

Inquiry into National Broadcasting Legislation Amendment Bill 2010

SUBMISSION: Quentin Dempster AM

Merit-based appointment of ABC and SBS non-executive Directors

1. The ABC and SBS are taxpayer-funded national public broadcasters governed by their own Acts of the federal parliament. While the Acts provide for the independence of these entities from ministerial or departmental direction, executive governments over the years have been known to indulge in what is often described as ‘board stacking’. Perversely, both ‘sides’ of domestic politics i.e. voices speaking on behalf of either the Labor Party or the Liberal Party, have hypocritically complained of ‘stacking’ by the opposing party which happened to be in government at the time.
2. Political patronage apparent in some appointments has tended to politicise the work and operations of the ABC in particular. This can be damaging to the role, functions and professional operations of the broadcaster and its public standing.

The ABC and SBS have clear tasks and obligations set before them by legislation. While directors have duties to maintain the independence and integrity of the entities in all their decision making, public disquiet about motivations behind some decision-making has been apparent over the decades. The 2001 Senate ECITA Committee report *‘Above Board? – Methods of appointment to the ABC Board’* provided the first formal examination of the politicisation of the ABC and led to the recommendation that all board appointments be at arm’s length through the application of merit selection procedures.

3. *‘Above Board?’* laid the groundwork for the Bill now before the House of Representatives and the Senate. The inquiry which produced that report was prompted by controversy running about the governance of the ABC at the time. I made a submission to that select committee and was examined by senators during public hearings. I copy here an extract which appeared in the final report:-

2.15 The general view of submissions to the Committee suggests that the habits of appointing political sympathisers to the Board is

as old as the ABC itself. Mr Dempster, a former staff-elected Director of the ABC Board, comments:

The need for this inquiry does not follow just on recent negative perceptions arising from the activities of current ABC directors. It arises because of a pattern of behaviour by executive government over almost the entirety of the ABC's existence since 1932. In short, the behaviour can be characterised as the application of the party political 'stack' of the Board from time to time.

And later:

The history shows that it is almost impossible for incumbent governments to put the ABC's clear need for non-controversial appointments of directors with a demonstrated commitment to independent public broadcasting ahead of their party political interest to send 'signals of influence' by the appointment of directors with links, connections or associations with their own party. Both the Liberal and Labor parties do not seem to be able to restrain themselves from applying political patronage to the task of selecting ABC directors. To those of us working at the ABC under this pathetic two-party indulgence it has become wearisome, to say the least.

2.17 Professor Ken Inglis, author of a history of the Australian Broadcasting Commission, gave this perspective:

At the end of Labor's 12 years in office Alan Ramsey of The Sydney Morning Herald made what seems to me a judicious review of its appointees' politics. Of 26 Board members, including chairman, '12 came from overt political backgrounds, among them a former Labor premier, a former Liberal senator, a former Liberal Cabinet minister, four trade union activists, four advisers to various State Labor administrations, and Labor's former opinion pollster, Rod Cameron. In short, 'less than half Labor's ABC appointments over the years have had obvious party political connections, while two of them came from among the ranks of its political opponents'. (12 June 1996). Most of the directors appointed since the Howard government took office have been formally or informally identifiable as supporters of the coalition.

4. The '**Above Board?**' report and its examination of board stacking remain highly relevant to the clear need for reform. This **National**

Broadcasting Legislation Amendment Bill 2010 seeks to establish merit selection procedures for the first time in the history of the ABC and SBS. The taxpaying public deserves no less and needs to be liberated from the adversarial games, patronage and influence peddling often practised by the major political parties exploiting the ‘spoils of office’.

5. New merit selection procedures enshrined through this Bill should, over time, result in the appointment of dynamic Australians, experts in their fields, contributing to the development of the ABC and SBS and their capacity to meet their charter obligations. Public confidence in these great institutions should be enhanced as a direct consequence.

