



National Broadcasting Legislation Amendment Bill 2009

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Law and Bills Digest Section

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National Broadcasting Legislation Amendment Bill 2009

Date introduced: 29 October 2009

House: Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: Schedule 1 and Schedule 2, items 1, and 3-7 commence by Proclamation or 6 months after Royal Assent whichever day is the earlier. Schedule 1 item 2 commences immediately after the other items.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Australian Broadcasting Corporation Act 1983* (the ABC Act) and the *Special Broadcasting Service Act 1991* (the SBS Act) to introduce a new board appointment process, and also to reinstate the position of the staff-elected Director to the Board of the ABC.

Basis of policy commitment

The amendments are part of the Australian Labor Party (ALP) election commitments to provide a 'new transparent and democratic board appointment process in which non-executive Directors are appointed on the basis of merit'.¹ The ALP also promised to restore the staff-elected director on the Australian Broadcasting Corporation (ABC) Board.

Background

Under current law, the Managing Director is appointed by the ABC Board for a period of 5 years (section 13 ABC Act). By definition, the Managing Director is not a non-executive member of the Board (section 3), and this Bill applies to the appointment of non-executive Directors. Special provision is made for the new position of the staff-elected Director as well.

The first staff-elected position was introduced by the Whitlam Government without legislation in 1975, and subsequently abolished by the Fraser Government. It was then

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1. A Albanese (Minister for Infrastructure, Transport, Regional Development and Local Government), 'Second reading speech: National Broadcasting Legislation Amendment Bill 2009', House of Representatives, *Debates*, 20 October 2009, p. 1164.

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created again in 1986.² In 2006, the then Howard Government enacted the *Australian Broadcasting Corporation Amendment Act 2006* (the 2006 amendment) to remove the position of staff-elected Director to the ABC Board on the ground of perceived conflict of interest and ‘to ensure the efficient functioning of the ABC Board. ... This change is in line with modern principles of corporate governance and will also provide more consistency in governance arrangements for Australian Government agencies’.³

The reintroduction of the position of staff-elected Director in this Bill is justified in similar terms by this Government, and it may be the case that the future fate of the position will continue to be determined by the flavour of the government of the day.

The ABC is an authority for the purposes of the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) which means that, as an independent statutory body, it is appropriate that it is treated as legally and financially separate from the Commonwealth.

The Bills Digest to the 2006 amendment explained the duties of the Director as follows:

Currently, neither the CAC Act nor the ABC Act make a distinction between the duties of the staff-elected Board member and other members of the ABC Board. The statutory duty of a staff-elected representative is not to the staff, specifically, any more that 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.⁴

Position of political parties and significant interest groups

The group known as Friends of the ABC have welcomed the reinstatement of the position of staff-elected Director and are in support of the other measures in the Bill. They are lobbying for members of the public to contact both the Opposition and Senator Fielding to urge support for the Bill.⁵

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2. Economics, Commerce and Industrial Relations Section and others, *Australian Broadcasting Corporation Amendment Bill 2006*, Bills digest no. 121, 2005–06, 8 May 2006, p. 2 viewed 1 February 2010, <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd121.pdf> . See this digest for a full background to the staff-elected Director issue.
 3. H Coonan (then Minister for Communications, Information Technology and the Arts, ‘*Restructure of the ABC Board*’ Press Release, 24 March 2006, viewed 1 February 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FVV4J6%22>
 4. Op. cit., p. 6.
 5. Friends of the ABC (Victoria) website, viewed on 1 February 2010, <http://www.fabc.org.au/vic/index.html>.

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The Liberal Party has stated that it remains opposed to the plan to reinstate the position of staff-elected director to the ABC Board on the basis that:

The position creates the potential for conflict of interest with the staff-elected director legally bound to act in the best interests of the Corporation, despite having been appointed as a representative of staff and elected by them.⁶

The Liberal Party moved amendments to the Bill in the House of Representatives on 4 February 2010 to remove the proposed provision, and also to provide that former politicians and staff only be banned from appointment within 18 months from ceasing their employment. The Bill proposes a blanket ban on members and former members of all Australian Parliaments, and persons who are or were 'senior' political staffers from being appointed to the Boards of the ABC or the SBS (**new subsection 12(5A)**).

