

# CHAPTER 1

## Referral and conduct of the inquiry

1.1 On 30 March 2006, the Senate referred the provisions of the *Australian Broadcasting Corporation Amendment Bill 2006* to the Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry and report by 2 May 2006.

1.2 In accordance with its usual practice, the committee advertised the inquiry in *The Australian*, calling for submissions by Monday 10 April. The committee also directly contacted a number of relevant organisations and individuals to invite submissions.

1.3 Submissions were received from 59 organisations and individuals, as listed in Appendix 1. The committee also held a public hearing in Canberra on Thursday, 13 April 2005. A list of those who gave evidence at this hearing is in Appendix 2.

1.4 The committee thanks all those who assisted in its inquiry.

### *Notes on references in this report*

1.5 References in this report are to individual submissions as received by the committee rather than a bound volume of submissions. References to Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

## Purpose of the bill

1.6 The Australian Broadcasting Corporation Amendment Bill 2006 (the Bill) amends the *Australian Broadcasting Corporation Act 1983* (the ABC Act) to abolish the staff-elected director position on the board of the ABC.

1.7 As noted in the minister's second reading speech, abolishing this position is consistent with the findings of the Review of the Corporate Governance of Statutory Authorities and Office Holders (the Uhrig Review).

1.8 The Minister stated 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.<sup>1</sup>

1.9 The inherent conflict of interest faced by the staff-elected Director was acknowledged by the Chairman of the ABC, Mr Donald McDonald, when he stated that:

Inevitably there has been a tension between the expectations placed by others on their role and their established duties as directors of a corporation.<sup>2</sup>

### **Role of the ABC Board of Directors**

1.10 The ABC Board manages the operations of the ABC, with the board consisting of:

- not fewer than five, but no more than seven Directors, appointed by the Governor-General on recommendation of the Government;
- a Managing Director, appointed by the Board; and
- a Director, elected by the staff of the ABC.

1.11 According to the ABC:

The duty of the Board is to ensure that the functions of the Corporation are performed efficiently with maximum benefit to the people of Australia, and to maintain the independence and integrity of the Corporation. The Board is also responsible for ensuring that the gathering and presentation of news and information is accurate and impartial, according to recognised standards of journalism, and that the ABC complies with legislative and legal requirements.<sup>3</sup>

1.12 Former and the current staff-elected Directors of the board broadly described their role as providing input on 'policy development and operational matters'<sup>4</sup> and 'act[ing] in the interests of the ABC as a whole'.<sup>5</sup> However, this is undoubtedly the

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1 Senator Nick Minchin, Second Reading Speech, *Australian Broadcasting Corporation Amendment Bill 2006*, 29 March 2006.

2 Donald McDonald, Statement, *Proposed Amendments to the ABC Act*, 24 March 2006.

3 About the ABC Board, [www.abc.net.au/corp/board/about\\_board.htm](http://www.abc.net.au/corp/board/about_board.htm) (accessed April 2006).

4 Mr Quentin Dempster, *Committee Hansard*, 13 April 2006, p. 3.

5 Mr Ian Henschke, former board director, *Committee Hansard*, 13 April 2006, p. 3.

role of any member of the Board, whether they be staff-elected or appointed by the Government. The current staff-elected director described the particular relevance of her role as:

... bring[ing] to the board the knowledge of how to make a program, how to do an interview, how the selection of news is done, the order of news, the time pressures upon people who are supposed to deliver to a certain deadline and the collation of information. That simple thing about how to make a program is often very useful because questions are raised about things that people see and hear on the ABC platforms. Often the staff elected director is the only one who can explain why a certain thing was done in a certain way.<sup>6</sup>

1.13 A key feature of the staff-elected director is argued as being a conduit between the staff and the board, feeding up ideas that might not be brought forward by other directors.<sup>7</sup> It ensures the skills and expertise of the staff are utilised.<sup>8</sup> The committee was presented with examples of where the staff-elected director had provided advice on decisions before the board:<sup>9</sup>

- Intervention by Tom Molomby in proposals to move Melbourne operations to East Burwood, that led to a rethink that he argued had stood the organisation in good stead.<sup>10</sup>
- Involvement in a board 'decision not to proceed with a deal with Telstra over ABC content'.<sup>11</sup>
- Debate around 'backdoor sponsorship' deals.<sup>12</sup>

1.14 Although, the committee notes that this is not necessarily evidence that the staff-elected director was instrumental in the Board's deliberation or decision-making on these issues. Nor does it establish that these matters would not have been raised or resolved in the absence of a staff-elected Director.

