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Depoliticising the ABC Board and appointment process

Discussion paper

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Summary

The ABC Board carries the ultimate responsibility for the independence and integrity of the national broadcaster. In previous eras both sides of politics made inappropriate partisan appointments to the ABC board. Despite the ‘arm’s length, merit based’ reforms made in 2013, the appointment process has once again become deeply politicised. Basic governance standards are being breached.

Four or five of the six “independent” board members of the ABC were not recommended by the nomination panel, but instead were effectively government appointments made outside of the default process.

Recommendations to improve this process:

1. The process of consultation on the appointment of the chair should be formalised and expanded to include genuine consultation with a cross-party committee, in addition to the Leader of the Opposition.
2. A cross-party committee should be given responsibility for overseeing the ABC Board appointment process, either replacing the current nomination panel, or overseeing it.
3. ABC audiences and the wider public should be more involved. Better publicity around upcoming vacancies and selection criteria should be provided.
4. Consideration should be given to selection of an ‘audience supported board member’. Candidates who wish to make their applications public could publish their profile, CV and interviews on the ABC website. Support from ABC audiences for these nominations could be assessed through online or written submissions.
5. The option for the minister to bypass the nomination process should be removed, or available only with genuine consultation with the shadow minister.

Introduction

In September 2018, the chair of the ABC Justin Milne resigned following allegations that he had interfered with the independence of the ABC. This raises the question of how the next chair of the ABC, Milne's replacement, will be appointed.

Concerns about journalistic integrity and the independence of the ABC mean that the appointment of the next chair of the ABC Board, as well as board appointments in the future, must be made carefully and with consideration of due process.

In 2016, The Australia Institute released *No politics at Aunty's table*, a report outlining how the governance of the ABC could be depoliticised. The report identified a number of problems with the ABC Board and appointment process.¹

This briefing paper updates those sections of *No politics at Aunty's table* focused on the ABC Board, with new details and recommendations specifically relating to the ABC chair.

¹ Pitt (2016) *No politics at Aunty's table*, <http://www.tai.org.au/content/no-politics-auntys-table>

Depoliticising the ABC Board

The ABC Board is the body with highest direct authority over the public broadcaster. The *ABC Act* makes the board responsible for the whole of the ABC's operations. Under Part II(8) of the Act, the board must:

- ensure that the ABC is performing “efficiently”, and providing “maximum benefit to the people of Australia”.
- maintain “independence and integrity” and “accurate and impartial” journalism.
- ensure the ABC is complying with The Act and Charter and
- develop codes of practice (these include editorial standards and complaints handling).
- consider any Commonwealth Government policy statement about “broadcasting or digital media services, or any matter of administration, that is relevant to the performance of the functions”

Unfortunately, the ABC Board became a political battlefield with obviously partisan appointments from both sides of politics. Examples of partisan appointments and the long history of criticism of the board process appear in *No politics at Aunty's table*.²

APPOINTMENT PROCESS

The whole board consists of up to nine people, but no fewer than seven.³ With the resignation of Milne and firing of Michelle Guthrie as managing director, there are seven board members. The five to seven non-executive directors (including the chair) are appointed for five-year terms, which the government may renew once. The two other directors are the managing director, who is ultimately chosen by the board (currently vacant), and a staff-elected director (Jane Connors).⁴ This paper is largely concerned with the appointments of the five to seven non-executive directors, particularly the chair. For simplicity, it will consider the managing director and the staff-elected board member “non-independent” directors.

² Pitt (2016) *No politics at Aunty's table*, <http://www.tai.org.au/content/no-politics-auntys-table>

³ Duke (2018) *Businessman Joseph Gersh tipped for ABC board role*, <https://www.theage.com.au/business/companies/businessman-joseph-gersh-tipped-for-abc-board-role-20180326-p4z6az.html>

⁴ The staff elected director's position was only re-instated in the 2013 amendments to the *ABC Act*. It had been abolished in 2006 under controversial circumstances. Commentators suggested that the Communications Minister of the day, Helen Coonan, got rid of the position to specifically target staff-elected director Romana Koval, herself accused of circulating information that, critics said, should have been kept confidential to the board. Senator Coonan maintained that she moved to abolish the position because of its inherent conflicts of interest.