ABC Staff-elected Director

6. The position of staff-elected director on the ABC Board has existed as a statutory role since legislation transforming the ABC from a commission to a corporation from 1983 to 2006. The staff-elected director position originally was an initiative of the Whitlam Government (1972-75). Moss Cass, the Minister for the Media, had authorised an election by the staff, the successful candidate being appointed by Executive Council (the Governor-General and the federal cabinet) to the board. The practice of ministerial appointment of a staff-elected nominee was discontinued in the Fraser government years, but reinstated by amendment to the ABC Act by the Hawke government in 1983. The staff-elected directors who have sat on the ABC board to the abolition of the position on 15 June 2006 were Marius Webb (1975-78), Tony Bond (interim 1983), Tom Molomby (1983-88), John Cleary (1988-92), Quentin Dempster (1992-96) Kirsten Garrett (1996-2000), Ian Henschke (2000-2002) and Ramona Koval (2002-2006).
7. On 24 March 2006, one hour before nominations closed with the Australian Electoral Commission to fill the pending Koval vacancy for staff-elected director of the ABC, the Minister for Communications, the Hon. Helen Coonan, announced her intention to abolish the position forthwith. I was a candidate for that vacancy and subsequently won a voluntary postal ballot by 1144 votes to my opponent's 384 (informal 2). Total number of persons on the roll of voters was 4143. 2508 ballot papers were not returned. On 8 May 2006 I was declared elected staff-elected

director of the ABC for a two year term by the returning officer of the Australian Electoral Commission.

8. On 11 May 2006 the Senate voted to amend the Act to abolish the position. Later in May the House of Representatives also voted to amend the Act. So since that time I have been the staff-elected director of the ABC ... in exile. The Liberal-National coalition government used its then majority numbers in the Senate to amend the Act. I note that the Australian Labor Party, the Democrats and the Greens are committed to the restoration of the position along with introduction of the 'Nolan rules' or a derivative for merit assessment for ABC board appointments and to all other public sector boards in the future.

9. All but two of the 59 submissions received by the Environment, Communications, Information Technology and the Arts Legislation Committee of the Senate which examined the Bill to amend the ABC Act were against the abolition of the position. I appeared at a public hearing with director Koval and two other former staff-elected directors Kirsten Garrett and Ian Henschke and faced questioning by government and non-government senators. I will recount the major points made to defend the position and to address the then Minister's stated reasons for the Bill that:-

The position of a staff-elected Director is not consistent with modern principles of corporate governance and a tension relating to the position on the ABC Board has existed for many years. This tension is manifested in the potential conflict that exists between the duties of the staff-elected Director under the Commonwealth Authorities and Companies Act 1997 to act in good faith in the best interests of the ABC, and the appointment of that Director as a representative of ABC staff and elected by them. The election method creates a risk that a staff-elected Director will be expected by the constituents who elect him or her to place the interests of staff ahead of the interests of the ABC where they are in conflict. There is a clear legal requirement on the staff-elected Director that means he or she has the same rights and duties as the other Directors, which includes acting in the interests of the ABC as a whole. The Government is of the view that there should be no question about the constituency to which ABC directors are accountable.

10. The Minister further relied on the recommendation of the Uhrig Review on 'representational appointments' covering statutory authorities and office holders.

11. The major arguments in defence of the position in the ABC's case are worth detailing as debate about governance and so called 'representational' appointments is likely to continue through the universities of Australia, the health system and all other entities and institutions (including those in the private sector) where high governance standards are considered crucial.
12. The position of staff-elected Director of the ABC had prevailed in the ABC Act since the creation of the corporation in 1983, a period of 23 years. The staff-elected Director is an executive director of the corporation and is subject to the Act's provisions 17 *Disclosure of interests* and 18 *Removal from office*. The Coonan Bill was said to address an 'ongoing tension relating to the position' and a 'potential conflict' between the duties of the staff-elected Director under paragraph 21 (1) (a) of the *Commonwealth Authorities and Companies Act 1997* to act in good faith in the best interests of the ABC, and the appointment of that Director via election by ABC staff. It is said that the election method creates a risk that a staff-elected Director will be expected by the constituents who elect him or her to place the interests of staff ahead of the interests of the ABC as a whole where they are in conflict. While the Act's provisions requiring an election of eligible employees as the method of appointment may imply a constituency, a director so appointed is subject to the Act's Duties or the Board.

Duties of the Board

8. (1) It is the duty of the Board:

- (a) to ensure that the functions of the Corporation are performed efficiently and with the maximum benefit to the people of Australia;
- (b) to maintain the independence and integrity of the Corporation;
- (c) to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism.

