

Date: 10 April 2006

To: The Secretary

Senate Environment, Communication, Information Technology and the Arts  
Legislation committee

Department of the Senate

Parliament House

Canberra ACT 2600

Re: Australian Broadcasting Corporation Amendment Bill 2006

I wish to make a submission to the Senate Committee inquiring into the Australian Broadcasting Corporation Amendment Bill 2006, in which the Australian Broadcasting Corporation Act (1983) is to be amended to abolish the position of staff-elected director and deputy staff elected director.

I held the position of deputy staff-elected director on the ABC Board from 2000 – 2002, and since June 15<sup>th</sup> 2002 I have been staff elected director on the ABC Board. My second term is due to finish on 14<sup>th</sup> June of this year.

The submission that follows is based on my reflections on these roles, and on my experience as a senior broadcaster with the ABC, for which I have worked on a full time basis since 1987. As you will understand, I am unable to elaborate on any confidential Board deliberations.

Yours sincerely,

Ramona Koval (Staff-elected Director, ABC Board)

## **Re: Australian Broadcasting Corporation Amendment Bill 2006**

### **General comments**

The outline to this amendment bill states that a potential conflict exists between the duties of staff-elected director (SED) to act in good faith in the best interests of the ABC, and the appointment of that Director via election by ABC staff. It goes on to say that 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.

Contrary to this view, there has never been uncertainty about the position. All Directors are obliged to act independently, in the best interests of the ABC. Only the method of our appointment differs. The SED is elected by the staff. All the other Board members have been picked by the Government excepting the Managing Director who has been picked by the Board. The SED is the only Director appointed independently of the government.

The SED position means that at least one person brings to the Board expertise in journalism and broadcasting, and a working knowledge of the role and functions of the public broadcaster and its importance in the cultural life of the country. It is notable that some directors have no understanding of these things, and seem to have been selected for characteristics quite unrelated to the functions of the board.

Since the creation of the Corporation in 1983, the Staff Elected Director has provided balance to party-political stacking of the Board. Previous incumbents have also been publicly engaged in defending the role and independence of the ABC and making sure that its obligations under the charter were upheld. The position has evolved as a vital structural element in the protection of the ABC's strategic and editorial independence.

There have been many instances of this. The various SED's raised concerns in the early 1990's about the ABC's proposed commercial partnership with Fairfax and Cox (US) in pay TV in Australia.

In 1995 the then SED Quentin Dempster (supported by staff) assisted the Senate in its enquiries exposing breaches of the ABC Act through the backdoor sponsorship issue – a point acknowledged at the time by Senator Coonan's predecessor, the Hon Richard Alston, in his Senate Report "Our ABC".

In 2000, then SED Kirsten Garrett engaged in debate over the provision of the ABC's programming output across to Telstra's Broadband portals. Had the ABC entered into such a partnership with Telstra, it may now have been in even greater financial difficulties.

## **ABC Board Director's Protocols**

Some media reports have cited my inability to “sign up” to ABC Board Protocols as evidence of conflict of interest or lack of Board functionality.

In October 2002 I informed the Chairman of my unwillingness to support a number of proposals in the Board Director's Handbook, a document which is not binding in law and which serves only as a gentleman's agreement. I assured the Chairman and the Board that I fully intended to act in accordance with my legal obligations under the Corporations Law and the ABC Act.

Among other problems, the document attempted to make the actions of individual directors subject to approval by the chairman or the majority of the Board. This confusion between members of Boards of Directors and members of Cabinet is regrettable, and is contrary to the requirement that Directors act at all times independently and in good faith.

The duties of members of Cabinet and members of Boards of Directors, while possessing some similarities, are significantly different. Briefly stated, the principal differences would seem to be as follows:

Corporations are not parliaments and parliaments are not corporations. It is unsurprising, therefore, that the rules governing the rights and responsibilities of the executives of each should differ.

The sources of the duties are quite different. The duties of members of Cabinet derive from the conventions of the Constitution. The duties of members of Boards of Directors derive from Acts of Parliament and the common law.

The duties of members of Cabinet are governed principally by the constitutional convention of ‘collective ministerial responsibility.’ The duties of members of Boards of Directors have no constitutional foundation but are defined precisely by statute.

The constitutional convention of ‘collective ministerial responsibility’ has no private law equivalent. It is the product of the ultimate accountability of ministers to parliament. The ultimate duty of Directors, in contrast, is the fiduciary duty that Directors owe to the company to act in good faith in its best interests.

The principal rules governing the collective behaviour of members of Cabinet are the following: First, a government that loses the confidence of the parliament must resign; i.e. all members of Cabinet must resign. Second, if a minister cannot agree publicly with the decisions of Cabinet, he or she must resign. Thirdly, the deliberations of Cabinet must remain confidential.

The principal duties of Directors, in contrast, are the following:

First, the Board collectively and Board members individually must act in good faith in the best interests of the company.

Secondly, directors must act with due care and diligence.

Thirdly, Board members have a duty to avoid conflicts of interest.

Fourthly, Board members must not misuse information obtained by them as Directors.

The qualitative difference between the duties of Cabinet ministers and Board members is obvious.

Generally, there is an expectation that members of a Board of Directors will act collectively, just as members of Cabinet are required to do. However, this is subject to the overriding duty of each individual member of the Board to act in good faith in the Corporation's best interests. Consequently, it is not open to a Board majority to enforce its view of good faith and best interests on any individual member.

An individual director whose opinion differs from that of the majority should act with discretion in broadcasting that opinion. However, where important matters of principle are involved, the director's individual duty to the Corporation will outweigh his or her collective duty to the Board. Under corporations law, there is no requirement upon any such member to resign. Indeed to do so may be to act contrary to the overriding duty to act in good faith and in the best interests of the corporation concerned.

