

Policy and Regulation for Third Sector Broadcasting

*What Can Be Learned from The Australian and Canadian
Experiences?*

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Abstract

Third Sector Broadcasting, which is sometimes also known as community broadcasting, is a significant sector of broadcasting and is becoming more important in many parts of the world. At present, it is clear that third sector actors have become significant players in the worldwide broadcasting industry. Due to the progress of the sector, during the last decade several countries have introduced their first laws or policies recognizing, or dealing specifically, with third sector broadcasting. Unlike many other countries, Australia and Canada have long-established specific laws and policies for the sector. This thesis presents a detailed comparative analysis of the regulation of Third Sector Broadcasting in Australia and Canada, drawing on the considerable experience of these jurisdictions in dealing with third sector-specific policies and regulations. The essential goals of the thesis are to identify significant regulatory and policy issues, and to develop guidelines to inform future policy and legislative developments in relation to TSB in jurisdictions that are yet to adopt specific laws or policies for the sector, or which have only recently done so.

In addressing these goals, the thesis identifies and analyses eight key issues that need to be addressed when designing a best practice policy and regulation framework for TSB. Additionally, the thesis explains how TSB can contribute to the fulfillment of internationally recognized human rights and, thus, why it is desirable for governments to support the development of the sector. The thesis also assesses the legitimacy, under international human rights law, of subjecting third sector broadcasters to restrictions or requirements over and above those that apply to other types of broadcasters.

Certification of Compliance

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Introduction

This thesis is concerned with the regulation of private not-for-profit broadcasting, which is known as third sector broadcasting (TSB). The thesis addresses its central research questions relating to the regulation of TSB primarily by means of a comparative study of the current and historical policy and regulatory frameworks for TSB in Australia and Canada. This Introduction to the thesis outlines: the main research questions addressed by the thesis; its relevance, its structure; and its methodology, including the reasons for selecting Australia and Canada for the comparative study.

Research Questions

The main research question addressed by the thesis is: what are the key elements of a best practice policy and regulatory framework for TSB, which balances the diverse goals of TSB policy against each other and against legitimate competing objectives, while taking into account practical realities?

In addition to addressing this main research question, the thesis will demonstrate how third sector broadcasters (TSBs) contribute to the fulfillment of internationally recognized human rights and, as a consequence, the desirability of a regulatory framework which is supportive of the development of the sector. A third important objective of the thesis is to assess the legitimacy, under international human rights law, of subjecting TSBs to regulatory restrictions or requirements over and above those that apply to other types of broadcasters, especially commercial broadcasters.

Relevance and Importance of the Research

Third sector actors, including those in the developing world, have long been campaigning for opportunities to participate in broadcasting, which has traditionally been dominated by State or commercial actors. This advocacy gained momentum during the past decade and interest in TSB has, accordingly, increased. In recent years, the right of non-profit actors to participate in broadcasting and the potential contribution of TSB to the

fulfillment of human rights has been recognized, among others, by UNESCO,¹ The European Parliament², the Committee of Ministers of the Council of Europe,³ the Rapporteurs on Freedom of Expression of the UN and the regional human rights protection systems,⁴ the African Commission on Human and Peoples' Rights⁵ and various organizations from the civil society sector.⁶

Although TSB has existed for some time, and in some forms, in most countries in which broadcasting activity is not an exclusive monopoly of the State, it has traditionally suffered from a lack of legal recognition as a separate sector. For this reason, TSBs may be subject to policy and regulatory frameworks which have been designed with commercial or public broadcasting in mind and which are inappropriate for them. Lack of specific legal recognition of TSB, and the application to TSBs of inappropriate regulatory frameworks, has been identified as one of the main obstacles to the development of the sector worldwide.⁷ As a result of the advocacy efforts of third sector actors and the increased international recognition of the sector, this situation has, fortunately, been improving. During the past decade the following countries have adopted laws or regulation specifically addressing TSB for the first time: Ireland (2001)⁸, United Kingdom (2004)⁹, Bolivia (2005),¹⁰ India (2006)¹¹, Uruguay (2007)¹², Bangladesh (2008),¹³ Argentina (2009)¹⁴, Chile (2010)¹⁵ and Spain (2010).¹⁶

¹ See for example, UNESCO, *Media Development Indicators* 'Media Development Indicators' <<http://unesdoc.unesco.org/images/0016/001631/163102e.pdf>>.

² See European Parliament Resolution on Community Media in Europe [2008] 2008/2001 INI.

³ Committee of Ministers of the Council of Europe, *Declaration on the Role of Community Media in Promoting Social Cohesion and Intercultural Dialogue* (2009).

⁴ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, *Joint Declaration on Diversity in Broadcasting* (2007).

⁵ African Commission on Human and Peoples' Rights, *Declaration of Principles of Freedom of Expression in Africa*, ACHPR /Res.62(XXXII)02 art V(2) 'African Declaration'.

⁶ See for example Article XIX Global Campaign for Freedom of Expression, *Access to the Airwaves Principles on Freedom of Expression and Broadcast Regulation* 'Access Airwaves' <<http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf>>; Myers, Mary, *Voices From Villages Community Radio in the Developing World* (Center for International Media Assistance, 2011).

⁷ UNESCO Division for Freedom of Expression, Democracy and Peace Communication and Information Sector, *Legislation on Community Radio Broadcasting - Comparative Study of the Legislations of 13 Countries* (UNESCO, 2003) 106-7.

⁸ *Broadcasting Act 2001* (Ireland) (The act was later reformed by the *Broadcasting Act 2009* which modified several dispositions regarding TSB).

⁹ *Community Radio Order 2004* (UK) 'UK Order'.

Despite the increased interest from the international community and the progress made by the sector in obtaining legal recognition, most countries are yet to adopt specific laws or policies for TSB. Even where specific laws or policies have been adopted, these are not always entirely adequate for the needs of the sector; in fact, sometimes they impair rather than aid the development of the sector.

Unlike most other jurisdictions, Australia and Canada have had specific policies and regulatory regimes relating to TSB since the 1970s. Consequently, for the purposes of this thesis, a comparative study of the experiences these two countries have had dealing with the complex issues involved in TBS policy and regulation was undertaken. This research is used to formulate recommendations for a legal and regulatory framework which supports the development of TSB, while appropriately balancing other considerations. The recommendations are primarily aimed at policy makers from jurisdictions where a specific framework for the sector is yet to be adopted, or where it has only recently been adopted. However, the findings presented in this thesis will also be of relevance to policy makers and stakeholders in jurisdictions with an established TSB regulatory framework, including Australian and Canadian policy makers and TSB stakeholders.

Although much valuable academic literature has addressed issues relating to the regulation of TSB, legal analysis of the multiple, complex issues involved in the development of a legal and policy framework for the sector is lacking. Indeed, an in-

¹⁰ Decreto Supremo No. 28526 [Supreme Decree No. 28526] of 16 December 2005. Community radio was first recognized through presidential decree but formal legislation was adopted in 2011; Ley General de Telecomunicaciones, Tecnologías de Información y Comunicación Ley No. 164 de 2011 [General Law of Telecommunications, Information Technologies and Communication Law No. 164 of 2011] (Bolivia).

¹¹ *Policy Guidelines for setting up Community Radio Stations in India* (2006) ‘*Indian Policy*’.

¹² *Ley de Radiodifusión Comunitaria* (2007)[Community Broadcasting Law (2007)] (Uruguay) ‘*Uruguayan Law*’.

¹³ *Community Radio Policy 2008* (Bangladesh).

¹⁴ *Ley 26.522 Servicios de Comunicación Audiovisual* (2009) [Law 26.522 Audiovisual Communication Services (2009)] (Argentina) ‘*Argentinean Law*’

¹⁵ *Ley 20.433 que Crea los Servicios de Radiodifusión Comunitaria Ciudadana* (2010) [Law 20.433 which Creates the Community Citizens’ Broadcasting Services (2010)] (Chile) ‘*Chilean Law*’

¹⁶ Ley 7/2010 General de la Comunicación Audiovisual [General Law 7/2010 of Audiovisual Communication] (Spain) ‘*Spanish Law*’.

depth comparative study of the Australian and Canadian experiences dealing with TSB, aimed specifically at extracting lessons useful for the design of a framework which supports the development of TSB in fulfillment of human rights ideals, has never been conducted before, as far as can be verified.

As will be further discussed in Chapter 1, the thesis focuses on terrestrial TSB.¹⁷ This focus requires explanation. It has been argued that technological developments could, in the future, eliminate scarcity and therefore the need to regulate broadcasting through a licensing system. The concept of a ‘spectrum commons’ system where all persons are free to ‘broadcast’ radio signals as long as they use equipment that complies with certain standards is explained in Section 3.1.2.2. If such a system were to be implemented, many of the premises which currently guide regulation and policy for terrestrial TSB and terrestrial broadcasting in general would have to be rethought.¹⁸ However, while significant debate exists among technical experts regarding the viability of a ‘commons’ system, the reality is that it is unlikely that any countries will replace their traditional systems, based on individual transmission rights, with a ‘spectrum commons’ in the near future.

For the purposes of this thesis, it seems reasonable to assume the existence of a regulatory system under which a licence is a pre-requisite to participation in terrestrial broadcasting. One of the arguments made throughout the thesis will be that separate licence categories should be established for commercial and third sector broadcasting services. Accepting this premise, the thesis focuses on assessing how the policy and regulatory framework applied to services licenced as TSBs should differ, if at all, from that applied to broadcasters from other sectors, and makes recommendations in this respect. While some of the considerations and recommendations presented in this thesis could also apply to a case where access to the spectrum is based on a commons system, at present, such a scenario is too hypothetical to be specifically factored into the analysis.

¹⁷ Section 1.1 elaborates on the concept of ‘terrestrial broadcasting’ and how it is different from other forms of broadcasting such as satellite, cable or internet based broadcasting.

¹⁸ Throughout Chapter 3 it will be explained that many of the rationales most commonly employed to justify the regulation of broadcasting start from the premise that the activity is restricted to a select few privileged with a licence.

While the focus of the thesis will be on terrestrial TSB, some of the considerations that are presented apply irrespective of the technical means used for distribution. As will be argued throughout the thesis, there is a strong case for supporting TSB because of its potential to contribute to the fulfillment of internationally recognized human rights. It will also be argued that, where TSBs have been favoured with special measures of support in pursuance of specific policy goals, it is also valid to subject them to special regulation aimed at ensuring that such goals are indeed fulfilled.¹⁹ Third sector actors may, moreover, require government support in order to effectively participate in other communications platforms. If cable or satellite are the dominant platforms, then special measures such as ‘must carry’ rules may be required to enable participation from third sector actors. Even in the case of the internet, which is generally considered an open, accessible platform, third sector actors may still require financial support in order to obtain appropriate production equipment. If measures are adopted to support third sector broadcasting through other platforms, then subjecting those favoured by the measures to special regulation may be necessary or justifiable. In this respect, the recommendations that are presented in Sections 6.3 to 6.7 of this thesis may be relevant for such cases. However, it should be noted that scenarios other than terrestrial TSB have not been specifically considered in detail in the analysis presented in this thesis.

Structure of the Thesis

The thesis is divided into six Chapters. Chapter 1 introduces the concept of TSB and explains the features which distinguish it from commercial and State broadcasting. It also introduces the different types or sub-sectors of TSB. Chapter 2 makes the argument that third sector broadcasting has great potential to contribute to the fulfillment of internationally recognized human rights and, thus, that there is a strong case for States supporting the development of the sector. This chapter also identifies other types of measures which can be used to advance the same human rights related goals and the

¹⁹ However, this does not mean that favouring TSB with government funding or regulatory concessions provides a blanket justification to subject them to any kind of restrictions or requirements. The thesis will assess which regulatory measures are valid to apply to the sector.

comparative advantages supporting TSB has over these other measures. Finally, the chapter details the possible ways in which TSB can be supported.

Chapter 3 deals with the question of whether it is valid to subject TSBs to restrictions or requirements over and above those that are applied to other types of broadcasters. The fundamental premise adopted is that, because for-profit and not-for-profit actors have an equal right to freedom of expression, broadcasting law and regulation should not distinguish between the two without proper justification. The chapter argues that proper justification exists for subjecting TSBs to special regulation only when they have received concessions in other areas or benefitted from special measures of support that have not been accorded to for-profit broadcasters. The chapter also formulates the main policy goals which can provide valid justifications for imposing regulatory burdens upon TSBs that are not imposed upon other broadcasters.

Chapters 4 and 5 set out, in some detail, the historical development of the policy and regulatory frameworks for TSB in Australia and Canada respectively. Both chapters also provide an explanation and analysis of the policy and regulatory frameworks that currently apply to TSBs in each country. The overarching purpose of these two chapters is to provide the essential background for the comparative analysis of the legal and regulatory regimes undertaken in Chapter 6.

Chapter 6 examines eight main issues that need to be resolved when designing a regulatory framework for TSB: the provision of access to the spectrum to TSBs; the licensing system for TSB services; the financial regulation of TSBs; the provision of government funding to TSBs; the regulation of TSBs in relation to advertising, selling of air-time and on-air requests for donations; content regulation for TSBs and governance and participation requirements for TSBs. The chapter will make recommendations regarding each of these areas. The recommendations are made on the basis of a comparative legal and policy analysis, with the objective of providing guidance regarding how to best balance the different goals of TSB policy against each other, and against legitimate competing objectives, while taking into account practical considerations. In

addition to these eight major issues, the chapter incorporates recommendations relating to a considerable number of subsidiary issues that need to be resolved in developing a best practice regulatory regime that appropriately supports TSB. A brief conclusion summarises the main substantive arguments and recommendations presented in the thesis.

Methodology and Sources

For the purposes of the thesis, two jurisdictions - Australia and Canada - were chosen for comparative analysis. This comparative analysis was not approached from a strict legal perspective. The object of the analysis was not to determine the correct interpretation of the rules applicable to TSBs in both countries or to assess the validity of these rules in relation to each country's constitutional order. Instead, the analysis centres on the substantive content of the policies and regulations which each country has adopted in relation to TSB, the concerns and goals which underpinned such policies and regulations and the actual effect the measures adopted have had on the development of the sector in each country.²⁰ This analysis has been used to extract recommendations which can provide guidance to policy makers from other jurisdictions when developing their own policy and regulation frameworks for the sector.

This thesis has been conducted primarily through detailed documentary research. The main sources used have been the historical and current laws and policy documents relating to TSB from the jurisdictions chosen for the comparative analysis, Australia and Canada. Although relevant case law has been consulted, in both jurisdictions this is relatively scarce.

Documents relating to international human rights law (IHRL) have also been consulted. These include treaties, case-law from supranational tribunals and pronouncements from

²⁰ While both Australia and Canada follow the common law tradition, this focus on substantive content and practical effects allows the analysis to be relevant for jurisdictions that follow a different tradition.

monitoring bodies.²¹ The Universal (United Nations) and the three regional systems - , the European, the Inter-American and the African - were all considered. The objective has not been to assess whether the Australian and Canadian frameworks for TSB comply with their respective obligations under IHRL. Instead, the IHRL documents have been used to identify a series of goals that all States should seek to advance, for example, diversity of information and equality in the access to means of communications.²² IHRL sources, along with documents containing empirical research regarding TSB, both in Australia and Canada and in other countries, have also been relied on to demonstrate the potential of TSB to advance these human rights related goals. The comparative analysis and the recommendations that are made in Chapter 6 seek to determine how to design a framework that ensures TSBs fulfill this potential while balancing other considerations.

Legislation and administrative rules concerning TSB from jurisdictions other than Australia and Canada has also been reviewed and referred to where appropriate.²³ In addition to aiding in the general analysis, these sources have been used to demonstrate that many of the concerns and issues Australian and Canadian policy makers have confronted during their history of dealing with TSB are not exclusive to these two countries. This comparative approach establishes that these issues and concerns are general in nature and, thus, that it is useful to study the experience of countries that have a longer history than most in dealing with them.

Although no independent empirical research was conducted as part of this thesis, documents such as position papers issued by TSB representatives in Australia and Canada have been reviewed and analysed, as well as documents from the World Association of Community Radio Broadcasters (AMARC), which is the main representative of TSBs at the international level. This has allowed the analysis to take into account the views of TSBs themselves.

²¹ For example, the General Comments from the UN system's treaty bodies and the joint declarations that are annually made by the freedom of expression rapporteurs of the four systems.

²² These goals are discussed further in Chapter 2.

²³ Due to the language barrier, only legislation which could be found in English or Spanish could be reviewed.

The extensive legal academic literature relating to the regulation of broadcasting in general has also been identified and analysed. This has been especially useful for the analysis of the validity of subjecting TSBs to specially designed regulation, as presented in Chapter 3 of the thesis. Other sources which are also referred to in the thesis include decisions from domestic courts from jurisdictions other than Australia and Canada, such as United States, as well as relevant academic literature from fields other than law, especially the disciplines of media studies and economics.

Why Australia and Canada Have Been Chosen for Comparative Study

As noted above, the main reason Australia and Canada have been selected for a comparative study concerning TSB policy and regulation is that both countries have had policies and laws specifically dealing with the sector for longer than most other jurisdictions. However, there are other elements which make the experiences of these two countries particularly instructive. As will be discussed in Section 1.3, immigrant, indigenous and religious groups are among the groups that most commonly engage in (and benefit from) TSB, with ethnic, indigenous and religious broadcasters sometimes being considered special types of TSBs. Australia and Canada are both pluralistic, multicultural countries, with significant immigrant and indigenous populations and with significant cultural and religious diversity. For this reason, ethnic, indigenous and religious broadcasters all have a significant presence in both countries. Community broadcasters and broadcasters linked with academic institutions, which are also two of the most common types of TSBs, also have a significant presence in both countries.²⁴ The significant diversity of those participating in the TSB sector, which is not necessarily the case in other jurisdictions, makes Australia and Canada especially valuable for a comparative analysis of TSB policy and regulation.

Despite the advantages identified above, there are some limitations of the comparative analysis undertaken in this thesis which must be mentioned. Both Australia and Canada are developed countries and, accordingly, their social and economical conditions differ

²⁴ All these different forms or sub-sectors of TSB are explained in Chapter 1.

significantly from those of developing or less developed countries. The two countries are also larger than most in terms of their geographical dimensions, with relatively low population densities, and with the population irregularly scattered through their territories. These very specific conditions have influenced the development of TSB policy and broadcasting policy in both countries, and are clearly not identical to those that exist in other countries.²⁵ While these limitations must be kept in mind, the intention of the research undertaken in this thesis has never been to suggest that an analysis of the Australian and Canadian experience could or should result in a 'one size fits all' ideal policy and regulatory framework for TSB that can be mechanically applied to all jurisdictions. On the contrary, the particular and ever changing circumstances in each jurisdiction clearly needs to be considered every time a TSB framework is being developed or reviewed.²⁶ However, understanding the experiences of other countries can, nevertheless, be of great assistance to those with the task of developing such a framework and, for the reasons already explained, the Australian and Canadian experiences are especially valuable in this regard.

²⁵ How these factors have influenced the development of TSB policy and broadcasting policy in general in each country is discussed in Chapters 4 and 5 respectively.

²⁶ Chapter 6 discusses some of the reasons why different contexts may call for different approaches regarding a same issue or area of TSB policy or regulation.

Chapter 1 - What is Third Sector Broadcasting?

The goal of this thesis is to make recommendations which can aid decision makers in designing a policy and regulation framework for third sector broadcasting (TSB). In order to design such framework, the essential first step is to understand the concept of TSB. For this reason, this first Chapter is devoted to introducing and explaining the concept of TSB. Section 1.1 briefly discusses the concept of ‘broadcasting’ in general and specifies the meaning that that term will be attributed within the context of this thesis. Section 1.2, explains what TSB is, what the other sectors of broadcasting are and how TSB distinguishes itself from the other sectors. In Section 1.3, some special forms or sub-sector of TSB are discussed.

1.1. Broadcasting

1.1.1. Broadcasting - Concept

From a technical point of view, the act of ‘broadcasting’ can be defined as the transmission of electronic signals containing information of either, audio (radio) or video + audio (television), with the purpose of them being received simultaneously by an audience of indeterminate numbers.²⁷ There are various methods which can be used for the transmission of the signals, these include: ‘terrestrial broadcasting’, where the signals are disseminated through the air using land based transmission devices; ‘satellite broadcasting’, where the dissemination relies on transmission devices located in outer space; and ‘cable broadcasting’, where the signals are disseminated through coaxial or optical cables. The dissemination of radio or television content through the internet is sometimes referred to as ‘internet’ broadcasting independently of the technology used for transmission.

²⁷ For a discussion on various interpretations of ‘broadcasting’ see *Mediakabel BV v. Commissariaat voor de Media* (C-89/04) [2005] ECR I-04891.

As commented above, the technical concept of broadcasting requires for the audience to be indeterminate from the point of view of those disseminating the signals. That means that communications where those transmitting have direct control over who will receive the signal, for example by transmitting point-to-point, are not normally considered broadcasting.²⁸ Services such as cable can be limited to subscribers but may still fall within the definition of broadcasting if the signals are transmitted simultaneously to all connected to the service.²⁹

The legal definition of broadcasting varies from jurisdiction to jurisdiction and not all definitions may include all of the different methods of broadcasting described above. In the case of Australia and Canada, however, both countries have legal definitions of broadcasting which are technologically neutral.³⁰ This means that whether an activity is legally considered broadcasting or not does not depend on the technical method used for the dissemination of signals.

The investment required to establish cable or satellite distribution platforms is normally outside the possibilities of third sector actors. For this reason, these platforms are rarely used for TSB. In Australia and Canada special measures have been adopted to allow certain third sector services to be delivered through satellite.³¹ In the case of Canada a special policy has been implemented regarding ‘community channels’ through which third sector content is distributed by cable.³² While these measures will be discussed in Chapters 4 and 5, the focus of the thesis will be in policy and regulation for terrestrial TSB as this is the most common type of TSB. The internet is commonly used by third sector actors to disseminate audio and audiovisual content. However, internet broadcasting will not be contemplated in the remaining chapters of this thesis. The reason is that the goal is to provide recommendation regarding policy and regulation for TSB.

²⁸ The Australian definition of broadcasting expressly excludes point-to-point communications.

²⁹ Both Australia and Canada consider this type of distribution by cable a form of broadcasting.

³⁰ *Broadcasting Services Act 1992 (Cth)* s 6 (definition of ‘broadcasting service’) ‘*BSA*’; *Broadcasting Act 1991 (Can)* s 2(1) (definition of ‘broadcasting’) ‘*BA*’.

³¹ See Sections 4.3.10, 5.2.4.3, 5.2.4.5

³² See Section 5.2.5.

Unlike other forms of broadcasting, internet broadcasting is not commonly subjected to special regulation.³³

Terrestrial broadcasting has traditionally been free-to-air. The concept of ‘free-to-air’ refers to content that is made available for free to all those with the adequate reception devices. However, encryption technologies have made possible for transmitters using terrestrial methods to charge receivers directly for the right to decode the signals and receive the content. The European Court of Justice has found that encrypted terrestrial broadcasting falls within the concept of broadcasting because the signals are receivable by all even if not decodable.³⁴ Chapter 2 discusses the potential benefits of developing TSB. Most of these benefits depend upon the third sector content being freely available to the public. In addition, the not-for-profit nature of third sector broadcasters (TSBs) means the free-to-air model will normally suit their goals better. For these reasons, the policy analysis contained in the following chapters will refer exclusively to free-to-air TSB.³⁵

As the focus of the thesis is free to air terrestrial third sector broadcasting, the term ‘TSB’ will be used throughout the following Chapters to refer exclusively to this type of TSB. For convenience sake, the term ‘broadcasting’ without further qualifications will be used to refer to free-to-air terrestrial broadcasting and clarifications will be made when reference is made to other forms of broadcasting.

1.1.2. Analogue and Digital Broadcasting

Broadcasting has traditionally relied in the use of analogue transmission technologies. However, in the present most countries have or are in the process of replacing the use of analogue technologies in terrestrial broadcasting with more efficient digital

³³ Section 3.1 discusses various rationales which are employed to justify the regulation of broadcasting. These rationales, for the most part, do not apply to internet broadcasting.

³⁴ See *Mediakabel BV v. Commissariaat voor de Media* (C-89/04) [2005] ECR I-04891.

³⁵ While the focus is on free-to-air terrestrial TSB, Canada’s cable community channel policy will be analyzed in order to contrast the approach adopted in this policy with the policies adopted in the country for terrestrial TSB.

technologies.³⁶ Digital transmissions technologies are considered superior because they require less spectrum bandwidth for the transmission of a signal of equal quality. In addition, digital decoders are less sensitive to interference which reduces the need for ‘guard bands’, which are frequencies that are deliberately left unused in order to protect users of other frequencies from potential interference. For these reasons, replacing analogue transmission with digital based ones results in more radio frequencies becoming free for use. The spectrum that has been or is expected to be freed by the transition to digital terrestrial broadcasting is known as the ‘digital dividend’.

If digital dividend becomes available, this presents an opportunity to increase the overall number of broadcasting services (including third sector ones) which is normally limited the availability of appropriate frequencies. However, the digital transition has also been identified as presenting significant risks for the development of TSB. These risks include: increased competition for the freed frequencies from economically powerful telecommunications services which may prevent broadcasters from accessing them;³⁷ the costs associated with replacing analogue transmission devices with digital ones which may prove too burdensome for TSBs with low resources;³⁸ and governments neglecting or giving low priority to the needs of sector during the transition process.³⁹

The above described risks are significant. Given the importance of TSB for human rights,⁴⁰ States can be considered to have an obligation to ensure that development of the sector is not unnecessarily impaired by the digital transition.⁴¹ However, due to limitations of time and space, the focus of this thesis has been limited to the analysis of

³⁶ Australia and Canada have both completed the digital transition process in relation to television but not for radio.

³⁷ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade* (2010) Art. 6(c).

³⁸ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, *Joint Declaration on the Protection of Freedom of Expression and Diversity in the Digital Terrestrial Transition* (2013).

³⁹ See Rennie, Elinor, ‘Community Television and the Transition to Digital Broadcasting’ (2001) 28(1) *Australian Journal of Communication* 57.

⁴⁰ This importance is discussed in detail in Chapter 2.

⁴¹ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 38, Art. 3(d).

policy and regulation for TSB under normal circumstances. The temporary issues that can arise during the transitional period and the possible measures that can be undertaken to ensure the continued development of TSBs during a digital transition will not be discussed.⁴²

1.1.3. Broadcasters and Content Providers

The new digital technology allows transmitting multiple sub channels in a single signal. This has led to some countries establishing systems where former terrestrial broadcasters are not licensed to administer transmitters. Instead ‘multiplex’ operators broadcast signals with multiple sub channels. The content that was previously transmitted directly by a former terrestrial broadcaster may represent a sub channel of the multiplex. In some cases these multiplexes are operated by States directly or a private party is licensed to provide only the technical transmission service while States retain the power to decide whose content must be carried through the multiplex. However, in other cases private, commercially oriented, multiplex operators are allowed to decide on the content to be carried.⁴³

Technically speaking, the ones who engage in broadcasting in these cases are the multiplex operators and not the content providers. However, those who provide radio or television content to be carried through a digital multiplex are sometimes colloquially or even legally referred to as ‘broadcasters’, even though they do not engage directly in the dissemination of radio signals. Although the remaining chapters of this thesis will refer to third sector ‘broadcasters’ most of the considerations discussed throughout apply independently of whether the TSBs operate their own transmitters or have their content

⁴² However, the issue of access by third sector actors to capacity in digital multiplexes, which can become a permanent issue depending on the system adopted by a country after the transition, will be discussed in Section 6.1.3.

⁴³ For a discussion on the different models for regulating access to bandwidth in digital multiplexes see European Platform of Regulatory Authorities, *Final Report of the Working Group on Digital Terrestrial Television* (2004) <http://www.krrit.gov.pl/Data/Files/_public/Portals/0/radiofonia%20i%20telewizja%20cyfrowa/agcom_dttwg_finalreport.pdf>.

broadcast through the transmitter of a third party such as the State or a commercial multiplex operator.⁴⁴

1.1.4. Narrowcasting

The term ‘narrowcasting’ is often used to refer to the transmission of audio or video signals where the party transmitting has control over those who are to receive the signals, for example, by transmitting through a closed circuit. However, in Australia the denomination ‘narrowcasting service’ is used to refer to broadcasting services that have limited reach (due to low transmission power) or appeal (due to broadcasting for special interest groups).⁴⁵ In this relation, it is important to note that some TSB services fall within the Australian concept of narrowcasting. Australian legislation’s narrowcasting licence category is discussed further in Section 4.3.4.

1.2. Third Sector Broadcasting

1.2.1. The Other Sectors of Broadcasting

In order to understand TSB, it is necessary to distinguish it from the other sectors of broadcasting. The two traditional sectors of broadcasting are the commercial sector and the State or ‘public’ sector. The commercial sector is comprised by broadcasters which are established and controlled by private persons and have the generation of profits as the primary goal of their operations. Broadcasters from the public sector are normally classified as ‘official’ or ‘public service’ depending on their level of independence from government. Broadcasters which are directly under the control of the government or a branch thereof are classified as ‘official’ broadcasters.⁴⁶ Broadcasters which are

⁴⁴ The implications of transferring decision making in relation to access to the spectrum to a commercial multiplex operators are discussed in Section 6.1.3.

⁴⁵ *BSA* s 18.

⁴⁶ Buckley, Steve, et al., *Broadcasting, Voice and Accountability, A Public Interest Approach to Policy, Law and Regulation* (The World Bank Group, 2008) 36-7.

established by the government but which are independent from it are known as ‘public service’ broadcasters (PSBs).⁴⁷

The level of independence State sector broadcasters must have in order to be considered PSBs not always clear. Ideally PSBs will have both legal independence and financial independence.⁴⁸ Legal independence is attained, for example, by subjecting PSBs to a mandate that makes them accountable to the public rather than to the government or a specific governmental authority⁴⁹ and establishing safeguards that prohibit the directors or employees of the PSBs to be arbitrarily dismissed by government authorities.⁵⁰ Financial independence is ensured by providing PSBs with means of financing that are not dependant on ad-hoc government decisions.⁵¹

In addition to State, commercial and TSB, ‘experimental’ broadcasting could be considered a fourth sector of broadcasting. ‘Experimental’ broadcasting refers to broadcasting operations whose main goal is to experiment with new technologies or methods of transmission. Broadcasting for the purposes of technical experimentation is a sector that will not be discussed on this thesis.

1.2.2. Third Sector Broadcasting - Concept

TSB is an umbrella term used to refer to forms of broadcasting that do not fit within the sectors described in the previous section. At the most basic, TSB can be said to be all broadcasting which is not established by the State and does not have the generation of profits or technical experimentation as its main purpose. In this sense, the third sector is

⁴⁷ Discussed in depth in Rumphorst, Werner, *Model Public Service Broadcasting Law and Aspects of Regulating Commercial Broadcasting* (International Telecommunication Union, 1999).

⁴⁸ Buckley et al, above n 46, 189.

⁴⁹ See Committee of Ministers of the Council of Europe, *Appendix to Recommendation No. R(96)10 Guidelines on the Guarantee of the Independence of Public Service Broadcasting*, Guideline 17; Buckley, above n 46, 193.

⁵⁰ See for example Committee of Ministers of the Council of Europe, *Ibid*, Guideline 8; Buckley et al, *Ibid*, 200.

⁵¹ Buckley et al, *Ibid*, 203-5; Werner, above n 47, 4.

sometimes referred as the ‘private non-profit’⁵² or the ‘non-commercial, non-public’⁵³ sector. Licences for TSB are often issued to organizations that fall within the notion of third sector or civil society. Different jurisdictions have different eligibility requirements but examples of entities which often engage in TSB include among others: Community based associations or cooperatives, charity organizations, religious institutions, and organizations representing special interest groups such as students, youth, senior, immigrant, minority or indigenous communities.

In France, francophone Belgium, and several African countries TSB is referred to as ‘associative’ broadcasting.⁵⁴ However the term most commonly associated with TSB is ‘community’ broadcasting. ‘Community broadcasting’ is very commonly used as a blanket term to refer to all forms of TSB.⁵⁵ Despite this, it has been argued that the term is inappropriate to describe all TSBs.⁵⁶ For this reason, the ‘community’ label is also sometimes employed more restrictively to refer to a particular sub-type of TSBs which is described in Section 1.3.1. Within the context of this thesis, the term ‘community’ will be used to refer that specific form of TSB. However, it is important to clarify that many sources that will be cited throughout the following chapters refer to the whole third sector when using the term ‘community’ in relation to broadcasting.

TSB is also sometimes referred to as ‘alternative’ broadcasting. However, using this term may be inadequate. Referring to TSBs as ‘alternative’ may carry the implication that their main role is to assuage discontents with the service provided by commercial and State broadcasters or that they would not be necessary if the service provided by the other sectors was satisfactory. While many TSBs initiatives are motivated by a desire to

⁵² See for example Office of the OAS Special Rapporteur for Freedom of Expression, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, OAS Doc. OEA/Ser.L/V/II CIDH/RELE/INF. 3/09 (2009) [69] ‘*Inter-American Standards*’.

⁵³ Raboy, Marc, ‘Media and Democratization in the Information Society’ in Bruce Girard and Sean O Siochru (eds), *Communicating in the Information Society* (UNRISD, 2003) 101-119, 102.

⁵⁴ See for example Yordi, Cristopher, *The Economics of Rural Radio in Africa – An Introductory Study into the Costs and Revenues* (African Farm Radio Research Initiative, 2008); Kern European Affairs, *The State of Community Media in the European Union* (Prepared at the request of the Directorate-General for Internal Policies of the Union of the European Parliament, 2007).

⁵⁵ This is the case in Australia. Discussed further in Chapter 4.

⁵⁶ UNESCO, above n 7, 99-101.

address real or perceived deficiencies in the service provided by other broadcasters, this characteristic is not essential for a station to be considered third sector. As will be discussed further in Chapter 2, the importance and value of TSBs does not lay only in their capacity to fill the gaps left by the other sectors. The term ‘alternative’ may also carry connotations of political or social activism.⁵⁷ Many TSBs pursue aims of social change but this is also not essential for stations to be considered TSBs.

1.2.3. Distinguishing Third Sector Broadcasting from the Other Sectors

The boundaries between the different sectors of broadcasting are not always clear. For this reason, it may be difficult to determine whether particular broadcasters belong to the third sector. Since not all jurisdictions recognize TSB as a distinct legal category, stations are sometimes formally licensed as commercial broadcasters even though they are, in practice, TSBs. Even when TSB is legally recognized, persons pursuing not-for-profit goals may still opt for commercial licences if TSB licences are subjected to excessive restrictions regarding the content they can broadcast or the means for their financing.⁵⁸

Issues of funding may also blur the lines between sectors. While TSBs are expected to be independent from both, governments and commercial interests, very few of them are able to subsist through donations alone. For this reason, TSBs normally require to engage in commercial activity or to be supported with government funding in order to finance their activities. TSBs are distinguished from commercial broadcasters because of their non-profit goals and not because of the source of their funding.⁵⁹ For this reason engaging in commercial activity such as selling air-time for advertising does not necessarily invalidate the third sector nature of the station. Similarly, receiving government support is not incompatible with the nature of TSBs provided the control of the stations remains

⁵⁷ See Drejer, Tanja, ‘Speaking up or being heard? Community Media Interventions and the Politics of Listening’ (2010) 32 *Media, Culture and Society* 85.

⁵⁸ Sections 6.3-6.6 assess to what degree is valid or desirable to restrict TSBs in these areas.

⁵⁹ See note 1589 and text accompanying.

effectively on the hands of independent non-profit actors.⁶⁰ While TSBs are not defined by their sources of funding, there is always a risk that their funding practices can compromise their independence. Special regulation may be required to ensure the independence of TSBs. One of the key issues that will be discussed throughout this thesis is how to balance the financial needs of TSBs against the goal of ensuring their independence.

Government ‘access’ stations which are controlled by governments but provide access air time to community groups are sometimes incorrectly identified as belonging to the third sector.⁶¹ Establishing ‘access’ stations is a measure that can be used to broaden access to broadcasting alternatively or in addition to TSB.⁶² However and while some of the content broadcast through these stations may be third sector if its producers are sufficiently independent, the stations themselves cannot be considered true third sector stations if they are controlled by government authorities instead of private non-profit actors.

Broadcasters which are public in nature but do not form part of main public broadcasting system are sometimes mislabeled as third sector stations.⁶³ If a station is controlled by government entity, then it belongs to the public sector and cannot be considered third sector. This is independent of whether the station is controlled by national or local authorities or whether it is controlled by the central government or an independent public entity. In this relation, it is convenient to refer to the *African Charter on Broadcasting* which highlights the importance of distinguishing TSB from decentralized public broadcasting.⁶⁴ One possible exception to this is the case of broadcasters controlled by public academic institutions which are usually considered TSBs despite the licensees being public nature entities.

⁶⁰ Section 6.4 discusses measures which can be implemented to ensure government funding practices do not interfere with the independence of TSBs.

⁶¹ These type of stations are discussed in Section 2.2.7.

⁶² Section 2.2.7 discusses the advantages and disadvantages of establishing public access stations in comparison to supporting TSB.

⁶³ This is the case of provincial educational stations in Canada. Discussed in Section 5.1.4.

⁶⁴ African Charter on Broadcasting Part III(2) ‘*African Charter on Broadcasting*’ <http://portal.unesco.org/ci/en/files/5628/10343523830_african_charter.pdf/african%2Bcharter.pdf>

In addition to public educational entities, indigenous communities or religious organizations who have been granted legal personality under public law also sometimes engage in TSB.⁶⁵ This may seem to clash with the concept of TSB if it is understood as the ‘private, non-profit’ sector. In practice, however, what matters is the whether stations are controlled by independent persons and not government authorities rather than whether the licence holder is an entity incorporated under private or public law.⁶⁶

As has been shown, defining the third sector and delineating its limits in relation to the other sectors of broadcasting is not simple. While elaborating a perfect definition of TSB is not essential for developing an adequate framework for the sector, certain elements such as determining which entities will be eligible to hold TSB licences, what means of financing will be available to TSBs and what measures will ensure the independence of TSBs require careful consideration. Chapter 6 will present recommendations regarding policy and regulation for TSB in these and other areas.

1.3. Types of Third Sector Broadcasters

This section will introduce the following specific types or sub-sectors of TSB: Community, ethnic, indigenous and religious broadcasting, and broadcasting linked with academic institutions. As great diversity exists within the third sector of broadcasting, not all TSBs necessary fit within one of these categories. These sub-sectors have been selected for special discussion because they often receive special attention in academic literature from fields such as communications’ studies.⁶⁷ In Australia, all these types of TSBs are encompasses within the single legal category of ‘community broadcasting’ but

⁶⁵ However, neither Australia nor Canada provide legal status through public law to religious organizations or indigenous organizations. In both countries, indigenous or religious groups need to incorporate legal persons through private law mechanisms in order to apply for broadcasting licences.

⁶⁶ The law of Georgia is notable for expressly establishing that TSB licences can be issued to entities of public law see *The Law on Broadcasting, N.780/23 (2004)* (Georgia) Art. 2(m) trans, <www.gncc.ge/files/7050_3380_492233_mauwyebloba-eng.pdf>.

⁶⁷ See for example Matsaganis, Matthew D. , Vikki S. Katz and Sandra J Ball-Rokeach, *Understanding Ethnic Media : Producers, Consumers, and Societies* (SAGE, 2011); Forde, Susan, Kerrie Foxwell and Michael Meadows, *Developing Dialogues : Indigenous & Ethnic Community Broadcasting in Australia* (Intellect, 2009).

the different sub-sectors have received some differential treatment in policy documents and in the government's funding practices.⁶⁸ In the case of Canada, the Canadian Radio-television and Telecommunications Commission (CRTC) does have specific policies for all these different types of broadcasters.⁶⁹ With the exception of Canada, very few countries have specific policies for different types of TSBs. While this section only introduces these sub-sectors and explain their concepts, Section 6.8. will assess whether it is necessary or desirable to legally recognize any or all of these sub-sectors as separate broadcasting categories or implement separate regulatory frameworks for them.

1.3.1. Community Broadcasting

As noted in the book *Broadcasting Voice and Accountability*:

There is no single definition of community broadcasting, and there are almost as many models as there are stations. Each community broadcasting initiative is a hybrid, a unique communication process shaped by its environment and the distinct culture, history, and reality of the community it serves. Indeed the term community broadcasting is applied to a wide range of non-commercial initiatives, including rural, cooperative, participatory, free, citizens', alternative, popular, and educational broadcasting.⁷⁰

This is the reason why the term 'community broadcasting' is sometimes used to refer to the whole of the third sector. However, the concept of community broadcasting is also used more restrictively to refer to those TSBs which follow a participatory model where the intended audience of the broadcasting service is also involved in its control and administration and in the production of the content to be broadcast. For example, a study prepared by Kern European Affairs for the European Parliament noted '*Community Media are open to participation in programme making and management by members of*

⁶⁸ Discussed throughout Chapter 2.

⁶⁹ See Section 5.2.4.

⁷⁰ Buckley et al., above n 46, 207.

the community'.⁷¹ A study on community radio prepared by UNESCO similarly noted: '*Community radio treats its listeners as subjects and participants and not as objects*'.⁷² Reference to community participation as an essential characteristic can also be found in Argentinean law which establishes in its definition of community broadcasters that:

Their fundamental characteristic is the participation of the community in the ownership of the medium as in the programming, administration, operation, financing and evaluation.⁷³

In relation to community broadcasting, the concept of 'community' is sometimes understood strictly in a geographical sense.⁷⁴ However, community stations can also serve specific social groups or 'communities of interests' such as youth, elderly or minority groups.⁷⁵ Community broadcasting is also sometimes understood as a label that can only be applied to local services. For example, the U.K. *Community Radio Order (2004)* establishes that '*[i]t is a characteristic of community radio services that they are local services*'.⁷⁶ This view may lead to community broadcasting licences being restricted to small coverage areas and low transmission power.⁷⁷ Community stations, as well as TSBs in general, can provide valuable local services.⁷⁸ However, since communities are not necessarily geographically based, being local in nature is not an essential characteristic of community broadcasting. In this relation, the World Association of Community Radio Broadcasters (AMARC)⁷⁹, the main representative of community broadcasters at the international level, strongly opposes the adoption of any

⁷¹ Kern European Affairs, above n 54, iii.

⁷² UNESCO, above n 7, 6.

⁷³ Argentinean Law, above n 14, art. 4 (definition of 'community station') [author's trans].

⁷⁴ See for example Chilean Law, above n 15, art. 1.

⁷⁵ Buckley et al, above n 46, 212; See also Kern European Affairs, above n 54; *Broadcasting Act 2009 (Ireland)* ss 64-66 '*Irish Law*'.

⁷⁶ UK Order 2004, above n 9, s 3.

⁷⁷ See for example Chilean Law, above n 15, art. 1.

⁷⁸ Discussed in Section 2.3.5.

⁷⁹The Acronym AMARC comes from the original name French name of the organization "Assamble Mondiale des Artesans des Radio Communautaires" (World Assembly of Community Radio Operators). Although the organization which was created in Quebec has changed its name, it continues to be known as AMARC.

legal definitions which limit the concept of community broadcasting to stations with small coverage areas.⁸⁰

Some definitions of community broadcasting establish as an essential element that the stations must pursue social and/or cultural goals.⁸¹ While AMARC accepts that community broadcasters should pursue social and cultural goals, it considers that they should be defined by their participatory model rather than by their goals.⁸² If pursuing specific goals is considered an essential element of community broadcasting, this may translate into them being restricted in the broadcast of content that is not deemed to advance those goals. Whether imposing content restrictions upon community broadcasters is valid or desirable is discussed in Section 6.6.

The exact level of community participation required for a broadcaster to be considered ‘community’ is hard to determine. ‘Community ownership’ is an ideal that is not always fully attainable as no legal entities may exist of which all members of the intended audience are members. For this reason, some definitions refer instead to ownership ‘representative’ of the community.⁸³ In order to secure this representativeness, structural and governance requirements may be established as eligibility conditions for prospective community licensees.⁸⁴ Special conditions such as minimum quotas for the broadcast of content produced by members of the community served or restrictions on the acquisition of content from other sources may also be imposed in pursuance of fulfilling the community participation ideal.⁸⁵ In the case of Australia and Canada, representativeness and community participation have been notable concerns within their respective community broadcasting policies. Chapters 3 and 4 detail how the definition and concept of community radio have evolved in each country.

⁸⁰ See for example *Principles for a Democratic Legislation on Community Broadcasting* (AMARC, 2008), Principle 6

⁸¹ See for example UK Order, above n 9, s 3; Indian Policy, above n 11, art. 1(d).

⁸² See *Principles for Guaranteeing Diversity and Pluralism in Broadcasting and Audiovisual Communications Services* (AMARC, 2010), Principle 13.

⁸³ See for example *African Charter on Broadcasting*, above n 64, Part III(1)

⁸⁴ Discussed further in Sections 6.2.1 and 6.7.

⁸⁵ Discussed further in Sections 6.6.3 and 6.7.2.

Before proceeding to the following sub-sections, it is necessary to clarify that, while it is not their essential characteristic, the type of broadcasters discussed below may also follow the participatory model of community broadcasting. For this reason a station may be, for example, both ‘ethnic’ and ‘community’ if it meets the definition of both types. However, community broadcasters which also form part of the sub-sectors discussed below may have special needs or conditions which require distinguishing them from other community broadcasters.⁸⁶

1.3.2. Ethnic Broadcasting

Ethnic broadcasting is not legally recognized as a distinct form of broadcasting in most countries. However, multiple authors have commented on the need to recognize ethnic broadcasting as distinct from community broadcasting and other forms of TSB.⁸⁷ Brinson define ethnic media, of which ethnic broadcasting would be a subset of as:

those mass media (periodicals, television, radio, and websites) that are owned and controlled by members of a particular racial or ethnic group and that are also consciously intended for the members of that group. By this definition, ethnic media are contrasted with mainstream media and other forms of alternative media in that the racial and ethnic identity of the owners and audience are fundamental to the purpose and content of the media. Thus, a typical local television news broadcast or labor union newspaper do not classify as ethnic media, regardless of the race or ethnicity of the owners and audience, as racial and ethnic issues are not fundamental to the purpose and content of those institutions.⁸⁸

Matsaganis, Katz and Ball-Rokeach describe ethnic media more simply as ‘media produced for a particular ethnic community’⁸⁹ By these definitions, the concept of ethnic

⁸⁶ Discussed in Section 6.8.

⁸⁷ See for example UNESCO, above n 7, 99-101; Forde, Susan, Kerrie Foxwell and Michael Meadows, above n 67; Matsaganis, Matthew D. , Vikki S. Katz and Sandra J Ball-Rokeach, above n 67.

⁸⁸ Brinson, Peter, Ethnic Media: The Need for New Directions in Research <<http://www.ssc.wisc.edu/~pbrinson/Linked%20Files/final%20paper.doc>>

⁸⁹ Matsaganis, Matthew D., Vikki S. Katz and Sandra J Ball-Rokeach, above n 67.

broadcasting would include services aimed at immigrant groups, indigenous and national minorities and even to ethnic majorities. A study published by UNESCO considered that ethnic broadcasting included broadcasting aimed at immigrants, indigenous and national minority audiences.⁹⁰ However, Canadian policy, one of the few to have specific provisions regarding ethnic broadcasting, uses the term more restrictively to refer to broadcasting aimed at ethnically distinct groups other than indigenous Canadians or the two main ethnic groups of the country, the English and the French (independently of whether those groups represent a minority in the area of broadcast).⁹¹ In the case of Australia, there is not an express ethnic broadcasting policy but, at present,⁹² the term seems to also be used to refer only to broadcasting aimed at immigrant ethnic groups.⁹³

For the reasons above and because the need of immigrant ethnic groups in relation to broadcasting services may be different than those of indigenous or national minority groups, the term ethnic broadcasting would be used within this thesis to refer only to broadcasting aimed primarily at immigrant ethnic groups.⁹⁴ This type of services are sometimes referred to as ‘immigrant media’. However, as Matsaganis, Katz and Ball-Rokeach correctly note, this term is inadequate.⁹⁵ Target audiences of ethnic broadcasting services do not only include immigrants but also nationals of foreign ethnic origin.

Ethnic broadcasting is sometimes thought of as referring exclusively to broadcasting which is in languages different than the main language or languages used in the country where it is taking place.⁹⁶ The use of non-national language by ethnic broadcasters may

⁹⁰ UNESCO, above n 7, 100; See also Matsaganis, Matthew D., Vikki S. Katz and Sandra J Ball-Rokeach, above n, 67 which interprets the concept of ethnic media in the same sense.

⁹¹ Canadian ethnic broadcasting policy discussed in detail in section 5.2.

⁹² In the past the concept of ethnic broadcasters and indigenous broadcasters were treated as single category for government funding purposes which the Australian indigenous sector objected to. See Section 4.2.7.2.

⁹³ Ethnic broadcasting in Australia discussed in section 4.2.7.1.

⁹⁴ Special needs of immigrants and refugees in relation to broadcasting services discussed in Section 2.1.4.1.

⁹⁵ Matsaganis, Matthew D., Vikki S. Katz and Sandra J Ball-Rokeach, above n 67, 9.

⁹⁶ For example, a court decision from the Australian Capital Territory noted ‘The nature of ethnic broadcasting, it seems to be common ground, is that it is based on language groups, rather than nationality or ethnic origin’ (*Hari Narain v Ethnic Broadcasters Council of the ACT and Surrounding District Inc (Ebc) and Werner Albrecht* [2006] ASTSC 98, [21]).

be a reason why they require special consideration in regulation as will be discussed in Section 6.8.1.1.2. However, ethnic broadcasters should not be defined in basis of the language they use. Groups can be ethnically distinct while sharing the same language.⁹⁷ Additionally, ethnic broadcasters may have reasons to address their audiences in the national language.⁹⁸

Finally, it should be noted that the concept of ethnic broadcasting is not limited to TSB.⁹⁹ The public and commercial broadcasting sector can also deliver ethnic services.¹⁰⁰ However, ethnic communities are among the groups that most commonly engage in TSB. Section 2.1.4.1 explains some limitations which may prevent the commercial and State sector from satisfying the needs of ethnic communities and why TSB can be of great value to these communities. For brevity reasons, ‘ethnic broadcasting’ will be used in the remaining chapters to refer to ethnic TSB, clarifications being made when appropriate.

1.3.3. Indigenous Broadcasting

The first step for defining indigenous broadcasting would seem to be to define ‘indigenous’. However, there is no universally accepted definition of indigenous. The UN *Declaration on the Rights of Indigenous Peoples* does not provide a definition of ‘indigenous peoples’.¹⁰¹ The closest thing to an international law definition can be found in the *ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*. This convention defines its scope of application in the following manner:

This Convention applies to:

⁹⁷ This is, for example, the case of English and French speaking Caribbean immigrants in Canada that represent distinct ethnic groups despite their native language being the same as the host country’s official languages.

⁹⁸ See Section 2.3.1.

⁹⁹ In fact, ethnic broadcasting licences in Canada do not require licensees to operate in a not-for-profit basis. See Section 5.2.4.4.

¹⁰⁰ In Australia, a State broadcaster the ‘Special Broadcasting Service’ (SBS) was created with the purpose of delivering ethnic services. See Section 4.1.4.

¹⁰¹ UN, *Declaration on the Rights of Indigenous Peoples* UN Doc A/RES/61/295 (2007).

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.¹⁰²

While commonly used, the definition contained in Convention 169 is not universally accepted and the convention has only been ratified by 22 countries.¹⁰³ However, it falls outside the scope of this thesis to attempt to elaborate a perfect definition of indigenous peoples when abundant literature already exists on this matter.¹⁰⁴ For the purpose of this thesis, ‘indigenous broadcasting’ will be used to refer to broadcasting relating indigenous peoples as understood in the scope of application clause of Convention 169.

Australian legislation does not contain an official definition of indigenous broadcasting. In Canada, the term ‘native broadcasting undertaking’ is used to refer to TSB outlets which are controlled by indigenous peoples.¹⁰⁵ Despite of this, using the term ‘indigenous broadcasting’ has been preferred as it is the term most commonly used internationally to refer to this sub-sector of TSB. Canadian policy does not require for

¹⁰² International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169)* (1989), Art. 1.

¹⁰³ Status of Ratifications, available at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

¹⁰⁴ For a discussion on the multiple definitional issues that surround the concept of ‘indigenous peoples’ see Sanders, Douglas, ‘Indigenous Peoples: Issues of Definition’ (1999) 8(1) *International Journal of Cultural Property* 4

¹⁰⁵ Canadian Policy’s definition of ‘native broadcasting undertaking’ is cited in note 1211.

services to broadcast solely or primarily in indigenous languages in order to be considered 'native'. This is adequate as indigenous peoples should be free to use whichever language they wish in their media.¹⁰⁶ The use of indigenous languages is not essential for a broadcaster to be considered 'indigenous'.

Canadian definition of 'native broadcasting' requires not only that the services be controlled by indigenous peoples but for their content to be oriented toward indigenous audiences.¹⁰⁷ In principle, any broadcasting service of any type must serve the needs and cater primarily to the specific audiences it is licensed to serve. If specific regulation for indigenous broadcasting is implemented this may include special content requirements.¹⁰⁸ However, as has been noted by Michaels, trying to define what constitutes 'indigenous content' is simply not practical as legitimate disagreements can exist even within members of a single indigenous community.¹⁰⁹ For this reason, for purposes of determining whether a broadcaster can be considered 'indigenous' the determinant factor is whether it is controlled by indigenous peoples and not the nature of its content.

Like in the case of ethnic broadcasting, indigenous content can also be sometimes found in the commercial or State broadcasting sectors. However, indigenous TSB is common where indigenous populations exist. An unfortunate reality is that indigenous communities are often economically disadvantaged which means they are not viable or attractive audiences for commercial services.¹¹⁰ While State broadcasters can provide service to indigenous audiences, indigenous peoples also often desire to control their own broadcasting outlets.¹¹¹ As with ethnic broadcasting, indigenous broadcasting will normally be used in the following chapters to refer to indigenous TSB and clarifications will be made when reference is made to indigenous broadcasting from other sectors.

In the context of this thesis, indigenous broadcasting will refer to broadcasting services controlled by peoples which are indigenous to the country in which the broadcast station

¹⁰⁶ See Section 2.3.1.

¹⁰⁷ See Section 5.2.4.3.

¹⁰⁸ Discussed further in Section 6.8.2.

¹⁰⁹ Michaels, Eric, 'Aboriginal content: Who's got it – Who needs it?' (1991) 4(3-4) *Visual Anthropology* 277.

¹¹⁰ See Section 6.1.2.1.2.

¹¹¹ See Section 2.3.2.

is located. Broadcasting by immigrants which are members of indigenous peoples of other countries falls within the concept of ethnic broadcasting. However, the concept of indigenous broadcasting includes outlets which transmit across borders and serve indigenous peoples with trans-frontier presence.

Many of the considerations that apply to indigenous broadcasting also apply broadcasting aimed at national minority groups. However, this thesis will only focus in indigenous broadcasting as this is the category which has received special attention in Australian and Canadian Policies.¹¹²

1.3.4. Religious Broadcasting

A study published by UNESCO in 2003 qualified religious broadcasting as a special form of broadcasting, distinct from community broadcasting, which is bidding for legal recognition throughout the world.¹¹³ Religious organizations have traditionally been major players in the third sector of broadcasting, in some countries religious broadcasting is the most common form of TSB.¹¹⁴ Despite this, it is surprisingly hard to find legal definitions of religious broadcasting. Canadian policy has no definition for religious broadcasting. However, it defines 'religious' as:

anything directly relating to, inspired by, or arising from an individual's relationship to divinity, including related moral or ethical issues.¹¹⁵

and 'religious program' as:

¹¹² In Canada, policy has given special consideration to the needs of 'official language minorities' and some stations, including TSBs are subjected to different set of regulations depending on whether they have English or French as their main language of broadcast. However, there is no 'national language minority broadcasting' licence category akin to that which exists for 'native broadcasting'. This is discussed throughout Chapter 5.

¹¹³ UNESCO, above n 7, 100.

¹¹⁴ Ibid.

¹¹⁵ CRTC, *Religious Broadcasting Policy*, Public Notice 1993-78 s III(B)(1) '*Religious Broadcasting Policy*'.

one which deals with a religious theme, including programs that examine or expound religious practices and beliefs or present a religious ceremony, service or other similar event.¹¹⁶

A definition of religious program can also be found in the *Broadcasting Code* of Ofcom (the broadcast regulatory entity of the U.K):

a religious programme is a programme which deals with matters of religion as the central subject, or as a significant part, of the programme.¹¹⁷

In the case of Australia, although the *Broadcasting Act 1992 (Cth)* authorizes the broadcast regulator to impose minimum quotas for the broadcast of matter of ‘religious nature’ it does not define it.¹¹⁸

Defining what constitutes religious content for purposes of broadcasting policy is not easy. While broadcast of religious ceremonies such as masses definitely qualifies, other types of content may represent grey areas. For example music, with religious content but which also has general appeal or discussions of ‘current affairs’ from a religious perspective. In these cases, the relevance the religious part of the content holds for the broadcasters and their audiences may be the determinant factor.

In human rights law the concept of religion is interpreted more broadly than what is classically understood as religion. Freedom of religion is normally understood to protect the right of persons to hold any ‘world views’ and to not be discriminated for holding them.¹¹⁹ For this reason views such as agnosticism or atheism are included within this broader concept of religion. However, as evidenced by the cited Canadian definition, the concept of religious in broadcasting policy is normally understood in the more traditional

¹¹⁶ Ibid.

¹¹⁷ Ofcom, *Broadcasting Code (2011)* (UK) s 4.

¹¹⁸ See Section 4.2.7.3.

¹¹⁹ See for example UN Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*, UN Doc. CCPR/C/21/Rev.1/Add.4 (1993), [2] ‘UNHRC GC 22’.

sense. This does not mean that only programming that is sectarian would constitute religious content. Academic discussion or balanced debates about religion can also be considered religious programming. The cited Canadian definition coincides with this view.

Unlike the case of indigenous broadcasting, it is not clear whether control by a religious organization should be the only factor that determines whether a broadcaster can be classified as 'religious'. There are special concerns relating religious content in broadcasting which are independent of whether the broadcast licence holder is a religious entity or not.¹²⁰ On the other hand, if a religious entity is the licence holder but the content of the station is not religious in nature then it may be more appropriate to classify that station under a different category.¹²¹ Section 6.8.3 will explain different concerns that may be addressed through the establishment of a special framework for religious broadcasting. In this sense, which broadcasters are subjected to the special framework will depend on the specific goals policy makers are pursuing through the implementation of such framework. For convenience reasons, the term religious broadcasting within the following chapters will be generally used to refer to broadcasters which are controlled by not-for-profit entities and for which religiously oriented programming is a significant component of their programming. As in all cases, clarifications will be made when required.

1.3.5. Broadcasting Linked with Academic Institutions

¹²⁰ See Section 6.8.3.1.

¹²¹ For example, if a religious entity is a licence holder but the station broadcast general interest content for commercial purposes, then this station can be classified as commercial. (See Reis, Raul, 'Media and Religion in Brazil: The Rise of TV Record and UCKG and Their Attempts at Globalization' (2007) 2(1) *Brazilian Journalism Review* 167). If a religiously affiliated university operates a broadcast station but broadcast content that is educational rather than religious in nature, then this station could be more appropriately classified as educational (See Hardy, Ashton R. and Lawrence W. Secret, 'Religious Freedom and the Federal Communications Commission' (1981) 16(1) *Valparaiso University Law Review* 57, 78).

A study published by UNESCO made reference in 2003 to ‘academic’ as a special form of TSB that is bidding for legal recognition.¹²² ‘Student’ broadcasting has been commonly used, to refer to TSB initiatives by student organizations or unions.¹²³ The term ‘educational broadcasting’ has been used by the Commonwealth of Learning (CoL) to refer to broadcasting that is ‘closely related to the task of educational provision’.¹²⁴ The same organization defined educational broadcasting to include ‘programmes, activities and events that support the educational processes, whether they are of a formal or non-formal kind’.¹²⁵ The CoL considered ‘instructional broadcasting’ to be a subclass of educational broadcasting that has ‘precisely defined target audiences: narrowly defined objectives; stated learning outcomes; target related format and treatment; and evaluation’.¹²⁶

In Australia the term ‘educational broadcasting’ was used in the past to refer to broadcasting of formal course content by educational institutions in a sense similar to the CoL’s concept of ‘instructional broadcasting’.¹²⁷ In Canada, the term ‘instructional broadcasting’ was used for some time to refer to a special type of broadcasting which was formally associated with communication or media university courses and had the purpose of training future broadcasting professionals.¹²⁸ In the present, Canadian policy uses the term ‘campus radio’ to refer to broadcasting stations associated with educational institutions.¹²⁹

As has been shown, a multitude of terms have been used to refer to different forms of broadcasting which are linked with academic institutions. However, none of these seem adequate or broad enough to refer to all types of TSB linked with academic institutions. Referring to broadcasting as ‘educational’ or ‘instructional’ is more adequate to denote

¹²² UNESCO, above n 7, 100.

¹²³ Including in the past in Canada. See Section 5.2.4.2.1.

¹²⁴ Vyasulu Reddi, Usha, *Educational Broadcasting In the Commonwealth - With Special Reference to Educational Television*, The Commonwealth of Learning (2003) 2 .

¹²⁵ Ibid, 1-2.

¹²⁶ Ibid, 1.

¹²⁷ See Section 4.2.7.4.

¹²⁸ See Section 5.2.4.2.1

¹²⁹ See Section 5.2.4.2.

the purpose or the perceived social value of the content rather than its source. Since content from the public or the commercial sector can also be qualified educational or instructional, the terms are not adequate to refer specifically to TSBs linked with academic institutions. While the term ‘academic’ does indicate a link with an academic institution, it is also narrow as it would not include broadcasting by student organizations for non-academic purposes. The term ‘campus’ could carry the implication that the station coverage has to be limited to an institution’s campus or that it has to be physically located in a campus. While the Canadian definition of campus radio does not establish these requirements, it has been opted not to use this term as it can be cause for confusion.

Since academic institutions and student organizations are among the actors that most commonly engage in TSB, and their participation can take many forms, it has been preferred to refer within this thesis to a broad concept of broadcasters linked with academic institutions. This concept includes broadcasting where educational institutions are licensees, were the licensee is a student union or organization or were the licensee is a separate non-profit organization that is in some way linked to an academic institution.¹³⁰ It is not necessary for the content of a broadcasting station to be educational in nature for it to fall within this category.

¹³⁰ Campus licences in Canada are issued to separate non-profit organizations with some link to academic institutions. Discussed further in Section 5.2.

Chapter 2 - Why Recognize and Support Third Sector Broadcasting

As already explained the final goal of this thesis is to make recommendations for the elaboration of a framework supportive of the development of TSB balancing competing policy objectives. However, before proceeding with that task, valid questions that needs answering is: why should TSB be supported? This chapter addresses this question. Section 2.1 will explain how TSB can contribute to the fulfillment of internationally recognized human rights and thus, why it is desirable to support it. Section 2.2 will discuss measures, other than TSB, which have been used to pursue the same goals described in Section 2.1. Section 2.3 analyzes some key features of TSB and explain how these features give it comparative advantages in relation to the measures discussed in Section 2.2.

Another legitimate question is, even if the desire exists to support TSB, is a special policy and regulation framework for the sector necessary for that purpose? Section 2.4 will look at some ways in which TSB can be supported and how establishing a specific framework for the sector can help supporting it.

2.1. The Potential of Third Sector Broadcasting to Contribute to the Fulfilment of Human Rights

2.1.1. Freedom of Expression

2.1.1.1. The Right to Seek an Audience

Freedom of expression would be meaningless if it was limited to a right for persons to express themselves freely in an empty space. For this reason, it is widely accepted in international human rights law (IHRL) that freedom of expression also encompasses the

right of persons to seek others as an audience for their message.¹³¹ In this sense, and referring to the *American Convention on Human Rights* (ACHR),¹³² the Inter-American Court of Human Rights (IACtHR) has stated that:

it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely.¹³³

Both the *International Covenant on Civil and Political Rights* (ICCPR)¹³⁴ and the ACHR¹³⁵ expressly establish the right of persons to use any medium of their choice to express their messages. In keeping with this notion, the IACtHR has determined that freedom of expression: ‘also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible’.¹³⁶

The *European Convention on Human Right* (ECHR) does not contain a similar provision regarding choice of medium, nor does the *African Convention on Human and Peoples’ Rights* (ACHPR). However, both the European Court of Human Rights (ECtHR)¹³⁷ and the African Commission on Human and Peoples Rights (African Commission)¹³⁸ have determined that freedom of expression includes the right to communicate through broadcasting. The ability to engage in broadcasting is normally limited by the requirement to hold a broadcast licence. While this is a restriction on the right to seek an

¹³¹ See for example, Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, 1985 [31] ‘*Advisory Opinion OC-5/85*’.