1.15 The committee is strongly of the view that, given that this director's position is elected by the staff and that re-appointment is dependent on election by this group, there is unnecessary scope for a conflict to arise between supporting the interests of the staff, and acting in 'good faith in the interests' of the ABC.<sup>13</sup>

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6 Ms Ramona Koval, *Committee Hansard*, 13 April 2006, p. 5.

7 Solway Sager-Nutting, *Submission 4*, p. 1.

8 Ms Louise Merryweather, *Submission 13*, p. 1.

9 For an overview, see Friends of the ABC (SA), *Submission 27*, pp. 8–11 and Mr Quentin Dempster, *Submission 44*, pp 2–4.

10 Tom Malomby, *Is There a Moderate on the Roof?*, 1991, p. 326.

11 Dr John Cleary, *Submission 48*, p. 3.

12 Mr Quentin Dempster, *Submission 44*, p. 2.

13 *Commonwealth Authorities and Companies Act 1997*, para. 23(1)(a).

1.16 Numerous submitters pointed out a distinction between a director being elected by the staff and a director being a representative of the staff.<sup>14</sup> They argued that the distinction was clearly understood by staff directors. However, evidence to the inquiry acknowledged that the expectations of staff are not always aligned with the role of the staff-elected director. One witness cited the problem of staff believing that the director is working to represent their interests, resulting in a situation where they will 'go to the staff elected director and seek to put pressure on them'.<sup>15</sup>

1.17 The potential for a lack of independence in the role of the staff-elected director was apparent in an example of a staff-elected director not signing the ABC Board Protocol. The protocol outlines the governance arrangements of the Board, covering matters such as recognition of rights and responsibilities of directors and expectations, as well as rights and benefits accorded to directors.<sup>16</sup> The protocol is viewed as important for the effective operation of the board, particularly in light of alleged leaks of confidential board information in 2004.

1.18 The staff-elected director defended her action in not signing the protocol:

It was about independence. It was about having my decisions and opinions subsumed to the opinions of the rest of the board—so that went to independence, which is an absolute core issue as far as a director of a corporation is concerned. I did not want to be in breach of the law, frankly.<sup>17</sup>

1.19 However, this raises concerns about the ability of staff-elected directors to uphold the interests of the ABC, and in doing so, acting in a manner that places the interests of the ABC above those of the staff who elected them.

### **Implementing the principles of modern governance**

1.20 Some submissions argued that having staff-elected directors was consistent with governance practice elsewhere. This included in universities and private firms.<sup>18</sup> It was also argued that having staff-elected directors was common practice in other similar countries such as Germany.<sup>19</sup> One submitter noted that she was on the board of a public company which included workers,<sup>20</sup> while another drew attention to the

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14 See for example, Ms Kirsten Garrett, *Submission 28*; Media Entertainment and Arts Alliance, *Submission 51*.

15 Mr Darce Cassidy, Friends of the ABC, South Australia Inc, *Committee Hansard*, 13 April 2006, p. 35.

16 The ABC Board, *The ABC Board Protocol*, October 2004, [http://www.abc.net.au/corp/board/board\\_protocol.htm](http://www.abc.net.au/corp/board/board_protocol.htm) (accessed April 2006).

17 Ms Ramona Koval, *Committee Hansard*, 13 April 2006, p. 20.

18 Dr John Carmody, *Submission 52*, pp 1–2.

19 Dr John Carmody, *Submission 52*; p. 2.

20 Ms Marea Howe, *Submission 3*, p. 1.

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election of a staff director in a private sector organisation (Canberra Girls Grammar School).<sup>21</sup> Evidence to the inquiry also argued that employee participation is a well-established principle of good management, and that the directorship was a suitable vehicle to help ensure this was fulfilled.<sup>22</sup>

1.21 However, the Uhrig Review, as well as the submission by Professor Stephen Bartos,<sup>23</sup> raised the potential difficulty an elected board member may have in divorcing themselves from the position of the constituents who elected them. The Uhrig Review states:

The review does not support representational appointments to governing boards as representational appointments can fail to produce independent and objective views. There is the potential for these appointments to be primarily concerned with the interests of those they represent, rather than the success of the entity they are responsible for governing. While it is possible to manage conflicts of interest, the preferred position is to not create circumstances where they arise.<sup>24</sup>

1.22 Criticising reliance on the Uhrig Review, Friends of the ABC (ACT & Region) stated that the review was primarily concerned with regulatory and service delivery authorities and the ABC was not amongst the bodies it examined.<sup>25</sup>

