



Australian Broadcasting Corporation Amendment Bill 2006

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Australian Broadcasting Corporation Amendment Bill 2006

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House: Senate

Portfolio: Communications, Information Technology and the Arts

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Purpose

To amend the *Australian Broadcasting Corporation Act 1983* (the ABC Act) to remove the position of staff-elected Director from the Board of the Australian Broadcasting Corporation (ABC).

Background

The first staff-elected position on the governing body of the ABC was introduced by the Whitlam Government without legislation in 1975, and subsequently abolished by the Fraser Government. The current position was created by an amendment to the ABC Act in 1986.¹

Section 12 of the ABC Act requires that the ABC Board consist of:

- (a) the Managing Director;
- (b) the staff-elected Director; and
- (c) not fewer than 5 nor more than 7 other Directors.

On 24 March 2006 Senator the Hon Helen Coonan, the Minister for Communications, Information Technology and the Arts [announced](#) that the staff-elected Director position on the ABC Board would be abolished. The Minister stated that the change would improve corporate governance:

“As the staff-elected Director has been elected by staff rather than appointed, there have been claims that the position creates uncertainty about accountability.

“However, there is a clear legal requirement on the staff-elected Director that means he or she has the same rights, duties and obligations as the other Directors, including to act in the interests of the ABC as a whole.

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“The Government is of the view that there should be no question about the constituency that ABC Directors are accountable to,” Senator Coonan said.

“Therefore, to ensure the efficient functioning of the ABC Board, the staff-elected position will be removed. This change is in line with modern principles of corporate governance and will also provide more consistency in governance arrangements for Australian Government agencies.”²

The Minister also noted that the Special Broadcasting Service (SBS) did not have a staff-elected position.

The Explanatory Memorandum provides the following rationale for the amendments:

The Bill addresses an ongoing tension relating to the position of staff-elected Director. A potential conflict exists between the duties of the staff-elected Director under paragraph 23(1)(a) of the *Commonwealth Authorities and Companies Act 1997* to act in good faith in the best interests of the ABC, and the appointment of that Director via election by ABC staff. The election method creates a risk that a staff elected Director will be expected by the constituents who elect him or her to place the interests of staff ahead of the interests of the ABC as a whole where they are in conflict

The difficulties associated with such a position were recognised in the June 2003 ‘Review of the Corporate Governance of Statutory Authorities and Office Holders’ (the Uhrig Review) at pages 98 and 99. That Review concluded: ‘The Review does not support representational appointments to governing boards as representational appointments can fail to produce independent and objective views. There is the potential for these appointments to be primarily concerned with the interests of those they represent, rather than the success of the entity they are responsible for governing.’ The Bill resolves these issues by abolishing the staff-elected Director position.³

The Uhrig report and corporate governance

The Coalition announced its intention to examine statutory authorities and office holders in its 2001 election platform.⁴ On 14 November 2002, the Prime Minister the Hon. John Howard appointed Mr John Uhrig AC to review the governance practices of statutory authorities and office holders, particularly those agencies which impact on the business community. The objective of the review was to identify issues concerning existing governance arrangements and to provide policy options for Government to gain the best from statutory authorities and office holders and their accountability frameworks.⁵

The Prime Minister was provided with the [Review of the Corporate Governance of Statutory Authorities and Office Holders](#) in June 2003.⁶ The Uhrig Report was released by the Minister for Finance and Administration on 12 August 2004.

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The Review concluded that there was no universally agreed definition of corporate governance and suggested the following definition: ‘in general terms, corporate governance encompasses the arrangements by which the powers of those who implement the strategy and the direction of an organisation are delegated and limited to ensure the organisation’s success, taking into account the environment in which the organisation is operating.’⁷

The Report recommended that two templates be applied to ensure good governance of statutory authorities: agencies should either be managed by a Chief Executive Officer (CEO) or by a board structure. Both templates detail measures for ensuring the boundaries of responsibilities are better understood and the relationship between Australian government authorities, Ministers and portfolio departments are made clear.⁸