¹³² *American Convention on Human Rights*, 1114 UNTS 123 (entered into force July 18, 1978) ‘ACHR’.

¹³³ Advisory Opinion OC-5/85, above n 131, [31].

¹³⁴ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) Art 19(2) ‘ICCPR’.

¹³⁵ ACHR, above n 132, Art. 13.1.

¹³⁶ Advisory Opinion OC-5/85, above n 131, [31].

¹³⁷ *Informationsverein Lentia and Others v. Austria* (1993) 39 Eur Court HR (Ser A) 276; See also, *Radio ABC v. Austria* [1997] VI Eur Court HR 2197; *Demuth v. Switzerland* [2002] IX Eur Court HR.

¹³⁸ African Declaration, above n 5, Art. V

audience, this restriction has been deemed justifiable under IHRL as discussed further in Section 3.1.2.

The need to obtain a licence can constitute a significant barrier for persons wishing to exercise their freedom of expression through broadcasting. There are three main types of systems under which broadcast licences can be issued:¹³⁹ discretionary systems where licensing decisions are left totally to the discretion of an administrative authority;¹⁴⁰ comparative systems, also known as ‘beauty contest’ systems, where an authority must determine among various applicants which is the most likely to serve the public interest according to some predetermined criteria;¹⁴¹ and auction systems, where licences are issued to the applicant who offers the highest monetary bid. The auction system is the most transparent, but it inevitably excludes financially disadvantaged actors from broadcasting. In relation to this, both the Supreme Court of Mexico¹⁴² and the Inter-American Commission on Human Rights (IACHR)¹⁴³ have found that making access to broadcasting exclusively dependent upon financial capacity constitutes a violation of State duties regarding freedom of expression.

Even though they are not directly dependent upon financial capacity, discretionary and beauty contest systems have also traditionally excluded financially disadvantaged actors. Independently of the system used, States can establish a licence access fee. Since the number of licences that can be issued is normally limited, it can be legitimate to require those privileged with licences to pay a licence fee.¹⁴⁴ However, if the fee is set to high, then it can become a major barrier to access.¹⁴⁵ Since corruption is always a risk, the

¹³⁹ Other systems exist, such as lotteries or single bid tenders. However, these are much less commonly used.

¹⁴⁰ The use of this type of system is considered contrary to contemporary IHRL standards as decisions about who gets to exercise their freedom of expression through the airwaves and inform the population are deemed too important to be left purely to discretion. See Inter-American Standards, above n 52, [60]-[61].

¹⁴¹ See for example, Eve Salomon, *Guidelines for Broadcasting Regulation*, Prepared for the Commonwealth Broadcasting Association and UNESCO s 5.52

¹⁴² Supreme Court of Mexico, Decision, Action of Unconstitutionality 26/2006, 2007.

¹⁴³ Inter-American Commission on Human Rights, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, OAS Doc. OEA/Ser.L/V/II.118 (2003) [414].

¹⁴⁴ Discussed further in Section 3.1.2.

¹⁴⁵ See UN Human Rights Committee, *General Comment No. 34: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (2011) [39] ‘UNHRC GC 34’; UN Special Rapporteur on the Promotion and

possibility also exists that money offered will be a factor even if the system is not auction based. Even if comparative systems are conducted as intended, the financial capacity of applicants is commonly used as one of the comparative criteria. The reason financial capacity is taken into account is the theoretical undesirability of a licensee being, or becoming, unable to fulfil their responsibilities, leaving audiences without a broadcasting service and creating for the public purse the expense of having to conduct a new licensing process. In addition, there is sometimes concern that financial difficulties may lead licensees to reduce the quality of their service. While these concerns are valid, a requirement to demonstrate the capacity to provide the service at the licensing stage is an access barrier that favours established businesses over other types of actors such as not-for-profit groups with limited resources.¹⁴⁶ Even if financial capacity is not a licensing criterion, applicants with better financial resources normally have an advantage in comparative processes due to their capacity to hire experts to assist them in the preparation of their proposals and better opportunities for political lobbying. Beyond economical barriers, certain groups may be also be disadvantaged in their capacity to access licences due to political or social reasons, as discussed further in Section 2.1.4.1.

As long as broadcasting is restricted through a licensing system, reducing any unnecessary barriers that may exclude sectors of the population from exercising their right to seek an audience through engaging in the activity is paramount.¹⁴⁷ Recognizing and supporting TSB is one of the most effective measures for broadening access to broadcasting activity. This has been recognised by the UN Special Rapporteur on Freedom of Expression who has noted:

People faced with economic exclusion also face systemic obstacles to freedom of expression that are associated with the conditions of poverty, including low levels of education and literacy, poor infrastructure, lack of access to electricity and general

Protection of the Right to Freedom of Expression, *Annual Report to the Human Rights Council*, UN Doc. E/CN.4/2002/75 (2001) [85].

¹⁴⁶ For this reason, it is debated whether the financial capacity of applicants should be a consideration when assigning TSB licences. This is discussed further in Section 6.2.3.1.

¹⁴⁷ See Office of the OAS Special Rapporteur for Freedom of Expression, *A Hemispheric Agenda for the Defense of Freedom of Expression* OAS Doc. OEA/Ser.L/V/II CIDH/RELE/INF. 4/09 (2009) [107] ‘*Hemispheric Agenda*’.

communications services. The Special Rapporteur recommends that Governments consider community broadcasting as a vital tool for the voiceless, which would enable them to exercise their right to freedom of expression and access to information.¹⁴⁸

TSB is distinct in nature from both commercial and State broadcasting and has special features which allow it to broaden access to broadcasting beyond what is possible with just the two traditional sectors. These features are discussed further in Section 2.3. In addition, the barriers of entry to broadcasting can be reduced by recognizing TSB as distinct category of broadcasting and having separate licensing processes for TSBs and commercial broadcasters. If prospective TSBs are not required to compete against commercial applicants in the same licensing processes this facilitates the participation of not-for-profit groups in broadcasting.¹⁴⁹ Separating the processes also allows implementing an auction system, higher licensing fees or a stricter scrutiny of the applicants' financial capacity for the licensing of commercial broadcasters while still providing an option for comparatively economically disadvantaged actors to participate in broadcasting through the not-for-profit licences. Establishing a special licence class with a different, more accessible licensing process is just one of the ways in which States can support the development of TSB in order to broaden access to broadcasting. This is discussed further in Section 2.4.2.

2.1.1.2. The Right to Information / Social Dimension of Freedom of Expression

In IHRL the notion of freedom of expression has been expanded and, as a counterpart to the right of persons to express themselves freely, a right to seek and receive information from others willing to share it has also been recognised.¹⁵⁰ This notion is often called the

¹⁴⁸ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, *Annual Report to the Human Rights Council*, UN Doc. A/HRC/11/4 (2009) [63].

¹⁴⁹ The need to compete with commercial broadcasters in the same licensing process has been noted as a significant barrier for prospective TSBs in Canada. Discussed further in Section 5.3.2.2.

¹⁵⁰ See for example, ICCPR, above n 134, Art 19(2); *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 UNTS 221 (entered into force September 3, 1953) Art. 10(1) 'ECHR'; ACHR, above n 132, Art. 13(1).

‘right to information’.¹⁵¹ Under this right, States have an obligation to abstain from interfering unduly in the relationship between willing speakers and willing listeners.¹⁵² While this is the most basic obligation derived from the ‘right to information’, it is not the only one. Such right also imposes positive duties on the State, such as the obligation to ensure that their citizens have access to diversity of information.¹⁵³ In recognition of this obligation, the concept of diversity of the media, also called plurality of the media, has moved to the forefront of human rights concerns in recent years, receiving significant attention both from intergovernmental organisations (IGOs) and the civil society sector.¹⁵⁴ The ECtHR has recognised that pluralism is especially important for broadcasting and that States have a positive duty to protect it:

The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.¹⁵⁵

As has been recognized by UNESCO, the first requirement for diversity in broadcasting is the availability of a sufficient number of outlets.¹⁵⁶ For this reason, as long as broadcasting remains an important source of information for a significant part of the population, States have an obligation to promote the availability of a reasonable number of broadcasting outlets. For this reason, IHRL monitoring bodies and organisations from

¹⁵¹ This concept of ‘right to information’ should not be confused with the ‘right of petition of information’, which is the individual’s right to request access to information held by the State. The right of petition of information is a different legal concept, which is equally important but not directly relevant to this thesis. Hins and Voorhoof discuss how the right to information is well established under ECtHR case-law while the right to access State held information is yet to be fully recognized by the same tribunal (See Hins, Wouter and Dirk Voorhoof, ‘Access to State-Held Information as a Fundamental Right Under the European Convention on Human Rights’ (2007) 3(1) *European Constitutional Law Review* 114).

¹⁵² See for example *Gaskin v. The United Kingdom* (1989) 160 Eur Court HR (Ser A), [52]; See Also Tushnet, Rebecca, ‘Domain and Forum: Public Space, Public Freedom’ (2007) 30 *Colum. J.L. & Arts* 597.

¹⁵³ See for example *Informationsverein Lentia and Others v. Austria* (1993) 39 Eur Court HR (Ser A) 276, [34].

¹⁵⁴ See for example, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4; Access Airwaves, above n 6, Principle 4.

¹⁵⁵ *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (European Court of Human Rights), Grand Chamber, Application No. 38433/09, 7 June 2012, [134].

¹⁵⁶ *Media Development Indicators*, above n 1, 42.

the civil society sector which focus on freedom of expression recommend that a reasonable amount of spectrum frequencies be reserved for broadcasting.¹⁵⁷

Beyond the actual availability of outlets, States are expected under IHRL to apply policies that are conducive to multiple opinions and points of view being presented and discussed through the media, including broadcasting.¹⁵⁸ In the words of the ECtHR:

the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.¹⁵⁹

One way in which diversity can be promoted is through content regulation. Except for very exceptional cases,¹⁶⁰ it is considered undesirable for States to directly require broadcasters to broadcast specific content, due to the likely clash with stations' freedom of expression and the potential for government abuse.¹⁶¹ However, there are other mechanisms, such as quotas, which can be used to promote diversity of content without resorting to directly requiring specific content to be broadcast.¹⁶²

¹⁵⁷ See for example UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4; Media Development Indicators, above n 1, 42; African Charter on Broadcasting, above n 64, Part I(3); Access Airwaves, above n 6, Principle 9(1).

¹⁵⁸ See for example, Office of the Organization of American States Special Rapporteur for Freedom of Expression, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, OAS Doc OEA/Ser.L/V/II CIDH/RELE/INF. 2/09 (2009) '*Inter-American Framework*', [226]; African Declaration, above n 5, Art. III.

¹⁵⁹ *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (European Court of Human Rights), Grand Chamber, Application No. 38433/09, 7 June 2012, [130].

¹⁶⁰ Exceptions include emergency situations or court mandated retractions.

¹⁶¹ See, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, *Annual Report to the Human Rights Council*, UN Doc. A/HRC/7/14 (2008) [28]; Buckley et al., above n 46, 174.

¹⁶² Further discussed in Section 2.2.4.

In addition to content regulation, diversity can be promoted through structural regulation.¹⁶³ An example of structural regulation in broadcasting is the application of special ownership and control restrictions that are additional to rules applicable to all businesses such as general anti-monopoly rules.¹⁶⁴ Diversity in the ownership of broadcasting outlets secures for the public what is known as ‘diversity of source’.¹⁶⁵ However, diversity of source does not guarantee diversity of content. Owners of broadcasting outlets can be completely independent of each other and still hold the same views or broadcast the same type of content. For this reason, it is considered that broadcasting policy should seek not only to prevent undue concentration of ownership, but to directly promote content diversity.¹⁶⁶

Diversity of content can be promoted in the licensing stage by reviewing the programming plans of the applicants and selecting those with the greater potential to contribute to diversity considering the output of the broadcasters already in operation in the licence area. However, recognising different broadcasting sectors with different roles is also a structural measure which can be used to promote diversity. This creates ‘sectoral diversity’,¹⁶⁷ a system where the multiplicity of outlets and the diversity of their ownership are complemented by the licensing broadcasters with different nature and purposes in order to promote diversity of content.¹⁶⁸ Although both sectors can provide valuable services to society, commercial and State broadcasters are often limited by their nature in the amount of diversity they can produce. Developing a third sector of broadcasting can contribute to diversity by providing outlets for content which is unlikely to be transmitted by the other two sectors. The following sub-sections briefly discuss the

¹⁶³ See Margarian, Gregory, ‘Substantive Media Regulation in Three Dimensions’ (2008) 76(4) *George Washington Law Review* 845.

¹⁶⁴ General anti-monopoly rules pursue goals different than ownership and concentration regulations for broadcasters. See Zlotlow, David, ‘Broadcast License Auctions and the Demise of Public Interest Regulation’ (2004) 92(3) *California Law Review* 885, 919.

¹⁶⁵ See, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4.

¹⁶⁶ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4; See also, Media Development Indicators, above n 1, 43.

¹⁶⁷ The concept of ‘sectoral diversity’ has been of special significance in Australian broadcasting policy. Discussed Further in Chapter 4.

¹⁶⁸ See Inter-American Standards, above n 52, [68]-[69].

limitations of the public and commercial sectors and describe how TSB can address those limitations by complementing these other two sectors.

2.1.1.2.1. The limitations of Public Service Broadcasting

It has been argued that, with sufficient safeguards, public service broadcasting (PSB) alone could fulfil the information needs of a society.¹⁶⁹ However, in this modern day, it is considered undesirable to leave broadcasting activity under the exclusive control of the State, even if the control is exercised through an independent statutory authority.¹⁷⁰ The African Commission has declared that: ‘A State monopoly over broadcasting is not compatible with the right to freedom of expression’¹⁷¹ and the ECtHR has acknowledged that a State monopoly of broadcasting can be as harmful as a private one, even if administered through a public service broadcaster.¹⁷² One reason for this is that plurality of voices is considered a prerequisite for diversity of information.¹⁷³ Regardless of how independent from government a public service broadcasting (PSB)¹⁷⁴ system is, and what measures are implemented to secure plurality in the decision making process of the service, the service would still represent a single broadcasting voice.

Even if multiple PSBs totally independent from each other were established, and wide opportunities for access were accorded to independent content producers, the public sector may still have limited capacity to provide sufficient diversity of content. Being public entities that are subject to a statutory mandate, PSBs may have to undergo a slow

¹⁶⁹ This view predominated in the broadcasting policy of Western European Countries before the 1980s (See Smudits, Alfred, 'The Case of Western Europe' in UNESCO (ed) *Public Service Broadcasting Cultural and Educational Dimensions* (UNESCO, 2005) 91-121); In support of this view see also McChesney, Robert, *The Mythology of Commercial Broadcasting and the Contemporary Crisis of Public Broadcasting* (1997) <www.ratical.org/co-globalize/RMmythCB.html>.

¹⁷⁰ In this relation it is telling that even in Europe, the continent where tradition and philosophy tended to support PSBs dominated broadcasting systems new policy documents call for a 3 sector system. See for example, Committee of Ministers of the Council of Europe, *Recommendation to Member States on Media pluralism and Diversity of Media Content* CM/Rec(2007)2.

¹⁷¹ African Declaration, above n 5, Art. V(1).

¹⁷² *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (European Court of Human Rights), Grand Chamber, Application No. 38433/09, 7 June 2012, [133].

¹⁷³ See for example, Inter-American Standards, above n 52, [24]; Access Airwaves, above n 6, Principle 3.1.

¹⁷⁴ See Section 1.1.

political process before being able to address new broadcasting needs when these arise. Being accountable for their expenses may also bind them to quality standards which may leave out potentially valuable content.¹⁷⁵ Limited resources may also force PSBs to prioritise their content decisions, which may result in the programming needs of certain groups being neglected.¹⁷⁶

Since they are not subjected to the same political controls as PSBs, TSB outlets have more flexibility to experiment with new types of content and address new programming needs. Their independent nature also allows TSBs to focus on community access rather than quality standards, providing an outlet for content from amateur or less established producers.¹⁷⁷ Furthermore, TSBs can address the programming needs of smaller communities when the resources of PSBs do not allow them to.¹⁷⁸

2.1.1.2.2. The Limitations of Commercial Broadcasting

Where broadcasting was dominated by commercial outlets, the sector was often considered capable of providing sufficient diversity of content if measures such as ownership concentration controls were implemented to ensure plurality.¹⁷⁹ While these controls are very important, they are in no way sufficient. As explained above, diversity of ownership does not guarantee, by itself, diversity of content. Additionally, as the viability of commercial broadcasters is dependent on market conditions, certain markets may not support the number of commercial broadcasters necessary to attain real plurality.¹⁸⁰ In markets where competition among multiple commercial broadcasters is high, the content output will be dependent on market pressures. In absence of special

¹⁷⁵ See, Rennie, Ellie and Daniel Featherstone, 'The Potential Diversity of Things We Call TV: Indigenous Community Television, Self-Determination and NITV' (2008) 129 *Media International Australia Incorporating Culture and Policy* 52

¹⁷⁶ Discussed Further in Section 2.1.4.1.

¹⁷⁷ Quality standards have been noted as a barrier for third sector producers to get their content broadcast in Australian public broadcasters. Discussed further in Section 4.3.10.

¹⁷⁸ Discussed further in Section 2.3.5.

¹⁷⁹ This is the view that guided broadcasting policy in the United States (See, World Television Council, *Public Broadcasting: Why? How?* (UNESCO, 2001), 9, <http://unesdoc.unesco.org/images/0012/001240/124058eo.pdf>).

¹⁸⁰ This was one of the arguments used to justify public service broadcasting monopolies in Europe (See for example, *Informationsverein Lentia and Others v. Austria* (1993) 39 Eur Court HR (Ser A) 276)

rules, content which is necessary or valuable but not commercially viable is likely to be neglected by the commercial sector.¹⁸¹ Moreover, the type of content which is most lucrative to broadcast will often be prioritized over that which is less lucrative even if it is also commercially viable.¹⁸² These limitations of the commercial sector mean that the programming needs of minority and disadvantaged groups are especially at risk of being neglected.¹⁸³

In theory, journalists and others who work in the commercial media could be required to be independent from the interest of the outlets' owners when conducting their activities.¹⁸⁴ However, it is difficult to enforce this independence in practice, as it would require direct government intervention in the content decisions of private media in order to solve disputes between workers, directors and owners. This type of interference, as explained above, is undesirable. For this reason, policy should assume that in absence of regulation, commercial interests will guide the content output of commercial broadcasters.

Because their goal is not to maximize profits, TSBs can serve as outlets for content which is not attractive to the commercial sector.¹⁸⁵ While TSBs need financial resources to operate, they only need to attain sustainability rather than profitability. TSBs also often rely on volunteers rather than paid employees.¹⁸⁶ This assists them to broadcast content and provide services which are not commercially viable.

2.1.2. Third Sector Broadcasting and Political Rights

¹⁸¹ See, Baker, Edwin, 'Giving The Audience What it Wants' (1997) 58(2) *Ohio State Law Journal* 311.

¹⁸² Content quotas are mechanisms that attempt to solve this issue. They are discussed further in Section 2.2.4.

¹⁸³ Discussed Further in Section 2.1.4.1 .

¹⁸⁴ See for example, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, *Joint Declaration on Freedom of Expression and the Administration of Justice, Commercialization and Freedom of Expression and Criminal Defamation* (2002).

¹⁸⁵ See for example, Fraser, Colin and Sonia Restrepo Estrada, *Community Radio Handbook* (UNESCO, 2001), 5; Meadows, Michael, et al., *Community Media Matters: An Audience Study of the Australian Community Broadcasting Sector* (Griffith University, 2007), 94.

¹⁸⁶ However and as noted in Section 1, some TSBs can also rely on paid employees and the participation of volunteers is not an essential requirement for a service to be considered third sector.

There is a consensus within all four IHRL protection systems that there exists a strong link between the right to freedom of expression and political rights.¹⁸⁷ Freedom of expression and adequate access to information are considered essential elements for the sustainability of a democratic system and for persons to be able to fully exercise their political rights.¹⁸⁸ In this respect, the OAS Rapporteur on Freedom of Expression has commented on how inequalities in access to the media introduce ‘a fundamental flaw in the process of democratic deliberation’.¹⁸⁹ Moreover, the ECtHR has recognised that States have a positive duty to guarantee effective pluralism in broadcasting for the protection of the democratic process.¹⁹⁰ Broadening access to broadcasting through TSB is one way of achieving such pluralism.

At the local level, the availability of media coverage of matters of local interest is also essential for the fulfilment of the right to effective political participation.¹⁹¹ In this sense, the 2010 Joint Declaration of Freedom of Expression Rapporteurs acknowledges as a key challenge to freedom of expression the reduction of local content output in the media generated by commercial pressures.¹⁹² Practices such as network broadcasting or programme sharing agreements, while they are cost-effective for commercial broadcasters, may result in the neglect of local informational needs.¹⁹³ Moreover, not all local communities are able to support commercial services. The public sector may not have the resources or the expertise to attend to local needs and, even if it did, it would be undesirable for a public service broadcaster to be the only voice providing coverage on local matters.¹⁹⁴ Although the ideal would be for all persons to have access to local services from all three sectors, TSB may secure the availability of a local broadcasting

¹⁸⁷ Discussed in detail in *Herrera-Ulloa v. Costa Rica* (Inter American Court of Human Rights), 2 July 2004. [112]-[116].

¹⁸⁸ See for example UNHRC GC 34, above n 145, [20].

¹⁸⁹ Hemispheric Agenda, above n 147, [102].

¹⁹⁰ *Animal Defenders International v. The United Kingdom* (European Court of Human Rights), Grand Chamber, Application no. 48876/08, 22 April 2013 [111].

¹⁹¹ See for example, *Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority*, opened for signature 16 November 2009, CETS No. 207 (entered into force 1 June 2012), Art. 2(2)(iii); Meadows et al, above n 185, 35.

¹⁹² UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 37, Art. 6(b).

¹⁹³ This phenomenon has been identified in Australia. Discussed further in Sections 4.1.5.

¹⁹⁴ See Section 2.1.1.2.1.

service where other types of services are not viable, thereby enhancing local political participation. The potential of TSB to contribute to local programming is further discussed in Section 2.3.5.

2.1.3. The Right to Participate in Cultural Life and Artistic Life

IHRL recognises that all persons have a right to participate in the cultural life of the community in which they live.¹⁹⁵ When compared to freedom of expression, the right to take part in cultural life has not been as discussed and developed in IHRL literature or case law. However, in its General Comment No. 21 of 2009, the UN Committee on Economic, Social and Cultural Rights (UNCESCR) elaborated on the content of this right. The UNCESCR established, among other elements, that the fulfilment of the IHRL obligations under this right require ‘positive action’ from the States, that ‘States parties are under an obligation to facilitate the right of everyone to take part in cultural life’, and that ‘the access of communities to means of expressions and dissemination’ is a necessary condition for the full realisation of this right.¹⁹⁶

While the *International Covenant on Economic Social and Cultural Rights* (ICESCR) only mentions a right to participate in cultural life, the *San Salvador Protocol*, which is the Inter-American system treaty on ESCR, makes reference to a right to participate in cultural and artistic life.¹⁹⁷ Similar wording is to be found in the UN *Convention on the Rights of the Child*.¹⁹⁸ It is not clear whether there is a substantial difference regarding the meaning of ‘cultural life’ and ‘artistic life’.

In common parlance, the arts are normally considered a form of cultural expression, so one would be inclined to the view that there is no substantial difference. In the

¹⁹⁵ *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3 (entered into force 3 January 1976), Art. 15(1)(a) ‘ICESCR’.

¹⁹⁶ UN Committee on Economic Social and Cultural Rights General Comment N° 21: Right of Everyone to Take Part in Cultural Life E/C.12/GC/21 (2009) [52] ‘UNCESCR GC 21’.

¹⁹⁷ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* OAS Treaty Series No. 69 (entered into force 16 November 1999), Art. 14(1)(a) ‘SSP’.

¹⁹⁸ *Convention on the Rights of the Child* 1577 UNTS 3 (entered into force 2 September 1990), Art 31(2).

aforementioned General Comment regarding the content of the right to participate in cultural life, the UNCESCR did not delve into these differences of wording between the ICESCR and other international treaties. However, it did stress the importance of allowing members of traditionally marginalized groups to develop their artistic potential¹⁹⁹ and, in a previous general comment, had already established that encouraging artistic creation was a goal of the ICESCR and the reason why it prescribed a right to benefit from the protection of the moral and material interests deriving from artistic creations.²⁰⁰ Additionally, the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* clearly establishes the importance of artistic creation for cultural diversity.²⁰¹ In light of this, the right to participate in cultural life can be said to also include an obligation for States to facilitate for persons the dissemination of their artistic creations.

As with freedom of expression, TSB can help broaden access to outlets, thereby facilitating for persons the fulfilment of their right to participate in the cultural life and artistic life of their communities.²⁰² As noted, the different nature of the sector allows it to consider other elements beyond quality standards or commercial attractiveness and to provide outlets for amateur or alternative producers who would not find them in the two traditional sectors.

2.1.4. The Right to Equality and the Prohibition of Discrimination

Under IHRL, persons have a right to receive equal treatment under the law.²⁰³ This right is strongly linked with the principle of prohibition of discrimination, under which States are not allowed to make unjustified distinctions of treatment among groups or classes of persons, or

¹⁹⁹ UNCESCR CG 21, above n 196, [28]-[31].

²⁰⁰ UNCESCR, *General Comment N° 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author* E/C.12/GC/17 (2005).

²⁰¹ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* 2240 UNTS 311 (entered into force 18 March 2007).

²⁰² See Sections 2.3.3-2.3.5.

²⁰³ See for example ICCPR, above n 134, Art 26; ACHR, above n 132, Art. 25; *African Charter on Human and Peoples' Rights*, OAU CAB/LEG/67/3 (entered into force 21 October 1986) Art. 13(1).

towards individuals due to their belonging to a particular group or class.²⁰⁴ However, merely abstaining from engaging in unjustified discrimination is not always enough for States to fulfil their obligation of providing equality before the law to their subjects. As stated by the United Nations Human Rights Committee (UNHRC):

the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.²⁰⁵

Economic status is recognised in IHRL as one of the grounds on which discrimination is prohibited.²⁰⁶ As explained in Section 2.1.1.1., financial barriers to the access to broadcasting often generate inequalities in relation to the exercise of freedom of expression. The OAS Rapporteur on Freedom of Expression has referred specifically to the need to combat these inequalities through the adoption of positive measures:

the right to information and to receive the greatest quantity of diverse information and opinions requires that a special effort be made to provide access to public debate under equal conditions and without any type of discrimination. This assumes special conditions of inclusion to allow all sectors of society to exercise this right effectively.²⁰⁷

Supporting the development of TSB is one positive measure States can take to address issues of inequality in relation to the ability of persons to participate in broadcasting activity in compliance with their obligations pertaining to the right to equality. Beyond the general effect of inequalities of financial capacity in access to broadcasting, there are

²⁰⁴ See UN Human Rights Committee, *General Comment No. 18: Non Discrimination*, UN Doc. CCPR/C/GC/18 (1989).

²⁰⁵ UNHRC GC 34, above n 145, [10].

²⁰⁶ *Ibid*, [7].

²⁰⁷ Hemispheric Agenda, above n 147, [15].

specific groups which may be especially disadvantaged in their capacity to participate in broadcasting activity or in relation to the satisfaction of their programming needs by broadcasters. These groups may require special consideration in broadcasting policy, as discussed in the next sub-section.

2.1.4.1. Traditionally Disadvantaged Groups

The 2010 Joint Declaration of the UN, OAS and ACHPR Rapporteurs on Freedom of Expression and the OSCE Representative on Freedom of the Media identified as one of the ten key challenges for freedom of expression for the present decade that:

Equal enjoyment of the right to freedom of expression remains elusive and historically disadvantaged groups – including women, minorities, refugees, indigenous peoples and sexual minorities – continue to struggle to have their voices heard and to access information of relevance to them.²⁰⁸

Groups identified as often disadvantaged in relation to access to information and media production and which can benefit from the establishment of TSB outlets include:

²⁰⁸ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 37, Art. 5.

indigenous peoples,²⁰⁹ national minorities,²¹⁰ immigrants,²¹¹ refugees,²¹² women,²¹³ lesbian, gay, bisexual and transexual (LGBT) persons²¹⁴ and the elderly.²¹⁵

These groups may not always be disadvantaged in all societies and the specific experiences of each group in every place and of each member within each group will vary widely. As Minore and Hill have accurately noted, ‘no matter how universal a problem is, in some ways it is always particular to a given situation’.²¹⁶ This section will unavoidably deal with overgeneralizations in order to illustrate some common problems that traditionally disadvantaged groups (TDGs) and their members may face as result of discrimination and inequality in broadcasting. The next sub-section provides some examples of the negative consequences that discrimination and inequality in broadcasting may produce.

2.1.4.1.1. Negative Effects of Discrimination and Inequality in Broadcasting

Discrimination and inequalities in the broadcasting industry may generate disadvantages for members of TDGs in relation to access to employment and economic opportunities in that industry. Unfortunately, those are rarely the only consequences.

²⁰⁹ See for example, Johnston, Michelle, ‘Noongar Identity and Community Media’ (2011) 140 *Media International Australia* 61; Inter-American Standards, above n 52, [105].

²¹⁰ See for example. Bodi, Tamas, ‘Community Radio Measurement – Means, Rationale and Enabling Environment’ (Master Thesis, Central European University, 2010); Nguyen, Thuy Thi Thu, ‘The Role of Radio and TV in the Life of Ethnic Minorities in Vietnam Case Study: The H’Mong People in Lao Cai and Lai Chau Province’ (Master Thesis, University of Tromso, 2008).

²¹¹ See for example, CRTC, *Ethnic Broadcasting Policy* Public notice 1999-117 ‘ethnic broadcasting policy’; Forde, Foxwell and Meadows, above n 67..

²¹² See for example, Foxwell, Kerrie, ‘Quantifying Community Radio... Some Qualifications’ (2001) 1(5) *Australian Community Broadcasting Series*, 11 <www.academia.edu/927155/Quantifying_community_radio_some_qualifications>; Burton, Ann and Franklin John-Leader, ‘Are We Reaching Refugees and Internally Displaced Persons?’ (2009) 87(8) *Bulletin of the World Health Organization* 638, 638.

²¹³ See for example. Jeffrey, Rowan Mary, ‘Radio "Magic" Women Culture and Community Access Broadcasting’ (Ph.D. thesis, University of Canterbury, 2004); Solervicens, Marcelo (ed.), *Women’s Empowerment and Good Governance Through Community Radio Best Experiences for an Action Research Process* (AMARC, 2008).

²¹⁴ See for example Bosch, Tanja Estella, ‘Radio, Community and Identity in South Africa: A Rhizomatic Study of Bush Radio in Cape Town’ (Ph.D. Thesis, Ohio University, 2003), 243-55; Jeffrey, Ibid.

²¹⁵ Gaynor, Niamh and Anne O’ Brien, *Drivers of Change? Community Radio in Ireland* (2010), 16 <doras.dcu.ie/16219/1/PDF_FinalReport.pdf>; Golden Days Radio for Senior Citizens INC, *Submission to the Inquiry into Community Broadcasting* (Parliament of Australia, Canberra, 2006).

²¹⁶ Minore, J.B and M. E. Hill, ‘Native Language Broadcasting: An Experiment in Empowerment’ (1990) 10(1) *Canadian Journal of Native Studies* 97, 112.

Another potential consequence is exclusion from political debate. As noted in Section 2.1.2, there is a close relationship between freedom of expression and political participation. The mass media is an essential tool for TDGs to make their views known to the governments that make decisions which affect them and also for members of these groups to communicate with each other in order to organise themselves socially and politically. The UN Special Rapporteur on Freedom of Expression has noted that:

For these groups, the media plays the central role of fostering social mobilization, participation in public life and access to information that is relevant for the community. Without a means to disseminate their views and problems, these communities are in effect excluded from public debates, which ultimately hinders their ability to fully enjoy their human rights.²¹⁷

Given its influential nature, broadcasting is an especially important medium for the political participation of TDGs.²¹⁸ Moreover, broadcasting is a medium which is not dependant on literacy, which is a feature of great importance for the most marginalised groups.²¹⁹ The so called ‘digital divide’ problem, under which some groups within society lack the same capacity as others to access and disseminate information through modern mediums such as the internet, and in particular social media, may also make broadcasting especially important for TDGs.²²⁰

Another potential consequence of discrimination in broadcasting is invisibility. Lack of presence in the media can lead to ignorance on the part of the general population of the issues which affect these groups and prevent the impetus necessary to generate the political will to address them. The OAS Rapporteur on Freedom of Expression has recognised that:

²¹⁷ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, above n 148, [55].

²¹⁸ The influential nature of broadcasting is discussed further in Section 3.2.2.

²¹⁹ *Broadcasting Policy and Practice in Africa* (Art. 19. Global Campaign for Free Expression, 2003), 1.

²²⁰ Media Development Indicators, above n 1, 64.

In some instances, the use of the mass media has helped drive public awareness and bring pressure to bear for the adoption of measures for improving the quality of life of the population's most vulnerable or marginalized sectors. However, the traditional mass media are not always accessible for disseminating the needs and claims of society's most impoverished or vulnerable sectors.²²¹

The OAS Rapporteur has also pointed out that, beyond perpetuating the marginalisation of these groups, invisibility is also detrimental to the whole of society, which has a right to receive information about the interests, views and cultures of the members of TDGs.²²²

Closely tied with the problem of invisibility is the issue of lack of representation. As La Ferle and Lee explain:

representation is important because in a media-dominated society ... people often rely on the media to portray and define those things they have not experienced for themselves.²²³

When members of TDGs are unable to find themselves represented in the mass media, this can have a disempowering effect and aggravate feelings of marginalisation and alienation from mainstream society.²²⁴ Inadequate representation may be as damaging as lack of representation. Lack of participation of members of TDGs in the control of outlets and the production of media content can lead to whatever representation there is of them being stereotyped or otherwise artificially homogenised.²²⁵ As Mahtani describes, when representation is inadequate 'the media propel certain traits, most often negative, about minorities into the spotlight, whilst others are downplayed or completely absent from

²²¹ Inter-American Standards, above n 52, [98].

²²² Hemispheric Agenda, above n 147, 101.

²²³ Ferle, Carrie La and Wei-Na Lee, 'Can English Language Media Connect with Ethnic Audiences? Ethnic Minorities Media Use and Representation Perceptions' (2005) 45(1) *Journal of Advertising Research* 140, 142.

²²⁴ Mahtani, Minelle, 'Representing Minorities: Canadian Media and Minority Identities' (2001) 33(3) *Canadian Ethnic Studies Journal* 99, 102.

²²⁵ Discussed in Misajon, Roseanne and Tseen Khoo, 'Pinoy TV: imagining the Filipino-Australian community' (2008) 32(4) *Journal of Australian Studies* 455.

representations'.²²⁶ This can help perpetuate negative views the general population may have about certain groups. In addition, such inadequate representation can also have a negative impact on the collective esteem of the TDGs themselves, further disempowering them.²²⁷

2.1.4.1.2. Special Needs of Traditionally Disadvantaged Groups in Relation to Broadcasting Services

In addition to the potential negative effects discussed in the previous subsection, inequalities in the broadcasting field may also result in any special needs that TDGs may have in relation to broadcasting services being left unaddressed, which is in itself a form of discrimination.

Persons who do not have complete understanding of the main language or languages used by the media in the countries in which they reside may have a special need for broadcasting services in their own languages in order to be able to access information and entertainment in equal measure to the rest of the population.²²⁸ Even if media in the language of their country of origin is easily available, immigrants and refugees still have a need for local information in their own languages. Access to information relating to their legal rights in their own languages through mass mediums such as broadcasting can help counterbalance the special situation of legal vulnerability of refugees and disadvantaged immigrants.²²⁹ In addition, broadcasts from their country of origin may be inadequate for the needs of refugees, depending on the circumstances which led to their emigration.²³⁰ Access to local broadcasts in their own languages has been identified as

²²⁶ Mahtani, above n 224, 100.

²²⁷ Ibid.

²²⁸ See Jeffrey, above n 213,136; Hemispheric Agenda, above n 147, 102; Also notable in this relation is the fact that the even the ILO Convention 107, a treaty which is now derided for its marked assimilationist ideology recognized the need of indigenous peoples for mass media in their own languages [International Labour Organization, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No 107)* (1957) , Art. 26].

²²⁹ See, Casillas, Dolores Ines, 'Sounds of Surveillance: U.S. Spanish-Language Radio Patrols La Migra' (2011) 63(3) *American Quarterly* 807.

²³⁰ See, Clyne, Michael and Felicity Grey, 'Community Language Media and Australia's Changing Language Demography' (2004) 12(2) *People and Place* 24, 31.

being especially important in the first stages of the settlement process during which immigrants and refugees are the most vulnerable.²³¹

Regardless of their level of fluency in other languages, minority or indigenous groups seeking to preserve their own languages have a special need for broadcasting services in those languages in order to assist them in those efforts. As Higgins explains, media creation is necessary in order for 'languages to evolve in a manner adaptive to the requirements of modern societies'.²³² Broadcasting has many characteristics which makes it an essential tool for language (and culture) maintenance and revival efforts. Being an audiovisual medium is an important advantage in the case of languages which lack a written form or whose written form is not unified.²³³ The medium is considered to be more efficient in capturing the interest of the youth, which is essential for efforts of this nature.²³⁴ The medium allows for the use of live formats such as talk radio which, because of their dynamism and interactivity, are considered conducive to the process of language modernisation.²³⁵ Listening to a language being spoken in a medium as influential as broadcasting has also been found to have a legitimising effect, which reinforces speakers' belief in the value of preserving it, and indicates to non-speakers that there is value in learning it.²³⁶

²³¹ National Ethnic and Multicultural Broadcasters' Council (Australia), *Submission to the National Human Rights Consultation* (2009), 6 <<http://www.nembc.org.au/userfiles/file/Submissions/NEMBC%20Submission%20to%20NHRC%20June%202009.pdf>>; Bednall, David, *Media and Immigrant Service* (Australian Government Publishing Service, 1992), x.

²³² Higgins, Stephen Harold, 'The Media Imperative: Ethnic Minority Survival in the Age of Mass Communications' in Stephen Harold Higgins (ed) *Ethnic Minority Media An International Perspective* (Sage Publications, 1992) 1-21, 3.

²³³ See Standing Committee on Education and the Arts, *National Language Policy* (Australian Parliament Senate, 1984), [14.31].

²³⁴ Levo-Henriksson, Ritva, 'Media as Constructor of Ethnic Minority Identity: A Native American Case Study' in Linda K. Fuller (ed) *Community Media International Perspectives* (Palgrave MacMillan, 2007) 55-65, 61; Valaskakis, Gail 'Communication, Culture and Technology: Satellites and Northern Native Broadcasting in Canada', in Stephen Harold Higgins (ed) *Ethnic Minority Media An International Perspective* (Sage Publications, 1992) 63-82, 68.

²³⁵ See Johnston, above n 209; Agirreazkuenaga, Irati, 'The Role of Media in Empowering Minority Identities: Basque-Language Radio During the Franco Dictatorship (1960s -1976) and their Influence as Identity Catalysts' (2012) 34(4) *Media, Culture & Society* 498.

²³⁶ W. J. Howell, 'Minority-Language Broadcasting and the Continuation of Celtic Culture in Wales and Ireland', in Stephen Harold Higgins (ed) *Ethnic Minority Media An International Perspective* (Sage Publications, 1992) 217-243, 218.

Even if their languages and cultures are not endangered and are thriving elsewhere, immigrants and refugees and their descendants may desire to maintain their own languages and culture within their new adopted countries. This is their right and they may have a special need for broadcasting services to assist them in this endeavour.²³⁷ Broadcasting is important for these efforts for reasons similar to those described above. In addition, recognising their cultures and languages through giving them a presence in broadcasting is a way to communicate to members of these groups that abandoning their cultural and linguistic identity is not a requirement for being accepted as legitimate members of the wider society.²³⁸

In cases where women or LGBT persons find themselves in situations of vulnerability, these situations can be counterbalanced by making information relating matters such as sexual reproductive health, means of addressing situations of domestic violence and how to access counseling and social services as widely accessible as possible.²³⁹ Given the characteristics of the medium, broadcasting is an important tool for the mass dissemination of this type of essential information.

The elderly are among the groups most affected by the digital divide and the deterioration of eyesight often associated with advanced aging can become a serious barrier to the access of information through the print media.²⁴⁰ For reasons such as this, elders have been identified as tending to be more reliant than other sectors of society on broadcasting, especially radio.²⁴¹ The additional barriers they may face in accessing alternative mediums means that the consequences of broadcasting outlets failing to address their information and entertainment needs can be much more detrimental for elders than for

²³⁷ Forde, Susan, Michael Meadows and Kerrie Foxwell, *Culture Commitment Community The Australian Community Radio Sector* (Griffith University, Australian Key Centre for Culture and Media Policy, 2002), 61.

²³⁸ Clyne and Grey, above n 230, 34.

²³⁹ Hemispheric Agenda, above n 147, [102]; See also Jeffrey, above n 213.

²⁴⁰ Hough, Michelle and Andrejz Kobylanski, 'Increasing Elder Consumer Interactions with Information Technology' (2009) 26(1) *Journal of Consumer Marketing* 39; Giles, Melissa Kay, 'Diversity in Action: Minority Group Media and Social Change' (Master Thesis, Queensland University of Technology, 2011), 31.

²⁴¹ *Ibid.*

other members of the population. For this reason, it is necessary for broadcasters to pay special regard to the needs of the elderly if the principle of equality is to be respected.

TSBs have historically been valuable in providing voices to and addressing the programming needs of TDGs.²⁴² In order to understand how the development of TSB can aid in addressing the special broadcasting needs of TDGs and the consequences of discrimination and inequality in broadcasting it is important to consider the reasons why the other two broadcasting sectors often fail to adequately serve TDGs. These reasons are discussed in the following sub-sections.

2.1.4.1.3. Barriers to the Establishment of Commercial Broadcasting Outlets by Members of Traditionally Disadvantaged Groups

The UN Special Rapporteur on Freedom of Expression has recognised that ‘[m]inorities, indigenous peoples, migrant workers, refugees and many other vulnerable communities have faced higher barriers, some of them insurmountable, to be able to fully exercise their right to impart and also to access information’.²⁴³ Similarly, the already cited Tenth Anniversary Joint Declaration of freedom of expression defenders identified among the top challenges to freedom of expression in the present decade the ‘obstacles to the establishment of media by and for historically disadvantaged groups’.²⁴⁴

There may be direct legal barriers preventing the access to broadcasting licences by members of TDGs, such as openly discriminatory exclusions based on gender or race or the prohibition of the use of minority or foreign languages in broadcasting. Barriers of this type are totally incompatible with IHRL and are not acceptable under any

²⁴² As noted in Sections 1.3.2 and 1.3.3, ethnic and indigenous community are among the actors that most often engage in TSB with ethnic and indigenous broadcasters sometimes being considered special sub-types of TSB.

²⁴³ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, above n 148, [55].

²⁴⁴ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 37, Art.5(a).

circumstances.²⁴⁵ While it is acceptable to impose restrictions on the control of broadcasting outlets by non citizens, and may even be justifiable to prohibit such control in order to prevent the domination of national information markets by multinational corporations, national origin should not be used as a licensing criteria.

Even in the absence of openly discriminatory provisions, the structure of licensing systems may further disadvantage these already disadvantaged groups.²⁴⁶ In discretionary systems, access to licences depends on the political clout of the interested parties. Such a system may favour TDGs if the circumstances and size of a group make it attractive for the decision maker to court its political good will. However, the weakest groups will find it very difficult to obtain licences under this type of system.

Comparative hearing systems may be a barrier to the establishment of services by or for TDGs if the licensing criteria do not contemplate the need to consider minority interests. For example, the licensing authorities may be obliged to consider that a service intended for the general population is better for the public interest than one intending to cater to the interests of only a particular group or to broadcast in a language other than the one spoken by the majority of the population. On the other hand, if inclusive criteria are used, such as favouring services that will attend to needs that are unaddressed by existing services, this may facilitate access to licences by TDGs. Regardless of the licensing criteria, personal and political bias on the part of the decision makers and the greater capacity applicants from majority groups may have for political lobbying and for preparing attractive proposals may present a challenge for TDGs.

As already noted, auction systems will operate to the detriment of economically disadvantaged groups.²⁴⁷ However, they may present an additional barrier to the establishment of services that intend to serve the needs of TDGs. While a broadcasting

²⁴⁵ See for example OSCE High Commissioner on National Minorities, *Guidelines on the use of Minority Languages in the Broadcast Media* (2003), Art. 4, which states: ‘All persons, including persons belonging to national minorities, have the right to enjoy the freedom of expression and to maintain and develop their identity in and through the broadcast media in conditions of equality and without discrimination’.

²⁴⁶ The different systems which can be used for broadcast licensing were discussed in Section 2.1.1.1.

²⁴⁷ See Section 2.1.1.1.

service intending to serve a minority interest may be commercially viable and even attractive, the expected profits may be less than those of a service that would serve a general audience. In those cases, the commercial value of the licence will be higher for those intending to use it to provide a general service, presenting an additional barrier for bidders looking to establish a special interest service.

Another possible barrier to the establishment of broadcasting services by members of TDGs can be discrimination or bias on the part of private financial entities such as banks. If bias exists, members of TDGs may find more difficult to obtain the finance necessary to establish a broadcasting service than an applicant from a non-disadvantaged group in a similar financial situation would.²⁴⁸ Even in absence of discrimination and bias, there may be a lack of market research (or culturally adequate market research) relating to TDGs.²⁴⁹ This may make it difficult for entrepreneurs belonging to TDGs to demonstrate the financial viability of their projects, which is necessary to procure loans and other means of financing.

Eliminating all unnecessary barriers to the access to commercial broadcasting licences by members of TDGs is a basic requirement if equality is to be secured. However, the mere fact that a broadcasting outlet is owned and controlled by members of a group does not guarantee that the programming needs of that group will be adequately addressed. Moreover, the most disadvantaged groups may not represent commercially viable markets. Because commercial broadcasting is driven by market forces, it is likely that the needs of certain groups will be left unattended in absence of special measures, as discussed below.

2.1.4.1.4. Why the Commercial Sector May Fail to Address the Needs of Traditionally Disadvantaged Groups

²⁴⁸ Baynes, Leonard M., 'Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action for Broadcast Licensing' (2004) 57(1) *Rutgers Law Review* 235, 274-83; Ivy Planning Group, *Whose Spectrum is it Anyway Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to present* (Prepared for the US Federal Communications Commission, 2000) <transition.fcc.gov/opportunity/meb_study/historical_study.pdf>.

²⁴⁹ For example the numbers, geographical distribution, economic capacity and consumption patterns of a particular group may not have been adequately researched.

Various authors have observed that the profit drive nature of commercial broadcasting may be uncondusive to the satisfaction of the programming needs of TDGs. For example, Thomas has observed that:

The economic imperative in broadcasting poses a specific threat to ethnic and racial minorities. Broadcasting has often been accused of appealing to the lowest common denominator in order to maximize audience and market shares. Accordingly, this practice has tended to exclude ethnic and racial minorities from television programming on the basis that their numbers were negligible.²⁵⁰

In similar vein, Baynes has noted that ‘the discrimination that exists against people of color by the broadcast network is driven by the profit structure of the broadcast industry, which relies almost exclusively upon advertisers for their revenues’.²⁵¹

In the traditional commercial broadcasting business model, broadcasters who attract the largest audiences can command the highest revenue from advertising. If general interest programming is considered sufficient to attract TDGs, there will be no commercial incentive for broadcasters to produce content that addresses their specific needs or for advertisers to support it.²⁵² However, this does not mean that broadcasting specifically targeted at TDGs will never be of interest to commercial broadcasters.

Commercial broadcasters, independent of ownership, will be interested in airing programs for specific groups if this provides opportunity for economic gain.²⁵³ Depending on the market conditions, it may be preferable for a commercial broadcaster to try to secure the audience of a specific group, even a disadvantaged one, than to aim

²⁵⁰ Thomas, Eric, ‘Canadian Broadcasting and Multiculturalism: Attempts to Accomodate Ethnic Minorities’ (1992) 17(3) *Canadian Journal of Communication* <www.cjconline.ca/index.php/journal/article/view/676/582>.

²⁵¹ Baynes, above n 248, 285.

²⁵² See, La Ferle and Lee, above n 223.

²⁵³ Thomas, above n 250.

for the widest audience possible through general interest programming.²⁵⁴ Also, if a group has a special need for a certain product or service, advertisers seeking to promote those goods or services may prefer to support programs specifically targeting that group.²⁵⁵ However, not all groups will be able to attract the interest of commercial broadcasters.²⁵⁶ Generally, the number, territorial concentration and economic capacity of the group's members are the main factors which will determine whether commercial broadcasters will develop programming targeted at the group. This means that is very unlikely that the commercial sector will produce or air programming that addresses the needs of some of the most vulnerable groups, such as recent and less established immigrant communities and refugees.

However, the mere fact that a group is large, highly concentrated and has significant combined economic capacity, is no guarantee that its programming needs will be adequately addressed by the commercial sector. Discrimination and bias from the advertising industry may diminish the commercial attractiveness of programming for TDGs.²⁵⁷ Stereotyped views regarding the spending power and consumption patterns of the group members may lead advertisers to underestimate the potential of programming targeted to it.²⁵⁸ As explained above, a lack of specific market research and reliance on market research methodology which does not account for cultural differences are barriers which can prevent the commercial potential of programming for TDGs from being identified.²⁵⁹ In addition, if the views of the general population regarding a certain group - such as immigrants or LGBTs- are negative, advertisers may be unwilling to openly

²⁵⁴ For a detailed discussion on the economic incentives and disincentives commercial broadcasters may have to program for TDGs under different scenarios See Spitzer, Matthew L., 'Justifying Minority Preferences in Broadcasting' (1991) 64 *Southern California Law Review* 293.

²⁵⁵ For example private money remittances services may want to target immigrant communities directly See Rees, David, 'Alternative remittance systems in Australia: *Perceptions of users and providers*' (2010) 393 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice*.

²⁵⁶ An Australian Government report concluded that indigenous communities in remote Australia will never be able to sustain commercial services, discussed further in Section 4.2.7.2.

²⁵⁷ Ivy Planning Group, above n 248, 2 Baynes, above n 248, 283-90.

²⁵⁸ Ofori, Kofi Asiedu, *When Being No.1 is not Enough: The Impact of Advertising Practices on Minority-Owned & Minority Formatted Broadcast Stations* (prepared for the US Federal Communications Commission, 1999), 12 <transition.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/>.

²⁵⁹ See, Matsaganis, Katz and Ball-Rokeach, above n 67, 262.

cater to these groups, even if they would otherwise constitute commercially attractive audiences.²⁶⁰

Even when broadcasters and advertisers are interested in catering to a specific group, the group's needs may still not be adequately served. If there is no competition for a specific audience, broadcasters may take the view that any programming targeted to it will capture its attention, resulting in TDGs being served, but nominally through low quality programming. In the case of immigrants and minorities with a trans-frontier presence, importing programming from other countries may be a cheaper alternative to local production, leaving unmet the special needs these groups may have for local information. Additionally, the output of commercial broadcasters may not really be targeted to a whole group, but only to the subset comprised of the members who have attained higher economic and social status, leaving the needs of the most vulnerable members unfulfilled.²⁶¹

2.1.4.1.5. Why the Public Sector May Fail to Address the Needs of Traditionally Disadvantaged Groups.

Ideally, public broadcasters should be required to cater for the programming needs of the whole population, especially those who have been overlooked by the private sector.²⁶² However, public broadcasters do not always address the needs of TDGs to the extent that they should. The political will to do so may be lacking, and if the views of the government regarding a specific group are negative, the likelihood of official broadcasters addressing their needs is very low. Governments may also regard multicultural and multilingual broadcasting as detrimental to national unity and identity.²⁶³ This view sometimes persists despite evidence which indicates that

²⁶⁰ Baynes, above n 248, 289-90; Ivy Planning Group, above n 248, 59.

²⁶¹ For this reason broadcasting services targeting TDGs may use a subscription based business model, which is often considered more adequate for broadcasting to niche audiences, but which makes the services unavailable to those who cannot afford it.

²⁶² Buckley et al., above n 46, 192.

²⁶³ Fraser and Restrepo Estrada, above n 185, 10; Bostock, William, 'Ethno-Cultural Control in Australia: The Issue of Ethnic Broadcasting' in James Jupp (ed) *Ethnic Politics in Australia* (George Allen & Unwin, 1984) 97-113.

disregarding the needs of cultural and linguistic minorities can actually exacerbate conflicts.²⁶⁴

Broadcasters following the public service model should theoretically be free of the influence of such political considerations, but in practice this may not always be the case.²⁶⁵ Even when the ideal of independence is met, they may be unable to address the needs of TDGs if this does not come within their mandate. For example, if their mandate commits public service broadcasters to follow non pluralistic standards of morality, this may impede them from adequately addressing the needs of women and LGBT communities. Similarly, mandates which commit public service broadcasters to promote a non pluralistic notion of national identity may prevent them from addressing the needs of indigenous, minority, immigrant and refugee groups. If public service broadcasters are envisioned as national level services, the provision of the type of localized information for which TDGs may have a basic need may also fall outside the scope of their mandate.²⁶⁶

Even where the political will exists and the mandate permits, resource constraints may prevent the needs of TDGs from being adequately addressed. Governments or public service broadcasting institutions may be forced to prioritise the different broadcasting needs of the population. In this scenario, it is possible that serving the interests of the majority will take precedence over those of TDGs, even if the latter are in most need of public sector attention due to their neglect by commercial broadcasters. Since monolingual broadcasting systems are much cheaper to operate than multilingual ones, resources constraints are one of the usual causes why the needs of linguistic minorities

²⁶⁴ Howell, above n 236, 40 accurately notes in this regard: ‘Broadcasting in one language is cheaper, easier, and presents the population with a standard communication currency and unified identity that helps the cause of nationhood. But ignoring the desires and needs of ethnic minorities for broadcasts that reflect their cultural identities and heritage is often a prescription for alienation, political strife, and separatism’; See also Supreme Court of Latvia, Judgment case No. 2003-02-0106 where the court concluded that restricting the use of their own language in local broadcasting contributed to the Russian national minority of the country preferring transfrontier broadcasts from Russia, which furthered alienation and separation between them and the wider Latvian community .

²⁶⁵ Buckley et al., above n 46, 190.

²⁶⁶ See Rennie and Featherstone, above n 175.

are ignored by public broadcasting systems.²⁶⁷ Additionally, when the linguistic diversity within a country is great, it may be impossible for the public broadcasting system to address the needs of all language groups. This may force it to prioritise among them or to select a single language for the public broadcasting system in order to prevent conflicts.²⁶⁸

In general terms it can be said that, among TDGs, those with larger numbers and those which are better organised as pressure groups are more likely to ensure that their needs are prioritised by public broadcasting systems. However, the views of the general population may also be an important factor. In this sense, immigrants and refugees may be in the weakest position because the general population may perceive their claims for special services as less legitimate than those of nationals.²⁶⁹ The general population may even resent the government for investing in broadcasting services for immigrants and refugees if they are not perceived as being entitled to national resources.²⁷⁰ These are all disincentives which may lead to the needs of immigrants and refugees being ignored by public broadcasting systems.

Given that a multilingual population is a competitive advantage in a globalised world, States may consider it desirable to support broadcasting in foreign languages in order to create an incentive for language maintenance among immigrant communities and language acquisition among others.²⁷¹ This can sometimes counter the political disincentives outlined in the previous paragraph. However, it can also lead to languages spoken by the host country's most important trade partners and widely spoken languages

²⁶⁷ In this relation McGonagle has noted: 'Throughout Europe, public service broadcasters are today coming under ever-increasing strain; having to operate in an austere economic climate and to hold their own against the growing dominance of commercial broadcasting. Furthermore, they are under constant pressure to streamline their operations and become more efficient. These background considerations make it very difficult to set aside shares of limited available funds for the advancement of broadcasting in minority languages'. McGonagle, Tarlarch, 'Regulating Minority-Language use in Broadcasting: International Law and the Dutch National Experience' (2004) 16(5) *Mediaforum* 155.

²⁶⁸ Fraser and Restrepo Estrada, above n 185, 8; Minore and Hill, above n 216, 104-5.

²⁶⁹ Matsaganis, Katz and Ball-Rokeach, above n 67, 197; Levo-Henriksson, Ritva, above n 234, 59.

²⁷⁰ See Grimes, Seamus, 'Residential Segregation in Australian Cities: A Literature Review' (1993) 17(1) *International Migration Review* 103, 107.

²⁷¹ See Standing Committee on Education and the Arts, above n 233, [10.2]-[10.5].

such as Spanish and Chinese being prioritised for resources and broadcast air-time, to the detriment of the languages of the communities in most need of broadcasting services.²⁷²

Even when programming directly targeted at TDGs is included within the public broadcasting system, it may not adequately serve the needs of the groups concerned. Due to limitations of air-time, programs for TDGs may end up being relegated to inconvenient time slots.²⁷³ Additionally, the goals pursued by the government through such programs may not always coincide with the best interests of the TDGs. For example, programming in minority and foreign languages might be introduced as a temporary measure for the government to reach groups who are not proficient in the main language of the country but pursue, in reality, an assimilationist agenda.²⁷⁴ Programming aimed at TDGs may also be introduced in the public broadcasting system, not for the purpose of addressing their needs, but as a means of maintaining government control, placating demands for the establishment of independent broadcasting services controlled by the groups themselves or delegitimising ‘pirate’ (unlicensed) broadcasting stations that may have been started by TDGs.²⁷⁵

2.1.4.1.6. Special State Obligations in Relation to Traditionally Disadvantaged Groups

The ECtHR has recognised that the principle of no discrimination is breached not only when the State unjustifiably treats a person or group differently, but also when it fails to perform those distinctions of treatment that are reasonably and foreseeably necessary to secure the due respect of human rights.²⁷⁶ Accordingly, broadcasting policy needs to take into account the special circumstances and needs of TDGs.

²⁷² See, Clyne, Michael, ‘Language Policy in Australia: Achievements, Disappointments, Prospects’ (1997) 18(1) *Journal of Intercultural Studies* 63, 67.

²⁷³ Howell, above n 236, 227.

²⁷⁴ Higgins, above n 232, 4.

²⁷⁵ Matsaganis, Katz and Ball-Rokeach, above n 232, 195-6.

²⁷⁶ See for example, *Thlimmenos v. Greece* [2000] IV Eur Court HR, [44].

As Camauër explains, TDGs may not be able to successfully establish and maintain media outlets if they are required to compete under the same conditions as more powerful groups, as ‘conditions are not equal when the starting points of the actors are so diverse’.²⁷⁷ For this reason, the State’s positive duty to take measures to combat inequality and discrimination are especially important in relation to TDGs. This has been recognised by the OAS Rapporteur on Freedom of Expression who has stated:

States must adopt affirmative measures (legislative, administrative, or of any other nature), in a condition of equality and non-discrimination, to reverse or change existing discriminatory situations that may compromise certain groups’ effective enjoyment and exercise of the right to freedom of expression.²⁷⁸

As authors such as Holt and Packer have noted, when a State devotes resources to broadcasting services aimed at the general population, it has an obligation to devote an equitable amount of those resources to broadcasting services and programs aimed at minority groups within its borders.²⁷⁹ The principle is that, if all members of society contribute through taxes or other financial schemes to public or publicly funded broadcasting services, then it will constitute a form of discrimination if funds are not allocated to address the needs of groups with special broadcasting needs, at least in proportion to their numbers.²⁸⁰ Since their need for programs in their own languages is patently evident, linguistic minorities can be more easily identified as being discriminated against when no resources are devoted to broadcasting in their languages, despite their contributions to the funding of broadcasting services.²⁸¹ However, the principle is also applicable to other TDGs.

²⁷⁷ Camauër, Leonor, ‘Ethnic Minorities and their Media in Sweden. An Overview of the Media Landscape and State Minority Media Policy’ (2003) 2 *Nordicom Review* 69, 84.

²⁷⁸ Inter-American Framework, above n 158, [238]; See also, Hemispheric Agenda, above n 147. [15].

²⁷⁹ Holt, Sally and John Packer, ‘OSCE Developments and Linguistic Minorities’ (2001) 3(2) *International Journal of Multicultural Societies* 99, 123.

²⁸⁰ See, Bednall, above n 231, xi.

²⁸¹ See for example R. Dumbar, ‘Minority Language Rights in International Law’ 50(1) *The International and Comparative Law Quarterly* (2001) 90, 107-8.

In addition to general rules of IHRL, UNESCO treaties such as the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*²⁸² and the *Convention for the Safeguarding of the Intangible Cultural Heritage* can be interpreted as imposing on States an obligation to support broadcasting in endangered languages or relating to endangered cultures.²⁸³ For European States, a similar obligation can be implied from the CoE *Framework Convention for the Protection of National Minorities*.²⁸⁴ When assimilation policies have caused a culture or language to become endangered, then a positive duty to take measures aimed at reversing the effects of such policies arises.²⁸⁵

As noted in Chapter One, TDGs tend to be among the groups that most often participate in TSB, ethnic and indigenous broadcasting being considered special sub-types of TSB. As discussed in Section 2.3, the characteristics of TSB means the sector has great potential to aid in addressing the inequalities which affect TDGs in relation to broadcasting services and access to broadcasting activity. For this reason, supporting the TSB efforts of TDGs is one measure States can adopt in order to fulfil their special obligations toward TDGs. The possible ways in which TSB by TDGs can be supported are discussed further in Section 2.4.5.

2.1.5. Freedom of Religion

In relation to the dissemination of ideas, freedom of religion is *lex specialis* to freedom of expression. Accordingly, all the principles of freedom of expression apply, even when the content of the expression is religious in nature. Like freedom of expression, freedom of religion encompasses both a private dimension (the freedom to hold beliefs) and a

²⁸² *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2240 UNTS 311 (entered into force 18 March 2007) Arts. 7-8.

²⁸³ *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003), 2368 UNTS 3 (entered into force 26 April 2006). Art. 2(3) of this convention defines safeguarding as 'measures aimed at ensuring the viability of the intangible cultural heritage', as explained, media creation is essential to secure the continued viability of cultures and languages.

²⁸⁴ *Framework Convention for the Protection of National Minorities*, opened for signature 1 February 1995, CETS No. 157 (entered into force 1 February 1998). Art. 5(1) of this convention requires the parties 'to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture'. As explained, broadcasting may be essential for culture and language maintenance and revival efforts.

²⁸⁵ See, Standing Committee on Education and the Arts, above n 233, [8].

public one (the freedom to externalise beliefs).²⁸⁶ Regarding that public dimension, there is no mention in IHRL instruments regarding a choice of medium. However, following the general freedom of expression principles, all have the right to externalise their beliefs through broadcasting unless other considerations merit a restriction of that right.

Freedom of religion clearly encompasses the freedom of persons to change their religion or beliefs²⁸⁷ and under the public dimension of freedom of religion, persons have a right to share their religiosity with others in activities such as religious worship ceremonies. However, there has been some debate regarding whether a right to engage in religious proselytism - that is, to deliberately seek to change the belief of others - exists.²⁸⁸ In this regard, Sturges considers that freedom of religion 'in protecting a right to change religion or belief ... implicitly protects the right to persuade others to change'.²⁸⁹ The soundness of this proposition can be easily observed by drawing parallels with freedom of expression. Just as the right to information is a counterpart to freedom of expression, which can be fulfilled only in an environment conducive to the free exchange of ideas, so the right of persons to form and change their beliefs can be realised only where the exchange of ideas that enhance or challenge those beliefs is equally free.

As explained in Section 1.3.4, religious organisations are one of the types of third sector actors that most often seek to participate in broadcasting, religious broadcasting sometimes being considered a special sub-set of TSB.²⁹⁰ Although religious broadcasts occur on commercial channels, in many cases religious groups may find a not-for-profit TSB model more suitable for their broadcasting activities. Additionally, like other third sector actors, religious groups may not have the capacity to access commercial licences,

²⁸⁶ See for example, ICCPR, above n 134, Art 18(1); ECHR, above n 150 Art. 9(1); ACHR, above n 132 Art. 12(1).

²⁸⁷ See for example, ICCPR, above n 134, Art 18(2); ECHR, above n 150 Art. 9(1); ACHR, above n 132 Art. 12(1).

²⁸⁸ See for example, *Larissis v. Greece* [1998] I Eur Court HR, Partly Dissenting Opinion of Judge Valticos, joined by Judge Morenilla; *Kokkinakis v. Greece* (1993) 260-A Eur Court HR (Ser A) 52, Dissenting Opinion of Judge Valticos; Ofcom, Religious Programmes and the Ofcom Broadcasting Code, A report of the key findings of a qualitative research study (2005).

