

The Senate

Environment and Communications
Legislation Committee

National Broadcasting Legislation Amendment Bill 2010
[Provisions]

November 2010

© Commonwealth of Australia 2010
ISBN 978-1-74229-392-9

This document was printed by the Senate Printing Unit, Parliament House, Canberra

Committee membership

Committee members

Senator Doug Cameron (ALP, NSW) (Chair)
Senator Mary Jo Fisher (LP, SA) (Deputy Chair)
Senator Scott Ludlam (AG, WA)
Senator Anne McEwen (ALP, SA)
Senator the Hon. Judith Troeth (LP, VIC)
Senator Dana Wortley (ALP, SA)

Committee secretariat

Mr Stephen Palethorpe, Secretary
Mr Geoff Dawson, Principal Research Officer
Ms Nina Boughey, Senior Research Officer
Mrs Dianne Warhurst, Executive Assistant

Committee address

PO Box 6100
Parliament House
Canberra ACT 2600
Tel: 02 6277 3526
Fax: 02 6277 5818
Email: ec.sen@aph.gov.au
Internet: www.aph.gov.au/senate/committee/ec_ctte/index.htm

Table of Contents

Committee membership	iii
Recommendations	vii
Chapter 1 - Introduction	1
Conduct of the inquiry	1
Description of the bill	1
Report structure	4
Chapter 2 - Merit-based appointment of directors	5
Independence of public broadcasters.....	6
Merit-based appointment of board directors	11
The merit-based process proposed by the bill	12
Chapter 3 - Staff-elected director	23
Conclusion	27
Additional Comments - Australian Greens Senator Scott Ludlam	29
Appendix 1 - Submissions and answers to questions taken on notice	33
Appendix 2 - Public hearings	35
Appendix 3 - Recommended amendments to National Broadcasting Legislation Amendment Bill 2010	37

Recommendations

Recommendation 1

2.18 The committee recommends that the ABC Board review whether the partnership between ABC Books and HarperCollins maintains the necessary independence of ABC Books and the ABC as a whole.

Recommendation 2

2.27 In order to protect the independence of Australia's public broadcasters, the committee urges the government and the ABC and SBS boards to ensure that the interventionist approach by government, which has resulted in the politicisation of public broadcasters, does not occur again.

Recommendation 3

2.49 The committee recommends that the bill be amended to provide that a former politician or senior political staff member is eligible for appointment to the ABC and SBS boards provided that they meet the following conditions:

- the individual ceased to hold office at least 18 months prior to the appointment; and
- the individual is nominated by the Nomination Panel following an independent, merit-based selection process as set out by the bill.

Recommendation 4

2.63 The committee recommends that the government include the Merit Protection Commissioner as a permanent member of the Nomination Panel for appointments to the ABC and SBS boards.

Recommendation 5

3.19 The committee recommends that the bill be amended to provide that a staff-elected director may hold office for a maximum of one five-year term.

Recommendation 6

3.24 The committee recommends that the SBS Act be amended to include a staff-elected director on the SBS Board.

Recommendation 7

3.27 Subject to the amendments contained in recommendations 3–6 of this report, the committee recommends that the Senate pass the National Broadcasting Legislation Amendment Bill 2010.

Chapter 1

Introduction

Conduct of the inquiry

1.1 On 30 September 2010 the Senate, on the recommendation of the Selection of Bills Committee, referred the provisions of the National Broadcasting Legislation Amendment Bill 2010 to the Environment and Communications Legislation Committee for inquiry and report by 16 November 2010.¹

1.2 The committee advertised the inquiry on its website and in *The Australian*, and wrote to relevant organisations and associations inviting submissions. The committee received 6 submissions (see Appendix 1) and held one public hearing (see Appendix 2). The committee thanks submitters and witnesses for their contributions.

Description of the bill

1.3 The purpose of the bill is to amend the *Australian Broadcasting Corporation Act 1983* (ABC Act) and *Special Broadcasting Service Act 1991* (SBS Act) to implement a new merit-based appointment process for non-executive directors to the ABC and SBS boards. The bill will enshrine in legislation a merit-based selection process which the government initiated in October 2008.²

1.4 The bill will also re-instate the position of staff-elected director to the ABC Board.

-
- 1 Senate Selection of Bills Committee, Report No. 11 of 2010: see *Senate Hansard*, 30 September 2010, p. 529. The bill was first introduced into the House of Representatives on 29 October 2009, and passed on 4 February 2010. It was introduced into the Senate on 4 February 2010, but lapsed at the end of the 42nd Parliament before being debated. It was reintroduced into the House of Representatives in the new parliament on 30 September 2010.
 - 2 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Measures to ensure strong and independent national broadcasters', 16 October 2008, www.minister.dbcde.gov.au/media/media_releases/2008/076 (accessed 8 November 2010). Information about the existing process is available from the Department of Broadband, Communications and the Digital Economy website, www.dbcde.gov.au/television/abc_and_sbs_board_appointments (accessed 8 November 2010).

Merit-based selection process

1.5 Schedule 1 to the bill makes provision for a merit-based appointment process for non-executive directors to the ABC and SBS boards. The process has the following features:

- A nomination panel will be established to conduct a competitive selection process and make recommendations to:
 - the Prime Minister with respect to the appointment of a Chairperson of the ABC Board; and
 - the Minister for Broadband, Communications and the Digital Economy with respect to the appointment of other non-executive directors.³
- The nomination panel will consist of three or four part-time members appointed by the Secretary of the Prime Minister's Department for terms of up to three years.⁴ The bill provides that the panel 'is not subject to direction by or on behalf of the Government of the Commonwealth'.⁵
- The selection criteria for ABC and SBS board directors are to be determined by the Minister for Broadcasting, Communications and the Digital Economy by legislative instrument.⁶ The bill retains the existing requirement that a person shall not be appointed to the ABC Board unless they have relevant experience in broadcasting, communications, management, financial or technical matters, or cultural or other relevant interests.⁷
- The nomination panel will be required to:
 - publish advertisements inviting written applications for the position of non-executive director or Chairperson;⁸
 - undertake an assessment of the comparative suitability of applicants;⁹ and

3 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, clause 24B (ABC); Item 29, clause 43 (SBS).

4 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, clauses 24E and 24F. Note that the proposed amendments to the SBS Act provide that the nomination panel is that established under the ABC Act: Item 18.

5 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, clause 24C.

6 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, clause 24W (ABC); Item 29, clause 43A (SBS).

7 The requirement is currently provided in subsection 12(5) of the ABC Act, and the guidelines currently used to select ABC Board directors: Department of Broadband, Communications and the Digital Economy, answer to question on notice, 1 November 2010 (received 8 November 2010). The bill retains this requirement for appointment to the ABC Board in item 12, subclause 12(5).

8 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, subclause 24B(3) (ABC); Item 29, subclause 43(3) (SBS).

-
- provide a written report to the relevant minister consisting of at least three candidates who are nominated for appointment.¹⁰
 - Prior to making a recommendation to the Governor-General with respect to the appointment of a Chairperson to the ABC Board, the Prime Minister is required to consult with the Leader of the Opposition.¹¹
 - If a person not nominated by the nomination panel is appointed, the Minister or Prime Minister must table reasons for that appointment in each house of the Parliament.¹²
- 1.6 Schedule 1 also:
- increases the maximum tenure of non-executive directors from five years to ten years;¹³ and
 - provides that current or former members of Commonwealth, State and Territory Parliaments and senior political staff members are ineligible for appointment as a non-executive of either board.¹⁴

ABC Staff-elected Director

1.7 Schedule 2 to the bill reinstates the position of staff-elected director to the ABC Board. The position was abolished in 2006 by the *Australian Broadcasting Corporation Amendment Act 2006*.¹⁵

1.8 The staff-elected director will be a director of a Commonwealth authority for the purposes of the *Commonwealth Authorities and Companies Act 1997*¹⁶ and have the same duties and obligations as the other ABC Board directors.¹⁷

9 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, subclause 24B(2) (ABC); Item 29, subclause 43(2) (SBS).

10 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, paragraph 24B(1)(d) (ABC); Item 29, paragraph 43(1)(d) (SBS).

11 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, subclause 24X(1).

12 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, subclauses 24X(2)–(4) (ABC); Item 29, clause 43B (SBS).

13 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 8 (ABC); Item 26 (SBS).