The rule concerning Cabinet solidarity has no application in relation to Corporation directors. Any endeavour by a Board to impose such a rule is illegitimate.

One version of the document required that I not participate in "public (including media) discussions, interviews or articles relating to ABC Board matters". This could imply that as a Director I cannot comment in public on any matter to do with the ABC at all, as a Board matter is really anything to do with an organisation.

The deed acknowledged "the right of the Director to have regard to the interests of ABC staff in his or her decision-making BUT ONLY to the extent that it does not, in the opinion of the Board, conflict with the interests of the Corporation as a whole. This would in principle subjugate my rights to the control of others, and this was unacceptable.

It is clear that a Director must act bona fide in the best interests of the Corporation. But that assessment is a matter for the individual director, and is not determined by the opinion of other directors.

There was a proposal that the Board should, from time to time, meet in the absence of each of the Managing Director and the staff-elected Director. This was said to be due to sensitivities of the Board addressing performance of Staff and management. Given that there is no inevitable conflict of interest in staff assessing performance of other staff (for example in interview committees, appeals boards, salary reviews) I formed the view that a declarations of conflicts of interest in particular cases would be adequate to resolve any difficulty. The original proposal appeared to be designed to side-line the Staff Elected Director from Board discussions at the will of the Chairman. This does not seem to me to be in the interests of the Corporation as a whole, and I was bound to oppose it

As stated above, I assured the Chairman and the Board that I fully intended to act in accordance with my legal obligations under the Corporations Law and the ABC Act.

## **Staff elected director's reports**

SED making reports to staff has been cited as a potential conflict of interest.

Since 2002, I have made eleven written reports to staff while I have been a member of the Board. Each is prefaced with the following statement about legal limitations on my ability to discuss very many matters:

*This Report contains a summary of the representations I made as Director on your behalf at the most recent meetings of the ABC Board. It also contains a summary of my views in relation to decisions taken by the Board.*

*Board proceedings are confidential. Consequently, my reports will not make any reference to Board deliberations as distinct from Board decisions. My reports will appear on the day when decisions are announced by the Chair or Managing Director.*

*I note that there may be occasions on which either the fact that a matter is on the agenda for discussion or the fact that a particular decision has been made may not be disclosed, even by reference only to my input, because to do so would invade individual privacy, prejudice commercial confidentiality (within the meaning given to this term by the Freedom of Information Act) or would constitute a breach of confidence. As I am sure you will understand, I will be unable to report on these matters until the reason for retaining confidentiality no longer applies.*

*Within those broad legal parameters, however, it is my intention to provide you with as much information as possible about Board matters and my representations in relation to them.*

My reports have covered my uncontentious representations to the Board on the full range of financial, policy and operational concerns. They explain the reasons for my position on board decisions once they are made. It is no breach of confidentiality to disclose my own views on matters concerning the Corporation. It is no breach of a director's duty to a company to disclose that director's views on an issue, unless in a particular case it would not be in the best interests of the company to discuss a particular matter.

I have not breached confidentiality or my duties as director by circulating these reports.

## **Bias Monitoring and the ABC**

My opposition to the Managing Director's action in commissioning Reham to monitor ABC output from May 12 (the day of the federal budget) arose from the following sequence of events.

At the Board's meeting in March, an ABC director tabled a letter to the chairman detailing a 'chance' meeting he had had with an ex-advisor of the former Minister for Communications (Senator Alston) at Parliament House, Canberra. The letter detailed an approach Senator Alston had made to Media Monitors to 'carry out a review of bias at the ABC'.

Senator Alston had twice before complained formally about ABC bias, and his accusations had twice been overwhelmingly rejected. I saw the director's letter and management's subsequent action as a clear case of political interference with the ABC.

Until that time both the Board and the MD had stood by ABC staff and the then existing accountability processes.

When the Managing Director announced his decision to commission Reham to begin immediate monitoring, my concern intensified. This decision was made without consultation with the Board although it had initially been raised at a Board meeting. This was a highly unusual move, as no date has been officially set for the federal election. It involved substantial expense at a time the ABC was publicly highlighting our funding problems.

In spite of my repeated oral and written requests for a board policy determination on methodology and other issues, I believed I had no alternative but to raise my concerns publicly.

I gave due notice to the Board that as a Director I was obliged to protect the independence and integrity of the ABC and that I had been left with no option but to canvass my concerns with the staff and the public. I obtained legal and governance advice on my duties and obligations before taking this action.

My letters are not Board papers, and I made them public as a consequence of my duty as a Board Director under Clause 8(1)(b) of the ABC Act to act in the best interest of the Corporation.

## **Concluding points**

Senator Coonan's announcement also mentions "concerns about conflicts of interest and the effective functioning of the ABC Board". The Board has functioned perfectly well in the almost four years since joined it. I have always acted in the Corporation's best interests. When in any doubt, I have sought the advice of senior counsel, and have followed that advice.

The Minister's intervention in acting to abolish the SED position while an election governed by the Australian Electoral Commission is underway reveals the urgency of the Government's desire to control the ABC.

It is my sincere concern that the pressure on the ABC to conform to the Government's political agenda will only intensify in the coming months. This is a time of great uncertainty for the Corporation as it searches for a new Managing Director and awaits the government's latest political involvement in appointing a new Chairman or perhaps extending the current Chairman's appointment.

With the SED position removed, Government will be in a position more like that of Silvio Berlusconi, who has his very own set of TV stations as well as holding the state owned media in his hands. Is this really what Australians want?