²⁸⁹ Sturges, Paul, 'Limits to Freedom of Expression? Considerations Arising from the Danish Cartoons Affair' (2006) 32 *IFLA Journal* 181, 183; See also, *Olmedo Bustos et al v. Chile* (Inter American Court of Human Rights), 5 February 2001, Reasoned vote of judge Carlos Vicente de Roux Rengifo.

²⁹⁰ See Section 1.3.

depending on the licensing system used to allocate them. TSB can therefore play an important role in enabling persons to exercise their right to express their religious views through the airwaves and fulfilling the public's right to have access to information about different views on religious matters. Despite this, it is sometimes debated whether religious groups should be allowed to hold TSB licences or broadcasting licences in general. The arguments for and against participation by religious groups in broadcasting are discussed in Section 6.8.3.

2.1.6. Traditional Terrestrial Broadcasting Remains Relevant for the Fulfilment of Human Rights.

Throughout the previous sub-sections it has been argued that recognizing and supporting TSB is a measure which can aid in reducing the barriers to participation in over the air broadcasting and improve diversity of content in the terrestrial broadcasting sector. However, it has been argued that, because of the availability of alternative platforms such as the Internet and cable and satellite broadcasting, which persons can use to disseminate audiovisual content and access information, access to traditional terrestrial broadcasting is not as critical as it was in the past. If traditional terrestrial broadcasting is no longer relevant, adopting measures to facilitate access to it by new actors such as third sector groups would be a wasted effort. However, the availability of alternative mediums does not mean traditional terrestrial broadcasting is no longer important or necessary for the fulfillment of human rights.

Currently, most economists favour a system whereby access to the radio spectrum is based solely on market principles.²⁹¹ However, human rights monitoring bodies, IGOs and civil society groups concerned with human rights have consistently advocated for

²⁹¹ Discussed further in Section 3.2.1.3.

spectrum to be reserved for broadcasting in recognition of the important role terrestrial broadcasting still plays in the fulfillment of human rights.²⁹²

Broadcasting, and radio in particular, remains the most widely accessible platform worldwide.²⁹³ While mediums such as cable, satellite or the Internet are valuable and have undoubtedly contributed to the fulfillment of freedom of expression and other human rights, access to these mediums is not equal for all persons. ‘Digital divide’ is a term that is used to refer to the reality that some lack the same capacity as others to access and disseminate information through the more modern mediums.²⁹⁴ The digital divide exists at the global level, with alternative delivery platforms being more widely used in countries that are more developed. However, even within a country, significant divides can exist. There can be economic divides, where the poor are less likely to have access to the more modern mediums, and geographic divides, where services are available in some areas but not others.²⁹⁵ As noted in Section 2.1.4.1.1, the digital divide is a problem that often affects TDG, with the elderly being specially identified as a group that still relies primarily on traditional broadcasting for their information and entertainment.

Terrestrial broadcasting also holds some advantages over other mediums that sustain its relevance. Traditional broadcasting allows the possibility of capturing audiences’ attention while changing television or radio channels. This is an advantage over the internet, which require audiences to play a more active and intentional role in seeking the message.²⁹⁶ The same possibility exists in relation to cable and satellite services, , but sometimes the providers of these services allow their clients to select the stations they

²⁹² See for example UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4; Media Development Indicators, above n 1, 42; *African Charter on Broadcasting*, above n 64 Part I(3); Access Airwaves, above n 6, Principle 9(1).

²⁹³ See Bodi, above n 210, 7

²⁹⁴ Media Development Indicators, above n 1, 64.

²⁹⁵ In the case of Canada, although cable is used as the primary platform for the delivery of third sector television content, terrestrial third sector television have also been necessary to deliver services in certain areas as cable is not available everywhere in the country. Discussed further in Section 5.2.4.6.

²⁹⁶ In this relation, Langer has noted that a usual limitation of alternative means of communication such as internet sites is that they tend to reach only those that are already predisposed in favour of a certain message. See Langer, John, ‘Media Democratization In Australia What Is It, Who's Got It, Where To Find It, How It Works (Or Doesn't) – PART 2’ (2001) 26/27 *Australian Screen Education* 68.

want to receive. The ability to capture the attention of audiences other than those already predisposed to seek the content, combined with the wider reach of the medium, means terrestrial broadcasting is still a highly desirable medium for those seeking to disseminate any kind of message. Broadcasting is also audiovisual in nature, which audiences generally prefer over written mediums. While the Internet can deliver audiovisual content, not all persons who have access to the Internet necessarily have access to the broadband capacity required to carry audiovisual services in a manner which can replace traditional television and radio services.

For the reasons outlined above, it is clear that terrestrial broadcasting is still a very relevant medium for many around the world who are seeking to either disseminate a message or secure access to information and entertainment. Those who still depend on traditional broadcasting as a medium are often those whose needs have historically failed to be addressed by the two traditional broadcasting sectors. In such a context it is clear that until terrestrial broadcasting is fully replaced by other mediums which are accessible to all, the need will remain to adopt measures aimed at broadening participation and diversity in terrestrial broadcasting.

2.2. Measures Other than Third Sector Broadcasting

In the previous section it has been argued that supporting the development of TSB is one of the measures States can take in order to fulfil their positive IHRL obligations regarding diversity of, and access to, broadcasting. However, supporting TSB is not the only measure that can be taken for that purpose. There is a multitude of other measures that policy makers can use to increase diversity in broadcasting and facilitate access to the activity. The adequacy and effectiveness of these measures will depend on specific circumstances and it is not suggested that supporting TSB should always be favoured over other measures. In fact, in most cases a combination of measures will be necessary to adequately address the issues which might preclude diversity and equality of access to broadcasting. However, TSB has significant advantages which, in many cases, would make its development more effective than alternative measures. For this reason, it is

argued that supporting TSB should always be given serious consideration by policy makers seeking to address these issues. In order to illustrate the potential value of TSB, this section will outline some of the other measures that are commonly aimed at improving diversity and equality in broadcasting and will identify their limitations.

2.2.1. Employment Rules

The 2010 anniversary Joint Declaration of the UN, OAS and ACHPR rapporteurs on freedom of expression and the OSCE representative on freedom of the media identified as one of the key challenges to freedom of expression for the present decade the ‘underrepresentation of historically disadvantaged groups among mainstream media workers, including in the public media’.²⁹⁷ UNESCO has similarly noted that:

The media’s capacity to represent social diversity is also dependent on the make-up of its workforce e.g. the balance of journalists and media executives who are women or who come from minority groups.²⁹⁸

UNESCO has included among its indicators for media development whether TDGs are fairly represented in the media industry workforce.²⁹⁹ Under this approach, an adequate representation of social diversity in the media workforce is expected to produce media output that is equally representative of that diversity.

Special employment rules can be used to address situations in which the underrepresentation of TDGs in the media workforce is a concern. All broadcasters, public or private, should be prohibited from discriminating in their employment practices. However, additional rules can be imposed to secure adequate representation of TDGs, such as directly including in the licence conditions of private broadcasters (and in the mandates of public service ones) the obligation to maintain a workforce that is

²⁹⁷ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 37, Art.5(c)(i).

²⁹⁸ Media Development Indicators, above n 1, 52.

²⁹⁹ Media Development Indicators, above n 1, 53.

proportionally representative of the social composition of the area served. More specific rules, such as establishing minimum quotas for the employment of members of a specific group, can also be used to secure the representation of particularly disadvantaged groups.³⁰⁰

While employment rules can be valuable tools for the pursuit of equality, they are limited in what they can do to secure diversity in broadcasting. Special employment rules can assist members of TDGs to overcome the barriers that discrimination and bias from potential employers may create for their access to employment and economic opportunities. However, they do not address the general effect of economic inequality in relation to access to broadcasting. Even among TDGs, employment rules will only secure access to the industry by group members who are best educated and qualified. The experiences of these persons may not always be the same as those of the most disadvantaged members of their groups. For this reason, the most effective employment rules may still leave those in the most need of getting their voices heard without representation in the media workforce.

Moreover, improving the balance of the work force does not guarantee an increase in diversity of content. One reason for this is that, regardless of the balance of the workforce, the majority of the content decisions remain with owners and managers. The commercial and political pressures that lead commercial and public broadcasters to neglect minority and local needs persist independently of the composition of the stations' workforce.

Finally, improving the representation of TDGs in the workforce of the mainstream media may not be enough to ensure that their special broadcasting needs are adequately addressed. A study by Mahtani concluded that improved representation of members of TDGs in a broadcasting outlet does not always lead to its content being more reflective of

³⁰⁰ This system has been used, among other places, in the U.S.

them or more concerned with their needs.³⁰¹ A risk has also been identified that employees from TDGs will try to cater to the tastes of the majority, due to believing this will improve their opportunities for promotion or due to fear of being perceived as only being able to program for, or to appeal to, the members of their own groups.³⁰²

2.2.2. Diversity as a Licensing Criterion for Commercial Broadcasters

In jurisdictions that have comparative licensing systems, licensing authorities can be required to prioritise the potential contribution to diversity of the services proposed by the applicants over other considerations (such as the financial or technical capacity of the applicants). Diversity should always be a consideration when comparative hearings are used for broadcast licensing.³⁰³ However, requiring licensing authorities to consider diversity as a licensing criterion may not be enough to ensure it is effectively attained. As already noted, the discretion that is inherent in comparative systems can lead to political or financial factors influencing the licensing decisions, despite the criteria established.³⁰⁴ In order to reduce the potential for unbridled discretion, a point system could be utilised, where the weight to be given to each criterion in the comparison is established by law. However, a degree of subjectivity is unavoidable, as has been recognised by the ECtHR:

Most of the criteria could, despite the points system adopted, be subject to a highly subjective assessment.³⁰⁵

Besides the unavoidable subjectivity, the other major limitation of this measure is that applicants would be tempted to embellish their proposals as much as possible in order to

³⁰¹ Mahtani, Minelle, 'Mapping the Meanings of "Racism" and "Feminism" Among Women Television Broadcast Journalist in Canada' in Kathleen M. Blee and France Winddance Twine (eds), *Feminism and Antiracism International Struggles for Justice* (New York University Press, 2001) 349-366.

³⁰² Mahtani, Minelle, above n 22, 114-8; Lorna, Roth, 'The Delicate Acts of "Colour Balancing": Multiculturalism and Canadian Television Broadcasting Policies and Practices' (1998) 23(4) *Canadian Journal of Communication* <www.cjc-online.ca/index.php/journal/article/view/1061/967>.

³⁰³ See Inter-American Standards, above n 52, [65].

³⁰⁴ Section 2.1.1.1.

³⁰⁵ *Glas Nadezhda EOOD and Elenkov v. Bulgaria* (European Court of Human Rights), Fifth Section, Application No. 14134/02, [48]; See also Salomon above n 141, s 5.52.

maximize their chances of being awarded a licence.³⁰⁶ As explained in Section 2.1.1.1, the more economically powerful applicants have an advantage in comparative hearings because of their capacity to hire professionals to assist them in the preparation of their proposals. Moreover, if no mechanisms are in place to secure compliance with the plans that are presented in the application, the actual performance of the winner may not meet the expectations outlined in its own bid.

Even when the applicants are completely sincere in their bids, being commercial services motivated by profits, they may be driven by the market to change their original plans.³⁰⁷ Given the undesirability of direct State intervention in the content decisions of private media,³⁰⁸ it is rarely possible to enforce exact adherence to the plans presented at the licensing stage, especially if securing the financial viability of the services is also a concern.³⁰⁹

2.2.3. Ownership Incentives

As already observed, there may be multiple structural barriers to the access to broadcasting by TDGs and, generally, by the economically disadvantaged.³¹⁰ Special measures can be taken at the licensing stage to counteract the effect of these barriers.³¹¹ In comparative licensing process, decisions makers can be required to favour applicants belonging to underrepresented group. In auction systems, formulas such as special bidding credits, fiscal incentives or payment facilities can be used to favour smaller businesses or bidders belonging to TDGs.

³⁰⁶ See Salomon, *Ibid*, s 5.52

³⁰⁷ Evan, Gahr, 'FCC Preferences: Affirmative Action for the Wealthy' (1993) 9(8) *Insight on the News* 6.

³⁰⁸ See Section 2.1.1.2.

³⁰⁹ The Canadian regulatory authorities have had trouble forcing licensees to comply with their promises of performance when they claim financial distress renders them unable to comply with them. See Task Force on Broadcasting Policy, *Report of the Task Force on Broadcasting Policy* (Amperand Communications Services Inc., 1986) 18.

³¹⁰ See Sections 2.1.1.1 and 2.1.4.1.

³¹¹ See Buckley et al, above n 46, 231.

As is the case with employment rules, ownership incentives can be of great value in the pursuit of equality of economic opportunity. However, they may fail to improve diversity in broadcasting or to ensure that the broadcasting needs of TDGs are addressed. Commercial ownership incentives have been primarily used in the United States and have been widely discussed in academic literature in that country. In *Metro Broadcasting, Inc. v. Federal Communications Commission*, the Supreme Court concluded that, while being owned by a minority member does not guarantee that a station will broadcast any particular type of content, greater diversity in the ownership of broadcast stations contributes generally to the diversity of content and also to the diversity of the workforce.³¹² However, the ownership measures have been identified as having limited effectiveness in producing the desired outcome.

Various authors have identified the common incidence of sham applications in which members of the groups favoured by the ownership incentives (women, ethnic minorities and indigenous peoples) were presented as fronts during the application process, but were later found not to be the persons in actual control of the stations.³¹³ In addition, it has been noted that in many cases the bidding incentives in auctions have succeeded only in creating more competition for majority applicants, forcing them to bid closer to their reserve prices in order to obtain licences, but not resulting in the issue of licences to the intended beneficiaries.³¹⁴

Even when stations do end up under the actual control of the intended beneficiaries of the ownership incentives, the effectiveness of the measures is limited by the nature of commercial broadcasting. Given this nature, the market is likely to be more influential than the personal preferences of owners in determining the output of commercial

³¹² *Metro Broadcasting Inc. v. Federal Communications Commission et al.*, 497 U.S. 547 (1990), [580]-[581].

³¹³ Baynes, above n 248, 272-3.

³¹⁴ Buck, Stuart, 'Replacing Spectrums Auctions with a Spectrum Commons' (2002) 2 *Stanford Technology Law Review* [120] <stlr.stanford.edu/STLR/Articles/02_STLR_2>; Ayres, Ian and Peter Cramton, 'Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition' (1996) 48(4) *Stanford Law Review* 761.

stations.³¹⁵ To an even greater extent than employment rules, ownership incentives are limited in that they can only create access opportunities for those who are already relatively wealthy. Moreover, ownership incentives can have an impact only in situations where there is competition for licences; they do not address the reality that some broadcasting services can be necessary but not commercially viable.

2.2.4. Content Quotas

Content quotas can be imposed on private and public service broadcasters through their licence conditions and mandates respectively. The most common type of content quotas are national and local content quotas. National content quotas normally seek to create an incentive for the development of national production industries and protect local culture from foreign influence.³¹⁶ Local content quotas can be used to require broadcasters to address local informational needs where they would otherwise lack the incentive to do so. While local content quotas can be very valuable for this reason, they cannot overcome situations in which local broadcasting services are simply not commercially viable or where the PSB system lacks the resources to address all local needs.

Content quotas can also be used to directly require stations to devote a minimum amount of time to content relevant to TDGs. For example, quotas may be imposed requiring minimum amounts of time to be devoted to content concerning minority or indigenous cultures.³¹⁷ However, compliance with this type of quota is difficult to monitor and enforce. Given the undesirability of governments directly requiring stations to broadcast specific content,³¹⁸ content quotas should be general in nature.³¹⁹ Monitoring compliance with general content quotas is difficult because there is no objective way of defining what constitutes, for example, ‘indigenous content’ or ‘women’s content’.³²⁰ Neither

³¹⁵ Gahr, above n 306; See also, *Steele v. Federal Communications Commission* 770 F 2d 1192 (DC Cir, 1985), [1199].

³¹⁶ Both Australia and Canada have used content quotas for these purposes, Discussed further in sections 4.1.5 and 5.1.2 respectively.

³¹⁷ Buckley et al., above n 46, 174.

³¹⁸ See, Section 2.1.1.2.

³¹⁹ Buckley et al., above n 46, 174.

³²⁰ Michaels, above n 109; Spitzer, above n 254, 330-1.

government authorities nor even members of the group themselves can be given the power to to determine what is to be considered content belonging to a certain group as, even among group members, legitimate disagreements may exist about this.³²¹ By contrast, quotas requiring minimum amounts of time to be devoted to broadcasts in minority languages are much easier to monitor and enforce.

The main limitation of content quotas is that they only address issues related to the insufficiency of national or local content and of content devoted to the needs of TDGs; they do not directly address issues of inequalities in the access to outlets for the exercise of freedom of expression. They may indirectly open some access opportunities, as broadcasters may require the contribution of independent third sector producers in order to fulfil their quotas. However, control over the content to be broadcast remains with the public or commercial broadcasters with the already discussed limitation of the sectors.³²²

Finally, content quotas relating to minority culture programming may be counterproductive to language and culture revival and maintenance efforts. This is because they may give broadcasters an incentive to prioritise content such as documentaries or the rehearsing of traditional materials, which are certain to count toward the quota and which may have greater appeal to the mainstream audience.³²³ This is detrimental to the creation of outlets for the contemporary and innovative cultural productions of minority groups that is necessary for the success of revival and maintenance efforts.³²⁴

2.2.5. Direct Access

Direct access rules require a station to provide access to a specific person or entity. The access can be limited to the provision of air-time and transmission service or it might

³²¹ Michaels, *Ibid.*

³²² See Sections 2.1.1.2.1 and 2.1.1.2.2.

³²³ See Lysaght, Ruth, 'Language Image in National Minority Language Television Idents TG4 (Teilifis na Gaeilge, Ireland) and Whakata Maori (Maori Television, New Zealand)' (2009) 4 *Estudios Irlandeses* 45, 48.

³²⁴ Discussed in Section 2.1.4.1.

include an obligation to provide access to production facilities or even to assist in production. It is difficult to implement direct access rules in order to increase diversity in broadcasting unless there are specific entities which can be considered representative of a specific disadvantaged group. This may be the case for indigenous communities which have directly been granted legal personhood.³²⁵ However, more often than not, there is no such entity.

Apart from the practical difficulties, direct access rules are normally considered to be incompatible with freedom of expression rights of broadcasters, except for political candidates during election periods or for the exercise of the right to reply.³²⁶ Additionally, singling out one or more groups for priority access can constitute discrimination against other disadvantaged groups which are not benefitted by the same rules.

2.2.6. Access Quotas

Access quotas require stations to devote a certain amount of air-time to access to persons or entities within a specific category. They may require stations to devote a certain amount of their broadcast time to content produced by independent community groups from their licence area. Like direct access rules, access quotas may require the station not only to provide the transmission service, but to also provide access to production facilities or directly assist the groups in production. This can be of great value for economically disadvantaged groups which may not be able to produce content by their own means.

Unlike content quotas, access quotas are aimed directly at opening access opportunities. Because they focus on who produces the content instead of its nature, access quotas are easier to monitor and enforce than content quotas. Since stations remain free to choose, among the groups which meet the conditions set in the quota, whose content to carry,

³²⁵ This is the case in a number of countries, for example, Argentina and Bolivia.

³²⁶ See, Buckley et al., above n 46, 175; Access Airwaves, above n 6, Principle 2(3).

access quotas are less burdensome to the freedom of expression rights of broadcasters than direct access rules. However, this may also hamper their effectiveness. Because commercial and public stations retain the power to decide whose content to carry in order to fulfil their quotas, market and political pressures can undesirably influence which groups are granted access.³²⁷

The other limitation of access quotas is that the amount of air-time that commercial stations can be required to devote to access is limited, as any measures which cause excessive detriment to their commercial viability can be considered in breach of their right to freedom of expression.³²⁸ For this reason, air-time which can be allocated for access through quotas may be insufficient to accommodate all groups in need of representation. Additionally, commercial and even public broadcasters are unlikely to be willing to relinquish for access the highest viewership and listenership time slots, which may be precisely the ones in which the intended audiences of the groups who seek access have time to watch or listen.

2.2.7. Public Access Stations

Public access stations are stations that are funded and controlled by the government and which are devoted entirely to provide access opportunities for third sector groups. As explained in Chapter One, this type of station is sometimes confused with TSB stations, but they differ from real TSB outlets in that it is the government, not the third sector actors, which has the power to make decisions about key issues such as the distribution of air-time. Public access stations can be open generally to community groups, to a specific range of groups, or to a single group. For example, an ethnic access stations might be open to all immigrant communities, or a special station may be funded by the government to provide access to a specific indigenous community.

³²⁷ In Venezuela a system whereby the government issues a list of recognised groups which count toward the quotas has been implemented. This could theoretically help ensure that the access rules benefit the intended groups. However, the system has been criticised because it allows the government to exclude groups politically opposed to it from the list.

³²⁸ See Access Airwaves, above n 6, Principle 24(2).

The establishment of public access stations allows more air-time access by third sector actors than is possible through access quotas. Other than that, the strengths and limitations of the two measures are very similar. The public access station model can be of great value for economically disadvantaged groups, as public access stations normally provide access to studio facilities, not only air-time, and personnel from the government or from a public service broadcaster may also assist in production. However, the government control over the access and the potential influence it can exercise over content are potential limits to the effectiveness of this measure.

Public access stations can be established as a means for the government to appease claims for the establishment of independent stations and thwart discussion on topics which are controversial or uncomfortable.³²⁹ Even if this is not the case, governments may be reluctant to permit controversial topics to be discussed on access stations, for fear that their provision of transmission and production assistance will be perceived as an endorsement of a certain viewpoint.³³⁰ Distrust on the part of the third sector groups toward the government may also hamper the effectiveness of the station, as they may not feel free to express themselves through an outlet that is government controlled for fear of reprisals.³³¹

The establishment of public access stations, as well as all other measures discussed in this section, has significant potential to contribute to diversity and equality in broadcasting. However, as has been shown, all these measures either have significant limitations which hamper their potential effectiveness or fail to address all of the issues which preclude equality and diversity in broadcasting. Many of these shortcomings can be addressed by

³²⁹ Matsaganis, Katz and Ball-Rokeach, above n 67, 195-6.

³³⁰ For example, Dugdale, Joan, *Radio Power: A History of 3ZZ Access Radio* (Hyland House, 1979), 50-53; narrates the experience of the first public access station in Australia and how the Australian government sought to dissuade the station's administration from providing a separate time slot for the Melbourne Croatian community, at a time where Croats were a national minority within the former Yugoslavia bidding for independence, because the issue made the Australian government uncomfortable.

³³¹ See, Castells I Talens, Antoni, '¿Ni Indígena, Ni Comunitaria? La Radio Indigenista en Tiempos Neoindigenistas [Neither Indigenous, Nor Community? The Indigenist Radio in Neoindigenist Times]' (2011) 15 *Nueva Época* 123.

aiding the development of TSB. The following section details the features of TSB and the advantages it can have over other types of measures.

2.3. Features of Third Sector Broadcasting

The potential of third sector mass media outlets to foster equality in broadcasting has been well recognised by international and supranational bodies. For example, the Committee of Ministers of the Council of Europe has recognised:

the contribution of community media in fostering public debate, political pluralism and awareness of diverse opinions, notably by providing various groups in society – including cultural, linguistic, ethnic, religious or other minorities – with an opportunity to receive and impart information, to express themselves and to exchange ideas.³³²

Similar acknowledgements have been made by the UN Rapporteur on Freedom of Expression,³³³ the OAS Rapporteur on Freedom of Expression³³⁴ and UNESCO.³³⁵ This section will discuss some of the features of TSB in order to illustrate its potential to contribute to diversity and equality in broadcasting and identify its comparative advantages in relation to other types of measures.

2.3.1. Airtime

Along with dedicated access stations, reserving frequencies for TSBs is the measure which makes the most amount of airtime available for access by independent non-commercial actors. If the context is one where market forces incentivize similar output, increasing the amount of non-commercial content in the airwaves can be one of the most

³³² Committee of Ministers of the Council of Europe, above n 3.

³³³ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, *Annual Report to the Human Rights Council*, UN Doc. A/HRC.4/14/23(2010), [66]; See also, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, above n 148, [64].

³³⁴ Inter-American Standards, above n 52, [105].

³³⁵ *Media Development Indicators*, above n 1, 52.

effective ways to improve diversity. Moreover, TSB stations allow for third sector programming to be broadcast during key time-slots that other broadcasters would be unlikely to relinquish for access.

As noted, TSB stations can be operated by a single group or through an access model.³³⁶ Third sector access stations are a valuable alternative, as not all groups have the need for, or the capacity to provide, a full time service.³³⁷ Moreover, time-sharing of a broadcasting frequency by various third sector groups multiplies the number of voices which can be granted access in the same amount of spectrum bandwidth, in comparison to allocating the same frequency to commercial or public broadcasters.³³⁸ While competition among groups, and even within groups, for airtime and control within a third sector access station's administration can develop and interfere with the effectiveness of the service, the lack of government control in comparison to public access stations enhances freedom of expression for the participating groups. Government distribution of air-time may seem simpler. However, the benefit of TSB access stations is that all groups involved in the station are equal. In TSB access stations there are not the differences in power that exist when the government controls access. Government control does not only generate a risk of political abuse but it can also be counterproductive counterproductive to the empowering effect which is pursued through the opening of access opportunities.³³⁹

The devotion of sufficient air-time to the specific needs of TDGs is essential if they are to be adequately addressed. For example, a study by Alcock and O'Brian relating to minority languages in Europe concluded that the survival of a minority language required a minimum of 5 hours of television and 20 hours of radio broadcasting per week in that language.³⁴⁰ In similar vein, Jeffrey found that 'one-off' programmes cannot provide

³³⁶ See Section 1.3.

³³⁷ See, OSCE High Commissioner on National Minorities, above n 245, Art. 15(A).

³³⁸ See for example, Meadows, Michael, et al., 'A Quiet Revolution: Australian Community Broadcasting Audiences Speak Out' (2008) 129 *Media International Australia Incorporating Culture and Policy* 20, 29; Gaynor and O' Brien, above n 215, 24-29.

³³⁹ Discussed further in Sections 2.3.2 and 2.3.3.

³⁴⁰ Alcock, A. and T. O'Brien, *Policies to Support Radio and Television Broadcasting in the Lesser Used Languages of the European Community* (University of Ulster, Northern Ireland, 1980) cited in Valaskakis,

meaningful representation of TDGs and that these groups require regular and on-going representation in broadcasting.³⁴¹ Allocating frequencies for TSB by TDGs ensures that more air-time is devoted to their special programming needs than may be possible through quotas.

Various authors have commented that establishing stations, whether third sector or public, that specialise in serving TDGs risks creating situations of media segregation or ‘apartheid’, and in the case of linguistic minorities, of creating ‘language ghettos’.³⁴² It has also been noted that specialised outlets may be less effective in enabling disadvantaged groups to communicate with majorities and that there is a risk that advocacy efforts made through such outlets will degenerate into ‘preaching to the converted’ situations.³⁴³ While these risks are real, there is evidence that specialised TSB stations can actually have the opposite effect. The potential of TDG TSB stations for positive cross-group communications has been identified by Meadows who, after researching indigenous broadcasting in Australia, concluded:

Despite limited research on the subject, audience studies suggest that some Indigenous media services have significant non-Indigenous audiences, and may play an important cross-cultural role in furthering reconciliation³⁴⁴

It has also been noted that the success of special media in capturing TDG audiences can help commercial outlets to identify the potential of broadcasting for those audiences and, in that way, creates incentives for the mainstream media to also cater to the need of these

Gail ‘Communication, Culture and Technology: Satellites and Northern Native Broadcasting in Canada’, in Stephen Harold Higgins (ed) *Ethnic Minority Media An International Perspective* (Sage Publications, 1992) 63-82, 74.

³⁴¹ Jeffrey, above n 213, 185.

³⁴² See for example Schejter, Amit M., ‘The Stranger That Dwelleth with You Shall Be unto You as One Born among You’ – Israeli Media Law and the Cultural Rights of the “Palestinian-Israeli” Minority’ (2008) 1 *Middle East Journal of Culture and Communication* 156, 176; Wright, Harley, ‘Law, Convergence and Communicative Values on the Net’ (1996) 7(1) *Journal of Law, Information and Science* 54, 60; Camauër, above n 277, 69.

³⁴³ Giles, above n 240, 79.

³⁴⁴ Meadows, Michael, ‘Silent Talking: Indigenous Media Policy and the Productivity Commission’ (2000) 95 *Media International Australia Incorporating Culture and Policy* 29, 42; Giles, Ibid, 77; Levo-Henriksson, above n 234, 60; Committee of Ministers of the Council of Europe, above n 3; *Ethnic Broadcasting Policy*, above n 211.

groups.³⁴⁵ In addition, services controlled by or aimed at minority groups do not necessarily have to only broadcast content solely aimed at those groups. For example, in the case of linguistic minorities, they can choose to broadcast content in mainstream languages through their TSB outlets if they have a desire to reach the wider society.³⁴⁶ However, the power to make these decisions should reside with the minority groups themselves.

In any case, it is not being argued that supporting the establishment of TSBs by TDGs will eliminate the need to adopt measures aimed at increasing the participation of TDGs in commercial or public broadcasting. UNESCO, while acknowledging the importance of third sector media for TDGs, noted that ‘it is also important that minority group issues be reflected in mainstream media as well’.³⁴⁷ In a similar sense Camauër, after researching ethnic media in Sweden, concluded that:

Both majority *and* minority media are vital components of (ethnic) minority groups’ communication environment. In democratic societies, it is vital that citizens who are also members of a minority have their needs met by both kinds of media.³⁴⁸

For the reasons above, even when special TSB services exist to serve TDGs, content and access quotas may still be necessary to ensure that public and commercial broadcasters also fulfil their role in relation to the needs of these groups.

2.3.2. Control

One of the main advantages of TSB is that it provides control over the broadcasting outlets instead of merely access to them.³⁴⁹ As noted by Minore and Hill, although

³⁴⁵ See, Aldea, Patricia Gónzales, ‘Participation in Radio Programmes and Immigration. The Romanian Case’ (2011) 30 *Revista de Științe Politice* 173.

³⁴⁶ Kern European Affairs, above n 54, 6.

³⁴⁷ *Media Development Indicators*, above n 1, 52.

³⁴⁸ Camauër, above n 277.

³⁴⁹ The Australian Aboriginal and Torres Strait Islander Commission has highlighted the importance of offering indigenous peoples control over broadcasting outlets instead of merely access to them. Discussed further in section 4.2.7.2.

providing control over broadcasting technology will never eliminate marginality by itself, it can provide a sense of independence and have a valuable empowering effect.³⁵⁰ In the case of specific TDGs, the importance of control over their own media outlets has been internationally recognised. For example, both the *Universal Declaration on the Rights of Indigenous Peoples* and the *European Framework Convention for the Protection of National Minorities* use the phrase ‘their own media’ when describing the media rights of the groups concerned,³⁵¹ and the UN Rapporteur on Freedom of Expression has highlighted the importance of women having ‘access to their own means of communication’.³⁵²

Numerous academics have also commented on the importance that control over their own media has for TDGs. For example, Higgins has concluded that ‘[it] is essential for minorities to have full control over the financing and administration of their own media’³⁵³ and Jeffrey has noted that such control is valuable because it allows TDGs to exercise true self representation unmediated by outsiders.³⁵⁴ Group members who distrust or do not feel comfortable around outsiders are more likely to participate in stations which are controlled by members of their own group.³⁵⁵ Conversely, it has been noted that government controlled access stations might be distrusted by the community, leading to lower levels of participation.³⁵⁶ Control of media outlets by the groups concerned has also been cited as essential for language and culture revival and maintenance efforts, as these efforts, in all cases, should be led by the groups themselves.³⁵⁷

³⁵⁰ Minore and Hill, above n 216, 111.

³⁵¹ UN, *Declaration on the Rights of Indigenous Peoples* UN Doc A/RES/61/295 (2007) Art. 16(1); *Framework Convention for the Protection of National Minorities*, CETS No. 157 (entered into force 1 February 1998), Art. 9(3); See also, OSCE High Commissioner on National Minorities, above n 245, Art. 8.

³⁵² UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, above n 333, [42].

³⁵³ Higgins, Stephen Harold, ‘The Promise and Limits of Ethnic Minority Media’ in Stephen Harold Higgins (ed) *Ethnic Minority Media An International Perspective* (Sage Publications, 1992) 276-289, 285.

³⁵⁴ Jeffrey, above n 213, 86.

³⁵⁵ See Kadel, Kamala, ‘A Radio by Women for Community: Radio Purbanchal in Nepal’ (2010) 1 *Women in Action* 75, 78.

³⁵⁶ Discussed in Castells I Talens, above n 331.

³⁵⁷ See Levo-Henriksson, above n 234, 58.

There are multiple reasons why governments may be wary of allowing TDGs to have full control over broadcasting outlets. They may fear that minority or indigenous groups will use them to advocate secession or independence³⁵⁸ and it may be difficult for authorities to monitor independent broadcasts in foreign languages they do not understand in order to ensure they are not being used for criminal or subversive purposes or to enforce decency or other types of content standards.³⁵⁹ These concerns may have some validity but they can never justify depriving TDGs of their right to control their own broadcasting outlets. The nature of freedom of expression is such that there is always a possibility of abuse and even its legitimate exercise may generate consequences contrary to State interests.³⁶⁰ However, these are risks that must be borne, as the consequences of denying TDGs freedom of expression have the potential to be much more detrimental.

Of all the measures discussed in section 2.2, only ownership incentives are aimed at broadening access to the control of broadcasting outlets. All of the other measures leave significant amounts of control in the hands of the governments or of the broadcasters, be they public service or commercial. As explained, the effectiveness of ownership incentives is limited by the nature of commercial broadcasting. TSB may be the only means by which groups which cannot support commercially viable services can acquire control over broadcasting outlets. Even if control of a station needs to be shared among various third sector groups in an access station, it is still exercised by each group in conditions of equality, unlike employment rules, quotas or public access stations, where the relationship is one of dependence.

2.3.3. Participation

³⁵⁸ Matsaganis, Katz and Ball-Rokeach, above n 67, 195.

³⁵⁹ See, Griffen-Foley, Bridget, 'From the Murrumbidgee to Mamma Lena: Foreign Language Broadcasting on Australian Commercial Radio, part I' (2006) 30(88) *Journal of Australian Studies* 51, 54.

³⁶⁰ In this regard it is important to recall that ECtHR have recognized that even the advocacy of secession is protected by freedom of expression as long as it does not constitute a direct incitement to violence (*Stankov and the United Macedonian Organization Ilinden v. Bulgaria* [2001] IX Eur Court Hr 273, [97]).

One of the most significant features of TSB is that it allows for the highest level of participation by the communities served.³⁶¹ As already noted, the participatory ideal of community broadcasting is for the members of the community served to be in charge of all aspects of the broadcasting service including: ownership, management, content production (including the technical aspects) and programme scheduling.³⁶² As explained in Chapter 1, not all forms of TSB follow this ideal. However, TSB is the only one of the three broadcasting sectors which allows for this level of participation. As Day explains, because of their nature, ‘commercial radio and public service radio cannot and do not attempt to provide that extensive a range of participation opportunities’.³⁶³ A wider range of participation opportunities means that more persons in general can get involved in the service and exercise at least some degree of influence over it. This multiplies the number of voices whose freedom of expression is enhanced by the establishment of a single station.

Participation opportunities are also opportunities to develop and demonstrate skills. This can be of great benefit for disadvantaged members of society and facilitate their access to employment in multiple fields. In particular, participation in TSB can help members of disadvantaged groups access employment in the mainstream media, which can generate a positive ripple effect.³⁶⁴ General media literacy skills developed through participation in TSB can also be of great value in human rights advocacy, as they enable community groups to be more effective when conducting campaigns relating to their rights and needs in the mainstream media.³⁶⁵ Participation in the technical aspects of TSB services has also been identified as being able to challenge the phenomenon known as ‘technophobia’

³⁶¹ Day, Rosemary, *Community Radio in Ireland: Participation and Multi-Flow Communication* (Hamptom Press, 2009), 124-40 classifies community participation in broadcasting outlets in seven levels, from highest to lowest: ‘Full and active participation’, ‘Self-Management’, ‘Participation’, ‘Mediated Participation’, ‘Controlled Participation’, ‘Controlled Access’ and ‘Reactive Access’. Of these, she concludes that only TSB allows for the three highest levels of participation. Public access stations and access quotas can allow, at the best, only for ‘Mediated Participation’.

³⁶² Discussed in Section 1.3.1

³⁶³ Day, above n 361, 121.

³⁶⁴ Kern European Affairs, above n 54, 7.

³⁶⁵ Ibid.

which may afflict elders as well as women in cultures in which technology is perceived exclusively as a male field, greatly improving the lives of these persons.³⁶⁶

There may be concerns that the groups will lack the capacity to fully manage all aspects of a broadcasting service on their own and that the services will fail if not under the direction of professionals.³⁶⁷ The risk for a service to fail always exists regardless of the model followed. However, in the case of the most disadvantaged groups success may be impossible without government support through financial and technical resources and training. This demands more resources than the imposition of access quotas, as it requires mainstream broadcasters to provide facilities and technical support to TDGs and, in the short term, may be even more expensive than establishing a public access station. However, the resources needed to support TSB stations tend to reduce as the capacity of the communities to manage them improve; in the most successful cases, stations can even become self sustaining. In any case, the resources demand needs to be weighed against the significant potential benefits of higher levels of participation. In addition, and as Higgins has correctly noted, recognizing the capacity of a community, especially a traditionally disadvantaged one, by trusting it to fully manage its own broadcasting service can have, in itself, a very valuable legitimizing and empowering effect.³⁶⁸

2.3.4. Barriers to Participation

In addition to the possibility of opening a higher number of participation opportunities, TSB lowers the barriers to participation in comparison to other types of measures. In the present environment there will always be persons excluded from mass communication; not even the best broadcast policy can do much for the freedom of expression of the homeless or the starving.³⁶⁹ Even if TSB can significantly enhance the freedom of expression of TDGs, the most disadvantaged members of the groups may still end up

³⁶⁶ King, Donna L. and Christopher Mele, 'Making Public Access Television: Community Participation, Media Literacy and the Public Sphere' (1999) 43(4) *Journal of Broadcasting and Electronic Media* 603, 615; Jeffrey, above n 213, 107-13.

³⁶⁷ See Dugdale, above n 330, 12-13.

³⁶⁸ Higgins, above n 353, 284.

³⁶⁹ Evan, above n 306.

without a real opportunity to participate. As Jeffrey explains, ‘in practice, access can never be truly equal because of the unequal positioning of potential participants within their own community’.³⁷⁰ However, the impossibility of making participation in broadcasting available to all is not a reason not to attempt to make participation accessible to as many as possible.

As already observed, one of the main limitations of ownership incentives and employment rules is that they can open opportunities only for those who already have the financial resources or the skills necessary to own broadcasting outlets or to work in them. The book ‘Shouts in the Chorus of Ladies’ notes that the value of TSB is not so much that it allows for the participation of women, as women do participate in the mainstream media, but that it opens participation opportunities for women who could never find them in the mainstream media, stating: ‘community radios facilitate the access of girls and older women; academics, students or illiterate; with or without prior experience in the media’.³⁷¹ (Translated from Spanish by the author)

Content and access quotas are similarly limited in that commercial broadcasters tend to prefer professional content which approximates mainstream production standards. This presents a barrier for the participation of amateur community producers with limited resources. Public service broadcasters who acquire content with public funds may be bound to quality standards which are also incompatible with amateur community productions.³⁷² While TSB is not necessarily synonymous with amateurism and low production standards, the nature of the sector allows third sector broadcasters to prioritize access and diversity over production quality in ways commercial broadcasters are

³⁷⁰ Jeffrey, above n 213, 188.

³⁷¹ AMARC, *Gritos en el Coro de Señoritas La Apropiación del Rol Político de las Mujeres A Través de los Medios* (Shouts in the Chorus of Ladies The Appropriation of the Political Role of Women Through the Media) (AMARC, Buenos Aires, 2008), 27.

³⁷² The British Broadcasting Corporation (BBC) is often considered the first and most successful public service broadcaster; for this reason many other public service broadcasters attempt to emulate its model. However, the BBC model considers among the main roles of public service broadcasters to provide the public with the highest quality of content possible which can be incompatible with the provision of access to amateur producers. See Rennie and Featherstone, above n 175; See also Jeffrey, above n 213, 17.

unlikely to and which public service broadcasters may be impeded from doing because of their mandate.³⁷³

Only public access stations can be considered to facilitate participation in a manner comparable to what can be achieved through TSB. However, government control can be a barrier in itself, as access may end up being dependent on government recognition as a group. In addition, disadvantaged groups within disadvantaged groups, such as women or LGTB persons from immigrant or minority communities, may also be unable to find participation opportunities in government access stations, which may prioritise official representatives or recognised community leaders. These persons may find access to participation difficult even in TSB stations, but independent outlets generally tend to be more inclusive than government controlled ones.³⁷⁴

2.3.5. Localism

As explained in Section 1.3.1, TSB is not always local in nature, nor should it be required to be.³⁷⁵ However, TSB can be a valuable means of securing a private local broadcasting service in areas which are of no interest to commercial broadcasters because broadcasting is not commercially viable.³⁷⁶ Since PSB also do not always possess the resources necessary to provide local services to all communities, TSB may be the only alternative to ensure that at least one local broadcasting service is available. TSBs that rely on volunteers can be particularly cost-effective to establish as a first level service in underserved communities.³⁷⁷

Even when local services from the other sectors exist, the nature of TSB stations allows them to operate at higher levels of localism than is practical for other types of

³⁷³ Day, above n 361, 122.

³⁷⁴ Jeffrey, above n 213, 189.

³⁷⁵ See Buckley et al., above n 46, 212.

³⁷⁶ The need to provide local broadcasting services where not commercially viable has been a main impetus behind TSB development in Australia and Canada. Discussed in Sections 4.1.9 and 5.1.10 respectively.

³⁷⁷ This has been identified as one of the main reasons Governments have supported indigenous TSB in both Australia and Canada. This is discussed in Sections 4.2.7.2 and 5.2.4.3 respectively.

broadcasters.³⁷⁸ Being closer to the communities served, both physically and in terms of the content output, allows TSB stations to incentivize participation and empower communities at grassroots levels that commercial and public outlets are unable to reach.³⁷⁹ Local TSBs have also been observed to facilitate organisation at the community level, serving as starting points for community cooperation initiatives.³⁸⁰ TSB stations operating at the most local levels may also be the only outlets which allow groups such as indigenous communities to broadcast content by and for themselves without having to be concerned about whether it can be understood by wider audiences or whether it constitutes a positive representation of their group.³⁸¹ These stations can also help disseminate more localised information, which is of great value for groups such as immigrant and LGBT persons, who have special need of information about their local communities and the support services available to them locally.³⁸² TSBs have also been identified as valuable outlets for local artists and cultural producers, thereby assisting them in the exercise of their right to participate in cultural and artistic life.³⁸³ Finally, the strong links that a TSB station can develop with the community it serves can make local TSBs the most effective outlets for government programs that require community outreach, such as those relating to crime or disease prevention.³⁸⁴

2.3.6. Legal Protection

³⁷⁸ See Day, above n 361, 123.

³⁷⁹ Ibid, 123; See also Chávez, María Eugenia, 'Women in Community Radio in Mexico: Contributing to Women's Empowerment' in Marcelo Solervicens (ed) *Women's Empowerment and Good Governance Through Community Radio Best Experiences for an Action Research Process* (AMARC, 2008) 101-105, 105.

³⁸⁰ See for example, Chia, Joy, 'Engaging Communities Before an Emergency: Developing Community Capacity Through Social Capital Investment' (2010) 25(1) *The Australian Journal of Emergency Management* 18.

³⁸¹ Discussed in Rennie and Featherstone, above n 175.

³⁸² See for example Jeffrey, above n 213, 136; Meadows et al., above n 185, 78-80, 82-84.

³⁸³ See, Fairchild, Charles, 'The Grinding Gears of a Neo-Liberal State: Community Radio and Local Cultural Production' (2006) 39(2) *Southern Review* 61; Friz, Anna, 'Re-Enchanting Radio' (2008) 48(1) *Cinema Journal* 138; Meadows et al., Ibid, 39.

³⁸⁴ See for example, Parker, Terry and Praeger, Megan, 'Commonwealth Local Government Forum Pacific Project' (2008) 11(1) *Commonwealth Journal of Local Governance* 137, 142-3; National Broadcasting Commission (Nigeria), 'Community Radio: An Essential Tool for Achieving the Government's Seven Point Agenda' (Paper presented at A Policy Dialogue on Community Radio in Nigeria, 2009); Stevens, Neville *Review of Australian Government Investment in the Indigenous Broadcasting and Media Sector 2010* (2011) <arts.gov.au/sites/default/files/pdfs/broadcasting-review.pdf>

A limitation of all of the measures discussed in section 2.2 is that they are ultimately dependent on the will of the government to create and maintain them. All of them risk being undermined if the political will which led to their establishment shifts direction. Even if the measures are not actually revoked, iminished interest in the enforcement of quotas and employment rules and in the allocation of resources to public access stations can seriously impair their effectiveness. TSB is not totally independent of political vicissitudes; its effectiveness can be greatly impaired if political support diminishes.³⁸⁵ However, if IHRL standards are respected, licences for private broadcasters, including TSB licences, must be issued for a specific term and cannot be revoked arbitrarily during that term.³⁸⁶ This means TSB stations cannot be arbitrarily closed without violating IHRL. While IHRL may be limited in its enforcement mechanisms, the amount of legal protection it affords may be sufficient to allow TSBs to subsist even if the political environment turns hostile toward independent voices, providing an essential outlet when it is needed the most.

The legal status of TSBs, as well as all the other features of TSB discussed throughout this section, means supporting the development of the sector should be seriously considered by policy makers aiming to address issues of inequality and lack of diversity in broadcasting. Even when other measures have also been adopted, the features of TSB means it can complement these other measures by addressing their limitations. The next section discusses how the development of TSB can be supported.

2.4. How Third Sector Broadcasting can be Supported

Persons wishing to seek audiences through broadcasting for not-for-profit reasons have the same rights as those wishing to do so in the pursue of profits.³⁸⁷ For this reason,

³⁸⁵ See Fairchild, Charles, *Community Radio and Public Culture: Being an Examination of Media Access and Equity in the Nations of North America* (Hampton Press, 2001), 100.

³⁸⁶ See Inter-American Standards, above n 52, [74]-[76].

³⁸⁷ See in this relation Committee of Ministers of the Council of Europe, *Recommendation to Member States on the Legal Status of Non-Governmental Organizations*, Recommendation CM/REC(2007)14, Art.

access to broadcasting activity must not be restricted to commercial entities; persons seeking to exercise their freedom of expression through the airwaves for non commercial reasons should not be forced to use forms of legal organization designed for commercial activity which may be inadequate for their purposes.³⁸⁸ Because they have the same rights, not-for-profit actors should, at least, be allowed to access licences and participate in broadcasting on the same terms and conditions as commercial entities. However, the potential of TSB to contribute to the fulfillment of human rights makes desirable for States to recognize the sector as a different category from commercial broadcasting and provide support to it. As already noted, supporting TSB is one way in which States can fulfil their positive obligations under IHRL. This section looks at some of the ways in which TSB can be supported.

2.4.1. Free Access to Spectrum or Concessionary Fees

As will be discussed in Section 3.1.2 an exclusive right to use a radio frequency for any purpose has a significant economic value. In this context, it is not unreasonable to require commercial broadcasters to pay fees in proportion to the profits they are expected to derive from the exclusive exploitation of their radio frequencies.³⁸⁹ However, the not-for-profit nature of TSBs should be considered when determining what fees, if any, would be required for them in exchange for the use of a radio frequency. In order to support the sector, TSBs can be provided with free access to frequencies or be charged fees which are limited only to what is necessary for the licensing authority to recoup its administrative costs.³⁹⁰

Providing a concession of this kind to TSBs represents a financial sacrifice for States, namely, the forfeiting of the higher fees they could collect by licensing the same

5 which acknowledges that “NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them”.

³⁸⁸ See Inter-American Standards, above n 52, [106].

³⁸⁹ As the State is forfeiting the opportunity to allocate the spectrum for a different purpose. Discussed further in Sections 3.2.1.3 and 3.2.1.4.

³⁹⁰ See Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4.

frequencies to commercial broadcasters or, as will be discussed in Section 3.1.2. by allocating them for purposes other than broadcasting. However, the potential of TSB to contribute to the fulfillment of human rights justifies such sacrifice. In addition, and as has been noted, TSBs can sometimes deliver services that publicly funded broadcasters have an obligation to provide but which they are not capable of providing.³⁹¹

2.4.2. Separate Licensing Procedure

As noted in Section 2.1.1.1, applicants with better financial resources normally have an advantage when competing for broadcast licences. This is the case even if the licensing system is merit-based and does not contemplate financial capacity as a licensing criterion. As commercial actors are usually in a stronger financial position than third sector groups, providing a separate licensing process for TSBs that do not require prospective licensees to directly compete with commercial actors can be a way to support the sector. For this purpose, a specific spectrum reserve can be made for TSB. This is discussed further in Section 6.2.2.

In addition to supporting the sector, separating the licensing processes for the two sectors has practical benefits. Weighing the merits of proposals for commercial and non-commercial broadcasting services in the same licensing process can be difficult for licensing authorities, as the goals and purposes of the services are completely different in nature.³⁹² In this sense, separating the processes can make the labor of licensing authorities easier. In addition, separating the processes allows using a different system such as an auction system, if this is deemed preferable for the licensing of commercial broadcasters, without affecting TSBs for whom such system is not appropriate.

2.4.3. Simplified Licensing Process

³⁹¹ See Section 2.1.1.2.1.

³⁹² The Canadian licensing authority has acknowledged that the need to decide between commercial and TSB services in the same processes has presented a challenge. Discussed further in Section 5.3.2.2.

In addition to having separate licensing processes for TSBs and commercial broadcasters, TSBs can also be supported by having a simplified licensing process. Since third sector actors normally have limited resources, establishing a licensing system that does not require them to hire legal or engineering experts in order to apply for licences can greatly aid the development of the sector.³⁹³ In addition, the possibility exists to completely exempt TSBs from the licensing process in certain areas where the competition for licences is not high.³⁹⁴ This possibility is discussed further in Section 6.2.7.

2.4.4. Government Funding

An evident way in which TSBs can be supported is by directly providing them with public funding. Government funding can be provided for the sector through a diverse range of mechanisms such as the issuing of grants for TSBs or prioritizing them for the placement of paid government advertising. Government funding can be incredibly valuable for the sector and the investment is justified because of its potential. However, concern also exists that government funding practices could be abused in order to compromise the independence of TSBs. This issue is discussed further in Section 6.4.1

2.4.5. Special Measures to Support Third Sector Broadcasting by Traditionally Disadvantaged Groups

In addition to supporting TSB in general, special measures can be adopted to support TSB by specific groups which have special needs in relation to broadcasting or who face additional barriers to their participation in the activity. In this respect, all of the measures discussed in the previous sub-sections can be used to support specific forms of TSB. For example, TSBs serving TDGs can be prioritized for government funding or the process for licensing services aiming to serve TDGs can be separated from that of TSBs aiming to serve general audiences. Whether any specific groups require such special

³⁹³ Inter-American Standards, above n 52, [66].

³⁹⁴ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 38, Art. 3(d)(ii).

consideration will depend on each context. Section 6.8 discusses reasons why it may be desirable to distinguish between different types of TSBs including prioritizing some for support.

2.4.6. The Relationship between Support and Regulation of Third Sector Broadcasting.

As shown throughout this section, there are multiple ways in which States can support the development of TSB in recognition of the role the sector can play in the fulfillment of human rights. In principle, not-for-profit actors should not be discriminated in broadcasting in relation to commercial ones. Since commercial and not-for-profit actors have an equal right to freedom of expression, when all conditions are equal the regulation of commercial broadcasters and not-for-profit broadcasters should also be equal.³⁹⁵ However, when TSB has been recognized as its own broadcasting category and TSBs have benefitted from special measures of support, then this may provide justifications for imposing special regulation upon TSBs. For example, regulation may be implemented in order to prevent any concessions from being exploited for purposes other than those for which they were granted or to ensure that the goals pursued through the supportive policies are effectively met. The following Chapter discusses the possible justifications for the special regulation of TSB and elaborates on this point.

³⁹⁵ See Inter-American Standards, above n 52, [112].

Chapter 3 - Why Regulate Third Sector Broadcasting

In the previous chapter it was explained that for-profit and not-for-profit actors have an equal right to participate in broadcasting and, thus, law and regulation should normally treat them equally. However, it was also explained that TSBs have great potential to contribute to the fulfillment of internationally recognized human rights which can justify special measures of support. Some of the ways in which TSBs can be supported were discussed in Section 2.4. In this chapter, it will be argued that TSBs can be justifiably subjected to special requirements or restrictions that are different or additional to those that apply to commercial broadcasters, but only under two conditions: that TSBs have benefitted from measures of support and that the special regulation pursues legitimate goals. The chapter will also identify and examine the policy goals that can provide valid justification for the special regulation of TSBs.³⁹⁶

The chapter is divided into four sections. Section 3.1 will explain why it is not acceptable under international human rights law for any broadcasting regulations to be arbitrary and, thus, why a valid justification is necessary for any special regulations imposed upon TSBs. Section 3.2 outlines the rationales most commonly employed to justify the special regulation of broadcasting in relation to other communication mediums and analyzes to what degree, if any, these rationales provide bases for the implementation of additional or different regulation for TSBs in comparison to other broadcasters. Section 3.3 identifies the goals most commonly pursued by regulation that are specific to commercial or public broadcasters and contrasts them with those pursued by the special regulation of TSBs. Finally, Section 3.4 details the goals most commonly pursued by TSB regulation and analyzes whether they justify subjecting TSBs to restrictions or requirements over and above those that apply to other sectors of broadcasting.

³⁹⁶While commercial broadcasters and TSBs are controlled by private entities with equal freedom of expression rights, State broadcasters, being public entities, are different in nature. For this reason the chapter will primarily focus on assessing the validity of differentiating between commercial and TSBs in regulation.

3.1. Broadcasting Regulation, Including the Special Regulation of Third Sector Broadcasters Requires Justification

In Section 2.4 it was argued that third sector actors and commercial actors have equal rights to participate in broadcasting and, thus, that third sector actors should be allowed to participate in broadcasting, at the least, under the same conditions as commercial broadcasting enterprises. This means that TSBs should not be arbitrarily subjected to restrictions or requirements over and above those that apply to commercial broadcasters. This point has also been made by the OAS Special Rapporteur on Freedom of Expression who has noted:

The mere legal recognition of access to a license is not enough to guarantee freedom of expression if there are discriminatory or arbitrary conditions on the use of licenses that severely limit the ability of the private non-profit sectors to utilize the frequencies, as well as the general public's right to receive the broadcasts. The right to freedom of expression recognized in Article 13 of the American Convention prohibits the placing of arbitrary or discriminatory limits on the use of community broadcast licenses.³⁹⁷

However, an argument that is sometimes made in relation to the regulation of broadcasting is that States' ownership of the radio frequency spectrum empowers them to authorize or negate the right to transmit radio signals to any persons for any reasons and impose any conditions they desire upon those authorized to transmit.³⁹⁸ The basis for this argument is that States have sovereignty over the air space of their territories, which is the space through which radio waves travel.³⁹⁹ Accordingly, as a matter of territorial sovereignty, terrestrial broadcasters who transmit radio signals via the spectrum are subject to any regulations States decide to impose as a condition for authorizing them to

³⁹⁷ Inter-American Standards, above n 52, [112].

³⁹⁸ See Spitzer, above n 252, 991 and 1028-9; Thierer, Adam, 'Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age' (2007) 15 *CommLaw Conspectus* 431, 441.

³⁹⁹ However, this sovereignty is limited by States' obligations under the system of the International Telecommunications Union.

transmit. Under this view, no justification is necessary for applying different regulation to different types of broadcasters. States are entitled to specify different conditions for different broadcasters which each must accept in exchange for the authorization to transmit through the spectrum.

The above argument is, however, not valid as ‘spectrum’ in this context refers simply to the range of electromagnetic frequencies considered viable for radiocommunication purposes.⁴⁰⁰ In reality:

Spectrum does not exist in a physical sense, but rather is a conceptual tool used to organize and chart a set of physical phenomena associated with electromagnetic radiation.⁴⁰¹

The physical space through which radio waves travel is nothing more than the atmosphere, the same space through which the sound waves produced in verbal speech travel. If States’ sovereignty over the air-space justified the imposition of any kind of regulation upon broadcasters, then it must follow that such sovereignty would also empower them to impose any regulation over verbal speech, which would be patently incompatible with freedom of expression.⁴⁰²

As was explained in Section 2.1.1.1, the right to freedom of expression includes a right for persons to seek an audience through the medium of their choice. The ability to engage in radio transmissions forms part of this right. As will be discussed in the following sections, there may be valid justifications to restrict the right of persons to engage in radio transmissions, including through a licensing system. There can also be valid reasons to subject broadcasting to special regulation in comparison to

⁴⁰⁰In a broader sense, spectrum refers to the entire range of frequencies of electromagnetic radiation which, in addition to radio waves, includes x-rays, gamma rays and other types of waves. However, in relation to telecommunications ‘spectrum’ is used only to refer to what is known as radio waves, which are defined in the International Radio Regulation, by convention, as waves of frequencies lower than 3000GHz [See Productivity Commission, *Broadcasting*, Report no. 11 (AusInfo, 2000) 52 n 1].

⁴⁰¹ KB Enterprises LLC, *Spectrum Auctions in Developing Countries: Options for Intervention*, Open Society Institute (2009), 2.

⁴⁰² See Buck, above n 314, [1]-[3].

communications conducted through other mediums. However, there is no blanket justification that will authorize the imposition of any kind of measure whatsoever. Broadcasting regulation cannot be discriminatory or arbitrary. In order for it to be valid under IHRL, any restriction or regulation implemented requires a justification. This includes regulatory distinctions between different categories of broadcasters.

As was discussed throughout Chapter 2, the potential of the TSB sector to contribute to the fulfillment of internationally recognized human rights can validate distinctions which provide more favourable treatment to TSBs broadcasters. The remaining sections of this Chapter will ascertain what justifications exist for regulatory distinctions which impose additional burdens upon TSBs.

3.2. Justifications for the Regulation of Broadcasting

Broadcasting, in general, is normally subjected to special regulation that is not imposed on communications through other mediums. This section will explain the arguments most commonly employed to justify such regulation. The goal of the section is not to assess the validity of these arguments as bases for the special regulation of broadcasting in comparison to other mediums. Instead, the objective is to determine whether, if accepted as valid for those purposes, the same rationales also provide bases for subjecting third sector broadcasters to special regulation in comparison to commercial broadcasters.

3.2.1. Broadcast Licences as a Privilege

3.2.1.1 Justifications for a Licence Requirement in Broadcasting

In this section, the term ‘broadcast licence’ will be used to refer to an authorization to engage in radio transmissions for the specific purpose of delivering broadcasting services.⁴⁰³ As noted in Section 2.1.1.1, restricting broadcasting through a licensing

⁴⁰³ The term ‘broadcast licence’ will be used in this sense for the sake of brevity. However, it should be noted that sometimes ‘broadcast licence’ is used to refer only to an authorization to produce content for

system is a restriction on freedom of expression. However, this restriction has been accepted under IHRL. The freedom of expression article of the ECHR Article 10, expressly states: ‘This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises’.⁴⁰⁴ While no similar wording can be found in the texts of the ICCPR, the ACHR or the ACHPR, the monitoring bodies of the respective systems have made reference to the practice of broadcast licensing without questioning its validity.⁴⁰⁵ In contrast, imposing licence requirements on other types of media, such as print or the internet, has been opposed by the freedom of expression rapporteurs of the four international human rights protection systems through joint declarations.⁴⁰⁶

Neither the texts of IHRL treaties, nor the pronouncements of monitoring or enforcement bodies, have provided a detailed explanation of the reasons why the licence requirement is acceptable. However, the issue has been widely debated academically and in domestic jurisdictions. One justification provided for restricting entry through a licensing system is the concern that excessive competition in broadcasting could be detrimental to the viability and quality of services.⁴⁰⁷ However, the most commonly invoked and accepted justification for imposing a licence requirement upon those interested in broadcasting is the need to rationalize access to the spectrum.⁴⁰⁸

The problem of ‘interference’ is often cited as the reason why the ability to engage in broadcasting (and radio transmissions in general) needs to be restricted. Interference

broadcasting purposes and a different type of licence or authorization is required to make radio transmissions. This, for example, may be the case where a multiplex system is used for digital broadcasting. See Section 6.1.3.

⁴⁰⁴ ECHR, above n 150, Art 10.

⁴⁰⁵ See for example Inter-American Commission on Human Rights, Press release 29/07; African Declaration, above n 5, Art. V(2).

⁴⁰⁶ See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, *Joint Declaration On the Regulation of the Media, On the Restrictions to Journalist, and On Investigating Corruption* (2003); UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4.

⁴⁰⁷ *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 402 (1969); See also Warren, Christopher, ‘The Price of Freedom: New Media Ownership Laws and a Free Australian Press’ (2007) 13(1) *University of New South Wales Law Journal Forum* 40, 42.

⁴⁰⁸ See for example *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 389 (1969); UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4.

occurs when multiple parties transmit simultaneously in the same frequency through the same space and render each other's signals impossible to decode by their intended receivers.⁴⁰⁹ The most common mechanism for dealing with this problem is the establishment of a system where engaging in radio transmissions is generally prohibited and authorizations to transmit in determinate frequencies are issued to specific actors by way of exception. Normally, the demand for authorizations exceeds the available frequencies. For this reason, States may opt to issue transmission authorizations that specify the purpose for which they may be used, for example, telecommunications or broadcasting.⁴¹⁰ This is a means whereby governments can ensure that frequencies are distributed among different types of services in accordance with their policy goals.⁴¹¹ In this sense, a system where a limited number of licences are issued for broadcasting purposes restricts participation in broadcasting to the few privileged by licences, but also guarantees that at least some frequencies will be devoted to broadcasting.

If it is accepted that the threat of interference requires transmission rights to be distributed among a limited number of actors and that the availability of certain services needs to be ensured, then a system of requiring specific licences for specific spectrum related activities such as broadcasting is justified. However, these premises are not universally accepted, as is discussed in the following sub-sections.

3.2.1.2. The Spectrum Commons Model as an Alternative to Licensing

The 'spectrum commons' model deals with the interference problem through the establishment of technical standards for the transmission and reception devices which allow multiple users to transmit on the same frequencies without preventing the decoding of each other's signals.⁴¹² Under this model, no prior authorisation is required for radio

⁴⁰⁹ See International Telecommunications Union, Radio Regulations, Edition of 2012, art. 1(166).

⁴¹⁰ Some frequencies are also reserved by international agreement for purposes such as communications with air planes and sea vessels.

⁴¹¹ As noted in Section 2.1.6, ensuring a reasonable amount of frequencies is devoted to broadcasting is a requirement of IHRL in contexts in which terrestrial broadcasting remains relevant for the fulfillment of the populations' human rights.

⁴¹² For an introduction to the spectrum commons model See for example Buck, above n 314; Benkler, Yochai, 'Overcoming Agoraphobia: Building The Commons of the Digitally Networked Environment'

transmissions. Instead, any person is allowed to transmit over the air provided their equipment complies with the established standards. Adopting a spectrum commons model would eliminate the rationing of access to the spectrum through a licence system.

Elements of the commons model can coexist with a traditional licensing system. Examples of ways in which this can occur include: designating some frequencies on which transmission is permissible for all without the requirement of a licence;⁴¹³ authorising the use of certain transmission devices that are compliant with specific standards without the requirement of a licence;⁴¹⁴ or allowing transmission in frequencies assigned to specific users, as long as no harmful interference is caused to licence holders.⁴¹⁵

Despite innovations of this kind, the technical viability of a true spectrum commons model is a highly contested point among communications' technology experts. Debate centres on whether current technology could allow the major spectrum reliant services, such as broadcasting or cellular communications, to be successfully delivered without granting exclusive transmission rights on determinate frequencies to specific providers.⁴¹⁶ Some argue that even if the commons system is not currently viable, technological developments could make it so in the future.⁴¹⁷ Others, however, maintain that some type

(1998) 11(2) *Harvard Journal of Law & Technology* 287; Noam, Eli, 'Beyond Spectrum Auctions: Taking the Next Step to Open Spectrum Access' (1997) 21(5) *Telecommunications Policy* 461.

⁴¹³ These are often called 'unlicensed bands'. See for example El-Moghazi, Mohamed Ali, Fadel Digham and Elsayed Azzouz, 'Radio Spectrum Policy Reform in Developing Countries' (Paper presented at 3rd IEEE Symposium on New Frontiers in Dynamic Spectrum Access Networks, 2008), 4.

⁴¹⁴ A successful example of this practice are devices based on Bluetooth technology which transmit radio signals in high frequency and with low power, which renders interference with other signals virtually impossible (Buck, above n 314, [89]).