Under the current legislative arrangements, established in 2013, there are two routes by which non-executive, or “independent”, board members are appointed. The default route is via the Nomination Panel for ABC and SBS Appointments (the formation of this panel is discussed below).

The nomination panel works with the Communications Department to identify potential applicants. In practice, the panel and the Department develop selection criteria and often contract a recruitment firm to advertise and attract candidates.⁵

The nomination panel assesses candidates against the criteria, and provides the Communications Minister with a shortlist of applicants. The Minister then makes their final choice, and recommends the appointment to the Governor General, who has never been known to reject the recommendation. For all practical purposes, the Minister makes the final decision. The process is very similar for the chairperson, but in that case the nomination panel gives its report to the Prime Minister instead of the Minister, and the Prime Minister is required to consult the Leader of the Opposition before making his or her recommendation to the Governor General.

The alternative route is for the Communications Minister to make a unilateral recommendation from outside the candidates recommended by the panel. The Minister must then table their reasons for the direct recommendation in Parliament within 14 sitting days.

NOMINATION PANEL AND ITS MEMBERS

The Nomination Panel for ABC and SBS Appointments was introduced under former Labor Communications Minister Stephen Conroy in an attempt to introduce a merit-based arm’s length nomination and appointment system, as had been Labor’s policy in opposition leading up to the election of 2007.

Minister Conroy did not immediately move to implement the “merit-based appointments” policy on gaining power but, at various points leading up to its eventual passage in 2012, his department and enquiries examined submissions on the precise way to systematise good appointments.

Despite these efforts, the nomination panel is at risk of itself being the subject of partisan appointments. The nomination panel is appointed by the Secretary of the Department of Prime Minister and Cabinet, a position that has itself become highly politicised in recent years. For example, two former panel members were highly questionable appointments:

⁵ Department of the Prime Minister and Cabinet (2017) *Nomination panel for ABC and SBS board appointments*, <https://www.pmc.gov.au/news-centre/pmc/nomination-panel-abc-and-sbs-board-appointments>

Janet Albrechtsen, the News Limited columnist and former board member perceived by many as hostile to the ABC, and Neil Brown, who told *The Australian*, if it were up to him, he would “scrap the ABC and start over”.⁶

The chairperson of the panel is former Treasury Secretary and Westpac bank chair, Ted Evans. The other current members of the panel are Anne Fulwood, a retired reporter and journalist, Sally Pitkin, a company director and chair of Super Retail Group and Helen Williams, a retired senior public servant. We do not suggest that any current member of the panel is partisan, but want to emphasise that the panel is vulnerable to partisan appointments.

PROBLEMS OF THE CURRENT APPOINTMENT PROCESS

The ABC Board appointment process, in practice, has failed to meet well-known standards for public sector boards. The Labor government invoked the “Nolan Principles” when they announced their intention to depoliticise the board appointment process. Named after former UK judge Michael Nolan, these seven principles aim to limit problems including bias and abuse of power, while elevating public trust and the quality of public institutions. The Nolan Principles are reproduced in the appendix.

The current appointment process (as operated) does not follow these principles, with limited openness and transparency. The majority of board appointments have been the “direct recommendation” of Communications Minister Mitch Fifield, rather than recommended by the nomination panel in what is the default process anticipated by the *ABC Act*. Direct recommendations from the Communications Minister to the Governor General are effectively appointments because the Governor General follows the minister’s recommendation in making appointments.

Of the two board appointments made in late 2015, neither was made through the default process. The mining health and safety expert Kristin Ferguson was assessed as “very suitable” by the panel but then withdrew her nomination before they made their recommendations. She was then a direct recommendation of Minister Fifield.⁷

Leadership coaching executive and entrepreneur Donny Walford was a direct recommendation made by Minister Fifield.⁸ When making such an appointment, the

⁶ *The Australian* (2014) *Brown: I’d Scrap ABC and Start over*,

<http://at.theaustralian.com.au/link/aea57c639520de8077d4b84f8233c405?domain=theaustralian.com.au>

⁷ Davies (2018) *ABC board members appointed by Fifield despite being rejected by merit-based panel*,

<https://www.theguardian.com/media/2018/sep/27/abc-board-members-appointed-by-fifield-despite-being-rejected-by-merit-based-panel>