At the time when the previous Government abolished the position of staff-elected Director, the Australian Greens opposed the change and were strongly in favour of the staff-elected position on the Board.⁷

In relation to persons who are ineligible for appointment, the Department's information on its website about the merit-based appointment process outlines what is meant by 'senior' political staff which will be determined by the Minister by way of legislative instrument (**proposed subsection 3(3)**) and will be defined as:

- Chief of staff
- Special adviser
- Principal adviser
- Senior adviser
- Media adviser, and
- Adviser.

A legislative instrument is a normally a disallowable instrument, unless the relevant legislation declares it not to be. However, no such declaration applies in this case.

Commenting on the merits-based provisions of the Bill, Dr Meredith Edwards draws comparisons with the system in Britain, on which the Bill is based, and states:⁸

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6. N Minchin (then shadow Minister for Broadband, Communications and the Digital Economy, '*Coalition remains opposed to staff-elected ABC Board position*', Press Release, 17 November 2009, viewed 1 February 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FMH8V6%22>
 7. R Siewert, Second reading speech: Australian Broadcasting Amendment Bill 2006, *Debates*, 9 May 2006, p. 10.

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There is no question that the process set out in the Bill is a paradigm shift from the position until now – on paper at least. Cronyism should be significantly reduced. The power of ministers will be significantly constrained. But even the best drafted legislation carries risks that the government’s intentions are not carried through. Here, the British implementation experience can alert us to potential pitfalls.

She illustrates that lessons from the British system could improve the Bill by:⁹

- requiring the Minister’s role to be spelt out in more detail in a separate code of conduct
- providing a civic education component, transparency and independent monitoring processes
- having an overall audit from outside the Department, by, for example, the public service commissioner or the Australian National Audit Office, if not Parliament itself.

Financial implications

The Explanatory Memorandum states that the Bill is not expected to have any impact on Commonwealth revenue.¹⁰

Main provisions

Schedule 1—Merit-based appointment of ABC and SBS non-executive Directors

Items 4 to 12 of the Bill make changes to the composition of and method of appointment of the Board.

Currently the ABC Act provides that the Board is to consist of a Managing Director, and not less than 5, nor more than 7 other Directors. **Items 4-6** have the effect that the Board will now also specifically make mention of the Chairperson, and have not less than 4, nor more than 6 other Directors.¹¹

The Governor-General appoints the Chairperson and the Directors, but **new subsection 12(5)** provides that before doing this, in the case of the Chairperson, the Prime Minister must be satisfied of certain things, and in relation to the other non-executive Directors, the

8. M Edwards, ‘Board games: our ‘independent’ ABC’, *The Public Sector Informant*, February 2010, p. 26. See also, M Mannheim, ‘Pollies still able to tinker with Aunty appointments’, [Canberra Times](#), 2 February 2010, p. 3.

9. Ibid, M Edwards, p. 27.

10. Explanatory Memorandum, National Broadcasting Legislation Amendment Bill 2009, p. 1.

11. The Bill also inserts the ‘staff-elected Director’ as a member of the Board, see **Schedule 2, item 1**.

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Minister must be satisfied of certain things. These things include that the person has experience in connection with broadcasting, communications or management, or experience in financial or technical matters, or have cultural or other interests relevant to the oversight of a public organisation providing broadcasting services (**paragraphs 12(5)(c), (d), and (e)**). These requirements are the same that are in the ABC Act currently.

Appointments for the Chairperson and Directors are part-time for a period of 5 years (subsection 12(2)), and reappointment is possible but the period of being in office cannot exceed 10 years (**new subsection 12(2A)**).

Appointments of the Chairperson and Directors must comply with **new Part IIIA** which inserts the merit-based process into the ABC Act (**new subsection 5B**) but this is not required for the reappointment to office (**new subsections 12(5C) and (5D)**).¹²

Under **new Part IIIA** there is to be a Nomination Panel (the Panel) established to oversee appointments to the Board of the Chairperson and Directors. The Panel is to be made up of a Chair and at least 2 and not more than 3, other members (**new section 24E**). Members are appointed by the Secretary of the Prime Minister's Department (**new subsection 24F(1)**), and the Panel is not subject to direction by, or on behalf of, the Government (**new section 24C**).

The Bill is silent as to how the Secretary makes his or her selection of panel members, and it is also silent as to how the Chair becomes Chair. In practice, this decision is also made by the Secretary, not by members of the Panel. On 21 October 2008 the Secretary announced¹³ the appointments of Mr Ric Smith as Chair for three years, and Professor Allan Fels, Ms Leneen Forde and Mr David Gonski as members for various periods of time ranging from 2 to 3 years. The Secretary can also terminate appointments on grounds such as misbehaviour, mental or physical incapacity, bankruptcy, and unacceptable absence, to mention a few examples (**new section 24N**).

