This chapter focuses on the senior appointment processes for the public sector bodies that were discussed in the last chapter. It deals with appointments at the Commonwealth level for authorities that operate under the *Commonwealth Authorities and Companies Act 1997 (Cth)* (CAC Act). As indicated in earlier chapters, these bodies have the power to make and implement decisions on matters related to the public purpose of the entity, unlike those that fall under the *Financial Management and Accountability Act 1997 (Cth)* (FMA Act) such as departments of state. There are guidelines for the selection of Australian Public Service (APS) agency heads and other relevant statutory office-holders, which come under the *Public Service Act 1999 (Cth)* (PS Act) (APSC 2009a). These guidelines are comprehensive in defining the role of key players, such as the secretary of a department, and how the merit-based process is to proceed. There are, however, no comparable guidelines for office-holders within Australian public bodies outside the PS Act; the Australian Public Service Commission (APSC) guidelines stop short of being applicable to the chairs and directors of such boards.

Most state governments have various procedures for making public sector appointments: New South Wales (New South Wales Government 2004), Queensland (Queensland Government 2006), Victoria (Victorian Government 2011) and Western Australia (Government of Western Australia 2010) each have a set of guidelines with the guidelines in South Australian currently under review (South Australian Government 2000). None of the states have procedures that are as comprehensive as international better practices.

In the last few years, two incidents have occurred that have the potential to undermine public confidence in Australia’s appointment processes. One was the resignation of Adelaide businessman Robert Gerard from his position on the board of the Reserve Bank of Australia (RBA) in December 2005, after the opposition raised allegations of tax evasion. Another has been controversy over recent appointments to the board of the Australian Broadcasting Commission (ABC). The former was not a major crisis of confidence and, therefore, did not lead to pressure on the government to make the current processes more rigorous, transparent and independent. The second example, however, was sufficiently serious to spur the Labor Party into commitments for reform, as the case study in this chapter on the ABC indicates. The topic of board appointment processes is important because it can only be a matter of time before a political appointment to a high-profile board in Australia backfires enough to severely dent faith in public integrity and confidence in its key institutions.¹

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¹ In March 2012, political controversy arose around the lack of systematic and transparent processes by which Mr David Gonski was appointed to chair the Future Fund.
This chapter first describes appointment processes to Australian public sector boards and briefly puts them in a comparative perspective; it then presents some findings from research conducted for this book (chapter 3) on the views of public sector officials about appointment processes and the consequent tensions that arise; and finally identifies some unresolved issues of principle and suggests some policy approaches that might best suit Australia into the future. Where relevant, the chapter refers to the ABC as a case study.

The Australian context and a comparative perspective

The Australian scene

Until recently in Australia, little interest was shown at the Commonwealth level in appointment processes to its boards. The Labor government under Kevin Rudd (2007–10) made some statements about what it intended to do, and the current government is pursuing that intent (see below). To date, however, there has been relatively little transparency about the appointment processes that have been, or are being, followed in relation to public sector boards at the Commonwealth level. What is known is that appointment processes are usually neither comprehensive nor systematic, and there is therefore much scope for reform.

The processes of selection and appointment are usually focused around the relevant minister, the prime minister, the governor-general and the Federal Executive Council, with assistance provided by cabinet, the Department of the Prime Minister and Cabinet (PM&C) and other relevant departments. Ministers are expected to make appointments on the basis of merit, and to take into account skills, qualifications and experience (PM&C 2009a). Boards may or may not be involved in identifying the skills and experiences that are required when vacancies arise. The Cabinet Handbook states that: ‘Where a significant appointment process is proposed, the responsible minister must write to the Prime Minister seeking his or, at his discretion, Cabinet’s approval of the appointment’ (PM&C 2009a: 19–21). It also notes that ministers must ensure that the person being proposed is appropriately qualified and has relevant experience; due regard is paid to the government’s policy of encouraging an increase in the number of appointments of women; and attention is paid to the need to have an appropriate geographical balance in appointments (2009a: 19–21).
In some cases, the enabling legislation relating to Commonwealth authorities does impose some important restrictions on ministers’ powers of appointment. For example, a number of statutes require board members to have expertise in a specified area. There are also several acts that specify a process that must be followed before members are appointed, for example, the *Primary Industries and Energy Research and Development Act 1989 (Cth)* (PIERD Act). Yet, under legislation for these corporations (or authorities), ministers have broad statutory powers that seem to be subject to little or no formal oversight or transparency.

John Howard’s Coalition government (1996–2007) carried out governance reform of its boards in the second half of the 2000s, especially through the leadership activities of the then Department of Finance and Administration (Finance) following the endorsement by the government of key recommendations in the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Uhrig review) (Uhrig 2003) (discussed in some detail in chapter 8). The Uhrig review, while noting how significant appropriate board appointments can be, and offering some guidance on how ministers could be supported in the appointment process to ensure the necessary experience and skills relevant for a particular appointment (Uhrig 2003: 86–7; 97–8), did not include a recommendation on this issue of appointment. Nor were its terms of reference directed primarily to this topic, which demonstrates that the Uhrig review was not intended to cover everything to do with governance.

