



SENATE STANDING COMMITTEE
FOR THE
SCRUTINY OF BILLS

SECOND REPORT
OF
2010

24 February 2010

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MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)
Senator M Bishop (Deputy Chair)
Senator D Cameron
Senator J Collins
Senator R Siewert
Senator the Hon J Troeth

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 2010

The Committee presents its Second Report of 2010 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

National Broadcasting Legislation Amendment Bill 2009

National Broadcasting Legislation Amendment Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2009*. The Minister for Broadband, Communications and the Digital Economy responded to the Committee's comments in a letter received on 3 February 2010. A copy of the letter is attached to this report.

Extract from Alert Digest No.14 of 2009

Introduced into the House of Representatives on 29 October 2009
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Corporation Act 1991* to implement a new merit-based appointment process for the ABC and SBS Boards. The bill also reinstates the position of staff-elected Director to the ABC Board.

In particular, the bill:

- provides for the assessment of applicants' claims to be undertaken by an independent Nomination Panel established at arms length from the government;
- requires vacancies to be widely advertised, at a minimum in national and/or state and territory newspapers, and on the website of the Department of Broadband, Communications and the Digital Economy;
- provides for the assessment of candidates to be made against a core set of selection criteria, supplemented where necessary by additional criteria as determined by the Minister; and
- requires a report containing a short-list of recommended candidates to be provided to either the Minister or Prime Minister by the Nomination Panel.

Trespass unduly on rights and liberties

Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

Proposed new subsection 12(5A) of the ABC Act, to be inserted by item 12 of Schedule 1, provides that certain persons are not eligible for appointment as the Chairperson or a Director of the ABC Board. These persons are: members or former members of the Commonwealth Parliament (paragraph 12(5A)(a)); members or former members of state or territory parliaments (paragraph 12(5A)(b)); or a person who is or was a senior political staff member (paragraph 12(5A)(c)). Proposed new subsection 17(2A) of the SBS Act, to be inserted by item 24 of Schedule 1, duplicates this disqualification for non-executive Directors of the SBS Board.

The term ‘senior political staff member’ is defined as a person included in a class of persons specified by legislative instrument (proposed new subsection 3(3) of the ABC Act, to be inserted by item 3 of Schedule 1). The explanatory memorandum gives examples (at page 3) of the positions expected to be included in the legislative instrument: Chief of Staff, Special Adviser, Principal Adviser, Senior Adviser, Media Adviser and Adviser. The concept is not intended to extend to more junior positions such as Electorate Officer or Departmental Liaison Officer.

Legislation regularly stipulates the knowledge, skills and experience needed for Commonwealth positions and disqualification from office is generally based on criminal record, bankruptcy or similar lack of fitness for office. Unusually, proposed new subsections 12(5A) and 17(2A) base the disqualification from office on a person’s previous public employment. The explanatory memorandum states (at pages 6 and 15) that the exclusion of former politicians and senior staffers from consideration for ABC and SBS Board positions is intended to strengthen the independence and impartiality of the Boards (consistent with Board duties) and to overcome past perceptions of political bias.

While cognisant of the clear intent of the bill, the Committee notes that discrimination based on political opinion is contrary to human rights (see, for example, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights); and freedom of expression is a recognised human right (see Article 19 of the International Covenant on Civil and Political Rights). Further, political opinion is not necessarily a selection criterion for senior political staff positions.

Such disqualification is based on bias – actual, perceived or vicarious – and the disqualification of all those covered by the provisions is for life. Importantly, it would apply to people who occupied the relevant positions prior to the commencement of the legislation. The Committee **seeks the Minister’s advice** as to the rationale for why this is considered appropriate, as well as the particular reasons why appointment to the ABC and SBS Boards is considered ‘different’ or ‘special’ to other appointments. The Committee also **seeks the Minister’s advice** as to why the term ‘senior political staff member’ will be defined by legislative instrument rather than being defined in the bill itself (which would provide certainty as to the precise positions intended to be covered).

