

Submission
to the Senate Environment, Communications Information Technology
and the Arts Legislation Committee

Inquiry into the Australian Broadcasting Corporation
Amendment Bill 2006

Friends of the ABC (Queensland)
Friends of the ABC (Victoria)
Friends of the ABC (WA)

April 2006

A. Friends of the ABC

Friends of the ABC is the major organisation representing the public's interest in its national broadcaster. It is a politically independent organisation whose aim is the maintenance of the ABC as a healthy independent and comprehensive national public broadcaster. (*Appendix A. information sheet on Friends of the ABC*)

B. Staff-Elected Director Position

1. No mandate to Abolish

The Government has no mandate to change the ABC Act and abolish the staff-elected Director position - the sole position which provides for staff input into the governance of the ABC and the only Board position not directly appointed by the government, except for the managing director who is appointed by the Board. Furthermore, it is common knowledge that the Board appoints to the position of managing director only a person who has the approval of the government of the day.¹

The Government did not inform voters of its intention to change the ABC Act prior to the last election. Abolition of the staff-elected position was not specified in the policies of the Liberal-National Party Coalition released prior to the election. The Coalition did not inform Friends of the ABC of any such intention, despite FABC specifically asking the Government about its plans for the position immediately prior to the last election. (question 3.4 of *Appendix B. Questionnaire on the ABC for Candidates in the 9th October 2004 Federal Election*, the pre-election questionnaire FABC sent to major political parties and politicians.)

There should be time for full consideration of the implications of removing the staff-elected Director position and meaningful public debate. The community is entitled to know, before an election, if the government will abolish the only position on the Board of its independent national broadcaster that is selected truly independently of the government.

¹ Senator Coonan acknowledged that she would expect to be "at least involved in knowing the final deliberations of the board". (February 2006 Senate Estimates, Environment, Communications, Information Technology And The Arts at ECITA 47). When in government, it is the expectation of political parties of both major political persuasions that the Board's appointment of the ABC managing director is subject to the approval of the government.

2. Staff-Elected Director - Brings to the Board

2.1 ABC Staff Input and Expertise

The staff-elected Director brings to the Board valuable insight into ABC operations from the people who create the ABC's programs and run its services. While the staff Director does not represent the staff, he/she is in the position to receive from staff and bring to the attention of the Board, information which is relevant to the governance of the ABC.

The election of a staff-elected Director ensures that at least one member brings to the ABC Board expertise in journalism, broadcasting and a working knowledge of the role and functions of the broadcaster. This is particularly important on occasions when the government appoints to the Board no people with public broadcasting experience. Presently, the only member of the Board with expertise in public broadcasting journalism (an essential aspect of the ABC's operations) is the staff-elected Director.

While one effect of the abolition of the staff position is to deny staff input into the governance of the ABC, another outcome will be to limit the breadth of information and ideas available to other Board members. Effectively, it will result in Board members being denied all information which should be available to them to carry out their responsibilities.

2.2 Balance against stacking

The staff-elected position is the sole, albeit small, counter to governments of any political persuasion stacking the ABC Board. The existence of a position which is independent of the government is critical in an organisation required to provide information which is independent of government.

The staff position will always remain an important balance to political appointments. While different public appointment systems are more or less likely to result in governments appointing to the Board people who have appropriate skills and experience for the position, no system of government appointment will prevent a government which is so-intentioned from appointing its political 'mates'.

It is particularly important at the present time where there is no public transparency in the selection of board members and the political parties in government have almost unfettered power in the selection and appointment of Board members.² Over the years, the general public, independent commentators and all of the major political parties (when in opposition) have been critical of what they see as the abuse of the process by which the ABC Board is appointed.

2.3 A Watchful, Knowledgeable Eye

The position of staff-elected director has evolved to play an important role in protecting the ABC's integrity and independence.

