

Explanatory Statement

Australian Broadcasting Corporation Act 1983

Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013

Issued by the Authority of the Minister for Communications

Purpose

The *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013* (this determination) is made by the Minister for Communications (the Minister) under subsection 24W(1) of the *Australian Broadcasting Corporation Act 1983* (the Act).

The purpose of this determination is to determine generally applicable selection criteria for the appointment of the Chairperson and other non-executive Directors of the Australian Broadcasting Corporation (the ABC) (excluding the staff-elected Director). Specifically, the Nomination Panel established by section 24A of the Act is required to assess each applicant for such appointment against the selection criteria that are determined by the Minister (paragraph 24B(1)(b) of the Act refers).

This will ensure that the appointment of all non-executive Directors to the ABC Board is transparent, consistent and based on merit.

This determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Background

The *National Broadcasting Legislation Amendment Act 2012* (the NBLA Act) amended the Act and the *Special Broadcasting Service Act 1991* to implement a merit-based appointment process for non-executive Directors to the ABC and Special Broadcasting Service Corporation (SBS) Boards. The NBLA Act received the Royal Assent on 24 July 2012 and commenced on 24 November 2012.

The merit-based appointment process is conducted by the Nomination Panel, which is established under Part IIIA of the Act. The Nomination Panel plays a central role in conducting the selection process for the appointment of the ABC Chairperson and other non-executive Directors (excluding the staff-elected Director) prior to the Governor-General making appointments to the ABC Board.

Specifically, the Nomination Panel:

- advertises and invites people to apply for Board vacancies (refer to subsection 24B(3) of the Act);
- assesses all applicants for the appointment against the selection criteria determined by the Minister under subsection 24W(1) of the Act and any

additional selection criteria notified by the Minister under subsection 24W(2) of the Act (refer to paragraph 24B(1)(b) of the Act);

- assesses all applicants for the appointment on the basis of merit (refer to paragraph 24B(1)(c) and subsection 24B(2) of the Act); and
- provides a written report to the Prime Minister and the Minister if the appointment is for the Chairperson, or to the Minister if the appointment is for a non-executive Director other than the Chairperson, on the outcome of the selection process. The report must include a list of at least three candidates nominated for the appointment and a comparative assessment of those candidates (refer to paragraph 24B(1)(d) of the Act).

This determination sets out the selection criteria determined by the Minister under subsection 24W(1) of the Act. The selection criteria are intended to reflect the duties, skills and desirable attributes of non-executive Directors (excluding the staff-elected Director) on the ABC Board, and to address the requirements set out under subsection 12(5) of the Act in relation to a person's suitability for appointment.

Regulation Impact Statement

The Office of Best Practice Regulation has confirmed that the preparation of a Regulation Impact Statement is not necessary, as the determination has a nil or low impact on business or the economy or individuals.

Statement of compatibility with human rights

This statement of compatibility is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This determination is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

One function of the Nomination Panel established under section 24A of the Act is to assess all applicants for the appointment of a Chairperson and other non-executive Directors (excluding the staff-elected Director) to the ABC Board against the selection criteria determined or notified in writing by the Minister under section 24W of the Act (paragraph 24B(1)(b) of the Act refers).

This determination sets out general selection criteria determined by the Minister under subsection 24W(1) of the Act. The selection criteria are based on the duties, skills and desirable attributes of non-executive Directors (excluding the staff-elected Director) on the ABC Board, and address the requirements set out under subsection 12(5) of the Act in relation to a person's suitability for appointment.

These criteria will ensure that the appointment of all non-executive Directors (excluding the staff-elected Director) to the ABC Board is transparent, consistent and on the basis of merit.

Human rights implications

The right to enjoy and benefit from culture

Australia is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Article 15 of the ICESCR protects the right to enjoy and benefit from culture, including the right to take part in cultural life.

By determining selection criteria for the appointment of non-executive Directors (excluding the staff-elected Director) to the ABC Board, this determination positively engages Article 15 of the ICESCR.

