

Standing committee on Environment and Communications
Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Inquiry into National Broadcasting Legislation Amendment Bill 2010

Thank you for the opportunity to make a submission on the concept of merit as it relates to the appointment process for the Boards of both the Australian Broadcasting Commission (ABC) and the Special Broadcasting Service (SBS). As neither of these organisations employ staff under the *Public Service Act 1999*, I do not have jurisdiction with regard to their employment or governance arrangements. However, my experience as Merit Protection Commissioner and Parliamentary Service Merit Protection Commissioner may be helpful.

This submission:

- provides an overview of merit and how it is applied in the Australian Public Service (APS);
- uses the behavioural expectations of both the Senior Executive Service (SES) and members of a Board to tease out whether or not the APS experience is relevant and transferrable;
- provides some additional information on Board membership and diversity.

In providing this submission I have drawn upon a number of documents developed by the Australian Public Service Commission (APSC) and the Australian Institute of Company Directors (AICD). This reference list and some specific documents are provided as an attachment.

I am, of course, happy to speak to this submission if required and I do not consider anything in this submission precludes it from being made public.

Yours sincerely

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Merit in the Australian Public Service

Merit is a fundamental element of Australian Public Service (APS) employment and is underpinned by legislation. It should be noted that the Australian Public Service Commission (APSC) is currently consulting on possible changes to the APS Values, however the current APS Values require all employment-related decisions to be based on merit:

S 10 APS Values

(1) The APS Values are as follows:

...(b) the APS is a public service in which employment decisions are based on merit.

This is complemented by the later Value:

...(m) the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment.

Merit is basically about getting the best available person for the job and doing it in a way that is equitable, open and transparent. Regardless of the legislative or sector context for an organisation, 'getting the best available person for the job' is the main outcome desired for any recruitment and appointment process.

In the APS there are a range of legislative based requirements for recruitment of staff including the Senior Executive Service (SES) and Statutory Office Holders, and all are based on the premise that a decision relating to engagement or promotion is based on merit if:¹

- an assessment is made of the relative suitability of the candidates for the duties using a competitive selection process, and
- the assessment is based on the relationship between the candidates' work related qualities and the work-qualities genuinely requires for the duties, and
- the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties, and
- the assessment is the primary consideration in making the decision.

The APSC document, Merit and Transparency² provides quite detailed information on advertising, the use of executive search firms, the type and use of selection criteria, the role of the Secretary and the Minister, the Assessment Committee (equivalent to a Nomination Committee), representation of women, methods of assessment etc for APS Agency Heads and APS Statutory Office Holders. I have provided a copy of this document as an attachment, rather than repeating the information, as access to the specific details may be of benefit. Flowcharts 1 and 2

¹S 10(2), *Public Service Act 1999*.

² Merit and Transparency: Merit based selection of APS Agency Heads and APS Statutory Office Holders.

in the appendix outline the process currently applied in an APS Statutory appointment.

For SES engagements, transfers and promotions there is similar detailed information available that has also been provided as an attachment. In these selection processes, the principles of merit remain the same though there is a variation in its application as there are prescribed core selection criteria for assessment. Most non-Agency Head Statutory Officer Holders processes also base their selection criteria around these core components. These are:

- Shapes strategic thinking,
- Achieves results,
- Exemplifies personal drive and integrity,
- Cultivates productive working relations, and
- Communicates with Influence.

In addition, the Public Service Commissioner (PSCr) has a specific role in ensuring he or she has a representative (it is also APSC policy that the representative be at least one substantive level above the position being advertised) on the selection committee. While the Agency head has overall responsibility for the selection process, the PSCr must endorse the certification provided by the representative prior to the agency head executing the engagement or promotion of an SES officer.³

A key question under consideration by this Senate Committee must be however, how relevant and transferrable is the APS experience to that of a Board and its appointment process.

Expectations of the SES and Board Directors

While the SES and Board directors do operate in different environments (public, private, not-for-profit), the expectations of appropriate behaviour and acting in the best interests of the whole are remarkably similar.

