National Broadcasting Legislation Amendment Bill 2010

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Law and Bills Digest Section

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National Broadcasting Legislation Amendment Bill 2010

Date introduced: 30 September 2010

House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: Schedule 1 and Schedule 2, item 1 and items 3-7 commence by Proclamation. However if Proclamation is within 6 months of Royal Assent, then the provisions will commence on the day following that period of 6 months. Schedule 2, item 2 commences one day after the commencement of the provisions in Schedule 1.¹

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills home page, or through http://www.aph.gov.au/bills/. When bills have been passed they can be found at the ComLaw website, which is at http://www.comlaw.gov.au/.

Purpose

To amend the Australian Broadcasting Corporation Act 1983, (the ABC Act) and the Special Broadcasting Service Act 1991 (the SBS Act) to introduce a new board appointment process, and also to reinstate the position of the staff-elected Director to the Board of the ABC. A key amendment is the proposed permanent prevention of politicians and political-staffers from being appointed to the Boards.

Background

This Bill was previously introduced in Parliament on 29 October 2009 and lapsed on the prorogation of the 42nd Parliament.

Under current law, the Managing Director is appointed by the ABC Board for a period of 5 years (section 13 ABC Act). By definition, the Managing Director is an executive member of the Board (section 3), and this Bill also applies to the appointment of non-executive Directors to the Board. The Bill proposes amendments to the method of appointment of the Chairperson, Deputy Chairperson and other non-executive Directors on the Board. Special provision is made for the new position of the staff-elected Director as well.

Currently, board appointments are made by the Governor-General on advice of the Government. This Bill seeks to ensure that there is a new process by which a Nomination Panel will conduct a

¹ For commencement details, see Explanatory Memorandum, National Broadcasting Legislation Amendment Bill 2010, p. 2.

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merit-based assessment for non-executive Directors, and provide advice to the Government accordingly (still via the Governor-General).

In short, the process requires the Nomination Panel to provide a list of at least three candidates for the position to the Prime Minister or Minister (nominations for Chairperson would go to the Prime Minister). In relation to the Chairperson, the Prime Minister is to confer with Cabinet, and after Cabinet approval, consult with the Leader of the Opposition.

If the Prime Minister appoints a person not nominated by the Nomination Panel, the Prime Minister must table reasons for the appointment in both Houses of Parliament within 15 sitting days (new subsection 24X(2)). Similarly, if the Minister considers another person should be nominated, then the Minister must give the Prime Minister written notice of the name of that other person, and set out reasons for preferring that person (new subsection 24X(3)).

The first staff-elected position was introduced by the Whitlam Government without legislation in 1975, and subsequently abolished by the Fraser Government. It was then created again in 1986. In 2006, the then Howard Government enacted the Australian Broadcasting Corporation Amendment Act 2006 (the 2006 amendment) to remove the position of staff-elected Director to the ABC Board on the ground of perceived conflict of interest and ‘to ensure the efficient functioning of the ABC Board. ... This change is in line with modern principles of corporate governance and will also provide more consistency in governance arrangements for Australian Government agencies’. On the other hand, the current Government’s position is that:

The staff-elected director plays an important role in enhancing the ABC’s independence by providing the board with a unique and important insight into ABC operations. The staff-elected director brings particular expertise to the board but is not elected for the purpose of representing ABC staff. This is comparable to the other directors, who likewise do not represent the communities in which they work.

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

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Basis of policy commitment

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

Committee consideration

The provisions of the Bill were referred to and considered by the Senate Standing Committee on Environment and Communications and the Committee reported on the Bill on 17 November 2010. The Committee ALP majority made 4 recommendations in relation to the provisions of the Bill.

**Recommendation 3** recommends that instead of the permanent ban on former politicians and senior political staff members as proposed in item 12 of the Bill, an amendment be moved so that former politicians or senior political staff members should only be eligible to go on boards provided:

- 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.

**Recommendation 4** recommends an amendment to include the Merit Protection Commissioner as a permanent member of the Nomination Board.

**Recommendation 5** recommends that the term of office for the staff-elected Director be for a maximum of one five-year term.

Finally, **recommendation 6** recommends that the SBS Act be similarly amended to include a staff-elected Director on the SBS Board.

The two Coalition Senators on the Committee, Senators Fisher and McEwen, submitted a minority report whereby they agreed with recommendations 3 and 4, but opposed the recommendations in relation to the staff-elected Director.

It should be noted that on the Bill’s homepage, there are proposed amendments moved by Senator Birmingham on behalf of the Coalition which propose that in lieu of the permanent ban of politicians and political staffers, that there be a 12 month cooling-off period, in relation to both the ABC and SBS.

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SBS boards. These proposed amendments do not seek to repeal Schedule 2 which provides for the staff-elected Director to the ABC board.

Australian Greens Senator Ludham provided additional comments to the majority report whereby he indicates the Australian Greens ‘substantially agree’ with the views of the majority. However there is a substantial departure of view in relation to recommendation 3, relating to the appointments of politicians and political staffers. Senator Ludham recommends rejecting the Committee’s recommendation 3 and instead recommends maintaining the Bill’s absolute ban on former politicians and senior staffers being appointed.7

Senator Ludham also makes a recommendation which makes adjustments to the majority’s recommendation 4 as follows:

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 Chairperson 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.8

He also makes three other recommendations:

• that there be a shortlist of only three candidates, rather than ‘at least three’ candidates – he believes confining the field to the stipulated number would narrow the opportunity for politicised appointments
• that appointments proposed outside of the shortlist should require assessment by the panel, and
• that an appointment outside of the recommendations of the panel should be required to have reasons tabled for the departure from standard practice— along with the reasons that the panel gave for choosing the shortlist they had.9

Progress of the Bill in the House of Representatives

The Bill was read for the second time on 22 November 2010 and passed on the third read the next day. The Opposition opposed the Bill and, as mentioned, has tabled proposed amendments for the Senate debate in the name of Senator Birmingham relating to the appointment of ABC and SBS non-executive Directors and the need to provide a short (12 month) cooling-off period for politicians and staffers after the person has left their office.