Uhrig recommended that the selection of the management template and financial frameworks to be applied should be based on the governance characteristics of a statutory authority.⁹

The *Financial Management and Accountability Act 1997* (‘FMA Act’) should be applied to statutory authorities where it is appropriate that they be legally and financially part of the Commonwealth and do not need to own assets. This includes Budget-funded authorities. The FMA Act imposes some governance requirements including various management and reporting responsibilities for the CEO (sections 44–46, 49 and 51), as well as allowing the Minister to give guidelines to the CEO (s. 64).¹⁰ Furthermore, FMA Act provides an accountability framework for CEOs to manage agency resources. Uhrig recommended that these organisations should be governed by a CEO.

The *Commonwealth Authorities and Companies Act 1997* (‘CAC Act’) should be applied to statutory authorities where it is appropriate that they be legally and financially separate from the Commonwealth. The CAC Act also deals with governance issues; for example, it requires the head of the board to report to the responsible Minister (sections 15-16), and to ensure that the authority’s activities comply with government policies (s.28).¹¹ Uhrig recommended that these organisations should be governed by a board. The ABC is a Commonwealth Authority under the CAC Act.

In general, agencies which exclusively manage Commonwealth appropriations should be represented and governed by a CEO. A board structure is favoured if there is a strong commercial focus to the organisation, or if the agency is intergovernmental.

Of relevance here, the Uhrig Report dealt briefly in Chapter 6 with representational appointments. These are appointments in which a board member represents, for instance, other people, departments, entities and interests. The review did not consider staff-elected representation specifically except a brief consideration of departmental public servants sitting on boards of other government agencies.¹² The Review did not support representational appointments:

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The Review does not support representational appointments to governing boards as representational appointments can fail to produce independent and objective views. There is the potential for these appointments to be primarily concerned with the interests of those they represent, rather than the success of the entity they are responsible for governing.¹³

Analysis

Other bodies with staff-elected board members

The ABC is a Commonwealth authority for the purposes of the CAC Act.¹⁴ The ABC is not the only CAC body with a staff-elected board member. Other Commonwealth statutory organisations with staff elected positions on their governing bodies include the Australian National University, the Australian Institute of Health and Welfare and the Australian Film, Television and Radio School. Furthermore, many public bodies have a variety of other kinds of representational appointments including departmental, industry, interest group, community and regional appointments.

Legal obligations of staff elected board members

Neither the ABC Act nor the CAC Act require, or give the imprimatur, to staff elected board members to favour the interests of their constituents. This is, arguably, subject to one minor exception in subsection 17(1A) of the ABC Act which deals with the disclosure of interests by board members. It provides:

1A) Where a matter being considered or about to be considered by the Board relates to the terms and conditions of employment of employees, or to the terms and conditions on which a person performs services for the Corporation pursuant to a contract, section 27F of the *Commonwealth Authorities and Companies Act 1997* does not require the staff-elected Director or the deputy of the staff-elected Director to disclose an interest that he or she has by reason of being such an employee or performing services pursuant to the contract.

Whether staff representatives make a practice of prosecuting the interests of staff is moot but it is clear that the *legal* duty of such board members is not to their constituents but to the organisation more generally. These duties are set out in the ABC Act and in the CAC Act.

The CAC Act sets out the duties of directors (which in the case of the ABC, means the Board members¹⁵) such as reporting obligations. It also imposes duties on officers generally (which includes directors.¹⁶) These include duties of care and diligence,¹⁷ the duty to act in good faith,¹⁸ the duty not to misuse the officer's position¹⁹ and the duty not to misuse information.²⁰

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The ABC Act sets out the duties of the Board of the ABC in particular.²¹

Currently, neither the CAC Act nor the ABC Act make a distinction between the duties of the staff-elected Board member and the other members of the ABC Board. The statutory duty of a staff-elected representative is not to the staff, specifically, any more than it is for the other Board members. Therefore, a staff-elected board member who places the interests of staff ahead of the interests of the ABC as a whole could be in breach of their duties under the legislation as it currently stands.