As chapter 2 has indicated, some useful guidelines, which were devised by the Australian National Audit Office (ANAO), exist in the form of better practice guidance for incremental improvements. For example, its guidance paper on potential conflicts of interest for CAC bodies (2003a) suggests procedures for managing tensions in the board framework including: ‘Develop with the Minister an agreed procedure to enable board members to have input to the appointment of new members, chair and organisation head’ (2003a: 5). Similarly, its guidance paper on CAC boards provides a checklist on good board practices, including appointment protocols (ANAO 2003b: 4).

The most significant relevant reform of board appointment processes, discussed later in this chapter, is the legislation which has recently been drafted for appointments to the boards of the ABC and Special Broadcasting Service (SBS): the *National Broadcasting Legislation Amendment Bill 2010 (Cth)*. If the elements in that legislation were to become broader and apply to all boards, then a comprehensive merit–based appointment process could be mandated. Whatever happens to this legislation (it is currently before the Senate), it contains useful steps in developing a comprehensive appointment process and is, therefore, worthy of close attention whether that be within or beyond the current electoral cycle.
A comparative perspective

In the United Kingdom and Canada there have been particular triggers for making improvements to appointment processes. Changes to reduce perceived cronyism in the United Kingdom were driven by a desire to lessen public cynicism in the mid 1990’s, following a series of scandals (OCPA 2005a). The United Kingdom now has a relatively sophisticated appointment system, which is based around oversight and monitoring undertaken by various commissioners for public appointments. More recently, in Canada, which has a system of parliamentary scrutiny of appointments, change occurred in response to a crisis arising from a major sponsorship scandal and an adverse auditor-general’s report in which the governance of several public bodies came under scrutiny (Treasury Board of Canada 2005). More limited reform has also occurred in New Zealand, where board appointments are made by ministers, but in accordance with guidelines and advice and assistance from a number of other bodies (NZ, SSC 2009). The United Kingdom has by far the most advanced and comprehensive appointment system of the countries mentioned, which has modelling relevance both within and beyond Australia.

It is because the United Kingdom system of public sector appointments is so much more comprehensive than that found at either the Commonwealth or state levels in Australia, or indeed in other comparable countries, that this chapter pays particular attention to the better practices to be found in that country and compares them to current Commonwealth government practices (see Edwards 2006b, for more detail on schemes in other countries.) Therefore, the lessons drawn from the UK experience could be seen to be relevant not only within Australia but to comparable overseas countries such as Canada and New Zealand.

Behaviour of main players and empirical findings

It is not surprising that current public sector appointment processes, which lack general guidelines, in many cases show a lack of transparency and accountability and, hence, integrity. This became clear in research conducted for this book through interviews with senior officials of the Australian government and chairs and CEOs of CAC boards in the 2000s (chapter 3). What was surprising was that appointment processes were so commonly mentioned, even in responses to questions that did not focus specifically upon appointment processes. This occurred, for example, even to questions that asked respondents to identify
constraints to the implementation of effective corporate governance in their organisation and to nominate two or three major emerging governance issues that were facing their organisation.

Without any systematic approach to appointment processes across Commonwealth agencies, there exists much diversity and inconsistency in practice. Diversity in practice does reflect the difference in types of CAC bodies, but it also reflects the behavioural dynamics that operate between the board members and the minister or government. At one extreme is the use of the most systematic processes which permeate the generally accepted stages for good appointment processes: audit, advertisement, merit-based selection with eventual cabinet approval. The practice of appointing ‘mates’ with little due process is at the other end of the spectrum — it is a process highly focused around ministers (Edwards 2006a). So, while some good appointment practices occur, these practices are by no means common and overall could not be described as comprehensive or systematic.

In addition, lack of consistency in appointment processes leads to many tensions such as:

- among board members, particularly between ministerial appointments, on the one hand, and those seen to have a conflict of role, as government or industry ‘representatives’;
- between board members with informal links to the minister and other members of the board;
- between the chair and CEO, whether one or both are appointed by the minister;
- between the CEO, board and the portfolio department in attempting to gain the ear of the minister; and
- between the board and the minister where selection processes around the CEO leave some ambiguity.

These tensions and other consequences of the current appointment arrangements are elaborated below in the discussion of the role of ministers in appointments, the appointment of chairs and directors, the appointment of the CEO, and the role of appointed stakeholders and government representatives.

A few qualifications need to be kept in mind in what follows. There was much change in government policy during the period that the main interviews were conducted, arising principally from the Uhrig review (2003). One consequence, for example, was the increased relative power of portfolio secretaries compared with chairs of boards, and this was reflected in some interviews. Nevertheless, what follows is revealing about the attitudes of major players on whom we depend for effective governance of public sector bodies.
The role of the minister

In line with democratic principles, it is generally considered that it is the right of ministers to exercise ultimate responsibility for appointments — in terms of final decisions. This is certainly the case in Australia. Serious problems can arise, however, in perception or reality, when there is no formal process around the role of ministers in the appointment process. In these cases, it can be difficult for board members to perform their duties and to exercise the independent judgment that is expected of them (Edwards, Nicoll and Seth-Purdie 2003: 40).

Many practices occur at the Commonwealth level. At one end of the spectrum the enabling legislation is quite specific about the minister’s role (as in the PIERD Act, referred to earlier). In others the process is more opaque and our research unveiled several and often unsolicited comments because of that. One CEO reflected the view of many in saying: ‘What inhibits good governance in the public sector is the perception that directors (who are appointed by the minister) are doing what the minister wants rather than what is good governance’. Another reflected on a minister who had personally selected more than just a few ‘mates’ to chair boards who, according to this interviewee, did not necessarily have the most relevant skills. At least one of these chairs admitted to being a ‘minister’s chum’.