Due to the closed nature of ABC Board meetings, the public knows little of what takes place in Board meetings. We are aware, however, of the record of ABC staff for electing people with a strong commitment to the ABC's independence and quality public broadcasting. On occasions that important matters involving the ABC Board have come to public attention, they have revealed the integrity of staff-elected directors in defending the independence of the ABC and ensuring the broadcaster upholds its Charter obligations.

The staff-elected Director Quentin Dempster (a senior current affairs and investigative journalist) raised concerns in the early 1990s about the ABC's proposed commercial partnership with Fairfax and US cable operator Cox Communications in subscription (pay) television in Australia.

The staff elected director, Quentin Dempster, was crucial in 1995 in exposing breaches of the ABC Act and editorial policies through 'backdoor' sponsorship of some ABC programs. This resulted in a Senate Inquiry under the chairmanship of Senator Richard Alston and the report 'Our ABC'.³

² Clause 12 (5) in the ABC Act, which deals with qualification for appointment to the ABC Board, is so broad as to exclude almost no-one from appointment to the Board. It appears to the public that people antagonistic to the ABC, if not opposed to the very existence of independent public broadcasting, have been appointed.

³ Report of the Senate Select Committee on ABC Management and Operations, March 1995

In 2000, staff-elected director Kirsten Garrett (Executive Producer of *Background Briefing*) debated plans to provide ABC programming to Telstra's broadband portals. If the Telstra deal had proceeded it would have resulted in ABC news content on Telstra surrounded by advertising. The ABC's interest to retain Telstra business would have risked the content of ABC programming being compromised. As the public learned with the 'cash-for-comment' debacle⁴, Telstra expects favourable editorial comment in return for its business.

In 2004, staff elected director Ramona Koval (presenter of Radio National's *The Book Show*) raised concerns about the potential for political interference when the then managing director Russell Balding decided to contract out monitoring of the ABC's news and current affairs coverage for balance and bias in a non-election period, following a direct approach to him by board member Maurice Newman, who had not sought a formal resolution of the Board.

Many other important debates which will influence the future of the ABC lie ahead, particularly as the ABC engages in and considers further commercial activities which risk the integrity of the ABC and the independence of its programming. It is critical to the public interest that a staff member with a sound understanding of ABC program production participates in these discussions and keeps a watchful eye on the ABC's operations.

3. Response to Government's Public Reasons

3.1 Claims of the Government

The media release of Senator Helen Coonan, Minister for Communications, Information Technology and the Arts announced "the Board of the ABC will be restructured to improve corporate governance at the national broadcaster".⁵ Specifically Senator Coonan's media release advised of the Government's plans to abolish the staff-elected directorship, which the minister claimed has given rise to concerns about "conflict of interest", "accountability" and "confidentiality of Board deliberations". Her media release said the provision for a staff-elected Director was "an anomaly amongst Australian Government agency boards" and that the abolition of the staff-elected position "is in line with modern principles of corporate governance and will also provide more consistency in governance arrangements for Australian Government agencies."

The Explanatory Memorandum of the Bill to amend the ABC Act to abolish the staff-elected Director position claims the Bill addresses a potential conflict that exists between the duties of the staff-elected Director to act in good faith⁶ and the appointment of that Director via election by ABC staff, with the 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.

In explanation of a potential conflict of interest, the Explanatory Memorandum cites conclusions of the Uhrig Review⁷ at pages 98 and 99: "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."

3.2 Friends of the ABC's Response

In seeking to remove the staff-elected Director position from the ABC Board, the Government has failed to consider, or has disregarded, pertinent facts regarding the ABC. Furthermore, in using the Uhrig Review as its sole authority to justify abolishing the position of staff-elected Director it has relied upon a Review which did not investigate or consider the ABC. The terms of reference of the Uhrig Review specifically required it to consider federal statutory authorities of a different nature from the ABC, those which "have critical business relationships".⁸

⁴ Exposé by the ABC's *Media Watch* program that Telstra expected and received favourable editorial content in return for paid advertising led to an Australian Broadcasting Authority inquiry into radio stations 2UE, 3AW, 6PR, 5AD (5ADD) 5DN in 1999

⁵ Media Release 019/06, 24 Mar 2006

⁶ contained in paragraph 23(1)(a) of the Commonwealth Authorities and Companies Act 1997

⁷ June 2003 'Review of the Corporate Governance of Statutory Authorities and Office Holders'

⁸ Examples of bodies the Uhrig Review considered are the Australian Taxation Office, Australian Competition and Consumer Commission, Australian Securities and Investments Commission.