14 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 12, subclause (5A) (ABC); Item 24, subclause 17(2A) (SBS).

15 See Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Australian Broadcasting Corporation Amendment Bill 2006*, May 2006, at www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/broadcasting/index.htm (accessed 2 November 2010).

16 National Broadcasting Legislation Amendment Bill 2010, Schedule 2, Item 4, subclause 13A(1).

1.9 There are two differences between the staff-elected director provisions prior to 2006 and the provisions proposed by the bill:

- the bill does not propose to reinstate the position of deputy staff-elected director; and
- prior to 2006, there was a requirement that where a matter being considered by the ABC Board relates to the terms and conditions of employment, the staff-elected Director was not required to declare a pecuniary interest in the matter.¹⁸ A similar provision is not included in the bill.

Report structure

1.10 Chapters 2 and 3 of this report discuss evidence presented to the inquiry on the two key aspects of the bill:

- merit-based selection of directors; and
- reinstatement of the ABC staff-elected director.

1.11 The committee did not receive any evidence relating specifically to the position of the SBS. Accordingly, most of the discussion in this report focuses on the position of the ABC and makes the assumption that similar arguments apply to the SBS.

17 Explanatory Memorandum, National Broadcasting Legislation Amendment Bill 2010, p. 20.

18 ABC Act, as at 1 July 2005, ss. 17(1A).

Chapter 2

Merit-based appointment of directors

2.1 In his second reading speech on the bill, the Minister for Infrastructure and Transport, the Hon Anthony Albanese MP, explained that the existing process of appointments being made by the Governor-General on the recommendation of the government:

...has raised concerns about ABC and SBS board appointments being politically motivated. Commentators have also perceived that political appointments may have diminished the level of expertise of particular board members on complex technological and financial issues facing the national broadcasters.¹

2.2 The Minister explained that in order to address the lack of transparency in ABC and SBS board appointments:

...the government has developed a new appointment process whereby an independent panel will conduct a merit-based selection process for non-executive directors to the ABC and SBS boards and advise the government on suitable appointments.²

2.3 The issue of the politicisation of the ABC board, in particular, has been the subject of a range of media commentary, books and reports,³ including two previous Senate committee inquiries.⁴ Submitters and witnesses to this inquiry discussed the importance of ensuring that the ABC and SBS remain independent and free from political influence, and generally agreed that the merit-based selection process proposed by the bill would assist in promoting these aims.⁵

1 The Hon Anthony Albanese MP, Minister for Infrastructure and Transport, *House of Representatives Hansard*, 30 September 2010, p. 266.

2 The Hon Anthony Albanese MP, Minister for Infrastructure and Transport, *House of Representatives Hansard*, 30 September 2010, p. 266.

3 For example Ken Inglis, *This is the ABC*, Melbourne, Melbourne University Press, 1983; Rebecca Harrison, 'The Howard Government's record of political appointments', *Crikey*, 29 November 2007, at: www.crikey.com.au/2007/11/29/the-howard-governments-record-of-political-appointments/ (accessed 3 November 2010); Ari Sharp, 'Janet Albrechtsen to step down as director on ABC board', *SMH Online*, 11 November 2009, at www.smh.com.au/national/janet-albrechtsen-to-step-down-as-director-on-abc-board-20091110-i7lr.html (accessed 3 November 2010).

4 Senate Select Committee on ABC Management and Operations, *Our ABC*, March 1995; Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Australian Broadcasting Corporation Amendment Bill 2006*, May 2006.

5 Mr Donald McDonald, former Chair of the ABC Board, was the only witness who was not in favour of the amendments proposed by the bill. The Merit Protection Commissioner did not express a view in her submission: *Submission 6*.

- 2.4 This section of the report draws on the evidence presented to the inquiry to:
- briefly outline the importance of public broadcasters remaining independent and free from political interference;
 - discuss the contribution that a merit-based appointment process will make to ensuring the independence of the ABC and SBS; and
 - critically analyse the merit-based selection process proposed in the bill.

Independence of public broadcasters

2.5 As noted above, there have been a range of reports and inquiries into public broadcasting in Australia which have discussed the importance of public broadcasters being independent and free from political interference. The committee does not propose repeating the discussion canvassed in those previous reports regarding the importance of the independence of the ABC and SBS. It is sufficient to note that it is widely acknowledged that:

An independent, adequately funded and politically unbiased national broadcaster is one of the most important means by which public debate and discussion can take place in Australia without fear or favour.⁶

2.6 Concerns about the effect of political appointments to the boards of the public broadcasters go back to the mid 1990s,⁷ and have been well-canvassed in previous reports and discussions.⁸ Evidence to this inquiry suggested that these concerns have not diminished despite both sides of politics having been criticised for making politically-motivated appointments:

I think it is pretty outrageous how over the past couple of decades both parties have indulged their patronage with the ABC. I think it is a tribute to the institution that it has survived, and it is probably due to its public support. It really has, historically, been a political football, and that is what you see.⁹

2.7 Mr Quentin Dempster, former staff-elected director of the ABC Board, discussed a number of instances in which political appointments to the ABC Board have jeopardised the independence of the ABC:

6 Senate Environment, Communications, Information Technology and the Arts References Committee, *Above Board, Methods of appointment to the ABC Board*, September 2001, p. 13, quoting Council of Australian Postgraduate Associations, submission 592, p. 1.

7 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 22.

8 See for example Senate Select Committee on ABC Management and Operations, *Our ABC*, March 1995, pp 139–144; Senate Environment, Communications, Information Technology and the Arts References Committee, *Above Board, Methods of appointment to the ABC Board*, September 2001 pp 7–13.

9 Mr Matt Peacock, Delegate, Community and Public Sector Union (CPSU), *Proof Committee Hansard*, 1 November 2010, p. 6.

As chairman of the ABC, Donald [McDonald] inappropriately introduced [former Prime Minister] John Howard at a Liberal Party fundraiser during one election campaign. His behaviour was roundly attacked by editorial writers at the time, but at no time did he concede that his duties to the ABC and his then custodianship of its editorial policies were of higher importance than his friendship with John Howard.¹⁰

2.8 Mr Dempster discussed the 'intense political contention surrounding the appointment of Jonathan Shier as Managing Director by the McDonald board in 2000' arguing that this was another example of politicisation, as Mr Shier was a former Liberal Party official.¹¹ According to Mr Dempster, Mr Shier made a number of politically-motivated decisions, including:

- asking 'Max Uechtritz, the then director of ABC news and current affairs, to act to secure [Kerry] O'Brien's removal [as presenter of *The 7.30 Report*]'; and
- cancelling *Media Watch* 'in spite of its record as one of the most influential and watched programs on ABC television'. Mr Dempster explained that '*Media Watch* had exposed a 'cash for comment' culture within commercial radio in Australia which enraged those exposed. The then *Media Watch* presenter, Paul Barry, was contractually terminated'.¹²

2.9 Mr Dempster noted that similar issues arose under the leadership of Mr David Hill, who was Managing Director between 1987 and 1995, during the Hawke-Keating years. Mr Dempster gave evidence that:

Hill was known as [former NSW Premier, Neville] 'Wran's man' at the ABC...

...under pressure from Bob Hawke and Gulf War I, David Hill was going to sack Geraldine Doogue as the presenter of *The 7.30 Report*...It was almost that David was going to scapegoat Geraldine because she was seen to be an impediment to the ABC's then coverage of Gulf War I, which was controversialised at the time.¹³

2.10 In 2006, the ABC Board, chaired by Mr Donald McDonald AC, decided to cancel the publication of Chris Masters' biography of high profile broadcaster, Alan Jones, despite the book having been commissioned by ABC Books. Mr Dempster commented:

If ever there was a test of the ABC's independence as a publisher, this was it. We had a work by one of our finest investigative journalists about the way power operates in our country and the operation of Alan Jones's own network of influence, otherwise known as 'pick and stick'...Another

10 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 22.

11 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 22.

12 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 22.