13. Section 17 (1A) of the ABC Act directly addresses the potential conflict issue while 17 (2) requires all directors, including the staff-elected Director, to adopt procedures where directors disclose a direct or indirect pecuniary interest in a decision of the Board. The recommendation of the Uhrig Review on 'representational appointments; covering statutory authorities and office holders is

not relevant to the ABC which has its own enabling legislation designed for its specific purpose as the national public broadcaster.

14. It was incumbent on the proposer of the Bill to demonstrate the deleterious effect on the ABC of the alleged ongoing tension or the alleged conflict on the success of the entity, particularly after 23 years of operation of the Act's provisions. No examples were given. While undoubtedly there is a tension from time to time (as there may be among any of the directors acting independently) it is submitted that the record shows the staff-elected Director position has evolved as structurally integral to the protection of the ABC's independence and integrity. Rather than being an 'anomaly' as the proposer contends, the record shows the position has become a dynamic contributor to the perception and reality of the ABC's independence from government and the integrity of its commercial arrangements. Any tension created is dynamic tension in the processes of policy development by the Board. That can be demonstrated.

15. **Breaches of the ABC Act and ABC Board editorial policies – 'Backdoor sponsorship'** : - The staff-elected Director position (1992-1996) was crucial to the exposure of illegalities through funding of ABC programs from external sources in the 1990s. An 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 staff-elected Director acted to protect the independence and integrity of the corporation and assisted the Board to expose systemic editorial compromise of television programs. The then Board used the position of staff-elected Director to help restore public confidence in the ABC and its procedures. The issue was distressing because many careers were destroyed or adversely affected. Rather than act in the narrow self-interest of the ABC's staff, the staff-elected Director's role in the exposure was an agonising episode requiring the ABC's interests and reputation to be placed above those of its employees. As a consequence of the backdoor sponsorship episode, work in the 'infotainment' strand of television programming came to an end resulting in significant job losses for journalists, producers and support staff. Under the ABC Act's Section 8 (Duties of the Board) the staff-elected Director acted to fulfil the Act's clearly stated requirements to protect the corporation's reputation. With the ABC being seen to clean up its own editorial compromises in 1995 the national broadcaster was in a much less vulnerable

position when its television program *Media Watch* exposed cash-for-comment practices in commercial radio in 1997 and 1999. The development of editorial policies to accommodate external funding of programs had been informed by the input of the staff-elected Director (1984-1988 and 1988-1992) and when illegal practices became apparent the staff-elected Director (1992-1996) acted to raise concerns at the highest governance levels of the corporation. The ABC was seen by its audiences, the media industry and the public of Australia to be taking its obligations to the ABC Act very seriously. The role of the staff-elected Director in the exposure of 'backdoor' compromise of programs through external funding was acknowledged (p23, 24 and 25) in the Report of the Senate Select Committee on ABC Management and Operations – Our ABC – of March 1995. The Select Committee was chaired by Senator Richard Alston (LP Victoria) later to become the Minister for Communications. At no time during his eight years in the communications portfolio, with direct responsibility for the ABC and the ABC Act, did Senator Alston ever raise any pressing need for the abolition of the staff-elected Director position from the ABC Board even through his time of contentious dispute with the corporation in pursuit of his allegations of bias in ABC radio current affairs programs.

- 16. Strategic independence: Sectoral diversity – subscription (pay) television; ABC On-line.** The staff-elected Director position has been integral to the development of Board policy and operational procedures covering the ABC's commercial undertakings in subscription television and ABC On-line. The Senate Select committee report on ABC management and operations (1995) noted: "... the *Australian Broadcasting Corporation Act (1983)* specifically empowers and indeed encourages the Corporation to enter into commercial business arrangements. The range of commercial activities engaged in by the ABC varies enormously, as does the potential impact of the different activities on the independence of the ABC and the concomitant public concern about them". The committee acknowledged tension existed between the ABC's commercial activities and its Charter obligations, particularly the potential for the corruption of news value judgments to meet a commercial imperative. The ABC's 1993 consortium partnership with John Fairfax Holdings Pty. Ltd. and the U.S. based Cox Communications in a commercial pay TV 24 Hour News Channel accessing ABC material required rigorous policy debate to protect the ABC's taxpayer funded free-to-air

