

Committee Secretary

Senate Environment, Communications, Information Technology and the Arts Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Submission - Inquiry into the Australian Broadcasting Corporation Amendment Bill 2006

In your emailed communication of 31 March 2006 you invited the National Institute for Governance to make a submission to the Committee's inquiry into the Australian Broadcasting Corporation (ABC) Amendment Bill 2006 ("the Bill").

This brief submission addresses some of the governance issues involved. They are very much based on comments that were published in an interview I gave to the CCH Publication *Across the Board News* (Issue 172, 28 March 2006). This submission is not intended to address elements of the legislation that have attracted media controversy. As noted below, the position taken by the government is very much along the lines of governance directions pursued by the Commonwealth government following its acceptance of the Uhrig Report, and is consistent with the current corporate governance approach found in most Australian companies and increasingly in public sector bodies. Against this, it could be argued that the ABC is a special case because of its role in Australia. Whether or not it is a special case is not addressed in this submission because it is very much a matter for political judgement.

The background is a report of June 2003 - released August 2004 - by John Uhrig AC, the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Uhrig, 2003). That report took a firm position against the appointment of representative directors in general, although it did not specifically address the issue of staff-elected directors. The Minister's explanatory memorandum to the Bill quotes the relevant conclusion: '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.' The report itself adds "While it is possible to manage conflicts of interest, the preferred position is to not create circumstances where they arise. In the private sector, representational appointments arise in the context of representatives of the parent company sitting on the board of subsidiaries." The report goes on to point out how this can create issues for governance in private firms, and devotes the remainder of this section of the report to potential problems with departmental representatives on Boards. The section on representative appointments is brief, just a little over a page in the report, and its significant elements are contained in this present paragraph.

It is important to note that the relevant section of the Uhrig Report, Chapter 6, is a series of “Better Practice” observations. It was not a set of formal recommendations. I call this section of the report “the forgotten Uhrig”; it is an interesting and valuable contribution to governance debates, and would have had more force had the government formally adopted/amended/rejected the better practice suggestions or referred them for wider debate. As it is, the government’s announced decision on the Uhrig report only explicitly endorsed the actual recommendations. The status of Chapter 6 is therefore somewhat unclear.

That said, the Uhrig Report is an accurate reflection of commonly accepted practice in Australian corporate governance. In this country we have applied a model of governance that does not favour representative appointments. 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 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...”).

Representative appointments are nevertheless still common in the public sector. Often set by legislation, the public sector at both Commonwealth and State level has had a tradition of representative appointments of various sorts. But it is apparent from the government’s announced decisions on implementation of the Uhrig Report that it is inclined to remove people who might be representing industry interests or stakeholder interests, in part because of the issue of possible conflict of interest.

The resultant changes to corporate governance so far announced have however been relatively few. There are many public sector Boards where representative appointments remain: probably most numerous or obvious in the various rural industry representative appointments in the Agriculture portfolio, but widespread across the Commonwealth government. The Department of Finance and Administration’s *List of Australian Government Bodies and Governance Relationships as at 31 December 2004* (Finance, 2005) provides details of these bodies. There is an enormously wide variety of representational appointments, including departmental, industry, interest group, community, regional, age-group, staff and other representative categories. Staff representatives are a minority among these categories, but not unknown outside the ABC (for example, there are staff representatives provided for in the governance arrangements for the Australian Film, Television and Radio School and the Australian National University).

It is also arguable that departmental representatives on Boards are in some cases effectively appointed so as to represent the interests of staff; for example, the ex-officio appointment of serving members of the Defence force to the Board of the Defence Housing Authority. There are many instances where representatives of departments are on Commonwealth Boards – something which the Uhrig report did not rule out entirely, but did suggest was a situation where “conflicts of interest may arise and poor governance is likely” (Uhrig 2003, p. 99).

More broadly, staff-elected directors on a Board do represent an anomaly amongst Australian public and private sector boards in general governance terms – although ours is not a universally accepted governance model. In the CCH article cited earlier, I comment: “In Australia, the whole Anglo-American model of governance doesn’t favour representative positions on boards. However, it’s not the case around the world. There are other countries where representative positions are much more common. For instance in Germany, company boards will often have union representatives onboard. It is something you see in other countries but it is less common in our tradition of governance.”

In governance terms, the choice of model to be adopted for a public sector body should not be static or formulaic, but be driven by the objectives of the organisation concerned. In that regard, the legislation under consideration is evidence of a view by the government that it expects the ABC to operate very much in line with a normal corporate or commercial governance paradigm. That is the direction it has signalled it is taking with other public sector boards that are expected to operate with a “Board” (as opposed to “executive management”) template as a result of the Uhrig inquiry.

While there are both advantages and disadvantages of representative board positions, the final decision on an appropriate governance structure depends on where legislators see the ABC as situated in the broader

map of the broadcasting industry. As I noted in my interview on the subject, if one sees the ABC “as operating in the same space as other television and radio stations, having a governance structure like them is probably rational and reasonable. If you conceive of the ABC as being somehow some sort of different community-based body, you’ll see having representative directors onboard as being more reasonable.”

Yours sincerely,

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April 2004

References

- Bartos, S 2004 *Public Sector Governance Australia* CCH, Sydney
- Department of Finance and Administration (Finance) 2005 *List of Australian Government Bodies and Governance Relationships* Commonwealth of Australia, Canberra
- Uhrig, J 2003 *Review of the Corporate Governance of Statutory Authorities and Office Holders* Commonwealth of Australia, Canberra