13 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 22.

publisher took up the manuscript, and the work, *Jonestown*, was published to critical acclaim, winning a Walkley non-fiction award.¹⁴

2.11 In January 2009, ABC Books announced a commercial partnership with HarperCollins Publishers, a subsidiary of global media company News Corporation. Mr Dempster argued that this arrangement means that:

...it remains doubtful whether the ABC will ever publish any penetrating works which go to the core of the power structures in our country—certainly nothing about News Corp and its use of offshore tax havens such as the Netherlands Antilles, Bermuda, the Cayman Islands and what have you in its financial affairs. This will not be published in book form. The board allowed our independence as a publisher to be compromised through this decision alone.¹⁵

2.12 Mr Dempster added:

When I was on the board we had editorial after editorial attacking the ABC for going into bed with Fairfax and Cox Communications in a pay TV operation—and rightly so, because we are meant to be independent.¹⁶

2.13 The committee notes that the ABC and SBS each have special roles in Australian broadcasting, which are reflected in their respective legislation, charters and values.

2.14 The ABC's Charter, which is entrenched in legislation, specifically states that in providing broadcasting services, the ABC shall take account of its 'responsibility...as the provider of an independent national broadcasting service to provide a balance between broadcasting programs of wide appeal and specialized broadcasting programs'.¹⁷ The ABC Act also provides that it is the duty of the board 'to maintain the independence and integrity of the ABC'.¹⁸

2.15 Similarly, the SBS Board has as its first-listed duty to 'maintain the independence and integrity of the SBS',¹⁹ and the 'SBS Purpose and Values' specify that that the SBS will achieve its purpose of being a pioneering broadcaster by being 'independent from external pressures to conform or favour', and acting 'independently, distinctively and courageously'.²⁰

2.16 In his evidence to the committee Mr Dempster explained that:

14 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, pp 22–23.

15 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 23.

16 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 23.

17 ABC Act, subpara. 6(2)(a)(iii).

18 ABC Act, para. 8(1)(b).

19 SBS Act, para. 10(1)(a).

20 'SBS Purpose' at www.sbs.com.au/web/documents/SBSValues1208.pdf (accessed 4 November 2010).

We need an ABC which is fearless, not fearful. We need an ABC board, management and editorial leadership which treat the charter as a duty of intellectually honest and independent effort which does not allow itself to become a part of the adversarial game of Australian politics. The taxpayers who pay for the ABC do not deserve to be treated as part of so-called culture or political wars of influence peddling between the Labor and Liberal parties or the sectional interests which bankroll them.²¹

Committee comment

2.17 The committee strongly endorses Mr Dempster's comments and considers that they apply equally to the SBS. The committee has particular concerns about the effect of the partnership between ABC Books and HarperCollins and urges the ABC Board to review whether the arrangement maintains the necessary independence of ABC Books and the ABC as a whole.

Recommendation 1

2.18 The committee recommends that the ABC Board review whether the partnership between ABC Books and HarperCollins maintains the necessary independence of ABC Books and the ABC as a whole.

2.19 It is clear, from Mr Dempster's evidence as well as that provided by the Friends of the ABC,²² that the past practice of appointing directors to ABC and SBS boards has contributed to their politicisation.

2.20 Under the existing legislative frameworks, directors of the ABC and SBS Boards are currently appointed by the Governor-General on the recommendation of the government.²³ Both acts specify that a person shall not be appointed unless they have specified relevant experience.²⁴ However there are currently no legislated transparency or accountability mechanisms within the appointment process to ensure that directors do possess the requisite experience, or are the best possible candidates.

2.21 The committee questioned Mr Donald McDonald AC, former Chair of the ABC Board from 1996 until 2006, about the method through which he was appointed. Mr McDonald informed the committee that his appointment:

...probably took place like all the other appointments in that time: somebody rang me up and asked me whether I would do it.²⁵

2.22 Mr McDonald went on to say that in his case it was the minister who had phoned him directly and offered the position.²⁶ Mr McDonald also confirmed that he and the minister were personally acquainted.²⁷

21 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 23.

22 Ms Glenys Stradijot, Campaign Manager/Executive Officer, Friends of the ABC, *Proof Committee Hansard*, 1 November 2010, p. 11.

23 ABC Act, s12(2); SBS Act, s17(1).

24 ABC Act, s12(5); SBS Act, s17(2).

25 Mr Donald McDonald AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 18.

2.23 Mr Dempster reminded the committee that 'Donald [McDonald] is a close personal friend of John Howard, the former Prime Minister'.²⁸

2.24 Although there can be no doubt that, based on his considerable experience in the administration of the Sydney Theatre Company, Musica Viva and the Australian Opera Company,²⁹ Mr McDonald was suitably qualified for the position, he himself acknowledged that there were no checks and balances involved in appointing him to the position.³⁰

Committee comment

2.25 While the committee does not doubt that Mr McDonald was a suitably qualified and effective Chair of the ABC, the committee is of the strong opinion that the appointment of directors to the boards of our public broadcasting organisations by virtue of their connections with government ministers is completely inappropriate. It undermines the independence of the board and accordingly that of the whole of the organisation. The committee agrees with the comment of Ms Glenys Stradijot, Campaign Manager/Executive Officer, Friends of the ABC, that:

The independence of the ABC board is also important in terms of its job of protecting the ABC. The board needs to be independent of the government so that it can stand up for the interests of the ABC on occasions when governments are seeking to undermine the ABC or to interfere in its independence. There needs to be a board that can stand up to get the best funding for the ABC for its future. So the independence of the entire ABC depends on the independence of the board.³¹

2.26 Accordingly, the committee urges government and the ABC and SBS Boards to ensure that the interventionist approach that led to the politicisation of the boards of those public broadcasters and undermined their independence is not permitted to occur again, in order to maintain the independence of public broadcasters in Australia.

26 Mr Donald McDonald AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 18.

27 Mr Donald McDonald AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 18.

28 Mr Quentin Dempster AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 22.

29 Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts, 'Reappointment of Donald McDonald as Chairman of the ABC', *Media Release*, 5 July 2001 at www.dbcde.gov.au/Article/0,,0_4-2_4008-4_15854,00.html (accessed 4 October 2010).

30 Mr Donald McDonald, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 18.

31 Ms Glenys Stradijot, Campaign Manager/Executive Officer, Friends of the ABC, *Proof Committee Hansard*, 1 November 2010, p. 11.

Recommendation 2

2.27 In order to protect the independence of Australia's public broadcasters, the committee urges the government and the ABC and SBS boards to ensure that the interventionist approach by government, which has resulted in the politicisation of public broadcasters, does not occur again.

Merit-based appointment of board directors

2.28 The majority of the organisations and individuals who contributed to this inquiry expressed the view that a merit-based appointment process for directors of the ABC and SBS boards would go a long way towards addressing the politicisation of both organisations that has occurred in the past.³²

2.29 For example, in its submission, Friends of the ABC (NSW) stated:

The more open process envisaged by this Bill will go a long way towards restoring confidence in the ABC Board.³³

2.30 Similarly, the Community and Public Sector Union (CPSU) expressed the view that:

Merit based appointments will increase the calibre of boards, widen the scope of the talent pool available to fill the positions and will help build public confidence in the institutions that have been tarnished by the stacking of the boards by both sides of politics.³⁴

2.31 Mr Dempster further argued that:

Public broadcasters and, I believe, the wider public are looking to the current parliament to stop the practice of board stacking and adversarial and ideological influence peddling which sometimes goes with ABC board appointments. We need a paradigm shift, and the amendment before the parliament facilitates that. We need a new institutional maturity.³⁵

2.32 An administrative merit-based appointment process for appointments to the ABC and SBS boards has been in place since 2008, with appointments having been

32 Friends of the ABC (NSW) (*Submission 1*); Friends of the ABC (SA) (*Submission 2*); Mr Quentin Dempster (*Submission 3*); Friends of the ABC (NSW, Qld, Tas, Vic & WA) (*Submission 4*); and the CPSU (*Submission 5*) all supported the merit-based appointment process proposed by the bill. Ms Annwyn Godwin, Merit Protection Commissioner (*Submission 6*) did not express a view on the merit-based provisions of the bill, however expressed support of merit-based selection generally. Mr Donald McDonald, who appeared before the committee but did not make a submission was the only witness who did not support the bill.

