: experts advising Minister	Option C: augmented CNMC
Representativeness	Yes	No	Yes
Demonstrated interest	Yes	Yes	Yes
Access to expertise	Access to non-member experts	Member experts/access to non-member experts	Temporary member experts/access to non-member experts
Time	Yes	Yes	Yes
Capture-prevention	Yes	Yes	Yes
Decision-maker	CNMC with ministerial intervention as last resort under section 6(2) of the Ordinance	Minister on advice of CNMC	CNMC with ministerial intervention as last resort under section 6(2) of the Ordinance

The CNMC of the future should have:

- a membership *representing* the Government, the Parliament and the people;
- a membership with a *demonstrated interest* in Canberra as the National Capital;
- access to relevant *expertise*;
- a membership with *time* to deal adequately with its business; and
- majority and quorum arrangements to prevent *capture* by a single constituency.

Attachment F: Text of article in *Canberra Times*, 22 June 2011**Memorials clash with Griffins' vision**

*Steve Flora**

Marion Halligan, a Canberra author, recently described her city as “essentially horizontal”, with “low curves”, where “the landscape fits the buildings and vice versa”. This is the city that Walter Burley Griffin and Marion Mahony Griffin imagined would grow on the Limestone Plains, beneath the surrounding tawny hills.

It is not a city that can easily accommodate, in a central position – on the Rond Terraces next to Lake Burley Griffin – two 20m blocks of grey granite commemorating the two world wars. Yet that is what the Memorial(s) Development Committee and the National Capital Authority are trying to inflict on us.

Rosslyn Beeby's article “A legacy neglected” (Forum, June 18, p.4) invites us to contrast the Griffins' concept with the landscape vandalism being perpetrated by the MDC-NCA alliance. Material recently available under Freedom of Information tracks the process which threatens to deliver these unwelcome additions to Canberra.

The MDC's constitution says that the new memorials should be “as close as possible to the Australian War Memorial”. The NCA has tried hard to oblige. Although all sites on Anzac Parade were already allocated, the NCA agreed from the beginning that there would be “twin memorials” and that they would be located on or near Burley Griffin's “land axis”, represented by the 180m-wide swathe of land centred on Anzac Parade.

The FOI papers show how the NCA wrestled with the relationship between the memorials and the axis. According to an NCA staff paper of July 2005, the memorials were to be placed “flanking the land axis”. The paper also mentioned the need to “emphasize” and “not impede appreciation of” the axis. By March 2007, however, the NCA was briefing the Canberra National Memorials Committee, the statutory decision-maker, that “large vertical elements [on the Rond Terraces] will reinforce the land axis”.

This reference to verticality came 12 months before the competition to design the memorials; the MDC and NCA had already realised that the memorials had to be, like the menswear outfitter, “big and tall”. Even the July 2005 paper had mentioned “sculptures, plinths or columns of a significant scale” so that the memorials would be “a constant reminder of the significance of the events”.

Size became ever more important. Under the memorials' “design intent”, drafted mostly by the MDC and approved by the CNMC in August 2007, the memorials were “to be of sufficient size and stature to contribute positively to the character and significance of” the land axis. In the NCA-drafted brief provided early in 2008 to entrants in the design competition, the memorials were “to be of a larger size than those located along the [Anzac] Parade”.

Occasional concerns were brushed aside in the drive to build. In August 2008, the design competition jury's heritage adviser, Duncan Marshall, noted that “the pillars will be substantial new elements in the vista”. The jury, however, concluded that the winning design “complements and enhances the immediate adjacent precinct whilst

respecting the geometry and land axis and claiming its own space”. (Three of the jury’s eight members were also MDC members and a fourth was an NCA officer.)

The size and location of the memorials was driven by their need to be seen. They had to be bigger than every memorial in the Parade, because of the significance of the conflicts they commemorated.

In the words of Dr Dianne Firth, head of landscape architecture at the University of Canberra, “placing 20m vertical structures within the 180m wide land axis is an unnecessary and intrusive element that is totally inappropriate to Griffin’s land axis design concept”. Tony Powell, former commissioner of the National Capital Development Commission, says “[t]he height and location of these large, amorphous structures will have a devastating impact on the physical expression of Griffin’s land axis that has been meticulously developed over the last 98 years”.

The Griffin vision is the basis for a world-renowned urban landscape. This is not about resurrecting every line and drawing of the Griffin legacy. It is about protecting a beautiful city from crass and ugly depredation.

** Steve Flora is a member of the Lake War Memorials Forum.*

Attachment G: Preliminary statement of the legal position

[This statement, dated 1 July 2011, was received from Henry Burmester AO, QC, in response to the paper at [Attachment L](#). Mr Burmester is a former Chief General Counsel of the Commonwealth. See also paragraph 82, [Attachment H](#), [Attachment K](#).]

The argument for the Minister to get the Committee to revisit the issue could go as follows:

- a. the original decisions were not based on proper information or advice and could be argued to be invalid. In that situation a decisionmaker can properly treat the earlier decision as flawed and remake/revisit the decision.
- b. in any event, even if one assumes the original decision is valid, this type of decision can be amended/ revoked/ overturned if circumstances suggest that is appropriate, particularly where no contracts for building, and final approvals not yet given. This is not the type of decision that can only be made once, and the Minister and the Committee are not 'functus officio' ie no longer having the power having exercised it once. The reason for this conclusion is elaborated below.
- c. it may be appropriate to accord natural justice to the proponents, given they have certain expectations based on existing decisions. This, however, requires the Minister only to give them an opportunity to comment before he or Committee revisit the issue. It does not preclude a new decision being made, once this opportunity has been given.

The reasons I consider the matter can be revisited include the wording of s6 [National Memorials Ordinance] which does not suggest a single decision, but contemplates amendments etc. The power is triggered by the Minister receiving representations and deciding to put some recommendation to the Committee. It would seem strange if the Minister could not in response to representations eg make a recommendation for some refinement, alteration.

The Ordinance has detailed provisions about nomenclature but is sparse on how memorial determinations should be dealt with. The fact that s8A(2) deals with revocation of nomenclature is no reason why the absence of a similar express power re memorials means the same thing cannot occur. It rather supports the argument that the nature of the powers in the Ordinance may require revisiting and revocation.

S33 of Acts Interpretation Act, esp (1) and (3) support view that the power can be exercised from time to time. In particular, a determination by Minister is arguably an instrument within meaning of (3) and is a further basis for saying Minister has power, following a decision of the Committee, to revoke, amend make a different determination re war memorials. ... In any event it represents a general principle, that applies in absence of a contrary intention being shown. I do not consider there is any such contrary intent shown here.