⁴¹⁵ See for example El-Moghazi, Digham and Azzouz, above n 413.

⁴¹⁶ See for example Noam, above n 412; Benkler, above n 412; In the negative See Hazlett, Thomas W., 'Optimal Abolition of FCC Spectrum Allocation' (2008) 22(1) *Journal of Economic Perspectives* 103.

⁴¹⁷ See for example Ryan, Patrick S., 'Wireless Communications and Computing at a Crossroads: New Paradigms and Their Impact on Theories Governing the Public's Right to Spectrum Access' (2005) 3(2) *Journal on Telecommunications & High Technology Law* 239; Yugushi, Kiyotaka, 'Impact of Cognitive Radio Technology on Spectrum Management Policy' (Paper presented at International Telecommunications Society 17th Biennial Conference, 2008) <www.imaginar.org/its2008/184.pdf>.

of exclusive rights system will always be necessary, regardless of improvements to transmission and reception devices.⁴¹⁸

While the debate remains ongoing, the reality is that a true spectrum commons system, where the need to obtain a licence is completely eliminated for all types of transmissions, has never been implemented in practice. For this reason, the implications for broadcasting regulation of a theoretical scenario in which any person is free to engage in radio transmissions for the purpose of broadcasting without requiring prior authorization will not be explored further in this thesis.

3.2.1.3. Market Based Distribution of Spectrum and Service Neutral Frequency Rights

Most economists are in favour of basing spectrum distribution on market principles.⁴¹⁹ In 1959 Ronald Coase published an article advocating permanent property rights over the broadcast spectrum of the United States to be auctioned to the highest bidder.⁴²⁰ This set the basis for what is known as the 'property rights' model for spectrum access distribution. Under this model, the right to transmit on specific frequencies becomes a form of private property and the owners are free to use them for any legal purpose or not use them at all, and to transfer or lease them to any other party. Alternatively, if permanent property rights are not granted, temporary 'property-like' rights can be issued where persons are still allowed to use the assigned frequencies for any purpose and trade their rights with other persons, but the rights have a specified duration.⁴²¹ Whether rights are permanent or temporary, the goal is to transfer decisions about how radio frequencies are used from governments to the free market. If frequency distribution is market based and service neutral, then the requirement to apply for specific licences to engage in

⁴¹⁸ See for Example Hazlett, above n 416, 121-2; Faulhaber, Gerald and David Farber, 'Spectrum Management: Property Rights, Markets, and The Commons', 26-7 <www.ictregulationtoolkit.org/en/Publication.3629.html>.

⁴¹⁹ See for example, KB Enterprises LLC, above n 401; Cramton, Peter, 'Spectrum Auctions' in Martin Cave, Majumdar Sumit and Ingo Vogelsang (eds), *Handbook of Telecommunications Economics* (2001) 605-639; Hazlett, above n 416.

⁴²⁰ Coase, Ronald, 'The Federal Communications Commission' (1959) 2 *Journal of Law and Economics* 1.

⁴²¹ Australian Government, *Convergence Review Final Report* (2012) 99.

terrestrial broadcasting could be omitted. Instead, all persons would have to do in order to broadcast is to acquire access to a frequency in the market.⁴²²

Advocates of market based distribution and service neutrality argue that a free market is better suited than State administration to identify and produce the outcomes most valued for society and to ensure the economically and technically efficient use of the spectrum.⁴²³ In addition, it is argued that transferring decision making relating to the spectrum to the free market reduces the danger of government abuse.⁴²⁴ Indeed, one of the reasons the property rights model was originally proposed was to liberate broadcasters in the United States from State regulation, which its proponents considered pernicious.⁴²⁵ One of the bases under which this regulation was justified was that broadcasting activity required a licence which the government issued for free in exchange for broadcasters subjecting themselves to public interest regulation.⁴²⁶ In a scenario where frequency distribution is purely market based, such justification for regulation disappears.

One of the reasons auctioning frequencies to the highest bidder was proposed was that those who were granted exclusive transmission rights under a merit-based system derived significant economic benefit from exploiting those rights without paying proper compensation to the public purse.⁴²⁷ Auctioning frequencies ensures that the State receives fair market value in exchange for the exclusive rights granted. For the purposes of ensuring that the fee received matches the market value, any rights auctioned must be

⁴²² Policy makers may still opt to restrict access to broadcasting activity for other reasons such as those discussed in Sections 3.2.2 and 3.2.3. In these cases, States require those who want to disseminate audiovisual content to obtain a specific authorization for that purpose in addition to acquiring the right to use a frequency in the market.

⁴²³ See for example, Coase, above n 420, 18; Faulhaber, and Farber, above n 418, 8-9.

⁴²⁴ Coase, *Ibid*, 11; Hazlett, Thomas W., 'The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "big joke": an essay on airwave allocation policy' (2001) 14(2) *Harvard Journal of Law & Technology* 335, 402-3.

⁴²⁵ See Coase, *Ibid*; Spitzer, Matthew L., 'The Constitutionality of Licensing Broadcasters' (1989) 64(5) *New York University Law Review* 990.

⁴²⁶ See for example, Sohn, Gigi, 'The Gore Commission Ten Years Later: Reimagining The Public Interest in an Era of Spectrum Abundance' (2009) 17 *CommLaw Conspectus* 657, 662.

⁴²⁷ Coase, above n 420, 21-24; See also Herzog, Leo, 'Facing Facts about the Broadcasting Business: Rejoinder' (1952) 20(1) *University of Chicago Law Review* 106.

service neutral, so all interested parties compete monetarily for the spectrum independently of the use they intend to give to the frequencies.

When the property rights model was originally proposed by Coase, commercial broadcasters were the most economically powerful users of the spectrum. At that time, the main concern was that other spectrum users, such as the government or radio amateurs, would not be able to compete in an open market for frequencies against commercial broadcasters.⁴²⁸ Today, cellular based communications services have displaced commercial broadcasting as the most lucrative spectrum based business.⁴²⁹ For this reason, a reasonable concern is that leaving spectrum allocation to the market alone would reduce the availability of broadcasting services, potentially to none at all. From a 'free market' point of view, such an outcome could be said to be merely the consequence of society valuing other uses of the spectrum more highly than broadcasting. However, from a human rights perspective, the potential loss of freedom of expression outlets and information channels has been identified as a cause for concern.⁴³⁰ As explained in Sections 2.1.1.2 and 2.1.6, traditional terrestrial broadcasting remains very relevant around the world and ensuring the availability of outlets is considered necessary for States to fulfil their obligation to ensure their populations' right to information. A system under which licences are issued specifically for broadcasting and licensees are required to deliver the services ensures the availability of terrestrial broadcasting outlets.

As will be discussed in the next sub-section, if it is decided to licence certain frequencies specifically for broadcasting purposes, then this can provide a justification to regulate broadcasting differently than other mediums where entry is not restricted by a licence requirement. This justification would not exist in a potential scenario where broadcast licences do not exist and spectrum access is purely market based. A true free market system would also enable frequency rights owners to use the frequencies for any legal

⁴²⁸ See Smythe, Dallas W., 'Facing Facts about the Broadcasting Business' (1952) 20(1) *University of Chicago Law Review* 96.

⁴²⁹ See Hazlett, above n 424, 356.

⁴³⁰ As explained in Section 2.1.6, IHRL monitoring bodies and civil society organisations concerned with freedom of expression advocate for a number of spectrum frequencies to be specifically reserved for broadcasting.

purpose and change the type of service they deliver through the frequency at any time. For this reason, in such scenario there may not be a clear line separating commercial broadcasters from TSBs.

Purely market based distribution will also represent a major barrier to access to spectrum by broadcasters in general, and TSBs in particular may be unable to afford access at market prices. While the licence requirement rationale would not apply in such system, If TSBs were supported with direct subsidies or similar mechanisms to enable them to access spectrum in a market system, then this may also provide bases for subjecting the sector to special regulation following the considerations detailed in Section 3.4.

3.2.1.4. The Impact of a Licensing System for Broadcasting Regulation.

In a system where broadcasting requires a licence and only a limited number of licences are issued, those who obtain a licence can be considered to have been granted a privilege over other persons who may also wish to broadcast but were unsuccessful in procuring a licence. In addition, when licences are issued specifically for broadcasting, States forfeit the opportunity to allocate that spectrum to a different use and to verify through an auction that the fee retrieved for the public purse is equal to the spectrums' true market value.⁴³¹ Where terrestrial broadcasting remains relevant for the fulfillment of the population's human rights, this sacrifice can be justified by the need to ensure the availability of broadcasting services. However, adopting such a reserve means privileging broadcast licensees at the expense of an opportunity-cost for the State.⁴³² In these conditions, subjecting broadcasters to special regulation can be justified in order to ensure that broadcasting services, which have been made possible by making sacrifices in the public interest, indeed serve the public interest. Otherwise, some private persons would have been granted an unjustified privilege.

⁴³¹ This is the case even if broadcasting specific licences are auctioned to the highest bidders, because broadcasters are exempted from the need to compete against persons interested in using spectrum for other purposes. It is not guaranteed that a fee retrieved through a service neutral auction will be higher than a fee set by governments or determined through a broadcasting specific auction. However, if the spectrum is of interest to telecommunication firms, it will often be.

⁴³² See for example Australian Government, above n 421, 92.

While a licensing system can justify subjecting broadcasters in general to special regulation, it does not provide a basis for subjecting TSBs to additional or stricter regulation than commercial broadcasters. However, if TSBs are granted access to spectrum on more favourable terms than commercial broadcasters through support measures such as those discussed in Sections 2.4.1 to 2.4.3, then this is an additional sacrifice that is made in order to make their services possible. The additional public cost incurred in supporting TSBs in this manner can justify requiring them to comply with public interest regulation not imposed upon commercial broadcasters. This is discussed further in Section 3.4.

3.2.2. The Pervasive and Influential Nature of Broadcasting

As noted in Section 2.1.6, one of the main advantages of broadcasting over other mediums is that it does not require an active role from the potential audience. Persons may be unwittingly exposed to content while changing television channels or radio stations. This characteristic is referred to as the ‘pervasiveness’ of broadcasting.⁴³³ While its pervasiveness makes broadcasting a highly desirable medium for those seeking to disseminate a message, it has also been cited as a reason for subjecting broadcasters to special regulation not applied to other mediums. In relation to content that may offend audiences, broadcasters are often more restricted than other mediums because of the risk of audiences being unwillingly and unsuspectingly exposed to undesired content.⁴³⁴

Especially in the area of decency standards, broadcasting tends to be more heavily regulated than other mediums with stricter restrictions on language, profanity, violence and sexual content. While decency based regulation seeks to protect audiences in general from offensive content, the most common rationale for this kind of restriction is the protection of the rights of children, who are at risk of being exposed to harmful material

⁴³³ See *FCC v. Pacifica Foundation* 438 US 726, 749.

⁴³⁴ See Spitzer, above n 425, 1024.

through broadcasting.⁴³⁵ By extension, these measures also seek to preserve the right of parents to guide the upbringing and education of their children,⁴³⁶ which would be hindered if they were unable to prevent their children from accessing undesirable material available through broadcasting.⁴³⁷

Even if the pervasiveness of broadcasting is a valid justification for the stricter regulation of broadcasters in the areas of offensive content or decency standards, it does not provide any bases for differentiating between public, commercial or third sector broadcasters, as pervasiveness concerns apply equally across all three sectors. Its pervasiveness, along with other characteristics of broadcasting, such as its audiovisual nature, has also led broadcasting to be considered to have greater influence over the opinions of audiences than other mediums.⁴³⁸ The perceived greater influence of broadcasting has also been cited as a reason why broadcasters require special regulation in comparison to other mediums of communication.⁴³⁹ This rationale has been employed to justify restricting broadcasters from airing political advertisements or directly engaging in political campaigning.⁴⁴⁰ Concerns regarding the influence of the medium have also been used as basis for imposing stricter concentration of ownership controls for broadcasting than those applied to other communication mediums and to restrict the access to broadcast licences by non-nationals.⁴⁴¹

If influence is regarded as a valid reason to treat broadcasters differently from other mediums, it could also justify regulating different types of broadcasters differently if one

⁴³⁵ See for example *FCC v. Pacifica Foundation* 438 US 726, 749; Yoo, Christopher, 'Technologies of Control and the Future of the First Amendment' (2011) 53(2) *William and Mary Law Review* 747, 768.

⁴³⁶ ECHR, above n 150, Protocol No. 1, Art. 2; SSP, above n 197 art 13(4); ICESCR, above n 195, Art. 13(3); See also *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary* 268 US 510, 535.

⁴³⁷ *FCC v. Pacifica Foundation* 438 US 726, 750.

⁴³⁸ See *Animal Defenders International v. The United Kingdom* (European Court of Human Rights), Grand Chamber, Application no. 48876/08, 22 April 2013, [119].

⁴³⁹ The continued validity of this rationale has been called into question now that other mediums such as internet have greatly increased in relevance. However, the ECHR has, as recently as 2013, maintained that their influence justifies subjecting broadcasters to special restrictions. See *Ibid*, [119].

⁴⁴⁰ See *TV Vest AS and Rogaland Pensjonisparti v Norway* (European Court of Human Rights), First Section, Application No. 21132/05, 11 December 2008 [44]; *Murphy v Ireland* [2003] IX ECHR 1, [74].

⁴⁴¹ See Moss, David A. and Michael R. Fein, 'Radio Regulation Revisited: Coase, the FCC, and the Public Interest' (2003) 15(3) *Journal of Policy History* 389, 396-8.

type of broadcaster is deemed to be more influential than the other.⁴⁴² However, TSBs cannot be said unequivocally to always be more or less influential than broadcasters from the other sectors. While commercial or public broadcasters usually command larger audiences than TSBs, TSBs that serve specific communities of interest, such as ethnic or indigenous communities, may hold greater influence over their respective audiences. Furthermore, other factors such as the reach of the broadcasters (national, regional or local) are more relevant to assessing their level of influence for regulatory purposes than whether they operate on a profit or not-for-profit basis.⁴⁴³ For this reason, the ‘influence’ rationale does not provide a clear basis to distinguish TSBs from other types of broadcasters in terms of regulation, and especially not to impose on them requirements or restrictions over and above those applied to commercial stations.

The ‘influence’ and the ‘pervasiveness’ rationales have also sometimes led to broadcasters being subjected to special regulation in relation to the broadcast of religious content or even to prohibiting religious organizations from controlling broadcasting licences. In this case, the concern is that, because of its nature, the broadcasting medium offers greater potential for exploitation or abusive proselytism. Section 6.8.3 will analyze the validity of these rationales for the special regulation of religious broadcasting.

3.2.3. Economic Scarcity and the Barriers of Access to Broadcasting

As discussed in Section 2.1.1.1, the barriers of entry to broadcasting, especially the economic ones, are relatively high. It has also been noted that the economics of the broadcasting industry mean that the number of broadcasting services which can co-exist in any given market is limited.⁴⁴⁴ This market viability limitation is referred to as ‘economic scarcity’ and is independent of the ‘technical scarcity’ which may exist due to

⁴⁴² In the case of Australia, the BSA, above n 30, s 4(1) specifically states that different types of broadcasting services will be subjected to different levels of regulatory control according to their degree of influence.

⁴⁴³ However, even the reach of a broadcaster is not an unequivocal criterion as a local broadcaster can hold more influence over its local audience than a national one.

⁴⁴⁴ *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 402 (1969); See Also Warren, above n 407, 42.

an insufficiency of available frequencies.⁴⁴⁵ While participation in all mass communication mediums is limited by different barriers of entry and financial viability issues, it is argued that broadcasting has higher barriers of entry and more severe economical scarcity in comparison to other mediums.⁴⁴⁶ Pursuant to this premise there are two main reasons why broadcasting is said to require special regulation: that the barriers of entry to, and the economic conditions of the broadcasting industry, mean the market cannot guarantee sufficient diversity of content by itself;⁴⁴⁷ and that the high barriers of entry to broadcasting mean there is a risk that a few with the economic capacity to control broadcasting enterprises may end up wielding excessive opinion maker power to the detriment of the public interest.⁴⁴⁸

The concerns cited in the preceding paragraph have been used to justify imposing upon broadcasters the requirement to be balanced in their coverage of matters of public interest⁴⁴⁹ as well as special access rules, for example, requiring them to provide access to public office candidates in times of election.⁴⁵⁰ The same concerns have also been used as bases for the imposition of a 'right of reply' obligation upon broadcasters when the same obligation is not imposed on other media outlets.⁴⁵¹ A 'right of reply' is an obligation to provide someone who has been negatively affected by the content of a communication, in which he or she has been directly referenced, the opportunity to reply to such communication through the same medium.⁴⁵² It should be noted, however, that the ACHR and the case law of the ECtHR have considered the obligation to provide a 'right

⁴⁴⁵ *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 402 (1969).

⁴⁴⁶ Whether this is true is debatable. However, as explained, the objective is not assess the validity of the rationale itself but whether the rationale, if accepted, provide bases for the special regulation of TSBs in comparison to commercial broadcasters.

⁴⁴⁷ See Margarian, above n 163, 880-1.

⁴⁴⁸ See *Ibid*, 857.

⁴⁴⁹ See Levi, Lili, 'Book Review: Rationales & Rationalizations: Regulating The Electronic Media' (1998) 38(3) *Jurimetrics Journal of Law, Science and Technology* 515, 530; See Barron, Jerome, 'Access Reconsidered' (2008) 76(4) *George Washington Law Review* 826, 827.

⁴⁵⁰ As noted in Section 2.2.5, the provision of air time to political candidates in times of election is one of the few situations in which direct access rules are deemed acceptable under IHRL.

⁴⁵¹ Discussed in, Shelledy, David, 'Access to the Press: A Teleological Analysis of a Constitutional Double Standard' (1982) 50(3) *George Washington Law Review* 430.

⁴⁵² See Youm, Kyu Ho, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76(4) *George Washington Law Review* 1017 for a comparative study on the definition of the right to reply in multiple jurisdictions.

of reply’ to be a legitimate restriction on freedom of expression independently of the medium.⁴⁵³

Even if it is accepted that broadcasters should be regulated differently from other mediums in relation to balance requirements or the obligation to provide a ‘right of reply’, there are no clear justifications for differential treatment of broadcasters from different sectors in these areas. However, in the special case of community stations that follow a community access model in their programming, a balance obligation may be impractical and too burdensome for them to comply with. For this reason, they may require special consideration if a general balance requirement is imposed. This is considered further in Section 6.7.2.

As discussed throughout Chapter 2, supporting TSBs is a measure States can employ to address problems arising from the barriers of entry to broadcasting and the economic nature of the industry. As explained, TSB can foster equality and diversity in broadcasting by reducing the barriers to participation in broadcasting and providing outlets for content which is not commercially viable or attractive. When TSBs have been supported for these purposes, then it may be appropriate to impose requirements in relation to diversity of content and the provision of access opportunities which are exclusive to TSBs, or which are different from or additional to those applied to other broadcasters. This is discussed further in Sections 3.4.4 and 3.4.5.

3.3. Specific Regulation for Commercial and Public Sector Broadcasters.

In the previous section, the rationales most commonly employed to justify the regulation of broadcasting in general were discussed. However, there are also specific concerns in relation to commercial or public broadcasting that sometimes lead to the implementation

⁴⁵³ See ACHR, above n 131, Art 14; *Kaperzynski v Poland* (European Court of Human Rights), Fourth Section, Application No. 43206/07, 3 April 2012 [66]; See Also Inter-American Court of Human Rights, Advisory Opinion OC-7/86, Enforceability of the Right to Reply or Correction, 1986.

of regulation which is specific to these sectors. Before proceeding to analyse the possible justifications for the special regulation of TSB, this section will identify the most common bases for commercial and public sector specific regulation and assess whether the same concerns apply to TSB.

3.3.1. Specific Regulation for Commercial Broadcasters

Because of their nature, commercial broadcasters can be expected to adopt practices they believe will maximize their profits. For this reason, regulation is sometimes implemented to advance public policy goals which may conflict with the profit seeking orientation of commercial broadcasters. For example, policy makers may want to promote national or local production for cultural or economic reasons, whereas commercial broadcasters find importing foreign content more profitable. In these cases, quotas can be implemented requiring commercial broadcasters to broadcast minimum amounts of national or local content.⁴⁵⁴ Positive requirements are also sometimes imposed in relation to other types of content which are deemed desirable but for which the market offers insufficient incentives.⁴⁵⁵

Another area where commercial broadcasters are commonly regulated is in relation to the ownership or control of multiple outlets by a single person or business group. Economies of scale provide incentives for the ownership of broadcasting outlets to be concentrated in as few hands as possible.⁴⁵⁶ However, as noted in Section 3.2.3, because of the perceived influence of broadcasting, policy makers may prefer diversity of ownership so as to prevent excessive opinion making power being concentrated in a few actors. In order to

⁴⁵⁴ Both Australia and Canada have implemented regulation in this area. See Sections 4.1.5 and 5.1.2.

⁴⁵⁵ For example, Australia requires commercial broadcasters to broadcast minimum amounts of content aimed at children. See Section 4.1.5.

⁴⁵⁶ See Explanatory Memorandum, *Broadcasting Services Amendment (Media Ownership) Bill 2006* (Cth); Grupo Clarin S.A. c/Poder Ejecutivo Nacional y Otro s/ accion meramente declarativa (Unreported, Supreme Court of Argentina, 29 October 2013). In addition to economies of scale, economies of scope may also provide an incentive for this concentration.

secure a diversity of ownership, regulation may restrict the number of broadcast licences that can be controlled by a single person or group.⁴⁵⁷

‘Network broadcasting’ refers to the practice of two or more stations linking with each other to broadcast the same content simultaneously. Whether all stations are owned by the same group or by a diversity of actors, this practice is attractive for commercial broadcasters as it allows them to reduce costs and maximize profits. However, as noted in Section 2.1.2, network broadcasting is detrimental to the production of locally oriented content. It might also result in less original content being produced overall.⁴⁵⁸ For this reason, the networking of commercial broadcasters is sometimes restricted in order to foster the production of local and original content.⁴⁵⁹

Special regulation may also be implemented to protect the financial viability of commercial broadcasters. Commercial broadcasters are considered to provide a valuable service whose continuation must be guaranteed.⁴⁶⁰ However, there is sometimes concern that excessive competition within the sector could render them commercially unviable.⁴⁶¹ In addition, there is concern that, if faced with financial difficulties, commercial broadcasters will sacrifice their quality of service in order to reduce costs to the detriment of their audiences.⁴⁶² For this reason, policy makers sometimes restrict the entry of new competitors, even when frequencies are available, in order to protect the viability of incumbents.⁴⁶³ However, licensed commercial broadcasters can also be subjected to special regulation aimed at protecting the viability of the whole sector. For example, they

⁴⁵⁷ Hitchens, Lesley, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Hart Publishing Ltd, 2006) 11.

⁴⁵⁸ This is not always the case, as reducing costs through ‘networking’ can make it possible to acquire and broadcast content that would otherwise not be viable.

⁴⁵⁹ Australia has regulated the ‘networking’ of commercial broadcasters. See Section 4.1.5.

⁴⁶⁰ See Thornley, Phoebe, ‘Broadcasting Policy in Australia - Political Influences and the Federal Government’s Role in the Establishment and Development of Public/Community Broadcasting in Australia - A History 1939 to 1992’ (PhD Thesis, University of Newcastle, 1999), 41.

⁴⁶¹ This follows the notion of ‘economic scarcity’ discussed in Section 3.2.4.

⁴⁶² See UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 37, Art. 6(b).

⁴⁶³ This has been the case in Australia and Canada. This is discussed in Sections 4.1.5 and 5.1.5.

can be required to broadcast content which is distinct from each other or to have different target audiences in order to prevent them from cannibalizing each others' businesses.⁴⁶⁴

Since TSBs should not have the maximization of profits as their goal, the concerns described in this section may not directly apply to them. However, because TSBs are sometimes supported in the expectation that they will provide content that is lacking in the commercial sector, they may receive regulation in some of the same areas. In this sense, and as will be discussed in Section 6.6, TSBs are also sometimes subjected to networking restrictions and to positive requirements in relation to national or local content or other types of desirable content that is lacking in the commercial sector. Similarly, because TSBs may be supported as an alternative to ensure diversity of ownership in broadcasting where commercial incentives favour concentration, the number of outlets a single third sector group can control may be restricted.⁴⁶⁵

While the potential consequences of excessive competition within the third sector are not normally a concern for regulators, the potential impact that TSB activity can have on the viability of the commercial sector often is a matter of concern. As will be discussed in Section 3.4.2, the protection of commercial broadcasters is one of the most common goals pursued by TSB specific regulation.

3.3.2. Specific Regulation for Public Service Broadcasters.

As explained in Section 1.2, public sector broadcasters are normally classified as 'official' or 'public service' depending on their level of independence from the government. While 'official' broadcasters are characterized by a lack of regulation, being directly controlled by governments, 'public service' broadcasters are normally subjected to special regulation. The ideal of public service broadcasting requires PSBs to be administered by a statutory body which has a specific mandate and is independent

⁴⁶⁴ In the past Canadian regulation required each radio station to limit itself to a determinate 'format' for this purpose. This is discussed in Section 5.1.5.

⁴⁶⁵ For example, in the past, Australian policy prohibited a single person from controlling more than one TSB licence. See Staley, Tony, *Guidelines for the Planning of Public Broadcasting in Phase I* (Minister for Post and Telecommunications, 1978), Art 11.

politically and financially.⁴⁶⁶ For this reason, PSBs are normally subjected to regulation aimed at ensuring their independence. For example, PSBs may be required to be politically balanced in their programming or restricted to sources of funding which do not compromise their independence.⁴⁶⁷

PSBs are often established in the expectation that they will be independent of the interests which dictate the programming of commercial broadcasters.⁴⁶⁸ In addition, there is sometimes concern regarding the impact of PSBs on the viability of the commercial sector, especially since their access to public funding could be considered to provide them with an unfair advantage over commercial broadcasters.⁴⁶⁹ For these two reasons, PSBs may be subjected to regulation which restricts their capacity to engage in commercial activity, for example selling air-time for advertising purposes⁴⁷⁰.

While PSB is very different in nature from TSB, the concerns in relation to funding sources and their impact on the stations' independence which commonly underlie the regulation of PSBs may also apply to TSB. This is discussed further in the next section.

3.4. Goals and Justifications for Third Sector Broadcasting Specific Regulation

3.4.1. Ensuring the Not-for-Profit Nature of Third Sector Broadcasters and Preventing Licensees from Deriving Unfair Gain

While the potential of TSB to contribute to the fulfillment of human rights policy goals makes the sector a worthy recipient of government funding or special concessions such as

⁴⁶⁶ See for example, Committee of Ministers of the Council of Europe, Recommendation to Member States on The Guarantee of the Independence of Public Service Broadcasting, Recommendation R(96)10; Rumphorst, above n 47.

⁴⁶⁷ See Rumphorst, *Ibid*, 4; Media Development Indicators, above n 1, 55.

⁴⁶⁸ Buckley et al., above n 46, 37.

⁴⁶⁹ *Ibid*, 191.

⁴⁷⁰ See Committee of Ministers of the Council of Europe, *Explanatory Memorandum to Recommendation R(96)(10)*, Guideline 16.

those described in Section 2.4, there is a risk that TSB licensees could exploit any benefits granted to them for private profit.⁴⁷¹ For this reason, if TSBs have benefitted from special measures of support, a justification exists for implementing special regulation aimed at protecting public investment in the sector. In this sense, one of the goals most commonly pursued by TSB regulation is to ensure the not-for-profit nature of TSB and to prevent any concessions given to them from being exploited for purposes other than those for which they were granted.

The most commonly used mechanism to safeguard the not-for-profit nature of the sector is restricting the eligibility for TSB licences to registered not-for-profit entities.⁴⁷² Not-for-profit entities, independent of their activities, are usually subjected to regulation which aims to prevent any concessions granted to them from being abused.⁴⁷³ For example, a prohibition on distributing profits to members or paying excessive wages to directors. If eligibility for TSB licensees is restricted to organizations that are subject to this kind of regulation, then additional broadcasting specific regulation may not be necessary to secure the not-for-profit nature of TSBs. However, adopting TSB specific regulation may be valid if eligibility is not restricted to not-for-profit entities or if the general regulation applicable to not-for-profit entities is inadequate or insufficient.⁴⁷⁴

TSBs are also sometimes required to reinvest any income derived from the exploitation of the licence in the broadcasting service itself. This requirement aims to ensure that any concessions granted to TSBs are used to advance TSB and not any other goals, even other non-profit or charitable ones. Such additional regulation can be justified if TSBs have received support in pursuance of specific goals policy makers have adopted for the sector. This is taken up further in Section 6.3.1.

⁴⁷¹ See for example Australia Communications and Media Authority, *Community Broadcasting Not-for-Profit Guidelines* (2011).

⁴⁷² Discussed further in Section 6.2.1.

⁴⁷³ See for example, Garton, Jonathan, *The Regulation of Organised Civil Society* (Hart Publishing, 2009), 104; Phillips, Susan D. and Steven Rathgeb Smith, 'Between Governance and Regulation Evolving Government-Third Sector Relationships' in Susan D. Phillips and Steven Rathgeb Smith (eds), *Governance and Regulation in the Third Sector International Perspectives* (Taylor & Francis, 2011) 1-36, 10.

⁴⁷⁴ Section 6.2.1 discusses whether eligibility for TSB licensees should be reserved only for registered not-for-profit entities.

3.4.2. Protecting Commercial Broadcasters from Unfair Competition

Even though they pursue different goals, TSBs and commercial broadcasters can, and often do, find themselves competing with each other for audiences and revenue from advertisers and/or sponsors. Regulation is sometimes implemented in order to protect commercial broadcasters from competition from TSBs. For this purpose, TSBs may be subjected to restrictions on their capacity to broadcast advertisements or sell-air time to third parties.⁴⁷⁵ Content regulation may also be implemented with the aim of ensuring that TSBs provide a distinctive service which is not in direct competition with that offered by commercial broadcasters.⁴⁷⁶

If the conditions applied to both sectors are equal in all aspects, then there would be no compelling reasons to provide commercial broadcasters with special protection against competition from TSBs. Competition between non-profit and commercial actors is not unique to broadcasting. Non-profit entities can, and often do, compete with commercial entities when they conduct ancillary trading activities for the purpose of fund-raising and in the delivery of services in other fields such as health and education.⁴⁷⁷ However, non-profit organisations are sometimes restricted in their ability to trade and engage in commercial activity if they receive any benefits which may give them an unfair advantage over commercial actors.⁴⁷⁸ In this sense, regulation of TSBs for the protection of commercial broadcasters may be justified, but only if TSBs have benefitted from special concessions or public funding in a manner which would give them an unfair competitive advantage over commercial broadcasters.

If general rules regulating competition between non-profit and commercial actors are in place, additional TSB specific regulation could be considered redundant. However, a justification exists to subject TSBs to specific regulation if they have benefitted from

⁴⁷⁵ Discussed further in Section 6.5.

⁴⁷⁶ Discussed further in Section 6.6.

⁴⁷⁷ Garton, above n 473, 133.

⁴⁷⁸ *Ibid*, 134.

measures of support which are additional to any concessions or programs implemented to support the not-for-profit sector in general, and if this gives them additional advantages in comparison to non-profit entities competing with commercial actors in other fields.⁴⁷⁹

3.4.3. Protecting the Independence of Third Sector Broadcasters

TSBs are expected to be independent from both government and commercial influences. This is necessary for the third sector to be effectively separate and distinct from the other two in fulfillment of the ideal of ‘sectoral diversity’.⁴⁸⁰ In order to protect them from inappropriate government influence, TSBs may be restricted in their capacity to receive government funding or special mechanisms may be implemented to ensure the distribution of government funding does not compromise their independence.⁴⁸¹ In relation to commercial influences, the advertising industry has historically been the main force which guides the programming of commercial broadcasters. Restricting the capacity of TSBs to broadcast advertisements can serve the purpose of protecting them from this influence.⁴⁸² In addition, a general cap is sometimes imposed on the amount of funding TSBs can receive from a single person or source, be this public or private. Such a measure enforces what is known as ‘diversity of funding’ and serves the purpose of preventing any single entity or force from holding excessive influence over TSBs. The principle of diversity of funding is elaborated on in Section 6.3.2.

If TSBs have been supported with the goal of fostering sectoral diversity, then subjecting them to regulation aimed at preserving their independence is valid. Measures designed to secure their independence from governments and private financial contributors may be contained in general regulations applied to non-profit organizations.⁴⁸³ In these cases,

⁴⁷⁹ For example, if TSBs are granted free access to the spectrum while commercial broadcasters are required to pay for it, this is a special situation which is broadcasting specific and would not be covered by general rules.

⁴⁸⁰ See Section 2.1.1.2.

⁴⁸¹ Discussed further in Section 6.4.

⁴⁸² Buckley et al., above n 46, 221.

⁴⁸³ See Garton, above n 473, 103; Ford, Patrick, 'Third Sector Regulation in Post-devolution Scotland: Kiltling The Charity Cuckoo' in Susan Phillips and Steven Rathgeb Smith (eds), *Governance and Regulation in the Third Sector International Perspectives* (Taylor and Francis, 2011) 68-98.

additional TSB specific regulation could be redundant. However, the goal of promoting sectoral diversity and concerns relating to the advertising industry and its potential influence on programming are specific to broadcasting. In this sense, the special role of TSBs as a mass medium can justify resorting to special regulation for protecting their independence, even if other rules are also in place for the protection of the independence of not-for-profit entities in general.

3.4.4. Ensuring Third Sector Stations are Representative and Open to Participation

TSBs may be subjected to regulation that requires them to be representative of the communities they have been licensed to serve and to be open to participation from all members of that community. For example, they may be required to provide programming that caters to all interests within the community they are licensed to serve, be this a geographic community or a community of interest.⁴⁸⁴ They may also be obliged to broadcast content produced by community volunteers.⁴⁸⁵ As noted in Section 2.1, the reasons for supporting TSB include the capacity of the sector to provide services to audiences neglected by the other sectors and to broaden participation in broadcasting. If TSB has been supported in pursuance of these specific goals, then implementing regulation aimed at ensuring they are fulfilled can be justified. Representativeness and participation are not concerns normally pursued by general rules applicable to not-for-profit entities; thus TSB specific measures will be required if regulation is deemed necessary in this area.

3.4.5. Securing the Distinctiveness of Third Sector Content Output and the Broadcast of Desirable Content

As explained in Chapter 2, TSBs can serve a valuable role in providing outlets for content which is necessary or desirable, but which is not viable or attractive for the other sectors

⁴⁸⁴ This is discussed further in Section 6.6.1.

⁴⁸⁵ This is discussed further in Section 6.7.3.

of broadcasting. TSBs are sometimes subjected to regulation aimed at ensuring they provide such content. For example, TSBs may be required to comply with minimum quotas in relation to local content, national content or other types of content deemed lacking in the other sectors.⁴⁸⁶ Regulation can also take the form of restrictions on the capacity of TSBs to broadcast content already provided by the other sectors.⁴⁸⁷ Such restrictions serve the purpose of ensuring that the output of TSBs is distinctive and provides an effective contribution to diversity.

As noted in Section 2.4, persons have a right to exercise their freedom of expression for non-commercial purposes which is not dependent on whether the commercial or State sectors have failed to produce a specific type of content deemed desirable or to provide sufficient diversity of content. However, if TSBs have received special support in the expectation that they will improve diversity of content or provide specific types of content, then some level of regulation in this area can be justified.

3.4.6. Is Special Regulation for Third Sector Broadcasting Justified? – Conclusion

As shown in Section 3.1, it is not valid to arbitrarily or discriminatorily subject TSBs to requirements or restrictions that are not applied to other types of broadcasters. Any regulatory measures which distinguish between different categories of broadcasters require an adequate justification in order to be valid under IHRL. Accordingly, the notion of States ‘owning’ the spectrum does not serve as a blanket justification for differential regulation. Even if all the rationales detailed throughout Section 3.2 are accepted as valid justifications for broadcasting to be regulated specially in comparison to other mediums, those rationales fail to provide, on their own, bases for imposing additional requirements or restrictions upon TSBs. However, as explained throughout this chapter, justification for imposing on TSBs requirements or restrictions over and above those that apply to

⁴⁸⁶ Discussed further in Sections 6.6.3 and 6.6.5.

⁴⁸⁷ Discussed further Section 6.6.4.

commercial broadcasters may exist when they have been supported through measures such as those discussed in Section 2.4.

Even when TSBs have been favoured with funding or concessions, any special restrictions or requirements applied to them should not be capricious and must pursue legitimate goals. The goals described in Sections 3.4.1 to 3.4.5 are legitimate goals which can justify the special regulation of TSBs when they have been supported in pursuance of specific policy goals. The purpose of regulation is appropriately ensuring the objectives of the supportive policies are fulfilled.

While subjecting TSBs to special regulation is legitimate under the conditions explained above, it does not necessarily follow that regulating the sector will always be necessary, desirable or even beneficial to the advancement of the relevant policy goals. Even regulation implemented in pursuance of legitimate goals can become a barrier to the development of TSB and impair freedom of expression if it is too burdensome or impractical to comply with. However, regulation will also not always be detrimental to the stations. For example, knowing TSBs are subjected to regulation that ensures their independence and that prevents TSB licences from being exploited for private profit can improve their credibility with their audiences and specific regulation provides TSBs with greater clarity and certainty regarding the expectations society has of them.

The goal of this thesis is to determine how to establish a regulatory framework that is conducive to the development of TSB, balancing the legitimate goals described in this chapter against other relevant considerations, including the practical barriers TSBs may face when attempting to comply with regulation. Chapter 6 will make recommendations for the designing of such framework. For this purpose, the Australian and Canadian current and historical policies in eight key areas of TSB regulation will be discussed and compared. However, in order to conduct an adequate comparative analysis, it is necessary to understand the context in which Australian and Canadian TSB policies have evolved, as well as the present status of TSB in each country as far as policy and regulation is concerned. The following two chapters are devoted to this purpose.

Chapter 4 - Third Sector Broadcasting in Australia

The present Chapter provides an overview of the historical development of TSB in Australia and the status of the country's third sector in the present. Chapter 5 provides a similar overview for TSB in Canada. These overviews are meant to introduce to the reader the elements which are relayed upon for the comparative analysis undertaken in Chapter 6. For the purposes of such comparative analysis, it is not only relevant what the framework for TSB is in each country but also the development process and the reasoning which have lead to those frameworks being adopted. This is the reason why an historical overview is also included in Chapters 4 and 5.

Chapter 4 is divided in 3 sections, Section 4.1 provides an overview of broadcasting in Australia in General in order to illustrate the broader context in which Australian TSBs operate. Section 4.2 discusses the historical development of TSB in the country, including the development of each of the TSB sub-sectors. Section 4.3 contains the overview of the present policy and legislative framework applied to TSB in Australia.

4.1. General Overview of Broadcasting in Australia – History and Context

This section aims to provide a brief overview of Australia's general broadcasting policy. Section 4.1.1 discusses the nature and scope of the Australian Federal Parliament powers in relation to the regulation of broadcasting. Sections 4.1.2 to 4.1.8 detail the historical development of and current Australian policy in 7 key areas relating broadcasting. In section 4.1.9, the impact Australia's general broadcasting policy has had upon the development of TSB in the country is analyzed.

4.1.1. Regulatory Powers

Throughout the history of broadcasting in Australia, the provision contained in Section 51 (v) of the Australian constitution has been used as the primary legal base for the regulation of the activity by the Federal Parliament. This provision lists 'postal, telegraphic, telephonic, and other like services' among the areas over which the

Australian Federal Parliament is granted power ‘to make laws for the peace, order, and good government of the Commonwealth’. Broadcasting has been deemed to fall within the scope of this provision either because it can be considered a telegraphic or telephonic service,⁴⁸⁸ or because it is included within the phrase ‘other like services’.⁴⁸⁹

Unlike other jurisdictions, the Australian constitution does not contain a provision protecting an individual right to freedom of expression. For this reason, Australian courts have not been required to provide justifications for the regulation of broadcasting of the type discussed in Chapter 3 or to elaborate on the validity or necessity of such regulation. In *R v. Brislan*, the main Australian case regarding the constitutionality of broadcasting regulation, what was debated was not the legitimacy of government regulation of broadcasting itself, but whether the Federal Parliament was the competent body to undertake such regulation.⁴⁹⁰ The High Court concluded based on section 51(v) of the Constitution that broadcasting regulation was indeed an area within the powers of the Federal Parliament.⁴⁹¹ Two subsequent Australian High Court decisions have confirmed that the Federal Parliament’s powers in relation to broadcasting extend to the regulation and production of content⁴⁹² and the regulation of ownership and control of broadcasting outlets.⁴⁹³

None of the High Court decisions on broadcast regulation have elaborated on whether there are any limitations on the Federal Parliament’s powers in relation to the regulation of broadcasting. Limiting the analysis only to Australian domestic law and considering the lack of a domestic provision on freedom of expression,⁴⁹⁴ the only limitation on

⁴⁸⁸ See *R v. Brislan; Ex parte Williams* [1935] HCA 78 (Latham CJ) and (Rich and Evatt JJ).

⁴⁸⁹ See *Ibid*, (Latham CJ).

⁴⁹⁰ In this relation, the sole dissenting judge in the *Brislan* case considered that if the regulation of broadcasting was deemed to fall outside the competences of the Federal Parliament, then it would fall onto each individual Australian State to undertake such regulation. *Ibid*, (Dixon J).

⁴⁹¹ *Ibid*.

⁴⁹² *Jones v. The Commonwealth (No. 2)* [1965] HCA 6. The specific decision only concerned the ability of the Federal Parliament to regulation in relation to the State’s own content production activity. However, it has been interpreted to also apply to the regulation of content production by private parties. See Armstrong, Mark, *Broadcasting Law and Policy in Australia* (Butterworths, 1982); Baum, Daniel, ‘The Australian Broadcasting Commission A Critical Analysis’ (1975) 1(1) *University of New South Wales Law Journal* 31.

⁴⁹³ *Herald and Weekly Times Ltd v. Commonwealth* (1966) 115 C.L.R. 418.

⁴⁹⁴ Australia is a member State to the ICCPR but the country follows a dualistic system where international treaties are not directly enforceable by domestic courts in absence of domestic implementation provisions.

Parliament's powers would appear to be in section 51 (v) itself, which establishes that the powers granted are only "to make laws for the peace, order, and good government of the Commonwealth". However, what limitations, if any, that phrase imposes upon parliament powers in relation to broadcasting have not been determined.

4.1.2. The Geographic Reality of Australia and Its Impact on Broadcasting Policy

The Australian territory is big in dimension and its population is irregularly scattered. Most of the population concentrates in the urbanised areas while the 'remote' areas of the country are less populated. This reality has had significant impact on the way broadcasting policy has developed in the country. The conditions of the country meant that in the early stages interest from the commercial sector only existed for providing broadcasting services in the most populated metropolitan areas.⁴⁹⁵ For this reason, one of the primary goals of Australian broadcasting policy has been to ensure broadcasting services are extended to all parts of the country.⁴⁹⁶ The need to bring broadcasters services to other areas of the country was one of the main factors motivating the introduction of State⁴⁹⁷ broadcasting to complement commercial services.⁴⁹⁸ The desire to ensure broadcasting services in non-commercially attractive areas was also one of the factors which motivated the introduction of TSB in Australia and the provision of official support to the sector.⁴⁹⁹

4.1.3. The 'Dual System' Conception

⁴⁹⁵ Armstrong, above n 492.

⁴⁹⁶ This is a characteristic also share by Canadian broadcasting policy. See Section 5.1.2.

⁴⁹⁷ In Australia, State broadcasters are referred to as 'national' broadcasters. However, they are referred to as 'State' broadcasters within this chapter to prevent confusion as 'national' can also refer to the reach of a service in contrast with local services. 'State' also refers in this context to the Australian Nation-State and not the individual federal units which form part of Australia.

⁴⁹⁸ Armstrong, above n 492.

⁴⁹⁹ Discussed in Section 4.2.1; See also Section 4.2.7.2 which discusses how TSB has been especially important for delivering broadcasting services to indigenous peoples in remote Australia.

‘Dual System’ is a term commonly used to describe the reality of broadcasting in Australia from 1929 when State broadcasting was introduced to complement commercial services until 1976 when ‘public’, later known as ‘community’ broadcasters were introduced as the third sector of Australian broadcasting.⁵⁰⁰ The co-existence of commercial and State broadcasters is not unique to Australia.⁵⁰¹ However, what is more particular is the way both sectors were perceived as necessary services and attributed specific roles in the country’s broadcasting policy. The State broadcasting service was concerned primarily with providing a national service and extending its reach to the whole country.⁵⁰² Commercial broadcasters were expected to provide locally oriented services.⁵⁰³

4.1.4. State Broadcasting in Australia

State broadcasting began in Australia in 1929, when the government acquired a number of commercial stations in order to establish its own broadcasting service. In 1932 the Australian Broadcasting Commission (ABC) was created as a public statutory entity with the main purpose of providing content for the State broadcasting system.⁵⁰⁴ In 1983, the Australian Broadcasting Commission was renamed Australian Broadcasting Corporation and granted increased legal independence, but continued to be known as the ABC.⁵⁰⁵

In 1977 a second State broadcasting service, known as Special Broadcasting Service (SBS) was created. The SBS was not originally created as an independent entity but in 1991 it became an independent statutory body with the same status as the ABC.⁵⁰⁶ The

⁵⁰⁰ See for example Foxwell, above n 212; Patterson, Rosalind, ‘The Origins of Ethnic Broadcasting: Turning the Dial in Australia’ (1981) 2 *Journal of Intercultural Studies* 37, 37.

⁵⁰¹ Among other countries, commercial and State broadcasters have also co-existed in Canada. However, unlike in Australia, in Canada policy has consistently referred to its broadcasting system as ‘a single system’. This is a terminological difference which has not really had significant impact in practice. Discussed in Section 5.1.3.

⁵⁰² Oswin, James, *Localism in Australian Broadcasting: A Review of the Policy*, Department of Communications (1984).

⁵⁰³ Ibid.

⁵⁰⁴ Thornley, above n 460, 54-58.

⁵⁰⁵ A new Act, the *Australian Broadcasting Corporation Act 1983* (Cth) ‘ABC act’, was adopted for this purpose.

⁵⁰⁶ Through the adoption of the *Special Broadcasting Service Act 1991* (Cth) ‘SBS Act’.

SBS was originally created to take control over experimental ethnic station the Australian government had created.⁵⁰⁷ For this reason it was conceived as a ‘multicultural’ and ‘multilingual’ broadcaster tasked with the provision of ethnic and later indigenous and other types of special interest content.⁵⁰⁸ This role is different from that of the ABC, for whom general interest content has always been the priority. The provision of broadcasting services to ethnic and indigenous communities was seen as both a necessity and an obligation by the Australian government.⁵⁰⁹

Initially both the ABC and the SBS were merely content producers, but in 1998 they were both granted control over their own transmission facilities.⁵¹⁰ The ABC and the SBS are both authorized to generate some funds through their own activities but are primarily dependent on the funds the parliament distributes to them from the general budget.⁵¹¹ The ABC is completely prohibited from broadcasting any type of advertisements, whereas the SBS is authorized to broadcast advertisements or sponsorship announcements, but only to a maximum of 5 minutes in an hour.⁵¹²

There have been debates in Australia regarding the introduction of a third State broadcasting service specializing solely in indigenous content.⁵¹³ In 2005, National Indigenous Television (NITV) was established.⁵¹⁴ NITV was originally a private company which was created with government support for the purpose of providing an indigenous oriented national broadcasting service.⁵¹⁵ A 2010 review of the Australian Government Investment in Indigenous Media recommended that NITV be acquired by

⁵⁰⁷ Discussed further in Section 4.2.7.1.

⁵⁰⁸ See SBS Act, above n 506, s 6(1).

⁵⁰⁹ Thornley, above n 460, 196; Westerway, Peter, ‘Starting Aboriginal Broadcasting Whitefella Business’ (2005) (117) *Media International Australia, Incorporating Culture & Policy* 110.

⁵¹⁰ Through the *National Transmission Network Sale (Consequential Amendments) Act 1998* (Cth).

⁵¹¹ See ABC Act, above n 505, ss 29(2), 67 and 79B; SBS Act, above n 506, ss 44(2) and 56-60.

⁵¹² SBS Act, *Ibid*, s 45(2).

⁵¹³ See Aboriginal and Torres Strait Islander Commission, *Digital Dreaming: A National of Indigenous Media and Communications: Executive Summary* (Aboriginal and Torres Strait Islander Commission, 1999); Productivity Commission, above n 400, 288-9.

⁵¹⁴ Rennie and Featherstone, above n 175, 52.

⁵¹⁵ See *Ibid*; Stevens, above n 384, 7.

the government and for it to become an independent authority with the same status as the ABC and the SBS.⁵¹⁶ However, in 2012 the NITV service became part of the SBS.⁵¹⁷

4.1.5. Commercial Broadcasting in Australia

The first broadcasting services in Australia were provided by independent commercial parties licensed by the Australian government for this purpose.⁵¹⁸ At first, stations were financed through ‘listener’s fees’ (similar to a subscription) but this model proved commercially unsuccessful.⁵¹⁹ In 1924, regulations were introduced which established two classes of commercial stations: ‘A’ stations, primarily financed through listener’s fees and restricted in the time they could devote to advertisements; and ‘B’ stations, delivered free-to-air and not restricted in their capacity to sell advertising air-time to support their activities.⁵²⁰

The Government attempted to encourage ‘A’ stations to collaborate to bring broadcasting services to rural areas.⁵²¹ When this proved unfruitful, the government acquired the assets of ‘A’ stations for the establishment of a State broadcasting service.⁵²² From this point on, the former ‘B’ stations came to be known simply as ‘commercial’ stations and came to be considered essential public services rather than just businesses.⁵²³ Because commercial broadcasters were considered an essential public service, ensuring their

⁵¹⁶ Stevens, above n, 384.

⁵¹⁷ This decision may have been motivated by economic concerns as operating NITV as part of the SBS reduces administrative costs in comparison to creating a separate statutory body. Although part of the SBS, the staff of NITV is comprised predominantly by indigenous Australians and its content is developed primarily by indigenous producers. Further information about the NITV and its place within the SBS can be found on its official website: <www.nitv.org.au/>.

⁵¹⁸ Thornley, above n 460, 44.

⁵¹⁹ Armstrong, above n 492.

⁵²⁰ Ibid.

⁵²¹ This encouragement was only informal as no formal rules were implemented forcing licensees to extend their service to rural and remote areas. See Armstrong, above n 492.

⁵²² Thornley, above n 460, 53.

⁵²³ While the division was in place, ‘A’ stations were deemed responsible for providing a public service while ‘B’ stations were seen primarily as business and hence considered to be less social obligated. See Mackay, Ian, *Broadcasting in Australia* (Melbourne University Press, 1957); Thornley, above n 460, 49-50.

viability was seen as a government obligation.⁵²⁴ This view influenced the licensing policy to limit the issue of licences to new commercial entrants.⁵²⁵

As noted, after the introduction of a State broadcaster with a national focus, commercial stations were considered responsible for providing locally oriented programming.⁵²⁶ In 1946 regulations were introduced restricting the networking of private broadcasters.⁵²⁷ In addition to monopoly concerns, one of the motivations behind this regulation is that unrestricted networking could lead the commercial broadcasters to focus on content of nation-wide appeal in detriment of the locally oriented content the sector was expected to provide.⁵²⁸ In 1984 the report on Localism in Australian Broadcasting was presented.⁵²⁹ This report acknowledged that the networking restriction and local content requirements affected negatively the financial attractiveness of commercial broadcasters and hindered the proliferation of commercial stations. However, it considered the localism policy a valid compromise between the goals of increasing the number of stations and ensuring local content.⁵³⁰

In 1976, the first Australian content quota for commercial broadcasters was implemented.⁵³¹ In the present, commercial television stations are imposed a minimum Australian content requirements.⁵³² The broadcasting regulatory entity also is obligated to establish local content obligations relating ‘material of local significance’ for commercial television and radio stations,⁵³³ and ‘local presence’ for commercial radio stations.⁵³⁴

⁵²⁴ Thornley, *Ibid*, 43-44.

⁵²⁵ *Ibid*, 74-75.

⁵²⁶ Oswin, above n 502.

⁵²⁷ *Ibid*.

⁵²⁸ *Ibid*.

⁵²⁹ *Ibid*.

⁵³⁰ The localism policy was considered by the report adequate for radio. However, in relation to television the report noted that the higher production cost required the focus to be on national content at first.

⁵³¹ Flew, Terry, 'Culture, Citizenship and Content: Australian Broadcast Media Policy and the Regulation of Commercial Television 1972-2000' (Griffith University, 2001).

⁵³² BSA, above n 30, s 122(1)-(2). For a program to be considered ‘Australian’ it needs to meet number of conditions regarding the participation of Australian citizens in creative, production and acting roles. For details See *Broadcasting Services (Australian Content) Standard 2005*.

⁵³³ BSA, above n 30, s 43A and 43C. The Act requires ACMA to specify in the licence conditions what type of content would be considered of ‘local significance’. For examples of the interpretation ACMA has given to the phrase See *Broadcasting Services (Additional Regional Commercial Radio Licence Condition*

Initially the licensing of commercial stations was left to ministerial discretion.⁵³⁵ In 1977 the licensing of commercial stations was transferred to the Australian Broadcasting Tribunal a non-political body but the process remained discretionary in nature.⁵³⁶ In 1988 legislation was introduced which established some criteria for the licensing of commercial stations through a merit-based system.⁵³⁷ *The Broadcasting Services Act 1992 (Cth)* ordered for such merit-based system to be replaced with a price based system.⁵³⁸ In 1998 the *Commercial Broadcasting Licence Allocation Determination No.1* was issued which set the bases for the licensing of commercial broadcasters through an auction system.

4.1.6. Regulatory Authority

The first attempt in Australia to depoliticize the regulation of broadcasting was the creation in 1948 of the Australian Broadcasting Control Board (ABCB).⁵³⁹ The ABCB was an independent body but its role was solely to advise the Post-Master General and it had no real decision making power.⁵⁴⁰ In 1956 legislation was introduced requiring the ABCB to conduct a public inquiry before issuing a recommendation in relation to broadcast licensing matters.⁵⁴¹ While final licensing decisions remained a matter of ministerial discretion, the public inquiry requirement was still significant as a step toward transparency in the licensing process.

– *Material of Local Significance*) Notice of 19 December 2007; *Broadcasting Services (Additional Television Licence Condition) Notice of 8 November 2007*.

⁵³⁴ BSA, above n 30, s 43B. ‘Local presence’ refers to the actual physical presence of the station (facilities and employees) in the service area.

⁵³⁵ Thornley, above n 460, 68.

⁵³⁶ This followed the ‘Green Report’ Green, Frederick, *Australian Broadcasting: A Report on the Structure of the Australian Broadcasting System and Associated Matters, Inquiry into the Australian Broadcasting System (1977)* which had recommended transferring broadcast licensing to an independent body.

⁵³⁷ *Broadcasting Legislation Amendment Act 1988 (Cth)* s 27 inserting *Broadcasting Act 1942* s 83A(9)-(10).

⁵³⁸ BSA, above n 30, s 36(1).

⁵³⁹ Armstrong, above n 492.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Broadcasting and Television Act 1956 (Cth)* s 38 inserting *Broadcasting Act 1942* s 47(2).

The ABCB was replaced with the Australian Broadcasting Tribunal (ABT)⁵⁴² to whom the power to issue broadcast licences was transferred to the in 1997.⁵⁴³ In addition to its licensing functions, the ABT also monitored compliance with the Australian content quotas and classified musical productions as Australian or foreign for quota purposes.⁵⁴⁴

The *Broadcasting Services Act 1992* (Cth) (BSA) replaced the ABT with the Australian Broadcasting Authority (ABA). Unlike its predecessors who only exercised supervisory functions in relation to private broadcasters, the ABA was also granted authority to supervise the ABC and the SBS bringing all sectors of Australian broadcasting under the supervision of a single regulatory body.⁵⁴⁵ The possibility of creating a separate body for the regulation of TSBs in Australia was considered but ultimately it was decided for all sectors to be regulated by the same body.⁵⁴⁶

The BSA also reserved a portion of Australia's available radio spectrum to be administered by the ABA; this reserve is known as the 'broadcasting services band' (BSB).⁵⁴⁷ The reserve of the BSB allowed the ABA to determine the number and type of stations to be licensed in a service area in advance, separating this decision from the actual licensing process.

In 2005 the ABA was fused with the Australian Communications Authority (ACA).⁵⁴⁸ The ACA was the entity that, up to that point, was in charge of general spectrum management, frequency planning outside the BSB and regulation of telecommunications. The entity formed by the merger - the Australian Communications and Media Authority

⁵⁴²The ABT was created by the *Broadcasting and Television Amendment Act (No.2) 1976* (Cth).

⁵⁴³*Broadcasting and Television Amendment Act 1977* (Cth) s 6 inserting *Broadcasting and Television Act 1942* (Cth) s 16.

⁵⁴⁴ Australian Broadcasting Tribunal, *Annual Report 1976*, (1976).

⁵⁴⁵ ABA was empowered to attend to complaints made by members of the public relating to breaches by the ABC or the SBS of their own codes of practices if the complaint was presented first to the broadcasters themselves but no satisfactory resolution was reached. This is the same system used to attend complaints relating breaches by commercial or community broadcasters under the co-regulatory model discussed in Section 4.1.7.

⁵⁴⁶ See Standing Committee on Education, Science and the Arts, *Third Progress Report on all Aspects of Television and Broadcasting Including Australian Content of Television Programmes* (Australian Parliament Senate, 1976).

⁵⁴⁷ See BSA, above n 30, s 6.

⁵⁴⁸ Through the *Australian Communications and Media Authority Act 2005* (Cth).

(ACMA) - received the competences previously assigned to the ABA and ACA and remains to this day the regulatory entity in charge of broadcasting, radiocommunications and telecommunications.

ACMA has the power to impose specific licence conditions to commercial and community broadcasters.⁵⁴⁹ However, the regulation of private broadcasters is primarily conducted in Australia through legislation and the codes of practice prepared by each sector under the co-regulatory system discussed below. By contrast in Canada regulation is conducted primarily through policies issued by the regulatory entity.⁵⁵⁰

4.1.7. The Co-Regulatory System

One of the most distinctive features of broadcasting regulation in Australia is the co-regulatory system. In 1977, the ABT presented Report into the Public Inquiry into the Concept of Self Regulation for Australian Broadcasters.⁵⁵¹ This report set the basis for the co-regulatory system which was introduced in 1992 and remains in place to this day. The co-regulatory system is based primarily on ‘codes of practice’ which are prepared by bodies representing each of the different broadcasting sectors.⁵⁵² While some of the broadcast licensees’ obligations are established by law, the codes of practice address matters such as the internal governance of licensees and content standards.⁵⁵³

The codes of practice are approved and registered by ACMA.⁵⁵⁴ In case of non-compliance, members of the public have access to a two tiered complaints procedure where they can first present their complaints to the broadcasting service providers then, if no satisfactory resolution is reached, can elevate the complaint to ACMA who can

⁵⁴⁹ See BSA, above n 30, ss 43 and 87.

⁵⁵⁰ Discussed in Section 5.1.6.

⁵⁵¹ Australian Broadcasting Tribunal, *Self-Regulation for Broadcasters: A Report on the Public Inquiry Into the Concept of Self-Regulation for Australian Broadcasters* (1977).

⁵⁵² See BSA, above n 30, s 123 (1).

⁵⁵³ See Section 4.3.6.

⁵⁵⁴ BSA, above n 30, s 123 (4).

enforce the codes.⁵⁵⁵ The fact that a public entity approves and enforces the codes is what distinguishes the Australian co-regulatory system from mere industry self regulation. ACMA also has the power to establish additional program standards if the codes of practice have been deemed to be insufficient in relation to a specific matter or do not deal with a matter.⁵⁵⁶

4.1.8. Multiculturalism Policy

As in many other countries, Australian policy with regard to immigrants and indigenous peoples started as one of assimilation. During the first half of the past century the aim was for the development of a monocultural and monolingual country.⁵⁵⁷ A consequence of the assimilation policy was that English was promoted as the sole language and the use of languages other than English (LOTE), including the native languages of immigrants and indigenous Australians, was discouraged and, in the case of broadcasting, restricted.⁵⁵⁸

In the decade of the 1970s Australian policy began to change, at least officially, into one of “multiculturalism”.⁵⁵⁹ After the policy shift, immigrants and Australians from foreign backgrounds were encouraged to maintain their culture and languages.⁵⁶⁰ This policy was subsequently extended to indigenous Australians, with a specific concern for the

⁵⁵⁵ Ibid, s 148.

⁵⁵⁶ Ibid, s 125.

⁵⁵⁷ Lo Bianco, Joseph, *National Policy on Languages*, Department of Education (1987); Zangalis, George, *From 3ZZ to 3ZZZ: A Short History of Ethnic Broadcasting in Australia* (Ethnic Public Broadcasting Association of Victoria, 2001).

⁵⁵⁸ See Section 4.2.7.1.

⁵⁵⁹ In between assimilationism and multiculturalism there was a transitional phase where the policy was one of integrationism (immigrants were expected to adopt the dominant culture but not necessarily required to completely abandon their native cultures). However, there is no consensus in literature regarding when the integration policy phase started and ended. Some also argue that at least initially the shift toward multiculturalism was more rhetorical than real [See, Ashbolt, Allan, 'Radio and Television Services for Migrants: Problems and Prospects' in Ian Burnley, Sol Encel and Grant McCall (eds), *Immigration and Ethnicity in the 1980s* (Longman Cheshire 1985) 104-112; Jakubowicz, Andrew, 'State and Ethnicity: Multiculturalism as Ideology' in James Jupp (ed) *Ethnic Politics in Australia* (George Allen & Unwin 1984) 14-28; Shrimpton, Bradley, *The Representation of Cultural Diversity in Commercial Radio Broadcasting* (Ethnic Communities' Council of Victoria, 1999)].

⁵⁶⁰ See Galbally, Frank, *Migrant Services and Programs: Report of the Review of Post-Arrival Programs and Services for Migrants* (1978).

protection of indigenous Australian cultures and languages at risk of extinction.⁵⁶¹ The creation of the SBS was one of the consequences of the shift toward multiculturalism. The role of broadcasting in promoting multiculturalism is also acknowledged in the BSA which includes, within its list of objects the promotion of the role of broadcasters in developing and reflecting cultural diversity.

4.1.9. The Impact of Australia's General Broadcasting Policy on Third Sector Broadcasting

As evidenced by all the above, the lack of legal limitations to the parliament's regulatory powers means Australian policy makers have had the opportunity to pursue their goals in relation to broadcasting policy without the need to concern themselves with legal barriers or imperatives. While references to IHRL or the concepts of freedom of expression and the right of persons to information are rarely expressly mentioned in Australian policy documents, it is evident that Australia's broadcasting policy has been motivated by some of the same concerns. As noted, extending the access to broadcasting services to the whole of the population and ensuring for all the access to locally relevant content have been among the main goals pursued by Australian policy. These goals coincide with the fulfillment of persons' right to information under IHRL. Governments' interest in fulfilling these goals has also proven beneficial to the development of TSB. Since commercial broadcasters were expected to provide locally oriented content to all communities but the sector was not always able or willing to fulfill this ideal, TSB has been used in Australia as an alternative to ensure local services where it was not viable or attractive for commercial broadcasters to provide them.⁵⁶²

The interest in ensuring the availability of broadcasting services and extending them to the whole country has also aided the development of TSB as TSBs have been an

⁵⁶¹ See Westerway, above n 509; Batty, Philip 'Recruiting An Aboriginal Voice: The State Development of Aboriginal Broadcasting' in Luke Taylor et al (eds), *The Power of Knowledge, The Resonance of Tradition* (Aboriginal Studies Press, 2005) 169-181; Priorities Review Staff, *Report on Radio* (1974).

⁵⁶² Discussed in Section 4.2.1; See also Section 2.3.5, which explains that its potential for localism is one of the main advantages of TSB.

alternative to deliver basic broadcasting services in remote Australia.⁵⁶³ In addition to ensuring the availability of broadcasting services, the reserve of the BSB has also allowed ACMA to determine in advance whether a frequency should be allocated to TSB and make calls for applications that are specific for community licences. However, there have been calls to eliminate the BSB reserve which, if followed, can prove detrimental to the further development of the sector.⁵⁶⁴

As noted, because broadcasters are considered essential services, Australian policy has tended toward the protection of the financial viability of commercial broadcasters. It is not clear to what degree this deference to the interest of commercial broadcasters has been to the benefit or detriment of TSB development. TSBs are normally perceived as less threatening to the viability of commercial outlets than additional commercial services which may have facilitated their licensing when the entry of new commercial entrants was more restricted. At the same time, the interest in protecting commercial broadcasters may be one of the reasons why TSBs have been subjected to tight restrictions on their capacity to engage in commercial activity, especially in relation to the broadcast of advertisements.⁵⁶⁵ Restrictions in this area significantly limited the viability of TSBs in the past but regulation in this area has become more relaxed in the present. State broadcasters have always been restricted in relation to the broadcast of advertisements which can explain why similar policies have been adopted in relation to TSBs.