While all Australian public servants are expected to understand and comply with the APS Values and Code of Conduct, there are additional expectations for Agency Heads and the SES.

S 12 Agency Heads must promote APS Values

An Agency Head must uphold and promote the APS Values.

S 35(2) requires that an SES employee:

³ The SES: Selection, Mobility and Separation, p 3.

...(c) by personal example and other appropriate means, promotes the APS Values and compliance with the Code of Conduct.

In particular, the APS Code of Conduct⁴ has specific provisions relating to the requirement to act amongst other things, with “honesty and integrity” and “care and diligence”; to “comply with all applicable Australian laws”; to “disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent)” and “not make improper use of inside information”. The APSC has published guidance to support these requirements.

Without going into the specific details of the ABC and SBS legislation, it is my understanding that the *Commonwealth Authorities and Companies Act 1997* (CAC Act) in general, heavily mirrors the provisions in the *Corporations Act 2001* with regard to the role and conduct of Directors and Boards. That is, CAC Act bodies are created by separate statute but remain subject to the *Corporations Act 2001*. Board members are required to act consistent with their fiduciary and statutory duties and in particular, to act in “(a) good faith in the best interests of the corporation; and (b) for a proper purpose.”⁵ Professor Baxt identifies the fundamental duties of directors as the⁶:

- Duty to act in good faith in the best interests of the company;
- Duty to act with care and diligence;
- Duty to avoid a conflict in the position of a director and/or any interest that a director may have; and
- Range of duties that prohibit the misuse of information obtained by directors.

Given the level of consistency between the expectations on the SES and Boards in general, the relevance of the APS approaches to merit and transparency in engaging and promoting its senior staff appear to be substantiated.

The AICD provides some additional and specific thoughts with regard to Government Boards:⁷

The ‘directors’ of these government bodies operate within a special context. Director’s of government bodies must be aware of the special government duties which apply to their organisations. They frequently contend with areas of operations where competitive market forces would result in unacceptable financial, social or environmental outcomes. They require politically

⁴ S 13 (1)–(13), *Public Service Act, 1999*.

⁵ S 181, *Corporations Act 2001*.

⁶ Duties and Responsibilities of Directors and Officers, p 37.

⁷ AICD, *Company Director’s Course Handbook 2010*, p21.

sensitivity, clear goals and the ability to manage the competing business, community and government interests and strong moral judgement.

An understanding of these general (as well as the specific ABC and SBS specific) issues is important for determining both the membership and skill mix required for the board and that the selection criteria are appropriate to achieve the desired outcomes.

Potential Changes to Board Membership

The current membership of the Board is outlined in S 12 of the *Australian Broadcasting Corporation Act 1983* and consists of the Managing Director and not fewer than five and not more than seven other directors. The reason for the proposed changes to the composition of the ABC Board is unclear, although it may be in response to recent debate about the need for greater diversity in the composition on Boards; from public comment, a position supported by both the ASX and the AICD. In August 2009, the Corporations and Marketing Advisory Committee (CAMAC) released its report 'Diversity on the Boards of Directors'. This report notes that "A key factor in considering board diversity concerns the processes by which directors are selected for appointment and by which continuing board membership is reviewed".⁸

The APS has had considerable success in attracting and retaining gender diversity to the SES ranks with 37% of all SES positions currently being filled by women⁹. Consistent with the CAMAC Report, the APS has an appointment process that is widely advertised, has open selection criteria, is transparent in its processes and subject to review and, is a sound first step to attract and retain qualified and experienced people with both gender and cultural diversity.

The Secretariat also requested that I make comment on the proposed membership re-establishment, in Schedule 2 of the Draft Bill, of the position of a staff-elected Director to the ABC Board.