One of the issues examined by the Senate Environment, Communication, Information and the Arts (ECITA) Committee inquiry into the Bill was unwillingness of the current staff-elected director, Ms Ramona Koval, to sign certain ABC protocols. The committee majority [report](#) stated:

1.17 The potential for a lack of independence in the role of the staff-elected director was apparent in an example of a staff-elected director not signing the ABC Board Protocol. The protocol outlines the governance arrangements of the Board, covering matters such as recognition of rights and responsibilities of directors and expectations, as well as rights and benefits accorded to directors.¹⁶ The protocol is viewed as important for the effective operation of the board, particularly in light of alleged leaks of confidential board information in 2004.

1.18 The staff-elected director defended her action in not signing the protocol:

It was about independence. It was about having my decisions and opinions subsumed to the opinions of the rest of the board so that went to independence, which is an absolute core issue as far as a director of a corporation is concerned. I did not want to be in breach of the law, frankly.

1.19 However, this raises concerns about the ability of staff-elected directors to uphold the interests of the ABC, and in doing so, acting in a manner that places the interests of the ABC above those of the staff who elected them.

This difference of opinion between the committee majority report and that of Ms Koval (and the committee minority report) appears to centre on what constitutes ‘independence’ in the context of the ABC board. Ms Koval’s submission to the inquiry put her view as follows:²²

Some media reports have cited my inability to “sign up” to ABC Board Protocols as evidence of conflict of interest or lack of Board functionality.

In October 2002 I informed the Chairman of my unwillingness to support a number of proposals in the Board Director’s Handbook, a document which is not binding in law and which serves only as a gentleman’s agreement. I assured the Chairman and the Board that I fully intended to act in accordance with my legal obligations under the Corporations Law and the ABC Act.

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Among other problems, the document attempted to make the actions of individual directors subject to approval by the chairman or the majority of the Board. This confusion between members of Boards of Directors and members of Cabinet is regrettable, and is contrary to the requirement that Directors act at all times independently and in good faith...

Generally, there is an expectation that members of a Board of Directors will act collectively, just as members of Cabinet are required to do. However, this is subject to the overriding duty of each individual member of the Board to act in good faith in the Corporation's best interests. Consequently, it is not open to a Board majority to enforce its view of good faith and best interests on any individual member.

An individual director whose opinion differs from that of the majority should act with discretion in broadcasting that opinion. However, where important matters of principle are involved, the director's individual duty to the Corporation will outweigh his or her collective duty to the Board. Under corporations law, there is no requirement upon any such member to resign. Indeed to do so may be to act contrary to the overriding duty to act in good faith and in the best interests of the corporation concerned.

The rule concerning Cabinet solidarity has no application in relation to Corporation directors. Any endeavour by a Board to impose such a rule is illegitimate.

One version of the document required that I not participate in "public (including media) discussions, interviews or articles relating to ABC Board matters". This could imply that as a Director I cannot comment in public on any matter to do with the ABC at all, as a Board matter is really anything to do with an organisation.

The deed acknowledged "the right of the Director to have regard to the interests of ABC staff in his or her decision-making BUT ONLY to the extent that it does not, in the opinion of the Board, conflict with the interests of the Corporation as a whole. This would in principle subjugate my rights to the control of others, and this was unacceptable.

It is clear that a Director must act bona fide in the best interests of the Corporation. But that assessment is a matter for the individual director, and is not determined by the opinion of other directors. [emphasis added]

Possibility of conflicting interests of other board members

Whatever the expectations of those voting for the staff-elected board member, the duties of such a person are to the organisation generally just as it is for other Board members. It is worth noting, therefore, that if there is a concern that staff-elected board members might prosecute particular interests that must equally apply to the other Board members who are appointed by the Government through the Governor-General.