33 Friends of the ABC (NSW), *Submission 1*, p. 1.

34 CPSU, *Submission 5*, p. 4.

35 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 23.

made in March 2009 and June 2010.³⁶ The bill proposes to legislate this existing process. Mr Dempster made the point that this process has 'been completely noncontroversial', and that as a result:

We have to go back into the record books and remind ourselves of the unpleasantness which has resulted in us coming back to this issue.³⁷

2.33 Mr McDonald was the only person who provided evidence against the proposal, on essentially philosophical grounds as opposed to the practical effect of merit-based selection on the ABC and SBS boards:

I think it is completely unnecessary. It is a whole other layer of bureaucracy when the public have elected politicians, and therefore elected the government to make decisions and run things. Apparently, the government is good enough to decide when we go to war; it is good enough to appoint members of the High Court—it is good enough to do all sorts of things—but apparently it is not good enough to appoint the members of the ABC board. It is ridiculous.³⁸

Committee comment

2.34 The committee agrees with the vast majority of contributors to this inquiry, and notes that there is overwhelming evidence in support of merit-based appointments to the boards of public broadcasters. The committee believes that a transparent merit-based process of appointing directors has since 2009, and will continue to, increase the independence of the ABC and SBS boards, which in turn will improve the capacity of the ABC and SBS to provide high-quality, independent broadcasting services to the Australian public.

2.35 Furthermore, the committee considers that processes to improve the independence of the ABC and SBS boards will increase the capacity of both organisations to withstand political attacks, which have frequently occurred in the course of Senate Estimates processes.³⁹

The merit-based process proposed by the bill

2.36 An influential report by the United Kingdom's Committee on Standards in Public Life, chaired by Lord Nolan, and entitled *Standards in Public Life*, made a series of recommendations on how the public appointments process in general might

36 The Hon Anthony Albanese MP, Minister for Infrastructure and Transport, *House of Representatives Hansard*, 30 September 2010, p. 266.

37 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 27.

38 Mr Donald McDonald AC, Privacy Capacity, *Proof Committee Hansard*, 1 November 2010, p. 14.

39 See Dr van Barneveld and Mr Peacock, CPSU, *Proof Committee Hansard*, 1 November 2010, p. 6.

be improved.⁴⁰ Seven principles underpinning the public appointments process in the UK were derived from the report, and are referred to as the 'Nolan rules'. The Nolan rules have become widely regarded as a best-practice approach to public appointments under a Westminster system of government.⁴¹

2.37 The Nolan rules recommend that the following elements underpin a public appointment process:

- ministerial responsibility;
- merit;
- independent scrutiny;
- equal opportunities;
- probity;
- openness and transparency; and
- proportionality.⁴²

2.38 The CPSU, Friends of the ABC (NSW) and officers from the Department of Broadband, Communications and the Digital Economy each gave evidence about the ways in which the proposed selection process fulfils the Nolan rules.

Ministerial responsibility

2.39 The proposed model retains a level of discretion for the Minister and Prime Minister in the appointment process by allowing them to recommend the appointment of a person not nominated by the nomination panel, subject to certain conditions.⁴³ Friends of the ABC (NSW) submitted:

We note that this process follows the Westminster conventions on ministerial responsibility, with the Minister retaining the power to reject the recommendations of the selection committee and appoint someone else. This is balanced, to some degree, by the fact that the Minister would be obliged to make the reasons for his decision public.⁴⁴

2.40 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, expanded on this point:

40 Committee on Standards in Public Life, 'Standards in Public Life: First Report', May 1995, www.public-standards.gov.uk/Library/OurWork/1stInquiryReport.pdf (accessed 4 November 2010).

41 Dr Kristin van Barneveld, Deputy National Secretary, Community and Public Sector Union, *Proof Committee Hansard*, 1 November 2010, p. 1.

42 The Commissioner for Public Appointments (UK), 'The Seven Code Principles', www.publicappointmentscommissioner.org/Code_of_Practice/ef8446f3551.html (accessed 4 November 2010).

43 See discussion at paragraph 1.5.

44 Friends of the ABC (NSW), *Submission 1*, p. 3.

With regard to ministerial responsibility, ultimate responsibility for appointments is with ministers. That is provided for in our provision. The nomination panel makes recommendations to the minister or, in the case of the ABC chair, the Prime Minister, but there is still capacity for the minister in particular circumstances to come up with somebody.⁴⁵

2.41 This aspect of the proposed model accords with the view of the Nolan committee that:

Accountability to Parliament is an important constitutional principle which we have no wish to weaken. We recommend that ultimate responsibility for appointments should remain with Ministers.⁴⁶

Merit

2.42 The Nolan report recommended that all public appointments 'should be governed by the overriding principle of appointment on merit'.⁴⁷ Dr Pelling advised the committee that merit 'is what the whole process is fundamentally about'.⁴⁸

2.43 A number of witnesses and submitters questioned the fact that the bill specifically precludes former Federal and State politicians and senior political staff members from appointment.⁴⁹ The Explanatory Memorandum explains the scope of 'senior political staff members':

It is anticipated that the legislative instrument that specifies classes of senior political staff member would include positions such as a Chief of Staff, Special Adviser, Principal Adviser, Senior Adviser, Media Adviser and Adviser.⁵⁰

2.44 According to the Explanatory Memorandum, this provision is 'intended to strengthen the independence and impartiality of the ABC (and SBS) board[s]'.⁵¹ In support of the provision, Friends of the ABC (NSW) submitted:

The proposal to exclude from eligibility for appointment to the ABC Board former parliamentarians or people who have recently been "senior political

45 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, p. 35.

46 Committee on Standards in Public Life, 'Standards in Public Life: First Report', May 1995, p. 72.

47 Committee on Standards in Public Life, 'Standards in Public Life: First Report', May 1995, p. 73.

48 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, p. 35.

49 See National Broadcasting Legislation Amendment Bill 2010, Item 12, subclause 12(5A) (ABC); Item 24, subclause 17(2A) (SBS).

50 Explanatory Memorandum, National Broadcasting Legislation Amendment Bill 2010, p. 3.

51 Explanatory Memorandum, National Broadcasting Legislation Amendment Bill 2010, pp 6 and 15.

staff members" is also likely to lead to greater public confidence in the ABC Board.⁵²

2.45 However, a number of witnesses argued that the proposed exclusion of former politicians and senior political staffers undermines the merit principle and precludes an experienced and qualified class of persons from appointment. For example, Mr McDonald argued that:

I think it is an extraordinary provision, frankly, to suggest that somebody, having served the public as a member of parliament, is, as a result of that, contaminated to the extent that they cannot provide useful service to the public by being on the board of the ABC. I think that is not only extraordinary but profoundly offensive in retrospect to former politicians who have been on the ABC board.⁵³

2.46 The CPSU agreed:

We actually believe that many people drawn to public life from all sides of parliament do want to make a contribution. We think that there is a degree of self-loathing in the proposed legislation, and our concern is not about...whether people are ex-politicians or ex-staffers; our concern is with the notion of political appointments, and they are different things.⁵⁴

Committee comment

2.47 The committee is persuaded by the arguments put forward by Mr McDonald and the CPSU, and does not see any reason why, after a suitable period of time and provided they are found to be the most suitable candidate under a competitive, merit-based process, former politicians and political staff members ought not be eligible for appointment to the boards of public broadcasters. The committee notes the submission by the Merit Protection Commissioner that 'merit is basically about getting the best available person for the job and doing it a way that is equitable, open and transparent',⁵⁵ and does not see how excluding an entire category of people serves the interests of 'getting the best available person for the job'.

2.48 In the committee's view, a waiting period before former politicians and senior staffers become eligible for public appointment would be appropriate. This would be consistent with other Commonwealth government policies and laws, such as the Lobbying Code of Conduct, which does not preclude former parliamentarians from lobbying activities. Instead, the Code provides that former Ministers and

52 Friends of the ABC (NSW), *Submission 1*, p. 1.

53 Mr Donald McDonald AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 14.

54 Dr Kristin van Barneveld, Deputy National Secretary, Community and Public Sector Union, *Proof Committee Hansard*, 1 November 2010, p. 2.

