THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL BROADCASTING LEGISLATION AMENDMENT BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Broadband, Communications and the Digital Economy, Senator the Honourable Stephen Conroy)
NATIONAL BROADCASTING LEGISLATION AMENDMENT BILL 2010

OUTLINE

The purpose of the National Broadcasting Legislation Amendment Bill 2010 (the Bill) is to amend the Australian Broadcasting Corporation Act 1983 (ABC Act) and the Special Broadcasting Service Corporation Act 1991 (SBS Act) 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.

Schedule 1 to the Bill establishes a merit-based appointment process for ABC and SBS non-executive Directors, with the following features:

- the assessment of applicants’ claims will be undertaken by an independent Nomination Panel established at arms length from the Government;
- vacancies will 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;
- the assessment of candidates will be made against a core set of selection criteria, supplemented where necessary by additional criteria as determined by the Minister; and
- a report containing a short-list of recommended candidates will be provided to either the Minister or Prime Minister by the Nomination Panel.

Schedule 2 to the Bill re-establishes the position of staff-elected Director to the ABC Board.

FINANCIAL IMPACT STATEMENT

The measures contained in this Bill are not expected to have any direct or indirect financial impact on Commonwealth revenue.
NOTES ON CLAUSES

Clause 1 – Short title

This is a formal provision. Once enacted, the short title of the Act will be the *National Broadcasting Legislation Amendment Act 2010*.

Clause 2 – Commencement

The table in this clause sets out when the various provisions of the Bill will commence.

Item 1 of the table provides that the preliminary provisions of the Bill (i.e. short title, commencement and effect of Schedules) would commence on Royal Assent.

Item 2 of the table provides that Schedule 1 (which contains the merit-based appointment amendments to the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Act 1991* (SBS Act)) would commence on a single day to be fixed by Proclamation. A delayed commencement for Schedule 1 allows time for the making of key legislative instruments that are needed to give full operative effect to the merit-based appointments process. However, if Schedule 1 is not proclaimed to commence within 6 months of the Act receiving the Royal Assent, the Schedule is deemed to commence on the day following that period of 6 months. It is expected that Schedule 1 would be proclaimed to commence before the expiry of the 6 month period.

Item 3 of the table provides that item 1 of Schedule 2 (the re-establishment of the office of staff-elected Director to the ABC Board) would commence in the same way as Schedule 1. Item 1 of Schedule 2 would complement certain amendments made under Schedule 1 to the Bill relating to, for example, the number of directors to be appointed to the ABC Board.

Item 4 of the table provides that item 2 of Schedule 2 commences immediately after the commencement of the provisions in Schedule 1. Item 2 of Schedule 2 would amend newly amended subsection 12(4) of the ABC Act (see item 10 of Schedule 1 to the Bill) to include a reference to the office of the staff-elected Director.

Item 5 of the table provides that items 3 to 7 of Schedule 2 to the Bill commence in the same way as Schedule 1. Items 3 to 7 deal with procedural matters relating to the re-establishment of the staff-elected Director. Linking the commencement to Schedule 1 ensures that the restoration of the staff-elected Director position is integrated with the other changes. The provision for delayed commencement also allows time for the making of regulations relating to the election of the staff-elected Director.

Clause 3 – Schedule(s)

This clause gives effect to the Schedules to the Bill by providing that each Act specified is amended or repealed as set out in the items of the Schedules. Any other item in the Schedules to the Bill operates according to its terms.
Schedule 1—Merit-based appointment of ABC and SBS non-executive Directors

This Schedule contains amendments to the ABC Act (items 1-17 refer), and the SBS Act (items 18-30 refer).

This Schedule of amendments would provide for the merit-based appointment of ABC and SBS non-executive Directors as defined in subsection 3(1) of the ABC Act and section 3 of the SBS Act respectively.

**Item 1 – Subsection 3(1)**
**Item 2 – Subsection 3(1)**
**Item 3 – At the end of section 3**

Items 1-3 insert new definitions in section 3 of the ABC Act. Item 1 defines the term Prime Minister’s Department, which is the Department of the Prime Minister and Cabinet. Under proposed new section 24F of the ABC Act (see item 15 below) the Secretary of the Prime Minister’s Department is responsible for appointing the members of the Nomination Panel. Item 2 defines the term senior political staff member as a person included in a class of persons specified by the Minister under proposed new subsection 3(3) of the ABC Act (see item 3). A senior political staff member would be ineligible for appointment to the ABC Board (see item 12, proposed new paragraph 12(5A)(c)).

Item 3 is consequential to item 2, and would insert a new subsection 3(3) that allows the Minister to specify, by legislative instrument, a class of persons for the purposes of the definition of ‘senior political staff member’. This provides the necessary flexibility to ensure that the definition remains relevant should job titles and responsibilities change, become redundant or where new positions are created. Under the proposed merit-based appointments process, certain categories of persons would be ineligible for appointment as a Chairperson (subsection 3(1) of the ABC Act refers) or a non-executive Director (not including the staff-elected Director) of the ABC Board (see item 12, proposed new subsection 12(5A)). One such category is a person who is, or was, a senior political staff member (see item 12, proposed new paragraph 12(5A)(c)). 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. The concept of senior political staff member is not intended to extend to more junior positions, such as an Assistant Adviser, Junior Adviser, Assistant Media Adviser, Junior Media Adviser, Clerk to Whip, Executive Assistant/Office Manager, Secretary/Administrative Assistant, Electorate Officer, or Departmental Liaison Officer.

