

The Board of the ABC

A submission to the Senate Standing References Committee on the Environment, Communications Information Technology and the Arts.

From Michael Gordon-Smith, Sydney, August 2001

Summary

This submission puts forward three suggestions for consideration by the Committee.

Its central purpose is to propose that the chairman of the ABC's board be selected by the ABC's board. This simple change would improve the foundations of the ABC's governance and help to lift public confidence in its independence.

Secondly, it canvasses an alternative option for appointing directors to the board of the ABC. The ABC is significant to Australians both nationally and locally. It may therefore be appropriate that some directors are appointed by the Commonwealth, and some by States.

Finally, it recommends that the ABC hold an Annual General Meeting. AGMs are an established element of good practice in private sector corporate governance. An annual formal occasion such as an AGM would provide an occasion for announcing appointments to the board. It would help to promote public confidence in the board's representativeness, by making it more transparently accountable for its performance.

A review of the ABC's governance is a welcome development

Public confidence in the ABC as the national broadcaster, and in particular, in its independence and representativeness depends on public confidence in its board.

The ABC Act makes clear the board's role:

'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"

(Australian Broadcasting Corporation Act 1983, s.8(1))

As with any corporation, the directors of the ABC have a special fiduciary duty to the corporation they direct. In an ordinary company, this duty would be owed to the company's shareholders as a group. (Baxt, 2000, p.26)

Together, as a board, directors hold and exercise the delegated power and responsibility of ownership. In a conventional company, the owners delegating this power are the members or shareholders.

The terms of the ABC Act relating to the duty of its board reflect that although they are appointed by the Commonwealth Government, particularly because of the high importance attached to the ABC's independence, the ABC's directors have a fiduciary relationship to all Australians.

The ABC has been the subject of much review, but most of that attention has focussed on its role, its management and its operations. Until recently, comparatively little attention has been given to the arrangement of its governance.

Governance refers to 'the processes by which organizations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organization.' (Australian National Audit Office, 1999)

Corporate governance has been a subject of importance in the private sector for some time, particularly following periods when existing systems appear to have failed to recognise risks or to prevent catastrophes.

The analysis and reform of public sector management also has a long history. However, the *Commonwealth Authorities and Companies Act 1997* (CAC Act) and the attention given to the issue by the ANAO show the current importance of good corporate governance in the public sector, and particularly in those agencies involving a complex set of relationships between Ministers, Parliament, boards and CEOs.

Governance is an important factor in determining the ABC's vision, its strategy and its culture. The selection of directors, the way they operate as a board and the systems of accountability are key elements of the ABC's corporate governance.

This inquiry is a welcome development.

The Chairman of the Board

As Henry Bosch points out, 'the Corporations Law does not recognise the position of Chairman of a Company, it provides for the directors to elect one of their number as Chairman of the Board and all the Chairman's powers and responsibilities flow from that election.' (Bosch, 1997 p.55)

The election of its chairman is frequently the first decision of any independent board.

Another point made by Henry Bosch is that as well as a level of personal liability appointment to the position of director also involves being part of a team (ibid., p.3).

A group of directors defines itself as a team very largely by whom it elects as chairman, and by the way it makes this choice.

A process of election makes it clear that the chairman has the support of the board. It demonstrates that the chairman is accountable to the board, and if its confidence is lost, or if there is a need for a change in strategic direction demanding a new sort of leadership, that the board has the capacity to change its decision.

Knowing that the directors have elected the chairman gives confidence not only to the chairman, but also to management, to shareholders and to the world at large that the chairman represents the board as a whole.

It is usual for there to be natural leaders in any independent group. This is not only a reflection of the leadership skills of different individuals. It is also a reflection that as well as being a particular combination of individuals the group has a character as a team, shaped by all the relationships among its members.

A governance structure in which a chairman is elected by the board will be more likely to produce a chairman with leadership skills and qualities recognised and respected by the other directors. It also provides a mechanism, where there are differences of view, competing visions or styles, for the board, as a whole, to make a decision about the chairmanship that reflects its collective decision and direction.

In the ABC, as with many other public sector boards, the Government appoints the chairman and deputy chairman.

Governments may appoint skilled and talented individuals to these positions. They have certainly done so in the past. However, where the board does not appoint the chairman, it will only be by happy accident that the official occupant of the chair is the director who is the natural, actual leader and representative of that particular board.

This structural flaw makes the position of chairman more than usually difficult. The chairman's key roles, of guiding the board to work effectively, and of representing and speaking for the board both depend on it being clear that the chairman has the authority or the confidence of the board.

Without an election, there is no mechanism for confirming or bestowing that authority on the chairman, nor for changing the chairman should that confidence be lost or the strategic circumstances demand a different style of leadership from the board.

Even though Governments appoint individuals with skill, talent and integrity, it may often be the case that an appointed chairman happens not to be the natural representative leader of a

board. In those circumstances, the operation of a chairman and a board will be less than optimal.