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Past reviews of the ABC

The position of staff-elected Director was not the subject of any analysis or recommendations in either the Mansfield review²³ or the Report of the Senate Select Committee on ABC Management and Operations.²⁴ The Report of the Senate Environment, Communications, Information Technology and the Arts References Committee strongly recommended the retention of the position.²⁵ The ANAO Performance Audit on corporate governance in the ABC did not examine the issue.²⁶

Uhrig Report

In his submission to the Senate inquiry into this Bill (see below at page 10), Professor Stephen Bartos, Director of the National Institute of Governance and author of 'Public Sector Governance – Australia',²⁷ made several observations about the reliance placed on the Uhrig Review in justifying these amendments:²⁸

- While the Uhrig Review did not support representational appointments to governing boards, it was not specifically concerned with staff-elected directors.
- The Review dealt only briefly with representational appointments and, to the extent that it did, was concerned largely with departmental representatives on boards.
- The comments about representational appointments in the Review did not form part of the formal recommendations of the report. They were part of a 'series of "Better Practice" observations which are 'an interesting and valuable contribution to governance debates, and would have had more force had the government formally adopted/amended/rejected the better practice suggestions or referred them for wider debate'.
- However, the views on representational appointments noted in the Uhrig report represent commonly accepted practice in Australian Corporate Governance which does not favour such appointments.
- Nevertheless, representational appointments are still common in the public sector most obviously in the case of rural industry representative appointments in the Agriculture portfolio. There is an enormously wide variety of representational appointments, including departmental, industry, interest group, community, regional, age-group, staff and other representative categories. Staff representatives are a minority among these categories, but not unknown outside the ABC (for example, there are staff representatives provided for in the governance arrangements for the Australian Film, Television and Radio School and the Australian National University).
- 'It is also arguable that departmental representatives on Boards are in some cases effectively appointed so as to represent the interests of staff; for example, the ex-officio appointment of serving members of the Defence force to the Board of the Defence Housing Authority.'

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- Although Anglo-American governance norms tend not to favour representational appointments, this is not the universal position in all countries.
- ‘the choice of model to be adopted for a public sector body should not be static or formulaic, but be driven by the objectives of the organisation concerned.’
- ‘While there are both advantages and disadvantages of representative board positions, the final decision on an appropriate governance structure depends on where legislators see the ABC as situated in the broader map of the broadcasting industry. As I noted in my interview on the subject, if one sees the ABC “as operating in the same space as other television and radio stations, having a governance structure like them is probably rational and reasonable. If you conceive of the ABC as being somehow some sort of different community-based body, you’ll see having representative directors onboard as being more reasonable.”

Commentary

Commentary from staff-elected representatives

Responses to the decision by the current and former staff-elected representatives were reported by [Crikey](#) as follows.

Ramona Koval, the current staff-elected representative, sent this response to Crikey:

Contrary to the Minister's view, there has never been uncertainty about the accountability of the staff-elected director to the ABC Board. I am required to act in the best interests of the ABC, as are all other directors, and it's a serious responsibility that I have carried out with passionate commitment.

The position of staff-elected director is important to provide the Board with a working knowledge of the role and functions of a public broadcaster, and, at times, as a balance to the practice of party political stacking of the ABC board I have never breached confidentiality in this role. I have simply raised concerns about the potential for political interference.

The government's intervention in abolishing this position while an Australian Electoral Commission election is underway, reveals the urgency of its desire to control the organisation.

Kirsten Garrett, who was a staff representative on the ABC board from 1996-2000, said the argument that the staff position created an untenable conflict was unfounded:

This is just red raw politics with an extraordinary disregard for the Australian people. If it succeeds, the Government will have complete control of the ABC. The staff-elected director is already the last independent voice on the board and the accountability argument is a furphy.

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During my time on the board I found that the staff-elected director position was of great value because of the knowledge about the ABC and its place in the wider community that the person holding that position has. Many other directors were keen to hear the information a staff-elected director could put before the board. The debates and disagreements merely strengthened the board's decisions.

Once he or she enters the boardroom, the staff-elected director is answerable to the charter of the ABC and the Australian community. You are informed by staff but you are in fact an executive director of the board and must behave as such, that is independently. The staff-elected director is accountable in exactly the same way as other directors.

This is about clearing away any impediment to further weakening and dismembering the ABC and getting it ready for commercialisation. The campaign in the media of the last two weeks shows that the ABC, the media and the community are being softened up for this assault.