The legislative instrument made under new subsection 3(3) would be disallowable for the purposes of the Legislative Instruments Act 2003 (the LIA).
Section 12 of the ABC Act specifies the members of the ABC Board (subsection 3(1) of the ABC Act refers) and provides for their appointment. Currently, subsection 12(1) provides that the Board consists of the Managing Director (subsection 3(1) of the ABC Act refers) and between 5 and 7 other non-executive Directors (subsection 3(1) of the ABC Act refers). Subsection 12(3) provides that the Governor-General will appoint one of the non-executive Directors to be the Chairperson of the Board.

Items 4-6 would make amendments with respect to the composition of the ABC Board. The key change is made by item 4 which inserts a new paragraph 12(1)(b) which identifies the Chairperson as a member of the Board. As a result of this amendment, the Board would comprise the Managing Director, the Chairperson, and several other non-executive Directors. The specific identification of the Chairperson in subsection 12(1) is needed to accommodate the merit-based appointment processes unique to that position (see item 12, proposed new subsection 12(5)).

Items 5 and 6 would amend paragraph 12(1)(c) as a consequence of the amendment made by item 4. Paragraph 12(1)(c) would specify the minimum and maximum number of Directors to be appointed to the ABC Board in addition to the Managing Director and the Chairperson and (if Schedule 2 to this Bill is enacted) the staff-elected Director. Note that if Schedule 2 to the Bill is enacted the total number of Directors on the ABC Board will increase to accommodate the position of staff-elected Director.

Item 7 – Subsection 12(2)

Item 7 would amend subsection 12(2) to complement the express recognition of the Chairperson under subsection 12(1) of the ABC Act (item 4 refers). This amendment would confirm that a Chairperson referred to in new paragraph 12(1)(b), in addition to a Director referred to in paragraph 12(1)(c), must be appointed or re-appointed by the Governor-General.

The Chairperson would hold office on a part-time basis for a period specified in the instrument of appointment provided the term does not exceed 5 years.

Item 8 - After subsection 12(2)

Item 8 would insert new subsection 12(2A) into the ABC Act to provide term limits for all Directors except the Managing Director and the proposed staff-elected Director (the term limits for the latter two Directors are provided elsewhere). The inclusion of term limits balances the need for Board stability with the need for renewal of strategic direction and reflects corporate best practice. Proposed subsection 12(2A) provides that the sum of the periods for which a person holds office as either Chairperson or other non-executive Director, or both, must not exceed 10 years. The 10 year term limit would apply to both existing appointments and future appointments (or re-appointments) to the Board (the application provision in item 17(2) refers). The inclusion of a specific term limit would provide greater clarity with respect to the length
of service. It also recognises the benefits of continuity and realising opportunities to enhance performance through the introduction of new Directors to the Board.

Item 8 also inserts, as an aid to interpretation, two examples which illustrate, in practical terms, how proposed new subclause 12(2A) would operate.

**Item 9 – Subsection 12(3)**

Item 9 would make a consequential amendment to subsection 12(3) to reflect the new arrangements for the selection and appointment of the ABC Chairperson. As a result of this amendment, subsection 12(3) would provide that the Governor-General would appoint one of the non-executive Directors to be the *Deputy Chairperson* as defined in subsection 3(1) of the ABC Act.

**Item 10 – Subsection 12(4)**

**Item 11 – Subsection 12(4)**

Item 10 would amend subsection 12(4) to clarify that the performance of the functions, or the exercise of the powers, of the Board is not affected by, amongst other things, a vacancy in the office of Chairperson by reason that there is no Deputy Chairperson. The Board would, therefore, have the ability to continue to exercise its powers and perform its functions even if the offices of Chairperson or Deputy Chairperson were vacant.

Item 11 would make a consequential amendment to subsection 12(4) in a corresponding way to the amendment made to subsection 12(1) by item 5.

**Item 12 – Subsection 12(5)**

Item 12 would repeal and replace subsection 12(5) of the ABC Act. Subsection 12(5) specifies the conditions that must be met before the Governor-General appoints a Director. The restatement of subsection 12(5) provides for the roles and duties of the Prime Minister and the Minister in relation to the appointment of particular Directors to the ABC Board. The Prime Minister would be responsible for recommending a candidate for appointment as Chairperson of the ABC Board, while the Minister would be responsible for recommending the appointment of other non-executive Directors.

Before making a recommendation to the Governor-General, both the Prime Minister and Minister would need to satisfy themselves that the relevant candidates were suitable for appointment because they meet one or more of the following criteria:

- (a) experience in connection with the provision of broadcasting services or in communications or management; or
- (b) expertise in financial or technical matters; or
- (c) cultural or other interests relevant to the oversight of a public organisation engaged in the provision of broadcasting services.
These amendments are consistent with modern drafting practices in that responsibility for the mental activity (i.e. the formation of an opinion) should be conferred on the Minister, or Prime Minister, instead of the Governor-General. This approach is also consistent with the principles of ministerial responsibility and accountability to the Parliament.

The Nomination Panel established under new Part IIIA (section 24A, item 15) would assist the Prime Minister and the Minister in this regard by conducting a merit-based selection process. The intention is that the Nomination Panel’s selection process and report will assist the Prime Minister or the Minister to determine suitably qualified candidates for each appointment with reference to the considerations set out in new subsection 12(5) and the selection criteria determined by the Minister under proposed new section 24W (item 15 below refers).

Item 12 would also insert new subsections 12(5A), (5B), (5C) and (5D).

New subsection 12(5A) would make certain classes of persons ineligible to be appointed as the Chairperson or a Director. The ineligible persons include:

(a) a member or former member of the Parliament of the Commonwealth;

(b) a member or former 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;

(c) a person who is, or was, a senior political staff member.