Board members, however, can display independent behaviour, irrespective of their relationship with the minister: once selected, members often operate both professionally and independently. As one chair of a board remarked: ‘The minister is responsible for all appointments … but despite this, the minister has no influence’ (chair). And another: ‘We are totally independent. We are absolutely independent despite the fact that board members are all mates with the PM’.

This independent behaviour of board members is also reflected in the case of the ABC. While the Labor government’s position is that: ‘Unlike the previous government, we are not going to stack the board with our mates’, the relevant minister in 2007, Senator Stephen Conroy went on to admit that previous Labor governments ‘may have been guilty’ of this. (Sainsbury 2007). Despite that ‘guilt’, Ken Inglis reported, in his study of the ABC, that a member of the (old) ABC Commission once said to him (2002: 11):

‘We leave our guns parked at the door’. Recent and present directors make the point more positively, saying that they feel beholden not to the government which invited them to come on board, however preferable they may find its overall policies to those of the opposition, but to the ABC. They develop a common sense of themselves as stewards, custodians, disinterested guardians of a national treasure.
Appointments can reflect ‘merit-cronyism’ (Prasser 2005), as illustrated by one CEO: ‘I’m a pragmatist — what you need on a board is someone who your Minister trusts and not only skills expertise and talent. So I’m not supportive of an appointment process at such an arm’s length as a purist approach. It has great practical advantage to have the trust of the minister’. Thus, it is not always easy to say appointees were ‘mates’ or were appointed on merit but what is important is the actual perception of the reason for appointment, which is likely to be more negative than otherwise when processes are not transparent.

Appointing chairs and directors

Diversity of approaches in appointing board chairs and directors can be expected when there is a lack of formal process, in the majority of cases, applied to the making of appointments. In the case of chairs of boards of CAC bodies, they are mostly appointed by the minister, rather than following the private sector practice of the chair being appointed by the board itself. A few chairs referred to a phone call from the minister inviting them to the position. What we were not able to find out was what happened prior to that call: to what extent the search for a chair involved people outside the minister’s office. This is as yet largely unexplored territory and an obvious issue of lack of transparency. It is an important topic for, as Richard Leblanc and James Gillies have observed: ‘it is the selection of a chair that matters most to the board process, not the separation (of the chair and CEO)’ (2005: 12). One CAC CEO considered that: ‘the more I think about it, the more I realise that the minister’s appointment of the chair is the biggest issue’.

For director appointments, some of the practices include:

• responding to detailed specification in the legislation (e.g. research and development bodies which come under the PIERD Act);
• advice from the chair/board to the minister with or without a nominating committee; and
• advice from portfolio departmental heads to the minister, which may not include taking advice from the board or its chair.

Research for this book showed only a few examples of a systematic process by which the board identified skill gaps and informed the minister of what was needed in making appointments to the board. In other cases, even though there was a formal process, it was not considered effective because of the dominant role of the minister.

Many tensions can be expected to arise from more informal processes of selecting board directors, particularly as boards and departments compete to have the ear of the minister: ‘We give formal advice directly to the minister, which is against the arrangements that (the secretary) put in place. He wanted all advice for board appointments to come directly from the department.’ (CEO)
Appointing the CEO

The Uhrig review was categorical about the importance of the CEO of a CAC-type body being appointed by the board and not by the minister, although it stopped short of making that a specific recommendation. It could be argued, however, as one CEO did, that: ‘It does not make sense to appoint someone the minister doesn’t have faith in. Uhrig takes a technical, purist approach. I think this is not quite right or disingenuous’.

Tension can exist where there are provisions in the legislation for the board to select the CEO, but where there is the added requirement to have the appointment approved by the minister and cabinet. In one of these cases, we were informed by a CEO of the importance of a compromise candidate being selected, where necessary: The CEO is appointed by the board but the minister needs to find the person nominated acceptable, otherwise a compromise candidate is found. There is ambiguity over the minister’s role in the appointment process. This needs to be addressed.’

Currently, practices around CEO appointments differ across CAC bodies, with some bodies having the capacity to select their own CEOs, some making recommendations that go to cabinet and some having no capacity to choose at all.

Stakeholders and government representatives

There are several issues around the fact that CAC boards frequently include stakeholders in one form or another (e.g. experts or government representatives). Lack of clarity about the role of a board director can occur for members of boards who have some representative role, such as for a (state) government, industry or organisation. As chapter 8 has indicated, the Uhrig review discouraged (but fell short of making a specific recommendation on) any representational appointments to boards because they ‘can fail to produce independent and objective views’ (2003: 98). It is worth noting, however, that this pure principle is difficult to practice in the public sector where expertise, as well as representative views (e.g. from state governments), is required — as is sometimes specifically stated in the enabling legislation.