Attachment H: Analysis of National Memorials Ordinance, section 6, in relation to public participation and ministerial powers to recommend rescission of CNMC decisions

[See also paragraph 82, [Attachment G](#), [Attachment K](#), [Attachment L](#).]

Introduction

Any future reform of the Ordinance should not provide for less public participation than section 6 allows at present. Section 6 also effectively allows the Minister to intervene to recommend that the CNMC look again at faulty decisions. This power should also continue.

The text of section 6 can be analysed in relation to: the powers and functions of the Minister and the CNMC; the categories of material they may receive; the Minister's independent power. The powers and functions covered in the section relate to both nomenclature and the location or character of National Memorials.

Considered as a whole, the section provides:

- authorisation for official advice from the Department and the NCA;
- accountability of the Minister to the CNMC;
- a repertoire of possible ways for the public to participate in the work of the CNMC (by taking advantage of mandatory “shall” provisions; by persuading the Minister to use his discretionary “may” powers); and
- a basis for the Minister to make proposals or recommendations to the CNMC, including that it overturn its previous decisions. The Minister's powers in this respect are in **bold type** below.

Powers and functions

s. 6(1) The Minister *shall* consider:

- a. all matters referred to him by the Committee
- b. all communications, representations and recommendations made to him
- c. all communications, representations and recommendations made to the Committee

The Committee *shall* refer to the Minister:

- d. all such communications, representations and recommendations made to the Committee

s. 6(2) The Minister *shall* furnish to the Committee a report:

- a. with respect to all matters, communications, representations or recommendations referred to him by the Committee [6(1) d. above]

The Minister *may* submit to the Committee proposals or recommendations:

- b. with respect to all matters, communications, representations or recommendations referred to him by the Committee [6(1) d. above]**

- c. **with respect to any communications representations or recommendations made to the Minister [(1) b. above]**
- d. **on his own initiative**

Categories of material

- all matters, communications, representations and recommendations referred to Minister by Committee – Minister *shall* consider
- all communications, representations and recommendations made to Minister – Minister *shall* consider
- all communications, representations and recommendations made to the Committee – Committee *shall* refer to Minister; Minister *shall* consider
- **all matters, communications, representations or recommendations referred to Minister by the Committee – Minister *shall* furnish a report to Committee; Minister *may* submit to the Committee proposals or recommendations**
- **any communications, representations and recommendations made to Minister – Minister *may* submit to the Committee proposals or recommendations**

Minister's independent power

- **on his own initiative – Minister *may* submit to the Committee proposals or recommendations**

Attachment I: Copies of letters to Minister Crean May-June 2011

Letter of 16 May 2011 from Mr Brett Odgers on behalf of the Lake War Memorials Forum

The Hon Simon Crean MP
 Minister for Regional Australia, Regional Development and Local Government
 Minister for the Arts
 Parliament House
 Canberra ACT 2600

Dear Minister

World Wars I and II memorials

I write on behalf of the Lake War Memorials Forum which represents many hundreds of citizens and dozens of community and professional organisations from Canberra and interstate. The purpose of this letter is, firstly, to ask you to rescind approvals given so far to World Wars I and II memorials proposed for the Rond Terraces in Canberra. We request a meeting with you to discuss the issue.

Your intervention in this matter could not only resolve a significant public problem, but also restore due process to the approving body, the Canberra National Memorials Committee, and take the opportunity to reaffirm the Commonwealth's commitment to Canberra as the National Capital.

The National Memorials Ordinance 1928-89 provides that Parliament has primary responsibility for national memorials in Canberra. The Canberra National Memorials Committee (CNMC) was established under the Ordinance as the instrument of Parliament for determining the character and location of national memorials. Over recent years the CNMC has been neglected and its processes perverted, resulting in one very bad decision in the case of these proposed war memorials.

Secondly, we recommend, as part of your intervention, that you ask the Parliamentary Joint Standing Committee on the National Capital and External Territories (PJSCNCET) to conduct a public inquiry into the proposed war memorials, which would be entirely consistent with the purposes of the National Memorials Ordinance.

The Lake War Memorials Forum (LWMF) held a remarkable public meeting about the issues in the Albert Hall, Canberra, on 23 February 2011 when over 300 citizens voted unanimously that the project must not proceed and resolved that a delegation should meet with the Prime Minister to argue for her intervention. Community opinion is overwhelmingly and strongly opposed to these memorials, for a host of cogent reasons, ranging across commemorative alternatives, heritage impacts, location, land use conflicts, duplication of war memorials and design character. Moreover, it is well established that the Australian War Memorial commemorates World Wars I and II.

This letter is not so much about the opposition arguments regarding the merits of the proposals as about the **failure of due process** in how the approvals were obtained. It

is a sorry story, summarised in the attachment to this letter. The main elements comprise:-

A. The approvals processes were basically flawed. The National Capital Authority's (NCA) first reference to the Committee was confined to the site not the 'character' or need, as required by the Ordinance. The project was by then well advanced and the NCA gave the CNMC limited scope.

B. Any basis for the approvals is missing. They lack any supporting documentation, any rationale, any impact assessments, any discussion or consultation, apart from a one line ambiguous assertion that the proposal was consistent with NCA's policies. In plain fact, however, the proposed memorials are contrary to the National Capital Plan and NCA's mandatory *Guidelines for Commemorative Works in the National Capital*. Misleading statements about support for the proposal were provided. It is now known that RSL, naval and air force organisations, War Widows and related organisations oppose these memorials.

C. The CNMC was never properly constituted. Senior Parliamentarians were not present, bureaucrats were in a majority at all five relevant meetings and the two ACT seats were unfilled. The CNMC served as an administrative expedient, not as an instrument of Parliament.

D. Potential impacts of the memorials have not been considered. CNMC agenda papers included no environmental, heritage, social, land use, infrastructure or maintenance costs assessments. Such statutory decisions should under administrative law take all relevant considerations into account.

In summary, we believe that the approvals are invalid. It is an example of how a major development proposal, that is denied transparency, due process and well managed public engagement, can become a thoroughly bad project.

The controversy attending these proposed memorials could best be addressed, and better processes secured for the future, by your intervention to rescind the proposals and restore the basic role of the federal Parliament in approving national memorials in Canberra.