Furthermore, the Uhrig Review conclusion relied upon in the Bill's Explanatory Memorandum refers to "representational" appointments. It is not clear if the Uhrig Review is referring to a system akin to the ABC situation in which the staff-elected director is *not* a representative or one in which it is anticipated the person will act as a representative of their constituency.

3.2.1 No conflict of interest or constituency

By using the word "constituents" the Bill's explanatory memorandum implies the staff director is a representative. Staff-elected directors are not and have not sought to operate as representatives. Staff directors have understood themselves to be under the same legal obligations that apply to all other ABC directors, that is, the Corporations Law and the ABC Act.

The Minister herself points out in her media release, "there is a clear legal requirement on the staff-elected Director that means he or she has the same rights, duties and obligations as the other Directors, including to act in the interests of the ABC as a whole".

3.2.2 Staff Director Understands Legal Obligations

Perhaps staff directors understand their legal and ethical obligations even more than others the Government has appointed to the Board. In October 2002, Ramona Koval informed the chairman of her unwillingness to support a Board Directors Handbook which, among other problems, attempted to make the actions of individual directors subject to approval by the chairman or the majority of the board. Such a requirement is clearly contrary to the legal requirement that directors act at all times independently and in good faith. There has been no report to the public that any other member refused to 'sign-up' to the Handbook and it is reasonable to assume that pressure was exerted on Ramona Koval because she was the sole Board member refusing to sign.

3.2.3 Record of Staff Director Position Demonstrates Low Risk of Problems

The position of staff-elected Director has now operated for over 25 years⁹, and continuously since the creation of the Corporation in 1983. During that time there have been seven different people in the role¹⁰. If there exists any real conflict of interest or a risk so substantial that it warrants abolishing the position, there has been ample time and opportunity for the risk to have been realised. Yet, the Government has alluded only to one incident and failed to provide evidence of a single occurrence.

In supporting concerns about accountability and confidentiality, Senator Coonan has referred only to the incident in 2004 when Ramona Koval, the present staff-elected Director, raised publicly her concerns about the potential for political interference and Australian Stock Exchange chairman, Maurice Newman, quit the ABC board, citing "a gross breach of boardroom confidentiality" after his plan for external monitoring of ABC news and current affairs came to the attention of ABC TV's Media Watch. This was not a breach of the confidentiality of the Board. Her action arose as the result of an individual board member going directly to the ABC's Managing Director instead of initiating a resolution of the Board. The Board did not censure Ms Koval, as it would have been entitled to do if a breach had occurred.

3.2.4 Staff Director Less Subject to Influence of Support Base

The government is claiming the simple process of staff having selected a director creates an expectation that director will represent staff interests above those of the organisation. If assumed ownership by those who make the appointment is the pertinent issue, the same risk exists with the practice of governments appointing directors. In practice, the latter poses a far greater risk. Selection of the elected director is the outcome of a large number of voters who may or may not have voted for the director and have no capacity to speak to the director with a single voice. Whereas the government has the capacity to convey its wishes to Board members whom it appoints, as the single body responsible for their appointment

⁹ The position of staff-elected director was first created in 1975 by the Whitlam Government. abolished by the Fraser Government in 1978 and reinstated by the Hawke Government in 1983.

¹⁰ Marius Webb, Tom Molomby SC, Quentin Dempster AO, John Cleary, Kirsten Garrett, Ian Henschke and Ramona Koval OAM.