There are some distinct advantages in stakeholders being represented on boards: one chair remarked that ‘You do need some people who understand the business’. And then, there is the issue of balance: although some directors come with an industry background, they have to: ‘tread a very fine line between letting us understand the issues but not acting for their own interests.’ (CEO) If there is an awareness of the importance of managing conflicts of interest and there exist good processes in place to do that, then it could be argued that the Uhrig position is too ‘pure’.
A different set of arguments applies in the case of departmental representatives on boards. Uhrig was opposed to departmental representatives being on boards but kept the door open: ‘Membership of the board by the departmental secretary is unwise unless there are specific circumstances which require it’ (2003: 99). On the one hand, there is the issue of potential conflicts, especially when budget proposals are being considered and funding is sought from the department. On the other hand, there can be significant advantages: these representatives can bring awareness of government thinking and priorities to board discussion, such as the membership of the head of Treasury on the RBA Board (chapter 8). Much depends on the quality and capacity of particular public servants with dual roles.

There are many possible conflicts of interest here and one departmental secretary saw three aspects to the role: acting in the interest of the body; as portfolio secretary acting for the portfolio as a whole (‘because I carry the can’); and keeping a watch on things for the ministers (‘shit management’). Another portfolio head was quite clear about the priority role: ‘I’m portfolio secretary and I know that informally the minister and prime minister would expect me to keep an eye on them even though they have a CEO’. Since the recommendations of the Uhrig review have come into force, and the relative power of the portfolio secretary vis-à-vis the board chair has been enhanced, the case for a departmental representative on the board could arguably be said to be reduced.

**Principles and better practice**

This chapter now turns from current practice on appointment processes to better practice principles, and the implications for Australia if they were adopted and implemented.

**Relevant principles from the United Kingdom**

In the mid 1990s, there was a particular trigger for the UK government to enhance public confidence in the integrity of the political process around public sector appointments. There was significant ‘public and parliamentary disquiet over the issue of patronage, which fed into and exacerbated a broader decline in public trust in politicians and political institutions’ leading the Conservative Party to be ‘dogged by accusations of sleaze and corruption’ (Flinders 2009: 555). The ‘widespread public unease at standards in public life’ (HOCPASC 2003: 10), including concerns about abuse of power, cronyism and political bias in public

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2 See Edwards (2006b) for details on appointment practices in other comparable countries.
appointments led the then prime minister John Major, in 1994, to establish a committee to inquire into the standards of conduct of holders of public office (called the Committee on Standards in Public Life or The Nolan Committee).

Amongst a number of matters, the Nolan Committee was concerned to ensure that appointments to boards of non-departmental public bodies (so-called quangos) were made on the basis of merit, without undue political bias, and in accordance with a transparent and accountable process. To this end, the committee made a number of recommendations relating to appointments to public office, the ‘Nolan rules’ (each of which is discussed below), which were subsequently largely adopted by the government. Changes were made to reduce perceived cronyism and to lessen public cynicism; attention was paid to a more transparent process with a higher degree of independence and with close attention to merit-based appointment processes (OCPA 2005a).

Since the United Kingdom now has a comprehensive and relatively sophisticated appointment system that is based around the oversight and monitoring of various commissioners for public appointments, it is worth examining the relevance of the UK experience for Australia. There is an additional reason for focusing on UK practices in this chapter. The Labor government committed to basing its appointments to the ABC Board on the UK Nolan principles, also known as the seven principles of public life. “We are seeking advice as to the best way to implement the Nolan principles in terms of new appointments to the ABC” Minister Conroy said’ (Sainsbury 2007). And the legislation before parliament as of March 2012 embodies these principles. For these reasons it is useful to trace events in the United Kingdom which led to the creation of its set of comprehensive principles and a code of practice around public sector appointments.

The position of commissioner for public appointments was established soon after the publication of the Nolan Committee’s report. The Office of the Commissioner has since practiced under a Code of Practice (OCPA 2005b; 2009) (hereafter, the code) governing ministerial appointments to public boards that is based on principles that were enunciated by the committee. These principles, or ‘Nolan rules’ are as follows (OCPA 2009:19-20):

- **Ministerial responsibility** — the ultimate responsibility for appointments is with ministers.
- **Merit** — all public appointments should be governed by the overriding principle of selection based on merit, by the well-informed choice of

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3 Prior to 2004, there existed a single UK commissioner. Since then, this system has been replaced by one commissioner for England and Wales and separate commissioners for Scotland (2004) and Northern Ireland (2005). These countries have separate institutions and processes that share similar principles as those outlined above, although the Scottish system is stricter in many regards (See OCPAS 2006).
individuals who through their abilities, experience and qualities match the need of the public body in question.

- **Independent scrutiny** — no appointment will take place without first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.

- **Equal opportunities** — departments should sustain programmes to deliver equal opportunity principles.

- **Probity** — board members of public bodies must be committed to the principles and values of public service and perform their duties with integrity.

- **Openness and transparency** — the principles of open government must be applied to the appointments process, its workings must be transparent and information must be provided about the appointments made.

- **Proportionality** — the appointment procedures need to be subject to the principle of proportionality, that is they should be appropriate for the nature of the post and the size and weight of its responsibilities.

As a result of the application of these principles for more than a decade in England, Scotland and Wales, they have had in place a relatively systematic and transparent process of selection and appointment. The system requires appointments to be advertised and a shortlist to be compiled by a panel that includes or is overseen by an independent or impartial assessor. While the final decision on appointment still lies with the relevant minister, the processes that have been established reduce the scope for cronyism by increasing the probability that such decisions will be publicly exposed.\(^4\)

In 2011, both the commissioner for appointments in England and Wales and the commissioner for appointments in Scotland announced revised and streamlined codes. Although the stated principles were reduced, the essence of the ‘Nolan rules’ was maintained in the codes;\(^5\) hence the discussion to follow is based on those rules. The main difference now is that there is more devolution of responsibility to relevant government departments to ensure compliance with the code and a, related, stepped-up audit process that is overseen by the

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\(^4\) The minister can select someone who is not on the shortlist provided by the panel, but this must be reported to the commissioner. In Scotland, the minister’s decision on which candidate(s) is (are) appointed, and the reasons for this decision, is recorded and retained as part of the audit trail for the appointment round (OCPAS 2006: 24.5).

