



CPSU (PSU Group) Submission:

National Broadcasting Legislation Amendment Bill 2009

Senate Committee on Environment and Communications



22 October 2010

The CPSU

1. The PSU Group of the Community and Public Sector Union (CPSU) is an active and progressive union with approximately 55,000 members.
2. The CPSU shares industrial coverage of ABC staff with the Media, Arts and Entertainment Alliance (The Alliance) and with the Association of Professional Engineers, Scientists and Managers, Australia (APESMA). The CPSU represents ABC employees other than Journalists and Senior Executives Bands 2 and above. The ABC Staff Union amalgamated with a number of other unions in 1989 to form what is now the CPSU.
3. The CPSU shares industrial coverage of SBS staff with the Media, Arts and Entertainment Alliance (The Alliance). The CPSU represents SBS employees in administrative and operational roles.
4. The CPSU also represents employees of the Australian Public Service (APS), the ACT Public Service, the Northern Territory Public Service, Telstra, the telecommunications sector, call centres, employment services and broadcasting.

Introduction

5. The National Broadcasting Legislation Amendment Bill 2009 proposes two amendments: the introduction of a merit based system of selection to the ABC and SBS boards and the reintroduction of the position of ABC Staff Elected Director. These matters have been the subject of two previous Senate inquiries. The CPSU has made submission on and has appeared before both Senate inquiries. The CPSU position on both matters remains largely unaltered.

6. The CPSU members believe that the introduction of both these changes will enhance the governance and performance of the public broadcasters. Merit based appointments will increase the calibre of the boards, widen the scope of the talent pool available to fill the positions and will help build public confidence in the institutions that have been tarnished by the stacking of the boards by both sides of politics.
7. The two public broadcasters are required by their enabling legislation to carry out their functions independently and with integrity. On occasions this requires the broadcasters to report critically on the activities of the Government of the day. However, the organisations are dependent on that Government for their funding, and their Boards charged with protecting their independence are appointed by the Government of the day. It is easy to see why this model creates tension.
8. The restoration of the position of ABC Staff Elected Director will improve the decision making capacity of the ABC Board through the inclusion of a person on the board with a genuine and informed understanding of program making and editorial practice.
9. The CPSU argues that the principle of merit selection has general application. It is the submission of the CPSU that all public boards and appointments to public sector bodies including the Reserve Bank and Fair Work Australia would benefit from the introduction of merit based selection processes.

Merit Based Board Appointments: ABC and SBS

10. CPSU members have consistently argued that independent public broadcasting is dependent upon secure adequate long term base funding and a system for appointments to the boards that is based on merit rather than patronage.

11. The CPSU submission to the 2001 Senate Inquiry into ABC Board appointments¹ called for the introduction of a system of appointment modelled on the UK system commonly referred to as the Nolan Rules. The Nolan Rules (*the Code of Practice for Ministerial Appointments to Public Bodies*) require the following elements be applied in the public appointment process:

- ministerial responsibility;
- merit;
- independent scrutiny;
- equal opportunities;
- probity;
- openness and transparency; and
- proportionality.

12. The National Broadcasting Amendment Bill 2009 adopts many of the principles established by the Nolan Rules: it promotes the merit selection; it subjects applications to independent scrutiny; it promotes openness and transparency through the pre-determination of selection criteria and the open advertising of the positions and it is 'proportional' in that it does not involve significant overheads or governmental machinery to administer. It is for these reasons the CPSU welcomes this legislative initiative.

13. The CPSU is strongly committed to initiatives that improve the calibre of appointments to public bodies as they improve both the effectiveness of the bodies and build public confidence in our public institutions. The CPSU has made a number of recommendations that it considers would improve the operation of the merit based selection process.