1.23 Mr Rohan Buettel from the Department of Communications, Information Technology and the Arts clarified the application of the findings of the Uhrig Review:

Although the Uhrig review itself focused on particular agencies, its general principles are considered generally applicable and all statutory authorities are being considered in relation to them. The proposed change in the bill is consistent with the Uhrig report's conclusions about representative appointments.<sup>26</sup>

1.24 This view is supported by Professor Bartos, who argued that removing the staff-elected director position is consistent with the 'commonly accepted practice in Australian corporate governance'.<sup>27</sup> He commented:

In my own work on public sector governance (Bartos, 2004) I also note the difficulties of representative appointments ('It can be difficult for a person appointed because of a link to a particular industry, community or lobby

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21 Friends of the ABC (ACT & Region) Inc, *Submission 15*, p. 5.

22 Mr John Biggs, *Submission 26*, p. 1.

23 Professor Stephen Bartos, *Submission 2*, p. 2.

24 Review of the Corporate Governance of Statutory Authorities and Office Holders, *Commonwealth of Australia*, 2003, pp 98–99.

25 Friends of the ABC (ACT & Region) Inc, *Submission 15*, p. 2.

26 Mr Rohan Buettel, General Manager, Department of Communications, Information Technology and the Arts, *Committee Hansard*, 13 April 2006, p. 51.

27 Professor Stephen Bartos, *Submission 2*, p. 2.

group to divorce themselves from the political role of representing that group to the public sector body to which they have been appointed. It will, however, be to the detriment of the good governance of that organisation...”).<sup>28</sup>

1.25 As the submission by Professor Bartos pointed out, the appropriateness of having member of the board elected by the staff depends on the purpose of the governing body. The Uhrig Review raised concerns about possible conflicts of interest arising on boards, and did not support 'representational appointments' because of concern that these 'can fail to produce independent and objective views'.<sup>29</sup>

1.26 Parallels were drawn between the ABC and comparable broadcasting services, such as the Special Broadcasting Service (SBS) or New Zealand Television, which do not have a staff-elected director on the board. Evidence to the inquiry suggested that there is speculation that the SBS may have suffered a loss of programming integrity and the negative effects of advertising on the network.<sup>30</sup> However, alternatives exist to filling this potential void:

CHAIR—Would it not make more sense to have a consumer representative than a staff representative on these boards?

Ms Greenwell—That thought had occurred to me, because I suppose a stakeholder representative, which you can find in government agencies and in private ones as well, would have its equivalent of a consumer representative. But I would say that, for practical purposes, that would be extremely difficult. How on earth would you elect one? The existence of the ABC Advisory Council is possibly one way around that.<sup>31</sup>

## **Addressing the role of the staff-elected director**

### ***Maintaining independence on the board***

1.27 The matter of the independence or impartiality of the ABC Board, in the event that the position of a staff-elected director was to be abolished, was questioned. Some submissions argued that it was valuable to have at least one director not appointed by the government, to help maintain the independence of the broadcaster.<sup>32</sup> It was felt that the staff-elected director helped ensure independence and acted as a link to popular views about the ABC's need for freedom from political control.<sup>33</sup> However,

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28 Professor Stephen Bartos, *Submission 2*, p. 2.

29 Review of the Corporate Governance of Statutory Authorities and Office Holders, *Commonwealth of Australia*, 2003, p. 98.

30 See for example, Mr Darce Cassidy, *Committee Hansard*, 13 April 2006, pp 30–31; Ms Jill Greenwell, *Committee Hansard*, 13 April 2006, p. 33.

31 Ms Jill Greenwell, *Committee Hansard*, 13 April 2006, p. 33.

32 Mr Bob Briggs, *Submission 6*, p. 1.

33 See for example, Bishop Patrick Power, *Submission 25*, p. 1.

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the committee notes that there is a member of the Board that is not appointed by the Government. The Managing Director is a full member of the ABC Board, and is not appointed by the Government, but is an appointment of the Board.

1.28 Evidence to the inquiry indicated that the 'independence and integrity of the corporation' is achieved through the appointment of a staff-elected director, and that the loss of this position may result in the board operating in a way that is not in the interests of the ABC.<sup>34</sup> However, for the board to operate in a manner other than with independence and integrity would be contrary to the provisions of the *Commonwealth Authorities and Companies Act 1997*. The Act requires that a board member of any body covered under the Act must perform their duties on the basis that he or she:

- (a) makes the judgment in good faith for a proper purpose; and
- (b) does not have a material personal interest in the subject matter of the judgment; and
- (c) informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and
- (d) rationally believes that the judgment is in the best interests of the Commonwealth authority.<sup>35</sup>

1.29 There is a penalty for properly failing to discharge these duties.<sup>36</sup> Despite these requirements, the Uhrig Review suggested it was desirable to avoid the possibility in the first place, and discussed situations in the private sector where a similar type of problem can arise.