55 Merit Protection Commissioner, *Submission 6*, p. 2.

Parliamentary Secretaries may not engage in lobbying activities relating to any matter that they had official dealings within 18 months of leaving office.⁵⁶

Recommendation 3

2.49 The committee recommends that the bill be amended to provide that a former politician or senior political staff member is eligible for appointment to the ABC and SBS boards provided that they meet the following conditions:

- **the individual ceased to hold office at least 18 months prior to the appointment; and**
- **the individual is nominated by the Nomination Panel following an independent, merit-based selection process as set out by the bill.**

Independent scrutiny

2.50 The Nolan report emphasised the importance of independent scrutiny and advice in public appointments processes, finding that:

Public confidence would be enhanced if such advice [to the minister with respect to public appointments] included independent assurance that any proposed appointees had been scrutinised and found to be suitable for the post.⁵⁷

2.51 Dr Pelling advised the committee that the proposed process for ABC and SBS board appointments complies with this principle because:

With regard to independent scrutiny in the Nolan rules, 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. Essentially the process of our appointment panel, including members who are selected by the secretary of the Prime Minister's department, provides an independent scrutiny process which is separate from the department and from the minister in terms of identifying expert candidates for the post.⁵⁸

2.52 A number of submitters and witnesses questioned the independence of the nomination panel which, as described above, the bill provides is to be appointed by the Secretary of the Department of the Prime Minister and Cabinet.⁵⁹

2.53 Friends of the ABC (NSW, Qld, Tas, Vic & WA) submitted:

56 Lobbying Code of Conduct, 2008, subclause 7.1, at http://lobbyists.pmc.gov.au/docs/code_conduct.pdf (accessed 5 November 2010).

57 Committee on Standards in Public Life, 'Standards in Public Life: First Report', May 1995, p. 75.

58 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, p. 35.

59 See discussion at 1.4 above. See also National Broadcasting Legislation Amendment Bill 2010, Item 15, clause 24F.

With the independence of members of the Nomination Panel being critical to the integrity of the new appointment process and public confidence in it, integrity and transparency in the criteria and process for selection of the Nomination Panel is important. FABC believes that the Bill should specify criteria for selection of the Nomination Panel and provide further detail on the process for selection.⁶⁰

2.54 Similarly, Dr Kristin van Barneveld, Deputy National Secretary, CPSU, argued:

We think that public confidence would be enhanced by having a more open system that provides guidance on how the selectors are chosen.⁶¹

2.55 Dr van Barneveld suggested that the Prime Minister and opposition leader should make decisions about the composition of the nomination panel.⁶² However, Ms Stradijot, from Friends of the ABC, warned that this approach risks the appointment of 'lowest common denominator' appointees.⁶³ Although in making this argument Ms Stradijot was referring to the appointment of board members, the committee considers that the same argument applies to the selection of the nomination panel.

2.56 Dr Wendy Southern, Acting Deputy Secretary, Governance, Department of the Prime Minister and Cabinet, assured the committee that over the past two years during which an administrative merit-based appointment process has been in operation, very experienced and qualified individuals have been appointed to the selection panel.⁶⁴ In response to a question on notice the Department of Broadband, Communications and the Digital Economy acknowledged that there are no selection criteria prescribed in the Bill to guide the appointment of members to the Nomination Panel. Instead the department indicated:

In making appointments to the Panel, the Secretary of the Department of the Prime Minister and Cabinet takes account of the ability of potential Panel members to conduct a merit based appointment process. In making appointments to the Nomination Panel, the Secretary has taken the following into consideration:

- The candidate's experience on boards and in large organisations;
- The candidate's understanding of corporate governance; and
- An appropriate representation by gender and States.

60 Friends of the ABC (NSW, Qld, Tas, Vic & WA), *Submission 4*, p. 2.

61 Dr Kristin van Barneveld, Deputy National Secretary, Community and Public Sector Union, *Proof Committee Hansard*, 1 November 2010, p. 1.

62 Dr Kristin van Barneveld, Deputy National Secretary, Community and Public Sector Union, *Proof Committee Hansard*, 1 November 2010, p. 1.

63 Ms Glenys Stradijot, Campaign Manager/Executive Officer, Friends of the ABC, *Proof Committee Hansard*, 1 November 2010, p. 7.

64 Dr Wendy Southern, Acting Deputy Secretary, Governance, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 1 November 2010, pp 30–31.

In making appointments, the Secretary sought to select people who had this range of experience, who would be respected by both sides of politics, and together would have the widest possible understanding of aspects of Australian life and culture.⁶⁵

Committee comment

2.57 While the committee does not question the independence or quality of the individuals currently on the nomination panel, the committee shares the concerns expressed by the CPSU and Friends of the ABC regarding the need for assurance that the nomination panel is itself independent and free from political influence.

2.58 However, the committee is also cognisant of the fact that it is possible to over-bureaucratise a merit-based appointment process in pursuing the aim of independence. For example, it would be ridiculous if members of the nomination panel themselves needed to be appointed through a merit-based selection process, because there would be no logical end to a chain of merit-based selection processes. In the committee's view, an appropriate method of ensuring the integrity of the nomination panel would be for the panel to include, or be advised by, the Merit Protection Commissioner.

2.59 The Merit Protection Commissioner currently has an active role in ensuring that selection processes for agency heads and APS statutory office holders is merit-based under the government's merit and transparency policy relating to those positions.⁶⁶ The role involves the Commissioner, or her representative, being a full member of the assessment panel for these positions.⁶⁷ The Merit and Transparency policy states that:

The primary role of the Commissioner [in the selection processes for agency heads and APS statutory office holders] is to ensure that assessment of candidates is based on merit. The Commissioner (or his or her representative) is in all respects a full member of the assessment panel and therefore plays an active role in the process. He or she needs to be involved in all aspects of the selection exercise including shortlisting of applicants...⁶⁸

2.60 The policy does not apply to the ABC or SBS, however the Merit Protection Commissioner submitted:

Given the level of consistency between the expectations on the SES and Boards in general, the relevance of the APS approaches to merit and

65 Department of Broadband, Communications and the Digital Economy, answer to question on notice from hearing of 1 November 2010 (received 8 November 2010).

66 Merit Protection Commissioner, *Submission 6*, Attachment 2, p. 6.

67 A list of agencies and positions to which the policy applies is at www.apsc.gov.au/apsprofile/agencyheadselection.htm.

68 Merit Protection Commissioner, *Submission 6*, Attachment 2, p. 6.

transparency in engaging and promoting its senior staff appear to be substantiated.⁶⁹

2.61 The committee considers that, to ensure that assessment of candidates is based on merit, the Merit Protection Commissioner should be a member of the nomination panel for the ABC and SBS Boards to mirror his or her involvement in the appointment of APS heads and statutory office holders.

2.62 Accordingly, the committee recommends that the Merit Protection Commissioner have a standing appointment to the ABC and SBS board nomination panel.

Recommendation 4

2.63 The committee recommends that the government include the Merit Protection Commissioner as a permanent member of the Nomination Panel for appointments to the ABC and SBS boards.

Equal opportunities

2.64 The Nolan report recommended that 'the boards of public bodies should contain a balance of relevant skills, interests and backgrounds'.⁷⁰ In this regard Dr Pelling informed the committee that:

The principles of equal opportunity are taken into account in the selection process. Indeed, you would be aware that the SBS board is part of this process and quite specifically the selection panel looks at particular skills needed for people on the SBS board, given the statutory role of SBS.⁷¹

Probity

2.65 The Nolan report emphasised the importance of public boards observing the 'highest standards of impartiality, integrity and objectivity' and displaying a 'sense of the values and behaviour appropriate to the public sector'.⁷²

2.66 Dr Pelling advised that:

With regard to probity, board members of public bodies must be committed to the principles and values of public service. That kind of thing is taken into account in our criteria but our particular criteria do not specifically deal with that. Essentially, members of the ABC and SBS boards are, where there is some guidance in their legislation, subject to the standard principles

69 Merit Protection Commissioner, *Submission 6*, p. 4.

70 Committee on Standards in Public Life, 'Standards in Public Life: First Report', May 1995, p. 75.

71 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, p. 35.

72 Committee on Standards in Public Life, 'Standards in Public Life: First Report', May 1995, p. 82.

applying to directors in the Commonwealth Authorities and Companies Act. Those set out a basic set of rules about integrity of their service.⁷³

Openness and transparency

2.67 The Nolan report made a number of recommendations relating to the importance of openness and transparency in the appointment process for directors of public boards. The proposed process takes these principles into account by the requirements that:

- positions be advertised;⁷⁴ and
- the Minister or Prime Minister table reasons for appointing a person not nominated by the Nomination Panel.⁷⁵

2.68 Dr Pelling explained:

With regard to openness and transparency, the process is a public process. Anyone can apply. The independent panel assesses the applications and makes recommendations to the minister.⁷⁶

Proportionality

2.69 The final Nolan rule of proportionality means that appointment procedures ought to be appropriate 'for the nature of the post and the size and weight of its responsibilities'.⁷⁷

2.70 Dr Pelling explained:

I think the reference to proportionality is basically saying that you should not spend huge amounts of effort for relatively minor appointments and hardly any effort on relatively large appointments. Basically our process is about the heads of two substantial broadcasting organisations, and the process is proportionate to the requirements of those boards and has been successful in achieving its objectives to date.⁷⁸

73 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, p. 35.