As previously noted, a senior political staff member is a person included in a class of persons specified by the Minister (items 2 and 3 refer).

The exclusion of former politicians and senior political staffers from consideration for Board positions is intended to strengthen the independence and impartiality of the ABC Board, which is consistent with the Board’s duties under section 8 of the ABC Act. A number of appointments over the years have been perceived as politically biased. While the proposed exclusion will not completely stop similar accusations from being made in future, it is intended to protect the Board’s integrity by disqualifying individuals who hold, or have held, seats in a Federal or State/Territory Parliament or Legislative Assembly, or who serve, or have served, in senior advisory roles to a politician.

New subsection 12(5B) would provide that a person must not be appointed as the Chairperson or a non-executive Director unless the merit-based assessment process in new Part IIIA is complied with prior to that appointment. However, the rule requiring the use of the merit-based selection process in accordance with new Part IIIA would not apply in relation to a person’s recommended re-appointment as the Chairperson or as a Director (subsections 12(5C) and 12(5D) respectively). A decision to reappoint a non-executive Director would be made at the discretion of the Minister, and in the case of the Chairperson, at the discretion of the Prime Minister. The Minister’s, or Prime Minister’s, decision to re-appoint may be based on, but is not limited to, such considerations as the incumbent Director’s performance. The re-appointment of a non-executive Director would not be subject to the merit-selection process in new Part IIIA,
as that process would have been undertaken with respect to those individuals prior to their initial Board appointment.

The re-appointment of the Chairperson or a non-executive Director would be subject to the 10 year term limit proposed in subsection 12(2A) (see item 8 above)

**Item 13 – Subsection 12(6)**

Item 13 would make a consequential amendment to subsection 12(6) to reflect the express recognition of the position of Chairperson under new paragraph 12(1)(b) (see item 4 above).

**Item 14 – At the end of section 12**

Proposed subsection 12(7) would provide that the Governor-General’s appointment of a Chairperson or a Director is not invalid merely because of a defect or irregularity in relation to the appointment. This is a common provision in Commonwealth legislation concerning the validity of appointments.

**Item 15 – After Part III**

Item 15 would insert new Part IIIA into the ABC Act. New Part IIIA sets out the merit-based selection process for the appointment of the Chairperson and other non-executive Directors to the ABC Board. As previously noted in relation to new subsection 12(5B), a person must not be appointed as the Chairperson or a non-executive Director unless Part IIIA is complied with.

The Nomination Panel, established under new section 24A, would play a central role in the merit-based selection process to be conducted before the Governor-General makes appointments to the ABC Board.

Under new paragraph 24B(1)(a), the Nomination Panel would conduct a merit-based selection process for the appointment of the ABC Chairperson or a Director. In performing this and any other function the Nomination Panel would act independently from the Government and would not be subject to its direction (section 24C).

As part of the merit-based selection process, the Nomination Panel would invite people to apply for one or more Board vacancies by advertisements published in a national newspaper and/or major newspapers published in each State and Territory, and on the Department’s website (subsection 24B(3)). In inviting people to apply for Board vacancies, the Nomination Panel must invite written applications by persons seeking to be appointed to those vacancies.

New subsection 24B(4) would give the Nomination Panel discretion to run a single merit-based selection process to fill vacancies on the Boards of both the ABC and the SBS. It may be convenient and cost-effective to fill more than one vacancy under the same selection process. Principally this would mean that two or more positions would be advertised at the same time and the Nomination Panel would convene to consider multiple positions at the one time. The selection criteria and advertisements would
highlight the differences in the Charters of each broadcaster and the statutory duties of each Board.

In conducting the selection process, the Nomination Panel would assess all applicants for the appointment against the relevant selection criteria specified by the Minister under new section 24W (discussed further below).

The Nomination Panel would also be required to assess all applicants for Board appointments on the basis of merit. An assessment would be based on merit if it is conducted in accordance with subsection 24B(2).

The principle of merit is intended to be interpreted broadly for the purposes of the selection process established under new Part IIIA. Formal qualifications and traditional work experience should form only one element of the Nomination Panel’s assessment of an applicant’s experience, skills and competencies. Non-traditional activities and career paths should also be recognised and valued as suitable qualifications which contribute to an applicant’s overall suitability for appointment.

Following its assessment of the applicants, the Nomination Panel would be required to produce a written report on the outcome of the selection process. The report must contain a shortlist of at least 3 candidates nominated for each vacancy and a comparative assessment of those candidates. Paragraph 24B(1)(d) requires the Nomination Panel to provide this report to:

(a) the Prime Minister in relation to the appointment of the ABC Chairperson; or

(b) the Minister in relation to the appointment of other non-executive Directors of the ABC.

The intention is that the Nomination Panel’s report will assist the Prime Minister or the Minister determine the most suitably qualified candidates for each vacant position with reference to the considerations set out in proposed subsection 12(5) and the selection criteria specified under proposed section 24W.

New subsection 24B(5) would address the circumstance in which new Board vacancies arise as a result of the outcome of a particular appointment process. For example, where the Nomination Panel invites applications by persons seeking to be appointed as the ABC Chairperson (whether or not it also invites applications by persons seeking to be appointed as a Director referred to in paragraph 12(1)(c)) and, as a result of that selection process, an existing ABC Director is appointed as Chairperson, a new vacancy will arise with respect to that Director’s position. For reasons of convenience and efficiency, new subsection 24B(5) would give the Nomination Panel the option of conducting a new selection process to fill the consequential vacancy, or to draw on and consider applications received for the previous selection process for the purpose of making a consequential appointment.