The adoption by Australia of a multiculturalism policy can also be considered congruent with the goals of IHRL.⁵⁶⁶ As noted, the shift toward multiculturalism motivated the creation of the SBS. However, this shift also significantly aided the development of TSB as supporting ethnic and indigenous TSBs has been perceived as a more cost-efficient

⁵⁶³ Indigenous TSBs have been noted to provide a 'first level of service' to both indigenous and non-indigenous populations in remote Australia. See Productivity Commission, above n 400, 283.

⁵⁶⁴ Discussed further in Section 4.2.2.

⁵⁶⁵ As noted in Section 3.4.2, protecting commercial broadcasters is one of the goals commonly pursued by TSB regulation.

⁵⁶⁶ See Section 2.1.4.1.

alternative for the delivery of services that the State would otherwise have to deliver itself.⁵⁶⁷

Australia's broadcasting policy has not been historically characterized by heavy content regulation. However, and as noted, commercial broadcasters have been imposed direct requirements in areas such as national and local content. In contrast, TSBs have not been subjected to regulation in this area. This is notable as in other jurisdictions TSB are imposed higher requirements in this area in comparison to commercial broadcasters.⁵⁶⁸ Also relevant to note is that, unlike commercial broadcasters, the licensing process for community broadcasters in Australia remains merit-based.⁵⁶⁹ This can be interpreted as a recognition of the different nature and role of each sector.

4.2. History of Third Sector Broadcasting in Australia

The aim of this section is to provide historical background regarding TSB in Australia as well as the country's policy for the sector. Section 4.2.1 briefly discusses the development process of the Australian third sector. Sections 4.2.2 to 4.2.7 discuss the historical development of Australian policy in 5 key areas relating TSB while Section 4.2.8 provides a brief analyzes how the historical Australian experience is relevant for those seeking to develop TSB policy in other jurisdictions.

4.2.1. Development

Initially, Australia's legal framework only recognized two types of broadcasters: State and commercial. In the decade of 1960: interested groups began lobbying for the recognition of TSB.⁵⁷⁰

⁵⁶⁷This contrasts with the case of Canada where delivering these services has never been seen as a government obligation. Discussed further in Section 5.1.10.

⁵⁶⁸ See Sections 6.6.3 and 6.6.5.

⁵⁶⁹ Discussed in Section 4.3.2.2.

⁵⁷⁰ UNESCO, above n 7, 21.

A station established by the University of New South Wales in 1961 is considered the first example of TSB in Australia.⁵⁷¹ This station operated under an experimental licence given that the regulatory framework in place at the time did not allow for the issuing of non-commercial private broadcasting licences. The conditions of the experimental licence limited the station to offering formal educational content such as broadcasting lectures to distance learning students.⁵⁷² In addition to that experimental station, illegal ‘pirate’ not-for-profit stations appeared in Australia in the 1960s. They focused on social protest and served as precursors of TSB in the country.⁵⁷³

In 1972, the ABCB issued a report on FM Broadcasting.⁵⁷⁴ This report was the first to discuss the possibility of introducing TSB to complement the other two sectors of Australia’s ‘dual system’. The report acknowledged that there was a demand for broadcasting services targeted at minority and special interest groups that the State service could not address with the resources at its disposal and that the commercial sector was unlikely to address because of the relative size of these groups.⁵⁷⁵ For this reason, the report recommended that the law be amended to authorize the issue of licences for private non-commercial and special interest broadcasting services. The report also recommended that multiple groups cooperate in the running of TSB stations as very few of the interested groups were likely to be capable of providing a full time broadcasting service on their own.⁵⁷⁶ This model where the air-time of a station is shared by multiple distinct groups has been used by Australian TSBs throughout the years and remains common in the present.⁵⁷⁷

⁵⁷¹ Ibid.

⁵⁷² Thornley, Phoebe, above n 460, 247-8.

⁵⁷³ UNESCO, above n 7, 21.

⁵⁷⁴ Australian Broadcasting Control Board, Frequency Modulation Broadcasting: Report of the Australian Broadcasting Control Board (1972).

⁵⁷⁵ As noted in Section 2.1.4.1 its ability to serve disadvantaged groups for whom providing broadcasting services is not commercially attractive is one of the main reasons to support TSB.

⁵⁷⁶ It was deemed an inefficient use of the spectrum to allow a single group full time control of a frequency if it did not had the capacity to provide a full time service.

⁵⁷⁷ While there is a single licensee organization for each community broadcasting service in Australia, in most cases multiple and distinct groups need to participate in these organizations in order to make the services viable or licensees sell air-time to other third sector groups in order to support the stations.

In its submission to the 1972 report, the Federation of Australian Commercial Broadcasters supported the introduction of TSBs, provided they were strictly not-for-profit and did not compete with commercial broadcasters for advertisement revenue.⁵⁷⁸ The ABC in its submission to the same report, maintained that it could be able to address some of the minority interests TSBs were expected to serve if additional frequencies were assigned to it.⁵⁷⁹ However, it acknowledged that even with additional frequencies and resources, it would never be able to cater to every specialist interest group.⁵⁸⁰ These two submissions illustrate what the dynamic of the three sectors would be throughout the development of TSB in Australia and up to the present. Both the commercial and State sector supported the introduction of TSB. However, the State broadcasters have also been in competition with TSBs for frequencies and government resources, while commercial broadcasters have been concerned with potential competition from TSBs which made them advocate for the imposition of restrictions on the capacity of TSBs to engage in commercial activity.⁵⁸¹

The 1972 ABCB report was significant. However, its recommendations would not be introduced until years later. In 1973, the Senate Standing Committee on Education, Science and the Arts (SCESA) issued a report which also supported the introduction of TSB.⁵⁸² This report recommended that financial viability not be taken into account as a consideration for the licensing of TSBs. In addition, the report considered that two distinct types of TSBs could co-exist in the country: ‘public access’ stations that were government controlled but intended exclusively to provide access to independent not-for-profit groups and stations directly controlled by third sector groups.⁵⁸³ As discussed in Chapter 1 government controlled stations, even if intended for access by not-for-profit groups, cannot be technically classified as TSBs.

⁵⁷⁸ Australian Broadcasting Control Board, above n 574.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ Commercial broadcasters in Canada have also advocated for restricting the capacity of TSB stations in their country to engage in commercial activity. See Section 5.2.4.1.3.

⁵⁸² Standing Committee on Education, Science and the Arts, Second Progress Report on all Aspects of Television and Broadcasting Including Australian Content of Television Programmes (Australian Parliament Senate, 1973).

⁵⁸³ As discussed in Section 2.2.7 establishing State controlled public access stations is one of the measures, alternative to TSB, that can be implemented to deal with issues of inequality in broadcasting.

The concept of government controlled ‘access’ stations was initially favoured by Australian policy makers. However, TSBs advocates in the country were not content to gain access to government controlled facilities; they aspired to control their own broadcasting equipment.⁵⁸⁴ In 1975 the SCESA issued another report which supported the introduction of ‘public access’ stations noting: ‘the principle of freedom of speech in Australia should benefit from public access stations’.⁵⁸⁵ In practice, however, only two ethnic experimental stations were introduced following the ‘public access’ model.⁵⁸⁶ Because the ‘public access’ model was the one initially preferred, TSB was known in Australia as ‘public broadcasting’ for many years.

In 1975 the Report by the Working Party to the Minister of the Media on Public Broadcasting was presented.⁵⁸⁷ This report was the first in the country to deal exclusively with TSB and was very influential for the development of the sector. The report recommended the introduction of TSB noting that there was a need for local and special interest services that the commercial and State sectors could not satisfy. The report considered that adding local services to the State system would be detrimental to the quality of the national and regional outlets which were its priority. It also noted that the nature of the commercial sector and its need to attract large audiences meant the sector could not be expected to cope with all of society’s demands.

The *Broadcasting and Television Amendment Act (No. 2) 1976* (Cth) was the first to introduce TSB specific legislation in Australia. This Act introduced ‘public’ as a third class of licence meant for not-for-profit corporations and distinct from the commercial and ‘national’ (State) classes.⁵⁸⁸ After the enactment of this Act, TSBs began to proliferate in the country aided by a legal framework for their licensing. The BSA replaced the terminology of ‘public broadcasting’ with that of ‘community broadcasting’.

⁵⁸⁴ See Priorities Review Staff, above n 561.

⁵⁸⁵ Standing Committee on Education, Science and the Arts, above n 546.

⁵⁸⁶ Discussed in Section 4.2.7.1.

⁵⁸⁷ Working Party on Public Broadcasting, *Report to the Minister of the Media* (Department of the Media, 1975).

⁵⁸⁸ *Broadcasting and Television Amendment Act (No.2) 1976* s 14.

Up to the present, ‘community’ is used as a blanket term to refer to all forms of TSB in Australia and TSBs are licensed under the ‘community’ licence class.

4.2.2. Spectrum Access

When FM radio was being introduced in Australia, the possibility of using the FM band exclusively for the introduction of TSB services was considered.⁵⁸⁹ However, it was decided that it was necessary for commercial services to be provided in the band in order to make it sufficiently appealing for the public to acquire FM receivers.⁵⁹⁰ The 1975 Report on Public Broadcasting noted the desirability of reserving for a portion of the spectrum specifically for TSB but ultimately recommended against it. The report considered too impractical to establish a reserve at a time where the country was undergoing a spectrum reform to free additional frequencies.⁵⁹¹

When the first legislation on TSB was introduced in 1976, nothing was specified regarding the distribution of frequencies for TSBs, so this matter was left entirely to administrative discretion. The Act also established that ‘public’ licensees would be required to pay a fee determined by the licensing authority, so access to the spectrum was not free.⁵⁹² Although TSBs were required to pay a fee, during this time the assignment mechanism for private broadcasters, whether commercial or third sector, was not price based which meant the fees were not equivalent to the market value of the spectrum.

The situation changed with the enactment of the BSA. As noted above, this Act established that commercial broadcasting licences would be assigned through an auction process.⁵⁹³ However, in relation to TSBs the Act established that the licensing process would be merit-based and did not specify that community licensees would be required to

⁵⁸⁹ Australian Broadcasting Control Board, above n 574.

⁵⁹⁰ Ibid; Standing Committee on Education, Science and the Arts, above n 546.

⁵⁹¹ Working Party on Public Broadcasting, above n 587.

⁵⁹² *Broadcasting and Television Amendment Act (No.2) 1976* s 14, inserting *Broadcasting and Television Act 1942* s 111A(1).

⁵⁹³ See Section 4.1.5.

pay a fee.⁵⁹⁴ The Explanatory Memorandum to the Act clarified that the intention was to make frequencies for TSB available ‘free of charge’.⁵⁹⁵

As explained, the BSA also created the BSB, a spectrum reserve specific for broadcasting. The BSB is a reserve for broadcasting in general; no sub-reserve is made for TSB. However, ACMA determines the number and type of stations to be licenced in an area before issuing a call for applications. For this reason, prospective TSBs do not compete in the same licensing process with commercial broadcasters. While this has aided the development of TSB, the lack of a specific reserve has also been identified as a challenge for TSB development. In particular, the lack of reserved spectrum for the transition of TSBs to digital broadcasting was a cause of great concern for the sector.⁵⁹⁶ In the case of television where the country has fully transitioned to digital broadcasting, spectrum was allocated for community television stations to continue their broadcasts digitally. However, in 2014 a decision was announced that free access to spectrum would not longer be provided for (non-remote) community television stations after 2015.⁵⁹⁷ For this reason, the future of terrestrial third sector television in Australia is now in doubt.⁵⁹⁸

In 2002, the Productivity Commission issued a Radiocommunications Inquiry Report which recommended that a cost-opportunity assessment always be used for determining which users get access to the spectrum.⁵⁹⁹ For these purposes, the report recommended that the BSB be eliminated and that broadcasters of all three sector receive no preferential treatment in relation to access to the spectrum and compete directly in free market with other parties interested in spectrum such as telecommunication firms.⁶⁰⁰ This recommendation was a major cause of concern for TSBs who felt they would not be able

⁵⁹⁴ See BSA, above n 30, s 84.

⁵⁹⁵ Explanatory Memorandum, *Broadcasting Services Act 1992* (Cth), pt 6.

⁵⁹⁶ See for example Department of Communications, Information, Technology and the Arts *A Review of the Regulatory Arrangements That Should Apply to the Digital Transmission of Community Television Broadcasting Services Using Spectrum in the Broadcasting Services Band and How Access to the Spectrum Should be Provided Free of Charge*, (2002).

⁵⁹⁷ This is the stations that fall within the ‘CTV’ licence sub-category. See Section 4.3.3.3.

⁵⁹⁸ In Section 4.2.7.2 will be explained that there are indigenous television stations in remote Australia which are licenced as ‘community television’ stations. These stations will not be affected by the decision. However, not all of these stations originate programming as many only serve retransmission purposes.

⁵⁹⁹ Productivity Commission, *Radiocommunications Inquiry*, Report no. 22 (AusInfo, 2002).

⁶⁰⁰ *Ibid*, recommendation 10.1.

to compete for spectrum in an open market.⁶⁰¹ The report acknowledged that TSBs (and State broadcasters) would be unable to access spectrum at market prices. It recommended as a potential solution either that government subsidize TSBs in the purchase of spectrum access or, as a less desirable but more practical solution, that a reserve be made only for ‘not-for-profit’ uses of the spectrum.⁶⁰² The recommendations of the 2002 Productivity Commission report have so far not been implemented so the BSB continues to be reserved for broadcasting use. Community licences remain issued through a merit based process and confer free access to spectrum within the BSB that ACMA has decided to allocate for community broadcasting purposes.

4.2.3. Licensing Process

Before a legislative framework for the licensing of TSBs was established, some TSBs were licensed in Australia using alternative methods such as issuing ‘experimental’ licences or issuing ‘commercial’ licences with restrictions on advertisements imposed as licence conditions.⁶⁰³ Some early government reports on broadcasting policy elaborated on a potential framework for the licensing of TSBs. The 1973 SCESA report recommended the elimination of the notion of financial viability, which was a licensing requirement for private broadcasters at the time, in order to allow TSB stations to be licensed anywhere where a need for them was identified.⁶⁰⁴ The 1975 Public Broadcasting Report recommended that any legal entity as well as individuals should be eligible for TSB licensees.⁶⁰⁵

The Broadcasting and Television Amendment Act 1976 (Cth) provided the first framework for TSB licensing but did not establish any guidelines regarding the licensing procedure or criteria, as it left these matters to administrative discretion. However, it specified the type of entities that would be eligible for ‘public’ licences, namely

⁶⁰¹ These concerns were manifested by members of the sector in their submissions to the inquiry and noted in the report. Ibid, LII.

⁶⁰² Ibid, 240.

⁶⁰³ UNESCO, above n 7, 22; Thornley, above n 460, 185.

⁶⁰⁴ Standing Committee on Education, Science and the Arts, above n 582.

⁶⁰⁵ Ibid.

corporations but ‘not being a corporation the objects of which include the acquisition of profit or gain for the benefit of its individual members’.⁶⁰⁶ This made eligibility for ‘public’ licences open to not-for-profit corporations but not for individuals or non incorporated groups.⁶⁰⁷ The Act also provided that ‘public’ licences could be issued ‘to provide services for people within a specified area’, ‘to provide programs of a specified nature’ or to ‘provide programs for a specified purpose’.⁶⁰⁸ This meant community stations intending to serve both, geographic communities and communities of interest could be licensed.⁶⁰⁹

In 1978, the then Minister for Post and Telecommunications Tony Staley issued a ministerial statement on the Development of Public Broadcasting⁶¹⁰ which included the Guidelines for the Planning of Public Broadcasting in Phase I.⁶¹¹ These Guidelines described how the licensing process was to be conducted. The minister would be the one to issue a call for applications for ‘public’ licences.⁶¹² The ABT would then hold a public inquiry and issue the licences to the candidates deemed most suitable.⁶¹³ The Guidelines also prohibited the issue of ‘public’ licenses to any government or statutory body other than educational institutions, which eliminated the concept of government controlled ‘access stations’.⁶¹⁴

The *Broadcasting Legislation Amendment Act 1988* (Cth) was the first legislation to enumerate criteria for the assignment of TSB licences. The criteria were relatively vague but the Act specified that the licensing authority had to take into account the desirability

⁶⁰⁶ *Broadcasting and Television Amendment Act (No.2) 1976* (Cth) s 14, inserting *Broadcasting and Television Act 1942* (Cth) s 111A(2).

⁶⁰⁷ Individuals and non-incorporated groups are eligible for TSB licences in other jurisdictions. Discussed further in Section 6.2.1.

⁶⁰⁸ *Broadcasting and Television Amendment Act (No.2) 1976* (Cth) s 14, inserting *Broadcasting and Television Act 1942* (Cth) s 111A(1)(a)-(b).

⁶⁰⁹ As noted in Section 1.3.1, these are the two types of communities community stations can be licensed to serve.

⁶¹⁰ Staley, Tony, *Development of Public Broadcasting* (Minister for Post and Telecommunications, 1978).

⁶¹¹ Staley, above n 465.

⁶¹² *Ibid*, Art. 4.

⁶¹³ *Ibid*, Arts. 4. and 5.

⁶¹⁴ *Ibid*, Art. 9.

of community participation and control when issuing licences⁶¹⁵ and that, in the event that there were multiple suitable applicants for a single licence, the licence should be issued to the applicant deemed most ‘suitable’ by the licensing authority.⁶¹⁶ The Act also established that TSB licence applications should be refused if the licensing authority doubted the financial and technical capacity of the applicants to deliver the proposed service⁶¹⁷ or considered that issuing the licence would impair the commercial viability of other broadcasters in the same area.⁶¹⁸

A new licensing framework was introduced in 1992 after the adoption of the BSA. Under the new framework the licensing authority was not longer required to consider the potential effect on the commercial viability of other services during the licensing stage. Applicant’s ‘capacity’ and the desirability of community ‘participation’ remained licensing criteria but the concept of community ‘control’ was eliminated and new criteria were introduced. The licensing framework established in 1992 has remained relatively unchanged. Section 4.3.2 will detail the current Australian framework for TSB licensing including the licensing criteria. Two change since 1992 have been the introduction of ‘CTV’ licences and ‘temporary’ community licences. These are special subcategories of community licences with special conditions. These subcategories are discussed further in Section 4.3.3.

4.2.4. Advertising and Sponsorship Regulation

The origin of the concept of sponsorship in Australian TSB policy can be found in the 1972 ABCB report on FM Broadcasting.⁶¹⁹ This report recommended that ‘public’ stations be prohibited from airing advertisements but be allowed to acknowledge the financial contributions of businesses who had supported the stations by stating (only) the

⁶¹⁵ *Broadcasting Legislation Amendment Act 1988* (Cth) s 27, inserting *Broadcasting Act 1942*(Cth) s 83C(4)(g)-(f).

⁶¹⁶ *Ibid*, inserting *Broadcasting Act 1942* (Cth) s 83C(7).

⁶¹⁷ *Ibid*, inserting *Broadcasting Act 1942* (Cth) s 83C(4)(a)(ii).

⁶¹⁸ *Ibid*, inserting *Broadcasting Act 1942* (Cth) s 83C(4)(b).

⁶¹⁹ The restricted forms of advertisement allowed to ‘A’ stations in the early days of Australian broadcasting can be seen as a precursor to the concept of sponsorship. See Section 4.1.5.

name and address of the business. This concept has come to be known as ‘sponsorship’ although it was not named as such in the report.

In 1973, the SCESA issued a report which considered it acceptable for advertisements to be allowed in the third sector subject to special rules such as only allowing advertisements related to the specialized interests the station was meant to serve or imposing more time and duration restrictions in comparison to commercial broadcasters.⁶²⁰ As will be discussed in Section 6.5.1, restrictions of this type have been used in other countries, including Canada. However, Australian policy followed the FM Broadcasting report in fully prohibiting advertising and allowing sponsorship as an alternative for TSB stations to raise funds.

The PRS 1974 Report on Radio introduced the term ‘sponsorship’ but did not define it.⁶²¹ The report recommended establishing a maximum amount of station revenue that could come from a single sponsor as a measure to protect stations’ independence.⁶²² The 1975 Report by the Working Party to the Minister of the Media on Public Broadcasting elaborated on the concept of sponsorship, explaining that the goal of prohibiting advertising and only allowing sponsorship was to prevent TSBs from focusing on attracting the widest possible audiences in order to maximize revenue, as commercial broadcasters in Australia did at the time.⁶²³

The first legislation on TSB adopted in 1976 did not include rules relating sponsorship or advertisement, leaving this matter to administrative discretion. The Ministerial guidelines adopted in 1978 did specify that advertisements were prohibited and that sponsorship would be allowed but did not define what would be understood as ‘sponsorship’.⁶²⁴ The *Broadcasting and Television Amendment Act 1980* (Cth) elevated the prohibition of

⁶²⁰ Standing Committee on Education, Science and the Arts, above n 582.

⁶²¹ Priorities Review Staff, above n 561.

⁶²² As noted, protecting the independence of TSBs is one of the goals most commonly pursued by TSB regulation. See Section 3.4.3.

⁶²³ Working Party on Public Broadcasting, above n 58.

⁶²⁴ Staley, above n 465, Art. 10.

advertisement to the legislation level and specified that sponsorship announcements could only contain:

- (a) the name and address of the sponsor; and b) a description, made in accordance with directions given by the Tribunal, of the business, undertaking or activity (if any) carried on by the sponsor.⁶²⁵

For TSB stations this rules were not completely clear and uncertainty regarding which types of announcements they were authorized to make was a problem. In 1986 the ABT presented its report on Public Broadcasting Sponsorship Announcements which sought to assist stations by clarifying which type announcements were prohibited as ‘advertisements’ and which were authorized as ‘sponsorship’.⁶²⁶ The report noted that regulating commercial announcements was especially important to distinguish TSBs from commercial broadcasters because, at the time, there was no official definition of ‘public broadcasting’ in Australia.

The report gave a very broad interpretation to the advertising prohibition, defining as an advertisement as any message ‘which appears to be calculated to promote or oppose’ any product, service or person whether aired for a fee or for free and whether produced by the broadcaster itself or by a third party. This seriously restricted the viability of TSBs, as it did not only restrict their capacity to raise funds through selling air-time for commercial announcements but also prohibited them from ‘advertising’ themselves to the community for purposes of attracting donations and even to promote their own programmes to their audiences. TSB stations were also prohibited from donating air-time for the promotion of community activities or local musicians, which stations considered essential parts of their role. The ABT also determined that sponsorship announcements could only identify sponsors by their legal name and address, meaning that TSBs were not permitted to identify sponsors by trade names or marks or by the name of their products. Moreover,

⁶²⁵ *Broadcasting and Television Amendment Act 1980* (Cth) s 27 inserting *Broadcasting and Television Act 1942* (Cth) s 111BA(3).

⁶²⁶ *Australian Broadcasting Tribunal Report to the Minister for Communications Public Broadcasting Sponsorship Announcements* (1986).

no reference could be made to addresses of retail outlets which did not match the legal address of the sponsor. The prohibition on advertisements extended to government advertising, even though the Department of Communication advocated for the government to be allowed to advertise on TSB stations.

The ABT acknowledged that these guidelines would negatively impact the financial viability of TSBs and conceded that it was not likely that parliament's intention was to ban such a broad range of activities. However, the ABT felt that theirs was the correct legal interpretation of the advertising prohibition following the applicable legal definition of advertisement. The report contrasted the case of TSBs with that of the ABC, which was also generally prohibited from broadcasting advertisements but which was regulated by a special Act which specified that matters such as the promotion of the station itself or its programmes were exempt from the prohibition.⁶²⁷

In 1987, the law was amended to address some of the issues identified in the ABT report. These amendments exempted from the advertising prohibition, the broadcasting of 'community information' when no payment was received by the station,⁶²⁸ the promotion of the station itself (including messages designed to induce financial support from the audience)⁶²⁹ and the promotion of stations' own programs.⁶³⁰

The *Broadcasting Services Act 1992* (Cth) specified that sponsorship announcements could promote products or services and describe the business activities of the sponsors provided that they acknowledge that the licensee or one of its programs has received financial support from the sponsor.⁶³¹ For this reason, the main feature distinguishing sponsorship announcements from advertisement in Australia is the 'tagging' requirement. The current sponsorship regulation is discussed further in Section 4.3.7.2.

⁶²⁷ ABC Act, above n 505.

⁶²⁸ *Broadcasting Amendment Act (No.3) 1987* (Cth) s 33 (b), inserting *Broadcasting Act 1942* (Cth) s 119AB (3)(c).

⁶²⁹ *Ibid*, inserting *Broadcasting Act 1942* (Cth) s 119AB (3)(b)(i).

⁶³⁰ *Ibid*, inserting *Broadcasting Act 194* (Cth) s 119AB (3)(b)(ii).

⁶³¹ BSA, above n 30, Sch 2 s 2(2);

The BSA also established that the maximum time allowed for sponsorship announcements was four minutes in an hour of broadcast time.⁶³² In order to aid the financial viability of the sector this limit was later increased to five minutes in the case of radio⁶³³ and seven in the case of television.⁶³⁴ In 2007 the Senate Standing Committee on Communications, Information Technology and the Arts (SCCITA) issued a report which discussed the possibility of further relaxing the limits as the sector was still struggling financially difficulties but ultimately recommended that these limits be maintained. The limits remain in place to this day.⁶³⁵ In its submission to this report ACMA described its policy in relation to advertising in community stations in the following terms:

A key issue for any community sector in any country is how it funds itself. If you look at countries around the world, you will see that they are on a continuum between: ‘No advertising allowed; go and find some other way of doing it,’ and ‘You can advertise and, if you get the governance right, that’s all that’s important. You have to be not-for-profit and all those sorts of things.’ We are somewhere in the middle.⁶³⁶

4.2.5. Government Funding

In the early stages of the development of TSB in Australia policy makers and independent groups advocating for the introduction of the sector both favoured the idea of TSBs being fully funded by the government.⁶³⁷ Before the sector obtained legal recognition, Australian Government reports discussed potential mechanisms for preventing government funding from impairing the independence of TSBs. Among the

⁶³² Ibid, Sch 2 s 9(3).

⁶³³ *Broadcasting Services Amendment Act (No.1) 1999* (Cth) Sch 4, amending *Broadcasting Services Act 1992* (Cth) Sch 2 s (9)(3).

⁶³⁴ *Broadcasting Legislation Amendment Act (No.2) 2002* Sch 1 s 12, amending *Broadcasting Services Act 1992* sch 2 cl 9(3).

⁶³⁵ Standing Committee on Communications, Information, Technology and the Arts, *Tuning in to Community Broadcasting* (Parliament of the Commonwealth of Australia, 2007), 128-132.

⁶³⁶ ACMA, *transcript of evidence 29 November 2006*, 12 cited in Ibid, 127.

⁶³⁷ In this relation, Working Party on Public Broadcasting, above n 587, noted that government funding of TSB was necessary in order to attain true pluralism in Australian Broadcasting.

possible measures canvassed was a separation of the functions of licensing and financing TSBs into different government agencies, thereby spreading the distribution of funds to TSBs among multiple government agencies so that no single agency would hold excessive power over TSBs⁶³⁸ or creating a specialized and independent body tasked solely with channeling government funds to TSBs.⁶³⁹

By the time the sector was legally recognized in 1976, the notion that government could provide the sole source of funding for the sector had been abandoned, primarily due to financial constraints.⁶⁴⁰ This explains why stations were authorized to raise funds through the broadcast of sponsorship announcements. However, it was still considered desirable for the sector to receive a measure of government funding. The 1978 Ministerial guidelines specified that the government would support TSBs but only through ‘indirect’ funding.⁶⁴¹

In 1984 the Public Broadcasting Foundation (PBF) was created.⁶⁴² The PBF was incorporated as an independent private non-profit body by representatives of the Australian third sector, with support from the government. Its purpose was to serve as a body through which public funding for TSBs could be channeled without requiring the government to directly distribute grants to individual stations.⁶⁴³

Initially, the PBF only distributed funds to general community broadcasters; funding for ethnic and indigenous broadcasters was administered by the SBS.⁶⁴⁴ However, in 1986 the distribution of funding for all sectors was transferred to the PBF. The first years of the PBF were marked by infighting between the different TSB sub-sectors, as indigenous and ethnic broadcasters felt disadvantaged by distribution being made by an organization

⁶³⁸ Priorities Review Staff, above n 561.

⁶³⁹ Working Party on Public Broadcasting, above n 587.

⁶⁴⁰ See Thornley, above n 460, 134.

⁶⁴¹ Staley, above n 465, Art. 8.

⁶⁴² Community Broadcasting Foundation, *Submission to the Indigenous Broadcasting and Media Sector Review* (2010).

⁶⁴³ Thornley, above n 460, 337-40.

⁶⁴⁴ *Ibid*, 237.

controlled primarily by representatives of the general community sector.⁶⁴⁵ This situation was ultimately resolved by the implementation of a system where the government issued specific grants for each sub-sector and the PBF had specific committees which represented each sub-sector and determined the eligibility criteria for each type of grant.⁶⁴⁶ The PBF renamed itself Community Broadcasting Foundation (CBF) following the change of terminology adopted in the BSA but continues to serve the same role. At present, most Australian government funding for TSB is distributed by CBF. However, TSBs also sometimes receive support from other sources such as local governments. There is also a special Indigenous Broadcasting Program (IBP) which is used to distribute additional funding to indigenous broadcasters.⁶⁴⁷

Although the distribution system seems to be deemed adequate by Australian TSBs, concerns have been expressed that the level of government funding has not been constant throughout the years and is not always sufficient for the needs of the sector.⁶⁴⁸ The 2007 SCCITA report acknowledged the need to increase the levels of government funding for the sector and recommended increasing the placement of government advertising on TSB stations as an additional way to support the sector.⁶⁴⁹ Since funding for TSBs comes from the general budget, the amount of funding provided to the sector at any given time largely depends on the prevailing financial circumstances and the level of priority the government accords to TSB.

4.2.6. Content Regulation

The 1975 Report on Public Broadcasting noted that TSBs should not be limited in relation to the broadcast of political content.⁶⁵⁰ General community stations have never been subject to restrictions on political content, but for a time ethnic and indigenous

⁶⁴⁵ See *Ibid*, 237.

⁶⁴⁶ See Section 4.3.7.1.

⁶⁴⁷ See Section 4.2.7.2.

⁶⁴⁸ See for example Standing Committee on Communications, Information, Technology and the Arts, above n 635, 29-50.

⁶⁴⁹ *Ibid*, recommendations 4-8.

⁶⁵⁰ Working Party on Public Broadcasting, above n 587.

stations who had received funding from the SBS were prohibited from broadcast political content.⁶⁵¹ These restrictions were lifted once the distribution of their funding was transferred to the PBF and no TSBs in Australia are currently subjected to any kind of restriction in this area.

In relation to networking with other stations, the 1975 Report on Public Broadcasting considered that there was no reason to restrict TSBs in this area.⁶⁵² The 1984 report on Localism in Australian broadcasting took the opposing view, that TSBs should be prohibited from receiving most of their content through networking arrangement with other stations.⁶⁵³ Despite this, TSBs in Australia has never been subjected to networking restrictions, which is notable because it is an area in which commercial broadcasters have been regulated.⁶⁵⁴ As already explained, ACMA is required to establish local content obligations for commercial broadcasters but not for community broadcasters.

Considering that one of the reasons which motivated the introduction of TSB in Australia was the desire to ensure locally oriented broadcasting services where these were not commercially viable, the lack of networking restrictions or positive local content obligations may seem strange. A 2011 discussion paper issued in the context of Australia's Convergence review noted that the community sector has been broadcasting high proportions of local content despite the lack of regulation.⁶⁵⁵ This may explain why introducing such regulation has been deemed unnecessary.

4.2.7. Recognition and Regulation of Third Sector Broadcasting Sub-Sectors

In Australia there have never been specific frameworks for the different sub-sectors of TSB, all type of TSBs being considered initially within the single category of 'public' broadcasters and presently as 'community' broadcasters. The 1978 Ministerial

⁶⁵¹ This was because as a condition of funding they were required to adhere by SBS code of practice which prohibited the broadcast of political content.

⁶⁵² Working Party on Public Broadcasting, above n 587.

⁶⁵³ Oswin, above n 502.

⁶⁵⁴ See Section 4.1.4.

⁶⁵⁵ Convergence Review, *Discussion Paper: Australian and Local Content* (2011) 28.

Guidelines for the Planning of Public Broadcasting in Phase I established three categories of public broadcasting licences: Category E for educational bodies, Category S for ‘special interests’ stations and Category C for ‘community groups’.⁶⁵⁶ However, the explanatory notes accompanying these Guidelines clarified that these categories were not intended to be used in the regulatory process. Their sole purpose was to aid the government in the planning process.⁶⁵⁷ Stations licensed under one category were not prohibited from broadcasting content associated with another category and there were no category specific regulations.⁶⁵⁸ However, applicants had to identify themselves within a category when applying for a license and submit a ‘promise of performance’.

The main purpose of identifying different categories, according to the ministerial statement, was to help the government secure diversity by preventing by preventing all or most licences being allocated to a single type of station to the exclusion of the others.⁶⁵⁹ While the category system was in place, separate calls for applications were made for the different categories. This facilitated the access to licences by ethnic and indigenous broadcasters which were considered category S and hence were not required to compete against general community broadcasters in the same licensing process.⁶⁶⁰ In 1985, the E category was eliminated and with the enactment of the BSA the category system was completely dispensed with. Currently, all TSBs compete against each other (but not commercial broadcasters) in the same licensing processes. The following sub-sections briefly discuss the historical development of each Australian TSB sub-sector.

4.2.7.1. Development of Ethnic Broadcasting in Australia

As already noted, Australia’s policy in relation to immigrants started as one of assimilationism.⁶⁶¹ It was not until 1948 that programs broadcast in LOTE began to have a presence in the Australian airwaves. Following World War II, Australia received a

⁶⁵⁶ Staley, above n 465, Art. 2.

⁶⁵⁷ Ibid, Explanatory note B.

⁶⁵⁸ Ibid.

⁶⁵⁹ Staley, above n 610, 1000.

⁶⁶⁰ However, they competed against each other and other ‘special interest’ services.

⁶⁶¹ See Section 4.1.8.

significant influx of immigrants from non-English speaking backgrounds who were in need of communication services. The first LOTE programs appeared in commercial stations and their main purpose was to transmit essential information to the non-English speaking population.⁶⁶²

In 1952 a formal regulation was introduced which restricted the usage of LOTE in private broadcasting to a maximum of 2.5% of a station's programming and required any broadcast in LOTE to be accompanied by an English translation.⁶⁶³ This measure was motivated by the cold war context and the fear that subversive content could be transmitted undetected in non-English programming.⁶⁶⁴ Despite this restriction, the presence of ethnic content in the commercial sector rose during the 1950s and 1960s as the economic status of immigrant communities improved and allowed them to purchase air-time.⁶⁶⁵ However, by the end of the 1960s the situation changed as the business model of commercial radio shifted from one where sponsors paid for whole programs to the 'spot advertising' model which made access to commercial radio outlets more limited and expensive.⁶⁶⁶

As Australia's policy shifted toward multiculturalism, the restrictions on the use of non-English languages in broadcasting were removed in 1973.⁶⁶⁷ Despite the removal of the regulatory barriers, the level of ethnic content in the commercial sector continued to decline due to economic factors.⁶⁶⁸ The 1974 PRS Report on radio identified ethnic communities as one of the groups which would benefit from the introduction of TSB.⁶⁶⁹ The report acknowledged that some feared that authorizing ethnic TSB could create or

⁶⁶² Thornley, above n 460, 279.

⁶⁶³ See *Among Others*, Bostock, above n 263; Shrimpton, above n 559.

⁶⁶⁴ As discussed in Section 2.1.4.1, the practical difficulties associated with overseeing broadcasting in non-national languages is one of the reasons why governments are sometimes wary of authorizing ethnic broadcasting.

⁶⁶⁵ Zangalis, above n 557.

⁶⁶⁶ See Thornley, above n 460; Bostock, above n 263; Patterson, above n 500.

⁶⁶⁷ Clyne, above n 272, 64.

⁶⁶⁸ See among others, Shrimpton, above n 559; Patterson, above n 500, 43-4.

⁶⁶⁹ Priorities Review Staff, above n 561.

exacerbate ethnic conflicts but concluded that these concerns did not justify restricting the development of ethnic TSB stations.⁶⁷⁰

In 1975 the Australian government established two ethnic stations, 2EA and 3EA.⁶⁷¹ The initial purpose of these stations was to publicize the government's new health scheme 'Medibank' to non-English speakers.⁶⁷² Although government created and to a large degree controlled, these stations were officially experimental TSB stations meant to gauge the potential of introducing the new sector. They relied on independent volunteers for on-air presentation in the diverse languages.⁶⁷³ These stations would later evolve into what became the SBS.⁶⁷⁴

In the same year, access station 3ZZ was created. This station was legally part of the ABC system, but the ABC was instructed to operate it as a 'public access' station and to provide multiple community groups with access to produce and air their programs.⁶⁷⁵ This was intended as an experiment for the introduction of a government owned, designated public access station.⁶⁷⁶ Although the station was intended to provide access to all groups and not just ethnic communities, the great demand from ethnic communities for access to the airwaves led to non-English content dominating its air-time.⁶⁷⁷

3ZZ and the two experimental stations are considered the precursors of ethnic TSB in Australia. The experiences of these stations typified some of the problems commonly associated with ethnic and multicultural broadcasting: competition between different groups for air-time, fights between factions within groups for control of the programs and and government concern about international political issues being discussed by broadcasters under its support.⁶⁷⁸ For these reasons, the government exercised tight

⁶⁷⁰ Ibid.

⁶⁷¹ See among others Bostock, above n 263.

⁶⁷² See among others, Patterson, above n 500, 52.

⁶⁷³ Thornley, above n 460, 288.

⁶⁷⁴ See Section 4.1.3.

⁶⁷⁵ Dugdale, above n 330.

⁶⁷⁶ As noted, this was, at the time, the model preferred by the government for the introduction of independent non-commercial broadcasting (See Section 4.2.1.)

⁶⁷⁷ Dugdale, above n 330.

⁶⁷⁸ See Ibid; Ashbolt, above n 559; Zangalis, above n 557.

editorial control over the experimental stations and prohibited them from broadcasting political content.⁶⁷⁹ 3ZZ was comparatively less controlled but this may have led to the decision to close it in 1977.⁶⁸⁰ In that same year, the SBS was created and took control over the experimental stations.⁶⁸¹

Simultaneously with the above government initiatives, ethnic content also began to have presence in the then nascent general community sector.⁶⁸² By the end of 1970s, the Australian government began to support financially the establishment of ethnic TSB stations as well as the production of ethnic content for general community stations.⁶⁸³ Concerns remained regarding non government controlled ethnic broadcasting. However, TSB was seen as a more economic alternative to satisfy the high demand for ethnic broadcasting services than fully funded government services, and this outweighed those concerns.⁶⁸⁴

In 1977, the government issued Ethnic Broadcasting Guidelines.⁶⁸⁵ These guidelines were initially meant to apply only to the SBS service, but were later referred to by the Department of Communications as principles for ethnic radio in general, regardless of sector.⁶⁸⁶ The guidelines detail the goals of ethnic broadcasting in Australia which include: providing news and entertainment to the non-English speaking population in their own languages, facilitating the learning of English, assisting immigrants in their settlement process by facilitating access to information regarding their rights and obligations and encouraging culture maintenance. In addition, the guidelines also noted

⁶⁷⁹ See Among others Dugdale, Ibid; Ashbolt, Ibid.

⁶⁸⁰ Dugdale, Ibid.

⁶⁸¹ See Section 4.1.3.

⁶⁸² See among others, Patterson, above n 500; Zangalis, above n 557.

⁶⁸³ Zangalis, Ibid..

⁶⁸⁴ Thornley, above n 460, 308.

⁶⁸⁵ Minister for Immigration and Ethnic Affairs and Minister for Post and Telecommunications, *Ethnic Broadcasting Guidelines*, included in Galbally, Frank, *Migrant Services and Programs: Report of the Review of Post-Arrival Programs and Services for Migrants - Appendixes*, (1978), appendix 84.

⁶⁸⁶ Department of Communications and Department of Immigration and Ethnic Affairs, *The Extension and Development of Ethnic Radio: Discussion Paper* (1982).

that ethnic services should aim to serve all ethnic groups, including the numerically small, as equitably as possible.⁶⁸⁷

A discussion paper regarding the 'Extension and Development of Ethnic Radio' was published by the Department of Communications in 1982.⁶⁸⁸ This paper identified ethnic radio as radio with programming, in community languages or in English, directed toward specific ethnic communities or dealing generally with multicultural issues of concern to various ethnic communities.⁶⁸⁹ This is the closest to an official definition of ethnic broadcasting in Australia and matches the concept of ethnic broadcasting used in this thesis and detailed in Section 1.3.2. The paper also acknowledged that providing ethnic services through TSB was less burdensome on taxpayers than State run services and that it was easier for ethnic TSB stations than State ones to provide programming of local relevance.⁶⁹⁰

In 1984, the Senate Standing Committee on Education and the Arts presented a report regarding the need to develop a national language policy for Australia.⁶⁹¹ The report emphasized the general need for services in LOTE and recognized the important role of ethnic media in enabling social and political participation regardless of a person's level of competence in English. The report also noted the need to have a population competent in diverse languages for the purposes of foreign relations and commerce and acknowledged broadcasting as a tool which could contribute to language maintenance and learning.⁶⁹² Broadcasting was also identified in the report as a superior medium over print for disseminating information to the non-English speaking population due to it not being dependent on literacy.⁶⁹³

⁶⁸⁷ As noted, TSB is especially important for the smaller and less established communities which are less likely to be able to support a commercial service and have less political leverage to demand services from the government (Discussed in Section 2.1.4.1).

⁶⁸⁸ Department of Communications and Department of Immigration and Ethnic Affairs, above n 686.

⁶⁸⁹ Indigenous communities were specifically excluded from the definition of ethnic radio. Canadian policy had adopted a similar definition of ethnic broadcasting See Section 5.2.4.4.

⁶⁹⁰ Department of Communications and Department of Immigration and Ethnic Affairs, above n 686.

⁶⁹¹ Standing Committee on Education and the Arts, above n 233.

⁶⁹² *Ibid.*

⁶⁹³ *Ibid.*

As explained above, while the category system was in place, ethnic stations were considered category ‘S’ and their funding was initially distributed by the SBS.⁶⁹⁴ This provided a degree of separation between ethnic TSB and the general community sector. Additionally, the 1985 Report of the Committee of Review of the SBS recommended the creation of a separate category for ethnic broadcasters additional to the “S” category in order to secure the licensing of at least one ethnic station in every licence area with substantial ethnic communities.⁶⁹⁵ However, this recommendation was never implemented and, after the distribution of funds to ethnic broadcasters was transferred to the PBF and the category system was eliminated, there are no longer any elements officially separating ethnic broadcasting from general community broadcasting.

Ethnic broadcasting receives a degree of recognition as a distinct sector in government funding practice as government issues specific grants to support ethnic broadcasting.⁶⁹⁶ In 1985, ethnic broadcasters in Australia created their own representative body, the National Ethnic and Multicultural Broadcasters Council (NEBC).⁶⁹⁷ Among other activities, the NEMBC represents ethnic broadcasters before the CBF where it determines the distribution guidelines for ethnic broadcasting grants.⁶⁹⁸

4.2.7.2. Development of Indigenous Broadcasting in Australia

Like immigrants, indigenous peoples in Australia were initially subjected to assimilationist policies. As noted, under these policies the use by indigenous persons of their own languages was discouraged which resulted in multiple indigenous languages becoming extinct.⁶⁹⁹

Unlike ethnic content, content by or targeted to indigenous populations did not have any significant presence in the commercial or State broadcasting sectors during the 50s, 60s

⁶⁹⁴ See Section 4.2.7.

⁶⁹⁵ Committee of Review of the Special Broadcasting Service, *Serving Multicultural Australia - The Role of Broadcasting* (1985).

⁶⁹⁶ See Section 4.3.7.1.

⁶⁹⁷ Zangalis, above n 557.

⁶⁹⁸ See Section 4.3.7.1.

⁶⁹⁹ Lo Bianco, above n 557, 75.

and 70s. However, the development of ethnic broadcasting may have indirectly assisted in the development of indigenous broadcasting by allaying the fears associated with broadcasting in LOTE⁷⁰⁰ and by strengthening the political claim of the indigenous peoples for broadcasting services on their languages.⁷⁰¹

With the shift toward multiculturalism in the 1970s the first Australian Government initiatives for the introduction of broadcasting services specifically targeted toward the indigenous populations began to appear. These first initiatives were not for indigenous controlled TSB but for State controlled services through the ABC and, after its establishment, the SBS.⁷⁰² Similarly to the first ethnic broadcasting initiatives, the initial purpose was not to promote indigenous culture or language maintenance but to provide a basic service and to communicate with indigenous persons without or with limited knowledge of the English language.⁷⁰³ For this reason, these first initiatives were only concerned to provide services to indigenous populations in remote or rural areas; they did not address the needs of the indigenous Australians residing in urban centres.⁷⁰⁴

Westerway has identified a number of issues which ultimately thwarted the government's plans to provide content targeted specifically to indigenous populations in remote Australia through the State broadcasting system. These included: that most indigenous communities did not have hierarchical structures (elected or traditional) in place with whom the government could consult with for the introduction of the services; that many Australian indigenous peoples were nomadic, which meant their concept of community was not geographically based as government's was; that different ethnic and language groups were not always geographically separated, with multiple groups often inhabiting within the same general physical area; and that the geographical dimensions of the territories occupied by indigenous peoples and the dispersed nature of some indigenous communities presented technical barriers.⁷⁰⁵ These issues are all peculiar to indigenous

⁷⁰⁰ Such as the divisiveness and security concerns.

⁷⁰¹ See Westerway, above n 509, 111; above n 460, 335.

⁷⁰² Discussed in Westerway, *Ibid.*

⁷⁰³ Batty, above n 561, 177.

⁷⁰⁴ Westerway, above n 509, 115.

⁷⁰⁵ *Ibid.*, 115-7.

peoples in Australia and are not necessarily identical to the situation of indigenous groups in other parts of the world.⁷⁰⁶ These special factors have had significant influence over the development of indigenous TSB in Australia.

The 1974 PRS Report on Radio identified indigenous peoples as one of the specific groups which could benefit from the introduction of TSB Services.⁷⁰⁷ The report considered that indigenous Australians living in urban, rural or remote communities were three groups each with distinct and specific needs in relation to broadcasting services. The report also acknowledged the potential of broadcasting to contribute to cultural maintenance and suggested the funding of indigenous TSB by the government through the Department of Aboriginal Affairs.

The first forms of indigenous TSB in Australia began to appear in the late 70s, initially through some of the general purpose community stations which allowed access to airtime to indigenous groups.⁷⁰⁸ In 1981 the ABC also began carrying some content produced by independent third sector indigenous groups.⁷⁰⁹ The early 80s also witnessed the emergence of ‘pirate’ (unlicensed) community based indigenous television stations aiming to fill the gap left by the lack of licensed services.⁷¹⁰ Despite this, it was not until 1985 that the first TSB radio station specializing solely in servicing indigenous communities was licensed.⁷¹¹

One consequence of the shift toward multiculturalism was an acceptance of the desirability of maintaining and reviving indigenous languages and cultures. This was evidenced in the 1984 National Language Policy report which not only highlighted the importance of maintaining indigenous languages but also noted that, unlike other LOTE spoken in Australia, many indigenous languages were at risk of extinction which required

⁷⁰⁶ However, the geographic conditions were similar in Canada. Discussed in Section 5.1.2.

⁷⁰⁷ Priorities Review Staff, above n 561.

⁷⁰⁸ Forde, Foxwell and Meadows, above n 67, 60.

⁷⁰⁹ Task Force on Aboriginal and Islander Broadcasting and Communications, *Out of the Silent Land* (Department of Aboriginal Affairs, 1984), 21-2; See Also Ibid.

⁷¹⁰ Rennie, Elinor, 'Remote Beginnings, Metropolitan Developments: Community and Indigenous Television in Australia' in Linda K. Fuller (ed) *Community Media International Perspectives* (Palgrave Macmillan, 2007) 21, 25.

⁷¹¹ Forde, Foxwell and Meadows, above n 67, 60.

additional special efforts to be taken in order to preserve them.⁷¹² The report deemed broadcasting to be especially important for maintenance and revival efforts because many Australian indigenous languages lacked a written form.⁷¹³ At the time, there was a project to provide broadcasting services in remote Australia through satellite, which many feared could endanger indigenous cultures due to the lack of indigenous content in those services. Providing access rights to independent indigenous groups so they could produce content to be carried through the satellite was recommended as a measure to prevent such danger.⁷¹⁴ This acceptance of the cultural role of indigenous broadcasting was important for the development of indigenous TSB. While basic information services can be provided by government, culture and language maintenance and revival requires the groups themselves to lead the efforts.⁷¹⁵

Also in 1984, the *Out of the Silent Land* report was issued. This was the first government report to deal specifically with the broadcasting and communication needs of indigenous peoples in Australia. The report acknowledged that despite ‘comprehensive service’ obligations the commercial broadcasting sector had failed to produce significant amounts of content relevant to indigenous populations and that most indigenous broadcasting content came from third sector producers.⁷¹⁶ The report recommended that TSB be used to provide indigenous broadcasting services in urban and (non-remote) rural areas and for the government to financially support the sector.⁷¹⁷ In relation to remote areas, the report noted that while some community efforts had been successful in those areas many groups lacked the capacity to administer their own broadcasting services.⁷¹⁸ For this reason, the report recommended that the ABC provide indigenous content in these areas and for a simplified licensing process for indigenous TSB stations in remote areas to be implemented in order to facilitate and incentivize the development of such stations.⁷¹⁹ The report acknowledged that although the ABC sometimes acquired content from

⁷¹² Standing Committee on Education and the Arts, above n 233.

⁷¹³ Ibid, [14.31]

⁷¹⁴ Ibid, recommendation 116.

⁷¹⁵ See Batty, above n 561, 178-9; See also Section 2.3.2.

⁷¹⁶ Task Force on Aboriginal and Islander Broadcasting and Communications, above n 709.

⁷¹⁷ Ibid.

⁷¹⁸ Ibid.

⁷¹⁹ Ibid, recommendation 9.11.

independent indigenous producers, the production standards required by the ABC were a barrier to access by third sector indigenous groups.⁷²⁰ Reserving specific programming slots for access by indigenous groups without subjecting them to editorial control was recommended as a potential solution.⁷²¹

The *Out of the Silent Land* report was also notable in recommending that indigenous broadcasting be distinguished not only from general community broadcasting but also from ethnic broadcasting. The report considered that government funding allocations for the ethnic and indigenous sub-sectors should be separate.⁷²² The report also recognized that indigenous broadcasters could make a valuable contribution to improving the understanding of indigenous cultures by non-indigenous audiences. This recognition was significant as indigenous TSB in Australia has developed with a role of reconciliation, which is additional to its other roles of providing access to information and aiding in cultural maintenance and revival.⁷²³

In 1987, The Broadcasting for Remote Aboriginal Communities Scheme (BRACS) was introduced with the aim of addressing some of the issues identified in the *Out of the Silent Land* Report.⁷²⁴ Under this scheme, indigenous communities were provided with equipment for the terrestrial retransmission of ABC and commercial content fed through satellite.⁷²⁵ This aimed to secure communities' access to the broadcasts while also allowing them to decide not to rebroadcast content they found objectionable.⁷²⁶ The scheme also had the goal of providing indigenous communities with the opportunity to

⁷²⁰ Ibid.

⁷²¹ Ibid.

⁷²² Ibid, 24.

⁷²³ In this relation Meadows have noted 'Despite limited research on the subject, audience studies suggest that some Indigenous media services have significant non-Indigenous audiences, and may play an important cross-cultural role in furthering reconciliation'. Meadows, above n 344, 42.

⁷²⁴ For additional background on the BRACS scheme See Scott, Paul, 'What do We Have to Know this for?: The Broadcasting for Remote Aboriginal Communities Scheme and Tertiary Curricula' (1996) 18(1) *Australian Journalism Review* 25; Aboriginal and Torres Strait Islander Commission, above n 513; Meadows, Ibid.

⁷²⁵ Scott, Ibid, 26.

⁷²⁶ Aboriginal and Torres Strait Islander Commission, above n 513, 74; See also Australian Communications and Media Authority, *Remote Indigenous Broadcasting Services: Licensing Arrangements for Radio Providers* (Australian Communications and Media Authority, 2009), 6 <www.acma.gov.au/webwr/_assets/main/lib311201/ribs_discussion_paper.pdf> .

produce their own content and broadcast it through the retransmission facilities in replacement of the satellite feed.⁷²⁷

It is generally accepted that the scheme fell short of expectations, primarily due to inadequate funding for training and equipment maintenance.⁷²⁸ Among other disappointments, BRACS stations were in many cases used only for retransmission and failed to incentivize the production of indigenous community content.⁷²⁹ However, despite all its shortcomings, the BRACS scheme did achieve success in multiple indigenous communities who used the facilities as intended for both retransmission of mainstream services and the transmission of their own third sector content.⁷³⁰ Many of the indigenous TSBs currently in operation in Australia were originally established under the BRACS scheme.⁷³¹

Also in 1987, the Indigenous Broadcasting Program (IBP), a special government program for the distribution of funds for indigenous TSB, was created. Currently, the IBP is the main source of funding for indigenous TSB in Australia, although indigenous TSBs also receive funding from the CBF.⁷³² Funding through the IBP has been essential for the Australian indigenous TSB sector which is the most dependent on government funding out of all the Australian TSB sub-sectors.⁷³³ The indigenous is the only sub-sector for which a special funding scheme has been implemented.

As noted, indigenous TSBs in Australia became officially 'community' broadcasters once the categories system was eliminated.⁷³⁴ This was criticized by the 1999 *Digital Dreaming* Review, the second major government review of Australia's indigenous

⁷²⁷ Scott, above n 724, 26; Aboriginal and Torres Strait Islander Commission, *Ibid*, 74.

⁷²⁸ Scott, *Ibid*; Aboriginal and Torres Strait Islander Commission, *Ibid*, 20.

⁷²⁹ Productivity Commission, above n 400, 286; Meadows, above n 344, 33.

⁷³⁰ Rennie and Featherstone, above n 175, 54.

⁷³¹ Initially BRACS stations were not licensed as 'public' broadcasters but under a special 'limited' licence class. However, the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (Cth) s 6(1) converted stations previously licensed under the BRACS scheme onto community licensees under the BSA.

⁷³² Stevens, above n 384, 34

⁷³³ See Section 4.3.7.1.

⁷³⁴ The only specific reference to indigenous broadcasting in the original 1992 Act was a provision concerning the broadcast of advertisement in RIBS. See Section 4.3.3.4.

broadcasting sector. The review considered that the indigenous sub-sector had special needs which required it to be distinguished from the general community sector⁷³⁵ and that the need to compete with all other sectors in the same licensing process created a new barrier to the access to licences by prospective indigenous broadcasters.⁷³⁶ In light of this, the report recommended that separate rules be created for indigenous TSBs, including more flexible sponsorship limits than those applicable to general community broadcasters.⁷³⁷ It also recommended the reintroduction of the category system and the creation of a new denomination ‘specialist indigenous community radio licences’ so that prospective TSBs would not have to compete with any other type of TSBs in the same licensing process.⁷³⁸

As noted, in section 2.3.2 one of the main advantages of TSB is that it can allow TDGs control over their own broadcasting services. The Digital Dreaming Review also highlighted the importance of providing indigenous peoples with control over their own broadcasting services rather than just giving them access opportunities for the broadcast of their content in commercial or State services:

Access, where one is a client, is not **control**, where one sets the agenda. However, well-intentioned, neither mainstream stations (ABC, SBS or commercial) nor even general community stations are able to provide wholly satisfactory vehicles for indigenous communications.⁷³⁹ (emphases in the original)

The review also acknowledged that market forces alone would not satisfy the communication needs of indigenous peoples in Australia and that government intervention was required.⁷⁴⁰ In the specific case of broadcasting services for indigenous

⁷³⁵ In this relation the report noted: ‘Indigenous radio is unique and has unique problems. It is not simply another form of community radio. Therefore, it cannot be addressed successfully simply by re-cycling approaches prepared with quite different types of broadcasting in mind’. Aboriginal and Torres Strait Islander Commission, above n 513, 16.

⁷³⁶ Ibid, recommendation 2.2.

⁷³⁷ Ibid, recommendation 3.4.

⁷³⁸ Ibid, recommendation 2.2.

⁷³⁹ Ibid, 10.

⁷⁴⁰ Ibid, 13.

communities in remote Australia, the report considered that these will always depend on government support because the relative sizes and socio-economic conditions of these communities means that ‘They simply do not provide – **and never will provide** – the basis for commercially attractive markets’⁷⁴¹ (emphasis in the original).

In the year 2000, the Productivity Commission issued its *Broadcasting Inquiry Report* which reiterated the Digital Dreaming Review’s conclusion regarding the need to distinguish indigenous broadcasting from other forms of TSB.⁷⁴² The Inquiry report noted that the community radio code of practice was inadequate for the regulation of indigenous broadcasters; that the restrictive advertising and sponsorship regulation imposed on general community broadcasters was unnecessary for indigenous broadcasters who were not likely to attract significant advertising revenue even in absence of restriction and that the different roles of indigenous and general community broadcasters made difficult for the licensing authority to decide between the two in the same application process.⁷⁴³ In light of these considerations, the Inquiry report made two main recommendations in relation to indigenous broadcasting. The first was that:

A new licence category for Indigenous broadcasters should be created, with appropriate conditions relating to advertising.⁷⁴⁴

The second was that:

Spectrum should be reserved for Indigenous broadcasters to provide a primary service for Indigenous communities, where appropriate.⁷⁴⁵

Also in the year 2000, the objects clause in the BSA was amended to include:

⁷⁴¹ Ibid, 19.

⁷⁴² Productivity Commission, above n 400, 285-6.

⁷⁴³ Ibid, 285-7.

⁷⁴⁴ Ibid, recommendation 8.5.

⁷⁴⁵ Ibid, recommendation 8.6.

to ensure the maintenance and, where possible, the development of diversity, including public, community *and indigenous* broadcasting, in the Australian broadcasting system in the transition to digital broadcasting.⁷⁴⁶

The listing of indigenous broadcasting separately from community broadcasting could be interpreted as a step towards the recognition of indigenous broadcasting as a different sector.⁷⁴⁷ However, despite the introduction of this provision, indigenous broadcasting continues to be considered officially just a form of community broadcasting.⁷⁴⁸

In 2002, the BSA was amended to authorize the registration of a specific code of practice for remote indigenous broadcasting services (RIBS).⁷⁴⁹ Upon the registration of such a code the general community broadcasting codes of practice would cease to apply to RIBS.⁷⁵⁰ However a RIBS code of practice has not been registered to date so RIBS remain subjected to the general community radio broadcasting codes of practices⁷⁵¹ The same amendment created the CTV sub-category of community licences. This sub-category was defined as including those community television services ‘not targeted, to a significant extent, to one or more remote indigenous communities’.⁷⁵² The purpose of this, according to the amendment’s explanatory memorandum was to exempt RIBS from the additional conditions that were imposed on CTV licensees which, were deemed too burdensome for them to comply with. These conditions are discussed in Section 4.3.3.3.

In 2010 the Australian Government commissioned an independent review of its investment in indigenous broadcasting and media.⁷⁵³ This review is the third and most

⁷⁴⁶ BSA, above n 30, s 3(1)(n)

⁷⁴⁷ This interpretation has been made in Rennie and Featherstone, above n 175, 57.

⁷⁴⁸ See Forde, Foxwell and Meadows, above n 67; Stevens, above n 384.

⁷⁴⁹ *Broadcasting Legislation Amendment Act (No.2) 2002 (Cth) s 7* inserting *Broadcasting Services Act 1992 (Cth) s 123(1)(ba)*.

⁷⁵⁰ See *Ibid*, Sch 2 s 12.

⁷⁵¹ See, Australian Communications and Media Authority, above n 726.

⁷⁵² *Broadcasting Legislation Amendment Act (No.2) 2002 (Cth) Sch 1 s 1* inserting *Broadcasting Services Act 1992 (Cth) s 6(1)*. Remote indigenous television services already existed before introduction of the CTV category as successors of the BRACS stations. However, the CTV licence was created to issue the first licences for urban community television stations who up to this point had been operating under experimental narrowcasting licences. See Section 4.3.4.

⁷⁵³ Stevens, above n 384.

recent comprehensive review of the Australian indigenous broadcasting sector. This review also recommended that a specific licence category be created for indigenous TSBs and provided some recommendations regarding the framework that should be applied to such category/ The report suggested that indigenous licences should be restricted only to not-for-profit organizations and that the licence conditions include minimum quotas for indigenous content and indigenous staff employment as well as the obligation to comply with specific internal governance protocols.⁷⁵⁴ The creation of a separate code of practice for indigenous broadcasters (not only RIBS as currently prescribed by the BSA) was also recommended.⁷⁵⁵

These recommendations have not been implemented so indigenous TSB is still treated as part of the community broadcasting sector. However, indigenous broadcasting is clearly the sub-sector of TSB in Australia that has received the most specific attention from policy and law makers. This is evidenced by the presence of some legal provisions dealing specifically with RIBS,⁷⁵⁶ as well as the existence of a dedicated funding scheme such as the IBP and the issue of specific indigenous broadcasting grants to be distributed by the CBF.

4.2.7.3. Religious Broadcasting

Religious content has had a significant presence in both the commercial sector and the State sectors of Australian broadcasting since their early days.⁷⁵⁷ There have never been in Australia any restrictions on the control of broadcast licences by religiously affiliated bodies.⁷⁵⁸ Although religious broadcasting in Australia has traditionally been dominated

⁷⁵⁴ Ibid, recommendation 5.

⁷⁵⁵ Ibid, recommendation 4.

⁷⁵⁶ See Section 4.3.3.4.

⁷⁵⁷ See Griffen-Foley, Bridget, 'Radio ministries: Religion on Australian Commercial Radio from the 1920s to the 1960s' (2008) 32(1) *Journal of Religious History* 31; McLaren, Jim, 'Radio and Religion' (1986) 41 *Media Information Australia* 41.

⁷⁵⁸ This contrasts with the case of Canada where such restrictions have existed. See Section 5.2.4.5.

by Christian denominations, no legal provisions have banned broadcasting on the basis of being associated with other religions.⁷⁵⁹

A notable aspect of religious broadcasting in Australia is that it is the only TSB sub-sectors to have benefited from access rules. In 1943 a government report recommended that commercial broadcasters be required to provide one hour of free access time for religious groups on Sundays.⁷⁶⁰ This recommendation was implemented in the *Australian Broadcasting Act 1948* (Cth), which required the ABCB to ensure religious content was broadcast 'for adequate periods and at appropriate' times on Australian airwaves.⁷⁶¹ The Act did not specify how the ABCB was to fulfil this obligation or what powers it could use to achieve this end but in 1949 the ABCB introduced guidelines specifying that stations had to distribute among the different churches substantially represented in their licence area one hour of free access time each Sunday.⁷⁶²

The *Broadcasting and Television Act 1956* (Cth) specified that broadcast licensees were required to broadcast religious content for the periods determined by the ABCB and to do so free of charge if directed by the ABCB.⁷⁶³ This provision was, in its text, a content quota which did not necessarily require stations to provide access. The provision could be interpreted as allowing stations to fulfil their obligation to provide religious content by producing it themselves or importing it from other countries. However, in practice the ABCB gave effect to the provision as access quotas by requiring licensees to allocate free access time to religious groups in proportion to their number of adherents in their licence area.⁷⁶⁴ During this time, the regulatory authorities (the ABCB and then the ABT) encouraged licensees to provide free access times to community groups or for community service programming, but the provision of such access was not compulsory. The religious

⁷⁵⁹ Although in 1941 there was an episode where Jehova Witnesses were banned from the airwaves with base on security concerns. See Griffen-Foley, above n 756, 11-14.

⁷⁶⁰ According to Griffen-Foley, these recommendations were influenced by the World War 2 context in which recurring to religion was seen as essential for sustaining national Morale. See Griffen-Foley, *Ibid*, 16.

⁷⁶¹ It is important to note that, although the intention of the provision may have been primarily to support Christian content, the ABCB obligation was religion neutral in its text.

⁷⁶² Australian Broadcasting Control Board, *Annual Report 1950* (1950).

⁷⁶³ *Broadcasting and Television Act 1956* (Cth) s 40 inserting *Broadcasting Act 1942* (Cth) s 64.