Senate Environment, Communication, Information Technology and the Arts (ECITA) Committee Report

The Bill was referred to the ECITA Committee on 30 March 2006 for consideration. The Committee took 59 written submissions and heard evidence at a hearing held in Canberra on 13 April 2006.

The Committee reported on 2 May 2006. The majority report supported the Bill but minority reports by the ALP, the Greens and the Democrats did not.

Concluding Remarks

The Uhrig Review of governance in public sector agencies did not support representational appointments to boards. However, it did not specifically address staff-elected appointments nor did it give any attention to the ABC. Representational appointments, including staff-elected representatives continue to exist on the Boards of other agencies. Nevertheless, as a general proposition, modern Anglo-American governance theory tends not to support these kinds of appointments.

Main provisions

Item 2 of Schedule 1 amends section 12 of the ABC Act to remove the requirement for a staff-elected Director.

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Item 11 provides that any person who is the staff-elected Director shall cease to be a member of the Board upon the commencement of the item.

Items 1,3,4,5,6,7,8,9 and 10 make amendments which are consequential upon the removal of the requirement for a staff-elected director.

Endnotes

1. [Broadcasting and Television Legislation Amendment Act 1986](#)
2. Minister for Communications, Information Technology and the Arts, Media Release, 'Restructure of ABC Board' (24 March 2006). See http://www.minister.dcita.gov.au/media/media_releases/restructure_of_abc_board
3. Explanatory Memorandum, p. 1.
4. R. Grant, 'The Uhrig Review and the future of statutory authorities', *Research Note no 50*, Parliamentary Library, Canberra, 2004-05, p. 2.
5. J. Uhrig, *Review of the corporate governance of statutory authorities and office holders*, June 2003 Commonwealth of Australia, Canberra, http://www.finance.gov.au/governancestructures/docs/Uhrig_report.rtf
6. J. Uhrig, loc. cit.
7. *ibid.*, p. 17.
8. N. Minchin (Finance Minister), 'Australian Government Response to Uhrig Report', Media Release 57/04, 12 August 2004, <http://www.finance.gov.au/scripts/Media.asp?Table=MFA&Id=550>
9. *ibid.*, p. 12, point 6.
10. R. Grant, loc. cit.
11. *ibid.*
12. Uhrig, op cit. p. 99.
13. Uhrig, op cit. p. 98.
14. See http://www.finance.gov.au/finframework/docs/FMA_CACflipchart4April2006.pdf.
15. Commonwealth Authorities and Companies Act, section 5; definition of 'director'
16. Commonwealth Authorities and Companies Act, section 5; definition of 'officer'
17. Commonwealth Authorities and Companies Act, section 22.
18. Commonwealth Authorities and Companies Act, section 23.
19. Commonwealth Authorities and Companies Act, section 24.
20. Commonwealth Authorities and Companies Act, section 25.

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21. Australian Broadcasting Corporation Act 1983, section 8.
22. Ramona Koval, [Submission 43](#), Inquiry into Australian Broadcasting Corporation Amendment Bill 2006, Senate Environment, Communications and Information Technology Legislation [Committee](#), 10 April 2006, pp. 3–4.
23. Bob Mansfield, *The challenge of a better ABC* (January 1997).
24. Report of the Senate Select Committee on ABC Management and Operations, *Our ABC* (March 1995).
25. Report of the Senate Environment, Communications, Information Technology and the Arts References Committee, [Above Board? Methods of appointment to the ABC Board](#) (September 2001), paras.2.63-2.66.
26. ANAO Performance Audit, *Corporate Governance in the Australian Broadcasting Corporation* (Audit Report No.40, 2001-02).
27. Stephen Bartos, Public Sector Governance - Australia, CCH. See http://www.cch.com.au/fe_ps_details.asp?product_id=4560&topic_code=7&category_code=92&bhcp=1
28. Professor Stephen Bartos, [Submission 2](#), Inquiry into Australian Broadcasting Corporation Amendment Bill 2006, Senate Environment, Communications and Information Technology Legislation [Committee](#), April 2004 [sic].

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