services. As a direct result of boardroom debate and later submissions to the Senate select committee, the committee validated the staff-elected Director's consistent concerns about maintaining the ABC's editorial and structural independence from its commercial undertakings: "The committee therefore recommends that the position of Managing Editor of all news and current affairs should be abolished and replaced by separate offices of managing editors of free-to-air television news and pay television news. This physical separation will ensure that editorial independence of free-to-air news is maintained in appearance as well as practice". (P78 *Our ABC* report). Such were the concerns about ABC independence (including from the ABC's media rivals, particularly News Corporation) that the Senate Select committee also recommended: "...that two years after the transmission of ABC Pay TV, an external review should be conducted to assess the effects on the ABC's editorial and program making independence of the recently announced joint venture between the ABC, Fairfax Holdings and Cox Communications and, if necessary, recommend appropriate measures to protect such independence". The staff-elected Director had been consistent in bringing to the board table practical concerns about the diversion of ABC free-to-air resources to the commercial entity. History shows that the venture failed (with the loss of 100 jobs) when it could not negotiate a cable or satellite carrier. Again the staff-elected Director had to act in the best interests of the ABC's independence in this very necessary debate and not the particular interests of staff. The same dynamic tensions existed on the ABC's other commercial ventures – Broadcast News Australia and Australia Television, the sponsored satellite service to Asia. In 2001 the then staff-elected Director assisted the Senate ECITA committee in its inquiries into the proposed partnership between Telstra and the ABC through the provision of ABC content to Telstra's broadband portal. Again the issue of editorial control and independence was raised. The issue was crystallised through this statement from a Telstra representative: "What we do think we are buying is the ABC's integrity, honesty and independence". As a result of the debate and the Senate inquiry, consultants reviewed the ABC-Telstra deal and questioned the proposed contract's duration and the obligation on the ABC to provide to Telstra all ABC-produced content. The then Managing Director subsequently declared: The obligations that would have been imposed on the ABC by Telstra, the cost of servicing the deal and the fact that it did not sufficiently recognise the value of the ABC's breadth of content were, in the end, the

critical issues for the ABC”. Rather than acting in the narrow self-interest of ABC staff who stood to gain substantial job opportunities through the ABC-Telstra partnership, the staff-elected Director placed the ABC’s independence at the highest priority.

17.Trust. Surveys consistently show that the ABC is one of the most trusted institutions and corporations in Australia. The dynamic tension which surrounds the staff-elected Director’s role has established in the public mind the perception and, through these examples, the reality of that role’s part is sustaining the ABC’s independence in the media marketplace and from the government of the day.

18.Party political influence apparent in some ABC Board appointments has always had the potential to politicise and undermine public confidence in the ABC. Debates about the role, functions, funding and future of the ABC are part of the Australian story. Rather than being a perversion, as some contend, the position of staff-elected Director has become a vital part of the ABC and its obligations to the Act, the Parliament and engagement with all its audiences who are the taxpayers who pay for it. Remove the position and you risk turning the ABC in both perception and reality into ‘the government station’. You further politicise the ABC and undermine the public’s trust in this great institution.

19.Final points. The debate about exactly what are the highest standards of corporate governance was brought into sharp focus during the campaign to defend the position of staff-elected director of the ABC. What has been demonstrated is the need to have directors with a capacity to act independently. Staff-elected directors exist in many European jurisdictions, particularly in Germany, in both the public and private sectors. Instead of command and control concepts the objective which seems to drive this more inclusive form of governance is a shared responsibility for the entity’s success. This represents the best argument for the retention of staff-elected directors.

20. In the ABC's case the position may have evolved from concepts of workplace participation in the 1970s, but it has become structurally integral to the maintenance of the ABC's independence and integrity.

21. Directors with a capacity to act to protect the integrity of an entity is the issue. The judicial inquiry into the AWB food-for-oil affair exposed a systemic cover-up at board and management levels. Other comparisons are being drawn with domestic corporate failure (HIH, One Tel) and internationally (Enron, World Com). So the issue of the capacity of directors to act independently is now on the policy development agenda for experts in corporate governance world wide. Staff-elected directors exist in cultural and educational institutions, the health system and in some of the most successful and trusted private sector multi-national corporations.

22. Rather than being an impediment or a subversion of the highest standards in corporate governance they may come to represent the epitome of best practice corporate governance.