1.30 The *Australian Broadcasting Corporation Act 1983* (the ABC Act) is also an important legal instrument for upholding the independence and integrity of the ABC. Concerns were raised about the potential for 'politicisation' of the ABC without the presence of the staff-elected director. Several submissions argued that the abolition of the position was evidence of political interference with the independent broadcaster.<sup>37</sup> They argued that it showed a desire to marginalise workers, or to make the ABC more compliant with the wishes of the government of the day.<sup>38</sup>

1.31 However, these claims are purely speculative. There is no evidence to suggest that the board is anything other than independent. Section 8 of the ABC Act clearly outlines that it is the legal responsibility of the board to manage the corporation with 'maximum benefit to the people of Australia' and to 'maintain the independence and

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34 Mr Quentin Dempster, *Committee Hansard*, 13 April 2006, p. 2.

35 *Commonwealth Authorities and Companies Act 1997*, s. 22.

36 *Commonwealth Authorities and Companies Act 1997*, s. 23. See also Friends of the ABC (ACT & Region) Inc, *Submission 15*, p. 6.

37 See for example, Ms Marea Howe, *Submission 3*; Mr Colin MacKenzie, *Submission 5*; Dr Tim Moore, *Submission 8*.

38 Ms Marea Howe, *Submission 3*, p. 1.

integrity of the corporation'.<sup>39</sup> It would be illegal for the board to act in a way that would undermine their legal obligations to the ABC. Former staff-elected directors and the Friends of the ABC (South Australia) both supported the view that there is no reason to suggest that members of the ABC board – regardless of the nature of their appointment to the Board – currently operate in any way other than independently.<sup>40</sup>

1.32 Subsection 78(6) of the ABC Act supports the freedom of the ABC to operate without political interference. The legislation provides for the independent operation of the ABC, regardless of the presence or otherwise of a staff-elected director:

... the [Australian Broadcasting] Corporation is not subject to direction by or on behalf of the Government of the Commonwealth.<sup>41</sup>

### ***Broadcasting experience***

1.33 The ABC Charter embodies the ethos of public broadcasting. It outlines the functions of the ABC as a public broadcasting service and sets the broadcasting priorities for the board of directors.

1.34 Some evidence to the inquiry suggested that knowledge of public broadcasting to support the board is obtainable only through the staff-elected director, providing 'real life input' that it would not otherwise get.<sup>42</sup> Some submitters noted that with one exception, the staff-elected directors had been the only board members with broadcasting experience.<sup>43</sup> However, upon further investigation, the perceived 'reliance' on the staff-elected director as being the only member of the board to have broadcasting knowledge was not substantiated in evidence to the hearing:

CHAIR— ... One of the key issues that has been raised is knowledge of broadcasting. It is implied that the only way the board will have anybody on it with knowledge of broadcasting is by having a staff director. I put it to you that that is not in fact the case at all, that knowledge of broadcasting can be brought to the board by bringing in a person from the broadcasting industry who need not necessarily be a member of the staff. Would you agree or disagree with that?

Mr Henschke—I agree with that. There is knowledge of broadcasting. Mr Michael Kroger, for example, had worked with Kerry Packer's Nine organisation. So there was knowledge of broadcasting there.<sup>44</sup>

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39 *Australian Broadcasting Corporation Act 1983*, s. 8.

40 Mr Ian Henschke, *Committee Hansard*, 13 April 2006, p. 12; Mr Quentin Dempster, *Committee Hansard*, 13 April 2006, p. 12; Mr Cassidy, Friends of the ABC (South Australia) Inc, *Committee Hansard*, 13 April 2006, p. 36.

41 *Australian Broadcasting Corporation Act 1983*, ss. 78(6).

42 Ms Marea Howe, *Submission 3*, p. 1; Ms Lynda Gordon-Squire, *Submission 7*, p. 1.

43 Media Entertainment and Arts Alliance, *Submission 51*, p. 3.

44 Mr Ian Henschke, former board director, *Committee Hansard*, 13 April 2006, p. 9.



1.35 Indeed, there are other examples of board members – not including the staff-elected directors – with broadcasting experience. This includes current board members, Mr John Gallagher QC and Mr Steven Skala. Nor should the broadcasting experience of the Managing Director of the ABC (who is also a member of the Board) be overlooked.