\(^5\) The principles have been reduced to three: merit; fairness and openness. The other ‘Nolan rules’ are incorporated in the following way: (a) the ultimate responsibility for public appointments resting with ministers is stated up front, prior to these three principles (OCPA 2012); (b) independent scrutiny is covered through an appointment panel which must have an external perspective and be chaired by an assessor appointed by the commissioner (OCPA 2012); (c) equal opportunity and diversity is explicitly woven through the code (2011); (d) probity is covered with the panel needing to satisfy itself that candidates are committed to the Nolan principles (2011); and (e) proportionality is covered with greater attention to a ‘more proportionate independent assurance’ process (OCPA 2011).
commissioner (OCPA 2012; OCPAS 2011). There will also be, for England and Wales, a centre of excellence for public appointments that will have the aim of widening the pool of candidates applying for vacancies.

**Stages in a good appointment process**

Identifying the main stages in appointment processes is the first step in reforming the appointments system. Different jurisdictions have identified a variety of ways of selecting and appointing to public sector boards. There is, however, widespread acknowledgement of several main stages if better practices are to be followed; these are described in appendix 3. Those stages involve: agreeing a vacancy profile and timeline for appointment; locating suitable candidates; assessing and vetting potential candidates, selecting and appointing; and, less commonly, auditing the appointment process.

A well-structured and managed process would cover all these stages in a way that not only makes merit a primary consideration, but is also transparent and accountable and has a suitable degree of independence. How that independence is actually exercised has been the subject of debate (e.g. Aucoin and Goodyear-Grant 2002). A related issue is whether parliamentary accountability for non-departmental boards, which has been adopted in the United Kingdom (see below) but is uncommon elsewhere (Flinders 2010), should be part of the process. Roger Wettenhall is of the view that any serious discussion of the role of statutory authorities can never advance far without considering the parliamentary relationship, since parliament creates them and specifies how they are to operate (2012). The issue is the extent to which parliament plays a role. Irrespective of who oversees the process, it is to be expected that it would be accompanied by establishing effective board charters that specify the roles and responsibilities of directors, with associated monitoring of board and director performance.

**ABC case study**

For decades, governments on all sides of politics have been accused of stacking the ABC board with their ‘mates’ or, as one interviewee called them, ‘chums’. The current government announced its intention to change selection processes to: ‘ensure that all appointments to the ABC and SBS Boards are conducted in a manner that fosters independence, transparency, accountability and public confidence’ (Conroy 2008) and ‘to end political interference in the ABC by introducing a transparent and democratic board appointment process that appoints non-executive directors on merit’ (Albanese 2010). The government subsequently introduced into the parliament legislation to this effect but also, from October 2008, put into practice the merit-based assessment processes which are contained in that legislation.
The National Broadcasting Legislation Amendment Bill 2010 (hereafter the Bill) encompasses all of the stages in a good appointment process, as outlined above. Table 9.1 outlines the main proposals contained in the legislation which relate to the appointment stage. The Bill formalises a merit-based and independent appointment process that is based on the UK system of public sector board appointments. In fact, the basis for this policy goes back to the Labor policy *A Better ABC Board: Labor’s Policy on the ABC Board Appointment Process*, which was announced in 2003 (Crean and Tanner 2003; ALP 2004). It proposed that there be an independent ABC appointment selection committee. The Bill that is currently before the Senate encompasses the principles, identified in this chapter, for merit-based appointments and so represents a model of better practice, which may be of use in the future and to other jurisdictions. The Bill:

- places responsibility for assessing candidates in the hands of an ‘Independent Nomination Panel established at arm’s length from the Government’;
- specifies that vacancies are to be widely advertised;
- uses a set of core criteria (with additional criteria added if the minister so decides); and
- mandates a report from the panel to the minister, including a short-list of at least three recommended candidates.

The amending legislation specifies the functions of the panel and asserts that it would act independently from the government and would not be ‘subject to direction by or on behalf of the Government of the Commonwealth’ (s. 24C). The relevant department(s) is required to publish the processes by which such appointments were made in its annual report.