¹ CPSU Submission to Senate Environment, Communications, Information Technology and the Arts Committee (2001) submission 363 http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/1999-02/abcboard/submissions/sub363.pdf

Methods of Selection: World best practice

14. The CPSU in its previous submissions has argued that the Nolan principles, together with the retention of ministerial responsibility, provide for a more effective model for appointment than others that have been mooted over the years. Previous suggestions to shift the selection process to Parliament or to bi-partisan selection committees are regarded as inferior in that they promote safe or ‘lowest common denominator’ appointments. They also remove ministerial accountability. The Nolan based process is also regarded as superior to the Congressional nomination and confirmation processes that while transparent, are unnecessarily invasive and frequently result in the selection of the ‘thick skinned’ and safe candidate over the meritorious. The CPSU’s 2001 submission contained an analysis of the systems of appointment to public bodies used in the UK, Canada, South Africa and Hungary².
15. The CPSU submission reviewed each of these models and came to the view that the UK system (The Nolan system) was world best practice. The CPSU believes that the UK system still deserves its ranking as world best practice.

Appointment of non-recommended candidates

16. The CPSU notes that the UK system does not provide an absolute prohibition against ‘mates getting jobs’ or political stacking. To do so would remove the authority of the minister to make decisions. The beauty of the UK system, administered by the Office of the Commissioner of Public Appointments (OCPA), is that while preserving the principle of ministerial accountability it attaches risks to Ministers who disregard the independent advice. The publication of the nomination panel report findings about the appointee by OCPA where they were not the preferred candidate poses significant political risk to the Minister, particularly where they turn out to be a ‘dud’.

² See attachments 1-6 of the CPSU 2001 submission.

17. The CPSU notes that the Bill at s. 24X(2) (in the case of the position of Chairperson), and at 43B(2) (in the case of non-executive Directors) provides that where the Minister makes an appointment of a person not nominated by the Nomination Panel, he or she must table the reasons for that appointment in each House of Parliament. The CPSU notes that this process would allow the Minister to make an appointment of a person without the person having had to be subjected to the scrutiny of the Nomination Panel. The CPSU argues that this is a flaw in the proposed system and considers that while the Minister should have the right to make an appointment of a person not appearing on the list of three³, all candidates must 'run the gauntlet' of a Nomination Panel. Furthermore, where the Minister rejects all names provided on the list of three, the CPSU argues the Minister should seek a further report from the Nomination Panel on the Minister's preferred candidate prior to the making of the appointment.
18. **Recommendation:** That the Bill be amended to provide at s 24X(2) by the inclusion of the following additional words:

Where the person is not a person nominated by the Nomination Panel, the person must be a person who has submitted an application for the vacancy. The reasons must make specific reference to any reasons why the Nomination Panel did not include the person on the list of 3 candidates suitable for appointment. Where the Minister does not accept a person appearing on the list of three, the Minister will seek a further report from the Nomination Panel on their proposed appointee.

These words would appear after the proposed words appearing at s 24X(2):

If a person not nominated by the Nomination Panel is appointed as Chairperson, the Prime Minister must table the reasons for that appointment in each House of Parliament no later than 15 sitting days of that House after that appointment is made.

It is also recommended that s 43B(2) (Appointment of non-executive Directors not nominated by the Nomination Panel) be amended in similar terms.

³ The Bill at section 24B provides that the Nomination Panel must provide a list of three candidates for consideration to the Minister (or Prime Minister in the case of the position of Chairperson)

Who selects the selectors?

19. In its 2001 submission, the CPSU noted that one of the major difficulties in transplanting the UK model to the Australian context, and applying it to a single institution was the absence of the independent machinery that is available in the UK. In the UK the OCPA has the infrastructure to undertake these arms length evaluations. The difficulty that arose in the UK, as it does here, is how to choose the independent panel that makes the independent evaluations. The CPSU in its earlier submission suggested that the committee be made up of three persons:

- The chairperson, to be selected by the Minister from the class of retired High Court or Federal Court judges or other eminent persons who would be viewed by the community as a person known for their commitment to honesty, integrity and preparedness to make decisions based on merit. The person would be proposed by the Prime Minister on the advice of the Minister and agreed to by the Leader of the Opposition’;
- The Secretary of the Department; and
- The Chair of the ABC Board⁴.

