
Submission

to

the Inquiry into the National
Broadcasting Legislation
Amendment Bill 2010

of

the Environment and Communications
Legislation Committee

for

Friends of the ABC NSW, Qld, Tas, Vic & WA



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A. Friends of the ABC

Friends of the ABC (FABC) is the major community organisation representing the public's interest in its national independent broadcaster. It is a politically independent organisation whose aim is the maintenance of the Australian Broadcasting Corporation (ABC) as a healthy, independent and comprehensive national public broadcaster.

Friends of the ABC has no formal national structure. It comprises autonomous Friends of the ABC organisations in each Australian state and territory working together on national campaigns.

B. Introduction & Summary

Friends of the ABC strongly supports the *National Broadcasting Legislation Amendment Bill* which will formalise the merit-based board appointment process that the Labor Government has practised since it was elected in 2007 and restore the staff-elected Director to the ABC Board.

The past practice of governments appointing their supporters to the governing board of the ABC resulted in the appointment of people who lacked independence or merit and sometimes both. If allowed to resume, this situation, which was in danger of spiralling out of control, would ultimately damage the public's trust in the national broadcaster's independence and in the integrity of government.

No system can guarantee the independence of appointments to the ABC Board. However, FABC believes the Bill offers a substantial improvement to existing legislation that deals with appointments to the ABC Board. It balances well the right of the minister to appoint (in keeping with the Westminster tradition of accountability), while encouraging the minister to appoint according to merit.

Importantly, the Bill restores the Staff-elected Director to the ABC Board. The Staff Director position ensures there is at least one Board member with a sound understanding of the role and ethos of public broadcasting and an intimate understanding of the ABC's current operations. It is a sole counter should any government again stack the independent broadcaster's board.

The Bill is a real and much needed reform. Nevertheless, FABC believes the Bill should be improved to strengthen the independence, transparency and accountability of the process, and the likelihood of it resulting in suitable appointments. FABC has outlined in its submission some matters it wants the committee to consider.

C. FABC Proposals to Strengthen the *National Broadcasting Legislation Amendment Bill 2010*

In its examination of the *National Broadcasting Legislation Amendment Bill*, Friends of the ABC has considered the operation of the United Kingdom's system of public sector board appointments, on which Australia's proposed process is based. We have consulted Emeritus Professor Meredith Edwards AM¹, ANZSOG Institute for Governance, University of Canberra, as well as a number of people who have experience of the ABC Board's operations.

The decision of this and the former Labor government to make appointments to the ABC and SBS boards in accord with the process provided for in the Bill has provided a valuable opportunity to observe the Bill's proposed appointment process and its outcome. Nevertheless, it is also important to consider what else can occur within the parameters of the existing legislation.

FABC's interest is to strengthen the legislation to achieve an assessment process that fosters independence, transparency, accountability and public confidence, and results in board members with the appropriate skills and commitment to public broadcasting.

FABC requests the Environment and Communications Legislation Committee propose the Bill be amended to include the following:

1. a requirement for the Australian National Audit Office (ANAO) to audit the board appointment process from time to time.

While the *Auditor-General Act 1997* provides the Auditor-General with the discretion to audit the new appointment process, the ANAO is not required to audit it.

As the Bill introduces a process for public appointments that is new to Australia, FABC believes it is in the public interest that there be an independent and transparent audit from time to time to monitor its implementation and to evaluate the extent to which it is meeting the Bill's aim: "The new selection scheme will ensure that all future appointments to the ABC and SBS Boards are conducted in a manner that fosters independence, transparency, accountability and public confidence."²

2.1 the criteria and process for selection of the Nomination Panel.

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

2.2 the head of the Australian Public Service Commission and head of the department responsible for the public broadcasters to be members of the panel to select the Nomination Panel.

With the propensity of some governments to appoint heads of departments who will advance their political interests, and in particular in the key position of Secretary of the Department of Prime Minister and Cabinet, the Bill's provision that the Secretary of the Department of Prime Minister and Cabinet appoint the Nomination Panel risks undermining the independence of the appointment process at its core.