The Nomination Panel’s functions would also include those functions conferred on it by, or under, the ABC Act or the SBS Act (paragraphs 24B(1)(e) and (f)). For example,
item 29 below proposes to amend section 43 of the SBS Act to confer on the Nomination Panel an appointments function in relation to the SBS Board.

The Nomination Panel will form part of the Commonwealth. Proposed section 24D provides for the members of the Nomination Panel to have the privileges and immunities of the Crown in the right of the Commonwealth. This ensures that the Panel members are protected by the ‘shield of the Crown’. Crown immunities include the benefit of the presumption that legislation does not bind the Crown. As a result, the Panel members will not be liable for an offence for which the Commonwealth could not be prosecuted.

Proposed sections 24E-24P set out rules relating to the constitution and appointment of members of the Nomination Panel.

The Nomination Panel is to consist of a Chair and 2 or 3 other members. The Secretary of the Prime Minister’s Department is responsible for appointing members of the Nomination Panel, and for notifying the public about appointments made to the Nomination Panel.

Members of the Nomination Panel are appointed on a part-time basis and for a term that cannot exceed 3 years. Members of the Nomination Panel may be re-appointed by the Secretary of the Prime Minister’s Department.

The Secretary of the Prime Minister’s Department may also make acting appointments, in order to fill a temporary vacancy, or when a current member of the Panel is absent or otherwise unable to perform their duties. Acting appointments are not invalid merely because of technical or other defects relating to the appointment. This will provide certainty and stability and will ensure that an acting Nomination Panel member remains accountable for his or her actions.

The acting appointment arrangements set out in proposed section 24G operate in conjunction with sections 20 and 33A of the AIA (the legislative note refers).

Members of the Nomination Panel would be renumerated in accordance with new section 24H. Remuneration, such as daily sitting fees, would be determined by the Remuneration Tribunal under the Remuneration Tribunal Act 1973. The Remuneration Tribunal is an independent statutory body responsible for determining remuneration and related matters for a range of senior offices in Commonwealth bodies. However, if no determination by the Tribunal is in operation a member of the Nomination Panel would be paid the remuneration and allowances prescribed by regulations.

Proposed section 24H provides that regulations made under this section operate subject to the determinations of the Remuneration Tribunal. This means that if the Remuneration Tribunal determines remuneration or allowances of the kind covered by regulations made under this section, the Tribunal’s determination would prevail.

Consistent with modern drafting practice, there is no proposed section 24I.

Proposed section 24J would provide leave entitlements for a member of the Nomination Panel. The Secretary of the Prime Minister’s Department would be able to grant the
Chair leave on the terms and conditions determined by the Secretary. The Chair would, in turn, be able to grant leave to any other member of the Nomination Panel on the terms and conditions determined by the Chair.

Proposed sections 24K and 24L would impose certain disclosure obligations upon members of the Nomination Panel in relation to their performance of their statutory functions. Section 24K requires a member of the Nomination Panel to disclose actual or potential conflicts of interest (pecuniary or otherwise) to the Secretary of the Prime Minister’s Department.

Section 24L requires a member to disclose actual or potential conflicts of interest to other members of the Nomination Panel. This disclosure obligation relates to the Nomination Panel’s current or pending consideration of particular matters. A member’s disclosure must be timely and the fact of any member’s disclosure must be recorded in the Nomination Panel’s minutes of meeting.

A member’s failure, without reasonable excuse, to comply with their disclosure obligations would be a ground for terminating the member’s appointment to the Nomination Panel (see section 24N, discussed below).

Proposed section 24M is a standard resignation provision. It would allow members of the Nomination Panel to resign their appointments by giving the Secretary of the Prime Minister’s Department a written resignation. The resignation would take effect on the day it is received by the Secretary or, if the resignation specifies a later day, on that later day.

Proposed section 24N is a standard termination provision. It lists the grounds on which the Secretary of the Prime Minister’s Department may terminate the appointment of a member of the Nomination Panel. The Secretary may terminate the appointment of a Nomination Panel member on one or more of the grounds set out in this section.

Consistent with modern drafting practice, there is no proposed section 24O.

Proposed section 24P would allow the Secretary of the Prime Minister’s Department to determine any other terms and conditions for Nomination Panel members that are not expressly provided by the ABC Act.

Proposed sections 24Q-24V specify minimum requirements for the meetings of the Nomination Panel.

The Chair, including an Acting Chair, convenes whatever Nomination Panel meetings are considered necessary for the performance of the Nomination Panel’s functions. If present, the Chair presides over those meetings. If the Chair is absent, and there is no Acting Chair, the members present at the meeting will select a presiding member. The Nomination Panel must keep minutes of its meetings.

Three members constitute a quorum for Nomination Panel meetings. Subsection 33B(3) of the AIA provides that a member who participates in a meeting via telephone or other means of communication, such as a video-link, is taken to be present at the meeting. A
question arising at a meeting is decided by a simple majority of the members present and voting.

The person presiding at a meeting would have a deliberative vote and, if needed, a casting vote in the event of a tie. A deliberative vote is a vote that expresses an individual’s opinion on a matter being deliberated. A casting vote is a vote given in order to resolve a deadlock.

In addition to these minimum requirements regarding meetings, the Nomination Panel would be able to regulate its own proceedings as appropriate. For example, this may include such things as determining the priority and nature of agenda items, circulating an agenda in advance of each meeting, and circulating the meeting minutes following a meeting. The Nomination Panel may also determine its own approach to managing conflicts of interest as a result of any disclosures made under section 24L.