⁸ Department of Communications (2015) *Appointment of Two New Directors to the ABC Board*,

https://web.archive.org/web/20180320003630/http://www.minister.communications.gov.au/mitch_fifield/news/appointment_of_two_new_directors_to_the_abc_board

minister is required to table in parliament his reasons quickly (the law says within 14 sitting days).⁹ Walford's appointment was on November 18, 2015, taking advantage of the approaching long parliamentary summer break to shift back the transparency deadline to February 11, 2016, almost three months after the announcement. When the Communications Department did produce its Statement of Reasons, on February 2, the document was not published online – indeed the only publically accessible reference was a single line on page 3,639 of the “Journals of the Senate”.¹⁰ This instance of the process barely meets the letter of the law and surely fails its intent for openness, transparency, and independent scrutiny.

Of the two board appointments made in early 2017, at least one was not made through the default process.

A press release from Minister Fifield says that rural strategist and cattle farmer Georgina Somerset “participated in the Nomination Panel process and was recommended for appointment”.¹¹ The implication is that Somerset was recommended by the nomination panel. However, recent reporting by *The Guardian* quotes Minister Fifield in Senate estimates describing Somerset as “one of the minister’s recommendations”.¹²

The appointment of the Minerals Council of Australia chair Vanessa Guthrie was a direct recommendation by the Government. Vanessa Guthrie had participated in the nomination panel process but was not on the panel’s list of recommendations.¹³

The appointment of chairperson Justin Milne was recommended by the nomination panel.¹⁴

The appointment of businessman Joseph Gersh, made in May 2018, was not made through the default process. Gersh was shortlisted by the nomination panel but not ultimately recommended.¹⁵

⁹ *ABC Act 1983* (Cth), section 24X(C)

¹⁰ Parliament of Australia (2016) *Journals of The Senate, No. 135*,
http://parlinfo.aph.gov.au/parlInfo/download/chamber/journals/c72d053c-80ba-45d9-97b4-0eda118fbf72/toc_pdf/sen-jn.pdf;fileType=application%2Fpdf

¹¹ Fifield (2017) *Appointment of two new directors to the ABC Board*,
<http://mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1323/Appointment-of-two-new-directors-to-the-ABC-Board.aspx>

¹² Davies (2018) *ABC board members appointed by Fifield despite being rejected by merit-based panel*,
<https://www.theguardian.com/media/2018/sep/27/abc-board-members-appointed-by-fifield-despite-being-rejected-by-merit-based-panel>

¹³ Fifield (2017) *Appointment of two new directors to the ABC Board*,
<http://mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1323/Appointment-of-two-new-directors-to-the-ABC-Board.aspx>

¹⁴ Fifield (2017) *Joint media release with Prime Minister – Appointment of the ABC Board chairman*,
<http://mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1333/Joint-Media-Release-with-Prime-Minister--Appointment-of-the-ABC-Board-Chairman.aspx>

With Ferguson, Walford, Vanessa Guthrie and Gersh all appointed through “direct recommendation” of Minister Fifield, at least four of the six “independent” board members of the ABC were not recommended by the nomination panel. If Somerset was also a direct recommendation, five of the six “independent” board members are effectively government appointments made outside of the default process.

Long-serving former ABC journalist and former staff representative on the ABC Board Quentin Dempster has identified board members Gersh and Peter Lewis as potential chairs.¹⁶ Kirstin Ferguson is the acting chair,¹⁷ and thus is likely also a potential chair. It is concerning that two of these three potential chairs was appointed outside of the default process without being recommended by the nomination panel.

Table 1: ABC Board

Name	Position	Joined	Appointment type
Peter Lewis	Board member	2014	Default process
Kirstin Ferguson	Board member, acting chair	2015	Government recommendation
Donny Walford	Board member	2015	Government recommendation
Vanessa Guthrie	Board member	2017	Government recommendation
Georgie Somerset	Board member	2017	Unclear (see above)
Joseph Gersh	Board member	2018	Government recommendation
Jane Connors	Staff elected director	2018	None – elected
Justin Milne	Former chair	2017	Default process



PROBLEMS WITH CONSULTATION ON THE APPOINTMENT OF A CHAIR

The *ABC Act* requires the Prime Minister to consult with the Leader of the Opposition before appointing the ABC Board chair.¹⁸ However, there are no guarantees that this consultation process is genuine.