74 National Broadcasting Legislation Amendment Bill 2010, Item 15, subclause 24B(3) (ABC); Item 29, subclause 43(3).

75 National Broadcasting Legislation Amendment Bill 2010, Schedule 1, Item 15, subclause 24X(2) and (4) (ABC); Item 29, clause 43B (SBS).

76 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, p. 35.

77 The Commissioner for Public Appointments (UK), 'The Seven Code Principles', at www.publicappointmentscommissioner.org/Code_of_Practice/ef8446f3551.html (accessed 4 November 2010).

78 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, p. 35.

2.71 Dr Pelling elaborated on the most recent appointment processes:

If you look at the last two appointment processes, we have had two separate processes, in 2008–2009 and in 2009–2010. The first appointment process cost \$207,992 and the second appointment process cost \$112,115...

If there were four appointments in the first and two appointments in the second, that suggests that the cost per appointment is of the order of \$50,000 to \$60,000...⁷⁹

Committee comment

2.72 Based on the evidence provided by the Department of Broadcasting, Communications and the Digital Economy, the CPSU and Friends of the ABC, the committee is satisfied that, subject to Recommendations 3 and 4, the appointment process proposed by the bill complies with the principles underpinning the Nolan rules and is an appropriate way of ensuring ABC and SBS board directors are appointed on the basis of merit.

2.73 Appendix 3 contains suggested amendments to the bill to reflect recommendations 3 and 4.

79 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 1 November 2010, pp 31–32.

Chapter 3

Staff-elected director

3.1 The second component of the bill, contained in Schedule 2, reinstates the position of staff-elected director to the ABC Board.

3.2 The position of staff-elected director was created by a legislative amendment to the ABC Act in 1985. However, the origins of the position can be traced to the position of staff-elected commissioner introduced by the Whitlam government in 1975.¹

3.3 The position was removed by an amendment to the ABC Act in 2006.² At that time the Australian Labor Party, Australian Greens and Australian Democrats Senators voted against the abolition of the position of staff-elected director.³

3.4 The CPSU, Friends of the ABC and Mr Quentin Dempster, a former staff-elected director, were all strongly in favour of the reinstatement of the position. Dr Kristin van Barneveld, Deputy National Secretary, CPSU, argued that a staff elected director is:

...able to bring current knowledge and to provide those skills to the board, and being able to make sure that decisions that are made at the board level are decisions that, potentially, are the right decisions for the organisation.⁴

3.5 Similarly, Mr Dempster described his experience in the position:

What I found in my time there was that you could have a discussion, a very constructive discussion, and say: 'How are we going to handle this because there's going to be a lot of hurt. Let's work out where this can be communicated to the staff.' So the staff-elected director can be a very positive force, assisting the ABC... [T]he staff-elected director can be a part of the governance of the organisation and to give a sense of ownership of the entity and its responsibilities and its reputation.⁵

3.6 Mr Dempster's submission traces the history of the position and gives a range of examples in which the staff-elected director has protected the best interests of the ABC, and particularly its independence.⁶

1 Senate Environment, Communications, Information Technology and the Arts References Committee, *Above Board, Methods of appointment to the ABC Board*, September 2001, p. 22.

2 *Australian Broadcasting Corporation Amendment Act 2006* (No. 49 of 2006).

3 *Senate Hansard*, 10 May 2006, p. 10.

4 Dr Kristin van Barneveld, Deputy National Secretary, Community and Public Sector Union, *Proof Committee Hansard*, 1 November 2010, p. 6.

5 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 24.

6 Mr Quentin Dempster, *Submission 3*, pp 6–9.

3.7 Mr McDonald, former Chair of the ABC Board, argued against the reinstatement of the position on the basis that the Managing Director of the ABC is already a member of the Board and is 'capable of representing the interests of the staff'.⁷

3.8 However, Mr Dempster argued that:

The managing director can represent the staff view in terms of saying, 'They are not going to like this' or 'This should be good because we are going to expand these services and there will be more creative opportunities'. In that sense any managing director or chief executive is able to say what the implications for the staff are. What I have been trying to say is that the position has evolved as a very beneficial conduit to the governance and management of the ABC.⁸

3.9 The reason behind the removal of the position in 2006 was that the position 'is not consistent with modern principles of corporate governance' due to the apparent tension between the interests of staff and the organisation as a whole.⁹ In his second reading speech to the amending legislation in 2006, the then Minister explained:

This tension is manifested in the potential conflict that exists between the duties of the staff-elected Director under 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 as a representative of ABC staff and elected by them. 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 where they are in conflict...

There is a clear legal requirement on the staff-elected Director that means he or she has the same rights and duties as the other Directors, which includes acting in the interests of the ABC as a whole. The Government is of the view that there should be no question about the constituency to which ABC Directors are accountable.¹⁰

3.10 However, both Mr Dempster and the CPSU gave evidence that this tension does not in fact exist. Dr van Barneveld stated:

[T]he staff elected director is a board member like everybody else and is subject to the legislative constraints of a board member like anybody else.

7 Mr Donald McDonald AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 16.

8 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 27.

9 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Australian Broadcasting Corporation Amendment Bill 2006*, May 2006, p. 1.

10 Senator the Hon Nick Minchin, Second Reading Speech, Australian Broadcasting Corporation Amendment Bill 2006, 29 March 2006.

As I said in our submission, they most certainly are not the representative of the staff.¹¹

3.11 The CPSU explained that the role of representing staff interests is carried out by unions, and not the staff-elected director:

We take offence at any suggestion that the staff-elected director is the representative of staff on the board. That is the role of unions. There are three unions covering employees at the ABC, and we defend our role as being the representatives of staff. No staff-elected director has ever made a claim to be the representative of staff and, in fact, past staff-elected directors have communicated this directly to staff.¹²

3.12 Mr Dempster agreed with these statements and explained that:

When you are being approached, lobbied or emailed, [the staff-elected director would say] 'That's not something for me; take it up with your representatives'.¹³

3.13 The committee notes that the duties of all ABC Board members include:

- ensuring that the ABC's functions are performed efficiently and with maximum benefit to the people of Australia;
- maintaining the ABC's independence and integrity; and
- ensuring that the gathering and presentation of news and information by the ABC is accurate and impartial.¹⁴

3.14 ABC Board directors also have a range of other obligations under Part 3, Division 4 of the *Commonwealth Authorities and Companies Act 1997*, including obligations to act in good faith, not to improperly use their position or information from it to gain an advantage, and to disclose conflicts of interest. The staff-elected director will not be, and was not previously, exempt from these obligations and is accordingly bound, like any other director, to act in the best interests of the ABC as a whole and to maintain its independence and integrity.

3.15 Based on the evidence presented by the CPSU, Mr Quentin Dempster and the Friends of the ABC, the committee believes that the reinstatement of the position of staff elected director is in the best interests of the ABC.

3.16 However, Mr McDonald raised two pertinent points in relation to the position of staff-elected director, that the committee considers should be incorporated into the bill. The first relates to the burden on staff-elected directors of campaigning for the

11 Dr Kristin van Barneveld, Deputy National Secretary, Community and Public Sector Union, *Proof Committee Hansard*, 1 November 2010, pp 4–5.

12 Dr Kristin van Barneveld, Deputy National Secretary, Community and Public Sector Union, *Proof Committee Hansard*, 1 November 2010, p. 2.

13 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 25.

14 ABC Act, subsection 8(1).

position, and the pressure that the possibility of a second term places on staff-elected directors. Mr McDonald explained:

I think the most burdensome part of it was that, in the arrangements then—and at least these provisions are an improvement, if they are passed—their term was for two years only and they could stand for another two years. But it meant that if they wanted to do another term they were in a position of campaigning or passively campaigning for a chunk of that time. So they had to deal with all these pressures, all these inquiries and all these bombardments. If this provision for a staff elected director were to go through, I would urge the legislators to think seriously about limiting the term of the staff elected director to one term only. I think the five years is a big improvement on the previous two years and I think it would be an even further improvement if they could never stand again, so that they did not have to ever think about their re-election.¹⁵

3.17 The former staff-elected director, Mr Dempster supported this proposition put forward by Mr McDonald.¹⁶

3.18 The committee accepts the argument by Mr McDonald, and supports limiting the period a staff-elected director may serve to one term. Accordingly, the committee recommends that the bill be amended to provide that a staff-elected director may only serve one five-year term, and is not eligible for re-appointment.