Proposed sections 24W–24X set out the respective roles of the Minister and the Prime Minister in the appointments processes.

New section 24W would empower the Minister to determine selection criteria for the appointment of the ABC Chairperson or a Director. Since this instrument provides for the determination of generally applicable selection criteria that are binding on the Nomination Panel, it is a legislative instrument and is disallowable for the purposes of the LIA. This enables the selection criteria to be subject to parliamentary scrutiny.

The Minister would also be able to give written notice to the Nomination Panel of additional selection criteria for a particular appointment (subsection 24W(2)). This would enable the Minister to tailor additional selection criteria for particular appointments. For example, the Minister might determine that the ABC Board required a certain skill set and notify one or more criteria to the Nomination Panel relating to that skill set. While the additional criteria determined by the Minister would be binding on the Nomination Panel, it would not have general application with respect to all Board appointments. For this reason, a notification by the Minister under subsection 24W(2) is not a legislative instrument for the purposes of the LIA - subsection 24W(3) contains a declaration confirming this fact.

In accordance with new subsection 24B(1) (item 15 refers), the Nomination Panel would be required to assess all applicants for appointment to the ABC Board against the selection criteria determined by the Minister under new section 24W. The selection criteria determined by the Minister would complement the considerations set out under new subsection 12(5) of the ABC Act (see item 12), and assist the Minister (and the Prime Minister, where relevant) to identify the candidates best suited to the particular position.

Proposed section 24X would set out the consultation requirements the Prime Minister or the Minister must comply with prior to recommending the appointment of the ABC Chairperson or Director. These requirements are intended to facilitate greater transparency and parliamentary scrutiny of the selection and appointment of candidates to the ABC Board.
When the Nomination Panel gives the Prime Minister a report concerning the appointment of the ABC Chairperson, the Prime Minister must consult with the Leader of the Opposition in the House of Representatives before making a recommendation to the Governor-General that a particular person be appointed as Chairperson (subsection 24X(1)).

In addition, if the Prime Minister recommends that the Governor-General appoint as Chairperson a person who has not been recommended by the Nomination Panel, the Prime Minister must table his or her reasons for recommending the appointment of that person in each House of the Parliament no later than 15 sittings days after that appointment is made (subsection 24X(2)).

Similarly, if the Minister considers that a person not nominated by the Nomination Panel should be appointed as a Director, 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 for that appointment in each House of the Parliament no later than 15 sitting days after that appointment is made (subsection 24X(4)).

Proposed section 24Y would require the Department to include in its annual report a statement in relation to each completed selection process for the appointment of an ABC Chairperson or a Director. This statement is intended to indicate whether a particular selection process had been conducted in accordance with the legislative requirements set down in the ABC Act. Such a statement would assist in providing greater transparency for the Board appointment processes conducted in a financial year.

**Item 16 – Paragraph 68(1)(b)**

Paragraph 68(1)(b) provides that the money of the ABC shall be applied only to certain payments, including payment of any remuneration or allowances payable under the ABC Act.

The proposed amendment would exclude remuneration or allowances payable to the Nomination Panel members under proposed Part IIIA of the ABC Act. These payments will be made by the Department, not the ABC.

**Item 17 – Application and transitional**

Item 17 contains special application and transitional provisions. Subitem 17(1) would provide that the amendments made by items 7, 12 and 14 do not have retrospective application. Rather, they would only apply in relation to ABC Board appointments made after the commencement of those items. Items 7, 12 and 14 would commence in accordance with item 2 of the table in covering clause 2.

Subitem 17(2) would provide for the application of the amendment made by item 8. Item 8 would limit the total period for which the Chairperson or other non-executive Director holds office to 10 years. Item 8 would apply to both existing and future ABC Board appointments once it commences in accordance with item 2 of the table in
covering clause 2. The application rule in subitem 17(2) would apply subject to the operation of the transitional measure in subitem 17(3).

The transitional rule in subitem 17(3) would apply to the person holding the position of ABC Chairperson immediately before the commencement of the subitem. In effect, the rule would disregard, for the purposes of the 10 year rule in new subsection 12(2A), any time prior to the commencement of subitem 17(3), in which that person served as a Director only (i.e. not as Chairperson) on the ABC Board.

These arrangements ensure that the current ABC Chairperson is not disadvantaged, by virtue of legislative changes, from serving a maximum of ten years as a Chair of the Board. The provision with respect to the incumbent Chairperson would also promote stability, continuity and consistency of direction for the national broadcaster in the short to medium term. The transitional rule would not apply to future appointees to the position of Chairperson.

For example, if the current ABC Chairperson had served, prior to the commencement of subitem 17(3), 5 years as a Director and 3 years as Chairperson of the ABC Board, then, in accordance with the transitional rule in subitem 17(3), the 5 year period in which that person served as a Director would be disregarded for the purposes of the 10 year rule. As a result, that person would be eligible to serve another 7 years on the Board.

Subitem 17(4) is a transitional provision which provides that the person who is currently Chairperson under the ABC Act will be taken, on the commencement of subitem 17(4), to have been appointed by the Governor-General under new paragraph 12(1)(b) for the balance of the person’s appointment and on the same terms and conditions.

Subitem 17(4) would not prevent the variation of the terms and conditions under which that person is appointed after the commencement of that subitem (subitem 17(5)).

Subitem 17(6) would provide that the amendments made by Schedule 1 do not affect the validity of an appointment of a person as an ABC Director referred to in paragraph 12(1)(c) made before the commencement of the application and transitional provisions in item 17.