Your consideration of our recommendations will be greatly appreciated. You may like to refer to our website www.lakewarmemorialsforum.org which has been operating since November 2010.

[signed]

Brett Odgers

For the Lake War Memorials Forum

16 May 2011

Phone 6286 4395; mobile 0415 602 738; bjodgers@inet.net.au

Copies of this letter are being sent to Prime Minister Julia Gillard, Senator Kate Lundy, Senator Gary Humphries, Gai Brodtmann MP, Dr Andrew Leigh MP and Dr Allan Hawke AC

ATTACHMENT to letter of 16 May 2011 to Minister Simon Crean

The major elements of the story behind the approvals given by the Canberra National Memorials Committee to proposed new World War I and World War II memorials are as follows:

The processes behind the approvals

- NCA officers met initially with the proponents Memorial(s) Development Committee on 7 July 2005 and the Board of the NCA resolved on 26 July 2005 to support the memorials.
- The CNMC convened on 1 March 2007 for their initial consideration of the memorials – yet just the site - the concept, purposes and rationale were not on the agenda. The Committee met for less than 30 minutes yet conferred approvals on proposed Boer War, World War I and World War II memorials and alterations to the Attaturk Memorial.
- A briefing note for this meeting to the Secretary of the responsible Department of Transport and Regional Services questioned the validity of CNMC meetings arranged by NCA as they had not complied with the Ordinance's procedures; in regard to the 1 March 2007 meeting, NCA did not provide sufficient notice or information about the meeting and did not contact all CNMC members to confirm their availability.
- NCA drove the process, cooperated all along with the private developers, Memorial(s) Development Committee (MDC), did not provide CNMC any evidence of consultations outside NCA and MDC, whilst their respective officers gave the only presentations and evidence to the Committee.
- Further, the Chief Executive of the NCA, Annabelle Pegrum, sat on each of the first three crucial CNMC meetings, passing judgment on her own organisation's recommendations.
- This flawed process prevailed all the way through no less than five relevant CNMC meetings on 1 March 2007, 16 August 2007, 19 May 2008, 24 November 2008 and 15 March 2010.

A basis for the approvals is missing

- The initial relevant CNMC meeting **1 March 2007** occurred 20 months after the joint NCA/MDC project started, so the NCA bothered only to ask CNMC for an approval for their preferred site on the Rond Terraces and for reservation of the site for the war memorials until 30 June 2010. The choice of site was NCA's not MDC's.
- NCA's agenda paper contained just one line of justification: *'The proposals are consistent with the criteria contained within the Commemorative Guidelines.'* NB. First adopted by the NCA Board meeting of 26 July 2005, this formula continued to be through the subsequent CNMC meetings the only rationale provided by the NCA with respect to their responsibility to assess proposals against the National Capital Plan and for developing the symbolic character of the National Capital.

- In fact the memorials are plainly inconsistent with the *Guidelines* and siting zones.
- The memorials are also clearly contrary to 2006 Griffin Legacy Amendments 56 (Principles and Policies) and 60 (Constitution Avenue) to the National Capital Plan.
- The memorials are plainly in breach of the 1985 treaty between Australia and Turkey establishing Gallipoli Reach on the Lake Foreshore, in exchange for the naming of Anzac Cove, in commemoration of the 70th anniversary of Gallipoli.
- NCA's agenda paper contained another misleading statement: 'The site is not technically on Anzac Parade.' This line implies that Anzac Parade could be extended across Constitution Avenue and Parkes Way and, in the absence of any word from CNMC, that is the assumption adopted – without due authority and contrary to existing policy – by NCA officers.
- Yet another misleading statement at the crucial first meeting: 'The National RSL and the Australian War Memorial support the proposal.' In fact, each gave only provisional, qualified support. Since publicity has recently attended this project, RSL Sub-branches in Canberra have voted their opposition and leaders of naval and air force ex-servicemen organisations, together with War Widows and related associations, have declared their opposition. The Director of the War Memorial has published his misgivings in a staff newsletter.
- No assessments were ever provided to CNMC by NCA of alternative sites, land use conflicts, demand for and supply of land for memorials in the Central National Area, or of potential environmental, social and heritage impacts.
- The minutes of each meeting record very little discussion, very little time taken, and scarcity of agenda papers, except for the tabling of the design competition documents and graphics of site experiments.
- At the meetings of 19 May 2008 and 15 March 2010 NCA reported they were revising the *Commemorative Guidelines for National Memorials*. This could also have misled the CNMC. Presumably the bureaucrats on CNMC were apprised of the existing *Guidelines* and that the proposed war memorials seemed to be in conflict with them, but susceptible to change or interpretation. The NCA at their recent Public Forum conveyed the same ambiguity to the audience by saying they were revising the *Guidelines* and did not regard the existing 2004 *Guidelines* as binding or to be interpreted as in contradiction with the memorials.
- It is significant that Senator Nick Minchin, as Leader of the Opposition in the Senate, offered to the CNMC out of session (being invited but unable to attend the 19 May 2008 meeting) some useful comments: 'This is a significant project no doubt of interest to the public and particularly the ex-service community. I would like to see more design detail and alternative sites and designs.'
- A major anomaly is that concerns expressed by the Heritage Division of the federal Environment Department were overlooked in the Design Competition

Jury's Reports and in NCA briefings to CNMC with regard to the Jury's assessments, despite being included in the Design Competition conditions: in particular, 'The memorials must respect the visual sensitivity and conserve the formal symmetry of the land axis including the portal effect and symmetry of Anzac Park East and West buildings.' The designed memorials do not comply with this advice and NCA officers have redefined Anzac Parade as extending to the Lake Foreshore and the Land Axis, and reducing in width to the alignment of existing Anzac Parade memorials.

Composition of the CNMC

The clear purpose of the National Memorials Ordinance is that the federal Parliament through their most senior Members and Senators on a bipartisan basis approve national memorials. This was amply demonstrated by SM Bruce when he was the sponsoring Prime Minister and later by Prime Ministers Whitlam and Fraser. History also records that Bruce and Whitlam were great supporters of Canberra as the National Capital.

The statutory membership of the CNMC is well known, although the 1989 amendments providing two seats for residents of the Australian Capital Territory are not widely known. The CNMC represents both the highest level of federal elected representatives and Territory civilian representation. The federal parliamentarians have five seats and there are two seats for the Secretary of the responsible Department and one other officer appointed by the 'Home Affairs' Minister. That is nine members, with the parliamentarians in a majority plus the two ACT representatives. Unfortunately, the quorum is only three, no doubt due to the pre-1989 days when the agendas required determinations of street and district nomenclature as well as memorials.