⁷⁶⁴ Australian Broadcasting Control Board, *Annual Report 1973-1974* (1974).

quotas were different in nature as they represented an actual obligation which was not discretionary and which could be cause for non-renewal if not complied with.⁷⁶⁵

The quotas specified that radio stations had to provide one hour per week of access and television stations 1% of their weekly air-time, but did not specify how the religious content had to be distributed within the schedule of each station.⁷⁶⁶ For this reason, quotas could be fulfilled, for example, by a one hour weekly program on Sundays mornings or multiple spot announcements scattered throughout late weeknights block.⁷⁶⁷ With regard to matters of that nature the interested parties had to reach their own arrangements which sometimes created conflict.⁷⁶⁸

The 1975 Public Broadcasting report noted that the introduction of TSB could eliminate the need for religious access quotas in the commercial sector as religious organizations would be able to participate in the new sector.⁷⁶⁹ Despite this, the quotas continued operating until the enactment of the BSA in 1992.⁷⁷⁰ The BSA authorizes the regulatory authority to impose religious content obligations only on commercial television stations, unlike previous laws which allowed such obligations to be imposed on any type of broadcasters. However, neither the ABA nor ACMA has ever implemented a religious quota for commercial television.⁷⁷¹

Since TSB began in Australia, religious groups have formed part of the sector.⁷⁷² While the ministerial guidelines were in use, religious broadcasters were considered category S. As with the other sub-sectors, religious broadcasting became considered just community broadcasting once the categories system was eliminated in 1992 and prospective religious broadcasters are currently required to compete with all other TSBs in the same licensing

⁷⁶⁵ See for example Australian Broadcasting Tribunal, above n 551.

⁷⁶⁶ Australian Broadcasting Control Board, above n 764.

⁷⁶⁷ See McLaren, above n 757; Australian Broadcasting Tribunal, *Annual Report 1976-1977* (1977).

⁷⁶⁸ See, McLaren, *Ibid*; Australian Broadcasting Tribunal, *Annual Report 1987-1988* (1988). As noted in Section 2.2.6, this is a common problem with access quotas.

⁷⁶⁹ Working Party on Public Broadcasting, above n 587.

⁷⁷⁰ Australian Broadcasting Authority, *Annual Report 2004-2005* (2005).

⁷⁷¹ In its final annual report, the ABA noted that it had studied the situation and concluded that the levels of religious content on commercial television were satisfactory, making a quota unnecessary. *Ibid*.

⁷⁷² See Thornley, above n 460.

processes. Unlike ethnic or indigenous broadcasters, religious broadcasters have never received specific government funding and they do not have a specific representation before the CBF.

4.2.7.4. Broadcasting Linked With Educational Institutions

Although most higher education institutions in Australia are public, broadcasting services linked with them are considered part of the third sector instead of the State sector.⁷⁷³ Higher education institutions have always been significant players in the Australian third sector.⁷⁷⁴ Even before there was a framework for TSB licences, some higher education institutions were engaging in broadcasting through experimental licences which is often considered the first example of TSB in Australia.⁷⁷⁵ These first experimental licences were very restrictive allowing only programming for restricted audiences such as formal course content for distance learning students.⁷⁷⁶

The 1974 PRS Report on Radio cited universities among the potential actors which may participate in TSB.⁷⁷⁷ The report also noted that the concept of educational broadcasting should be understood as encompassing more than just formal coursework content. In respect to government funding, the report expected educational institutions interested in TSB to fund their stations from their own budgets.⁷⁷⁸

Once the licensing framework was established, educational institutions were among the first TSB licensees. Under the ministerial guidelines there was initially a specific category “E” for broadcasters associated with educational institutions. The E category was somehow narrowly conceived as the guidelines established that it was meant for:

⁷⁷³ See Priorities Review Staff, above n 561; See Also Section 1.3.5.

⁷⁷⁴ See for example O'Connor, Michelle, 'The Learning and Teaching Partnership of the Community Radio and Tertiary Education Sectors at Radio Adelaide, 2SER and 2MCE' (2010) (6) *3CMEDIA* 26 for a discussion of the role of higher education institutions in the modern Australian TSB environment.

⁷⁷⁵ UNESCO, above n 7, 21.

⁷⁷⁶ See Section 4.2.1.

⁷⁷⁷ Priorities Review Staff, above n 561.

⁷⁷⁸ Similar views have guided Canadian policy in relation to broadcasters linked with educational institutions. See Section 5.2.4.2.

Educational bodies intending to provide programs of continuing and adult education, but including material designed to enrich the cultural life of the audience.⁷⁷⁹

According to the ministerial Statement accompanying the guidelines, the purpose of having a separate E category was to prevent educational institutions from dominating the emerging third sector. Concern was expressed that their institutional support would provide broadcasters linked with educational institutions with an advantage over other types of candidates as they would be able to more easily demonstrate their suitability and capacity in the comparative based licensing process.⁷⁸⁰

The E category was eliminated in 1985, after which an educational institution could apply under either, the C or S categories, depending on the nature of its intended content and category of licences available in the desired service area.⁷⁸¹ Among the reasons cited for the elimination of the E category were that the content output from stations linked with educational bodies was not sufficiently distinct from that of general community stations and that, in practice, educational institutions were often the only TSB licensees in regional areas, which forced them to operate as general service stations.⁷⁸²

As with the other sub-sectors, broadcasting linked with educational institutions was absorbed within the concept of community broadcasting upon the elimination of the category system. Broadcasters linked with educational institutions do not benefit from any specific funding programs and they are not subjected to any kind of specific regulation.

4.2.8. The Development of TSB in Australia – Considerations

⁷⁷⁹ Staley, above n 465, s 1.

⁷⁸⁰ Staley, above n 610, 1000.

⁷⁸¹ Thornley, above n 460, 271.

⁷⁸² *Ibid*, 267-74.

The history of TSB in Australia evidences the importance legal recognition and an adequate framework has for the development of the sector. As explained, although TSB initiatives started appearing in the country even before a framework for their licensing was implemented, it was not until the sector was legally recognized that TSBs began to proliferate. The situation described in the 1986 ABT report on Public Broadcasting Sponsorship Announcements is a clear example of how an inadequate framework can seriously impair the development of the sector. As a consequence of extrapolating a definition of advertisement designed for the commercial sector to a TSB context for which it was not appropriate, TSBs were restricted in excess of what was reasonable in detriment of their viability and quality of service. After amendments were introduced to address the issues identified in the ABT report, TSB became much more viable in Australia. This illustrates how the development of the sector can be aided by carefully considering the needs and nature of sector when designing its regulatory framework. Chapter 6 will aim to provide some guidance regarding how to develop a legal and policy framework supportive of the development of TSB.

The Australian experience also illustrates how TSB services can play a valuable role in providing services which are not viable or practical for the other sectors to deliver. As explained, TSBs in Australia have played in a role in fulfilling the country's localism policy for broadcasting and in ensuring broadcasting services are available which address the needs of ethnic and indigenous communities. The value of the service provided by TSBs has been acknowledged by the Australian governments which is the reason the sector has, since its recognition, always received at least a measure of direct financial government support.⁷⁸³ The importance that access to government funding can have for TSBs is also evidenced by the Australian case. As noted, while some Australian TSBs are self sustainable, it has been acknowledged that others, such as the RIBS would be unlikely to be able to subsist without government funding.⁷⁸⁴ Similarly, free access to the

⁷⁸³ As noted in Sections 4.2.7.1 and 4.2.7.2 the ethnic and indigenous TSB sub-sectors have been specifically prioritized for government support in recognition of the role played by TSB in addressing the needs of these audiences.

⁷⁸⁴ See Section 4.2.7.2.

spectrum has been identified as having been essential for the development of TSB in Australia.⁷⁸⁵

The relationship between TSB and the other two sub-sectors of Australian broadcasting is typical of the dynamics experienced in other jurisdictions where the three sectors coexist. In particular, balancing the financial needs of third sector outlets with the interest of commercial broadcasters in being protected from competition is a difficult issue that policy makers often face when dealing with TSB. In the case of Australia, although TSB have managed to develop despite restrictions in areas such as the broadcast of advertisements, it is clear that these restrictions have been burdensome for some stations. As noted, this has been recognized and restrictions have been progressively relaxed to aid the financial viability of TSB. The fact that other policy goals such as ensuring that TSBs broadcast minimum levels of national and local content have been attained in Australia without resorting to regulation or specific obligations also serves as an indication that heavy regulation of the sector may not always be advisable.⁷⁸⁶

As explained, ‘special interest’ TSB, especially ethnic and indigenous TSB, have managed to attain significant development in Australia despite being subjected to frameworks designed primarily for general community broadcasting. However, in the case of indigenous TSB there is also evidence throughout Australian history, that inadequate regulation have created significant barriers for the development of the sub-sector. This indicates that special regulation for specific sub-sectors of TSB may sometimes be advisable which is discussed further in Section 6.8.

4.3. Third Sector Broadcasting in Australia Today – Overview

This section aims to provide an overview of the current state of TSB in Australia as well to explain the regulatory and legal framework that is applied to TSB in Australia in the

⁷⁸⁵ Spurgeon, Christina L. and Joanna McCarthy, ‘Mobilising the Community Radio Audience’ (2005) 1 *Journal of Community, Citizen's and Third Sector Media and Communication* 1, 6.

⁷⁸⁶ This is discussed further throughout Chapter 6.

present. Sections 4.3.1 to 4.3.10 provide this overview while Section 4.3.11 presents a general conclusion to the overview.

4.3.1. The Community Broadcasting Licence Category

Australian legislation currently recognizes seven categories of broadcasting services.⁷⁸⁷ Of these licence categories, only the ‘community broadcasting’ category is specifically conceived for the licensing of TSBs.

The community category is defined in the BSA as follows:

Community broadcasting services are broadcasting services that:

- (a) are provided for community purposes; and
- (b) are not operated for profit or as part of a profit-making enterprise; and
- (c) that provide programs that:
 - (i) are able to be received by commonly available equipment; and
 - (ii) are made available free to the general public⁷⁸⁸

Requiring community services to be able to be received by commonly available equipment and to be offered for free to the public means that community licences are meant for the provision of terrestrial free-to-air broadcasting services.

The requirement to not be operated for profit makes the community category exclusive to services of a third sector nature.⁷⁸⁹ In 2011 ACMA issued guidelines which clarified the meaning of this requirement. ‘Not operated for profit’ is understood to mean that any surplus the station may have from its operations can only be invested in the development of the service itself and that no profits can be distributed to members of the licensed

⁷⁸⁷ According to BSA, above n 30, s 11: national (State), commercial, community, subscription, subscription narrowcasting, open narrowcasting and international.

⁷⁸⁸ Ibid, s 15.

⁷⁸⁹ The Nor-For-Profit Principle of TSB is further discussed in Section 6.3.1.

organization.⁷⁹⁰ The requirement that the service not be operated ‘as part of a profit-making enterprise’ is a peculiar element of Australian legislation. ACMA has clarified the meaning of this requirement, explaining that it prohibits community licences being used to aid parties other than the stations themselves in the generation of profits.⁷⁹¹ For example, stations are not allowed to provide free air-time so a third party can exploit it for profit.⁷⁹² These two requirements aim to protect the ‘not-for-profit’ principle of TSB which is discussed in more detail in Section 6.3.1.

According to guidelines issued by ACMA, ‘community’ can be understood both, in the geographic sense or as a group with a shared interest.⁷⁹³ However, the meaning of the requirement to provide the service for ‘community purposes’ is not entirely clear. The requirement can be interpreted as requiring stations to provide programs aimed at meeting the identifiable needs and interests of the communities they are licensed to serve.⁷⁹⁴ Judicially, it has been determined that the ‘community purposes’ requirement does not prohibit licensees from broadcasting content which can appeal to audiences beyond their specific communities provided this content is also of interest to their specific communities.⁷⁹⁵

4.3.2. Licensing Framework for Community Broadcasters

4.3.2.1. Eligibility

Australian legislation does not provide an exhaustive list of the type of legal entities which are eligible for community licences, limiting itself to establishing that once the ACMA has decided to issue a community licence it must call:

⁷⁹⁰ Australian Communications and Media Authority, above n 471, 2.

⁷⁹¹ Ibid, 3.

⁷⁹² See Ibid.

⁷⁹³ Ibid, 5. Indigenous, religious, ethnic and educational communities are cited in the guidelines among the examples of groups that fall within the notion of a shared interest community.

⁷⁹⁴ The Explanatory Memorandum to *Broadcasting Amendment Bill (No.3) 1987 (Cth)* states that a: ‘licence is granted for general community purposes if the licence is granted for the purpose of serving the general interests of the community that is located within its service area’ but this predates the BSA.

⁷⁹⁵ *3AW Southern Cross Radio Pty Ltd v Inner North East Community Radio Inc* (1994) ATPR 41-313.

for applications from companies that:

- (a) are formed in Australia or in an external Territory; and
- (b) represent a community interest.⁷⁹⁶

The concept of ‘company’ in the context of this provision is not limited to commercial corporations. The Act itself clarifies that ‘companies’ include incorporated associations⁷⁹⁷ and ACMA has confirmed that a wide range of entities including cooperatives are eligible for licences.⁷⁹⁸ The requirement to be a company excludes individuals and unincorporated groups from eligibility.⁷⁹⁹

It is not expressly prohibited for a type of legal entity normally used for commercial activities to be issued a community licence.⁸⁰⁰ However, ACMA is unlikely to issue community licences to for profit legal entities because it considers them not to be adequate structures for the fulfilment of the not-for-profit obligations of community licensees.⁸⁰¹ In practice, ‘incorporated associations’ is the type of legal structure predominantly used by Australian non-indigenous community broadcasters.⁸⁰² Indigenous TSBs normally use ‘aboriginal corporations’, a special type of not-for-profit body corporate provided for in Australian law for use by indigenous peoples.⁸⁰³

Whether an aspirant licensee meets the second eligibility requirement, ‘representing a community interest’, is in practice determined by ACMA through an assessment of the

⁷⁹⁶ BSA, above n 30, s 80(1).

⁷⁹⁷ Ibid, s 79.

⁷⁹⁸ Australian Communications and Media Authority, *Temporary Community Broadcasting Guidelines* (2011), 3.

⁷⁹⁹ With the possible exception of community broadcasting licences outside the broadcasting services band to which these eligibility requirements are not applicable.

⁸⁰⁰ However, commercial entities would be required to include a provision on their articles of incorporation evidencing not-for-profit purposes. See Australian Communications and Media Authority, above n 798.

⁸⁰¹ See Ibid; Australian Communications and Media Authority, *Community Broadcasting Participation Guidelines* (2010), s 7.1

⁸⁰² Australian Communications and Media Authority, *Community Broadcasting Participation Guidelines* (2010), 10.

⁸⁰³ Stevens, above n 384, 62; Aboriginal corporations are incorporated under the *Corporations (Aboriginal and Torres Strait Islanders) Act 2006* (Cth).

internal governance structure of the applicant organization.⁸⁰⁴ Elements which ACMA takes into account in making this determination include: whether membership is accessible to entire community claimed to be represented; whether decision making policies (including those pertaining programming) are transparent; whether there are any provisions that would make the applicant accountable to the community; and whether measures are adopted to encourage community participation.

4.3.2.2. Licensing Process

The licensing process for community broadcasters is merit-based.⁸⁰⁵ The process is triggered by ACMA who must make a public call for applications.⁸⁰⁶ If more than one applicant responds, the process becomes a comparative assessment or ‘beauty contest’. ACMA has the discretion to decide not to issue the licence to any applicant.⁸⁰⁷ For this reason, a merits based assessment is conducted by ACMA, even if there is only a single application. Applicants can be excluded from the process if deemed unsuitable.⁸⁰⁸ However, there is no pre-qualification stage: an assessment of suitability is only conducted by ACMA if specific concerns regarding the suitability of an applicant are raised.⁸⁰⁹ The process is normally conducted only through writing, but ACMA has the discretion to convene public hearings if it deems it convenient.⁸¹⁰ General members of the public can also provide written submissions, which ACMA takes into consideration.⁸¹¹

4.3.2.3. Licensing Criteria

⁸⁰⁴ See Australian Communications and Media Authority, *Allocation of Community Radio Broadcasting Licences Guide to Applying for a Licence Broadcasting Services Band* (2007); Australian Communications and Media Authority, above n 798.

⁸⁰⁵ BSA, above n 30, s 84.

⁸⁰⁶ Ibid, s 80; See also, Australian Communications and Media Authority, above n 804.

⁸⁰⁷ BSA, Ibid, s 85.

⁸⁰⁸ See BSA, above n 30, s 83 for the possible causes of unsuitability.

⁸⁰⁹ Australian Communications and Media Authority, above n 804, 11.

⁸¹⁰ Ibid, 10.

⁸¹¹ Ibid, 10-11.

The licensing criteria are established in section 84(2) of the BSA and have been clarified by ACMA in its licence application guidelines.⁸¹² The criteria are:

- (a) the extent to which the proposed service would meet the existing and perceived future needs of the community within the licence area of the proposed licence;
- (b) the nature and diversity of the interests of that community;
- (c) the nature and diversity of other broadcasting services (including national broadcasting services) available within that licence area;
- (d) the capacity of the applicant to provide the proposed service or services;
- (e) the undesirability of one person being in a position to exercise control of more than one community broadcasting licence that is a broadcasting services bands licence in the same licence area; and
- (f) the undesirability of the Commonwealth, a State or a Territory or a political party being in a position to exercise control of a community broadcasting licence.

The first three criteria are strongly related to each other. According to the ACMA guidelines, the ‘needs of the community’ for the purposes of criterion (a) are understood to mean ‘the programming interests of the community which are not being met by the programs of existing broadcasters, or other media, in the licence area’.⁸¹³ Identifying which needs exist in the community is addressed in criterion (b) while determining which interests are already adequately served by existing broadcasting services addresses criterion (c).

As explained, services aspiring to serve a specific community of interest participate in the same competitive process as those aspiring to serve the whole geographic community.⁸¹⁴ According to the guidelines, the assessment of a proposed service under criteria (a) takes into account the whole range of needs identified by ACMA to exist in the community and

⁸¹² Ibid.

⁸¹³ Ibid,13.

⁸¹⁴ See Section 4.2.7.

not just the capacity of the applicant to serve the specific community of interest it has identified in its application.⁸¹⁵ The guidelines state that:

this does not necessarily mean that an applicant which proposes to serve a specific community interest will be regarded as meeting the needs of the community to a lesser extent than an applicant which proposes to serve the general community.⁸¹⁶

Nevertheless, the obligation to consider the needs of the whole community may mean in practice that services intended for a specific community of interest may not be licensed unless the more general interests are considered to be already adequately catered for under criteria (c).⁸¹⁷ There is a provision in the BSA which allows for ministerial directions to be issued for ACMA to prioritize one or more specific community interests when making licensing decisions.⁸¹⁸ A direction issued under this provision could facilitate the licensing of special interest services but this would depend on the capacity of the interested groups to convince the government that their needs should be prioritized.

Criterion (d) refers to the capacity of the applicants. ACMA assesses applicants' capacity in three areas: management, financial and technical.⁸¹⁹ Whether capacity should be a licensing consideration for TSBs is discussed further in Section 6.2.3.1. Temporary community broadcasting licences are an alternative that prospective TSBs can use to build and demonstrate capacity before applying for regular licences, these are discussed in Section 4.3.3.2.

Criterion (e) does not prohibit for a single entity to hold more than one TSB licensee, but it is considered undesirable and already holding a licence is a negative factor for an applicant's evaluation. Similarly, under criterion (f) the holding of a community licence by a political party or an Australian States or Territory is not prohibited but deemed

⁸¹⁵ Australian Communications and Media Authority, above n 804, 13.

⁸¹⁶ *Ibid.*

⁸¹⁷ As noted, the competition against general interest applicants has been deemed a barrier for the access to licences by some special interest groups such as indigenous and ethnic communities in urban centres.

⁸¹⁸ BSA, above n 30, s 84(1).

⁸¹⁹ Australian Communications and Media Authority, above n 804, 15.

undesirable. As explained in Chapter 1, broadcasting by public entities other than educational institutions cannot be considered TSB. Broadcasting by political parties could be considered TSB but, as in Australia, it is normally deemed undesirable for them to directly control broadcasting services.⁸²⁰

4.3.2.4. Duration and Renewal of Licences

Community licences can only be issued for terms of 5 years.⁸²¹ Before the end of this term, licensees can apply for license renewal.⁸²² ACMA has the power to refuse renewal if it considers that the license would not be issued to the licensee if the process was for a new licence.⁸²³ In practice this means that ACMA, if so it decides, can conduct a de-novo assessment of the licensee's merit, applying the licensing criteria cited in Section 4.2.3.3. However, the license holder does not need to compete in a new comparative process against other parties interested in the license and ACMA is not obliged to conduct a merits reassessment. The power to conduct a reassessment is expected to be mainly used for cases in which specific concerns have been raised about a licensee.⁸²⁴ Whether TSB licensees should be required to compete with other interested parties in a new comparative process each time their licences come to term is discussed further in Section 6.2.5.

4.3.3. Sub-Categories of Community Licences

There are four classes of licences which can be considered sub-categories or special types of community licences. Special conditions or a different licensing procedure apply to these licences which distinguish them from regular community licences. These are:

⁸²⁰ See for example Access Airwaves, above n 6, principle 20.1; Committee of Ministers of the Council of Europe, above n 3.

⁸²¹ BSA, above n 30, s 89.

⁸²² Ibid s 90.

⁸²³ Ibid, s 91(2A).

⁸²⁴ According to the explanatory memorandum to the *Broadcasting Legislation Amendment Bill (No.2) 2002* (Cth) which introduced the relevant provision.

4.3.3.1. Community Broadcasting Services Outside the Broadcasting Services Band

Community licences can be issued for broadcasting in frequencies located outside the BSB.⁸²⁵ The main difference between these and regular community licences is that they are not issued through the public tender process described in Section 4.3.2.2. Instead, interested parties can directly submit a request to ACMA who will issue them a license at discretion.⁸²⁶ These licenses, unlike regular ones, do not grant direct access to spectrum. Accordingly, the interested party must gain access to spectrum through other means⁸²⁷ (such as by making a separate application for spectrum access under the *Radiocommunications Act 1992 (Cth)* or an agreement with another licensee). Since free access to the spectrum is normally essential for TSBs, these type of licences are not normally used in practice.⁸²⁸

4.3.3.2. Temporary Community Broadcasting Licences

Unlike regular licenses which are always issued for a term of 5 years, temporary licenses can be issued for any term up to a maximum of 1 year (at ACMA's discretion).⁸²⁹ For the issuing of temporary licenses the merit-based procedure is not used. Instead, ACMA designates frequencies as available for temporary community broadcasting and interested parties can apply for the use of the frequency.⁸³⁰ The process for issuing temporary licences is not competitive. ACMA's policy is that, if there is more than one suitable applicant for a licence, then licences are issued to all applicants with the sharing of the frequency coordinated through the imposition of timing conditions to each licensee.⁸³¹

⁸²⁵ BSA, above n 30, s 82.

⁸²⁶ Ibid.

⁸²⁷ See Productivity Commission, above n 400, 213.

⁸²⁸ In fact, the ACMA list of Community Radio Licences (available at www.acma.gov.au/webwr/assets/main/lib100052/lic035_community_radio_broadcasting_licences.pdf and stated to be current to 12/10/12) states that no non-BSB community radio services are licenced at present.

⁸²⁹ BSA, above n 30, s 92G(c)

⁸³⁰ ACMA can decide to make available a frequency for temporary community broadcasting: if the frequency had been allocated for permanent community broadcasting but had not been assigned; if it became unassigned due to a licence cancellation; or if a suitable frequency is available but frequency planning has not been completed in the area. See Ibid, s 34; Australian Communications and Media Authority, above n 798, 2.

⁸³¹ See Australian Communications and Media Authority, Ibid.

The eligibility conditions for temporary licences are the same as for regular licences. However, the licensing criteria a) to d) described in Section 4.3.2.3. are not applicable to temporary licences. Only criteria e) and f) are taken into consideration.⁸³² Because demonstrating capacity is not a requirement, temporary licences can be used by prospective TSBs to build and demonstrate their capacity before applying for a regular community licence.⁸³³ However, performing successfully as a temporary licensee does not generate a right to a permanent licence. Former temporary licensees who wish to obtain a regular licence must compete in a merit-based process against all other interested parties.

Temporary licences are theoretically non-renewable. However, once their licences expire licensees are allowed to reapply for a licence in the same area.⁸³⁴ Since the licensing process is not competitive, this can have the same effect as a renewal, provided ACMA does not decide to change the designation of the frequency to a different purpose.

4.3.3.3. CTV Licences

CTV is the denomination used in the BSA for community licences issued for television services which are not RIBS.⁸³⁵ Unlike regular licences, for which a wide range of legal entities are eligible, only companies limited by guarantee are eligible for CTV licences.⁸³⁶ In addition, CTV licensees are subjected to special restrictions on the selling of air-time to third parties.⁸³⁷ ACMA is also authorized to impose additional conditions on CTV licensees including conditions pertaining matters of internal governance, additional reporting obligations and obligations regarding the provision of community access air-time.⁸³⁸ As noted, these additional obligations were considered too burdensome for RIBS to comply with; accordingly, they were not included in the CTV sub-category. As the

⁸³² BSA, above n 30, s 92E(1).

⁸³³ Discussed further in Section 6.2.6.

⁸³⁴ Australian Communications and Media Authority, above n 798, 4.

⁸³⁵ BSA, above n 30, s 6(1) Definition of CTV.

⁸³⁶ Ibid, s 81(1)(a).

⁸³⁷ Discussed in Section 4.3.7.3.

⁸³⁸ BSA, above n 30, s 87A(7).

decision has been made to not longer allocate free spectrum to CTV licensees after 2015, it is not clear whether this category will continue to be relevant.

4.3.3.4. Community Broadcasting Services Targeted to a Significant Extent to One or More Remote Indigenous Communities

As noted, the BSA provides for the regulation of RIBS through a separate code of practice, although this code has so far not been registered. The only other difference between RIBS and regular licences is that the advertisement prohibition and the sponsorship time limit only apply to RIBS in relation to announcements for which they have received a consideration in cash or in kind whereas in the case of regular licences the restrictions, apply independently of whether consideration is received or not.⁸³⁹ The reason or purpose of this exception is not clear. Considering that the current RIBS are the successors of the BRACS stations which also served retransmission purposes, it is possible that the provision was introduced to prevent RIBS being responsible for advertisements broadcast in retransmitted content.⁸⁴⁰

4.3.4. The Narrowcasting Licence Category

Narrowcasting is a licence class provided for in Australia legislation which can serve as an alternative to community licences for prospective TSBs. Narrowcasting are services whose reception is limited by any of a number of ways including by being ‘targeted to special interest groups’⁸⁴¹ or because they ‘provide programs of limited appeal’.⁸⁴² While general community services cannot operate as narrowcasting services, the narrowcasting category can allow the delivery of ‘special interest’ type TSB services. The narrowcasting class has not been specifically designed for TSB, it is open to for-profit entities but not-for-profit entities are also eligible.

⁸³⁹ Ibid, Sch 2 s 9(6).

⁸⁴⁰ See Section 6.5.1.3.

⁸⁴¹ BSA, above n 30, s 18(a)(i).

⁸⁴² Ibid, s 18(a)(iv).

The main advantage of the narrowcasting category is that it is a ‘class licence’. Under Australian legislation, a ‘class licence’ means that all services that fall within a category are granted a standing authorization to operate. For this reason, services aiming to operate as narrowcasters are not required to apply for individual licences or go through a competitive or merits assessment process.⁸⁴³ In addition, narrowcasting licensees are not subjected to the advertising restriction and the positive obligations in relation to community participation which are applicable to community broadcasters.⁸⁴⁴ However, unlike BSB community licences, narrowcasting licences do not provide free access to the spectrum. Narrowcasters who wish to provide an over-the-air service by their own means must therefore obtain a separate transmitter licence under the *Radiocommunications Act 1992 (Cth)* in order to begin transmissions. The assignment process for transmitter licences is price based, which creates a significant barrier for the use of the narrowcasting class for TSB.⁸⁴⁵ Alternatively, those licensed as narrowcasters can negotiate the carriage of their service through third parties such as cable or satellite operators. However, the services’ intended audiences may not always have access to these platforms and third parties normally charge market prices TSBs may not be able to afford.

The economic reality of most TSBs means they require free access to the spectrum in order to deliver their services. For this reason, the narrowcasting category, as non-BSB community licences, is not normally a viable alternative for prospective TSBs. In addition to the spectrum access barrier, opting for the narrowcasting category would exclude stations from eligibility for the government funding available to community stations, such as that distributed by the CBF and, in the case of indigenous broadcasters, through the IBP. In 2009, ACMA presented a proposal to facilitate the licensing of RIBS as narrowcasters. Because of its simpler licensing and renewal procedures and the less burdensome licence conditions, ACMA considered the narrowcasting category could be more adequate for the purposes of RIBS, for whom complying with the administrative

⁸⁴³ Australian Communications and Media Authority, *Narrowcasting For Radio Guidelines and Information About Open and Subscription Narrowcasting Radio Services* (2011).

⁸⁴⁴ See Explanatory Memorandum, *Broadcasting Services Act 1992 (Cth)* cl 15.

⁸⁴⁵ See Radiocommunications (Issue of Broadcasting (Narrowcasting) Transmitter Licenses Determination no.1 of 1996).

requirements of the community licence class is often burdensome.⁸⁴⁶ The proposal included modifying government policy to allow indigenous services licensed as narrowcasters to be eligible for government funding and creating a special transmitter licence category with reduced fees for non-commercial services operating in remote Australia (both indigenous and non-indigenous).⁸⁴⁷ This proposal has so far not been implemented.⁸⁴⁸

In addition to access to spectrum and funding, the content limitations of the narrowcasting category may also present a barrier to its use for TSB purposes. Ethnic and religious broadcasting have been specifically identified as type of services which can be delivered through narrowcasting licences.⁸⁴⁹ However, those opting for narrowcasting licences may have some limitations in terms of the content they can broadcast in comparison with community licensees. The ABA *Broadcasting Services Clarification Notice 2001* (the ‘Notice’) specifies that non-English broadcasting services can be prima-facie considered to fall within the narrowcasting category but only if they do not broadcast in English except incidentally.⁸⁵⁰ As explained in Section 1.3.2, some ethnic broadcasting services may need to include content in the national language within their programming in order to adequately serve their audiences, so this limitation may make the narrowcasting class inadequate for their purposes. In addition, the requirement to serve only limited audiences may allow narrowcasters to provide service aimed at a specific ethnic community but not the type of multicultural and multilingual services which are most common in the Australian ethnic broadcasting sector. The Notice also mentions that religious services are prima-facie considered to fall within the narrowcasting category but only if they are:

⁸⁴⁶ Australian Communications and Media Authority, above n 726, 3.

⁸⁴⁷ Ibid, 11-12.

⁸⁴⁸ Although the proposal would have eliminated the two main barriers to the use of the narrowcast licence category by RIBS, RIBS that opted for the narrowcast category would have been subjected to being represented by the Australian Narrowcast Radio Association (ANRA) and regulated by the narrowcast code of practice. Since narrowcasters in Australia are primarily commercially oriented this could have been less than ideal for RIBS which are third sector in nature. .

⁸⁴⁹ See for example Australian Communications and Media Authority, above n 843.

⁸⁵⁰ Australian Broadcasting Authority, *Broadcasting Services Clarification Notice (2001)* s 11.

provided for 1 or more of the following purposes, and for no other purpose:

- a) the propagation of religious beliefs, religious values and religious lifestyles;
- b) the broadcasting of religious rituals and events of religious significance;
- c) the provision of information and services relevant to religious beliefs, religious values and religious lifestyles.⁸⁵¹

The Notice also states that a service which broadcasts content not relevant to those purposes would probably not fit into the open narrowcasting class.⁸⁵² This means that religious TSBs wishing to offer a broader range of content may require a community licence.

Despite the spectrum access, funding and content limitations, the narrowcasting class has been used in Australia for TSB purposes. Before the CTV licence category was created, the first experimental non-indigenous third sector television stations in Australia operated under narrowcast licences.⁸⁵³ Narrowcast licences have also been used to provide ethnic services to the most established ethnic communities which can support a full time service through advertisement revenue.⁸⁵⁴ However, for most TSBs the narrowcast class is not a viable alternative to a community licence.

4.3.5. Recognition and Regulation of Sub-Sectors

As already noted, the Australian system is not characterized by the legal recognition of or special regulation for different TSB sub-sectors. Only the indigenous sub-sector has received some degree of specific regulation in the form of the special provisions concerning RIBS.⁸⁵⁵ However, three sub-sectors receive special recognition in term of government funding practice. The Australian Government issues specific grants for

⁸⁵¹ Ibid, s 10(1).

⁸⁵² Ibid, s 10(2). The notice specifies that mainstream music without religious content as an example of non-relevant content.

⁸⁵³ See Leiboff, Marett 'Australian Media Law Update' (2005) 10 *Media & Arts Law Review* 77.

⁸⁵⁴ See Earl, Greg, 'Niches in Narrowcasting' (1993) Jun(1) *Australian Financial Review* 32.

⁸⁵⁵ See Section 4.3.3.4.

supporting indigenous, ethnic and radio for the print handicapped (RPH) broadcasting services. RPH services are a particular type of TSB service in which volunteers read print material such as newspapers on-air as a service to the print handicapped. These grants are distributed by the CBF following guidelines issued by each sub-sector representative body.⁸⁵⁶ The indigenous sub-sector also benefits from a specific funding program, the IBP.⁸⁵⁷

4.3.6. Codes of Practice for Community Broadcasting

As noted, the co-regulatory system is a particular feature of Australian broadcasting policy.⁸⁵⁸ In relation to community broadcasting, the BSA establishes the basic technical and substantive obligations of licensees (for example, not broadcasting outside their licence areas and the prohibition on broadcasting advertisements) while the codes of practice deal with issues such as the internal governance of licensee's and content guidelines.⁸⁵⁹

There are currently two codes registered codes of practices that apply to community broadcasting licensees: the Community Radio Broadcasting Code of Practice developed by the Community Broadcasting Association of Australia (CBAA) and the Community Television Code of Practice developed by the Australian Community Television Alliance (ACTA). As noted, the BSA also authorizes the registration of a separate code of practice for RIBS, but a code has not so far been registered.⁸⁶⁰

4.3.7. Funding

⁸⁵⁶ See Section 4.3.7.1.

⁸⁵⁷ See Section 4.2.7.2.

⁸⁵⁸ See Section 4.1.7.

⁸⁵⁹ BSA, above n 30, s 123(2) provides a non-exhaustive list of the matters which can be covered by the codes of practice.

⁸⁶⁰ *Ibid*, s 123(1)(ba).

TSBs in Australia have access to multiple sources of funding. However, they are not subjected to any restrictions on the amount of funding they can derive from any source.⁸⁶¹ Sources of funding commonly relied on by Australian TSBs include membership fees⁸⁶² and donations from their audiences.⁸⁶³ TSBs in Australia also have access to government funding, sponsorship revenue and the sale of air-time which are discussed in the following sub-sections.

4.3.7.1. Government Funding

The Australian TSB sector benefits from direct government financial support. As noted, the main conduit for such government funding is the CBF. The CBF is a private entity which receives its funding from the Department of Broadband, Communications and Digital Economy and then distributes it to TSBs in the form of grants.⁸⁶⁴ Within the CBF there are four grant advisory committees, one for each of the sub-sectors to which the government issues specific grants. The members of the committees are nominated by the representative bodies of each subsector, the CBAA for the general community sector, the NEMBC for the ethnic sector, the Australian Indigenous Community Communications Association (AICA) for the indigenous sector, and RPH Australia for the RPH sector.⁸⁶⁵ These committees prepare the eligibility criteria for the grants and establish the criteria for selecting the awardees.⁸⁶⁶

In addition to the funding distributed by the CBF, there is also some direct government funding for TSB distributed through other bodies such as local governments. The indigenous sub-sector is also supported through the IBP. According to the 2011 Community Broadcasting Station Census prepared by McNair Ingenuity Research, direct

⁸⁶¹ Restrictions in this area have been implemented in other jurisdictions. See Section 6.3.2.

⁸⁶² Membership fees are fees persons pay to be part of a community licensee organization and receive benefits such as voting rights.

⁸⁶³ As noted, in the past TSB stations were prohibited from requesting donations through their broadcast but now they are expressly authorized to do so. See Section 4.2.4.

⁸⁶⁴ Information about the CBF and its operations is available on its webpage (<http://www.cbf.com.au>)

⁸⁶⁵ CBF organizational Chart available at <www.cbf.com.au/Content/articlefiles/CBF_Organisational_Chart.pdf>.

⁸⁶⁶ CBF Annual Report 2011 available at <www.cbf.com.au/docs/annual_report/CBF_Annual_Report_2011.pdf>.

government funding represented 29% of the total income of the Australian third sector.⁸⁶⁷ However, the actual level of dependence on government funding varies from station to station. RIBS are often primarily dependent on government funding, whereas urban stations rely primarily on other sources of funding.⁸⁶⁸

Government advertising is not exempt from the general prohibition on the broadcast of advertisements by community stations.⁸⁶⁹ However, as the content restrictions for sponsorship announcements have become negligible, community stations are now legally viable outlets for government advertisement and information campaigns.⁸⁷⁰ The use of TSB outlets for government advertisement campaigns has been recommended in government reports because of the potential of TSBs to reach audiences which are not always reached by mainstream media.⁸⁷¹ In addition, placing government advertising in community stations is seen as a way to provide additional support to them beyond direct funding.⁸⁷²

4.3.7.2. Sponsorship

The BSA prohibits community licensees from airing advertisements, but allows them to broadcast sponsorship announcements up to a maximum of 5 minutes in an hour of broadcast in the case of radio and 7 minutes in an hour in the case of television.⁸⁷³ As noted, in the past the distinction between advertisements and sponsorship announcements

⁸⁶⁷ McNair Ingenuity Research, *Survey of the Community Radio Sector Community Broadcasting Station Census*, CBOonline (2011).

⁸⁶⁸ See for example Forde, Meadows and Foxwell, above n 237, 107; Standing Committee on Communications, Information, Technology and the Arts, above n 635, 41.

⁸⁶⁹ In the past, the Department of Communications had supported in its submission to the ABT Public Broadcasting Report (See Section 4.2.4).

⁸⁷⁰ On-going sponsorship in the classical sense of announcements which merely acknowledge financial contribution with the possibility of generating good will may not be compatible with the present Australian Government Guidelines [See Financial Management Group, *Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies*, Department of Finance and Deregulation (2010)].

⁸⁷¹ Stevens, above n 384, 58-59; Australian Law Reform Commission, ALRC 69(1994); [See Also Ibid, which establishes in principle 23 that 'Particular attention should be paid to the communication needs of young people, the rural community and those for whom English is not a convenient language in which to receive information'].

⁸⁷² Standing Committee on Communications, Information, Technology and the Arts, above n 635, 60.

⁸⁷³ BSA, above n 30, Sch 2 s 9(3).

was very marked.⁸⁷⁴ Presently, the lines separating both types of announcements have become more blurred. The BSA provides that the following are not considered to be advertisements when broadcast by a community station:

a sponsorship announcement **that acknowledges financial support by a person of the licensee or of a program broadcast on a service provided under the licence**, whether or not the announcement:

(i) specifies the name and address of, and a description of the general nature of any business or undertaking carried on by the person; or

(ii) **promotes activities, events, products, services or programs of the person**⁸⁷⁵
(emphasis added)

While in the past community licensees were prohibited from directly promoting products or services, they are now permitted to do so.⁸⁷⁶ For this reason, the main element differentiating sponsorship announcements from advertisements in Australia is what ACMA refers to as the ‘tagging’ requirement. As the law requires sponsorship announcements to contain an acknowledgement of financial support, they must include a statement or ‘tag’ which specifies the name of the financial contributor and identifies this contributor as a sponsor of the station or a particular program.⁸⁷⁷ What this means in practice is that the same announcements that are broadcast as ‘advertisements’ in commercial stations can be broadcast as ‘sponsorship’ announcements by community stations, as long as they are accompanied by the appropriate tag.

The tagging requirement is not a significant issue for community television stations as the tag can be included in the form of text simultaneously with the spot. However, for community radio stations tagging is more burdensome as the tag extends the length of the

⁸⁷⁴ See Section 4.2.4.

⁸⁷⁵ BSA, above n 30, Sch 2 s 2(2)(b).

⁸⁷⁶ Whether products or services are directly promoted is often considered in doctrine the key element which differentiates sponsorship announcements from advertisements. See Section 6.5.1.1

⁸⁷⁷ See Australian Communications and Media Authority, *Community Broadcasting Sponsorship Guidelines* (2008), 10.

announcement and counts towards the station's sponsorship time limit.⁸⁷⁸ Representatives of the sector have advocated for the elimination of the tagging requirement as they consider it an unnecessary technicality. The requirement, however, remains in force.

Independently of any burdens caused by the tagging requirement, sponsorship is a significant source of funding for the Australian third sector. According to the 2011 census sponsorship was the largest source of funding for the sector in general representing 39% of the whole sector income.⁸⁷⁹ However, the actual levels of sponsorship revenue vary significantly from station to station depending on whether the audiences they serve are of interest to sponsors.

Both the community radio and television codes of practice establish that stations must ensure that editorial decisions are not influenced by sponsors.⁸⁸⁰ The community radio code also provides that sponsorship should not be a factor when deciding on the allocation of access air-time⁸⁸¹ while the television code states that it should not be the sole factor when making such decisions.⁸⁸²

4.3.7.3. Sale of Air-Time

Community stations in Australia are allowed to sell air-time as an additional means of raising funds to support their operations.⁸⁸³ The Administrative Decisions Tribunal of New South Wales has held that the practice of selling air-time is not incompatible with the non-profit nature of the third sector:

⁸⁷⁸ Ibid, 15.

⁸⁷⁹ McNair Ingenuity Research, above n 867.

⁸⁸⁰ Community Broadcasting Association of Australia, *Community Radio Broadcasting Codes of Practice* (2008), codes 6.3 and 6.4; Australian Community Television Alliance, *Community Television Broadcasting Codes of Practice* (2011) code 6.3.

⁸⁸¹ Community Broadcasting Association of Australia, Ibid, code 6.2.

⁸⁸² Australian Community Television Alliance, above n 880, code 6.3.

⁸⁸³ See Australian Communications and Media Authority, above n 877, 16; Australian Communications and Media Authority, above n 801, 23.

The fact that the Radio Station enters into contracts and collects money from Members who wish to broadcast a radio program, does not mean that their activities are being carried on for profit.⁸⁸⁴

Air time is most commonly sold to other third sector groups wishing to access the airwaves through the station, but it can also be sold to commercial entities.⁸⁸⁵ According to ACMA guidelines, those who purchase air-time on community stations must abide by the licensee's licence conditions in their broadcasts.⁸⁸⁶ Among other things, this means that the advertisements prohibition applies to sold air-time and any sponsorship announcements made in sold air-time count toward the station's total limit.⁸⁸⁷

It is not clear to what degree parties who purchase air-time on community stations are allowed to derive profits from the use of that air-time. In *3AW Southern Cross Radio Pty Ltd v Inner North East Community Radio Inc* it was noted that the obligation to not operate the station for profit probably applies only to the operation of the station as a whole and not to a program within the station individually considered.⁸⁸⁸ However, according to the ACMA guidelines, if a community station allows a third party to profit through the use of its air-time, this can be interpreted as a breach of the station's obligation not to operate 'as part of profit-making enterprise'.⁸⁸⁹ The ACMA guidelines seem to indicate that a third party may generate some profits, but that if these are disproportionate to the benefit generated for the station itself, the station may be regarded as assisting a third party to generate profits which would be a breach of its conditions.⁸⁹⁰

⁸⁸⁴ *Khan v Cumberland Community Radio Inc t/as 2CCR-FM* [2006] 222 NSWADT.

⁸⁸⁵ See Australian Communications and Media Authority, above n 877, 16; Australian Communications and Media Authority, above n 801, 23; Australian Communications and Media Authority, above n 471, 7. See Also *3AW Southern Cross Radio Pty Ltd v Inner North East Community Radio Inc* (1994) ATPR 41-313.

⁸⁸⁶ Australian Communications and Media Authority, above n 877, 16.

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *3AW Southern Cross Radio Pty Ltd v Inner North East Community Radio Inc* (1994) ATPR 41-313.

It should be noted, however, that no definitive conclusion was reached regarding this point as the court's decision was based on other grounds.

⁸⁸⁹ See Section 4.3.1.

⁸⁹⁰ See Australian Communications and Media Authority, above n 471, 7.

Regular community licensees are not subjected to any limitations regarding the amount of air-time they can sell to third parties. However, the following limits are imposed on CTV licensees: a maximum of 2 hours in a day to a single for-profit entity, 8 hours in a day total to for-profit entities and 8 hours in a day to any single entity.⁸⁹¹ ACMA is also empowered to impose additional limits on CTV licensees.⁸⁹²

According to the 2011 census, the selling of air time represented only 2.2% of the total income of the Australian third sector.⁸⁹³ However, as with other sources of funding, the importance of this source of funding varies from station to station.

4.3.8. Content Regulation

Community stations in Australia are not subjected to any special restrictions or guidelines in relation to the type of content they can broadcast. Although TSBs in Australia have always been expected to provide content of interest to the community they are licensed to serve, they are not restricted in their capacity to broadcast content of general interest.⁸⁹⁴ Nor are they subject to restrictions on the broadcast of content associated with the commercial sector or quotas for the broadcast of content deemed neglected by the commercial sector.⁸⁹⁵ Community stations can produce content following the same formats common in commercial broadcasting and even broadcast content that has been produced for commercial purposes, including the retransmission of broadcasts from stations of the Australian commercial sector.⁸⁹⁶

Unlike in Canada, there are no quotas establishing minimums of spoken word content for community radio licensees in Australia. In the absence of any type of regulation regarding these matters, community stations in Australia can follow any format they wish

⁸⁹¹ BSA, above n 30, s 87A.

⁸⁹² Ibid.

⁸⁹³ McNair Ingenuity Research, above n 867.

⁸⁹⁴ See Sections 4.2.6 and 4.3.1.

⁸⁹⁵ This type of measures have been implemented in other jurisdictions. See Section 6.6.1 and 6.6.4

⁸⁹⁶ For a discussion See Van Vuuren, Kitty, 'Commercial Trends in Community Radio: Sponsorship, Advertisement and John Laws' (2006) 39(3) *Southern Review* 26.

(only music, only talk, or mixed). However, ethnic broadcasting programs must consist of 50% spoken word content in order to be eligible for CBF funding.⁸⁹⁷ Musical content has been identified as being more prominent in Australian third sector radio than political or talk content.⁸⁹⁸

There are no national or local content quotas for community licensees. The Community Radio Code of Practice only establishes a quota with respect to music, 25% of musical content must be Australian music except for ethnic or classic music format stations for which the quota is only 10%.⁸⁹⁹ The Community Television Code of Practice provides that stations must ensure that a significant proportion of their programs are local and Australian⁹⁰⁰ and that non-local or foreign programming is only broadcast when relevant to the communities they are servicing.⁹⁰¹ However, no quotas are specified.⁹⁰² There are also no quotas concerning content that community stations must produce themselves or special restrictions in relation to their networking with other stations.⁹⁰³

4.3.9. Governance and Participation Regulation

As noted, whether the organizational structure of a community licensee is adequate for fulfilling the licence requirements is assessed by ACMA at the licensing stage. The codes of practice impose additional governance conditions. The Community Radio Code requires licensees to have written policies detailing the rights of members and volunteers, including the procedure for the dismissal of a volunteer⁹⁰⁴ and the handling of internal conflicts and complaints from members and volunteers.⁹⁰⁵ The Code also provides that

⁸⁹⁷ RIBS are also required to provide an “acceptable level” of spoken word content as a CBF funding requirement, a 25% is recommended but it is not an exact quota as the one for ethnic programs. CBF funding guidelines available at www.cbf.com.au/.

⁸⁹⁸ Forde, Foxwell and Meadows, above n 67.

⁸⁹⁹ Community Broadcasting Association of Australia, above n 880, code 5.2. (For comparison purposes, the commercial radio code of practice establishes a sliding scale of quotas going from 25% to 5% depending on the music genres played by the stations).

⁹⁰⁰ Australian Community Television Alliance, above n 880, code 2.4.

⁹⁰¹ Ibid, code 2.5.

⁹⁰² As noted ACMA must set quotas for commercial stations See Section 4.1.5.

⁹⁰³ Other jurisdictions have implemented restrictions in these areas. See Section 6.6.3.

⁹⁰⁴ Community Broadcasting Association of Australia, above n 880, code 2.3.

⁹⁰⁵ Ibid, codes 1.5 and 1.6.

stations must make these policy documents freely available to the public.⁹⁰⁶ The Community Television Code establishes requirements relating to the composition of the organization's board of directors⁹⁰⁷; the obligation of the board to be responsible for compliance with company and broadcasting legislation;⁹⁰⁸ the obligation to have written policies on how community programming needs and interest will be identified and addressed;⁹⁰⁹ and written policies on the handling of complaints from members and volunteers.⁹¹⁰

Although these requirements are quite basic, the fact that the Australian third sector has decided to self-regulate in governance matters is worth noting. According to ACMA, the sector decided to self-regulate in this area because the stations considered that other governance rules that may apply to licensee organizations, such as those applicable to incorporated associations, were not sufficient to ensure compliance with all the specific obligations of community licensees.⁹¹¹

In relation to participation, the BSA establishes as an ongoing obligation of community licensees:

the licensee will encourage members of the community that it serves to participate in:

- (i) the operations of the licensee in providing the service or services; and
- (ii) the selection and provision of programs under the licence⁹¹²

In 2010 ACMA issued guidelines regarding policies which, if implemented, can assist licensees to comply with their participation obligations.⁹¹³ These include: an open

⁹⁰⁶ Ibid, code 2.4.

⁹⁰⁷ Must have a minimum of 7 members and maximum of 12 and have demonstrated experience in areas relevant to the administration of the service such as law, management and television broadcasting. Australian Community Television Alliance, above n 880, code 1.1. (b),(c).

⁹⁰⁸ Ibid, code 1.1.(e).

⁹⁰⁹ Ibid, codes 2.1. and 2.2.

⁹¹⁰ Ibid, code 7.1.

⁹¹¹ Australian Communications and Media Authority, above n 801, 10.

⁹¹² BSA, above n 30, Sch 2 s 9(2).

⁹¹³ Australian Communications and Media Authority, above n 801.

membership policy which does not allow arbitrary refusals and obliges the licensee to inform rejected applicants of the reasons for refusal and provide them with the possibility of appeal; a policy of actively seeking new members and content providers; an active policy for the identification of community needs, including the needs of members of the community that are not already members of the station or part of its audience.

4.3.10. Participation of Third Sector Groups in the Other Sectors

In Australia, the licensing system for commercial broadcasters is price based which is a significant barrier to access. There are no measures that incentivize or facilitate the ownership of commercial broadcasters by persons belonging to TDGs.⁹¹⁴ Commercial broadcasters are not required to provide access to air-time to not-for-profit or community groups. There are no restrictions on the purchase of air-time on commercial stations by any type of entity, but financial capacity, as always, is a barrier to access. As already noted, there is a provision in the BSA which authorizes ACMA to require commercial television stations to broadcast religious content and in the past similar provisions have been used to require stations to provide access to air-time to local churches.⁹¹⁵ However, ACMA has so far opted not to exercise this power.

One indigenous satellite based commercial station, Imparja has been established with government support. Although the intention expressed by Imparja at the time of its licensing was to offer substantial indigenous content, commercial pressures have lead the service to focus primarily on mainstream content.⁹¹⁶ In 2001, Imparja reconfigured its satellite transmission capacity to provide a second channel which it devoted to broadcasting content provided by third sector producers from indigenous communities.⁹¹⁷ This service was known as Indigenous Community Television (ICTV) but despite this name it was not a CTV or community broadcaster licensed under the BSA. In 2007, the satellite capacity controlled by Imparja was transferred to NITV, so ICTV lost its satellite

⁹¹⁴ As discussed in section 2.2.3 these are one of the measures, alternative to TSB, which can be used to deal with issues of inequality in broadcasting.

⁹¹⁵ See Section 4.2.7.3.

⁹¹⁶ Rennie and Featherstone, above n 175, 54.

⁹¹⁷ Ibid.

access. ICTV continued as an internet based service and weekend only satellite service until 2013, when it managed to obtain satellite capacity for a full-time service. At present, the ICTV satellite channel is devoted primarily to broadcasting content from indigenous third sector producers.

In relation to the State sector, the ABC and the SBS sometimes acquire content from third sector producers. Neither of the stations is required to comply with access quotas. However, the SBS code of practice specifically authorizes it to allocate free access air-time to community and charitable organizations for the broadcast of ‘community information’.⁹¹⁸ One barrier third sectors producers have faced in getting their content broadcast in State stations is production standards. The ABC and the SBS are envisioned as services of high-quality, and it is difficult for third sector producers to meet their standards of quality and professionalism.⁹¹⁹ While NITV replaced ICTV in Imparja’s second channel this was also noted as a barrier to access. Indigenous community producers who used to provide content to ICTV did not find NITV to be an adequate outlet for their content because of its quality standards and focus on content of general interest instead of locally oriented content.⁹²⁰ The 2010 review of government investment in indigenous broadcasting and media recommended that NITV relax its standards and increase its acquisition of content from community producers.⁹²¹ However, since NITV has only recently become part of the SBS, it remains to be seen which policies will be adopted in this respect.

4.3.11. Conclusion

The limited participation of third sector actors in the commercial and State broadcasting sector evidence that TSB plays an essential role in broadening participation in Australian broadcasting in fulfilment of the ideals of freedom of expression and diversity of information. As noted, in the past alternatives such as ‘public access’ stations and, in the

⁹¹⁸ Special Broadcasting Service, Codes of Practice (2006) code 6.1.

⁹¹⁹ The fact that they acquire content with public funds also requires them to consider quality standards when purchasing content.

⁹²⁰ Rennie, and Featherstone, above n 175, 57; Stevens, above n 384, 50.

⁹²¹ Stevens, *Ibid*, 50.

case of religious broadcasting, requiring commercial broadcasters to comply with an access quota were used to facilitate third sector participation. However, in the present no other measures aimed at broadening participation are in force in Australia which highlights the importance TSB has in the country. The fact that third sector actors rarely access narrowcasting or non-BSB community licences highlights once again the importance of free access to the spectrum for the development of TSB. As explained, financial realities are not equal for all TSBs in Australia and the level of dependence on particular sources of funding varies widely from station to station. This illustrates why it may be undesirable to regulate TSBs too strictly in relation to the amount of funding they can derive from specific sources as is discussed further in Section 6.3.2.

The overview of Australian TSB policy shows content regulation is not a major feature of such policy. Financial and governance regulation have been clearly the tools preferred by Australian policy makers for advancing their goals for the sector. In special, it is notable that despite the progressive relaxation of the rules, restriction on the broadcast of advertisements remains a key element of Australia's TSB policy. Another characteristic of Australian policy is the lack of differentiated regulation for different types of TSBs. As noted, there are only four types of special categories with special licensing procedure or licence conditions and these only deviate slightly from the general framework. The fact that TSBs elaborate their own (enforceable) codes of practice is also a peculiar element of the Australian system.⁹²² As will be shown in the next Chapter, this all contrasts significantly with the Canadian system, where regulation is primarily conducted through policies issued by the regulatory authority, content regulation plays a comparatively more significant role, restrictions regarding advertising in TSB stations have been almost completely abandoned and specific policies with different sets of rules exist for different types of TSBs.

⁹²² This element of the Australian system has been identified in a UNESCO paper as positive for the advancement of freedom of expression. See UNESCO, above n 7, 23.

Chapter 5 - Third Sector Broadcasting in Canada

This chapter will provide an overview of the historical development of TSB in Canada and the current state of the sector in the country. Similarly to Chapter 4, this chapter is divided into three sections: Section 5.1 which provides a general overview of broadcasting in Canada and the broader context in which Canadian TSBs operate; Section 5.2 which discusses the historical development of TSB in Canada; and Section 5.3 which presents an overview of the regulatory framework applied to TSBs in Canada in the present. As with the previous chapter, the goal of this chapter is to introduce to the reader the present and historical elements of the Canadian framework for TSB which will be subjected to comparative analysis in Chapter 6.

5.1. General Overview of Broadcasting in Canada – History and Context

This section contains an overview of the development of broadcasting in Canada and Canada's general broadcasting policy. Section 5.1.1 discusses the powers of the Canadian federal parliament in relation to the regulation of broadcasting. Sections 5.1.2 to 5.1.9 detail the development of and current policies applied in Canada in eight key areas relating broadcasting. Section 5.1.10 analyses how the general Canadian broadcasting context and policy has influenced the development of TSB in the country

5.1.1. Regulatory Powers

The legitimacy of government regulation of itself has never been contested judicially in Canada. As in Australia, what has been debated is whether the power to regulate belonged to the Federal Parliament or to the Canadian provinces. This issue was addressed in *The Attorney-General of Quebec v. The Attorney-General of Canada and*

others case, commonly known as the *Radio Reference Case*.⁹²³ In this case, Privy council concluded that regulating broadcasting was a competence of the Federal Parliament.⁹²⁴

At the time of the *Radio Reference Case*, there were no provisions relating to freedom of expression in the Canadian Constitution, so this freedom did not feature in the considerations of the Privy Council. Broadcasting legislation made no reference to freedom of expression until the *Broadcasting Act 1968* (Can) which acknowledged for the first time that broadcasters have a right to freedom of expressions and that all persons have a right to receive programs.⁹²⁵ However, the Act also specified that these rights were subject to generally applicable statutes and regulations.⁹²⁶ The current *Broadcasting Act 1991* (Can) specifies that it should be interpreted and applied in a manner consistent with the freedom of expression of broadcasters,⁹²⁷ but also empowers the regulatory authority to impose regulation in multiple areas including content.⁹²⁸

A provision recognising freedom of ‘opinion and expression, including freedom of the press and other media communication’ was incorporated into the Canadian Constitution through the 1982 *Canadian Charter of Rights and Freedoms*.⁹²⁹ However, the provision has so far not been used to restrict the power of the State to regulate broadcasting. Like in Australia, the powers of the Canadian Federal Parliament can also be considered limited by a qualifying phrase contained in the grants of powers clause itself which specifies the powers are granted only to make ‘Laws for the Peace, Order, and Good Government of Canada’.⁹³⁰ However, the degree, if any, to which this phrase limits the Federal Parliament power to regulate broadcasting has not been tested.

⁹²³ *The Attorney-General of Quebec v. The Attorney-General of Canada and others* [1932] 7 UKPC 304

⁹²⁴ The Privy council based its decision on the provisions of *Constitution Act 1867* (UK) s 91(29), in concordance with s 92(10)(a).

⁹²⁵ *Broadcasting Act 1968* (Can) s 2(c).

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.*, s 2(3).

⁹²⁸ BA, above n 30, s 9.

⁹²⁹ *Constitution Act 1982* (UK) Sch B s 2(b). In addition, Canada is party to the ICCPR and the ACHR.

⁹³⁰ *Constitution Act 1867* (UK) s 91. As discussed in Section 4.1.1, a similar qualifying phrase is also contained in the Australian constitution.

While following the *Radio Reference Case* broadcasting regulation in Canada is conducted primarily at the federal level, a minor exception exists in the area of educational broadcasting.. The Canadian Constitution grants each individual province the power to legislate in relation to education.⁹³¹ This clause has been invoked by Provincial government to establish ‘educational’ broadcasters under their control, as discussed further in Section 5.1.4.

5.1.2. The Geographic Situation of Canada and its Impact on Broadcasting Policy

In 1957, a report of a Royal Commission on Broadcasting noted that: ‘One of the special factors affecting Canadian broadcasting is the sheer size of the country in relation to its population’.⁹³² As in Australia, one of the main challenges Canadian policy makers have faced is the need to extend broadcasting services throughout the whole of a country which is large in dimension and in which the population is irregularly scattered.

The need to extend the coverage of broadcasting services to the whole country under these conditions influenced the decision to incorporate both public and private services in the country’s broadcasting system. Leaving broadcasting to the private market alone was not deemed viable, the aforementioned Royal Commission having noted that ‘the Canadian economy is just not big enough to support a broadcasting system on commercial revenues alone’.⁹³³ On the other hand, extending broadcasting to the whole country at the sole expense of the government was unaffordable, thus accepting the collaboration of commercial broadcasting entrepreneurs was deemed a way to reduce the burden on the public purse.⁹³⁴

⁹³¹ Ibid, s 93.

⁹³² Royal Commission on Broadcasting, *Report of the Royal Commission on Broadcasting* (Queen's Printer, 1957), 7.

⁹³³ Ibid, 287.

⁹³⁴ Ibid, 233.

In addition to its size and dispersed nature of its population, another geographical feature that has been greatly influential in Canadian broadcasting policy is the fact that Canada shares a border with the United States, the world's largest exporter of audiovisual content. Producers from the United States have a significant scale advantage due to the larger domestic market at their disposal. This enables them to sell programs internationally at lower prices than the cost of producing similar programs for smaller markets such as Canada.⁹³⁵ The threat of foreign imports hindering the development of national cultural production is not a problem that is exclusive to Canada. However, Canada's proximity to the largest program exporter, the fact that the majority of its population share the language of that country, the fact that the culture of both countries are very similar and the comparatively small size of its domestic market mean this is an issue of special concern for Canadian policy makers.⁹³⁶ In addition to the importation of content into Canada, another concern is that the greater economic resources of U.S. broadcasters provide incentives for Canadian talent to emigrate to work for them.⁹³⁷

As a result of the above concerns, the promotion of Canadian content has been one of, if not the main priority of Canadian broadcasting policy. The report of the 1957 Royal Commission stated: 'as a nation we cannot accept, in these powerful and persuasive media, the natural and complete flow of another nation's culture without danger to our national identity'.⁹³⁸ This policy commitment towards the promotion of Canadian content has translated into legislative action. The *Broadcasting Act* presently identifies the country's broadcasting service as essential to the maintenance of 'cultural sovereignty'⁹³⁹ and requires that 'each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming'.⁹⁴⁰ These provisions apply to all sectors of Canadian

⁹³⁵ See for example Standing Committee on Canadian Heritage, *Our Cultural Sovereignty The Second Century of Canadian Broadcasting* (2003), 8; Pike, Robert M., 'Trying to Stay Canadian Maybe Uncertainty and Paradoxes in Public Policies for Canadian Television Broadcasting' (1998) 25(6) *International Journal of Social Economics* 1279, 1280.

⁹³⁶ Royal Commission on Broadcasting, above n 931, 8 and 66.

⁹³⁷ Standing Committee on Canadian Heritage, above n 935, 149.

⁹³⁸ Royal Commission on Broadcasting, above n 931, 9.

⁹³⁹ BA, above n 30, s 3(1)(b).

⁹⁴⁰ *Ibid*, s 3(1)(f).

broadcasting and national content quotas have been imposed to ensure broadcasters comply with this obligation. Section 5.2.4 outlines the Canadian content requirements that have applied to different types of TSBs throughout the years while Section 5.2.5 discusses the current content requirements for the different types of stations.

5.1.3. The ‘Single System’ Conception

Canadian policy has been consistent in referring to the co-existence of private and State broadcasters within the country as a ‘single system’. The origins of the ‘single system’ concept can be traced back to the first stages of the development of broadcasting in Canada. Private broadcasters were originally conceived as partners of the public broadcasting service, collaborating with it in the endeavour of extending the reach of broadcasting services to the whole country.⁹⁴¹ The *Broadcasting Act 1968* (Can) was the first Act to give legal recognition to the ‘single system concept’ by collectively defining all broadcasting services operating in Canada as a ‘single system ... comprising public and private elements’.⁹⁴² The *Broadcasting Act 1991* (Can) continues to declare that ‘the Canadian broadcasting system constitutes a single system’,⁹⁴³ but adds ‘community’ as a third element of the system. In this context ‘community’ refers to TSB.

The ‘single system’ conception has influenced the approach to regulation in the sense that broadcasters from all three sectors have been expected to contribute to the common goals of the Canadian broadcasting system such as diversity of content, balance in programming and the promotion of Canadian identity.⁹⁴⁴ The co-existence of broadcasters of different sectors within the ‘single system’ has also been acknowledged by the Canadian Radio-television and Telecommunications Commission (CRTC) as essential to ensure the structural diversity of the Canadian broadcasting system:

⁹⁴¹ Royal Commission on Broadcasting, above n 931, 117. This reality would later change See Section 5.1.5.

⁹⁴² *Broadcasting Act 1968* (Can) s 2(a).

⁹⁴³ BA, above n 30, s 3(2).

⁹⁴⁴ See *Ibid*, ss 3(1)(d)(i), (e), (f) and (l)(i).