Importantly, if the minister wishes to appoint a person who has not been recommended by the panel, after notifying the prime minister of this, and once the appointment is made, the minister must table a statement of reasons to parliament for that decision. In the case of the chair of the board, the prime minister, on receiving the short list from the panel, will be required to consult the leader of the opposition before making a recommendation to the governor-general, and similarly, if choosing an individual who is not on the panel’s recommended short list, provide reasons for the selection in a statement to parliament (s. 24X).
Table 9.1: Legislation by appointment stage

<table>
<thead>
<tr>
<th>Stage</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>1. Preparation — the process and vacancy profile</strong></td>
<td>Ministerial determination of selection criteria</td>
</tr>
<tr>
<td></td>
<td>Independent nomination panel established</td>
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<tr>
<td><strong>2. Locating suitable candidates</strong></td>
<td>Widely advertised positions</td>
</tr>
<tr>
<td><strong>3. Assessing and vetting candidates</strong></td>
<td>By ‘independent’ panel to set criteria</td>
</tr>
<tr>
<td></td>
<td>Background check by panel</td>
</tr>
<tr>
<td><strong>4. Selection and Appointment</strong></td>
<td>Shortlist of candidates — at least three names to minister</td>
</tr>
<tr>
<td></td>
<td>Ministers check on suitability of candidate — in relation to selection criteria</td>
</tr>
<tr>
<td></td>
<td>Minister gives reasons to parliament — if alternative candidate chosen</td>
</tr>
<tr>
<td><strong>5. Audit</strong></td>
<td>Department publishes annual statement on processes</td>
</tr>
</tbody>
</table>

Source: Based on DBCDE (2010).

The processes that are set out in the Bill represent a paradigm shift from the position adopted by governments up until now — on paper at least. As a result of the Bill’s implementation, cronyism should be significantly reduced and the power of ministers should be significantly constrained. A major advance will occur if the articulated aims of the legislation to foster independence, transparency, accountability and public confidence are achieved. Even the most skillfully drafted legislation, however, carries risks that the government’s intentions are not carried through. In that case, the UK implementation experience can alert us to potential pitfalls.

Unresolved issues of principle

This chapter ends by considering several critical issues of principle that need to be addressed if a comprehensive reform to processes of appointment to Commonwealth boards is to be achieved in Australia. What follows is broadly in line with the ‘Nolan rules’ and takes the reformed ABC board appointment process as its illustration.

The extent of ministerial involvement?

The breadth of the powers that are given to Commonwealth ministers in existing appointment processes, as outlined above, contrasts with the position in the United Kingdom, where the code has placed restrictions on ministerial involvement in the system and, most recently, has spelt out more clearly their role (OCPA 2012).
Despite the existence of the code, there has been a continual, and often heated, debate in the United Kingdom about the degree to which ministers should be involved — a tension between those that argue for a system completely independent of ministers as the only way to ensure appointment on the basis of merit and public confidence in the system, and those that argue that ministers must be involved in the process in line with the principle of representative democracy. Until recently in England and Wales, ministers could be kept informed about the progress of an appointment round if they wished, but could not be actively involved between the planning stage and the submission of a short list of suitable candidates \( \text{[OCPA 2005b; Gaymer 2007: 11]} \). The previous commissioner for public appointments for England and Wales is on record as saying that some ministers had unrecorded involvement in the middle of an appointment process, which could be interpreted as political interference \( \text{[Gaymer 2007: 12]} \). Under the new code, ministers can convey to the panel views ‘about the expertise, experience and skills of the candidates’ at each stage of the process \( \text{[OCPA 2012: 5]} \) alongside a clearer statement of their role.

Recently, the process has become cumbersome, with parliamentary select committees being able to hold pre-appointment hearings to scrutinise candidates for key public board positions before they are appointed (such as the chair of the BBC Trust) \( \text{[HOCPASC 2008; Flinders 2009]} \).

Although the proposed ABC/SBS legislation spells out in some detail the functions of the nomination panel through the planning, advertising, assessing and recommending stages of the appointment process, it pays scant attention to the specific role of ministers between the setting of the selection criteria and receiving the short list of recommended candidates from the nomination panel. Without this attention in the Bill, or a separate code of practice, real difficulties can be expected and public confidence undermined for any government that is planning to adopt this approach.

If changes are going to be made across Commonwealth boards, a key issue to be resolved is what role ministers should play and, related to this, whether a more independent body or parliamentary committee should be involved in vetting appointments — if not also in the selection process. The related issue of independence in the process is discussed below.

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\[ \text{Peter Aucoin and Elizabeth Goodyear-Grant (2002) argue for the independent decision-maker to appoint the most qualified applicant and not merely a qualified candidate (which is in fact the position in Nova Scotia). Their conclusion is that if the principle of relative merit is to be effective, then ministers should not have a say in appointments: ‘the standard of relative merit demands a process that is separate and independent of ministers’ (Aucoin and Goodyear-Grant 2002: 314).} \]
What is the meaning of ‘merit’?

Appointing on the basis of merit (the overriding principle in the United Kingdom, e.g. OCPA 2005b: 21) would seem to be an incontrovertible necessity but, over time, the principle has been interpreted in the United Kingdom in various ways. In line with the original recommendations of the Nolan Committee, the selection criteria take account of a balance of skills and background. Further, under the code, the concept of merit must be read in conjunction with the principles of equal opportunity and diversity, which are required to be ‘inherent within the appointments process’ (OCPA 2009: 23).

In practice, this means that ministers and departments are required to adopt a broad definition of merit that not only takes into account competencies and capabilities, but also takes into account non-traditional activities and career paths, while encouraging a greater number of women, people with disabilities and members of minorities to participate in selection processes.