Over the five relevant war memorials meetings, parliamentarians were never in a majority or at the highest level, their representatives being Senator Chris Evans (once, as Opposition Senate Leader), Minister Jim Lloyd (twice), Minister Bob Debus (twice) and Minister Brendan O'Connor. That is over five meetings only one Senator, no Cabinet level Minister and a perpetual majority of bureaucrats. The Secretary, Department of Veterans' Affairs took Ms Pegrum's position on the CNMC at the meetings of 24.11.08 and 15.3.10, giving a continuing and decided war memorials bias to the consideration of memorials for Australia's symbols of identity and achievements.

The CNMC served thus as an Executive and administrative expedient, by no means an instrument of Parliament or of the people, States and Territories it was created to represent.

Potential impacts of the proposed memorials

The LWMF has gathered a vast amount of material on the heritage, social and cultural impacts of the memorials, from people's expressed views in various media, through research and by public discourse on the issues. No such material, research, consultation or results of public discourse have been adduced by NCA and provided to the CNMC to inform their approvals.

In particular, the CNMC minutes and agenda papers include no environmental, social or heritage assessments. It is noted in NCA documents included in the design competition documents that existing land uses of the Rond Terraces, such as sport, recreation, cultural events and sightseeing, will be affected but without any quantification or a report on consultations with stakeholders. Given the large site selected, the NCA failed also in not informing the CNMC about land scarcity and several other major proposals in the pipeline for memorials and institutions in the Central National Area.

The NCA has divested its heritage responsibilities in respect of the proposed war memorials to the Commonwealth Department of Sustainability, Environment, Water, Population and Communities. The NCA takes a very narrow view of its own heritage responsibilities under its legislation and responsibilities.

The NCA is project manager of design and construction for the proposed war memorials, by virtue of a memorandum of understanding signed in 2007, and has declared that it supports construction of the memorials. Its eventual works approval is a given.

When the question of operating and maintenance costs of the memorial was raised at the 24 November 2008 meeting, NCA advised that the Commonwealth would 'by default' be responsible but maintenance and infrastructure costs would be 'low.' The CNMC endorsed the winning design at this meeting, based on the competition jury's recommendation but without an NCA assessment of whether the winning design complied with the competition conditions. The guideline cost of \$10-15m was clearly exceeded and the use of the optional maximum design envelope had serious implications for future infrastructure investment, but neither was accorded any comment.

Issues of infrastructure, in particular pedestrian bridge or underpass connections between the Rond Terraces and Anzac Parade, and the loss of the existing Rond Terraces car park, were recognised in the early drafts of the design competition brief, but NCA officers deleted these contingencies. They should be expected to entail major planning and financial costs in the future.

Transparency, consultation and accountability

The National Memorials Ordinance 1928 was amended in few respects in 1989. It contains inadequate provisions for transparency, consultation and accountability. The provision of a **quorum of three has allowed the Parliamentary role of the CNMC to be subverted**. Worse yet, at their meeting on 15 March 2010 CNMC voted to conduct more of their business out of session by correspondence. There were 10 substantive items on that meeting's agenda (chaired by Minister Brendan O'Connor) which were dealt with in 25 minutes.

Another flaw in the Ordinance is that nomenclature determinations are subject to disallowance by Parliament but **not memorials decisions**.

The whole process of the basic approvals obtained for the war memorials was devoid of independent expert advice or public consultation. During this period the NCA had a poor record for public consultation, as the JSCNCET reported regularly. It is, we

submit, no defence to avoid today's community engagement standards when the approvals for the war memorials are crying out for review and have never been exposed to public scrutiny and debate. Administrative law requires that decisions of statutory bodies must take into account all relevant considerations. True accountability for the CNMC demands these standards. A bad decision is not irreversible.

Conclusion

This sorry story of administrative expediency and process failure reflects upon the Commonwealth's commitment both to Canberra as the National Capital and to the ACT Government and community. The saga from 2005 to the present day, when intense public interest has been aroused, is also a good example of how major development proposals which are denied transparency, due process and well managed public engagement can become mediocre or thoroughly bad projects. A bad decision can be undone when there are good reasons to do so.

The controversy attending these proposed memorials could best be addressed, and better outcomes from such proposals secured from now on, by restoring due process and especially the fundamental responsibility of the Parliament and the proper status of the CNMC. As the story has unfolded, we would recommend that a public inquiry would be the most democratic and suitable means of clarifying the issues. The PJSCNCET would seem to be the right vehicle.

Lake War Memorials Forum

12 May 2011

Letter of 14 June 2011 from Dr David Stephens on behalf of the Lake War Memorials Forum

The Hon Simon Crean MP
 Minister for Regional Australia, Regional Development and Local Government
 Parliament House
 Canberra ACT 2600

Dear Minister

I refer to the letter to you of 16 May from Mr Brett Odgers on behalf of the Lake War Memorials Forum on the proposed World War I and World War II memorials. I would appreciate it if this letter could be considered in conjunction with Mr Odgers's letter.

The Lake War Memorials Forum (LWMF) believes the *National Memorials Ordinance 1928* gives you the power to rescind the decisions previously made by the Canberra National Memorials Committee (CNMC) regarding the proposed memorials.

Section 6(1) of the Ordinance requires you to consider "representations" made to you with regard to "the location or character of national memorials in the Territory". (This letter and the previous letter should be regarded as "representations" under the Ordinance.) The LWMF asks you now under section 6(2) of the Ordinance to submit recommendations to the CNMC that all previous decisions in relation to the proposed memorials be rescinded.

Mr Odgers's letter also proposed an inquiry by the Joint Standing Committee on the National Capital and External Territories (JSCNCET). The LWMF believes that previous CNMC decisions should be rescinded *before* any such inquiry. This would give certainty and a level playing field to both proponents and opponents while still allowing all issues to be aired before the JSCNCET.

Rescission of previous CNMC decisions is justified for the reasons outlined in the previous letter and now on the public record in my article in *Inside Story*: <http://inside.org.au/conspicuous-commemoration> reprinted in the *Public Sector Informant* supplement to the *Canberra Times* on 7 June.

The relevant section of the National Memorials Ordinance is extracted below.