At this level, it is not the number of owners that is the focus but the availability of different types of broadcasting services - each with its own distinct voice. While a diversity of individual owners is important, ensuring the availability of all three elements provides the foundation for viewpoint diversity within the Canadian broadcasting system.⁹⁴⁵

5.1.4. State Broadcasting in Canada

The first State broadcasting service established in Canada was the Canadian Radio Broadcasting Commission (CRBC) which was created in 1932.⁹⁴⁶ The CRBC was a hybrid entity, as in addition to administering a public broadcasting service it was also tasked with regulating the development of private broadcasting in the country.⁹⁴⁷ The CRBC was replaced in 1936 by the Canadian Broadcasting Corporation (CBC). The CBC initially had the same dual role as its predecessor. However, the *Broadcasting Act 1958 (Can)* transferred the regulatory functions to a new entity, the Board of Broadcast Governors.⁹⁴⁸ After this point, the CBC became solely a public broadcaster and it remains to this day Canada's main public broadcaster. The CBC was initially conceived as national level service but, since the *Broadcasting Act 1968 (Can)*, it has also been required to serve special regional needs.⁹⁴⁹ Local services, however, are expected to be delivered by private broadcasters.⁹⁵⁰

Unlike Australia, no separate State broadcasting service has been established to address special interest needs. Although the *Broadcasting Act 1991 (Can)* currently requires the programming of the CBC to 'reflect the multicultural and multiracial nature of Canada',⁹⁵¹ the provision of specific ethnic broadcasting services has not historically

⁹⁴⁵ CRTC, *Diversity of Voices*, Public Notice 2008-4 [13] '*Diversity of Voices*'.

⁹⁴⁶ *Canadian Radio Broadcasting Act 1932 (Can)* s 9.

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Broadcasting Act 1958 (Can)*

⁹⁴⁹ *Broadcasting Act 1968 (Can)* s 2(g)(iii).

⁹⁵⁰ See Section 5.1.5.

⁹⁵¹ BA, above n 30, s 3(m)(viii)

been regarded in Canada as the responsibility of the public sector.⁹⁵² Instead, the provision of ethnic content has been left to private initiatives.⁹⁵³ The CBC, however, was tasked in 1970 with the provision of broadcasting services to the indigenous peoples inhabiting northern Canada.⁹⁵⁴ The CBC has faced multiple difficulties throughout the years in attempting to serve the needs of the indigenous peoples of northern Canada.⁹⁵⁵ For this reason it has sought the collaboration of indigenous third sector actors for delivering these services. This is discussed further in Section 5.2.4.3.

The main source of funding for the CBC is the allocations by parliament from the general budget.⁹⁵⁶ However, the CBC is not prohibited from selling advertising air-time to support its activities.⁹⁵⁷ Under its current policy, the CBC does not broadcast commercial advertisements on its news radio stations, but does sell advertising air-time in its television, new media and music radio outlets.⁹⁵⁸ While the CBC is expected to prioritize the public interest, the Royal Commission regarded it desirable for it to be commercially successful in order to alleviate the burden on the public purse.⁹⁵⁹ In line with the 'single system' conception, the CBC has, throughout its history, collaborated with commercial broadcasters in the delivery of its signals.

In addition to the CBC, provincial educational broadcasters form part of the Canadian State sector. These are broadcasters that some provincial governments have established pursuant to the authority the Constitution gives them relating to educational matters.⁹⁶⁰

⁹⁵² See Task Force on Broadcasting Policy, above n 309, 533; This contrasts with the case of Australia where providing ethnic content has been perceived as a responsibility of the State sector. See Section 4.1.4.

⁹⁵³ See Ibid.

⁹⁵⁴ Meadows, Michael, 'The Way People Want to Talk: Indigenous Media Production in Australia and Canada' (1994) (73) *Media Information Australia* 64, 68.

⁹⁵⁵ See Minore and Hill, above n 216, 106.

⁹⁵⁶ Vipond, Mary and John Jackson, 'The Public/Private Tension in Broadcasting: The Canadian Experience with Convergence' (2002) *RIPE 2002*, 5; See also Task Force on Broadcasting Policy, above n 309, 319.

⁹⁵⁷ Federal Cultural Policy Review Committee, *Report of the Federal Cultural Policy Review Committee* (Information Services Department of Communications, Government of Canada, 1982), 278.

⁹⁵⁸ CBC Program Policies, Policy 1.1.11. <www.cbc.radio-canada.ca/en/reporting-to-canadians/acts-and-policies/programming/program-policies/>

⁹⁵⁹ See Royal Commission on Broadcasting, above n 931, 175.

⁹⁶⁰ See Section 5.1.1.

The CRTC has referred to provincial broadcasters as part of the country's third sector.⁹⁶¹ However, given their relation with provincial governments it is not accurate to label these stations as 'third sector'.⁹⁶² The provincial educational stations should not be confused with 'campus', 'institutional' or 'student' stations, which are terms that have been used throughout Canadian broadcasting history to refer to TSB stations linked with academic institutions.⁹⁶³

5.1.5. Commercial Broadcasting in Canada

As private enterprises had been relied on to deliver telecommunication services in Canada, it was initially expected that broadcasting services would also be delivered by the commercial sector.⁹⁶⁴ For this reason, the first broadcasting initiatives in Canada were from the commercial sector.⁹⁶⁵ Unlike Australia, commercial broadcasters in Canada have been free to air and financed primarily through advertising since the beginning.⁹⁶⁶

The attitude toward commercial broadcasters changed after the report of the 1929 Royal Commission on Broadcasting. This report concluded that commercial broadcasters would unavoidably favour the importation of American content and, accordingly, recommended establishing a State monopoly over broadcasting in order to secure the development of Canadian culture.⁹⁶⁷ Initially, the role of commercial broadcasters was envisioned as complementing the efforts of the CRBC in extending broadcasting services throughout the country.⁹⁶⁸ However, throughout the years, the relevance of commercial

⁹⁶¹ CRTC, *Policies for Community and Campus Radio*, Public Notice 1992-38 '1992 Policies'.

⁹⁶² See Chapter 1 for a discussion on the definition and concept of TSB.

⁹⁶³ CRTC, *Educational and Institutional Radio*, Public Notice 1987-255 s 4(a).

⁹⁶⁴ Vipond and Jackson, above n 956, 5.

⁹⁶⁵ Raboy, Marc, *Missed Opportunities: The Story of Canada's Broadcasting Policy* (McGill-Queen's University Press, 1990), 21.

⁹⁶⁶ Ali, Christopher, 'A Broadcast System in Whose Interest? Tracing the Origins of Broadcast Localism in Canadian and Australia Television Policy, 1950-1963' (2012) 74(3) *International Communications Gazette* 277, 283. As explained in Section 4.1.5, the first commercial broadcasters in Australia were financed through listeners' fees.

⁹⁶⁷ Raboy, above n 965, 30.

⁹⁶⁸ Initially, commercial services operated as 'affiliates' of the public networks. See Royal Commission on Broadcasting, above n 931, 12.

services in the Canadian broadcasting system gradually increased to the point that some commentators consider that they have effectively relegated the Canadian public sector to a subsidiary role.⁹⁶⁹

At first, securing the viability of commercial broadcasters was not a priority of Canadian broadcasting policy.⁹⁷⁰ However, after the introduction of television and FM radio Canadian policy documents began to emphasise the protection of existing broadcasters.⁹⁷¹ For example, the report of the 1986 Task Force on Broadcasting Policy expressly noted that ‘there was the implicit demand upon the state to protect Canadian broadcasters in order that they could provide sometimes uneconomic cultural services’.⁹⁷² For this reason, the policy favoured the licensing of new outlets only when they would not disrupt the commercial viability of existing ones.⁹⁷³

Although spectrum auctions are used in Canada for telecommunication services, the licensing process for commercial broadcasters remains merit-based.⁹⁷⁴ In Canada, broadcast licences do not directly confer a right to access spectrum; transmission rights are attained through a separate process which is based solely on technical criteria and is conducted in parallel to the broadcast licence application.⁹⁷⁵ Unlike Australia, the process for licensing commercial and third sector broadcasters in Canada is not separate. Broadcasters from all sectors participate in the same licensing processes. The Canadian licensing system is explained in more detail in Section 5.3.2.

Content regulation has been used throughout Canadian broadcasting history to ensure commercial broadcasters fulfil policy goals. Canadian content quotas have been used to promote the use of national production. Commercial broadcasters have also been

⁹⁶⁹ See for example, Raboy, above n 965, 154; Pike, above n 935, 1291.

⁹⁷⁰ As noted in Section 4.1.5, securing the viability has been one of the main goals of Australian broadcasting policy.

⁹⁷¹ Raboy, above n 965, 30.

⁹⁷² Task Force on Broadcasting Policy, above n 309, 40; Raboy, above n 965, 15.

⁹⁷³ See Federal Cultural Policy Review Committee, above n 957, 286

⁹⁷⁴ As noted in Section 4.1.5, Australia presently uses a price-based system for the licensing of commercial broadcasters.

⁹⁷⁵ See Industry Canada Spectrum Management, *AM, FM and TV Broadcasting Process*, Broadcasting Circular 1, 1993.

subjected to time restrictions in relation to advertising, although these were removed in 1986 for AM stations and 1993 for FM stations.⁹⁷⁶ With the introduction of FM radio, specific content regulation was imposed which aimed simultaneously to ensure that FM broadcasters provided a different service from AM stations and to protect the viability of AM stations.⁹⁷⁷ For example, a minimum ‘foreground’ program quota was imposed, which referred to programming that required concentration from listeners as opposed to the easy listening ‘rolling’ format used by most AM stations at the time.⁹⁷⁸ Stations were also required, both at the time of licensing and at licence renewal, to submit promises of performance relating to programming and music formats.⁹⁷⁹ This measure served the double purpose of securing diversity of content while protecting the viability of stations already broadcasting in a certain format.⁹⁸⁰ Many of these requirements have since been relaxed or eliminated, but the willingness to use content regulation to pursue policy goals remains an element of note.

5.1.6. Regulatory Authority

As explained above, when the CRBC was created it had the double function of providing a public broadcasting service and regulating private broadcasters.⁹⁸¹ The CRBC did not have direct powers regarding licensing, being limited to making recommendations to the Minister of Marine.⁹⁸² However, it had direct powers to regulate the activities of broadcasters, including determining advertisement caps and local content quotas.⁹⁸³

As noted, when the CBC replaced the CRBC it initially assumed the same dual role. The CBC was granted the additional power to determine the amount of time stations should

⁹⁷⁶ CRTC, *Policies for Local Programming on Commercial Radio Stations and Advertising on Campus Stations*, Public Notice 1993-38.

⁹⁷⁷ CRTC, *FM Radio in Canada A Policy to Ensure a Varied and Comprehensive Radio Service*, 1976, 3 ‘1976 FM Policy’; CRTC, *Revised Policy on the Use of Hits by English-Language FM Radio Stations*, Public Notice 1997-42, para. 2.

⁹⁷⁸ 1976 FM Policy, *Ibid*, 5.

⁹⁷⁹ *Ibid*, 8-9.

⁹⁸⁰ See Dumbar, Laurance and Christian Leblanc, *Review of the Regulatory Framework for Broadcasting Services in Canada Final Report* (CRTC, 2007) s 5.

⁹⁸¹ See Section 5.1.4.

⁹⁸² *Canadian Radio Broadcasting Act 1932* (Can) s 8(c).

⁹⁸³ *Ibid*, s 8(b).

allocate to political broadcasts and to assign that time equitably to different parties and candidates.⁹⁸⁴ In 1956, the powers of the CBC were expanded to include making regulations in order to promote and secure the use of Canadian talent by stations.⁹⁸⁵

The functions of regulator and public broadcaster were first separated in 1958 through the creation of the Board of Broadcast Governors. The Board was granted broad powers to make any regulations necessary for carrying out the purposes specified in the *Broadcasting Act 1958* (Can), which included securing the continued existence and efficiency of the Canadian broadcasting system and ensuring that such system provides a service which is varied, comprehensive and Canadian in character.⁹⁸⁶ In addition to the powers of its predecessors, the Board was granted express powers to make regulations respecting the standards of programs and permissible advertising.⁹⁸⁷

The Canadian Radio Television Commission replaced the Board in 1968. This Commission was the first regulatory body to be granted the power to issue and revoke broadcasting licences.⁹⁸⁸ Moreover, the Commission was authorised to prescribe classes of licences and to issue regulations applicable to all licensees, or to licensees belonging only to one or some of the licence classes.⁹⁸⁹ In addition, the Commission was authorised, subject to approval by the Treasury Board, to establish the licence fees to be paid by the different classes of licensees.⁹⁹⁰ However, the Act also provided that the Governor-in-Council could issue directions to the Commission relating to the allocation and allotment of frequencies and the reservation of frequencies for special purposes⁹⁹¹ and to declare particular categories of applicants as ineligible for broadcasting licences.⁹⁹²

⁹⁸⁴ *Canadian Broadcasting Act 1936* (Can) s 22(1)(e).

⁹⁸⁵ *An Act to Amend the Canadian Broadcasting Act 1936* (Can) 1956 s 7(1).

⁹⁸⁶ *Broadcasting Act 1958* (Can) s 10.

⁹⁸⁷ *Ibid*, s 11(1)(b)-(c).

⁹⁸⁸ *Broadcasting Act 1968* (Can) ss 16(1)(c) and 17(1)(a).

⁹⁸⁹ *Ibid* s 16(1)(a)-(b).

⁹⁹⁰ *Ibid* s 16(a)(b)(vii).

⁹⁹¹ *Ibid* s 22(1)(a)(i)-(ii).

⁹⁹² *Ibid* s 22(1)(a)(iii).

In 1975, the functions of telecommunications and broadcasting regulation were merged in a single entity, the CRTC, which continues to serve as the regulator of the two sectors to this day. The *Broadcasting Act 1991* (Can) further expanded the powers of the CRTC to include the power to impose must-carry requirements on distribution undertakings.⁹⁹³

As this history shows, Canadian broadcasting policy has been consistent in investing regulatory authorities with considerable powers to directly make regulations, rather than merely enforcing them. The report of the 1986 Task Force on Broadcasting Policy explained the dynamic of regulation as one in which Parliament defines the ends to be pursued through broadcasting policy, while the regulator plays the dominant role in adapting the broadcasting system to meet those ends.⁹⁹⁴ The consequence of this is that most of the matters that are regulated in Australia through legislation or self-regulatory codes are instead dealt with in Canada through regulatory policies issued by the CRTC.⁹⁹⁵

In addition to issuing general regulatory policies to be applied to all or particular classes of licensees, the CRTC can also impose specific licence conditions on individual broadcasters. When determining individual licence conditions, the CRTC can deviate from its general policies and establish requirements that are either more or less demanding than the generally applicable ones. This practice was described by the 1986 task force on broadcasting policy as ‘made to measure regulation’.⁹⁹⁶ The practice of individualized regulation has sometimes been criticised due to weak enforcement practices, as well as a tendency by the CRTC to relax conditions when applicants claim financial need.⁹⁹⁷

Self-regulation by broadcasters also forms part of Canadian broadcasting policy, but its role is less significant than in Australia. Compliance with certain industry created codes of practice can be imposed as licence conditions. However, government designed regulation has been deemed necessary to address certain issues, such as the promotion of

⁹⁹³ BA, above n 30, s 9(1)(h).

⁹⁹⁴ Task Force on Broadcasting Policy, above n 309, 171.

⁹⁹⁵ See Sections 4.1.6 and 4.1.7 for contrast.

⁹⁹⁶ Task Force on Broadcasting Policy, above n 309, 183.

⁹⁹⁷ *Ibid*, 184.

Canadian content. This is because self-regulation is unlikely to protect the public interest where this conflicts with the self-interest of broadcasters.⁹⁹⁸

5.1.7. Official Bilingualism

One peculiarity of the Canadian context is the ‘official bilingualism’ under which English and French are recognized as the two official languages of the country. Since the beginnings of broadcasting in Canada, it was considered that this medium needed to play a role in creating a shared identity for a society divided by these two language groups.⁹⁹⁹ One consequence of this is that during the early stages of broadcasting in Canada localism was not a main priority for policy makers.¹⁰⁰⁰ Policies focused on promoting content aimed at fostering national unity over content reflective of local or regional differences.¹⁰⁰¹

It was not until the *Broadcasting Act 1991* (Can) that a legal provision was introduced requiring locally produced content to form part of the programming of the Canadian broadcasting system.¹⁰⁰² Despite this, national identity building clearly remains a higher priority concern. In this respect, the *Broadcasting Act 1991* (Can) states that the broadcasting system provides ‘a public service essential to the maintenance and enhancement of national identity’.¹⁰⁰³

Another consequence of the official bilingualism policy is that broadcast policy has aimed to ensure the availability of broadcasting services in both official languages. The bilingualism policy was officially introduced in the *Official Languages Act 1969* (Can).¹⁰⁰⁴ However, even before that, the *Broadcasting Act 1968* (Can) had already declared that ‘all Canadians are entitled to broadcasting service in English and French as

⁹⁹⁸ Ibid, 181.

⁹⁹⁹ Raboy, above n 965, 8.

¹⁰⁰⁰ However, concerns relating localism occasionally appeared in policy discussions. See for example Royal Commission on Broadcasting, above n 931, 147.

¹⁰⁰¹ Ali, above n 966.

¹⁰⁰² BA, above n 30, s 3(1)(i)(ii).

¹⁰⁰³ BA, above n 30, s 3(1)(b).

¹⁰⁰⁴ *Official Languages Act 1969* (Can).

public funds become available'.¹⁰⁰⁵ The *Broadcasting Act 1991* (Can) currently establishes that the Canadian broadcasting system operates primarily in English and French¹⁰⁰⁶ and that 'a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available'.¹⁰⁰⁷

The term 'official language minority communities' is used to refer to communities of francophones in predominantly anglophone areas and vice versa and ensuring the needs of these communities are served is a key goal of Canadian broadcasting policy.¹⁰⁰⁸ For this reason, broadcasters who are the only ones in a service area broadcasting in one of the two official languages have, historically,¹⁰⁰⁹ been favored for licensing and subjected to less onerous regulation and licence conditions.¹⁰¹⁰

Following the official bilingualism policy, broadcasters in Canada are normally divided and subjected to different sets of rules depending on whether their main language of broadcast is English or French, with indigenous language and ethnic broadcasters being exceptions to this norm. This division serves practical purposes. Canada is often identified as having two broadcasting markets, the Anglo and the Francophone, which constitute separate and distinct realities.¹⁰¹¹ This is recognised by the *Broadcasting Act*, which states that: "English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements".¹⁰¹² One of the differences between the two markets is that the English market is much larger than the French one. In addition, because of the language barrier, the importation of U.S. content and the potential loss of talent due to emigration to the U.S. is less of a concern in

¹⁰⁰⁵ BA, above n 30, s 2(e).

¹⁰⁰⁶ Ibid, s 3(1)(b).

¹⁰⁰⁷ Ibid, s 3(1)(k).

¹⁰⁰⁸ See CRTC, *2004-2005 Action Plan Implementation of Section 41 of the Official Languages Act*, 2004.

¹⁰⁰⁹ However, in 2010 the CRTC noted that broadband could potentially become the ideal platform for official language minority communities to foster their languages and cultures. CRTC, *Campus and Community Radio Policy*, Public Notice 2010-499 [157] '2010 Policy'.

¹⁰¹⁰ The differences in regulation between English and French language TSBs is discussed in Sections 5.2.4.1 and 5.2.4.2.

¹⁰¹¹ See for example Thomas, above n 250, 10.

¹⁰¹² BA, above n 30, s 3(1)(c).

the francophone market than in the English market.¹⁰¹³ These differences in circumstances have been used to justify, for example, subjecting French language broadcasters to less restrictive obligations in relation to national content and diversity of content in comparison to English ones.¹⁰¹⁴

5.1.8 Multiculturalism Policy

The original *Official Languages Act 1969* (Can) contained no provisions regarding other languages, and neither did the *Broadcasting Act 1968* (Can) or its predecessors. This meant preserving indigenous or immigrants' languages was not seen as a goal of broadcasting policy. During the 1970s, Canada began a shift toward the recognition of multiculturalism. Canada's multiculturalism policy was enshrined in legislation in the *Multiculturalism Act 1985* (Can) which, among other things, declared it to be part of the policy of the Government of Canada to:

Preserve and enhance the use of languages other than English and French, while strengthening the status and use of the official languages of Canada; and
Advance multiculturalism throughout Canada in harmony with the national commitment to the official languages of Canada.¹⁰¹⁵

The *Official Languages Act* was amended in light of the shift toward multiculturalism and, at present, recognises: 'the importance of preserving and enhancing the use of languages other than English and French while strengthening the status and use of the official languages'.¹⁰¹⁶ The same Act also establishes a commitment of the Government to 'enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development',¹⁰¹⁷ but no such commitment is made regarding other groups. This means that while the importance of encouraging

¹⁰¹³ Standing Committee on Canadian Heritage, above n 935, 148-149.

¹⁰¹⁴ See Sections 5.2.4.1 and 5.2.4.2

¹⁰¹⁵ *Canadian Multiculturalism Act 1985* (Can) s 3(1)(i) and (j).

¹⁰¹⁶ *Official Languages Act 1985* (Can) Preamble.

¹⁰¹⁷ *Ibid* s 41(1)(a).

language maintenance by aboriginal Canadians, immigrants and Canadians with a foreign ethnicity is recognized, protecting English and French is the clear priority.

As noted, Canadian broadcasting law has been consistent in requiring broadcasting in English and French to be available throughout the country but, in the present, the *Broadcasting Act 1991* (Can) also establishes that: ‘programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose’. No similar provision is made in relation to immigrant cultures but the Act provides that the use of languages other than English and French can exempt a station from the obligation to broadcast predominantly Canadian content.¹⁰¹⁸

5.1.9. The Principles of Balance and Diversity in the Canadian Broadcasting System

Ensuring diversity and balance of programming have been two major goals of Canadian broadcasting policy. The principles of balance and diversity first appeared in legislation in the *Broadcasting Act 1968* (Can) which provided that:

the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern...¹⁰¹⁹

The current *Broadcasting Act* retains these principles, albeit with slightly different words:

The programming provided by the Canadian broadcasting system should be

¹⁰¹⁸ BA, above n 30, s 3(1)(f).

¹⁰¹⁹ *Broadcasting Act 1968* (Can) s 2(d).

(i) varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes (...)

(iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern.¹⁰²⁰

As in other countries, Canadian policy makers have attempted to secure balance and diversity through ownership restrictions and, more recently, through the recognition of the three broadcasting sectors.¹⁰²¹ However, Canadian policy has also pursued this goal through more direct means. The CRTC for a long time required each individual station to be balanced in its programming.¹⁰²² This meant that stations could broadcast programmes supportive of, or biased toward, specific viewpoints, but if they did so they were obliged to present the other viewpoints on those matters somewhere in the rest of their programming.¹⁰²³ With the introduction of cable and satellite services, which increased the channel capacity and allowed the delivery of more specialised broadcasting services, the conception of the principle of balance gradually shifted from requiring each individual station to offer balanced programming to requiring only the output of the system as a whole to be balanced.¹⁰²⁴

The goal of diversity has been pursued through the use of content restrictions and positive content requirements. As explained in Section 5.1.5, classifying stations by format and imposing licence conditions which require stations to program in adherence to their stated format is another measure that has been used to promote diversity.

¹⁰²⁰ BA, above n 30, s 3(1)(i).

¹⁰²¹ *Diversity of Voices*, above n 945, [13].

¹⁰²² See for example, CRTC, *Religious Broadcasting: Licensing Policy and Call for Applications for a Satellite to Cable, Interfaith Religious Programming Service*, Public Notice 1983-112, 2 '1983 Religious Policy'; CRTC, *Balance in Programming on Community Access Media*, Public Notice 1988-161 'Balance Policy'.

¹⁰²³ *Balance Policy*, Ibid.

¹⁰²⁴ The 1982 Federal Cultural Policy Review Committee noted that an individual balance requirement for each station had become unnecessary due to the increment in the number of available channels and that maintaining it would lead to duplication of content instead of diversity. See Federal Cultural Policy Review Committee, above n 957, 274.

5.1.10. The Impact of Canada's General Broadcasting Policy on Third Sector Broadcasting

Although, unlike Australia, Canada recognizes freedom of expression in its Constitution, this does not seem to have significantly constrained Canadian policy makers. Like their Australian counterparts, Canadian policy makers have had the freedom to pursue their goals without being limited by legal barriers or the need to comply with legal imperatives. However, as in Australia, the concerns of Canadian policy makers in relation to broadcasting have been in many ways similar to the IHRL concerns discussed in Chapter 2.

The goal of ensuring diversity of content is congruent with IHRL. As noted, Canada has recognized the importance of structural diversity and how a three sector based system ensures such diversity.¹⁰²⁵ The recognition of TSB as an essential component of the country's 'single broadcasting system' has undoubtedly aided its development in Canada. Although localism has been less of a priority in Canada than it has been in Australia, the policy makers' desire to secure local services in areas where the market could not support commercial ones has also been of aid to development of TSB in Canada.¹⁰²⁶

The goal of ensuring the balance of the Canadian broadcasting system as a whole is also congruent with freedom of expression. However, it is more debatable whether requiring each individual station to provide balanced programming is an acceptable restriction on the stations' rights.¹⁰²⁷ This requirement had a negative impact on the development of TSB, as complying with this requirement was very difficult for TSB stations focused on community access.¹⁰²⁸ Moreover, the requirement meant that certain special interest groups, such as religious organisations, were considered ineligible for broadcasting

¹⁰²⁵ Compare Sections 2.1.1.2 and 5.1.3.

¹⁰²⁶ See for example Federal Cultural Policy Review, above n 957, 304.

¹⁰²⁷ As discussed in Section 3.1.2.3, a balance requirement is a type of regulation that is sometimes justified under the economic scarcity rationale.

¹⁰²⁸ Discussed further in Section 5.2.4.1.6.

licences, as they were deemed by nature to be biased toward certain viewpoints on certain matters and therefore inherently incapable of producing balanced programming.¹⁰²⁹

Ensuring ‘official language minorities’ have access to broadcasting services in their own languages is also a goal that is consistent with IHRL. This has facilitated the licensing of third sector broadcasting outlets which intend to serve official language minority communities as they may be the only means of securing for these communities a local broadcasting service in their language when their size cannot sustain a commercial service.¹⁰³⁰ However, prioritizing the needs of these communities may have been detrimental to TSBs aiming to serve other special interest groups, such as immigrants or indigenous Canadians.

As noted, although not initially contemplated, the needs of indigenous Canadians came to be acknowledged in Canadian broadcasting policy.¹⁰³¹ However, promoting ethnic content is not expressed as one of the goals of the *Broadcasting Act* and, unlike in Australia, providing ethnic broadcasting has never been perceived as a role for the government. This explains why indigenous broadcasters in Canada have benefitted from specific government funding while ethnic broadcasters have not.¹⁰³²

As in Australia, the interest in protecting the viability of commercial broadcasters has had an influence on Canadian TSB policy. However, the historical approval of commercial activity by the country’s main public broadcasters may have also influenced TSB policy, as Canadian TSBs are less restricted than their Australian counterparts in terms of their capacity to engage in commercial activities, such as selling advertising air-time.

As explained above, one of the major features of Canadian broadcasting policy is the historical tendency to use content regulation to pursue policy goals. This tendency has

¹⁰²⁹ See 1983 Religious Policy, above n 1022, 2; See also Section 5.2.4.5.

¹⁰³⁰ See CRTC, *2004-2005 Action Plan Implementation of Section 41 of the Official Languages Act*, 2004.

¹⁰³¹ See Sections 5.1.4 and 5.1.8.

¹⁰³² As explained, in Australia where providing ethnic content has been perceived as a task for the public system, ethnic broadcasters have been favoured for government funding. See Section 4.1.9.

extended to TSB, as content regulation of TSBs has been much more prevalent in Canada than it has been in Australia.¹⁰³³ Given that promoting Canadian content has been the main priority of Canadian broadcasting policy, TSBs have been subjected to regulation relating to the use of national content.

The broad powers of the CRTC to develop and impose regulation can also be said to have aided the development of TSB in Canada, as these powers have allowed the CRTC to establish different classes of TSB licensees with special regulation for each and to exempt TSB outlets from paying licensing fees.¹⁰³⁴ The practice of ‘made to measure regulation’ has also allowed the CRTC to aid specific TSB outlets by exempting them from regulatory burdens through their individual licence conditions.

The concern of Canadian policy makers regarding the importation of content from the U.S. apply equally to terrestrial broadcasting and cable distribution undertakings. For this reason, it has been deemed necessary in Canada to regulate cable undertakings to protect and promote Canadian content.¹⁰³⁵ The regulation of cable undertakings has indirectly aid TSB, as these undertakings have been required to carry and support a ‘community channel’. The role of these ‘community channels’ in Canadian TSB history is discussed in Section 5.2.5.

All of the above makes clear that Canadian TSB policy has been greatly influenced by the country’s policy makers’ general attitudes and concerns in relation to broadcasting. However, the development of TSB in Canada has also been guided by goals and concerns that more specifically relate the sector. The following section discuss in more detail the historical development of the Canadian third sector and its different sub-sectors.

5.2. History of Third Sector Broadcasting in Canada

¹⁰³³ Discussed further in Sections 5.2.4 and 5.3.5

¹⁰³⁴ Discussed further in Sections 5.2.4, 5.3.1 and 5.3.3.

¹⁰³⁵ See Pike, above n 935, 1286-1288.

This section discusses the development of TSB in Canada. Since Canada has had separate policies for different types of TSBs, Sections 5.2.1 to 5.2.3 recount the general development of TSB in Canada, while Section 5.2.4 details the different types of TSBs existent in Canada and the policies that have influenced their development. In Section 5.2.5, Canada's cable community channel policy is discussed. This policy has provided, through cable, an alternative outlet for third sector content and has been a key element of Canadian broadcasting policy. Section 5.2.6 provides a brief analysis of how the history of TSB in Canada is relevant for the purposes of guiding the development of TSB policy in other jurisdictions.

5.2.1. Development

Third sector actors participated in the earliest stages of the development of broadcasting in Canada, as the government issued 'amateur' broadcasting licences for third sector operations, such as low-power stations operated by educational institutions.¹⁰³⁶ However, this changed after the CRBC was created and policy changed so broadcasting services needed to be primarily State delivered with the role of private broadcasters being subsidiary.¹⁰³⁷ As private broadcasters were only permitted because private capital was deemed necessary to aid the government in providing a broadcasting service to the whole country, TSBs were not contemplated under the original conception of the Canadian 'single system'.¹⁰³⁸ Although policy did not contemplate TSB, TSBs were not expressly prohibited. Indeed, no legislation has ever existed in Canada limiting the eligibility for broadcast licences to commercial entities.

As early as 1957, the report of the Royal Commission on Broadcasting noted that the establishment of community stations could aid the CBC in expanding its services throughout the country.¹⁰³⁹ When FM radio was introduced in the country, the CRTC noted that the first commercial FM stations were basically duplicating the service

¹⁰³⁶ Fairchild, above n 385, 132.

¹⁰³⁷ See Section 5.1.5.

¹⁰³⁸ See Section 5.1.3.

¹⁰³⁹ Royal Commission on Broadcasting, above n 931, 233.

provided by AM stations. For this reason, it decided to defer the licensing of additional commercial FM stations until it could elaborate a specific policy for them and, instead, allowed the establishment of some community and education-related stations.¹⁰⁴⁰ In 1975, in a decision approving licences for two student radio stations, the CRTC explained its rationale for licensing new types of services in the following terms:

Many of the different sectors of social life cannot find a place on the national service or the private commercial outlets. It is for this reason that the Commission has been willing to develop new models for different voices.¹⁰⁴¹

The CRTC FM policy was issued in 1976. This was the first policy to expressly deal with TSB, as it created the ‘Special FM’ licence class which included the subcategories of ‘community access’ (access stations controlled by private non-profit organisations) and ‘institutional’ (stations owned by non-profit organisations linked with institutions of post-secondary education).¹⁰⁴² Along with these two types of TSB services, the Special FM licence class also included an ‘educational’ category, which consisted of provincial educational stations.¹⁰⁴³

Two major factors provided the impetus for the development of TSB in Canada in the 1970s. The first was the plight of the indigenous people of northern Canada, who lacked broadcasting services in their languages and/or reflective of their culture. This led to the Federal Government supporting the establishment of indigenous TSB outlets in the region.¹⁰⁴⁴ The other factor was the initiative of the provincial government of Quebec to support the establishment of community radio stations in its province in the expectation that it would better reflect the local realities of its population.¹⁰⁴⁵ Because there was no

¹⁰⁴⁰ 1976 FM Policy, above n 977, 1.

¹⁰⁴¹ CRTC, Decision 75-247, 3 ‘1975 Decision’.

¹⁰⁴² 1976 FM Policy, above n 977, 19.

¹⁰⁴³ Ibid.

¹⁰⁴⁴ See for example Fairchild, above n 385, 141; Task Force on Broadcasting Policy, above n 309, 491.

¹⁰⁴⁵ See for example Fauteux, Brian, ‘The Development of Community Radio in Quebec: The Rise of Community Broadcasting in Late 1960s and Early 1970s Canada’ (2008) 3(1) *Canadian Journal of Media Studies* 131; McNulty, Jean, *Other Voices in Broadcasting The Evolution of New Forms of Local Programming in Canada*, Department of Communications (1979), 70.

financial support for TSB outside Quebec and the north, the development of TSB was slower in the rest of the country.¹⁰⁴⁶ Most TSB stations outside these two regions were linked to educational institutions, as they could provide support to them.¹⁰⁴⁷ However, despite being linked with educational institutions, many of these stations provided the type of community access normally associated with general community stations.¹⁰⁴⁸

In 1982, the Federal Cultural Policy Review Committee observed that TSB could provide an outlet for local talent.¹⁰⁴⁹ The 1986 report of the Task Force on Broadcasting Policy also supported TSB. This report acknowledged that TSB played different roles in different areas of the country, and, accordingly, considered it to be important for both small communities and large urban areas.¹⁰⁵⁰ The report noted that TSB was necessary to improve equality in access to broadcasting activity throughout the country¹⁰⁵¹ and that it could aid in serving groups with special needs, such as Francophones living outside Quebec and indigenous communities.¹⁰⁵² The Task Force also identified the need for specific regulation for different forms of broadcasting, stating that ‘(i)t is unrealistic to hold the same expectations for each of the many elements in the broadcasting system’.¹⁰⁵³ For these reasons, the Task Force recommended that ‘community broadcasting’ be legally recognised as the third sector of the Canadian broadcasting system.¹⁰⁵⁴

In 1990, the CRTC acknowledged that commercial radio was limited in terms of the diversity of content it could provide and that TSB stations, along with the CBC service, were part of its strategy to fulfil its mandate to secure diversity of content in the system:

While diversity among commercial pop and rock stations is a desirable objective, the private sector is limited in this regard. At a certain point, programming

¹⁰⁴⁶ Fairchild, above n 385, 150.

¹⁰⁴⁷ Fauteux, above n 1045, 146.

¹⁰⁴⁸ See 1992 Policies, above n 961, s B(4).

¹⁰⁴⁹ Federal Cultural Policy Review Committee, above n 957, 309.

¹⁰⁵⁰ Task Force on Broadcasting Policy, above n 309, 506.

¹⁰⁵¹ Ibid, 491.

¹⁰⁵² Ibid, 226.

¹⁰⁵³ Ibid, 149.

¹⁰⁵⁴ Ibid, 165.

becomes so specialized that audience levels become too low to generate the revenues that commercial stations need to survive.¹⁰⁵⁵

The third sector finally obtained legal recognition in Canada in the *Broadcasting Act 1991* (Can), which added ‘community’ as the third element of the single Canadian broadcasting system.¹⁰⁵⁶ In Canada, the term ‘community element’ refers to the whole of the country’s third sector and not only those stations licensed under the community radio or television categories.¹⁰⁵⁷

5.2.2. Licensing Policy

Since 1968, broadcast licensing decisions in Canada have been made by the broadcast regulatory authority, first the CRBC and then the CRTC.¹⁰⁵⁸ Licensing criteria are not established by law; instead, these are elaborated by the licensing body itself. The licensing authorities have opted not to establish separate licensing procedures for the different sectors of broadcasting. For this reason, broadcasters of different sectors compete against each other in the same licensing process. While the process has always been merit-based, the CRTC has admitted that, in markets where frequencies are scarce, the fact that TSBs must compete with commercial and public stations in the same licensing process has been a barrier for the development of TSB.¹⁰⁵⁹ Although the processes are not separate, the CRTC has periodically issued a number of policies aimed at aiding the establishment of TSBs. For example, in 1993 the CRTC issued a policy stating that it would give TSB services - such as community, campus and native stations - first priority in competitive situations for the licensing of low-power radio services.¹⁰⁶⁰

¹⁰⁵⁵ CRTC, *An FM Policy for the Nineties*, Public Notice 1990-111, s II(A)(2).

¹⁰⁵⁶ BA, above n 30, s 3(1)(b).

¹⁰⁵⁷ See Section 5.2.4.

¹⁰⁵⁸ See Section 5.1.6.

¹⁰⁵⁹ CRTC, *Achieving a Better Balance: Report on French-language Broadcasting Services in a Minority Environment*, Public Notice 2001-25, [169].

¹⁰⁶⁰ CRTC, *A Licensing Policy for Low-Power Radio Broadcasting*, Public Notice 1993-95, s C.

In 2000, policies were adopted for developmental community and campus radio. These policies allow for low-power TSB radio stations to be licensed through an abbreviated process in order to enable prospective broadcasters to develop capacity before applying for regular licences.¹⁰⁶¹ However, in 2002 the CRTC decided not to offer the option of developmental licences for third sector television,¹⁰⁶² and in 2010 refused to make the transition from a developmental to a regular licence automatic for licensees who had demonstrated adequate capacity to provide the service.¹⁰⁶³ These developmental licences are discussed further in Section 5.3.2.5.

In addition, the CRTC has issued policies which exempt certain TSBs from the licence requirement. This includes indigenous broadcasters in certain remote areas¹⁰⁶⁴ and low-power religious broadcasters.¹⁰⁶⁵ As explained, the broadcast licensing and frequency assignment process are separate in Canada, so broadcasters who are exempted from CRTC licensing must still apply to Industry Canada for spectrum access.

5.2.3. Government Funding and Financial Regulation

As explained in Section 5.2.1, in the initial stages of the sector's development TSBs received government support only in Quebec and Northern Canada. TSB stations were also limited in their capacity to raise funds through commercial activity. In 1975, the CRTC explained that the reason for limiting such capacity was to secure the distinctiveness of TSB stations, noting:

The Commission is of the opinion that truly alternative forms of programming can best be achieved and maintained through financing other than from the sale of air time.¹⁰⁶⁶

¹⁰⁶¹ CRTC, *Campus Radio Policy*, Public Notice 2000-12 [64]-[67] '2000 Campus Policy'; CRTC, *Community Radio Policy*, Public Notice 2000-13-1 [57]-[60] '2000 Community Policy'.

¹⁰⁶² CRTC, *Policy Framework for Community Based Media*, Public Notice 2002-61, [137] 'Community Media Framework'.

¹⁰⁶³ 2010 Policy, above n 1009, [35].

¹⁰⁶⁴ Discussed further in Section 5.2.4.3.

¹⁰⁶⁵ CRTC, Broadcasting Order 2013-621.

¹⁰⁶⁶ 1975 Decision, above n 1041, 4.

In a 1976 Policy, the CRTC specified the amount of advertising permissible for different types of FM stations. However, it decided to leave the number, duration and kind of commercial messages that could be broadcast by TSBs to be determined on a per-case basis in the individual licence conditions of each station.¹⁰⁶⁷

Both the 1982 report of the Federal Cultural Policy Review Committee and the 1986 report of the Task Force on Broadcasting Policy recommended that both the Federal and Provincial governments support TSB financially.¹⁰⁶⁸ The Canadian Government has provided direct and indirect funding for TSB through a variety of mechanisms and programs.¹⁰⁶⁹ However, government funding has been insufficient to wholly support the sector. For this reason, restrictions on the commercial activity of third sector broadcasters have been progressively relaxed in order to protect the financial viability of the sector.¹⁰⁷⁰ Different types of third sector broadcasters have been subjected to different restrictions at different times, as discussed in Section 5.2.4.

In 2007, the Community Radio Fund of Canada (CRFC) was founded. The CRFC is an institution similar to the Australian CBF. It is a private, non-profit entity established by third sector actors with the support of the government with the mission to receive government grants and distribute them to individual projects relating to TSB.¹⁰⁷¹ However, unlike the CBF, the CRFC only distributes funds for community and campus radio and its membership is not based on representation from each TSB sub-sector.¹⁰⁷²

5.2.4. Types of Third Sector Broadcasters in Canada

¹⁰⁶⁷ 1976 FM Policy above n 977, 19.

¹⁰⁶⁸ Federal Cultural Policy Review Committee, above n 957, 309; Task Force on Broadcasting Policy, above n 309, 505.

¹⁰⁶⁹ See Murphy, Kenneth, et al., *Cross-National Comparative Analysis of Community Radio Funding Schemes* Broadcasting Authority of Ireland Media Research Funding Scheme (2011), 43-47.

¹⁰⁷⁰ See for example Ibid, 43; Smith, Bruce and Jerry Brigham, 'Native Radio Broadcasting in North America: An Overview of Systems in the United States and Canada' (1992) 36(2) *Journal of Broadcasting and Electronic Media* 183, 187.

¹⁰⁷¹ Information on the CRFC and its mandate available at <www.communityradiofund.org>.

¹⁰⁷² Information on the composition of the CRFC available <at www.communityradiofund.org>.

While non-State, non-commercial broadcasters are collectively referred to as the ‘community element’ of the Canadian broadcasting system, the broadcasting policies of the CRTC recognise different types of TSB services, of which ‘community radio’ is only one. Canada has never had a unified policy for TSB; different policies and regulatory frameworks have guided the development of the various types of TSBs that exist in Canada. The following sub-sections discuss the development process of the different classes of TSBs and the policies that have applied to them.

5.2.4.1. Community Radio

5.2.4.1.1. Development and Definition

Community radio developed more rapidly in Quebec than in the rest of Canada, due to the support it received from the provincial Government.¹⁰⁷³ However, community radio is now common across the whole country.¹⁰⁷⁴ As noted, the first policy to deal directly with community radio was the 1976 FM radio policy. This policy defined ‘community access’ radio stations as those:

owned and controlled by a non-profit organization whose structure provides for membership, management, operation, and programming primarily by members of the community at large.¹⁰⁷⁵

The term ‘community’ in this, and subsequent, definitions refers to the whole population of the geographical area which the station is licensed to serve.¹⁰⁷⁶

In 1985, the CRTC issued a policy titled ‘The Review of Community Radio’ (the 1985 policy). This policy replaced the label ‘community access stations’ with ‘community radio stations’ and added a requirement that the programming of the stations ‘should be

¹⁰⁷³ See Section 5.2.1.

¹⁰⁷⁴ *Diversity of Voices*, above n 945, [169].

¹⁰⁷⁵ 1976 FM Policy, above n 977, 25.

¹⁰⁷⁶ As commented, at this stage the principle of balance was interpreted as prohibiting the issuance of broadcasting licences to special interest groups, See Section 5.2.

based on community access and should reflect the interests and special needs of the listeners it is licensed to serve.¹⁰⁷⁷ According to the CRTC, adding a content requirement was necessary because community participation in the ownership and operation of stations could not sufficiently guarantee that the output would be community oriented.¹⁰⁷⁸ The policy stated that community radio stations were expected to contribute to diversity and to provide programs dealing with issues affecting all members of the communities they were licensed to serve as well as programs of interest to specific groups within that community, such as particular neighborhoods or special interest groups.¹⁰⁷⁹

In the 2000 Community Radio Policy (the 2000 policy) the CRTC modified the definition of ‘community radio’ by adding the requirement that its ‘programming should reflect the diversity of the market that the station is licensed to serve.’¹⁰⁸⁰ This requirement complemented the country’s multiculturalism policy.¹⁰⁸¹ The CRTC considered that community stations could play an important role in disseminating the views and artistic contributions of members of minority cultures who inhabit their areas of service.¹⁰⁸² The same policy also described the role and mandate of community radio in the following terms:

The primary focus of a community radio station is to provide community access to the airwaves and to offer diverse programming that reflects the needs and interests of the community that the station is licensed to serve, including: music by new and local talent; music not generally broadcast by commercial stations; spoken word programming; and local information.¹⁰⁸³

This mandate introduced an element of localism to the expectations for community stations. In addition, it specified that their diversity obligations required community stations to broadcast content not commonly broadcast by commercial stations.

¹⁰⁷⁷ CRTC, *The Review of Community Radio*, Public Notice 1985-194, s 3(i) ‘1985 Review’.

¹⁰⁷⁸ *Ibid.*

¹⁰⁷⁹ *Ibid.*, s 3(ii).

¹⁰⁸⁰ 2000 Community Policy, above n 1061, [21].

¹⁰⁸¹ Multiculturalism Policy discussed in Section 5.1.8.

¹⁰⁸² 2000, Community Policy, above n 1061, [16]; See also section 2.1.3.

¹⁰⁸³ *Ibid.*, [24].

Representatives of the sector resisted the inclusion of this second element, arguing that it would force them to change their programming practices every time the commercial sector changed theirs in order to remain ‘alternative’.¹⁰⁸⁴ In addition, concern was expressed that such a requirement could marginalize community stations, making it difficult for them to attract audiences.¹⁰⁸⁵ However, the CRTC decided to maintain the requirement, clarifying that an obligation to broadcast music not played by commercial radio did not mean a prohibition to play music that was.¹⁰⁸⁶

Community radio stations are currently regulated by the Campus and Community Radio Policy adopted in 2010 (the 2010 policy). In this policy the CRTC maintained that ‘the programming of campus and community radio should distinguish itself from that of the commercial and public sectors in both style and substance’.¹⁰⁸⁷ This policy was adopted despite representatives of the sector having argued that ‘community radio’ should be defined only on the basis of community participation within the station and its operations, and not on the basis of whether its content is ‘alternative’ to that provided by commercial broadcasters.¹⁰⁸⁸ The 2010 policy and the framework applicable to community radio stations in Canada in the present is discussed further in Section 5.3.

5.2.4.1.2. Sub-Categories

For most of their history, community radio stations in Canada were divided into two sub-categories: type A and type B. This system of categorization was introduced in the 1985 policy and remained in force until it was eliminated by the 2010 policy. The type A classification was given to community stations that were the only stations (of any sector) to be licensed to operate in one of the two official languages in their service area.¹⁰⁸⁹ If at

¹⁰⁸⁴ Ibid, [13].

¹⁰⁸⁵ Ibid, [22].

¹⁰⁸⁶ Ibid, [23].

¹⁰⁸⁷ 2010 Policy, above n 1009, [12].

¹⁰⁸⁸ Ibid, [9].

¹⁰⁸⁹ 1985 Review, above n 1077, s 3(v).

least one other station was licensed to operate in the same market in the same language, stations received the type B classification.¹⁰⁹⁰

The main goal of this division was to support the development of community radio in underserved areas through more flexible regulation.¹⁰⁹¹ Many of the regulations applied to community radio stations were aimed at protecting commercial broadcasters from unfair competition and at securing the distinctiveness of community stations' content in relation to commercial stations.¹⁰⁹² These concerns did not directly apply to type A stations because they were not in competition with commercial broadcasters. For this reason, type A stations were always subjected to less restrictive regulation in comparison to type B ones. Since this system was based on the language of broadcast of the stations, it also aided the development of community stations aiming to serve official languages minorities.¹⁰⁹³

A weakness of this category system was that it made a community station's status dependent upon the presence of other stations. Type A stations were always at risk of being subjected to more restrictive regulation if another station was licensed in their market. This generated uncertainty and made it difficult for these stations to engage in long term planning. In addition, it was considered unfair that the presence of a type A station could help to develop or identify a commercially viable market, only for it to be punished with more restrictive regulation if a commercial station was subsequently licensed. The CRTC took into account these concerns and in the 1992 policy permitted type A stations to retain their type A status, even if other stations were licensed in the same market in the same language.¹⁰⁹⁴

The CRTC's rationale for abolishing the category system in the 2010 policy was that the distinction between type A and type B stations had lost its initial relevance, since by 2010

¹⁰⁹⁰ Ibid.

¹⁰⁹¹ Ibid.

¹⁰⁹² See Section 3.3.

¹⁰⁹³ See Section 5.1.7.

¹⁰⁹⁴ 1992 Policies, above n 961, s A(2).

many type A stations were operating in markets where there were already commercial broadcasters due to them having retained their Type A status.¹⁰⁹⁵

5.2.4.1.3. Advertising restrictions

Before 1985, the CRTC normally only allowed community radio stations to engage in ‘restricted commercial activity’. This concept of restricted commercial activity was similar to the Australian notion of ‘sponsorship announcements’.¹⁰⁹⁶ Thus, stations were allowed to acknowledge financial contributors without directly promoting their products or services.¹⁰⁹⁷ In 1983, the CRTC relaxed the concept of restricted commercial activity to allow the identification of a product’s brand names and prices, but continued to prohibit ‘references to convenience, durability or desirability or other comparative or competitive references’.¹⁰⁹⁸

The 1985 policy reviewed the restrictions on commercial activity by community stations. The policy noted that the purpose of those restrictions was to secure the non-profit nature of stations, as well as to protect their programming from commercial influences.¹⁰⁹⁹ Some representatives of the commercial sector expressed concern that their revenue would be negatively affected by increased commercial activity by community stations.¹¹⁰⁰ Representatives of the community sector argued that they needed advertising revenue in order to secure their own financial viability.¹¹⁰¹ In acknowledgment of their financial needs, the CRTC freed community stations from all restrictions on the form and content of commercial announcement and established quantitative limits in their place. stations were subject to a maximum average of four minutes per hour per day, with a maximum of 6 minutes of advertising in a single hour.¹¹⁰² The limit for A stations was more flexible: a maximum of 1500 minutes of advertising in a single week and 250

¹⁰⁹⁵ 2010 Policy, above n 1009, [24]

¹⁰⁹⁶ See Section 4.2.4

¹⁰⁹⁷ See 1975 Decision, above n 1041, [5].

¹⁰⁹⁸ 1985 Review, above n 1077, s 1.

¹⁰⁹⁹ Ibid, ss 1 and 3(v).

¹¹⁰⁰ Ibid, s 2.

¹¹⁰¹ Ibid..

¹¹⁰² Ibid, s 3(vi).

minutes in a single day or, alternatively, 20% of the total station air-time for stations that did not provide a regular full time service.¹¹⁰³

In the 1992 Policies for Community and Campus Radio (the 1992 Policy), the CRTC introduced a requirement that community stations should rely on diverse sources of funding.¹¹⁰⁴ However, it rejected a proposal from the commercial sector to impose a strict limit of 50% of their annual revenue on the income community stations could derive from advertising.¹¹⁰⁵ The CRTC acknowledged that the commercial sector was facing financial difficulties which justified their concern,¹¹⁰⁶ but noted that there had been a decrease in government funding and that community stations required advertising income to subsist.¹¹⁰⁷ In light of these considerations, the policy eliminated all advertising restrictions for type A stations, but maintained the restrictions for B stations, adding an additional limit of a maximum of 504 minutes of advertising per week.¹¹⁰⁸

The 2000 policy eliminated all advertising restrictions for type B stations. The CRTC's reasoning was that direct content regulation would be more effective for securing the distinctiveness of the community stations' output than advertisement restrictions.¹¹⁰⁹ Since the 2000 policy, all community radio stations in Canada have had unrestricted capacity to broadcast advertisements and raise revenue through them.

5.2.4.1.4. Content Regulation

The CRTC has utilized direct content requirements in order to ensure community radio stations fulfil its expectations. For example, in relation to diversity the 1992 policy established a quota which required a minimum of 20% of the musical content of community radio stations to be devoted to genres other than pop, rock or dance (the

¹¹⁰³ Ibid.

¹¹⁰⁴ 1992 Policies, above n 961, s A(3).

¹¹⁰⁵ Such system is used at present in the U.K., See Section 6.5.1.2.

¹¹⁰⁶ 1992 Policies, above n 961, s A(4).

¹¹⁰⁷ Ibid.

¹¹⁰⁸ Ibid.

¹¹⁰⁹ 2000 Community Policy, above n 1061, [50]-[51].

genres that dominated Canadian commercial radio).¹¹¹⁰ English language type B stations were subject to a maximum repeat factor of 10.¹¹¹¹ This meant that they could only repeat the same non-Canadian musical selection up to 10 times in a single broadcast week.¹¹¹² In comparison, the repeat factor allowed to commercial stations was 18.¹¹¹³ Community stations were also restricted in their individual licence conditions in the amount of air-time they could devote to the broadcast of ‘hits’.¹¹¹⁴ All French language stations, independent of sector, were exempted from repeat factor requirements because of the comparatively limited availability of French language Canadian music.¹¹¹⁵ The 2000 policy repealed the repeat factor and hit level requirements for all community stations.¹¹¹⁶ However, it introduced a new requirement that a minimum of 5% of all musical selections played by community stations had to fall within the category of special interest music.¹¹¹⁷

Community stations have also been required to broadcast spoken word content, a type of content neglected by the Canadian commercial sector. In 1986, radio regulations were implemented which required all FM stations to devote a minimum of 15% of their programming to spoken word content.¹¹¹⁸ However, the CRTC normally required community stations to comply with higher minimums: 20% for type A community stations and 35% for type B stations.¹¹¹⁹ These levels were subsequently acknowledged to be too burdensome for some stations to comply with, so the 1992 policy reduced the minimum level for type B stations to 25% and eliminated the requirement for type A stations.¹¹²⁰ In 2010, the CRTC further reduced the spoken word quota to 15%.¹¹²¹

¹¹¹⁰ 1992 Policies, above n 961, s A(5)(b).

¹¹¹¹ *Ibid* s A(5)(d).

¹¹¹² See CRTC, *Proposed Regulations Respecting Radio (A.M.) and Radio (F.M.) Broadcasting*, Public Notice 1986-66, s V.

¹¹¹³ CRTC, *An FM Policy for the Nineties*, Public Notice 1990-111, s III(D)(3).

¹¹¹⁴ 1992 Policies, above n 961, s A(5)(d). (Hits were defined as musical selections that had placed in the top 40 of a national or international recognized chart) See CRTC, *Proposed Regulations Respecting Radio (A.M.) and Radio (F.M.) Broadcasting*, Public Notice 1986-66, sV.

¹¹¹⁵ 1992 Policies, above n 961, s A(5)(d).

¹¹¹⁶ 2000 Community Policy, above n 1061, [32].

¹¹¹⁷ *Ibid*, [29].

¹¹¹⁸ 1992 Policies, above n 961, s A(5)(a).

¹¹¹⁹ *Ibid*.

¹¹²⁰ *Ibid*; The CRTC expressed the expectation that A stations will provide at least 15% spoken word content despite no formal requirement.

Community stations have also been subjected to Canadian content requirements. These requirements have been generally similar to those applicable to commercial stations in the country. In the 1992 policy, the CRTC determined that it would impose on community radio stations the same requirements in relation to Canadian music that were applied to commercial stations, namely, Canadian musical selections had to represent at least 30% of the general popular music selections broadcast by the stations and 10% of the special interest music selections.¹¹²² The 2000 policy increased the requirement in relation to Canadian popular music selections to 35% (the same increase had also been imposed on commercial stations).¹¹²³ However, the CRTC acknowledged that attaining sufficient Canadian music to meet the requirement would be difficult for community stations that broadcast less common genres and announced that it would consider granting requests for a lower quota on a per case basis.¹¹²⁴ The policy also increased the requirement in relation to special interest music selections to 12%.¹¹²⁵ In the 2010 policy the CRTC announced that it was considering increasing the minimums to 40% for popular music and 15% for special interest music¹¹²⁶ but ultimately decided to maintain the levels set in the 2000 policy.¹¹²⁷

In order to ensure they provide a local service, the CRTC have imposed restrictions on the capacity of community stations to network with or acquire programming from other stations. In its 1985 policy, the CRTC decided not to impose type A stations any restrictions in this area.¹¹²⁸ This determination was based in the reality that these stations typically operated in smaller communities and did not usually possess the resources to produce sufficient local programming to fill a full time schedule.¹¹²⁹ In contrast, Type B

¹¹²¹ 2010 Policy, above n 1009, [50]. However, a new condition was added under which only locally produced spoken word content would count towards the quota.

¹¹²² 1992 Policies, above n 961, s A(5)(e).

¹¹²³ 2000 Community Policy, above n 1061, [33].

¹¹²⁴ *Ibid.*

¹¹²⁵ *Ibid.*, [45].

¹¹²⁶ 2010 Policy, above n 1009, [61]-[62].

¹¹²⁷ CRTC, *Implementation of the Campus and Community Radio Policy*, Public Notice 2011-507, [11] ‘2011 Implementation Notice’.

¹¹²⁸ 1985 Review, above n 1077, s 3(xi).

¹¹²⁹ *Ibid.*

stations were only allowed to network for the purposes of a national news service or the dissemination of programming produced by other community stations.¹¹³⁰ In the 1992 policy, the CRTC relaxed the restrictions for type B stations, requiring them only to submit with their licence or renewal application a non-binding appendix demonstrating that any acquired or networked content would complement and not replace their local programming.¹¹³¹ There were no restrictions on the type of content which could be acquired or broadcast through networking. In a further concession, up to 60 minutes of advertising contained in programming that originated from other community or student stations could be exempted from counting toward a community station advertising cap, provided the programs satisfied certain conditions.¹¹³² The CRTC's purpose in implementing this exemption was to create an incentive for cooperation and program exchange between community stations, which it expected would aid the development of the sector as a whole.¹¹³³

It is important to note that the requirements outlined above describe the general CRTC policies. As has been explained, the CRTC can deviate from its general policies in individual licence conditions by modifying, eliminating or adding requirements.¹¹³⁴ Section 5.3.5 provides an overview of the content obligations that currently apply to community radio stations.

5.2.4.1.5. Volunteer Requirements

Community stations in Canada have been expected to engage independent volunteers in their operations. However, the CRTC has always opted against establishing a specific quota for volunteer participation. In the 1985 policy, it limited itself to establishing that community stations should not set quality standards for their programming that could become a barrier to amateur volunteer participation.¹¹³⁵ In the 1992 policy it stated that it

¹¹³⁰ Ibid.

¹¹³¹ 1992 Policies, above n 961, s A(6)(a).

¹¹³² Ibid, s A(6)(b)

¹¹³³ Ibid.

¹¹³⁴ See Section 5.1.6.

¹¹³⁵ 1985 Review, above n 1077, s 3(iii).

expected community stations to be active in informing the public about volunteering opportunities.¹¹³⁶

Before issuing the 2000 policy, the CRTC proposed to include a requirement that the majority of the content of community stations must be produced by volunteers. Representatives of the sector opposed this requirement because they desired to have the flexibility to also rely on paid staff.¹¹³⁷ The CRTC agreed to remove the reference to a volunteer requirement when issuing the policy. In the 2010 policy, the CRTC stated once again that establishing volunteer participation quotas was under consideration.¹¹³⁸ However, in 2011, it announced that a general minimum would not be established because volunteer participation in the community radio sector was generally high.¹¹³⁹

5.2.4.1.6. Access and Balance Requirements

Community stations have always played an important role in Canada in broadening access to the broadcasting activity. The 1986 report of the Task Force on Broadcasting Policy supported the development of community broadcasting because of the role it could play in providing participation opportunities to persons who could not find them in the commercial or State broadcasting sectors.¹¹⁴⁰ The CRTC has never implemented specific access quotas for community radio stations but has consistently reminded licensees in its policies that it expects them to provide access opportunities to members of the communities they serve.¹¹⁴¹ However, the goal of broadening access opportunities has often been at odds with the principle of balance, another key goal of Canadian broadcasting policy.¹¹⁴²

¹¹³⁶ 1992 Policies, above n 961, s A(9).

¹¹³⁷ 2000 Community Policy, above n 1061, [19].

¹¹³⁸ 2010 Policy, above n 1009, [54].

¹¹³⁹ 2011 Implementation Policy, above n 1127, [17].

¹¹⁴⁰ Task Force on Broadcasting Policy, above n 309, 165 and 491.

¹¹⁴¹ See for example 2000 Community Policy, above n 1061, [16]; 1992 Policies, above n 961, s A(9).

¹¹⁴² See Section 5.1.9.

As explained, in the past all broadcast stations were required to provide a balance of points of views for all matters of public interest discussed in their programming.¹¹⁴³ This obligation was difficult to harmonize with a ‘community access’ TSB model. If opinions on a matter of public interest were broadcast in one program, but not directly countered in that program, then the principle of balance, as interpreted by the CRTC, required that balancing views be broadcast in other parts of the station’s programming.¹¹⁴⁴ For community access stations this meant that if no other persons or groups were interested in accessing the station to counter these views, the station had an obligation to produce or procure a balancing program in order to fulfil the policy’ requirement.¹¹⁴⁵ For stations operating with limited resources this was disincentive to providing access opportunities to independent community groups.¹¹⁴⁶

The 1986 report of the Task Force on Broadcasting Policy considered that ‘a small community station with a restricted territory, which states points of view rarely expressed on major stations, ought not to be forced to broadcast opinions that are already widely circulated’.¹¹⁴⁷ However, in 1988 the CRTC issued a policy maintaining that community stations had the same balance obligations as all other stations.¹¹⁴⁸ The CRTC acknowledged that complying with the balance requirement could sometimes be burdensome for community stations and that it was undesirable for their balance obligations to deter them from providing access opportunities.¹¹⁴⁹ Accordingly, the policy recommended some mechanisms that access stations could use to fulfil their obligations. They included: ‘soap box’ programs where members of the public were invited to comment on public affairs; providing access opportunities to members of the public who had complained about lack of balance; and stations actively searching for persons or groups who may be interested in airing opposing views to those broadcast in their other

¹¹⁴³ See Section 5.1.9.

¹¹⁴⁴ See Balance Policy, above n 1022.

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Discussed in Cook, Peter and Myles Ruggles, ‘Balance and Freedom of Speech: Challenge for Canadian Broadcasting’ (1992) 17(1) *Canadian Journal of Communication*, 2 <www.cjc-online.ca/index.php/journal/article/view/647/553>.

¹¹⁴⁷ Task Force on Broadcasting Policy, above n 309, 162.

¹¹⁴⁸ Balance Policy, above n 1022.

¹¹⁴⁹ Ibid.

programmes. Nevertheless, if these mechanisms failed to secure the airing of balancing views, stations were required to produce or procure balancing programming.

The need to comply with balance requirements was a barrier to development of access based community stations.¹¹⁵⁰ However, this issue has lost its relevance, as Canadian policy in general has shifted from requiring each station to be balanced to pursuing the balance of the system as a whole.¹¹⁵¹

5.2.4.2. Campus Radio

5.2.4.2.1. Development and Definition

Campus radio stations have always been a significant part of the Canadian third sector. During the first stages of development of TSB in Canada campus radio stations were the most common type of TSBs outside Quebec and northern indigenous communities. While the lack of government funding made it difficult for other actors to establish TSBs outside those regions, educational institutions, with their comparatively better resources, were in a better position to establish TSB stations.¹¹⁵² For this reason, campus radio stations in Canada have served some of the roles commonly associated with community broadcasters in others part of the world, such as providing access to the airwaves to community groups.

In its 1975 Decision 75-247 (the 1975 decision) the CRTC defined for the first time ‘student’ radio as ‘broadcasting undertakings whose structure provides for membership, direction, management, operation and programming primarily by students as members of a post-secondary academic community’.¹¹⁵³ The 1976 FM policy did not refer to the concept of student radio, but established as a special FM sub-category ‘institutional’ stations, which were defined as ‘a station, other than an educational station which is

¹¹⁵⁰ See Cook, and Ruggles, above n 1146, 2.

¹¹⁵¹ See Section 5.1.9.

¹¹⁵² See Fauteux, above n 1045, 146.

¹¹⁵³ 1975 Decision, above n 1041, 2

owned or controlled by a non-profit organization associated with an institution of post-secondary education'.¹¹⁵⁴

Student' and 'institutional' would eventually become two separate categories within the special FM licence class, with institutional stations being those stations linked with academic institutions which did not meet the standards of student participation required by the definition of 'student radio'.¹¹⁵⁵ The CRTC 1992 Policies for Community and Campus radio (the 1992 policy) replaced the concepts of 'student' and 'institutional' radio with the sole category of 'campus' radio. Within the 'campus' category there were two subcategories: 'campus/community' stations which were to provide programming produced primarily by volunteers (either students or members of the community at large) and 'instructional' stations whose primary objective was the training of future professional broadcasters.¹¹⁵⁶

The 1992 policy also established that campus stations were expected to provide music and spoken word content not generally broadcast by commercial stations and, in general, to provide a service complementary to that provided by commercial and community stations and by other campus stations servicing the same area.¹¹⁵⁷ In the 2010 Campus and Community Radio Policy (the 2010) policy the CRTC eliminated the two subcategories and 'campus' radio became a single class. The CRTC noted that the distinction between community-based and instructional based stations had lost relevance, with very few instructional stations having been licensed.¹¹⁵⁸ The CRTC also noted that the role of training professionals could now be fulfilled through other means, such as closed circuit or internet broadcasting. Accordingly, it had become less important to have a special broadcast licence category devoted to that purpose.¹¹⁵⁹

¹¹⁵⁴ 1976 FM Policy, above n 977, 19.