FABC believes it is appropriate that the head of the Australian Public Service Commission and the head of the department responsible for the public broadcasters be members of the panel to select the Nomination Panel. The involvement of a wider range of people would bring a wider range of appropriate knowledge to the process and lessen the risk of inappropriate selection of Nomination Panel members.

¹ www.governanceinstitute.edu.au/research/people/meredith-edwards

² Media Release 29.10.2009 of Senator Stephen Conroy, Minister for Broadband, Communications and the Digital Economy

3. **a requirement there be at least one person with extensive independent public broadcasting experience appointed to the ABC Board.**

That requirement is not to be met by the staff-elected Director, or by the Managing Director who is appointed by the Board and may, but is not guaranteed to, have public broadcasting experience.

While the Bill's core set of selection criteria allows for the appointment of people with "experience in connection with the provision of broadcasting services", FABC believes that sound governance of the ABC is best assured by ensuring that at least one board member with extensive knowledge and experience in public broadcasting sits on the ABC Board at any time.

4. **ineligibility for appointment to the ABC Board of anyone who is opposed to the ABC being an independent and comprehensive national public broadcaster that can be accessed without direct fee.**

It is important that the interest of all people appointed to the ABC Board is for the ABC to thrive as a public broadcaster that is *independent* (from political and commercial influence), *comprehensive* and *accessible to all Australians* - elements in the ABC Act and which go to the very core of the type of national public broadcaster which is wanted by almost all Australians.

FABC recognises the problem of developing an objective measure of genuine commitment to the ABC, and understands that the introduction of an eligibility requirement of 'demonstrated commitment' would eliminate many people who are genuinely committed to the ABC's wellbeing and have relevant skills.

So it proposes that at least the ludicrous situation whereby people who are publicly known to advocate advertising on the ABC, its privatisation, or paid subscription access, for example, should not be appointed to its governing board.

5. **a requirement that the Minister consult the ABC Board when developing additional selection criteria, the ability of the ABC Board (through the Chairperson) to propose to the Minister additional selection criteria for particular appointments, and a requirement that the Board's proposals be made public prior to further appointments to the Board.**

While the Bill provides for the Minister to tailor additional selection criteria for particular appointments, the Board is well placed to identify the needs of the ABC in terms of the broadcaster's plans and deficiencies in skills or experience on the Board at particular times. The public should be entitled to know what the Board has recommended to the Minister.

6. **a requirement that the government not be involved in the Nomination Panel's process between the Minister informing the Panel of the selection criteria for an appointment and the Minister or Prime Minister receiving the Panel's formal report containing the short-list of recommended candidates.**

The Bill clearly states that the Nomination Panel is not subject to the direction of the Government and the expressed intention of the present government that the Nomination Panel operate at arms-length from government is admirable.

However, the Bill does not prevent a government from seeking to influence the Panel. FABC believes the Bill's specification that the Nomination Panel act independently from the government and not be subject to its direction would be strengthened by prohibiting government representatives from seeking to influence the Panel in the process of assessing individual applicants.

7. the number of names to be on the Nomination Panel's short list of nominations submitted to the Minister to be no more than three.

Three is a sufficient number of candidates from which a minister ought to be able to select. It is a reasonable balance between having only the most suitable people considered for appointment by the minister and allowing the minister to choose, and would be in line with the United Kingdom's code of practice.

FABC believes the Bill's present specification, that "at least" three candidates be submitted to the Minister on the Nomination Panel's short list of nominations, could weaken the Government's commendable aim to achieve merit-based appointments. If a minister has an interest to select other than on the basis of merit, the greater the number of candidates from which a minister can choose (and possibly could request the Panel submit), the greater would be the risk that people other than those best qualified will be appointed.

8. a list of the matters that are to be dealt with in a code of practice.

FABC understands that not all matters can be fully dealt with in the Bill, which makes essential the development of a code of practice to sit alongside the Bill.

We believe that matters that will be dealt with in the code of practice should be identified in the Bill and believe that a code of practice, similar to that in the United Kingdom, should be implemented.