6 Powers and functions of Minister

- (1) *The Minister shall consider all matters referred to him by the Committee, and all communications, representations and recommendations made to him or to the Committee with regard to the nomenclature of divisions of the Territory, or the location or character of national memorials in the Territory, and for that purpose the Committee shall refer to the Minister all such communications, representations and recommendations made to the Committee.*

(2) The Minister shall furnish to the Committee a report with respect to all matters, communications, representations or recommendations referred to him by the Committee, and may, with respect thereto or to any communications representations or recommendations made to the Minister, or on his own initiative, submit to the Committee proposals or recommendations for the nomenclature of divisions of the Territory, or the location or character of national memorials in the Territory.

I have copied this letter to the Prime Minister, Senator Lundy, Senator Humphries, Gai Brodtmann MP, Dr Andrew Leigh MP and Dr Allan Hawke AC. I can be contacted on 6251 5842, 0413 867 972 and clamshred@ozemail.com.au .

Yours faithfully

[signed]

David Stephens
For the Lake War Memorials Forum
14 June 2011

Attachment J: Potential for “commemorative carve-up” between the proposed Canberra lakeside war memorials and the Australian War Memorial

[Note: This document was made available to the Australian War Memorial Council on 5 August 2011]

Summary

The Memorials Development Committee (MDC) has a promotional brochure on its website saying the proposed new lakeside war memorials “will in future years become the focus for our acknowledgement of the wars that matured our nation”. Where does this leave the Australian War Memorial (AWM)?

The MDC tried in 2007 to define the relationship between the new memorials and the AWM. The form of words used envisaged that veteran organisations might opt to conduct ceremonies at the new memorials rather than at the AWM. The words did *not* say that the AWM was the exclusive venue for major national commemorative events.

The form of words did not define what was meant by “major national commemorative events” nor did it explain how commemorative events might be allocated between the new memorials and the AWM. These issues remain unresolved. If the new memorials are built there may need to be a “commemorative carve-up” between the AWM and the new memorials, which will be under the control of the National Capital Authority (NCA).

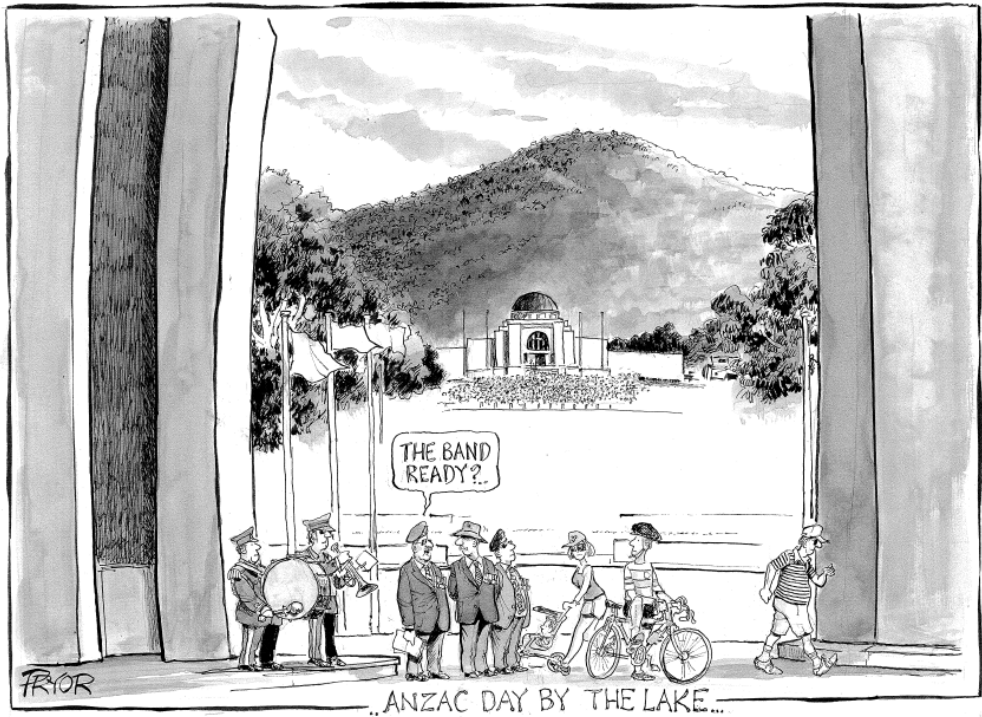
The 2007 form of words soon disappeared from relevant documentation as the new memorials project concentrated on design issues. The project thus developed without any explicit parameters on the relative roles of the new memorials and the AWM.

Design requirements included the need for the new memorials to cater for “commemorative ceremonies” as well as small groups of visitors. The winning design reflects this requirement, as it includes a large assembly space.

The new memorials are specially designed to catch the sun at sunrise on Anzac Day, on Remembrance Day and on the anniversary of the end of the Battle of Kokoda. It would be distinctly odd if these shafts of light were to fall with no-one looking at them, that is, without some accompanying ceremony.

The chair of the MDC has said that the AWM “is not a monument, it’s not a memorial”. The crux of the MDC’s campaign is therefore to *create* monuments or memorials to make up for what the Committee sees as the failure of the AWM to adequately commemorate the dead from the two world wars. It would be reasonable then to assume that any ceremonies to do with those wars – including those on Anzac Day and Remembrance Day – would be candidates for commemoration at the new, dedicated world war memorials, rather than the AWM.

The prospect that the new memorials will be “owned” by the NCA rather than the MDC should be taken into consideration when weighing any informal assurances from the MDC about the relationship between the new memorials and the AWM.



The opaque words that did not survive – explicitly

The MDC said this in July 2007 on the relationship between the proposed lakeside world war memorials and the AWM (numbers inserted for ease of reference):

[1.] Competitors [in the design competition for the new memorials] should note that the Australian War Memorial is a permanent venue for *major national commemorative events*.

[2.] It is not envisaged that this will change.

[3.] However, some veteran organisations may find it preferable and more appropriate to conduct ceremonies at specifically dedicated Memorials to World War I and/or World War II. (Emphasis added.)⁴⁰

Definition question: What ceremonies?

The above paragraph is opaque. Although Sentences [1.] and [2.] above *seem* to affirm the status of the AWM, it is clear that a lot turns on defining “major national commemorative events”.

Colonel Mike Buick, chair of the MDC, has said that the AWM “is not a monument, it’s not a memorial”.⁴¹ The crux of the MDC’s campaign is to *create* monuments or memorials to make up for what the Committee sees as the failure of the AWM to adequately commemorate the dead from the two world wars. It would be reasonable then to assume that any ceremonies to do with those wars – including those on Anzac Day and Remembrance Day – would be candidates for commemoration at the new, dedicated world war memorials, rather than the AWM.