**Special Broadcasting Service Act 1991**

**Item 18 – Section 3**

Item 18 would insert a defined term for *Nomination Panel* into section 3 of the SBS Act. A Nomination Panel means the Nomination Panel established under section 24A of the ABC Act. This amendment is related to the amendments proposed by item 29 below.
Section 8 of the SBS Act sets out the membership of the SBS Board (section 3 of the SBS Act refers), which currently consists of the Managing Director (section 3 of the SBS Act refers) and not fewer than 4, nor more than 8, non-executive Directors. In addition, subsection 21(1) of the SBS Act provides, inter alia, that the Governor-General must appoint one of the non-executive Directors to be the Chairperson (section 3 of the SBS Act refers) of the Board.

Items 19-21 would make amendments with respect to the composition of the SBS Board. Item 19 inserts a new paragraph 8(aa) to specifically identify the Chairperson as a member of the Board. As a result of this amendment, the SBS would consist of the Chairperson, the Managing Director and several other non-executive Directors.

It should be noted that, in contrast to the proposed arrangements for the ABC Chairperson, the amendment made by item 19 is not intended to accommodate a merit-selection process that is unique to the SBS Chairperson. Rather, the candidate for the position of SBS Chairperson would be subject to the same merit-selection processes as candidates for the other non-executive Director positions. In particular, it would be the Minister, and not the Prime Minister, that recommends the appointment to the Governor-General under section 17.

Items 20 and 21 would amend paragraph 8(b) as a consequence of the amendment made by item 19. The amendments would alter the composition of the Board such that not fewer than 3, and not more than 7, other non-executive Directors would sit on the Board in addition to the Managing Director and Chairperson. Therefore, the maximum number of Directors (section 3 of the SBS Act refers) on the Board would be 9.

Items 22-23 would amend subsection 17(2) of the SBS Act to provide that before the appointment power is exercised by the Governor-General, the Minister needs to ensure that the Directors collectively (including the proposed appointee) possess the knowledge and capabilities required by subsection 17(2) of the SBS Act. These amendments are consistent with modern drafting practices in that responsibility for the mental activity (i.e. the formation of an opinion) should be conferred on the Minister instead of the Governor-General. This approach is also consistent with the principle of ministerial responsibility and accountability to Parliament.

Item 24 would insert new conditions on the appointments of non-executive Directors to the SBS Board. These provisions are substantially similar to item 12 in this Schedule about the appointment of ABC Directors. The same policy rationales apply to the SBS as for the ABC.

Item 24 addresses the ineligibility for appointment of politicians and senior political staffers (proposed subsection 17(2A)), and the circumstances in which a merit-based
appointments process must be conducted in accordance with new Part 3A of the SBS Act (proposed subsections 17(2B) and (2C)).

However, the rule requiring the use of the merit-based selection process in accordance with new Part 3A would not apply in relation to a person’s recommended re-appointment as a Director (subsection 17(2C)). A decision to reappoint a Director would be made at the discretion of the Minister, whose decision to re-appoint may be based on, but is not limited to, such considerations as the incumbent Director’s performance. The re-appointment of a non-executive Director would not be subject to the merit-selection process in new Part 3A, as that process would have been undertaken with respect to those individuals prior to their initial Board appointment.

Item 25 – At the end of subsection 17(3)

Subsection 17(3) of the SBS Act provides that the appointment of a non-executive Director by the Governor-General is not invalid merely because of a defect or irregularity in relation to the appointment. Item 25 would provide that a failure to comply with new Part 3A would also not invalidate the appointment of a non-executive Director. This is a common provision in Commonwealth legislation concerning the validity of appointments.

Item 26 – At the end of section 18

Non-executive Directors of the SBS Board hold office for a period not exceeding 5 years (subsection 18(1) refers). However, the persons holding these offices are also eligible for re-appointment for up to 5 years under subsection 18(2).

Item 26 would insert new subsection 18(3) to provide term limits for non-executive Directors (the Managing Director’s term limit is regulated by section 29). New subsection 18(3) would provide that the sum of the periods for which a person holds either, or both of, the offices of Chairperson or a non-executive Director, must not exceed 10 years. The 10 year term limit would apply to both existing appointments and future appointments (see subitem 30(2)). Item 26 also inserts, as an aid to interpretation, two examples which illustrate, in practical terms, how proposed new subsection 18(3) would operate.

Subsection 18(3) is materially identical to proposed subsection 12(2A) of the ABC Act, which is discussed in relation to item 8 of Schedule 1 to the Bill. The same policy rationale applies to the SBS as for the ABC.
Item 27 – Subsection 21(1)  
Item 28 – Subsection 21(2)

Item 19 (discussed above) would allow the Nomination Panel to conduct a merit selection process prior to the appointment of the SBS Chairperson by the Governor-General. The appointee may or may not be a serving SBS non-executive Director. Consequently, items 27 and 28 would amend subsections 21(1) and (2), such that the Governor-General would no longer be charged with appointing one of the existing non-executive Directors as Chairperson.

Item 29 – After Part 3

Item 29 would insert new Part 3A into the SBS Act, which sets out the merit-based process for the appointment of non-executive Directors to the SBS Board.

The Nomination Panel established under new section 24A of the ABC Act would play a central role in the merit-based selection process to be conducted before the Governor-General makes appointments to the SBS Board (section 43).

The Nomination Panel’s performance of its function under the SBS Act would be independent of Government and free from Government direction (see item 15 above, particularly new paragraph 24B(1)(f) and new section 24C of the ABC Act).