Relevant extract from the response from the Minister

Trespass unduly on rights and liabilities

Schedule J, items 12 and 24, new subsections 12(5A) and 17(2A)

The national broadcasters - the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) - play an important role in Australian life, and it is imperative that they perform their functions in an independent and impartial manner. To this end, the Bill establishes a statutory merit-based and transparent selection process for the appointment of non-executive directors to the ABC and SBS Boards.

To complement the new merit-based selection process, the Bill would also exclude current and former politicians and senior political staff from appointment to the ABC and SBS Boards (see Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)). These measures are intended to strengthen the independence and integrity of the ABC and SBS Boards, which is consistent with the statutory duties of the Boards (see s 8 of the *Australian Broadcasting Corporation Act 1983* and s 10 of the *Special Broadcasting Service Act 1991*).

I do not agree that the exclusion of politicians and senior political staff from appointment to the Boards of the national broadcasters unduly trespasses on the rights and liberties of those affected by the rule. Rather, the new exclusion rule is a response to longstanding public concerns that ABC and, to a lesser extent, SBS Board appointments have been politically motivated. Such concerns have the potential to undermine public confidence, not only in the process whereby appointments are made to the Boards, but also in the management of the national broadcasters.

The ability of the national broadcasters to shape and influence public opinion is significant. It is essential, therefore, to ensure that the Boards of the national broadcasters fulfil their statutory Charters in a manner that is impartial and independent from the Government of the day. To this end, the new exclusion rule, along with the statutory appointment process, will ensure that appointments to the Boards of the national broadcasters are merit-based.

Further, it should be noted that the exclusion rule would only apply to a limited class of persons irrespective of their political persuasion or opinion, and would in no way curtail any person's freedom to express an opinion or view.

The term 'senior political staff member' is intended to cover a class of persons ineligible for appointment to the ABC and SBS Boards. It is anticipated that such a class of persons would include those who serve, or have served, politicians as Chiefs of Staff, Special Advisers, Principal Advisers, Senior Advisers, Media Advisers and Advisers. The roles and responsibilities attaching to these positions, as well as the position titles themselves, have changed over time and it is likely that they will continue to evolve and adapt. Defining the term 'senior political staff member' via legislative instrument provides the flexibility necessary to ensure that the definition remains relevant and up-to-date should job titles and responsibilities change or become redundant, or where new positions are created, without the need to amend primary legislation.

The Committee thanks the Minister for this response and draws it to the attention of the Senate. The Committee also seeks further clarification about these items. The Committee acknowledges the intention of the policy, but is not satisfied that the approach strikes a reasonable balance between the competing interests of strengthening the independence of these statutory appointments and protecting people's rights. The Committee **seeks the Minister's further advice** about whether consideration has been given to removing the retrospective application of the requirement so that it will only apply to those people who undertake or remain in 'senior political staff member' positions after commencement of the bill; and whether consideration has been given to limiting the period of exclusion (so that a person would be eligible to apply if they had not been in a proscribed position for a specified period of time). The Committee notes that clause 7 of the *Lobbying Code of Conduct* establishes exclusion periods of 18 months for former Ministers or Parliamentary Secretaries and 12 months for other specified employment (including persons employed in the Offices of Ministers or Parliamentary Secretaries under the *Members of Parliament (Staff) Act 1984* at adviser level and above).

Retrospective application

Schedule 1, subitem 17(2); Schedule 2, item 7

The application provision contained in item 7 of Schedule 2 provides that subsection 13A(6) of the ABC Act, which is inserted by item 4 of Schedule 2, applies in relation to persons elected as the staff-elected Director before or after the commencement of item 7. This means that the time limit imposed in proposed new subsection 13A(6) – namely, that a person who has been elected at two elections is not eligible for election again – can apply to persons elected before commencement of the legislation. The explanatory memorandum states (at page 21) that '(t)his means that if a person who served as staff-elected Director before 15 June 2006 becomes a staff-elected Director in future, their previous period in office is taken into account for the purpose of subsection 13A(6)'.