Creating monuments dedicated to the two wars makes sense only if these edifices become the focus of attention on key dates to do with these wars, particularly Anzac Day, Remembrance Day and other significant anniversaries of events now commemorated at the AWM. If the AWM is perceived to be inadequate at commemoration, why would it continue to host key commemorative ceremonies?

Finally, it is worth noting that the AWM was described in Sentence [1.] above as “a permanent venue” – one of a set – for major national commemorative events, not “*the* permanent venue” – the only one. Read together with Sentence [3.], these words provided only limited protection for the role of the AWM.

Allocation question: Which ceremonies are to be held where?

Sentence [3.] above begs the question of how to allocate particular ceremonies between the new memorials and the AWM. For example, on Anzac Day, if some veteran organisations were to prefer the new memorials and some prefer the AWM, would there be two Dawn Services?

⁴⁰ 29 July 2007: letter, Mike Buick, Chair, Memorials Development Committee (MDC), to Annabelle Pegrum, CEO, NCA: attaching draft *Commemorative purpose and design intent* for memorials. (FOI material.)

⁴¹ <http://www.mdc.org.au>, under “News”: broadcast 2GB, 9 November 2010.

The new memorials are specially designed to catch the sun at sunrise on Anzac Day, on Remembrance Day and on the anniversary of the end of the Battle of Kokoda.⁴² It would be distinctly odd if these shafts of light were to fall with no-one looking at them, that is, without some accompanying ceremony.

If Sentences [1.] and [2.] above were intended to set parameters on the role of the new memorials, they did not survive as an explicit statement. Within a few months they had disappeared from documentation being developed by the MDC and the National Capital Authority (NCA) relating to the proposed memorials.⁴³ They appear nowhere on the MDC's website in 2011.⁴⁴

Sentences [1.] to [3.] *may* still represent the views of the MDC. However, if the new memorials are built they will be “owned” and managed, not by the MDC, but by the NCA.⁴⁵ The NCA's charter includes “commemoration and celebration”.⁴⁶ In its memorials management role, the NCA will need to resolve the issues of definition and allocation referred to above. This raises some questions:

- Might the NCA offer incentives to veteran organisations to attract them to the new memorials for particular services?
- Might the AWM have to respond with counter-incentives?
- Might there need to be an unedifying carve-up, along the lines of “we’ll do the Dawn Service but you keep the National Service later in the morning”, “we’ll take Remembrance Day this year, but you do it next year”?

Capability issue: Designing the new memorials to cater for commemorative ceremonies

While the definition and allocation issues were set aside in 2007-08, the capability of the new memorials to hold commemorative services became a key element of the project. The focus on capability was unconstrained by any statement of the relative roles of the new memorials and the AWM. The *raison d'être* of the MDC – that the AWM did not adequately commemorate the two world wars – became the default parameter for the project.

The “Competitive Purpose and Design Intent” instructions to competitors in the design competition in February 2008 said, “Each Memorial will provide ... a spiritual and symbolic place for enduring national commemoration ... [B]oth Memorials are to

⁴² “Dawn drawn into service: Memorials align to sun”, *Canberra Times*, 27 February 2009, <http://www.mdc.org.au/NewsArticleCanberraTimesFeb09.pdf> .

⁴³ The words appear in an NCA briefing paper for the meeting of the CNMC in August 2007, although they were buried in words about the design requirement for “sufficient infrastructure capable of accepting large groups of visitors to enable the Memorials to act as a focal point for commemorative events of national importance into the future”. The words (or similar sentiments) do not appear in the Design Competition Brief in February 2008. (FOI material.)

⁴⁴ MDC website <http://www.mdc.org.au> .

⁴⁵ “Once completed, the Memorials will become an administered asset of the NCA and be managed on behalf of the Commonwealth of Australia”: Memorandum of Understanding for the proposed memorials to World War I and World War II between the National Capital Authority and Memorials Development Committee Ltd, (revised) 20 September 2010, Background F. “The NCA manages and maintains assets on behalf of the Australian Government”: National Capital Authority Service Charter, http://www.nationalcapital.gov.au/index.php?option=com_content&view=article&id=1780&Itemid=707 .

⁴⁶ NCA Service Charter.

... provide a focus for commemorative services by defining a ceremonial space between the Memorials.”⁴⁷

Further, it was a “mandatory” requirement that competition entries should provide

specific spaces for ceremonial functions, both casual and formal... The Memorials should be able to cater equally well to small groups of visitors as well as to specifically organised events and ceremonies. [It will be necessary to cater for] movement around the periphery of the memorial space by the general public not involved in ceremonies. There will be a need to incorporate places for wreaths to be laid at or around the Memorials.⁴⁸

The winning design followed this injunction. It included a number of ceremonial flagpoles, plus a 100 metre-wide granite apron between the two memorials; this space is clearly intended for commemorative services, as the illustrations of the winning design show.⁴⁹

The MDC’s promotional brochure showing the winning design says the new memorials “will in future years become the focus for our acknowledgement of the wars that matured our nation”.⁵⁰ The way the new memorials have been designed to cater for crowds makes clear that this “acknowledgement” includes not only casual browsing by visitors during the year but also formal ceremonies on key dates.

The brochure also describes as a prime attraction of the new memorials the inscriptions regarding battles, townships, the dead and personal stories. This information will duplicate material at the AWM.

Finally, the massive obelisks (20 metres tall) of the new memorials, the pavement and battlefield walls will present an imposing set of structures, physically and scenically rivalling the AWM. Once the NCA as manager has provided appropriate access and parking, tour operators will face some pressure to divide time – and make choices – between the new memorials, the AWM and the Anzac Parade memorials.

Conclusion

Ceremonies commemorating the two world wars have traditionally been held at the AWM. If the new memorials are built, pressure will ensue to “carve up” the ceremonial calendar between the new and the old memorials. Competition policy will have been extended to commemoration.

There is nothing in the MDC’s current documentation, either on its website or in its Constitution, that explicitly sets parameters on the role of the new memorials in relation to the AWM. Any verbal assurances given by the MDC on this point would presumably be “inherited” by the NCA, the owner-manager of the new memorials. The NCA would then have to decide what weight it was prepared to place on these assurances.