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

8. Ibid, p. 31.
9. Ibid.

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The position creates the potential for conflict of interest with the staff-elected director legally bound to act in the best interests of the Corporation, despite having been appointed as a representative of staff and elected by them.\textsuperscript{10}

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

There is no question that the process set out in the Bill is a paradigm shift from the position until now – on paper at least. Cronyism should be significantly reduced. The power of ministers will be significantly constrained. But even the best drafted legislation carries risks that the government’s intentions are not carried through. Here, the British implementation experience can alert us to potential pitfalls.\textsuperscript{11}

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

- requiring the Minister’s role to be spelt out in more detail in a separate code of conduct
- providing a civic education component, transparency and independent monitoring processes
- having an overall audit from outside the Department, by, for example, the public service commissioner or the Australian National Audit Office, if not Parliament itself.\textsuperscript{12}

**Financial implications**

The Explanatory Memorandum states that the Bill is not expected to have any impact on Commonwealth revenue.\textsuperscript{13}

**Key provisions**

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

**Items 2 and 3** relate to the definition of ‘senior political staff member’ as a class of persons to be specified in a ministerial declaration. As a statutory instrument, this will be a disallowable instrument.\textsuperscript{14}

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

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\textsuperscript{10} N Minchin (then shadow Minister for Broadband, Communications and the Digital Economy), *Coalition remains opposed to staff-elected ABC Board position*, press release, 17 November 2009, viewed 1 February 2010, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FMH8V6%22


\textsuperscript{12} Ibid., M Edwards, p. 27.

\textsuperscript{13} Explanatory Memorandum, National Broadcasting Legislation Amendment Bill 2010, p. 1.

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Currently the ABC Act provides that the Board is to consist of a Managing Director, and not less than 5, nor more than 7, other Directors. Items 4-6 have the effect that the Board will now also specifically make mention of the Chairperson, and have not less than 4, nor more than 6, other Directors.\textsuperscript{15}

The Governor-General appoints the Chairperson and the Directors, but new subsection 12(5) provides that before doing this, in the case of the Chairperson, the Prime Minister must be satisfied of certain things, and in relation to the other non-executive Directors, the Minister must be satisfied of certain things. These things include that the person has experience in connection with broadcasting, communications or management, or experience in financial or technical matters, or has cultural or other interests relevant to the oversight of a public organisation providing broadcasting services (paragraphs 12(5) (c), (d), and (e)). These requirements are the same as those in the current ABC Act.

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

Appointments of the Chairperson and Directors must comply with new Part IIIA which inserts the merit-based process into the ABC Act (new subsection 12(5B)) but this is not required for the reappointment to office (new subsections 12(5C) and (5D)).\textsuperscript{16}

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

The Bill is silent as to how the Secretary makes his or her selection of panel members, and it is also silent as to how the Chairperson becomes Chairperson. In practice, this decision is also made by the Secretary, not by members of the Panel. The Secretary can also terminate appointments on grounds such as misbehaviour, mental or physical incapacity, bankruptcy, and unacceptable absence, to mention a few examples (new section 24N).

In the selection process for the Chairperson of the Board, the Panel is required to give a report to the Prime Minister on the outcome of the selection process which provides a list of at least three candidates nominated for appointment, along with a comparative assessment of them (new

\textsuperscript{14} Legislative Instruments Act 2003, section 42.
\textsuperscript{15} The Bill also inserts the ‘staff-elected Director’ as a member of the Board, see Schedule 2, item 1.
\textsuperscript{16} Similarly, new Part 3A is inserted into the SBS Act, by item 29 of the Bill.

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paragraph 24B(1)(d)). The Prime Minister must then consult with the Leader of the Opposition before making a recommendation to the Governor-General to appoint the person as Chairperson (new subsection 24X). However, if a person who has not been nominated is recommended for the position of Chairperson, the Prime Minister will be required to table the reasons for the appointment in both Houses of Parliament within 15 sitting days of the appointment. The Bill does not say that the Prime Minister is required to consult with the Leader of the Opposition in this latter case.

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

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

The Department of Broadband, Communications and Digital Economy also states on its website the Prime Minister’s approval is required. Nevertheless the terms of the proposed amendments do not explicitly require it as a condition of the appointment.

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

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17. Applicants must be assessed on merit (new paragraph 24B(1)(c)), and merit is to be the primary consideration (new paragraph 24B(2)(d)).
18. Ibid., p. 12.

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Schedule 2—ABC staff-elected Director

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

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

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

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

Concluding comments

The Bill takes steps to make the appointment process to the Boards of the Australian public broadcasters more arms-length from the Government which go towards lessening the perception of favouritism to the process. The inclusion of the reinstatement of the staff-elected Director will have both its supporters and detractors on the issue of improvement in governance practice. One of the issues of concern has been whether such an appointment complies with current corporate practice, however it is open to proponents to argue that any inconsistency should be resolved by reforming corporate practice so that such staff-based appointments become an acceptable norm.

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