In the selection process for the Chairperson of the Board, the Panel is required to give a report to the Prime Minister on the outcome of the selection process which provides a list of at least three candidates nominated for appointment, along with a comparative assessment of them (**new paragraph 24B(1)(d)**).¹⁴ The Prime Minister must then consult with the Leader of the Opposition before making a recommendation to the Governor-General to appoint the person as Chairperson (**new subsection 24X**). However, if a person

12. Similarly, **new Part 3A** is inserted into the SBS Act, by **item 29** of the Bill.

13. Secretary of the Department of Prime Minister and Cabinet, 'Nomination Panel for ABC and SBS Appointments', Media Release, 21 October 2008, viewed 1 February 2010, http://www.dpmc.gov.au/media/communication_2008-10-21.cfm This panel is currently a non-statutory body.

14. Applicants must be assessed on merit (**new paragraph 24B(1)(c)**), and merit is to be the primary consideration (**new paragraph 24B(2)(d)**).

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who has not been nominated is recommended for the position of Chairperson, the Prime Minister will be required to table the reasons for the appointment in both Houses of Parliament within 15 sitting days of the appointment. The Bill does not say that the Prime Minister is required to consult with the Leader of the Opposition in this latter case, but the Explanatory Memorandum¹⁵ says that **in addition** to consulting with the Leader of the Opposition the Prime Minister must also table his reasons, so the consultation can be expected to occur in practice.

Similar provision is made in relation to the appointment of the other non-executive Directors in that a report is given to the Minister of Broadband, Communications and the Digital Economy nominating at least 3 candidates for appointment (**new paragraph 24B(1)(d)**). If the Minister considers that a person not nominated should be appointed, the Minister must give the Prime Minister written notice specifying who should be appointed and the reasons for the Minister preferring that person. The Minister then must table his or her reasons in both Houses within 15 sitting days of the appointment (**subsections 24X(3) and (4)**). The requirement to give the Prime Minister ‘notice’ may suggest that the Prime Minister must in practice also agree with the Minister. This interpretation is supported in part by the Explanatory Memorandum which states:

...the Minister must give the Prime Minister a written notice that identifies that person and sets out the Minister’s reasons for preferring that person over those candidates nominated by the Nomination Panel (subsection 24X(3)). If the Minister’s preferred candidate is **subsequently** appointed by the Governor-General, the Minister must table his or her reasons... (emphasis added).¹⁶

The Department of Broadband, Communications and Digital Economy also states on its website the Prime Minister’s approval is required.¹⁷

The SBS Act is amended to incorporate changes so that the Nomination Panel can also make recommendations to the Minister for the appointment of the Chairperson and Directors of the SBS Board (**items 18-30**). The Prime Minister does not have a direct role in relation to the appointment of the Chairperson of the SBS. The Minister must also consult with the Prime Minister and table reasons if he or she asks the Governor-General to appoint a person who has not been nominated by the panel (**new section 43B** of the SBS Act).

15. Explanatory Memorandum, op. cit., p. 12.

16. Ibid. p. 12.

17. Department of Broadband, Communications and the Digital Economy, [The merit-based appointment process](#), 17 November 2009.

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Schedule 2—ABC staff-elected Director

Under this Schedule, the staff-elected Director is included on the Board of the ABC (**item 1**) and must be elected in accordance with the regulations (**new section 13A**).

As noted in the note to **new section 13A**, as a member of the Board, the staff-elected Director is a director of a Commonwealth authority for the purposes of the CAC Act. The CAC Act sets out the duties of a director which include:

- reporting obligations
- care and diligence
- to act in good faith
- not to misuse the officer's position, and
- not to misuse information.¹⁸

Persons who are eligible to stand and to be appointed must be an employee of the ABC who works at least 22 hours a week, or is working under a contract for the ABC (**new subsection 13A(2)**).

Concluding comments

The Bill takes steps to make the appointment process to the Boards of the Australian public broadcasters more arms-length from the Government which go towards lessening the perception of favouritism to the process. The inclusion of the reinstatement of the staff-elected Director will have both its supporters and detractors on the issue of improvement in governance practice.

18. Commonwealth Authorities and Companies Act, sections 22, 24, 24, and 25.

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