From a merit perspective, the specific inclusion or exclusion of a group of people needs to be based on sound and defensible reasons and openly communicated. There are for example, specific provisions identified in the APS to support the employment of Indigenous Australians and people with a disability. In contrast there are also specific provisions that preclude some people from generally being employees in the APS, such as non-Australian citizens. Specific restrictions are also placed on the post-employment of politicians and senior public servants, especially with regard to positions of lobbyists and some large contracts. These restrictions are a specific strategy to address perceptions (real or perceived) of conflicts of interest. In each of these scenarios there is a conscious and informed decision to either

⁸ CAMAC, [Diversity on Boards of Directors](#), p 5.

⁹ APSC, [State of the Service Report 2008–09](#), p 69

include or preclude a group to ensure alignment with a larger strategic vision or intent.

Any decision with respect to Board membership is therefore, best made in the context of a clear understanding of the strategic intent and constitution of that Board. For the ABC Board, the mix of executive and non-executive directors, the inclusion or exclusion of a staff-elected director and, the optimum range of skills and experience, all need to be considered in the context of enhancing and supporting the strategic intent of the ABC.

In researching this aspect, one article 'Thinking of Changing the Basis of Board membership? What System Works Best?' attempted to address this issues and a short summary of the key issues raised is provided below. The article did note more generally, that an enhanced understanding of the importance of good governance has led to a questioning of the effectiveness of 'representational' or 'organisational democracy' on a governing board. The article goes on to state that "A representative arrangement appears to offer stakeholder groups a sense of close participation in the organisation's governance, an assurance that their 'voice' will be heard and that their position will be reflected in the voting process."¹⁰

The three main concerns cited with regard to representative structures are that they:

- encourage fragmentation of the 'bigger picture' by overly focussing on one groups' interests to the detriment of the whole organisation;
- are unrealistic and unfair by creating expectations that cannot be met as the constituency itself is not necessarily homogeneous; and
- produce contrary and unintended effects of marginalisation as they advocate on a single platform.

I note that a number of submissions put forward by other parties debate the issue of staff-elected director along similar lines. While I have been able to research some of the aspects of this issue from a theoretical perspective for inclusion as background information in this submission, the AICD may be better positioned to make expert comment on these matters.

The article then goes on to provide a range of strategies and techniques for regularly obtaining a comprehensive view of a particular stakeholder or interest group concerns and issues rather than reliance on institutionalised representation.

As with the membership of any board, it is important to understand the value the Board is expected to add and what skills and experiences will best promote the achievement of that value. The article concludes: "Once that is clear it will assist greatly to evaluate alternatives and to make the unavoidable trade-offs between inevitably imperfect alternatives."¹¹

¹⁰ Good Governance, Number 39, May–June 2004, p 2.

¹¹ Good Governance, Number 39, May–June 2004, p 5.

Conclusion

This submission has provided an overview of how the merit principle operates within the APS and outlines in broad terms the behavioural expectations of its senior executives. Information has also been provided with regard to membership of Boards more generally, with the underlying imperative of any recruitment process being alignment with the overall strategic intent of an organisation.

References of Interest

The Australian Public Service Commission (APSC) documents for your reference are:

- Merit and Transparency: Merit-based selection of APS Agency Heads and APS Statutory Office Holders, Second edition, February 2009; and
- The Senior Executive Service (SES): selection, mobility and separation, March 2010.

In addition the Australian Institute of Company Directors' (AICD) related documents for reference are:

- Professor Bob Baxt AO, Duties and responsibilities of Directors and Officers, 19th edition, May 2009;
- ASX, 'Corporate Governance Principles and Recommendations', Corporate Governance Guidelines, Second edition, August 2007; and
- AICD, 'Chapter 1: The Role of the Board and the Practice of Directorships' Company Director's Course Handbook, 2010.

Other references of interest:

Corporations and Markets Advisory Committee (CAMAC), 'Diversity on Boards of Directors Report, March 2009; and

Graeme Nahkies/Terry Kilmister, 'Thinking of Changing the Basis of Board Membership? What System Works Best?', Good Governance, Number 39, May–June 2004.