As part of the merit-based selection process, the Nomination Panel would invite written applications for vacancies by advertisements published in a national newspaper, and/or major newspapers published in each State and Territory and on the Department’s website (new subsection 43(3) refers).

As previously noted in relation to item 15 above, the ABC Act would allow the Nomination Panel to conduct, if appropriate, one selection process for vacancies at both national broadcasters (see commentary on subsection 24B(4), item 15 above).

In conducting a selection process for the SBS Board, the Nomination Panel must assess all applicants for the appointment against the selection criteria determined by the Minister under new subsection 43A(1) of the SBS Act, and any additional criteria applicable to a particular appointment as notified by the Minister under subsection 43A(2). The provision in the SBS Act for the making of selection criteria corresponds with those proposed for the ABC Act (see commentary about item 15, in relation to proposed section 24W of the ABC Act).

The Minister’s determination of selection criteria under subsection 43A(1) of the SBS Act would be a disallowable legislative instrument for the purposes of the LIA and therefore subject to parliamentary scrutiny. The Minister’s notification of additional selection criteria under subsection 43A(2) is not a legislative instrument and the declaration in subsection 43A(3) confirms this fact.

The Nomination Panel would also be required to assess all applicants for Board appointments on the basis of merit, in accordance with the assessment considerations set out in proposed subsection 43(2) of the SBS Act. These merit assessment considerations...
are the same as those in the corresponding provision of the ABC Act (see commentary in relation to proposed subsection 24B(2) of the ABC Act, item 15 above).

As is the case for appointments to the ABC Board, it is intended that the principle of merit would also be interpreted broadly for the purposes of the selection process established under new Part 3A of the SBS Act.

Following its assessment of the applicants, the Nomination Panel would be required to produce a written report for the Minister about the selection process for SBS non-executive Directors (paragraph 43(1)(d)). The report must nominate at least 3 candidates for each vacancy and must include a comparative assessment of those candidates against the applicable selection criteria specified by the Minister under section 43A.

If the Minister proposes to appoint a person who has not been nominated by the Nomination Panel, the Minister must give written notice to the Prime Minister specifying the name of the person and giving reasons for preferring that person over the candidates recommended by the Nomination Panel (subsection 43B(1)). If that person is later appointed by the Governor-General (on the Minister’s recommendation), the Minister would be obliged to table his reasons for that appointment in each House of the Parliament no later than 15 sittings days after that appointment is made (subsection 43B(2)). These requirements are intended to facilitate greater transparency and parliamentary scrutiny of the selection and appointment of candidates to the SBS Board.

Proposed section 43C would require the Department to include in its annual report a statement in relation to each completed selection process for the appointment of a non-executive Director to the SBS Board. It is intended that this statement indicate whether a particular selection process had been conducted in accordance with the legislative requirements. Such a statement would assist in providing greater transparency of the Board appointments conducted during that year.

**Item 30 – Application and transitional**

Item 30 is an application and transitional provision. Subitem 30(1) would provide that the amendments made by items 24 and 25 do not apply retrospectively. Rather, they would only apply in relation to SBS Board appointments made after the commencement of those items. Items 24 and 25 would commence in accordance with item 2 of the table in covering clause 2 (noted above).

Subitem 30(2) would provide for the application of the amendment made by item 26. Item 26 imposes term limits on non-executive Directors. Subject to the operation of subitem 30(3), these term limits would apply to SBS Board appointments made before, on or after the commencement of item 26 (including because of the transitional rule in subitem 30(4)). Item 26 would commence in accordance with item 2 of the table in covering clause 2.

The transitional rule in subitem 30(3) would apply to the person holding the position of SBS Chairperson immediately before the commencement of the subitem. In effect, the rule would disregard, for the purposes of the 10 year rule in new subsection 18(3), any
time, prior to the commencement of subitem 30(3), in which that person served as a paragraph 8(b) Director only (and not as Chairperson) on the SBS Board. A materially identical transitional measure would apply to the person holding the position of ABC Chairperson (see discussion of subitem 17(3) above).

Subitem 30(4) is a transitional provision which provides that the person who is currently the Chairperson under the SBS Act will be taken, on the commencement of subitem 30(4), to have been appointed by the Governor-General under section 17 as the Chairperson for the balance of the person’s appointment and on the same terms and conditions.

Subitems 30(4)-(6) are materially identical to the corresponding transitional arrangements for the ABC (as discussed in item 17 above).
Schedule 2—ABC staff-elected Director

Schedule 2 to the Bill would make amendments to the ABC Act in order to reinstate the position of the staff-elected Director to the ABC Board.

Item 1 – Before paragraph 12(1)(c)

Item 1 would insert a new paragraph (ba) at the end of paragraph (1)(b) (the latter paragraph would be inserted by item 4 of Schedule 1 to the Bill).

Subsection 12(1) of the ABC Act provides for the membership of the ABC Board. As a result of amending items 4-6 of Schedule 1 to the Bill, the Board would consist of the Managing Director, the Chairperson and not fewer than 4, nor more than 7, other Directors. Item 1 of Schedule 2 would amend the membership of the ABC Board by including the staff-elected Director.

The staff-elected Director would sit as a non-executive Director on the ABC Board and fall within the definition of Director for the purposes of the ABC Act (see section 3). Consequently, the staff-elected Director would have the same duties and obligations as the other non-executive Directors on the ABC Board. This would include any relevant duties set out under the ABC Act and the Commonwealth Authorities and Companies Act 1997 (CAC Act). In other words, the only difference between the staff-elected Director and the other non-executive Directors is their means of appointment. In other respects the staff-elected Director has the same duties and obligations as the other non-executive Directors.