A chairman has a set of duties and responsibilities the same as any director. However, the chairman has an additional special role.

Management, other directors and stakeholders generally cannot relate to an appointed chairman in that special role, as the board's leader and representative, with the confidence they can to an elected chairman. An elected chairman is actually accountable to a board, not for performance as a director, but for performance in the special role of chairman. An appointed chairman is not. Simply because of the mechanism of appointment, the chairman of the ABC's board is not accountable to the board, even in the role of chairman, but to the Government, to the Prime Minister, or to the Minister responsible for their appointment.

Because of this special role, whether the ABC board elects its chairman may be more important than the way directors are appointed to the way the board works, and to how it is perceived by the public.

Recommendation 1 – The ABC Act should be amended by deleting s.12 (3), and to provide instead for the directors to appoint one of their number as Chairperson and another as Deputy Chairperson.

The States

In its March 1995 report, the Senate Select Committee on ABC Management and Operations recommended that 'given the paramount importance of ensuring that the ABC remains a truly national broadcaster, the ABC Act should be amended to provide that it is highly desirable that a majority of the States are represented on the ABC Board at all times.' (p. 141)

The report of the Committee's minority suggested that this recommendation endorsed current practice. (p. 54)

The *Broadcasting Services Act 1992* contains provisions relating to the control of corporations that hold broadcasting licences. Section 2 (1)(d)(ii) of Schedule 1 provides that a person is 'in a position to exercise control of a [broadcasting] licence or company ... where the person ... is in a position to appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of the licensee or the company.'

Boards will be perceived to be less independent when the power to appoint directors is concentrated.

At present, one director of the ABC is elected by the ABC's staff. The remainder are appointed by the Government.

Criticism by management reviews has included suggestions that the ABC can be inward looking and that the organisation has appeared resentful of cultural change and inflexible in work practices. (Mansfield, 1997 pp.38-9) It may no longer be appropriate to reserve a board position for election by staff. Privileging the staff of the ABC above any other group, in particular above its audience, makes the board appear less rather than more representative.

However, a board will appear, and may be, more independent when the power to appoint directors is more widely shared.

One straightforward mechanism for sharing the power to appoint directors would be to adopt a stronger form of the recommendation of the Senate Select Committee, and to provide for the election of one director by each State of the Commonwealth, with any remaining directors to be appointed by the Commonwealth.

Recommendation 2 – The ABC Act should be amended

- **to provide for there to be 9 directors of the ABC, not including the Managing Director or Chief Executive,**
- **to provide for the appointment of one ABC director by each State, and of a further 3 by the Commonwealth;**
- **to remove the position of staff-elected director.**

The AGM

According to a discussion paper released by the Australian National Audit Office:

'The Annual General Meeting (AGM) is also an important component of the governance process in the private sector and helps to promote accountability in relation to Board appointments and Board performance. To date, public sector organisations have been largely insulated from such market related incentives and disciplines.' (ANAO, 1999 p.4)

As the ANAO notes, 'voting for directors usually takes place at the AGM and directors can be held to account at an AGM by the shareholders.'

The ABC's directors will not be voted for at an AGM, however a meeting would provide an appropriate opportunity for the announcement of the selection of directors.

At present, Senate Estimates Committees provide almost the only opportunity for the ABC to be held to account. It may be argued that these Committee hearings are addressed chiefly to management rather than board level issues. It would be extremely unusual for all directors of the ABC to be present. There is no other mechanism that provides even symbolically for open accountability of the ABC's board to all Australians.

An AGM would provide an occasion for all directors to be present to the general public and to report publicly on the activities and plans of the ABC.

Board appointments are sometimes not the matters of highest priorities for Ministers and Governments, but delays in appointments can impose difficulties on an organisation. Holding an AGM would have the additional advantage of specifying a date for the announcement of appointments and help to encourage the finalisation of appointments. This would be particularly important in the event that there were to be any increase in the diversity of control over appointments.

Recommendation 3 – The ABC Act should be amended to require the ABC to hold an AGM, open to the public, and to provide for appointments to the board of the ABC to be announced at the AGM

References

Australian National Audit Office (1999) *Principles and Better Practices - Corporate Governance in Commonwealth Authorities and Companies - Discussion Paper*.

Baxt, R. (2000) *Duties and Responsibilities of Directors and Officers* (Sydney, Australian Institute of Company Directors)

Bosch, H. (1997) *Conversations With A New Director*, (Sydney, Australian Institute of Company Directors)

Mansfield, B (1997) *The Challenge Of A Better ABC* (Canberra, AGPS)

Parliament of Australia, Senate Select Committee on ABC Management and Operations (1995) *Our ABC*

Parliament of Victoria, Economic Development Committee, (1999) *Report into the effects of Government Funded National Broadcasting on Victoria*

Michael Gordon-Smith

2001