20. The draft legislation provides that the Nomination Panel is to be made up of three or four persons, each of whom is selected by the Secretary of the Prime Minister’s Department. No guidance is provided in the legislation as to how the selection process is to be undertaken. The CPSU maintains its view that the Nomination Panel as proposed in its 2001 submission is a preferable model. The CPSU proposed model by stipulating the composition of the panel removes, or dissipates the political influence being exercised through the Secretary over the selection of the assessors. It also improves the quality of the scrutiny process by:

⁴ The CPSU’s earlier submission was limited to ABC Board appointments.

- Building the integrity and rigour to the process through the inclusion an independent assessor;
- Including knowledge and understanding of the skills that would enhance the performance of the Board through the inclusion of the Chair; and
- a knowledge of the broader media and communications environment through the inclusion of the Secretary of the Department or (his or her nominee).

21. **Recommendation:** That s.24F be amended to stipulate that the composition of the Nomination Panel will be:

- The Chair, to be selected by the Minister from the class of retired High Court or Federal Court judges or other eminent persons who would be viewed by the community as a person known for their commitment to honesty, and preparedness to make decisions based on merit. The person would be proposed by the Prime Minister, on the advice of the Minister and agreed to by the Leader of the Opposition.
- The Secretary of the Department, or his or her nominee.
- The Chair of the Board of the relevant broadcaster.

22. The CPSU notes that there has been media criticism of the proposed model on the grounds that the model as proposed would be easy to circumvent. The CPSU considers that the adoption of the two recommendations proposed above (i.e. at paragraphs 17 and 21) would improve the process and would counter that criticism thereby improving public trust and confidence in the proposed system.

Exclusions from appointment

23. This Bill places an absolute prohibition against the appointment of ex members of parliament and political staffers. The CPSU, while supporting the de-politicisation of the broadcasting boards, believes that this limitation is unnecessary. In its earlier submission the CPSU was highly critical of the practice adopted by both the ALP and Coalition of stacking the ABC Board. It noted however that the holding of political office should not of itself disqualify a person from continuing to contribute to public life by sitting on these boards. A distinction needs to be drawn between an appointment of a person with political form and a political motivated appointment. The CPSU stands by the following comment it made in its earlier submission on this matter:

Should political allegiance prevent appointment to the Board?: The CPSU does not consider that political allegiance should prevent appointment to the ABC Board. The CPSU notes that many Australian citizens with an interest in and dedication to public affairs and the promotion of a vision for public affairs are drawn to political activism. This should not limit their ability to serve their fellow citizens by sitting on the Board of the ABC⁵.

24. The CPSU also considers that it is incorrect to equate political appointment with the appointment of ex MPs and political staffers. Our most trenchant criticisms have been over the appointment of Board members with a political (but not necessarily party political agenda). The critical issue is whether a person is appointed to a Board because they are the most meritorious, or whether they have been appointed to serve the political interests of the Minister. The process that the CPSU advocates allows the Minister to appoint a person despite their political 'form'. The system properly applied may be used quite to 'cleanse' a candidate by establishing through objective and independent assessment that they are the best person for the job. The CPSU also recognises that their political form may be a useful attribute for a Board and may enhance the Board's navigation of the corridors of power.

⁵ CPSU Board Appointments Submission, 2001 p 10

25. The CPSU does not see the need to include the exclusions contained in s.12(5A). In its place it advocates the UK system which requires all applicants to make a declaration of their political interests and affiliations.
26. **Recommendation:** That the prohibition on ex-politicians and staffers be removed from this Bill, and in its place the following requirements be inserted:
- all applicants must be required to make a disclosure of their financial and political interests, and
 - the Nomination Panel be required to take these consider these disclosures when it forms its recommendations
27. The CPSU recommends that the disclosure requirements be modelled on the UK system.