Furthermore, we believe the Bill should specify that guidelines or codes that are determined by the Nomination Panel are to be publicly available.

D. FABC's views on amendments moved to the Bill introduced in 2009

The following are amendments moved to the Bill introduced in 2009, and which FABC requests the Environment and Communications Legislation Committee recommend not be made to the 2010 Bill:

1. Amendments that would enable former politicians and senior staff to be eligible for appointment to the governing boards of the ABC and SBS 18 months after leaving office

If adopted, FABC believes the amendments that were previously moved would negate the Bill's commendable intention of depoliticising appointments to the boards of the public broadcasters.

If it were possible to ensure that former politicians and senior political staff were appointed to the boards of the ABC and SBS only in instances where they are the best candidates for the job and would uphold the independence of the broadcasters, FABC would not be opposed to their appointment after sufficient time has elapsed so as not to damage the community's trust in the independence of the public broadcasters. However, FABC views favourably the Bill's exclusion of former politicians and senior political staff because of the difficulty of ensuring that governments appoint Board members only on the basis of merit, and not to reward political colleagues or to influence the public broadcasters.

If the Bill is amended so that former politicians and senior staff are to be eligible for appointment to the ABC and SBS boards, then FABC believes they should only become eligible after at least two years has elapsed since leaving office and only if they have been nominated on the Nomination Panel's formal short-list of recommended candidates.

2. Amendments to omit the Bill's provision to restore the ABC Staff-elected Director

Friends of the FABC regards the Staff-elected Director as an important and integral part of a new ABC Board appointment process.

- i) The contribution of the Staff Director to the Board is valuable because it brings to the Board long term experience and a sound understanding of public broadcasting. The position ensures there is at least one member of the Board who has current and intimate knowledge of the ABC's operations and usually its history.

The Staff Director was integral, for example, in bringing to the ABC Board's attention illegal ABC activities in the 1990s. The inquiry conducted on behalf of the ABC Board by Mr George Palmer QC established breaches of the ABC Act and Board editorial and co-production policies. The role of the staff-elected Director in the exposure of 'backdoor' compromise of programs through external funding was acknowledged in *Our ABC* - the 1995 report of the Senate Select Committee on ABC Management and Operations (p23, 24 and 25), which was chaired by Senator Richard Alston (later to become the Coalition's Minister for Communications).

- ii) More than any other Board member, the Staff Director is likely to have a strong commitment to the ABC's viable future.
- iii) Importantly, the Staff Director position is a sole, albeit small, counter should any government again stack the independent broadcaster's board. The Staff Director may be the sole board member who can be depended upon to be entirely independent of the government.

While there are processes that can and should be legislated to place greater pressure on governments to appoint ABC Board members on the basis of merit (such as that in the *National Broadcasting Legislation Amendment Bill*), there is no system which maintains the right and responsibility of elected government to appoint that can prevent a government that is so-inclined from stacking the ABC Board.

The existence of a Staff Director position ensures there is at least one member on the Board that is not appointed by the government. (The Managing Director sits on the ABC Board, but is appointed by ABC Board, and in practice, is never appointed without endorsement of the government.)

The argument put forward by the Coalition in the past - that the staff-elected director position creates the potential for conflict of interest - lacks substance:

- The Staff Director is elected, but is not a "representative" of staff, as a former Coalition communications spokesperson claimed.
- The Staff Director is bound by the same legal requirements as other ABC Board members - provisions in the *Commonwealth Authorities and Companies Act 1997* which require them to act in the best interests of the ABC (Section 23 (1) (a)) and the *Australian Broadcasting Corporation Act 1983* (Section 8 Duties of the Board, and Section 17 which addresses potential conflict of interest).
- The potential for conflict of interest for staff directors is no greater than it is for other ABC Board members, who may feel an allegiance to the government which appoints them or have an interest in maintaining good relations with the government for reasons such as an interest to secure further public appointment. In practice, it is likely to be less, because the staff director is elected by a large and diverse number of individuals who are spread across Australia, and in a secret ballot.