¹⁵ Fifield (2018) *Appointment of new directors to the ABC and SBS boards*, <http://mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1523/Appointment-of-new-directors-to-the-ABC-and-SBS-Boards.aspx>

¹⁶ Dempster (2018) *ABC board chair Justin Milne being urged to resign*, <https://thenewdaily.com.au/news/national/2018/09/26/abc-chairman-justin-milne-exit-ramp/>

¹⁷ MacMillan and Cockburn (2018) *ABC board member Dr Kirstin Ferguson nominated as acting chairperson*, <http://www.abc.net.au/news/2018-09-28/abc-board-member-kirstin-ferguson-nominated-as-chairperson/10315648>

¹⁸ *ABC Act 1983* (Cth), s 24X

Changes should be made so that consultation is genuine. However, there are other mechanisms that could guarantee that consultation is robust. Requiring a period in which the people recommended by the nomination panel for the position of chair are publicly known would allow commentary from ABC viewers and employees, and the general public. Having a cross-party committee involved in the process would also allow more scrutiny before a final decision is made.

Conclusion

Potential measures for depoliticising the ABC Board and selection process

The 2012 Labor government reforms, while replacing some very bad practices, leave room for improvement. The results of the process have deficiencies as well. It is opportune to ask which parts of the current system work, and how it might be strengthened.

- Firstly, the audience of the ABC and the wider public should be more involved in the appointment process. Upcoming Board and nomination panel vacancies should be better publicised on the ABC's own TV, radio and digital platforms as well as other media. Selection criteria and explanation on how they are to be applied should also be easily available to interested applicants and members of the public.
- The Senate Standing Committee on Environment and Communication, or other suitable cross-party body, should oversee the nomination process to ensure a greater degree of bipartisanship. This body could either take responsibility for the ABC Board nomination process overall, eliminating the Nomination Panel for ABC and SBS Appointments, or could appoint the panel itself.
- In addition to a staff appointed board member, an 'audience supported board member' could be initiated to give some recognition to ABC audiences. They are arguably the major stakeholders in the Board appointment process, but stakeholders that are currently largely excluded from it. Applicants that have been shortlisted by the committee or nomination panel would be given the option to make their application public. These applicant's profile, CV and interviews would be published on the ABC website. Support from ABC audiences for these nominations could be assessed through online or written submissions. The Minister should be obliged to give consideration to the quantity and quality of submissions in public applicants' favour. This process must be optional to ensure that high-quality nominees who need to keep their application confidential from current employers or other boards are not excluded from applying.
- At the moment, there is little to discourage the Minister from bypassing the nomination body and making a unilateral appointment. The Minister has been able to do this with minimal accountability and transparency (see above). This option should be eliminated, or at the very least, consultation should be required.
- The process of consultation on the appointment of the chair should be formalised and expanded to include genuine consultation with a cross-party committee, in addition to the Leader of the Opposition.

Appendix: The Nolan Principles

In 1995, former UK judge Michael Nolan handed down a report from the country's Committee on Standards in Public Life. His brief had been to consider how the Conservative government might clean up its reputation for the sleaze, lobbying and 'jobs for mates'. These principles have subsequently become embedded in public life in the UK and Northern Ireland. In the lead-up to Stephen Conroy's reform of ABC Board appointments, a team at the Australian National University published an influential book '*Public Sector Governance in Australia*' that described how the principles might locally apply.

The principles are:

- *Ministerial responsibility* — the ultimate responsibility for appointments is with ministers.
- *Merit* — all public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of individuals who through their abilities, experience and qualities match the need of the public body in question.
- *Independent scrutiny* — no appointment will take place without first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.
- *Equal opportunities* — departments should sustain programmes to deliver equal opportunity principles.
- *Probity* — board members of public bodies must be committed to the principles and values of public service and perform their duties with integrity.
- *Openness and transparency* — the principles of open government must be applied to the appointments process, its workings must be transparent and information must be provided about the appointments made.
- *Proportionality* — the appointment procedures need to be subject to the principle of proportionality, that is they should be appropriate for the nature of the post and the size and weight of its responsibilities.