

## **Explanatory Statement**

Issued by the authority of the Minister for Communications

*Australian Broadcasting Corporation Act 1983*

### ***Australian Broadcasting Corporation (Non-executive Director—Selection Criteria) Determination 2024***

#### **Authority**

The *Australian Broadcasting Corporation Act 1983* (the Act) establishes the Australian Broadcasting Corporation (ABC) and its Board.

Subsection 24W(1) of the Act requires the Minister to determine selection criteria for the appointment of the Chairperson or non-executive Director to the ABC Board (other than the position of staff-elected Director).

Part IIIA of the Act establishes the Nomination Panel, whose role is to conduct a merit-based assessment of candidates for Chairperson and non-executive Director roles on the ABC Board and report to the Minister (and the Prime Minister if the appointment is of a Chairperson) on the outcomes of these selection processes. Subsection 24B(b) of the Act provides that the Nomination Panel's assessment is conducted against the selection criteria determined by the Minister.

The Act does not impose any conditions that need to be satisfied before the power under subsection 24W(1) may be exercised.

#### **Purpose**

The purpose of the new Determination is to repeal and replace the *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013* (2013 Determination). The 2013 Determination is due to sunset on 1 April 2025.

The new Determination largely replicates the 2013 Determination by prescribing generally applicable selection criteria to be used by the Nomination Panel in assessing the suitability of candidates for ABC Board appointments. The instrument includes minor updates to further align the selection criteria with the Charter of the ABC (provided in section 6 of the Act), and to reflect the changing needs of the broadcaster. The language and structure of the instrument has also been updated to align with current drafting standards.

#### **Summary**

A key 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.

The new Determination identifies the knowledge, experience, skills and attributes that are desirable to be held by the Chairperson and non-executive Directors of the ABC Board. Candidates for ABC Board positions are to be assessed against these criteria by the Nomination Panel. The 2024 Determination also addresses the requirements set out under subsection 12(5) of the Act in relation to a person's suitability for appointment.

The new Determination is an integral element of the Nomination Panel process and supports appointments to the ABC Board that are transparent, consistent and based on merit. The criteria specified in the new Determination does not apply to the Managing Director, who is appointed under section 13 of the Act, or the staff-elected Director, who is appointed under section 13A of the Act.

The new Determination is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to the default sunseting requirements and disallowance. The 2024 Determination commences the day after it is registered in the Federal Register of Legislation.

Details of the instrument are set out in [Attachment A](#).

## **Consultation**

To support the introduction of 5-year funding terms for the ABC and SBS, the government requested the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department) review options to support the national broadcasters' independence. The review sought views on a wide range of topics, including ABC and Special Broadcasting Service (SBS) board appointment processes and the 2013 Determination.

The department also conducted targeted consultation with the ABC, SBS and Nomination Panel from July-August 2024 to inform the final drafting of the 2024 Determination.

No Regulation Impact Analysis was required for the replacement instrument (reference number OIA24-07902).

## **Statement of Compatibility with Human Rights**

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at [Attachment B](#).

**Details of the *Australian Broadcasting Corporation (Non-executive Director—Selection Criteria) Determination 2024***

**Part 1—Preliminary**

Section 1 – Name

Section 1 provides that the title of the instrument is the *Australian Broadcasting Corporation (Non-executive Director—Selection Criteria) Determination 2024*.

Section 2 – Commencement

Section 2 provides for the whole of the instrument to commence on the day after it is registered on the Federal Register of Legislation.

Section 3– Authority

Section 3 provides that the instrument is made under subsection 24W(1) of the *Australian Broadcasting Corporation Act 1983* (the Act).

Section 4– Definitions

Section 4 provides for the definition of 3 key terms and includes a note reminding readers that there are some terms (including ‘Director’ and ‘non-executive Director’) that are defined in the Act.

Section 5 – Schedules

Section 5 provides that each instrument specified in the Schedule is amended or repealed as set out in the applicable item in the Schedule concerned, and that any other item in a Schedule to the instrument has effect according to its terms. There is only one Schedule, which repeals the *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013*, which is due to sunset on 1 April 2025.

Section 6 – Selection criteria

Section 6 sets out the selection criteria determined by the Minister pursuant to subsection 24W(1) of the Act. During all times the instrument is in force, the criteria specified must 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.

Paragraph 6(1)(a) requires candidates to demonstrate substantial experience or knowledge in at least one of the following fields:

- the media industry;
- broadcasting and digital media;
- digital technologies in any sector other than the media sector;
- business or financial management;
- creative arts;
- educational content creation;
- corporate governance, including managing large and/or complex operations in the private, public or not-for-profit sectors;
- cultural industry and/or cultural policy, including its administration.

The fields listed paragraph 6(1)(a) reflect the operations of the ABC as a broadcaster and provider of digital media services. 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, to encourage and promote the musical, dramatic and other performing arts in Australia, and transmit programs internationally which encourage awareness of Australia and enable Australian citizens abroad to obtain news and information.

The fields listed in paragraph (6)(1)(a) should be read alongside the ABC's functions under its Charter (see section 6 of the ABC Act), for example, 'the media industry' could include audio, video and screen production, and journalism.