For example, the staff-elected Director would be legally obliged under the CAC Act to exercise his or her powers, and discharge his or her duties, in good faith in the best interests of the ABC, and for a proper purpose (section 23 of the CAC Act refers). Section 25 of the CAC Act sets out a Director’s duty in relation to the improper use of information. The CAC Act would also require the staff-elected Director to notify the other ABC Directors where he or she has a material personal interest in a matter that relates to the affairs of the ABC (subject to the exceptions in subsection 27F(2)). A breach of these and other applicable duties may result in the imposition of civil or criminal penalties.

In addition to these statutory duties, the ABC Board may, consistent with its duties under section 8 of the ABC Act, develop Board policies and protocols which facilitate good governance practices for its Directors (including the staff-elected Director).

Item 2 – Subsection 12(4)

Item 2 would amend subsection 12(4) to include a reference to the staff-elected Director. The effect of the amendment would be that the performance of the functions, or the exercise of the powers of the Board, is not affected by a vacant staff-elected Director position.
Item 3 – After subsection 12(4)

Item 3 would insert a new subsection 12(4A) after subsection 12(4) of the ABC Act. New subsection 12(4A) would operate to safeguard the ABC Board’s performance of its functions and the exercise of its powers in the event that the election of the staff-elected Director is invalid because of a defect or irregularity in connection with the conduct of that election. This presumption of validity for a staff-elected Director is consistent with provisions that apply with respect to defects to the appointments of the other Directors (see item 14 of Schedule 1 to the Bill which proposes to insert subsection 12(7) in similar terms for the appointed Directors).

Item 4 – After section 13

Item 4 would insert a new section 13A that would set out the categories of persons eligible for election, and to hold office, as the staff-elected Director, the consequences of ineligibility, specify the staff-elected Director’s period of office, and impose term limits.

Proposed subsection 13A(1) would require the staff-elected Director to be elected in accordance with regulations made under subsection 83(1) of the ABC Act. It is intended that the regulations, which will be made prior to the commencement of this provision, would prescribe electoral procedures for the staff-elected Director position. The regulations are expected to cover matters such as electoral rolls, candidate nominations, ballot papers, scrutineering, determination of results and disputes, and the conduct of elections where the office is vacated.

A legislative note in section 13A informs the reader that the staff-elected Director is a director of a Commonwealth authority for the purposes of the CAC Act. (Section 5 of the CAC Act provides that a director means - for a Commonwealth authority that has a council or other governing body – a member of that governing body.) This means that the staff-elected Director is subject to the same directors’ duties and obligations imposed by the CAC Act as the ABC Directors who are appointed to their position.

A person is eligible to be a candidate for election, and to hold office as, the staff-elected Director if they meet the eligibility criteria set out in new subsection 13A(2). The eligible persons would include ABC employees who work at least 22 hours per week (which would include many part-time ABC employees) and certain ABC contractors.

Subsection 13A(3) would determine what happens if a candidate for election becomes ineligible after nominating but before the election is held (for example, the candidate’s employment with the ABC ends).

A person elected as a staff-elected Director holds office on a part-time basis for a term of 5 years (subsection 13A(5)). This is comparable with other non-executive Directors who may be appointed for a term of up to 5 years (see section 12).

If the staff-elected Director position is vacant at the time of the election – for example, for the first election after the commencement of this Schedule, or due to the incumbent staff-elected Director’s resignation under section 16 or removal under section 18 – the five year term would commence on the day the winning candidate is declared to be
elected (paragraph 13A(5)(c)). In other circumstances, the winning candidate’s five year term would commence on the day after the preceding five year term ends (regardless of whether the incumbent staff-elected Director is re-elected or not).

The staff-elected Director is subject to term limits. A person who has been elected as the staff-elected Director at two elections – whether successive or otherwise – is not eligible for further election (subsection 13A(6)). This would bring the term of the staff-elected Director into line with the terms of the other non-executive Directors (see new subsection 12(2A), item 8 of Schedule 1 refers). A maximum of two terms of five years balances the need for Board stability with the need for a renewal of strategic direction with the introduction of new Board members.

**Item 5 – After paragraph 18(2)(a)**

Item 5 would insert new subparagraph (aa) after paragraph 18(2)(a).

Section 18 of the ABC Act provides grounds for the discretionary and compulsory removal from office of non-executive Directors of the ABC Board. These grounds would apply equally to a staff-elected Director as to a non-executive Director for the purposes of the ABC Act. Proposed subparagraph 18(2)(aa) would, however, add a further ground for the staff-elected Director’s compulsory removal, namely the staff-elected Director’s ineligibility to hold the office, by reference to the eligibility criteria set out in proposed subsection 13A(2) of the ABC Act.

**Item 6 – At the end of section 21**

Item 6 would add new subsection 21(7) at the end of section 21. New subsection 21(7) would provide that, for the purposes of section 21 only, the defined term non-executive Director does not include the staff-elected Director.

Section 21 concerns the appointment of acting non-executive Directors. The effect of item 6 is that a person cannot be appointed to act as staff-elected Director where the incumbent staff-elected Director is absent or otherwise unable to perform the functions of the office.

**Item 7 – Application**

Item 7 would provide that the term limit in new subsection 13A(6) applies to persons elected as the staff-elected Director under the ABC Act before or after the commencement of item 7. The application provision applicable to a staff-elected Director ensures that a candidate can serve no more than two terms, or ten years, in that position in total. This 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 is consistent with the approach taken with the other non-executive Directors on the ABC Board.