In Australia, the APSC has set out the meaning of ‘merit’ for its appointment processes (2009a: 5). This definition is narrower than that which is contained in the code: although the guidelines do include a segment on representation of women, they do not specifically provide for the element of diversity. In the case of the ABC legislation, however, following closely the wording of the UK code, diversity and equal opportunity are specifically taken into account: ‘A broad definition of merit will be applied to the ABC and SBS Board appointments whereby formal qualifications and traditional work experience will form only one element. Non-traditional activities and career paths are recognised and valued as suitable qualifications which contribute to an individual’s overall suitability for appointment’ (DBCDE 2010). In addition: ‘The principles of equal opportunity and diversity will be followed throughout the selection process. In particular, consideration will be given to ensuring that the membership of boards encompasses diversity in gender and geographical representation’ (2010).

Here, as elsewhere, what is contained in the legislation can differ from practice: there is some evidence that British bureaucrats have adopted a rather narrow definition of ‘relevant experience’ to favour appointees who have already had board experience (Flinders, personal correspondence 2010). And, a relevant consideration that is not emphasised in either the UK or Australian cases is the importance for board performance of having around the board table the most relevant set of expertise and competencies. This means defining merit broadly enough to encompass not only inherent skills or qualities of the applicant but also how well the applicant’s expertise fits with the expertise of other board members and also fits with the job that is required to be done.
How is independent scrutiny to be assured?

A central part of appointment processes to public sector bodies in the United Kingdom has been independent scrutiny by an independent assessor. According to the previous commissioner for public appointments for England and Wales, independent scrutiny ‘underwrites the integrity of the whole appointments process’ (OCPA 2005b: 31). The assessors are selected either by the OCPA, or by departments, in a competitive process. Their job is to ensure that the appointment process meets the requirements of the code and is in line with its principles (UK Cabinet Office 2006: 15; OCPA 2012). The revised code removes the requirement for an independent assessor and transfers some of their role to the relevant department. The assessment panel, however, must include at least one member with an ‘external perspective’ (2012: 6).

How independent will the selection and workings of the Australian nomination panel for the ABC be in practice? The panel will be appointed by the secretary of PM&C and will include a chair and two or three other members (s. 24E–24P). The nomination panel in the original ALP policy consisted of the secretary of the relevant department and head of relevant division, the APSC merit commissioner and an eminent and independent person. But the Bill does not specify the criteria for selection of panel members, or how the process of selection is to take place: will the appointees be eminent people who will be expected to ‘not rock the boat’ or people appointed because of their institutional affiliations? This needs clarification. Independence would also be threatened if the relevant minister is briefed orally before the short list is formally lodged with him or her, and this part of the process is not made transparent. There is also an issue over the independence of the head of PM&C, when compared to the APS commissioner, who is a statutory appointment (Nethercote 2010). One possibility would be designating the commissioner as an ‘independent officer of parliament’. It is worth noting that the current commissioner of public appointments for England and Wales is also the civil service commissioner (OCPA 2011).

Probity: How to handle conflicts of interest?

Conflicts of interest (including ‘duty’) arise where ‘the impartiality of an officer in discharging their duties could be called into question because of the potential, perceived or actual influence of personal considerations’ (ANAO 2003a: 1) (See also Finn 1993; OECD 2004b; 2005a, b). There can also be conflicts of role, especially in the public sector, with government members being appointed to public sector boards. Conflicts of role arise where ‘a person is called upon to play incompatible professional roles, and may face pressure to bring selective memory to bear on privileged information and/or act with dual personality’ (Howard and Seth-Purdie 2005: 61).
In Australia, under the CAC Act, a director of a Commonwealth authority who has a material personal interest in a matter that relates to the affairs of the authority is generally required to disclose the interest to the other directors, excuse themselves from meetings where the matter is considered and refrain from voting on the matter (CAC Act, s. 27F; 27K). The *Cabinet Handbook* (PM&C 2009a) and *A Guide on Key Elements of Ministerial Responsibility* (Howard 1998a) also contain some broad guidance on the procedures that should be followed to avoid conflicts of interest that can arise in appointment processes. The legal requirements contained in the CAC Act, and these statements of principle, leave considerable room for conflicts, or the perception of conflicts, to arise. This can undermine confidence in the integrity and independence of public sector boards.\(^7\)

The Australian Fisheries Management Authority (AFMA) is one Commonwealth authority with an established process to deal with potential or perceived conflicts of interest, which goes beyond the requirements that are outlined in the CAC Act (AFMA 2006) (See also ANAO 2003a). The Bill is, in fact, brief in dealing with probity issues but the nomination panel has the responsibility for determining the level of background checks to be undertaken prior to appointment (DBCDE 2010).

### Will public confidence be enhanced with openness and transparency?

The principle here is about accountability and ensuring that members of the public have confidence in the system as a result of having information on relevant aspects of appointment processes. The desire for a transparent process must, however, be weighed against privacy concerns. The response to this dilemma in England and Wales has been to establish mandatory publicising, confidentiality and audit requirements. Documentation in relation to appointment processes must be kept and retained for a minimum of two years.

The UK evidence is that, despite detailed legislation and oversight by the OCPA, more than a decade later serious breaches of the code still occurred, including a number of appointments that were made with the virtual absence of an audit trail (Hayward, Mortimer and Brunwin 2004; MORI 2005). Moreover, an independent study conducted for the Office of the Commissioner of Public Sector Appointments (OCPA) on the perception of ministerial appointments processes found, in 2005 (10 years after setting up the OCPA), poor public understanding of board appointment processes with only one in five UK citizens

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\(^7\) The OECD has produced some guidelines and a toolkit (2005b) to assist governments who wish to minimise actual or perceived conflicts. These have already been the basis of tools used by the NSW Independent Commission against Corruption and the Queensland Crime and Misconduct Commission (OECD 2004b: 8).
having confidence in the public appointments system. A more recent study regards raising knowledge ‘a significant challenge’ on the basis of the current lack of knowledge about public appointment processes (Cameron and Skinner 2010: 6).