1.36 Mr Henschke continued on to argue that public broadcasting experience does differ somewhat from commercial broadcasting. Nonetheless, it would appear that the fundamentals of broadcasting, such as editing, broadcasting and producing programs, remain not dissimilar between public and commercial broadcasting corporations. As the board of directors is clearly focused on upholding the interests of the broadcasting service – interests enshrined in the ABC Charter and legislated in section 6 of the ABC Act – there can be no legitimate cause for concern about a perceived 'lack' of broadcasting experience on the board, and certainly no reason that this can only be provided by a staff-elected director.

### ***Representing the interests of the staff***

1.37 The committee benefited from hearing from representatives of the Community and Public Sector Union and the Media, Entertainment and Arts Alliance. The unions stated their role in helping staff in the ABC with any matters affecting them. They commented that a demarcation exists between the role of the unions and that of the staff-elected director, premised on the staff-elected director not making representations to the board on behalf of the staff when the responsibility for managing such issues rightly falls to the unions:

... To the extent that the [staff-elected director] is seeking to usurp either my role, the role of the CPSU, or that of [the Media, Entertainment and Arts Alliance], no, I would not be happy with that.<sup>45</sup>

1.38 However, the working nature of the demarcation between the role of the unions and the staff-elected director appeared unclear, arising from the assertion by a staff-elected director that they make 'representations' on behalf of the staff to the ABC Board.<sup>46</sup> Making 'representations' on behalf of the staff is in conflict with the role of the staff-elected director, and the role of the unions:

Senator RONALDSON—I understand. My question was: when communicating with the staff, did you communicate on a broad range of issues or just issues that had been raised by staff?

Ms Koval—On a broad range of issues... ..I interpret this as: there were some issues that were brought to me by the staff and I then considered

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45 Mr Graeme Thomson, ABC Section Secretary, Community and Public Sector Union, *Committee Hansard*, 13 April 2006, p. 46.

46 Ms Ramona Koval, *Submission 43*, p. 5.

whether these were issues properly to be raised at the board or not, and, if they were, I would raise them.<sup>47</sup>

1.39 The incumbent staff-elected director, Ms Ramona Koval, stated that the role of the staff-elected director can be misunderstood by the staff that nominated the director:

I have often been called on by staff over the four years. I have conversations about the issue that the staff member may have. Ninety-nine per cent of the time I would say to them that it is not a board issue; it is a management issue or a union issue and I ask them to take it up with their manager or union. I say that it is not the kind of issue that I as a board member should properly be discussing or dealing with because it is in the realm of the management of the corporation. Of course, the board of the corporation should not try to manage the corporation.<sup>48</sup>

1.40 The uncertainty of both the demarcation between the role of the staff-elected director and that of the union, combined with the sometimes unmet expectations of staff for incumbents of this position, would suggest that staff interests may be better served through union representation, or through normal management channels.

1.41 The ABC Chairman, Mr Donald McDonald, has acknowledged that the interests of staff will not be neglected in the absence of a staff-elected Director. He has said that: 'The interests of staff and our audiences will continue to be among the main concerns of the ABC Board.'<sup>49</sup> The Managing Director is a full member of the ABC Board and acts as a conduit between staff, management and the Board. The heads of the ABC divisions also report regularly to the Board.

## Conclusion

1.42 This Bill aligns the operations of the ABC Board with modern principles of corporate governance and accountability, as explained in the Uhrig Review. By abolishing the position of staff-elected Director, the Bill resolves the potential conflict of interest in being under a legal duty to act in good faith and in the best interests of the ABC, whilst at the same time being expected by those that have elected them (i.e. ABC staff) to primarily represent and act in their best interests.

1.43 This Bill represents an important step towards reforming the ABC board and ensuring the longevity of the ABC as a public broadcasting service to the people of Australia, today and in the future.

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47 Ms Ramona Koval, *Committee Hansard*, 13 April 2006, p. 19.

48 Ms Ramona Koval, *Committee Hansard*, 13 April 2006, p. 17.

49 Donald McDonald, Statement, *Proposed Amendments to the ABC Act*, 24 March 2006.

**Recommendation**

**1.44 That the Australian Broadcasting Corporation Amendment Bill 2006 be agreed to without amendment.**

**Senator Alan Eggleston  
Chair**