The record since 2005 suggests that the NCA has accepted without question the view of the MDC that the AWM does not adequately commemorate the dead of the two

⁴⁷ Design Competition Brief, paras 3.1, 3.2. (FOI material.)

⁴⁸ Design Competition Brief, para 3.3.2. (FOI material.)

⁴⁹ Memorials Design Brochure, <http://www.mdc.org.au> ; WWI & WWII Memorials, <http://www.richardkirkarchitect.com/projects/cultural/wwi-wwii-memorials> .

⁵⁰ Memorials Design Brochure, p. 2.

world wars. This may predispose it, as the manager of the new memorials, to be favourable towards mounting key commemorative services at the new, dedicated memorials.

David Stephens
Media and Political Liaison
Lake War Memorials Forum
5 August 2011

Postscript

Dr Stephens made similar points to the above in a letter to the editor of the *Canberra Times*. Gary Rake, Chief Executive of the NCA, then wrote on 13 August 2011 in the *Canberra Times*:

David Stephens (Letters 10 August 2011) raises the prospect of a “carve up” of commemorative events between the Australian War Memorial and the National Capital Authority (as eventual manager of the proposed World War 1 and World War 2 Memorials).

I am not aware of such a notion ever being raised, or supported, by the NCA. For the avoidance of all doubt, let me state that there is absolutely no prospect I would support such a negotiation. I do not think any future board of the NCA could reasonably do so either. It would be offensive to even ask the AWM to discuss it.

The NCA is custodian of the symbolic role and special character of Canberra. We are particularly conscious of the part our National Capital plays in expressing our democracy, commitment to the rule of law and commemoration of service and sacrifice. In this regard, the Parliament, the High Court of Australia and the Australian War Memorial must retain unassailable pre-eminence.

Gary Rake
Chief Executive
National Capital Authority

Attachment K: Were key decisions of the CNMC properly made?

Originally prepared as "Paper A" by Dr David Stephens, Lake War Memorials Forum,
25 June 2011

Purpose

- To contrast provisions of the *National Memorials Ordinance 1928* (NMO) with actions by the Canberra National Memorials Committee 2007-08 (Relevant NMO provisions in full are on page 5, along with copies of Ministerial determinations)
- To ask questions arising (Questions are numbered consecutively for ease of reference)

Meeting	<i>NMO s. 3(4) Meetings of the Committee shall be summoned by the secretary of the department (DOTARS)</i>	
1 March 2007	Meeting was summoned by Minister.	
<i>Question regarding calling of meeting of 1 March 2007:</i>		
<i>(1) Were the decisions made at the meeting invalid because the meeting was improperly called?</i>		
Meeting	<i>NMO s. 6(2): Minister may submit to the Committee proposals or recommendations</i>	<i>NMO s. 7(1): Committee may approve, approve with alterations, reject or return to the Minister any proposal or recommendation made by Minister</i> <i>NMO s. 7(2): Minister shall make determination in accordance with the approval of the Committee</i>
1 March 2007	<ul style="list-style-type: none"> • Minister, in inviting members to the meeting, provided “background information” which included the words: “The support of the CNMC is now sought for setting aside a site...”. • Motion to approve location moved by Ms Pegrum, member of committee (CEO, National Capital Authority) 	<ul style="list-style-type: none"> • Motion agreed by Senator C Evans (chair), Minister Lloyd, Mr Taylor (secretary, Dept of Transport and Regional Services), Ms Pegrum, members • Minister makes determination on location

<p><i>Questions regarding meeting of 1 March 2007 and subsequent determination:</i></p> <p>(2) <i>Was the background information a “proposal or recommendation” from the Minister?</i></p> <p>(3) <i>Was the motion to approve location a “proposal or recommendation”?</i></p> <p>(4) <i>Was the location decision invalid because the Minister did not move the motion?</i></p> <p>(5) <i>Does s. 6(2) preclude other members from moving motions?</i></p> <p>(6) <i>Was the determination invalid? (NB determination in s. 7(2) seems to be linked to a proposal or recommendation by the Minister.)</i></p>		
Meeting	<i>NMO s. 6(2): Minister may submit to the Committee proposals or recommendations</i>	<i>NMO s. 7(1): Committee may approve, approve with alterations, reject or return to the Minister any proposal or recommendation made by Minister</i> <i>NMO s. 7(2): Minister shall make determination in accordance with the approval of the Committee</i>
16 Aug. 2007	<ul style="list-style-type: none"> • Agenda paper prepared and signed off by NCA, including recommendation that the Committee approve commemorative purpose and design intent (a one page document); Minister received this paper; Minister made no proposal or recommendation in advance of meeting • Agenda paper referred to design competition but made no recommendation regarding it • Motion to endorse design intent moved by Mr Taylor, (secretary, DOTARS) (motion refers only to design intent, although design intent cross-references commemorative purpose) • Motion to hold design competition moved by Mr Taylor 	<ul style="list-style-type: none"> • Motion agreed by Minister Lloyd (chair), Mr Taylor, Ms Pegrum, members, regarding design intent • Motion agreed by Minister Lloyd (chair), Mr Taylor, Ms Pegrum, members, regarding design competition • Minister makes no determination on design intent or commemorative purpose • Minister makes no determination on design competition • Ms Pegrum writes to Colonel Buick, MDC, 2 Nov. 2007, noting Committee endorsed commemorative purpose and design intent. Quotes words on former as “approved by the CNMC” but not design intent words.

Questions regarding meeting of 16 August 2007 and subsequent determination:

(7) May another entity besides the Minister (eg NCA) make a “proposal or recommendation” to the Committee?

(8) Was the NCA agenda paper a “proposal or recommendation”?

(9) Was the motion to endorse the design intent a “proposal or recommendation”?

(10) Was the motion to hold a design competition a “proposal or recommendation”?

(11) Was the design intent decision invalid because the Minister did not move the motion?

(12) Was the design competition decision invalid because the Minister did not move the motion?

(13) Was the design competition itself invalid because the Minister did not move the motion?

(14) Did the failure to make a determination on design intent invalidate the decision?

(15) Did the failure to make a determination on the design competition invalidate the decision?

(16) Are the discrepancies material between the agenda paper recommendation, the design intent motion and Ms Pegrum’s letter?