Paragraph 6(1)(b) sets out attributes that all candidates are expected to possess. These are:

- demonstrated high-level leadership and vision, and the ability to articulate a clear direction for an organisation;
- financial literacy;
- high-level judgement;
- the highest standards of professional and personal integrity;
- an understanding of, or the ability to credibly represent, the communication needs of Australia's diverse society; and
- an understanding of the media environment, in particular the ABC, the Charter and its place within the Australian community.

These should be read in the context of ABC's status as a large and complex organisation.

Paragraph 6(1)(c) requires persons to demonstrate a commitment to high standards of governance. This reflects expectations that the Board discharges its duties under section 8 of the Act to ensure that the ABC operates in a manner that is among other things, independent, impartial, and legal.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Australian Broadcasting Corporation (Non-executive Director—Selection Criteria) Determination 2024***

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

#### **Overview of the legislative instrument**

Subsection 24W(1) of the *Australian Broadcasting Corporation Act 1983* (the Act) requires the Minister to determine selection criteria for the appointment of the Chairperson or non-executive Director to the ABC Board (other than the staff-elected Director). The *Australian Broadcasting Corporation (Selection criteria for the appointment of non-executive Directors) Determination 2013* (2013 Determination) is due to sunset on 1 April 2025.

Part IIIA of the Act establishes the Nomination Panel, whose role is to conduct a merit-based assessment of candidates for Chairperson and non-executive Director roles on the ABC Board and report to the Minister (and the Prime Minister if the appointment is of a Chairperson) on the outcomes of these selection processes. Subsection 24B(1)(b) of the Act provides that the Nomination Panel's assessment is conducted against the selection criteria determined by the Minister.

A key 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.

The 2024 Determination identifies the knowledge, experience, skills and attributes that are desirable to be held by the Chairperson and non-executive Directors of the ABC Board. Candidates for ABC Board positions are to be assessed against these criteria by the Nomination Panel. The 2024 Determination also addresses the requirements set out under subsection 12(5) of the Act in relation to a person's suitability for appointment. The instrument is an integral element of the Nomination Panel process and supports appointments to the ABC Board that are transparent, consistent and based on merit.

The 2024 Determination does not apply to the Managing Director, who is appointed under section 13 of the Act, or the staff-elected Director, who is appointed under section 13A of the Act.

#### **Human rights implications**

This instrument engages the following rights:

- The right to enjoy and benefit from culture
- The right to freedom of opinion and expression
- The right to take part in public affairs and elections

### *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.

Similar protections for women, children and people with disabilities are found in Article 13 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEWAD), Articles 30 and 31 of the Convention on the Rights of the Child (CRC) and Article 30 of the Convention on the Rights of Persons with Disabilities (CRPD) respectively. Further, Article 5 of the Elimination of All Forms of Racial Discrimination (CERD) guarantees the right of everyone to equal participation in cultural activities without distinction as to race, colour, or national or ethnic origin.

By determining selection criteria for the appointment of a Chairperson or non-executive Directors (excluding the staff-elected Director) to the ABC Board, this determination positively engages the abovementioned Articles of the ICESCR, CEWAD, CRC, CRPD and CERD.

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 a Chairperson or non-executive Directors (excluding the staff-elected Director) on the ABC Board. These are intended to ensure that the Board is comprised of persons capable of performing the duties of the Board in accordance with the Act. This includes ensuring that the functions of the ABC, as set out in its Charter, are performed efficiently and with the maximum benefit to Australian people (subsection 8(1) of the Act refers).

In so doing, this determination enhances 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.

### *Right to freedom of opinion and expression*

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to freedom of expression. The right includes the right to seek, receive, or impart information and ideas of all kinds, and the means of their dissemination. The right extends to

any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

Further protections for children and people with disabilities are found in Article 13 of the Convention on the Rights of the Child (CRC) and Article 21 of the Convention on the Rights of Persons with Disabilities (CRPD) respectively. Further, Article 21 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) guarantees the right of everyone to freedom of opinion and expression without distinction as to race, colour, or national or ethnic origin.

The United Nations Human Rights Committee has recognised the important role of the media to ensure freedom of expression in any society<sup>1</sup>. The Committee has stated that, as a means of protecting the right of media users to receive a wide range of information and ideas, State parties should take particular care to encourage an independent and diverse media. State parties should ensure that public broadcasting services, in particular, operate in an independent manner and they should guarantee their editorial freedom<sup>2</sup>.

As a national broadcaster, the ABC is an important contributor to media diversity in Australia and is required under its Charter (section 6 of the Act refers) to provide innovative and comprehensive broadcasting services of a high standard that inform the Australian community. The ABC Board is required under section 8 of the Act to ensure that the gathering and presentation of news and information by the ABC is accurate and impartial.

The effective operation of the ABC, empowered though a board consisting of suitably qualified and experienced persons, positively contributes to the right to freedom of opinion and expression by supporting an independent and diverse media landscape in Australia.

#### *The right to take part in public affairs and elections*

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<sup>3</sup>. The role of a Chairperson or non-executive Director 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**

The instrument is compatible with human rights. To the extent that the measures in the 2024 Determination may limit the right to privacy, they are lawful and non-arbitrary. Additionally, any impacts are reasonable, necessary and proportionate.

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<sup>1</sup> United Nations Human Rights Committee, General Comment No. 34, paragraph 13

<sup>2</sup> United Nations Human Rights Committee, General Comment No. 34, paragraphs 14 and 16

<sup>3</sup> United Nations Human Rights Committee, General Comment No. 25, paragraph 5