3.2.5 Staff Conflict of Interest Less than Most Organisations

The Bill's Explanatory Memorandum contains an assumption that the interests of staff who elect the staff-elected Director conflict with those of the organisation as a whole. This assumption fails to take account of the unique nature of the ABC, where there is a closer nexus between the interests of the ABC and those of the staff than exists in most organisations, and consequently a lower potential for conflict of interest to arise between the interests of employees and the requirements of the ABC specified in the ABC Act.

A high proportion of ABC staff are engaged directly in what the ABC exists to do, i.e., produce programs.¹¹ Many ABC staff choose specifically to work for the ABC. They wish to work for the type of broadcaster specified in the ABC Act and are amongst the strongest advocates of its independence and its Charter. While FABC knows of no research having been conducted which would prove the truth or otherwise of this claim, it is frequently demonstrated in matters staff raise with ABC management which have come to public attention, the public statements of ABC staff across a range of forums (for example, in media comment and articles, and in addresses to other organisations and public meetings), the high level of interest students and suitably qualified people have in working for the ABC, and the ABC's retention of high quality staff who are able to command more favourable wages and conditions outside the ABC.

3.2.6 Conflict of Interest of Government-appointed Board Members

The Government has appointed members of the ABC Board with a far greater potential for conflict of interest than has been shown to exist for any director that staff have elected to the Board. Extending beyond individual matters which may arise, the political and business interests of some government-appointed Board members have serious potential to conflict with the Board's overarching duty to protect the ABC's independence and work for its best interests.

For example, as the author of a regular column in *The Australian*, Janet Albrechtsen has an ongoing business relationship with the powerful Murdoch media organisation, News Ltd. News Ltd is a business rival of the ABC in an important developing area, digital television and online. *The Australian* is consistently hostile in its representation of the ABC in editorial opinion. Ron Brunton is a senior fellow of a right-wing think tank and Steven Skala is on the board of another.¹² Right-wing think tanks are known to oppose public ownership of any services they believe can be delivered by the commercial market (albeit with lesser quality and a focus more suited to commercial, rather than public interest).

3.2.7 ABC not the only Australian Government Agency with a Staff-elected Director

The ABC is not the only Australian Government agency that has provision for staff to be elected to their board. Two other examples are The Australian Institute of Health and Welfare and The Australian National University¹³.

It is difficult for the public to believe the Government's action genuinely arises from concern for good governance when the ABC has been singled out.

3.2.8 International Practice

Senator Coonan's claims that the removal of staff elected directors is good governance are out of step with international best practice, and demonstrate a lack of respect for a position which is democratically elected by workers in an organisation. It is not uncommon in Europe for staff representatives to sit on boards, including in those Scandinavian countries ahead of Australia on various Global Competitiveness, Anti-Corruption and Human Development indexes.

¹¹ ABC 2004-05 Annual Report, p. 97

¹² Ron Brunton: Institute of Public Affairs. Steven Skala: Centre for Independent Studies

¹³ In Australia, university governance also is characterised by staff representation in corporate activities that crucially depend upon maintenance of free critical inquiry, reassurance to such knowledge workers that this principle can be represented at board level is important in attracting and retaining staff and maintaining their confidence and so underpinning their productivity.

3.2.9 Only One Position out of Eight!

The staff-elected director is one position out of eight positions, seven of which are appointed by the Government and the other appointed by the ABC Board. As the sole staff position on the ABC Board, the staff-elected director can only influence the Board with the weight of his/her arguments.

3.2.10 Responsibilities Greater than Confidentiality

With the Government having placed great emphasis on the matter of board confidentiality to support its removal of the staff-elected Director, it should be kept in mind that all members of boards have legal and ethical responsibilities above protecting the confidentiality of the board on which they sit. Too often there have been serious consequences, in Australia and abroad, when individual members of corporate boards have placed board confidentiality above the public interest or the long-term good of the body they oversee.

C. Urgent Need to Address

It is incredible that Senator Coonan would announce “the Board of the ABC will be restructured to improve corporate governance at the national broadcaster”, and yet consider only the position of the staff-elected Director. The public would be more inclined to believe the genuineness of the Government’s claimed interest in the good governance of the ABC if, at the same time, it considered the closed operations of the ABC Board and the discredited system of government appointments to the Board.