<i>Meeting</i>	<i>NMO s. 6(2): Minister may submit to the Committee proposals or recommendations</i>	<i>NMO s. 7(1): Committee may approve, approve with alterations, reject or return to the Minister any proposal or recommendation made by Minister</i> <i>NMO s. 7(2): Minister shall make determination in accordance with the approval of the Committee</i>
24 Nov. 2008	<ul style="list-style-type: none"> • Agenda paper prepared by Attorney-General's Department (responsible for territories at the time), in consultation with NCA, including recommendation that Committee approve final design; Minister received this paper; Minister made no proposal or recommendation in advance of meeting • Motion to approve character and design (as in winner of competition) and location moved by Minister Debus (chair) 	<ul style="list-style-type: none"> • Motion agreed by Minister Debus (chair), Mr Wilkins (secretary, AGs), Mr Campbell (secretary, DVA), members, to approve character and location • Minister makes determination on character and location
<p><i>Questions regarding meeting of 24 November 2008 and subsequent determination:</i></p> <p><i>(17) Was the Minister's motion a "proposal or recommendation".</i></p> <p><i>(18) Did this decision and determination retrospectively validate the 2007 decisions about location and design intent?</i></p> <p><i>(19) Did this decision and determination retrospectively validate the design competition?</i></p> <p><i>(20) Does the determination (which refers to a particular design CID1666) authorise a different design or would a new design require a new determination? (There are rumours that the proponents are considering modifying the design because of funding difficulties.)</i></p>		

Determinations

Determinations are made by the Minister under section 7(2) of the Ordinance.



COMMONWEALTH OF AUSTRALIA

INSTRUMENT OF DETERMINATION

NATIONAL MEMORIALS ORDINANCE 1928

SUBSECTION 7(2)

APPROVAL OF THE LOCATION OF THE
WORLD WAR I AND WORLD WAR II MEMORIAL

I, **James Eric Lloyd**, Minister for Local Government, Territories and Roads, pursuant to subsection 7(2) of the *National Memorials Ordinance 1928*, hereby approve the location of the proposed World War I and World War II Memorial on block 11 section 48 Parkes, as approved by the Canberra National Memorials Committee, and that the site be reserved until 30 June 2010.

Dated this *Twentieth* day of *April* 2007

A handwritten signature in blue ink, appearing to read 'Jim Lloyd'.

Jim Lloyd MP
Minister for Local Government,
Territories and Roads



National Memorials Ordinance 1928
Subsection 7(2)

**Determination of the location and character of the
World War I and World War II Memorials**

Under subsection 7(2) of the *National Memorials Ordinance 1928* and in accordance with the approval of the Canberra National Memorials Committee,
I, the Hon Robert John Debus MP, Minister for Home Affairs, determine:

the location for the World War I and World War II Memorials to be the Rond Terraces situated at the southern end of Anzac Parade on the northern foreshore of Lake Burley Griffin's Central Basin, and

the character for the World War I and World War II Memorials to be the character set out in design 'CID 1666'.

Dated 25th November 2008

THE HON ROBERT JOHN DEBUS MP
Minister for Home Affairs

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Attachment L: Does the *National Memorials Ordinance 1928* allow the overturning of previous decisions of the Canberra National Memorials Committee?

[Originally prepared as “Paper B” by Dr David Stephens, Lake War Memorials Forum, 25 June 2011. See also paragraph 82, [Attachment G](#), [Attachment H](#).]

Purpose

To consider whether the Minister for Regional Australia, Regional Development and Local Government (the Minister), can:

(a) overturn, through the Canberra National Memorials Committee (the Committee) previous decisions of the Committee, and

(b) overturn determinations of previous Ministers.

(Previous decisions and determinations in relation to the proposed lakeside memorials are covered in *Paper A*.)

Background

The *National Memorials Ordinance 1928* (the Ordinance) is reprinted in full in the Attachment to this paper [not attached to this version]. It constitutes the Committee as the decision-maker on national memorials. While the Committee is nominally chaired by the Prime Minister of the day, it has in recent years been chaired by the Minister responsible for territories, currently the Minister for Regional Australia, Regional Development and Local Government (s. 3).

National Memorials Ordinance s. 6

This section reads as follows (with the material words underlined):

6 Powers and functions of Minister

(1) The Minister shall consider all matters referred to him by the Committee, and all communications, representations and recommendations made to him or to the Committee with regard to the nomenclature of divisions of the Territory, or the location or character of national memorials in the Territory, and for that purpose the Committee shall refer to the Minister all such communications, representations and recommendations made to the Committee.

(2) The Minister shall furnish to the Committee a report with respect to all matters, communications, representations or recommendations referred to him by the Committee, and may, with respect thereto or to any communications representations or recommendations made to the Minister, or on his own initiative, submit to the Committee proposals or recommendations for the nomenclature of divisions of the Territory, or the location or character of national memorials in the Territory.

The underlined words, taken together, read as follows:

6 (1) The Minister shall consider all communications, representations and recommendations made to him with regard to the location or character of national memorials in the Territory.

6(2) The Minister may, with respect to any communications representations or recommendations made to the Minister, or on his own initiative, submit to the Committee proposals or recommendations for the location or character of national memorials in the Territory.

Questions

1. Does sub-section 6(1) require the Minister to consider all communications, representations and recommendations made to him by anyone, including:
 - (a) communications and representations made by members of the public, and
 - (b) communications and representations which relate to previous decisions of the Committee regarding the proposed memorials?
2. Does sub-section 6(2) allow the Minister to submit proposals or recommendations to the Committee which would overturn previous decisions of the Committee?

(The question seems to turn on whether the words “proposals or recommendations for” are simply to facilitate forthcoming meetings and decisions of the Committee about national memorials *or* are intended to mean something like “pertaining to” or “regarding”. The words in s. 6(1) “with regard to” may be relevant.)

3. If the answer to question 2 above is “Yes”, what would be the appropriate wording for a determination overturning the previous determinations made relating to the proposed memorials. (The Minister’s determination power is in s. 7(2) of the Ordinance.)

Other material

The Attorney-General’s Department prepared a *Canberra National Memorials Committee Members Introductory Package*, which went out to members of the CNMC prior to the May 2008 meeting of the Committee. (The Attorney-General’s portfolio was then responsible for territories matters.)

The *Package* included these words, under the heading “The Minister’s Power and Functions”:

The Minister for Home Affairs considers all matters referred to him about the location and character of national memorials, and naming of divisions and public places in the ACT. He may also, on his own accord, make recommendations and proposals regarding such matters to the Committee.

This is clearly a lay interpretation of section 6 of the NMO. While it is not a complete paraphrase of the section, it is perhaps significant that the interpretation is quite broad and not confined to facilitating prospectively the operations of the Committee.