Broader Application of the Merit Principle in Public Life

28. The CPSU is persuaded that the Merit Principle is universal in its application. All institutions are improved by the selection of the best, smartest and most effective leaders. All institutions benefit from casting the net as widely as possible to find these candidates and all organisations benefit from the resultant increase in public trust.
29. The filling of these offices should not be viewed as a spoil of electoral victory where one side of politics clears out the previous incumbents and appoint their own. The practice weakens the public institutions and feeds public cynicism of their politicians.
30. The CPSU believes that the Senate Committee should use this inquiry to promote a broad discussion about the manner in which public offices are filled. This change would mark a significant change in the governance of public bodies. The CPSU does not underestimate the scale of this proposal. The system would alter the manner in which

literally thousands of positions are filled. Key and critical institutions such as Fair Work Australia, and the Reserve Bank would be affected. The Remuneration Tribunal determination⁶ lists hundreds of boards to which the CPSU considers the merit selection principle could be applied.

Staff Elected Director

31. The second element of this Bill would reintroduce the position of Staff Elected Director at the ABC. The CPSU relies on its earlier submission⁷ in this matter.

32. The CPSU supports the amendment without qualification.

33. The CPSU argues that:

- the decision to remove the position in 2006 was flawed and was based on a faulty assumption about the representational role of the Staff Elected Director; and
- the decision failed to recognise how the Staff Elected Director contributed to the improved governance and operation of the ABC.

34. One of the principal arguments raised to justify the removal of the position was that the Staff Elected Director was a representational position in which the Staff Elected Director represented the interest of ABC staff to the ABC Board. Reliance was placed on the report of the Uhlig⁸ Review that recommended that governing boards should not include representational directors.

35. The CPSU maintains its view that the representatives of staff at the ABC are the three trade unions that have industrial coverage at the ABC. These unions are the CPSU, the

⁶ Remuneration Tribunal, Determination 2010/11 Remuneration and Allowances for Holders of Part-Time Public Office <http://www.remtribunal.gov.au/determinationsReports/Current%20Principal%20Determinations/2010-11%20Determination%2020.9.2010.pdf>

⁷ CPSU Submission on the Australian Broadcasting, Corporation Amendment Bill 2006, Removal of Staff Elected Director http://aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/broadcasting/submissions/sub50.pdf

⁸ The Uhlig Review) (2003), [Review of the Corporate Governance of Statutory Authorities and Office Holders](#)

Media Alliance, and APESMA. None of the Staff Elected Directors have laid claim to having a representational role. We reaffirm the statement made in our 2006 submission:

The Staff Elected Director is distinguished from other members of the Board only by their method of selection and by their direct knowledge of broadcasting, program making and journalism. In all other respects the Staff Elected Director is identical to other Board members. All directors, including the Staff Elected Director, are subject to the provisions of the *Commonwealth Authorities and Companies Act 1997* and are required to act in good faith in the best interests of the ABC⁹.

36. The inclusion of a Staff Elected Director improves the governance of the ABC through the inclusions on the board of a person with day to day understanding of the processes that are involved in broadcasting. The knowledge of the craft of journalism, of the day to day practice of gathering and disseminating news and of production and production flows can only help a Board that may have no practical experience of these matters. The CPSU asserts that on issues such as the development and ongoing revisions of Editorial Policies, which has and is likely to be an on-going matter that requires Board attention, it is imperative that the Board be able to take an informed view. The CPSU notes that the current Board does include a Director with broadcasting experience as a Journalist. It also notes that this has not always been the case and is not guaranteed by the merit based appointment procedures also covered by this Bill.

Conclusion:

37. The CPSU supports the proposed legislation. It has made a number of suggestions about how the legislation could be improved, but believes that even without amendment the passage of this Bill would improve the selection process for the Boards and the governance of the two broadcasters. The CPSU also encourages the Senate to examine the principles that underpin the merit selection process and consider the extension of that principle to the filling of all public body vacancies that are currently filled by the decision of a Minister.

⁹ CPSU submission (2006), p 2.