1. New System of Board Appointments

The existence of a democratically elected staff member on the ABC Board contributes to good governance. The present system by which government appointments are made to the Board runs counter to good governance - both in the appointment process and its outcome. It does not ensure that across the Board there exists the range of skills, interests and perspectives needed to govern a national public broadcaster. It has resulted in a number of appointees who fulfil neither the criteria of merit nor independence, let alone both.

The method and outcome of Government appointments to the ABC Board are resulting in a lack of public confidence in the competence, integrity and independence of the ABC Board. As the politicisation of an important public body occurs, public trust in our institutions generally declines. Respect for the politicians who make the appointments, people perceived to be political appointees, and the institutions which they direct is eroded. If not addressed, this practice could ultimately threaten the public’s belief in the legitimacy of government.

What is needed as a matter of urgency is a new system of government appointments to the ABC Board - one which is merit-based, transparent and ensures the assessment process is at arms-length from government.

An example, which has become a mark of good governance, is the United Kingdom’s system of a Public Appointments Commissioner. Commonly referred to as ‘the Nolan Rules’, it was introduced by the Conservative prime minister John Major in 1995. The Nolan Rules entail an assessment process which is merit-based, transparent and independent of the government. In keeping with the Westminster practice of accountability, the Government of the day retains the final decision to appoint. (*Appendix C. FABC information sheet outlining the Nolan Rules*)

2. ABC Board - Secret Society

There is open debate in the highest body in Australia, the Parliament. It is not in the public interest that the Board which determines the direction and operations of the country’s most significant information and cultural institution should operate in almost total secrecy.

Good governance in the operations of the ABC Board would be enhanced if the community was informed, within the parameters of protecting the ABC’s independence, of ABC Board policies which go to determine the Board’s vision for the ABC and the broadcaster’s character.

D. Summary & Recommendations

1. Staff-Elected Director

The Government has no mandate to abolish a position which provides valuable input into the ABC's governance, is important in protecting the ABC's independence, and is the sole balance to the stacking of the ABC Board by governments.

The staff-elected Director position is important because it brings to the Board that which government appointees often do not - extensive experience in public broadcasting journalism and ABC operations. Over the many years the position has existed there has been no evidence that a staff-elected director has put staff interests above those of the organisation as a whole. On the contrary, staff-elected directors have demonstrated a strong commitment to the best interests of the ABC and played an important role in protecting its independence and integrity.

In the absence of an appointment system that ensures governments appoint to the ABC Board people with the skills and commitment to govern an independent public broadcaster, the existence of a staff-elected position is even more important.

Being only one out of eight positions on the Board the input of the Staff-elected director on any specific matter is only as influential as other Board members consider it should be. Furthermore, if any staff-elected Director was to operate in a manner contrary to the interests of the ABC, the Board has the capacity to address this problem.

Recommendation: that the position of Staff-elected director on the ABC Board be retained.

2. Government Appointments Process

The present process for government appointments to the ABC Board has been discredited in the eyes of the public. A system of appointments is needed that ensures the appointment of ABC Board members with the capacity and commitment to ensure the ABC flourishes as Australia's independent and comprehensive national public broadcaster

Recommendation: that a new system of government appointments to the ABC Board be introduced - one which is merit-based, transparent and has an assessment process which is at arms-length from government.

3. Board Transparency

The community could better ensure the ABC Board is acting in the interests of the ABC if, within the parameters of protecting the ABC's independence, Board policies relating to the vision and nature of the ABC were made public.

Recommendation: that a full public inquiry be held to consider the best way in which the ABC Board can operate to ensure the community is informed of the ABC Board's policies and decisions which go to determining the Board's vision for the ABC and the broadcaster's character.

Appendices:

- A. Information sheet on Friends of the ABC
- B. Questionnaire on the ABC for Candidates in the 9th October 2004 Federal Election
- C. FABC information sheet outlining the Nolan Rules

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