The current commissioner for public appointments intends to uses his powers of audit to rigorously enforce the merit principle and compliance with the new code through spot audits (OCPA 2012: 6). He will report publicly on a department’s compliance with the code and will publicise good and poor performance.

In Australia, as this chapter has shown, there is no real transparency about how people are selected for board positions, unlike other countries where transparency has been regarded as essential to a process which gains and maintains public confidence. This is not just about who is selected, but also all the stages in the appointment process. The public should be provided with sufficient information to understand what processes are followed to fill positions on public boards — from identifying vacancies through to choosing suitable candidates.

In the case of the ABC, one of the stated aims of the current policy is to restore public trust in the ABC. The crucial question here is: to what extent can we expect the proposed reforms to enhance faith in the system? Obviously, any reforms will require a civic education component, transparency and independent monitoring processes to shift attitudes of distrust about politicians. If the British experience is anything to go by, however, even this may not be sufficient to ensure public confidence in the board appointment system.

On the audit issue, the department(s) will be required to provide a statement in relation to each process for each director or chair appointment processes in its annual report, but it would seem sensible to have an overall audit from beyond the department, for example from the APSC or the ANAO, if not parliament itself. This will be all the more important if the government decides to extend what will be significantly improved appointment processes beyond the ABC and SBS Boards to all boards in the public sector.

The above suggests that a key issue for Australia to address is how far and in what way it wants to go with more rigorous and transparent processes, beyond what is intended for the ABC/SBS board processes. The UK experience would suggest that a good and transparent communication process will be required if the government is to gain public confidence in its board appointment processes.
Can there be an efficient as well as an effective process?

An important consideration in the establishment of appointment processes is cost and timeliness: the need for greater accountability, independence and rigour must be balanced against the need to use scarce resources cost-effectively. One of the seven ‘Nolan rules’ that are taken into account in the code in England and Wales is proportionality — the notion that the processes ‘should be appropriate for the nature of the post and the size and weight of its responsibilities’ (OCPA 2009: 27).

A more structured, transparent and independent process for Commonwealth public sector board appointments in Australia would be more costly than the current informal system. An issue here is whether the additional costs that are associated with a more rigorous system could be expected to be offset by the advantages associated with greater accountability and public confidence in the process, as well as the improvements in organisational performance that stem from having a more competent and cohesive board (see Edwards and Clough 2005; Leblanc and Gillies 2005). Arguably, though, the UK system has gone too far in attempting to ensure transparency and accountability: Matthew Flinders claims that processes have become ‘too cumbersome and inflexible’ and are likely to put off some potential candidates (2010). This is particularly so, Flinders claims, since the introduction of pre-appointment processes that involve the parliament. A balance is obviously needed here between competing principles.

At the Commonwealth level in Australia, a workable balance between efficiency and accountability concerns could well be attained in a number of ways: for example, by requiring boards to routinely undertake a skills audit before each new appointment and by giving the APS commissioner the additional function of being commissioner of public appointments, as is now the case in England and Wales (Nethercote 2010). Given that the APSC already oversees merit-based appointment processes that occur under its current jurisdiction, this would not be an excessive burden but would give the perception (which would, hopefully, be the reality) of a more independent voice in the process of selecting and appointing members of public sector boards. A third way of gaining the balance would be to involve parliament (e.g. a senate committee), but only in the case of major appointments, such as the chair of the ABC or RBA.
Conclusion

This chapter has presented the current picture of board appointment processes, as they relate to Commonwealth boards. Over the past several years, improvements have been made or are intended, most notably with the processes around appointment of directors of the ABC and SBS boards. The findings of the empirical survey on the pervasiveness of political appointments and lack of current good processes across all boards, however, leave much room for improvement. The chapter has raised a number of in-principle questions, such as what should be the role of the minister in board appointment processes and how independent can the process in fact be with the minister having final say? Is there any role for parliament in this process? And can Australia expect, in the foreseeable future, to have the proposed reforms to the ABC appointment process expanded to cover all major public sector boards? Or is this only likely to happen, as the experience in the United Kingdom suggests, after there has been a crisis in public confidence?

There is an opportunity now to begin a measured process of reform that could help enhance and protect public confidence in the governance of public institutions. As a newcomer to reform in this area, and in line with the encouragement that was given in Ahead of the Game to learn lessons from other jurisdictions, much can be gained from examining the changes that have been made in recent years in the United Kingdom, as indeed the current government has done for its Broadcasting Legislation Bill. The principles that are articulated in the code provide a framework for improving outcomes and public confidence. While there is considerable scope for variation in the processes that are adopted, departing from these general principles could jeopardise the integrity of the appointment process and the institutions that those boards are intended to serve.

Good governance around appointment processes to public sector boards requires the exercise of the norms or values which are contained in the framework provided in chapter 1: values of trust, public accountability and transparency in the context of legitimate exercises of political authority by elected representatives. Public servants and board members must be able to distinguish between what is legitimate and what might be informal government pressures, which, in the longer term, only serve to undermine the integrity of public institutions.