As a national broadcaster, the ABC plays an important role in Australian cultural life and this is reflected in its Charter (section 6 of the Act refers). Under its Charter, the functions of the ABC include:

- to provide broadcasting programs that contribute to a sense of national identity, inform and entertain, and reflect the cultural diversity of, the Australian community;
- to encourage and promote the musical, dramatic and performing arts in Australia.

The selection criteria in this determination identify the skills and attributes desirable of non-executive Directors (excluding the staff-elected Director) on the ABC Board. These are intended to ensure that the Board is comprised of Directors capable of performing the duties of the Board in accordance with the Act, including by ensuring that the functions of the ABC, as set out in the ABC Charter, are performed efficiently and with the maximum benefit to Australian people (subsection 8(1) of the Act refers).

In so doing, this determination will enhance the ability of Australians to enjoy and benefit from culture, including their right to take part in Australia's cultural life through the ABC's services.

The right to take part in public affairs

Australia is also a signatory to the International Covenant on Civil and Political Rights (ICCPR), another of the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Article 25 of the ICCPR protects the rights of citizens to take part in the conduct of public affairs, directly or through freely chosen representatives.

This determination does not engage Article 25 of the ICCPR. The United Nations Human Rights Committee has stated that the conduct of public affairs relates to the exercise of legislative, executive and administrative powers by the constituent parts of government, and covers all aspects of public administration. That is, Article 25

addresses the right to participate in the conduct and exercise of political powers.¹ The role of non-executive Directors on the ABC Board does not involve the conduct of public affairs in this sense. Rather, the ABC is a body corporate established by the Act for a public purpose. It is a separate legal entity from the government.

Conclusion

This determination is compatible with human rights because it positively engages and promotes human rights.

Consultation

The ABC and Nomination Panel were directly consulted in writing by the Minister during the development of this determination as both are directly impacted by the selection criteria. The consultation informed the further development of the selection criteria in this determination.

Notes on the *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013*

Section 1 – Name of determination

Section 1 provides that the name of the determination is the *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013*.

Section 2 - Commencement

Section 2 sets out the date on which this determination commences. This determination will commence on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 - Definitions

Section 3 sets out key definitions for the purposes of the determination.

Section 4 – Selection Criteria

Section 4 sets out the selection criteria determined by the Minister under subsection 24W(1) of the Act and to be used by the Nomination Panel to assess all applicants for the appointment of a non-executive Director (that is, the Chairperson and other non-executive Directors, excluding the staff-elected Director) under the merit-based appointment process established under Part IIIA of the Act.

The selection criteria are intended to reflect the duties, skills and desirable attributes of non-executive Directors on the ABC Board and to address the requirements set out under subsection 12(5) of the Act in relation to a person's suitability for appointment.

¹ United Nations Human Rights Committee General Comment No. 25, paragraph 5.

Subsection 4(1) requires candidates to demonstrate substantial experience or knowledge in at least one of the following fields:

- the media industry, including broadcasting, digital media and/or digital technologies;
- business or financial management;
- corporate governance, including managing large and/or complex operations in the private, public, or not-for profit sector;
- cultural industry and/or cultural policy, including its administration.

The fields listed in subsection 4(1) reflect the operations of the ABC as a broadcaster and provider of digital media services, the ABC's status as a large and complex organisation, and the ABC's functions under its Charter (see section 6 of the ABC Act). Amongst other things, under its Charter, the ABC is required to contribute to a sense of national identity and reflect the cultural identity of the Australian community, and to encourage and promote the musical, dramatic and other performing arts in Australia.

Subsection 4(2) sets out the duties and attributes that candidates are expected to possess. These are:

- demonstrated high level leadership and vision;
- a commitment to high standards of governance;
- high-level judgment;
- the highest standards of professional and personal integrity; and
- an understanding of the media environment, in particular the ABC, its Charter and its place within the Australian community.