Recommendation 5

3.19 The committee recommends that the bill be amended to provide that a staff-elected director may hold office for a maximum of one five-year term.

3.20 The second issue that Mr McDonald raised that the committee feels should be reflected in the bill is why the ABC Board and not the SBS Board is to have a staff-elected director:

If it is good and necessary for the ABC, why is it not good and necessary for SBS?¹⁷

3.21 Mr Dempster agreed that this was a good suggestion.¹⁸

3.22 The committee did not receive any evidence on the specific situation of the SBS, but notes that the SBS Act currently provides that in appointing directors:

...the Governor-General must have regard to the need to ensure that the Directors include a person who the Governor-General is satisfied, having regard to consultations between the Minister and representatives of

15 Mr Donald McDonald AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 15.

16 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 27.

17 Mr Donald McDonald AC, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 15.

18 Mr Quentin Dempster, Private Capacity, *Proof Committee Hansard*, 1 November 2010, p. 23.

industrial organisations representing employees, has an appropriate understanding of the interests of employees.¹⁹

3.23 However, this provision does not require that the director be a current staff member. The committee is convinced of the benefits of having a current staff member on the board of the ABC, and considers that the same principles that justify the position on the ABC Board warrant the extension of the position to the SBS Board.

Recommendation 6

3.24 The committee recommends that the SBS Act be amended to include a staff-elected director on the SBS Board.

Conclusion

3.25 Overall, the committee considers that this bill represents a much needed reform to two aspects of the governance of public broadcasters in Australia – a merit-based selection process for ABC and SBS Board appointments and the inclusion of a staff-elected director. Subject to the amendments contained in recommendations 3–6 of this report, the committee recommends that the Senate pass the bill.

3.26 Appendix 3 contains suggested amendments to the bill to reflect recommendations 3–6.

Recommendation 7

3.27 Subject to the amendments contained in Recommendations 3–6 of this report, the committee recommends that the Senate pass the National Broadcasting Legislation Amendment Bill 2010.

Senator Doug Cameron
Chair

19 SBS Act, para. 17(2)(c).

Additional Comments

Australian Greens Senator Scott Ludlam

The Australian Greens substantially agree with the views expressed in the majority report. As a truly independent source of unbiased journalism and cultural activity, the ABC has a vital role to play in Australian society. A healthy, functional democracy depends upon access to reliable information and critical analysis, especially in areas that make the Government of the day and other powerful vested interests uncomfortable.

Further, it is not only the reality of independence that is important, but the public perception of it. If the Australian public are suspicious that the work of the ABC is being tailored to suit a partisan political agenda, they will be disinclined to trust its reporting and much of the value of the ABC will be lost.

Given this, and the history of political interference in the work of the ABC outlined on pages six to nine of the majority report, the present bill is very welcome and deserving of support. The majority's recommendations are aimed at further strengthening the bill, and I support recommendations one and two unequivocally.

My primary point of departure from the majority arises with regard to recommendation three. I accept that many former politicians and political staffers may be capable of making a valuable contribution to the board of the ABC, particularly if they are vetted through a robust merit-based selection process, and I acknowledge the CPSU's argument that 'political appointments' are not necessarily the same thing as 'appointments of politicians'. However, in my view these arguments are outweighed by the following considerations:

- There are obvious reasons for suspecting former politicians and staffers of political partisanship, even though they do not have an exclusive claim to that dubious distinction.
- Of the range of potentially partisan applicants, this cohort is readily identified and excluded.
- There is a significant problem of public perception with this cohort, especially given that the proposed selection process leaves a certain degree of executive discretion intact. The Communications Minister or Prime Minister would ultimately personally appoint these former parliamentarians, potentially from their own party, all the while attempting to reassure the public that the appointment is not politically-motivated.
- The group excluded by these provisions of the bill is small enough that there will be no difficulty recruiting appropriately-qualified board members without them.

Recommendation four is the only other place that I arrive at a slightly different conclusion to the majority. I agree that the laudable aim of depoliticising ABC board appointments is further advanced by ensuring that the nomination panel is not simply appointed at the open discretion of the Secretary of the Department of Prime Minister and Cabinet (PM&C). The inclusion of the Merit Protection Commissioner on the panel is a good idea and I endorse it. However, that still leaves the head of PM&C appointing potentially three of four panel members.

The CPSU's suggestion (at page 9 of their submission) provides a more comprehensive solution to the problem of establishing a depoliticised nomination panel. I recommend melding their suggestion with majority recommendation four to provide for a three-person nomination panel chaired by the Merit Protection Commissioner, with the other two members being the Secretary of the Department of Broadband, Communications and the Digital Economy and the chair of the ABC Board (or another board member nominated by the board if the Chair is unavailable). This has the same advantages as the CPSU's recommendation, in that the panel would be chaired by someone with expertise in merit-based decision-making and a minority of members (one) might be vulnerable to public perception of a pre-disposition for selection decisions that advance the political agenda of the incumbent Government.

I support majority recommendations five and six for the reasons given in the majority report. The perception that the position of staff-elected director is at odds with the responsibilities of the board clearly arises from the mistaken belief that the function of this position is to represent the interests of staff. Evidence to the Committee makes it plain that this is not the case, and the position brings useful operational knowledge into the boardroom.

My final recommendations pick up on useful suggestions from Friends of the ABC (FABC) and the CPSU that would serve to further limit the scope for politicised selection decisions. Firstly, FABC suggested limiting the shortlist that will be presented to the Communications Minister or Prime Minister to three, rather than 'at least three', as a longer list obviously provides greater scope for a more politically-palatable selection to be made. Secondly, the CPSU suggested that if the executive wishes to appoint a candidate from outside the shortlist, that candidate must be someone who has been assessed by the selection panel. Further, the executive must table the panel's reasons for not shortlisting that person alongside the executive's reasons for selecting him/her. This will help to ensure that the Government only disregards the results of the independent, merit-based selection process where it can make a persuasive public argument for its decision.

Recommendation 1

That the Government disregards majority recommendation 3 and sustains an absolute ban on former politicians and senior political staffers being appointed to the board of the ABC.

Recommendation 2

That the Government builds on majority recommendation 4 and amends the bill to provide for a three person nomination panel chaired by the Merit Protection Commissioner, with the other members being the Chair of the ABC Board (or another board member nominated by the board) and the Secretary of the Department of Broadband, Communications and the Digital Economy.

Recommendation 3

That the Government amends the bill to provide that the executive selects board members from a shortlist of three, rather than 'at least three'.

Recommendation 4

That the Government amends the bill to provide that if the executive appoints a board member from outside the shortlist supplied by the selection panel, the appointee must have been assessed by the panel and the executive must table the panel's reasons for not shortlisting the person alongside the executive's reasons for appointing him/her.

Recommendation 5

That the Government act on majority recommendations 1, 2, 5 and 6 as they are presented in the majority report.