This can be compared with subitem 17(2) of Schedule 1 which provides that '(s)ubject to subitem (3), the amendment made by item 8 [of Schedule 1] applies in relation to appointments made before, on or after the commencement of that item'. Item 8 of Schedule 1 inserts proposed new subsection 12(2A) into the ABC Act which limits to ten years the total period for which the Chairperson or other non-executive Director may hold office. However, subitem 17(3) is a transitional provision which applies to the person holding the position of ABC Chairperson immediately before commencement of the bill. In effect, the transitional provision allows any time that the person served on the Board as a Director only to be disregarded for the purposes of the ten-year rule inserted by new subsection 12(2A). The explanatory memorandum explains (at page 13) that '(t)his is to ensure the incumbent Chairperson is not disadvantaged by legislative changes that are not intended to change the basis of the original appointment'.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee is mindful that transitional provisions must provide commencement dates for provisions to take effect. Further, the issue of including or disregarding previous Board service clearly involves a policy decision. The Committee nevertheless remains concerned that the retrospective effect of the application provisions may adversely affect certain individuals and **seeks the Minister's advice** as to the rationale for the approaches taken in subitem 17(2) of Schedule 1 and item 7 of Schedule 2.

Relevant extract from the response from the Minister

Retrospective application

Schedule 1, sub item 17(2); item 7

The positions of staff-elected director and Chair are different from other directors and, consequently, require application and transitional arrangements that are appropriate to the circumstances peculiar to those positions. The application provision applicable to the staff elected director (see item 7 of Schedule 2) ensures that a candidate can serve no more than two terms, or ten years, in that position in total. This is consistent with the approach taken with the non-elected non-executive directors on the ABC Board. The application provision in item 7 would also facilitate a measured renewal of Board membership and its strategic direction.

The provisions in items 17(3) and 30(3) of Schedule 1 apply to the incumbent ABC and SBS Chairpersons respectively. The effect of these provisions is to disregard, for the purposes of the ten year term rule in items 8 and 26, time served as directors only on the relevant Boards (i.e. time served not as the Chairperson). These arrangements ensure that the current ABC and SBS Chairpersons are not prevented, by virtue of the amendments in the Bill, from serving a maximum of ten years as Chairs of the Boards. Further, the provisions with respect to the incumbent Chairpersons would also promote stability, continuity and consistency of direction for the national broadcasters in the short to medium term.

The Committee thanks the Minister for this response, which satisfies its concerns.

Senator the Hon Helen Coonan
Chair



SENATOR THE HON STEPHEN CONROY

MINISTER FOR BROADBAND, COMMUNICATIONS AND THE DIGITAL ECONOMY
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE

Senator Helen Coonan
Chair, Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

National Broadcasting Legislation Amendment Bill 2009

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 19 November 2009, requesting a response to issues relating to the National Broadcasting Legislation Amendment Bill 2009 (the Bill) identified in the Committee's *Alert Digest No 14* of 18 November 2009. My response follows.

Trespass unduly on rights and liabilities

Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)

The national broadcasters - the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) - play an important role in Australian life, and it is imperative that they perform their functions in an independent and impartial manner. To this end, the Bill establishes a statutory merit-based and transparent selection process for the appointment of non-executive directors to the ABC and SBS Boards.

To complement the new merit-based selection process, the Bill would also exclude current and former politicians and senior political staff from appointment to the ABC and SBS Boards (see Schedule 1, items 12 and 24, new subsections 12(5A) and 17(2A)). These measures are intended to strengthen the independence and integrity of the ABC and SBS Boards, which is consistent with the statutory duties of the Boards (see s 8 of the *Australian Broadcasting Corporation Act 1983* and s 10 of the *Special Broadcasting Service Act 1991*).

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Yours sincerely



Stephen Conroy
Minister for Broadband,
Communications and the Digital Economy