Senator Scott Ludlam

Appendix 1

Submissions and answers to questions taken on notice

Submissions

- 1** Friends of the ABC (NSW) Inc
- 2** Friends of the ABC, SA Branch
- 3** Mr Quentin Dempster
- 4** Friends of the ABC – NSW, Qld, Tas, Vic and WA
- 5** Community and Public Sector Union

Answers to questions taken on notice

- 1** Mr Quentin Dempster - Answers to questions taken on notice (from public hearing, 1 November 2010)
- 2** Department of Broadband, Communications and the Digital Economy - Answers to questions taken on notice - ministerial discretion (from public hearing, 1 November 2010)
- 3** Department of Broadband, Communications and the Digital Economy - Answers to questions taken on notice - selection criteria (from public hearing, 1 November 2010)
- 4** CPSU - Answers to questions taken on notice (from public hearing, 1 November 2010)

Appendix 2

Public hearings

Monday, 1 November 2010 – Canberra

Community and Public Sector Union

Dr Kristin van Barneveld, Deputy National Secretary

Mr Matt Peacock, Delegate

Friends of the ABC – NSW, Qld, Tas, Vic and WA

Ms Glenys Stradijot, Campaign Manager/Executive Officer

Mr Donald McDonald AC (private capacity)

Mr Quentin Dempster (private capacity)

Department of Broadband, Communications and the Digital Economy

Dr Simon Pelling, First Assistant Secretary, Broadcasting and Switchover

Mr Jason Dickie, Manager, National and Community Broadcasting Section

Department of the Prime Minister and Cabinet

Dr Wendy Southern, Acting Deputy Secretary, Governance

Mr Glen Kierse, Assistant Secretary Infrastructure, Regulation and Competition Policy Branch

Appendix 3

Recommended amendments to National Broadcasting Legislation Amendment Bill 2010

Recommendation 3

2.49 The committee recommends that the bill be amended to provide that a former politician or senior political staff member is eligible for appointment to the ABC and SBS boards provided that they meet the following conditions:

- **the individual ceased to hold office at least 18 months prior to the appointment; and**
- **the individual is nominated by the nomination panel following an independent, merit-based selection process as set out by the bill.**

Recommended amendments

(1) *Schedule 1, item 12, page 5 (lines 8 to 15), omit subsection 12(5A), substitute:*

- (5A) The following persons are not eligible for appointment as a Director referred to in paragraph (1)(b) or (c) while they hold office, or for a period of 18 months after they cease to hold office:
- (a) a member of the Parliament of the Commonwealth;
 - (b) a member of the Parliament of a State, of the Legislative Assembly for the Australian Capital Territory or of the Legislative Assembly of the Northern Territory.
- (5AA) A person who is employed as a senior political staff member is not eligible for appointment as a Director referred to in paragraph (1)(b) or (c) while they are employed as a senior political staff member.
- (5AB) A person who was employed as a senior political staff member is not eligible for appointment as a Director referred to in paragraph (1)(b) or (c) for a period of 18 months after ceasing to be employed as a senior political staff member.
- (5AC) Subsections (5B), (5C) and (5D) do not apply to a person to whom subsection (5A), (5AA) or (5AB) applies.
- (5AD) A person to whom subsection (5A), (5AA) or (5AB) applies must not be appointed other than in accordance with a competitive selection procedure set out in section 24B.

Note: A former politician or a former senior political staff member is not eligible to be appointed as a Director unless the person has been nominated by the Nomination Panel.

(2) *Schedule 1, item 24, page 16 (lines 1 to 10), omit subsection 17(2A), substitute:*

- (2A) The following persons are not eligible for appointment as a Director referred to in paragraph 8(a), (aa) or (b) while they hold office, or for a period of 18 months after they cease to hold office:
- (a) a member of the Parliament of the Commonwealth;
 - (b) a member of the Parliament of a State, of the Legislative Assembly for the Australian Capital Territory or of the Legislative Assembly of the Northern Territory.
- (2AA) A person who is employed as a senior political staff member is not eligible for appointment as a Director referred to in paragraph 8(a), (aa) or (b) while they are employed as a senior political staff member.
- (2AB) A person who was employed as a senior political staff member is not eligible for appointment as a Director referred to in paragraph 8(a), (aa) or (b) for a period of 18 months after ceasing to be employed as a senior political staff member.
- (2AC) Subsections (2B) and (2C) do not apply to a person to whom subsection (2A), (2AA) or (2AB) applies.
- (2AD) A person to whom subsection (2A), (2AA) or (2AB) applies must not be appointed other than in accordance with a competitive selection procedure set out in section 43.

Note: A former politician or a former senior political staff member is not eligible to be appointed as a Director unless the person has been nominated by the Nomination Panel.

Recommendation 4

2.63 The committee recommends that the government include the Merit Protection Commissioner as a permanent member of the Nomination Panel for appointments to the ABC and SBS boards.

Recommended amendment

(3) *Schedule 1, item 15, page 8 (lines 28 to 31), omit section 24E, substitute:*

24E Membership

The Nomination Panel consists of the following members:

- (a) the Chair of the Nomination Panel;
- (b) the Merit Protection Commissioner appointed under Part 6 of the *Public Service Act 1999*, or his or her nominee; and
- (c) at least 1, and not more than 2, other members.

Recommendation 5

3.19 The committee recommends that the bill be amended to provide that a staff-elected Director may hold office for a maximum of one five-year term.

Recommended amendments

(4) *Schedule 2, item 4, page 22 (line 27) to page 28 (line 6), omit subsection 13A(5), substitute:*

- (5) Subject to sections 16 and 18, the person who is the staff-elected Director holds office on a part-time basis for a period of 5 years starting:
- (a) if, on the day on which the person is declared to be elected, another person holds office as the staff-elected Director because of a previous election—on the day after the day on which the other person ceases to hold office; or
 - (b) in any other case—on the day on which the person is declared to be elected.

(5) *Schedule 2, item 4, page 23 (lines 7 to 9), omit subsection 13A(6), substitute:*

- (6) A person who has been elected as the staff-elected Director at one election is not eligible for election at any other election of the staff-elected Director.

Recommendation 6

3.24 The committee recommends that the SBS Act be amended to include a staff-elected Director on the SBS Board.

Recommended amendment

(6) *Schedule 2, page 23 (after line 22), at the end of the Schedule, add:*

Special Broadcasting Service Act 1991**8 Paragraph 8(b)**

Repeal the paragraph, substitute:

- (ab) the staff-elected Director; and
- (b) not fewer than 3 nor more than 7 non-executive Directors.

9 Paragraph 17(2)(b)

Omit “; and”.

10 Paragraph 17(2)(c)

Repeal the paragraph.

11 At the end of section 17

Add:

- (4) In this section, *non-executive Director* does not include the staff-elected Director.
- (5) If there is a defect or irregularity in the appointment of a person as a staff-elected Director, the performance of the functions, or the exercise of the powers, of the Board is not affected by anything done, or omitted to be done, by or in relation to that person while he or she purported to be, or to act as, the staff-elected Director.

12 At the end of section 18

Add:

- (3) In this section, *non-executive Director* does not include the staff-elected Director.

13 At the end of section 21

Add:

- (3) In this section, *non-executive Director* does not include the staff-elected Director.

14 At the end of section 24

Add:

- (7) In this section, *non-executive Director* does not include the staff-elected Director.

15 At the end of Division 1 of Part 3

Add:

27A Staff-elected Director

- (1) Subject to this section, the staff-elected Director must be elected in accordance with the regulations.

Note: As a member of the Board, the staff-elected Director is a director of a Commonwealth authority for the purposes of the *Commonwealth Authorities and Companies Act 1997*: see the definition of *director* in section 5 of that Act.

Eligibility for election

- (2) A person is eligible to be a candidate for election, and to hold office, as the staff-elected Director if:
 - (a) the person is an employee of the SBS who, by the terms of his or her employment, is required to devote at least 22 hours per week to the duties of that employment; or

-
- (b) the person (the *relevant person*) performs services for the SBS, under the direction and control of the Managing Director or an employee of the SBS, under:
 - (i) a written contract entered into between the SBS and the relevant person; or
 - (ii) a written contract entered into between the SBS and a person other than the relevant person, being a contract that specified the relevant person as the person who would perform the services under the contract.

Effect of candidate ceasing to be eligible after nomination

- (3) If a person who has been nominated as a candidate for election as the staff-elected Director ceases to be eligible to be such a candidate after having been nominated and before the day on which the election takes place:
 - (a) if there are 2 or more other eligible candidates—the election must be held as if the person were not a candidate; or
 - (b) if there is only one other eligible candidate—the other candidate must be declared to be elected; or
 - (c) if there is no other eligible candidate—fresh invitations must be issued for the nomination of candidates.

Candidate may vote at election

- (4) A person who is eligible to be a candidate for election as the staff-elected Director is eligible to vote at the election.

Period of office

- (5) Subject to sections 26 and 27, the person who is the staff-elected Director holds office on a part-time basis for a period of 5 years starting:
 - (a) if, on the day on which the person is declared to be elected, another person holds office as the staff-elected Director because of a previous election—on the day after the day on which the other person ceases to hold office; or
 - (b) in any other case—on the day on which the person is declared to be elected.
- (6) A person who has been elected as the staff-elected Director at one election is not eligible for election at any other election of the staff-elected Director.