¹¹⁵⁵ See CRTC, *Educational and Institutional Radio*, Public Notice 1987-255, s 4.

¹¹⁵⁶ 1992 Policies, above n 961, s B(1).

¹¹⁵⁷ *Ibid*, s B(4).

¹¹⁵⁸ 2010 Policy, above n 1009, [26].

¹¹⁵⁹ *Ibid*, [27].

In the 2010 policy the CRTC decided to establish a unified policy for ‘community’ and ‘campus’ radio which, up to that point, had been governed by separate policies. The reasoning underlying these changes was that it was more convenient to maintain a general policy for both types of stations and just distinguish between the two by exception when necessary.¹¹⁶⁰ The policy established that ‘campus’ stations would be distinguished from ‘community’ ones by the participation of student volunteers in programming, the presence of students and administrators of the educational institutions on the stations’ boards of directors and the campus stations’ access to funding through student levies.¹¹⁶¹ The present governance requirements for campus stations are discussed further in Section 5.3.6.1.

5.2.4.2.2. Advertising Restrictions

In the 1975 decision the CRTC stated:

Competitive pressures of the market place have direct or indirect influence on the nature of programming. It is precisely because it wishes to safeguard the special nature of the programming of the student sector that the Commission is reluctant to permit such stations to become involved in conventional commercial activities.¹¹⁶²

In line with this view, campus stations have always been restricted in their capacity to raise funds through advertisements. Like community stations, they were initially prohibited from broadcasting conventional advertisements and were limited to ‘restricted commercial activity’.¹¹⁶³ As explained above, in 1985 the CRTC allowed community stations to broadcast conventional advertisements.¹¹⁶⁴ However, the restrictions continued in force for campus stations. In 1992, a general policy was issued under which

¹¹⁶⁰ Ibid, [11].

¹¹⁶¹ Ibid, [17].

¹¹⁶² 1975 Decision, above n 1041, 4.

¹¹⁶³ See Section 5.2.4.1.3.

¹¹⁶⁴ Ibid.

campus stations were normally to be allowed to broadcast ‘restricted advertisements’,¹¹⁶⁵ for a maximum of four minutes per hour.¹¹⁶⁶

In 1993, the CRTC issued a new policy which permitted campus stations to broadcast up to 504 minutes of advertising per week with a maximum of four minutes of advertising in a single hour.¹¹⁶⁷ Of these 504 minutes, a maximum of 126 could be devoted to conventional advertisements, while the remaining time had to conform with the definition of ‘restricted’ advertisement.¹¹⁶⁸ The 2000 Campus Radio Policy (the 2000 policy) eliminated all restrictions on the content of advertisements, but retained the global quantitative limits.¹¹⁶⁹ The 2010 policy maintained the maximum of 504 minutes in a week, but eliminated the requirement regarding a maximum amount of minutes in a single hour.¹¹⁷⁰ The CRTC also established that simple sponsor mentions would not count toward the stations’ limits.¹¹⁷¹ Since this policy remains in force, campus stations, unlike community ones, continue to be restricted in relation to advertising. This is discussed further in Section 5.3.4.1.

Throughout the years, the CRTC has justified the more restrictive treatment given to campus stations in the area of advertising by reference to the fact that campus stations have access to funding from the educational institutions with which they are affiliated, as well as from student unions, a source of funding which is not available to community stations.¹¹⁷² As a result of this financial advantage, the CRTC regards campus stations as more capable than community stations of remaining viable, even if subjected to advertising restrictions.

¹¹⁶⁵ ‘Restricted advertisements’ were subjected to the same content limitations that were imposed to community stations under the 1983 revised definition of restricted commercial activity. See note 1165 and text accompanying.

¹¹⁶⁶ 1992 Policies, above n 961, s B(5); the CRTC also announced that some campus stations such as those being the only ones operating in their market in one of the official language could be granted additional flexibility through their individual licence conditions.

¹¹⁶⁷ CRTC, *Policies for Local Programming on Commercial Radio Stations and Advertising on Campus Station*, Public Notice 1993-38.

¹¹⁶⁸ Ibid.

¹¹⁶⁹ 2000 Campus Policy, above n 1061, [58]; In contrast, the CRTC eliminated all advertising restrictions for community stations in the same year. See Section 5.2.4.1.3.

¹¹⁷⁰ 2010 Policy, above n 1009, [125].

¹¹⁷¹ Ibid.

¹¹⁷² 1975 Decision, above n 1041, 5; 1992 Policies, above n 961, s B(5).

5.2.4.2.3. Content Regulation

In some areas, such as Canadian music and balance of programming, requirements for campus station and community stations have always been the same.¹¹⁷³ . In relation to musical diversity, the 1992 policy established for campus stations the same obligation as community stations to devote a minimum of 20% of their musical programming to genres other than pop, rock and dance¹¹⁷⁴ and to adhere to a maximum repeat factor of 10.¹¹⁷⁵ However, campus stations were subjected to an additional obligation to devote a minimum of 5% of that programming to ‘special interest music’¹¹⁷⁶ and a maximum of 15% of their musical selections to ‘hits’.¹¹⁷⁷ French language stations were exempt from hits and repeat factor requirements and ‘instructional’ stations had more flexible requirements (30% maximum ‘hits’, 18 maximum repeat factor).¹¹⁷⁸ The reason why the requirements for instructional stations were less strict was that their role of training future professional broadcasters required them to provide programming more similar to that of commercial stations.¹¹⁷⁹

The 2000 policy maintained the 5% requirement for special interest music but eliminated the 20% requirement in relation to music from genres other than pop, rock or dance.¹¹⁸⁰ The rationale for this was that campus stations provided airtime to emerging subgenres that fell within the categories of pop, rock or dance which contributed to diversity.¹¹⁸¹ The policy also reduced the maximum ‘hit’ level allowed to non-instructional campus stations to 10%.¹¹⁸² While the maximum hit level requirement was eliminated in 2000 for community stations, it remains in force for campus stations. Now that the ‘instructional’

¹¹⁷³ See for example Balance Policy, above n 1022; 2010 Policy, above n 1009, [59].

¹¹⁷⁴ 1992 Policies, above n 961, s B(9).

¹¹⁷⁵ Ibid, s B(10)(b); See Section 5.2.4.1.4 for the definition of ‘repeat factor’.

¹¹⁷⁶ Ibid, s B(9).

¹¹⁷⁷ Ibid, s B(10)(a); See Section 5.2.4.1.4 for the definition of ‘hits’.

¹¹⁷⁸ Ibid, s B(10)(a)-(b).

¹¹⁷⁹ Ibid, s B(10)(a).

¹¹⁸⁰ 2000 Campus Policy, above n 1061, [26].

¹¹⁸¹ Ibid, [27].

¹¹⁸² Ibid, [29].

sub-category has been eliminated, 10% is the limit applicable to all English-language campus stations.

In relation to spoken word content, the 1992 policy imposed on campus stations the same minimum required of type B community stations, namely, 25% of their programming.¹¹⁸³ However, campus/community stations were required to devote at least 15% of their programming ‘to focused spoken word programs, specialized block programs that showcase particular types of music, or programs targeted to identifiable groups within the community’,¹¹⁸⁴ while instructional stations were required to devote at least two hours per week to formal academic programming.¹¹⁸⁵ The 2000 policy eliminated the 15% requirement for focused spoken word programs¹¹⁸⁶ and the 2010 policy eliminated the two hours formal academic programming requirements and equated campus stations’ spoken word requirement to that of community stations.¹¹⁸⁷ This means that community and campus stations are currently subject to the same requirements in relation to spoken word content.

While specific requirements have never been imposed on community stations in relation to station produced content, the CRTC established in its 2000 policy a requirement for campus stations to produce a minimum of two-thirds of their weekly programming themselves.¹¹⁸⁸ The CRTC noted that campus stations normally produced their own programming, but considered that setting a formal requirement was appropriate because campus stations were allowed to solicit advertising.¹¹⁸⁹ It is not clear why the same requirement was not applied to community stations, which were also allowed to solicit advertisements. The requirement for station produced content was eliminated in 2010 and there are no longer any such formal requirements.¹¹⁹⁰

¹¹⁸³ 1992 Policies, above n 961, s B(8).

¹¹⁸⁴ *Ibid*, s B(12).

¹¹⁸⁵ *Ibid*.

¹¹⁸⁶ 2000 Campus Policy, above n 1061, [28].

¹¹⁸⁷ 2010 Policy, above n 1009, [58]; See Section 5.2.1.4.

¹¹⁸⁸ 2000 Campus Policy, above n 1061, [61].

¹¹⁸⁹ CRTC, *Call for Comments on a Proposed New Policy for Campus Radio*, Public Notice 1999-30 [106].

¹¹⁹⁰ See, CRTC, *Standard Conditions of Licence for Campus and Community Radio Stations*, Public Notice 2012-304.

5.2.4.2.4. Governance Requirements

Unlike community stations, campus stations in Canada have been subjected to specific requirements regarding their internal governance structure. In the 1992 policy, the CRTC established that the majority of the board of directors of campus licensees had to be comprised of members of the student body or the faculty of the educational institution to which the station was linked.¹¹⁹¹ The CRTC, however, indicated that it might authorise campus stations with boards of directors that did not meet this requirement in areas where no community stations were in operation.¹¹⁹²

The 2000 policy established that the board of directors had to provide balanced representation of the institutions' student body, faculty and administration, the stations' volunteers and the community at large.¹¹⁹³ This criterion was retained by the 2010 policy and remains in force.¹¹⁹⁴ These governance requirements are further discussed in Section 5.3.6.1.

5.2.4.3. Native Broadcasting Undertakings

'Native broadcasting undertakings' is the denomination used in Canada to refer to indigenous broadcasting services. In the late 1950s broadcasting services were first introduced in Northern Canada.¹¹⁹⁵ Although the large majority of the region's population was indigenous, these first services were primarily oriented toward addressing the needs of the non-indigenous government workers.¹¹⁹⁶ As in Australia, indigenous communities expressed concern that the introduction of mainstream broadcasting services in the region

¹¹⁹¹ 1992 Policies, above n 961, s B(2).

¹¹⁹² Ibid.

¹¹⁹³ 2000 Campus Policy, above n 1061, [56].

¹¹⁹⁴ 2010 Policy, above n 1009, [17].

¹¹⁹⁵ CRTC, *Northern Native Broadcasting*, Public Notice 1985-274, s I '1985 Northern Policy'.

¹¹⁹⁶ Ibid; See also Rupert, Robert, 'Native Broadcasting in Canada' (1983) 25(1) *Anthropologica* 53, 59.

could have a negative impact on their cultures and languages.¹¹⁹⁷ Indigenous TSB began appearing in the 1960s as a response to this threat.¹¹⁹⁸

In 1974 the CBC started an expansion plan under which it provided remote communities with a population of more than 500 persons with equipment for the terrestrial retransmission of its satellite service.¹¹⁹⁹ Similar to the Australian BRACS program, communities could replace the CBC feed with locally originated programming.¹²⁰⁰ However, the CBC did not provide training, support or funding for local production.¹²⁰¹ The expansion of the CBC service accentuated the need for indigenous programming. In 1980 the report of the Committee on Extension of Service to Northern and Remote Communities acknowledged this need stating:

Canada must fulfill its objectives to provide opportunity for its native peoples to preserve the use of their languages and foster the maintenance and development of their own particular cultures through broadcasting and other communications.¹²⁰²

In 1982 the federal Department of Communications issued its Northern Broadcasting Policy. Among other elements, this policy established that indigenous peoples in the Canadian north should have access to the broadcasting distribution systems available in the region and that content originated by indigenous peoples should be produced for distribution in areas with a significant indigenous population.¹²⁰³

In 1983, the Northern Native Broadcast Access Program (NNBAP) was created. This program was a fund to support the production of indigenous content by 'native

¹¹⁹⁷ See Minore and Hill, above n 216, 105

¹¹⁹⁸ See Rupert, above n 1196, 58; Baltruschat, Doris, 'Television and Canada's Aboriginal Communities Seeking Opportunities through Traditional Storytelling and Digital Technologies' (2004) 29(1) *Canadian Journal of Communication* <<http://www.cjc-online.ca/index.php/journal/article/view/1403/1495>>.

¹¹⁹⁹ See CRTC, *Call for Comments Respecting Northern Native Broadcasting*, Public Notice 1985-67.

¹²⁰⁰ Rupert, above n 1196, 56.

¹²⁰¹ CRTC, *Call for Comments Respecting Northern Native Broadcasting*, Public Notice 1985-67.

¹²⁰² Cited in 1985 Northern Policy, above n 1195, s II.

¹²⁰³ *Ibid*, s III.

communication societies', collectives of indigenous independent producers.¹²⁰⁴ This fund was meant for the production of content and not for the operation of distribution platforms. The native communication societies were expected to arrange carriage through the platforms of the CBC or private broadcasters servicing the area.¹²⁰⁵ Although the Northern Broadcasting Policy granted indigenous peoples access to the available distribution systems, many of the NNBAP funded societies faced difficulties in obtaining carriage for their programming. The CRTC decided not to specify access quotas for the CBC or private broadcasters.¹²⁰⁶ For this reason, private broadcasters were often uncooperative and the CBC was conflicted as its nationally oriented mandate clashed with the local orientation of the society's programming.¹²⁰⁷ When carriage was obtained, the programs were sometimes relegated to the less desirable time-slots in which they could not be conveniently accessed by their intended audiences.¹²⁰⁸ In acknowledgement of these circumstances the CRTC noted that, in many cases, 'community-owned stations will have to be called upon to provide access.'¹²⁰⁹

Indigenous TSB activity expanded in Canada as a result of indigenous producers being supported by the NNBAP and requiring outlets for their content. In 1990 the CRTC issued the 'native broadcasting policy'. The CRTC noted that the expansion of indigenous TSB and the fact that indigenous TSBs now co-existed with commercial broadcasters in some markets required the establishment of a specific framework for the sub-sector.¹²¹⁰ The policy defined 'native undertaking' in the following terms:

This undertaking is characterized by its ownership, programming and target audience. It is owned and controlled by a non-profit organization whose structure provides for board membership by the native population of the region served. Its programming can be in any native Canadian language or in either or both of the

¹²⁰⁴ See *Ibid*, s III; Minore and Hill, above n 216, 98.

¹²⁰⁵ 1985 Northern Policy, *Ibid*, s III.

¹²⁰⁶ *Ibid*, s V(A)-(B).

¹²⁰⁷ Minore and Hill, above n 216, 106.

¹²⁰⁸ 1985 Northern Policy, above n 1195. s V(A)

¹²⁰⁹ *Ibid*, s V(B)

¹²¹⁰ CRTC, *Review of Native Broadcasting – A Proposed Policy*, Public Notice 1990-12, s 1 '1990 Native Review'.

two official languages, but should be specifically oriented to the native population and reflect the interests and needs specific to the native audience it is licensed to serve. It has a distinct role in fostering the development of aboriginal cultures and, where possible, the preservation of ancestral languages.¹²¹¹

The CRTC encouraged the development of indigenous commercial broadcasting but designed the policy as applicable only to third sector services in acknowledgement of the reality that the large majority of indigenous broadcasters were not-for-profit in nature.¹²¹² Although up to this point the Canadian government had been concerned only with indigenous broadcasting in the north, the CRTC applied the policy to the whole country in the hope that this would encourage the development of indigenous TSB in the south.¹²¹³

The definition acknowledged the important role of indigenous broadcasters in aiding the preservation of Canadian indigenous languages and cultures. Under the policy, indigenous broadcasters were expected to serve this role to the best of their abilities and their performance in this area was one of the criteria under which they would be assessed during the licensing and licence renewal process.¹²¹⁴ However, the CRTC decided against imposing specific requirements or quotas in relation to the use of indigenous languages. An indigenous language requirement was not viable as some indigenous Canadian languages had become extinct and some licence areas were shared by multiple language groups which required broadcasters to resort to a common language.¹²¹⁵ Commercial broadcasters advocated that native radio stations be required to play exclusively indigenous music, but the CRTC policy simply noted that indigenous radio stations were expected to give air play to indigenous musicians.¹²¹⁶ Establishing a specific indigenous music quota was not deemed viable due to practical barriers such as

¹²¹¹ CRTC, *Native Broadcasting Policy*, Public Notice 1990-89, s 2 'Native Policy'.

¹²¹² *Ibid.*

¹²¹³ 1990 Native Review, above n 1210, s 1.

¹²¹⁴ Native Policy, above n 1211, ss 2(2)-(3) and 4.

¹²¹⁵ 1990 Native Review, above n 1210, s 4(ii)

¹²¹⁶ Native Policy, above n 1211, s 2(3).

the scarcity of Canadian indigenous recordings and the difficulty of defining ‘native music’.¹²¹⁷

Similarly to the community radio policy in force at the time, the native policy separated native radio stations into two categories - type A and type B - based on whether a commercial station was also in operation in the same licence area.¹²¹⁸ Type A native stations were not subjected to any restrictions on advertisements, in contrast to type A community stations, which at the time were still restricted in this area. The CRTC noted that the limited advertising potential of type A stations did not warrant regulation.¹²¹⁹ Type B native stations were subjected to the same restrictions applicable to Type B community stations, an average of four minutes of advertising per hour with a maximum of six minutes in a single hour.¹²²⁰ However, native stations were granted a concession, whereby advertisements could be accompanied by a translation in one or more native languages without the translations being counted toward the advertising cap.¹²²¹

In 1998, the CRTC issued a decision in which it exempted the native stations formerly classified as ‘type A’ from the requirement of a broadcast licence as well as from some general regulations generally applicable to broadcasters in Canada, such as the requirement to keep ‘logger tapes’ and comply with minimum Canadian content requirements.¹²²² These concessions were made in acknowledgement of these stations’ limited resources and their important cultural role.¹²²³

In 2001, the CRTC revoked the advertising restrictions for all types of native radio stations a few months after it had abrogated the restrictions imposed on community

¹²¹⁷ Ibid.

¹²¹⁸ Ibid, s 3.

¹²¹⁹ Ibid, s 2(3).

¹²²⁰ Ibid, s 5; As noted this is the same reason while eliminating advertising restrictions for RIBS has been advocated for in Australia See Section 4.2.7.2.

¹²²¹ Ibid, s 5.

¹²²² CRTC, *Exemption Order Respecting Certain Native Radio Undertakings*, Public Notice 1998-62 ‘1998 Exemption Order’; “logger tapes” are recordings of the station programming stations are required to keep for a certain time in case legal issues such audience complains arise. Keeping these tapes was a burden for the exempted stations given their low resources.

¹²²³ Ibid, [13].

stations.¹²²⁴ In the same notice, the CRTC also determined that stations which were unable to fill a full time service without resorting to rebroadcasting programming from other stations would be either encouraged or required in their individual licence conditions to acquire programming only from other native stations in order to prevent competition with commercial broadcasters.¹²²⁵ This policy remains in place today.

Unlike the campus and community radio policies, the native broadcasting policy applies to both radio and television. However, the policy did not specify any special rules for native television stations. For native television networks the policy determined that the same rules would apply as for commercial networks, while individual native television stations would be treated the same as non-indigenous ‘remote’ stations.¹²²⁶ In practice there is in Canada one major indigenous television network whose programming is distributed by a combination of terrestrial, satellite and cable technologies. This network was originally licensed by the CRTC as Television Northern Canada (TVNC) in 1991 and became the Aboriginal Peoples Television Network (APTN) in 1999 when it was authorized to expand its service to the whole country.¹²²⁷ TVNC and APTN have served in Canada a role similar to that served by ICTV in Australia, both providing an outlet for the content of independent indigenous producers.

5.2.4.4. Ethnic Broadcasting

Ethnic broadcasting in Canada began in the 1960s as a commercial initiative driven by the demand in the market for programming targeted at immigrants.¹²²⁸ As explained in Section 5.1.8, after Canadian policy shifted toward multiculturalism in the 1970s the right and the value of immigrants and Canadians of foreign ethnicity to preserve their cultures and languages was acknowledged. The use of non-Canadian languages (languages other than French, English or the languages of Canadian indigenous peoples) in broadcasting

¹²²⁴ CRTC, *Changes to Conditions of Licence for Certain Native Radio undertakings*, Public Notice 2001-70 [11]; As explained advertisement restrictions had been eliminated for general community stations months earlier See Section 5.2.4.1.3.

¹²²⁵ *Ibid*, [20].

¹²²⁶ Native Policy, above n 1211, ss 3 and 5.

¹²²⁷ CRTC, Decision 1999-42.

¹²²⁸ Task Force on Broadcasting Policy, above n 309, 533.

was authorized up to a maximum of 40% of a station's programming.¹²²⁹ The 1976 FM policy was the first to introduce the concept of 'ethnic' stations, which could be licenced to broadcast content in non-Canadian languages in excess of the generally applicable limit.¹²³⁰ In this policy the CRTC determined that it would deal with applications for stations intending to broadcast in non-Canadian languages on a per case basis.¹²³¹

In 1979 the Department of Communications published its 'Other Voices in Broadcasting' report. This report noted that, as FM radio had become more popular, ethnic minority groups were finding it difficult to attain access to air-time on commercial stations and that the CBC was not involved in the provision of ethnic broadcasting.¹²³² This highlighted the need for dedicated ethnic stations. The report considered that stations broadcasting in non-Canadian languages were special services independently of the nature of their content:

While the programming is of general interest to those who understand the language, it cannot really be described as mass programming because the majority of the people within reach of the station's signal cannot understand the language used.¹²³³

The first CRTC policy dealing specifically with ethnic broadcasting was issued in 1985. The policy noted that, because of frequency scarcity, licences would be issued only for multilingual stations and not for stations aiming to provide services in a single non-Canadian language.¹²³⁴ This was a formalization of what had been CRTC practice up to that point in time. The core of the policy was a complex classification system which divided 'ethnic programs' into five types:

¹²²⁹ Ibid.

¹²³⁰ 1976 FM Policy, above n 977, 25.

¹²³¹ Ibid, 11.

¹²³² McNulty, above n 1045, 121.

¹²³³ Ibid, 120.

¹²³⁴ CRTC, *A Broadcasting Policy Reflecting Canada's Linguistic and Cultural Diversity*, Public Notice 1985-39.

TYPE A: A program in a language or languages other than French, English or native Canadian.

TYPE B: A program in French or in English that is directed specifically to racially or culturally distinct groups whose first or common bond language (in the country of their origin) is French or English (such as Africans from Algeria, Mauritania and Morocco; Caribbean Blacks; groups from India).

TYPE C: A program in French or in English that is directed specifically to any culturally or racially distinct group whose heritage language is already included in TYPE A (such as those groups who have not retained the use of a third-language).

TYPE D: A program using a bilingual mix (French or English plus a third-language from TYPE A) that is directed specifically to any culturally or racially distinct group (such as French and Arabic, English and Italian, English and Punjabi).

TYPE E: A program in French or in English that is directed to any ethnic group or to a mainstream audience and that depicts Canada's cultural diversity through services that are multicultural, educational, informational, cross-cultural or intercultural in nature.¹²³⁵

For the classification system, only the core spoken word content was relevant; musical content and tangential content such as advertising or subtitles in the case of television was not taken into account.¹²³⁶

Ethnic stations were defined as those required to devote a minimum of 60% of their programming to ethnic programs Types A to D. The CRTC determined that specific quotas regarding ethnic programming from Types A and B would be determined in each station's individual licence conditions.¹²³⁷ Unlike the community, campus, or native policies, the ethnic policy is not third sector specific as stations are not required to be not-for-profit in order to be classified as 'ethnic'. Moreover, the ethnic policy applies to both radio and television.

¹²³⁵ Ibid, s I.

¹²³⁶ Ibid..

¹²³⁷ Ibid, s II.

As a measure to protect the viability of ethnic stations, the policy restricted the broadcast of ethnic programming from Types A to D by non-ethnic radio stations to a maximum of 15% of their programming and by non-ethnic television stations to 10% or 15% if no ethnic television stations were licenced in the same area.¹²³⁸ The CRTC could increase these limits up to a maximum of 40% on a per case basis at request of the stations.¹²³⁹

The main concern of ethnic stations was that they would be unable to comply with both their special ethnic content obligations and the general Canadian content obligations.¹²⁴⁰ The CRTC determined that general obligations would continue to apply to ethnic stations until further study. In 1986, following the findings of a Consultative Committee on Ethnic Broadcasting, the CRTC determined that all stations, whether ethnic or non-ethnic, would only be required to broadcast a minimum of 7% Canadian content in their ethnic programming of Types A to D. This was a significant reduction from the general policy, which at the time required 30% of musical programming in radio stations to be Canadian.¹²⁴¹

The 1985 policy was replaced by a new ethnic broadcasting policy in 1999. The policy was modified in acknowledgement of the need to streamline the complex regulatory framework and to provide more flexibility to broadcasters.¹²⁴² The new policy eliminated the different categories of ethnic programs and simplified the definition of ethnic program to establish that:

¹²³⁸ Ibid, s III; It seems odd that, given the purpose of the restrictions, these applied even in cases where no ethnic stations were operating in the same market. The CRTC seems to believe ethnic programming activities by conventional broadcasters could discourage the establishment of dedicated ethnic stations (See Ethnic Broadcasting Policy, above n 211, [56].

¹²³⁹ Ibid..

¹²⁴⁰ Ibid, s IV.

¹²⁴¹ See CRTC, *Consultative Committee on Ethnic Broadcasting*, Public Notice 1985-241; CRTC *Proposed Regulations Respecting Radio (A.M.) and Radio (F.M.) Broadcasting*, Public Notice 1986-66, s IV(i)

¹²⁴² Ethnic Broadcasting Policy, above n 211.

An ethnic program is one, in any language, that is specifically directed to any culturally or racially distinct group other than one that is Aboriginal Canadian or from France or the British Isles.¹²⁴³

Under the new policy, ethnic radio stations are required to devote a minimum 60% of their weekly programming to ethnic programs and minimum of 50% of that programming to content in non-Canadian languages.¹²⁴⁴ In the case of television the percentages are the same but are calculated monthly instead of weekly.¹²⁴⁵ The CRTC considered that the 40% non-ethnic programming allowed to ethnic stations would provide them with an opportunity to use mainstream programming to cross subsidize their ethnic programming.¹²⁴⁶

The 1999 policy also eliminated all restrictions on the broadcast of ethnic programming in national languages by non-ethnic stations. However, non-ethnic radio and television stations remained restricted to a maximum of 15% of their programming that they can devote to content in non-Canadian languages without special authorization.¹²⁴⁷ An exemption was granted to campus and type A community radio stations in markets without ethnic stations. In acknowledgment of their capacity to provide services to underserved communities, these stations could broadcast up to 40% content in non-Canadian languages without prior authorization¹²⁴⁸ In 2010 when the community radio classifications were eliminated, the CRTC extended this concession to all community and campus radio stations in markets without ethnic stations.¹²⁴⁹

The 1999 policy also determined that, even though in some areas one or two large ethnic communities would be sufficient to support an ethnic station, it would normally require stations to serve multiple groups in order to ensure services for smaller communities.¹²⁵⁰

¹²⁴³ Ibid, [9].

¹²⁴⁴ Ibid, [16] and [26].

¹²⁴⁵ Ibid.

¹²⁴⁶ Ibid, [17].

¹²⁴⁷ Ibid, [53].

¹²⁴⁸ Ibid, [55]-[56].

¹²⁴⁹ 2010 Policy, above n 1009. [82].

¹²⁵⁰ Ethnic Broadcasting Policy, above n 211, [20]-[21].

The specific groups to be served by each station are determined in their individual licence conditions.¹²⁵¹

Despite concerns expressed by ethnic television stations, the CRTC's 1999 policy maintained the requirement for them to comply with the regular Canadian content quotas (60% of their programming).¹²⁵² In the case of radio, the limit is reduced to only 7% during ethnic programming periods.¹²⁵³ The 1999 policy essentially remains in place.

5.2.4.5. Religious Broadcasting

Broadcasters in Canada have never been prohibited from including religious content in their programming schedules. However, the licensing of broadcasting services focusing specifically on religious content was initially not authorized,¹²⁵⁴ as religious broadcasters were deemed by the CRTC to be unable by nature to comply with the balance requirement of Canadian broadcasting policy.¹²⁵⁵

In 1983 the CRTC issued for a first time a notice outlining its policy regarding religious broadcasting. In this notice the CRTC acknowledged that the presence of religious programming in the Canadian broadcasting system was a requirement of diversity, but maintained its policy not to issue licences to broadcasters whose intention was to focus specifically on religious content.¹²⁵⁶ The CRTC justified this policy on the following grounds: that religious broadcasters were 'strongly predisposed toward one particular point of view' and could not provide balanced programming;¹²⁵⁷ that there were insufficient frequencies to accommodate all religious groups which made it undesirable to grant broadcast licences to just one or a few groups;¹²⁵⁸ and that a policy requiring

¹²⁵¹ Ibid, [18].

¹²⁵² Ibid, [29].

¹²⁵³ Ibid, [33].

¹²⁵⁴ See CRTC, *Review of the Policy on Religious Broadcasting*, Public Notice 1992-8.

¹²⁵⁵ See Section 5.1.9.

¹²⁵⁶ 1983 Religious Policy, above n 1022, 2.

¹²⁵⁷ Ibid.

¹²⁵⁸ Ibid, 3.

each religious broadcaster to address the needs of all religious groups in their licence area would be too difficult to monitor and enforce.¹²⁵⁹

Although it declined to license over-the-air religious broadcasters, the CRTC decided to call for applications for a national reach satellite religious broadcasting service. The satellite service would be required to have a management structure representative of the multiple religious groups existent in Canada and to distribute air-time equitably among such groups.¹²⁶⁰ The CRTC also established that any funds solicited through the service could only be reinvested in the service itself.¹²⁶¹ This is notable because such requirement has not been imposed in Canada on terrestrial TSBs.¹²⁶²

In 1993 the CRTC reassessed its position in relation to religious broadcasting and issued a new policy. Representatives of religious groups advocated for the licensing of over-the-air religious broadcasters, citing that it had become very difficult for them to attain access or purchase air-time on general stations.¹²⁶³ The CRTC announced that it would issue licences for over-the-air religious broadcasting services. The policy established that television stations licenced for religious purposes were expected to provide exclusively religious programming. In the case of radio the policy was silent but it did note that both radio and television stations could be limited in their capacity to broadcast mainstream programming to protect the viability of other broadcasters in the licence area.¹²⁶⁴

Under the new policy, licensees intending to provide religious services were not required to represent multiple religious groups but they could be required to provide multi-faith programming, if necessary, to address the needs of the community in the licence area.¹²⁶⁵ The policy required religious broadcasters to adhere to the same balance standards as all broadcasters, which meant that they had to expose their audiences to different points of

¹²⁵⁹ Ibid.

¹²⁶⁰ Ibid, 6.

¹²⁶¹ Ibid, 9.

¹²⁶² Such requirement is imposed to terrestrial TSBs in other jurisdictions. Discussed in Section 6.3.1.

¹²⁶³ CRTC, *Religious Broadcasting Policy*, Public Notice 1993-78, s II(3) '1993 Religious Policy'.

¹²⁶⁴ Ibid, s III(B)(1) and 2(c).

¹²⁶⁵ Ibid, s III(B)(2)(b).

view on matters of public concern, including religion itself.¹²⁶⁶ Although representatives of the religious sector advocated for religious broadcasters to be free to import content from other countries, the CRTC declined to exempt them from the general Canadian content requirements.¹²⁶⁷

The policy also included ethical guidelines for religious programming which applied independently of whether this programming was broadcast by specialized religious stations or by general stations. These guidelines prohibit practices such as predicting divine rewards or punishments when making public requests for funds, targeting specific groups for proselytism, or calling into question the human rights or dignity of any individual or group.¹²⁶⁸ However, unlike the first satellite religious service, religious broadcasters licenced under the 1993 policy are not required to reinvest any funds solicited through the service in the service itself. The policy does not require the religious broadcasters to be not-for-profit, but entities that request funds from audiences through the airwaves are required to be registered as charities.¹²⁶⁹

The 1993 policy remains in force. However, as Canadian policy has shifted from requiring each individual station to provide balanced programming, the CRTC has become more flexible in its interpretation of the balance requirements imposed on religious broadcasters.¹²⁷⁰ The CRTC has also become more flexible in relation to authorizing religious stations to include mainstream content within their programming.¹²⁷¹

Despite the existence of a religious broadcasting policy, ‘religious broadcasting’ is not considered a licence class in Canada, as are the community, campus, native or ethnic

¹²⁶⁶ Ibid, s III(B)(2)(a).

¹²⁶⁷ Ibid, s III(B)(2)(c).

¹²⁶⁸ I bid, s IV.

¹²⁶⁹ Ibid, s III(A)(1); Since advertising is not restricted, the ability to directly request funds from audiences is not always essential for the stations’ viability. For this reason, it is viable in Canada for commercial entities or non-profits without charity status to deliver religious broadcasting services.

¹²⁷⁰ See Section 5.1.9; See also Cook and Ruggles, above n 1146.

¹²⁷¹ Ibid.

categories.¹²⁷² However, broadcasters aiming to provide a religious service need to identify this in their licence application and there is a specific licence application form for religious services.¹²⁷³ It is not clear why ‘religious’ was not granted status as a licence class. In their submissions before the 1993 policy, some groups argued against the establishment of a specific licence category for religious broadcasters. These groups considered that all broadcasters are the same in that they represent their own world views so there is no need to treat religious broadcasters differently.¹²⁷⁴ This may have influenced the decision of the CRTC.

5.2.4.6. Community Television

In Canada there have been notable third sector television services such as the religious and indigenous networks. However, local community services in Canada have been primarily delivered through the cable community access channels, discussed in Section 5.2.5, instead of over the air-services. As the Canadian licensing system is flexible, issuing terrestrial television licences to third sector actors has always been viable but not common in practice.¹²⁷⁵

In 1986, the CRTC announced for the first time that it was considering introducing a specific policy to facilitate and encourage the establishment of over-the-air community television services.¹²⁷⁶ However, the policy that was issued in 1987 only applied to low power television services in remote areas or areas underserved by cable or terrestrial television services.¹²⁷⁷ The main purpose of the policy was to secure local television services for communities in these areas. Stations licenced under this policy were expected to be locally owned and provide primarily locally oriented programming, but no specific quotas were established.¹²⁷⁸ The policy did not prohibit the broadcast of advertisements but required stations to comply with the general regulations applicable to

¹²⁷² 1993 Religious Policy, above n 1263, s III(B)(1).

¹²⁷³ CRTC Form 134 <www.crtc.gc.ca/eng/forms/efiles/f134.htm>.

¹²⁷⁴ 1993 Religious Policy, above n 1263, s II(2).

¹²⁷⁵ See Section 5.3.2.1.

¹²⁷⁶ CRTC, *Proposed Regulations Respecting Television Broadcasting*, Public Notice 1986-176, s IV.

¹²⁷⁷ CRTC, *Regulations Respecting Television Broadcasting*, Public Notice 1987-8, s IV.

¹²⁷⁸ *Ibid*, s IV(iii)-(iv).

all television services. The CRTC expressed its willingness to grant special concessions in the individual licence conditions of the stations when warranted by the special context in which they operate.¹²⁷⁹

In 2001, the CRTC announced that it was considering establishing a policy for over-the-air community television in urban areas and other areas not covered by the 1986 policy. The CRTC considered such services would be valuable for providing locally oriented programming in urban areas.¹²⁸⁰ However, it anticipated that in metropolitan areas spectrum congestion would be a barrier, thus the services may need to use alternative delivery platforms.¹²⁸¹ In 2002 the CRTC issued a general policy for low-powered community-based television services. This policy is not third sector specific; both for-profit and not-for-profit applicants are eligible to apply for these licences.¹²⁸² However, preference is given to locally based applicants.¹²⁸³ Community television stations are required to devote 60% of their programming to local content and to provide community members with access and training opportunities for the production of programming.¹²⁸⁴ Stations are allowed to broadcast 12 minutes of advertising per hour but only local advertisements are allowed.¹²⁸⁵ The CRTC explained the reasoning behind this policy in the following terms:

such advertising on community-based television programming undertakings, while providing an affordable venue for small, community advertisers, will have minimal impact on the revenues or profitability of conventional local radio or television licensees.¹²⁸⁶

Although the new policy applies to both remote and non-remote community television licensees, the CRTC stated that it would be willing to grant remote stations concessions

¹²⁷⁹ Ibid, s IV(v).

¹²⁸⁰ CRTC, *Proposed Policy Framework for Community-Based Media*, Public Notice 2001-129 [104].

¹²⁸¹ Ibid, [106].

¹²⁸² Community Media Framework, above n 1062, [112]

¹²⁸³ Ibid, [111]

¹²⁸⁴ Ibid, [113]

¹²⁸⁵ Ibid, [117]

¹²⁸⁶ Ibid, [119]

in their individual licence conditions if some of the general rules would be too burdensome for them to comply with.¹²⁸⁷ In 2010 the CRTC adopted a new community television policy but the framework for over-the-air community-based television remains essentially unchanged.¹²⁸⁸

Despite the introduction of the policy for over-the-air community television, cable community channels remain the main source of not-for-profit television in Canada. The CRTC noted in 2008:

While campus and community radio, in both official languages, is reasonably widespread, community-based television operations do not yet occupy a significant place in the system. Cable community channels remain an important component of the system but, increasingly, they have a regional rather than a local focus.¹²⁸⁹

5.2.5 The Cable Community Channel Policy

Although the focus of this thesis is on terrestrial broadcasting, when analyzing TSB in Canada it is necessary to consider the country's policy for a cable community channel. This policy has been one of the primary mechanisms used in Canada to provide outlets for community content and has served as an alternative to terrestrial TSB.

The community channel policy was first established in 1975.¹²⁹⁰ Under this policy all cable service providers that had a minimum number of subscribers determined by the CRTC were required to provide a 'community channel' as a social service in exchange for the privilege of holding a cable television licence.¹²⁹¹ The community channels were administered by the cable providers themselves. However, they were expected to provide local non-commercially oriented programming and provide access opportunities to

¹²⁸⁷ Ibid, [141].

¹²⁸⁸ CRTC, *Community Television Policy*, Public Notice 2010-622.

¹²⁸⁹ Diversity of Voices, above n 945, [16].

¹²⁹⁰ See CRTC, *Community Channel Policy Review*, Public Notice 1990-57.

¹²⁹¹ Ibid.

community members to produce and distribute content.¹²⁹² The CRTC assessed the providers' performance in this area during their licence renewal processes.¹²⁹³ Community channels were authorized to broadcast content from other community channels, but not commercial content or foreign content.¹²⁹⁴ As community channels were regarded as a social obligation, cable providers were expected to finance the services themselves and, initially, no advertising or sponsorship was allowed.¹²⁹⁵ This had the purpose of ensuring the non-commercial nature of the channels and protecting over-the-air broadcasters.¹²⁹⁶

In 1986 the policy was amended to allow the broadcast of simple sponsorship announcements in community channels in order to finance the services.¹²⁹⁷ Any income derived from these announcements had to be reinvested in the community channel itself.¹²⁹⁸ In 1991 another amendment was introduced which authorized providers with less than 2000 subscribers to broadcast strictly local advertisements on their community channels.¹²⁹⁹

In 1997 the policy was modified so the provision of a community channel is no longer mandatory for any cable providers. Instead, cable service providers were required to allocate 5% of their gross annual revenues to one or more of the eligible Canadian government programs for funding the production of Canadian programming.¹³⁰⁰ The policy allows cable providers, depending on their number of subscribers, to use some or all of that 5% to fund a community channel or an outlet for 'local expression'.¹³⁰¹ Most

¹²⁹² See Ibid.

¹²⁹³ See Ibid s 7.

¹²⁹⁴ See Ibid s 4.

¹²⁹⁵ Initially, the CRTC expected providers to devote 10% of their gross subscriptions revenue to the community channel but this was not a compulsory requirement. See Ibid, ss 1 and 2.

¹²⁹⁶ See CRTC, *Community Channel Policy*, Public Notice 1991-59.

¹²⁹⁷ See CRTC, *Community Channel Policy Review*, Public Notice 1990-57

¹²⁹⁸ Ibid.

¹²⁹⁹ CRTC, *Broadcasting Distribution Regulations*, Public Notice 1997-150 [10].

¹³⁰⁰ Ibid.

¹³⁰¹ Ibid.

cable providers opted to continue to provide community channels as this was the preferable alternative.¹³⁰²

In 2004, amendments were introduced which imposed more specific obligations on those providers who opted to deliver a community channel. Under the new policy, community channels are required to devote a minimum of 60% of their programming to local programming.¹³⁰³ Community channels are also required to devote a minimum of 30% of their programming to access by the community; if the demand for access exceeds 30%, channels are required to provide access time up to 50% of their programming.¹³⁰⁴ The new regulation also specified a maximum of two minutes per hour that community channels could devote to self promotional material.¹³⁰⁵ Of that maximum, only 25% could be allocated to the promotion of the cable provider and its related services; the remaining 75% must be allocated to the promotion of the community channel itself or the services of non related cable providers.¹³⁰⁶

The CRTC announced in 2002 that it would issue licences to non-profit community groups to provide ‘community programming undertakings’ in areas where a cable provider had opted not to provide a community channel.¹³⁰⁷ In 2004, it was established that, if a community programming undertaking is licenced in an area, a cable provider must distribute it as part of its basic service.¹³⁰⁸ It was also established that community programming undertakings are entitled to receive the portion of the 5% contribution to Canadian programming that their cable provider could have allocated to its community channel had it decided to operate one.¹³⁰⁹ The services provided by these independent

¹³⁰² See Standing Committee on Canadian Heritage, above n 935, 331-2.

¹³⁰³ CRTC, *Amendments to the Broadcasting Distribution Regulations- Implementation of the Policy Framework for Community-Based Media*, Public Notice 2004-18, regulations amending the broadcasting distribution regulations, amendment 4 inserting 27.1(1).

¹³⁰⁴ Ibid, regulations amending the broadcasting distribution regulations, amendment 4 inserting 27.1(3).

¹³⁰⁵ Ibid, regulations amending the broadcasting distribution regulations, amendment 3 replacing 27(1)(b).

¹³⁰⁶ Ibid, regulations amending the broadcasting distribution regulations, amendment 3 inserting 27(1.1) and (1.2)

¹³⁰⁷ Community Media Framework, above n 1062, Public Notice 2002-61 [92].

¹³⁰⁸ CRTC, *Amendments to the Broadcasting Distribution Regulations- Implementation of the Policy Framework for Community-Based Media*, Public Notice 2004-18, regulations amending the broadcasting distribution regulations, amendment 9 replacing 35(1).

¹³⁰⁹ Ibid, regulations amending the broadcasting distribution regulations, amendment 7 replacing 29(3)-(6).

undertaking are also known as ‘community channels’ and must adhere to the same regulations that apply to community channels that are operated by the providers. Despite these changes, the establishment of community controlled cable channels has been slow as most cable providers opt to operate their own community channels.¹³¹⁰

In 2010 the CRTC revised once more its policy in this area, with the most significant changes being that cable providers who operate a community channel are required to devote at least 50% of their programming-related expenditure for the community channel to financing community access programming.¹³¹¹ In addition, the CRTC announced that, beginning 1 September 2014, community channels must devote a minimum of 50% of their programming to access programming.¹³¹²

5.2.6. The Development of Third Sector Broadcasting in Canada – Considerations

Like the Australian experience, the Canadian experience provides evidence of the importance that legal recognition of the sector has for its development. As explained, although the CRTC has always had the power to issue licences for TSB initiatives, the development of the sector did not gain momentum until specific policies were adopted for it. The issues identified in Canada regarding the application of the general balance requirement to community stations also exemplify how indiscriminately applying to TSBs rules designed with other types of broadcasters in mind can impair the development of the sector.

As explained above, a major characteristic of Canadian TSB policy has been the use of very specific policies for different types of TSBs. However, while the historic tendency has been toward specificity, the CRTC has also made decisions aimed at reducing the complexity of the whole framework. The CRTC’s decision to adopt a joint policy for

¹³¹⁰ See CRTC, *Community Television Policy*, Public Notice 2010-622 [31]

¹³¹¹ *Ibid*, [29].

¹³¹² *Ibid*, [23].

campus and community radio, eliminate the sub-categories of campus licences and amend the complex categorization system for ethnic programs suggest that complexity and specificity are not always preferable in TSB policy. Other measures, such as distinguishing and giving concessions to community stations when they were the first in their markets, clearly served a purpose in aiding the development of the sector and were eliminated only after they were no longer necessary. Section 6.8 draws some conclusions regarding the desirability of having specific regulation for different types of TSBs.

As explained, although Canadian policy initially heavily restricted the broadcast of advertisements on TSBs, the majority of these restrictions have now been lifted. Freeing some TSBs from advertising restrictions has helped them attain financial viability without causing them to lose their identity as a sector that is distinct from commercial broadcasters. This may be an indication that advertising is not per se incompatible with TSB. However, as noted, the CRTC has implemented other types of controls such as specific content requirements in order to ensure TSB fulfil the policy goals it has assigned to them. This contrasts with the Australian approach in which content regulation is not a major feature. The issues of advertising and content regulation for TSBs are further discussed in Sections 6.5 and 6.6 respectively.

As explained, Canada's cable community channel policy has been used as a mechanism, alternative to terrestrial TSB, for creating outlets for third sector content. The Canadian experience illustrates how other types of measures can be valuable in complementing TSB. However, it also evidences how terrestrial TSB services may prove essential where alternatives are not viable, as has been the case in However, it also evidences how terrestrial TSB services may prove essential where alternatives are not viable, as has been the case in areas of Canada where there are no cable services or where the available cable services cannot support a community channel. Some of the regulations that have been imposed on community channels Canada are similar to the regulations that have been applied to terrestrial TSBs in other jurisdictions. This means Canada's community channel policy is also relevant to the comparative analysis that will be presented in Chapter 6.

5.3. Third Sector Broadcasting in Canada Today – Overview

This section provides an overview of the legal and regulatory framework that currently applies to TSBs in Canada. Sections 5.3.1 to 5.3.7 discuss the present Canadian policies and regulations, while Section 5.3.8 provides a brief conclusion.

5.3.1. Third Sector Broadcasting Licence Categories in Canada

As discussed throughout section 5.2.4 there is no single licence category for TSB in Canada. There are presently three different licence classes in Canada that are specifically designed for TSB services: community radio, campus radio and native broadcasting undertakings. These three classes require licensees to be not-for-profit entities and for the services to be operated on a not-for-profit basis. As explained above, in the past each of these classes were divided into sub-categories, but this is no longer the case. In addition to these three classes, there are the ethnic broadcasting and community television classes which do not restrict eligibility to not for-profit entities and allow the services to be operated for profit but are often used for TSB purposes. As explained, despite the CRTC having a religious broadcasting policy, ‘religious broadcasting’ is not a licence class.

5.3.2. Licensing Framework

Providing an over the air broadcasting service in Canada normally requires two separate authorizations which are obtained through parallel processes: a broadcast licence from the CRTC and an authorization to use a radio frequency from Industry Canada.¹³¹³ This section will focus on the CRTC’s licensing process.

Unlike in Australia, the specifics of the broadcast licensing framework are not enshrined in Canadian legislation. Instead, the law empowers the CRTC to establish classes of

¹³¹³ See CRTC, *How to Apply for a Broadcasting Licence* <www.crtc.gc.ca/eng/info_sht/b313.htm>

licences¹³¹⁴ and to lay down the procedure to be followed for obtaining a licence.¹³¹⁵ Although the powers of the CRTC are flexible, the law empowers the Governor in Council to issue directions regarding certain matters, which the CRTC must follow.¹³¹⁶

5.3.2.1. Eligibility

Pursuant to the powers conferred on it, the CRTC has created a number of different classes of broadcast licence including those described in Section 5.3.1. The community radio, campus radio and native broadcasting categories require as an eligibility condition that licensees should be not-for-profit entities. Eligibility is not restricted to any specific type of not-for-profit entity but licensees of these categories are required to comply with certain internal structure and governance conditions as discussed in Section 5.3.6. As explained, the ethnic broadcasting and community television licence classes do not have specific eligibility requirements and are open all types of licensees. It should be noted that the licence categories created through the CRTC regulatory policies are only an expression of the Commission's general policy in relation to specific types of broadcasters. The CRTC can deviate from its general policies if it deems it necessary to do so and can issue broadcast licences to services that do not fall within any of the pre-established licence classes.¹³¹⁷

5.3.2.2. Licensing Process

As has been noted, in Canada the licensing processes for the different types of broadcasters are not separate. All types of third sector broadcasters compete along with commercial broadcasters in the same licensing process. Because the system is merit based instead of price based, this is not an insurmountable barrier to the establishment of TSBs. However, the need to compete against commercial broadcasters for licences still presents a challenge for prospective TSBs. The CRTC acknowledges that weighing the

¹³¹⁴ BA, above n 30, s 9(1)(a).

¹³¹⁵ Ibid, s 21(a).

¹³¹⁶ Ibid, s 7.

¹³¹⁷ This allowed the CRTC, for example, to issue licence to native broadcasters before formally establishing a policy for that class of stations. See Section 5.2.4.3.

merits of applications for services of very different natures against each other is not ideal but considers it a necessity because of frequency scarcity:

the scarcity of available frequencies often makes it necessary for the CRTC to examine proposals filed for a particular market for a single frequency under a competitive process, even though such proposals may have very different objectives and may appeal to audiences that are also very different.¹³¹⁸

One notable element of the Canadian framework is that the licensing process can be initiated by either the CRTC or the interested parties themselves. Although the CRTC can make a public call for applications for a licence in a specific licence area, prospective broadcasters (of all sectors) normally need to identify whether a suitable frequency is available in their desired area of service and request the CRTC to issue a licence to operate a broadcasting service using that frequency.¹³¹⁹

Once an application is made, the CRTC will usually invite parties other than the original applicant to present contending applications.¹³²⁰ If the application relates to a market with population under 250,000, before calling for competing applications the CRTC assesses whether the market conditions in that proposed service area are such that a new broadcasting service can be supported without excessive detriment to the viability of existing broadcasting services.¹³²¹ Whether or not contending applications are received, the CRTC is required by law to conduct a public hearing before issuing a licence.¹³²² These public hearings are announced in advance and all interested parties, including members of the general public, can submit comments or interventions regarding the application to the CRTC.¹³²³

¹³¹⁸ CRTC, *Achieving a Better Balance: Report on French-language Broadcasting Services in a Minority Environment*, Public Notice 2001-25 [169]

¹³¹⁹ For this purpose prospective broadcasters must follow a procedure before Industry Canada. Discussed further in Section 5.3.3.

¹³²⁰ See CRTC, *The Issuance of Calls for Radio Applications*, Public Notice 1999-111.

¹³²¹ See CRCT, *Revised Policy Concerning The Issuance of Calls for Radio Applications and a New Process for Applications to Serve Small Markets*, Public Notice 2006-159.

¹³²² BA, above n 30, s 18(1)(a).

¹³²³ An intervention is more formal than a mere comment and turns the intervener into a formal party of the process. See CRTC, *How to Participate in CRTC Public Proceedings* <www.crtc.gc.ca/eng/info_sht/

If additional applications are received in response to the call, the CRTC assesses the merits of the applications through a comparative process. In these comparative processes all applicants participate in the public hearing where they can present their proposals and comment on those of their competitors.¹³²⁴ If the CRTC considers that introducing more than one of the proposed services would benefit the population of the service area, it can pre approve non-favoured applicants to receive a broadcast licence if they are able to identify a different suitable frequency and obtain approval from Industry Canada.¹³²⁵

Both the original applicant and those that respond to the call for applications must identify the category of their proposed service (for example, commercial, community or ethnic) and their primary language of broadcast.¹³²⁶ However, all applications are weighed against each other in the same comparative process irrespective of the category the proposed services would fall into if licensed.¹³²⁷

There are some exceptions to this general procedure. CRTC policy establishes that in certain cases an application for a new radio service will not be followed by a call for additional applications. These cases include ‘proposals with very little or no commercial potential or impact, including some low-power applications’.¹³²⁸ Given the nature of TSB, some proposals for TSB services may fall under this category. In addition, the CRTC has a special policy for licensing developmental community and campus stations which is discussed in Section 5.3.2.5.

The *Canadian Broadcasting Act 1991* (Can) grants the Governor in Council a veto power over the licensing decisions of the CRTC. On petition from any person, the Governor can

g4.htm>; See also CRTC, *Guidelines on the CRTC Rules of Practice and Procedure*, Broadcasting and Telecom Information Bulletin 2010-59 [52]-[64].

¹³²⁴ See, CRTC, *Guidelines on the CRTC Rules of Practice and Procedure*, Broadcasting and Telecom Information Bulletin 2010-959 [147].

¹³²⁵ See for example CRTC, Broadcasting Decision 2008-62.

¹³²⁶ For these purposes, the CRTC has different application forms for different types of broadcasters which are available at <www.crtc.gc.ca/eng/forms/form_200.htm>.

¹³²⁷ See for example CRTC, Broadcasting Decision 2008-62.

¹³²⁸ CRTC, *Revised Policy Concerning the Issuance of Calls for Radio Applications and a New Process for Applications to Serve Small Markets*, Public Notice 2006-159 [19].

set aside or refer back to the CRTC a licensing decision if the Governor is satisfied that the decision derogates from the broadcasting policy goals specified in the Act.¹³²⁹ However, the Governor cannot require the CRTC to issue a licence to any specific person.¹³³⁰

5.3.2.3. Licensing Criteria

Canadian legislation is silent in relation to broadcasting licensing criteria and the CRTC has not issued a general policy detailing such criteria. However, the CRTC has noted on its website that applicants must meet minimum criteria in the areas of ownership, financial and technical capacity, and programming.¹³³¹ These criteria are assessed against the policy goals the CRTC has for each type of station.¹³³² The website also notes that a market study may be required to confirm whether there is demand for the proposed service, whether it will contribute to diversity and to assess the impact the prospective service may have on existing broadcasters.¹³³³ As already explained, the special needs of the official language minorities receive special consideration in Canada and are also taken into account in competitive licensing situations.¹³³⁴ The CRTC has noted that the weight to be given to each of the factors in the comparison depends on the specific circumstances of the market in the licence area.¹³³⁵

Although the criteria are the same for broadcasters of all sectors, the CRTC has acknowledged the special role community stations play in serving their audiences and contributing to diversity and has stated that:

¹³²⁹ BA, above n 30, s 28(1).

¹³³⁰ BA, above n 30, s 7(2).

¹³³¹ See CRTC, How to Apply for a Broadcasting Licence < www.crtc.gc.ca/eng/info_sht/b313.htm > . For these purposes, prospective broadcasters are required to submit the relevant documentation at the licence application stage.

¹³³² For example, in the case of a community station, capacity means the capacity to fulfil the role CRTC policy assigns to community stations. See 2010 Policy, above n 1009, [146].

¹³³³ See CRTC, How to Apply for a Broadcasting Licence < www.crtc.gc.ca/eng/info_sht/b313.htm > .

¹³³⁴ See Section 5.1.7.

¹³³⁵ 2010 Policy, above n 1009, [145].

It is therefore important, when community stations are competing with other types of radio stations during the licence application process, to use criteria that can assess their special role and particular circumstances.¹³³⁶

The CRTC also has a special policy regarding the licensing of low-power radio services. This policy grants the first priority in competitive situations to applicants proposing original content, not-for-profit radio services such as campus, community or native stations.¹³³⁷ Ethnic stations along with commercial stations aiming to originate programming are granted second priority over retransmission services.¹³³⁸ The reason ethnic stations are in the second priority is because the ethnic licence class is not reserved for not-for-profit entities.¹³³⁹

5.3.2.4. Duration and Renewal of Licences

The *Canadian Broadcasting Act 1991* (Can) specifies that the maximum term for which broadcast licences can be issued is seven years, but empowers the CRTC to issue licences for any term up to that maximum.¹³⁴⁰ The CRTC is also empowered to renew licences for any term up to that maximum.¹³⁴¹ As when issuing licences for the first time, the CRTC is expected to conduct a public hearing before renewing a licence. However, the Act authorizes the CRTC not to hold a renewal hearing if it is satisfied that the public interest does not require one.¹³⁴²

When a renewal application is submitted, the CRTC normally makes a public announcement acknowledging that the application has been received and expressing its *prima facie* view on whether the licensee has complied with all applicable laws,

¹³³⁶ CRTC, *2004-2005 Action Plan Implementation of the of Section 41 of the Official Languages Act*, 2004 s 4.3.3.

¹³³⁷ CRTC, *A Licensing Policy for Low-Power Radio Broadcasting*, Public Notice 1993-95; See Also CRTC, *Community Media Framework*, above n 1062, appendix.

¹³³⁸ *Ibid.*

¹³³⁹ See Section 5.3.1.

¹³⁴⁰ BA, above n 30, s 9(1)(b)

¹³⁴¹ *Ibid.*, s 9(1)(d).

¹³⁴² *Ibid.*, s 18(2).

regulations and licence conditions.¹³⁴³ Any interested person can make a submission, including other broadcasters in the same licence area, prospective applicants who may be interested in accessing the licence that is up for renewal and members of the public.¹³⁴⁴ However, renewal hearings are only for determining whether a licence should be renewed, they are not a direct competition between incumbents and prospective new entrants akin to hearings for new licences. The process provides licensees with an opportunity to respond to any issues of possible non-compliance identified to the CRTC as well as to any third party submissions.¹³⁴⁵

The CRTC makes its renewal decisions based on the result of the process described above. In addition to revoking the licence or renewing it on its original terms, the CRTC can also renew it with new licence conditions or to renew it for a short term to provide the licensee with an opportunity to address any issues identified in the process.¹³⁴⁶ The Governor in Council has the same veto powers in relation to renewal decisions as it has in relation to new licensing decisions.¹³⁴⁷

5.2.3.5. Developmental Licences

The CRTC has established a policy framework for issuing developmental licences for low-power campus and community radio stations. The purpose of these developmental licences is to provide prospective licensees with a training opportunity and a way to start operations quickly.¹³⁴⁸ Applications for developmental licences are assessed through an expedited public process.¹³⁴⁹ In addition, applicants for developmental licences are not required to provide evidence of financial capacity to deliver the service.¹³⁵⁰ For this

¹³⁴³ See for example CRTC, Broadcasting Notice of Consultation 2010-334 (stations found in apparent non-compliance); CRTC, Broadcasting Notice of Consultation 2013-306 (stations found in apparent compliance).

¹³⁴⁴ See for example Ibid.

¹³⁴⁵ See CRTC Rules of Practice and Procedure, SOR/2010-277 s 27.

¹³⁴⁶ See CRTC, *Revised Approach to Non-Compliance by Radio Stations*, Broadcasting Information Bulletin 2011-347 [8].

¹³⁴⁷ Ibid s 28(1).

¹³⁴⁸ 2000 Campus Policy, above n 1061, [64]; 2000 Community Policy, above n 1061, [57].

¹³⁴⁹ 2000 Campus Policy, Ibid, [66]; 2000 Community Policy, Ibid [59].

¹³⁵⁰ Ibid.

reason, developmental licences can be used for prospective TSBs to build and demonstrate capacity before applying for regular licences.¹³⁵¹

Under CRTC policy, the term of developmental licences is five years.¹³⁵² Developmental licences are non-renewable, so after they expire licensees must apply for a regular licence if they want to continue providing broadcasting services.¹³⁵³ The CRTC has opted not to grant developmental licensees an automatic transition to regular licences, thus they need to go through the same process, described in Section 5.3.2.2, as any other prospective campus or community licensee.¹³⁵⁴

5.3.2.6. Third Sector Broadcasters Exempted from the Licence Requirement

The CRTC has exempted native radio stations in ‘remote’ areas from the broadcast licence requirement.¹³⁵⁵ Since 2013, low-power radio services whose programming ‘consists solely of live local broadcasts of religious services, weddings, funerals, and other such religious celebrations and ceremonies’ are also exempted from the licence requirement.¹³⁵⁶ It should be noted that these exemptions only apply to the licence issued by the CRTC; exempted stations still need to obtain approval to use a frequency from Industry Canada.

5.3.3. Access to the Spectrum

Unlike in Australia, no portion of the spectrum has been reserved in Canada for broadcasting and for distribution by the broadcast regulator. Industry Canada is the authority which allocates spectrum to the different uses. For these purposes, it prepares a frequency allocation table which designates frequencies for different types of spectrum

¹³⁵¹ Discussed further in Section 6.3.6.

¹³⁵² 2010 Policy, above n 1009, [38].

¹³⁵³ 2000 Campus Policy, above n 1061, [69]; 2000 Community Policy, above n 1061, [61].

¹³⁵⁴ 2010 Policy, above n 1009, [35]-[36].

¹³⁵⁵ CRTC, *Exemption Order Respecting Certain Native Radio Undertakings*, Public Notice 1998-62; See Also Section 5.2.4.3.

¹³⁵⁶ CRTC, *Exemption Order for Low-Power Radio Stations that Provide Programming from Houses of Worship*, Broadcasting Order 2013-621.

uses including broadcasting.¹³⁵⁷ As explained, in parallel to their broadcast licence application process, prospective broadcasters in Canada must apply to Industry Canada for a technical certification to operate a transmitter.¹³⁵⁸ For this purpose, prospective broadcasters must identify an available broadcasting frequency in the allocation table and present a technical plan demonstrating that they will cause no harmful interference to existing broadcasters or other spectrum users in the area.¹³⁵⁹

While auctions are used in Canada for the distribution of spectrum for other purposes, in the case of broadcasting, the certification procedure is based solely on technical criteria.¹³⁶⁰ Broadcasters do not need to pay fees for using the spectrum to Industry Canada. Instead, broadcasters may be required to pay licensing fees to the CRTC.¹³⁶¹ The CRTC normally requires broadcasters to pay annual licensing fees based on their revenues.¹³⁶² However, the CRTC has exempted campus, community and native broadcasters from these fees.¹³⁶³ For this reason access to spectrum is, in practice, free for these categories of TSBs. Ethnic or religious broadcasters which, as noted, are not required to be strictly not-for-profit could be required to pay licensing fees to the CRTC.¹³⁶⁴

5.3.4. Funding

5.3.4.1. Financial Regulation and Advertising

¹³⁵⁷The current frequency allocation table can be found at <www.ic.gc.ca/eic/site/smt-gst.nsf/en/h_sf01678.html>

¹³⁵⁸ See Industry Canada, *AM, FM and TV Broadcasting Process*, Broadcasting Circular 1, 1993.

¹³⁵⁹ See Industry Canada, *Broadcasting Procedures and Rules for FM Broadcasting Undertakings*, Broadcasting Procedures and Rules 3, 2011; *Application Procedures and Rules for Television Broadcasting Undertakings*,. Broadcasting Procedures and rules 4, 2009.

¹³⁶⁰ See Industry Canada, *Framework for Spectrum Auctions in Canada*, Issue 3, 2011, 1.

¹³⁶¹ BA, above n 30, s 11(1)(a).

¹³⁶² *Broadcasting Licence Fee Regulations 1997* (Can) ss 7 and 11.

¹³⁶³ *Ibid*, s 2(a).

¹³⁶⁴ Licensees are only required to pay fees if their revenues exceed a threshold determined by the CRTC. See *Ibid* ss 1 and 5.

Although campus, community and native stations are expected to be operated not-for-profit, the CRTC does not require them to reinvest all income derived from the broadcast service in the service itself.¹³⁶⁵ There are also no caps on the amount of funding they can derive from any source or from a single source.¹³⁶⁶ None of these categories are restricted in relation to the selling of air-time for purposes other than advertising. In relation to the broadcast of advertisements, only campus stations are imposed a limit: a maximum of 504 minutes in a broadcast week. Their access to institutional funding appears to be reason why the advertising restrictions for campus stations have not been lifted.¹³⁶⁷

As explained, community television stations are restricted in the amount of air-time they can devote to advertising to 12 minutes per hour and are only allowed to broadcast local advertisements.¹³⁶⁸ However, since community television stations are not required to be strictly not-for-profit, this measure is aimed at protecting the viability of other broadcasters rather than protecting the not-for-profit nature of the station.

It is notable that, in contrast to over the air TSBs, community cable channels are strictly regulated in this area, with conventional advertisements being prohibited for providers with more than 2000 subscribers, sponsorship announcements being subject to content restrictions and providers being required to invest all sponsorship income in the community channel itself.¹³⁶⁹ As similar restrictions are sometimes imposed on terrestrial TSBs, Sections 6.3 and 6.5 will assess the desirability of these types of measures. For this analysis, it is necessary to consider that Canada's community channel policy expects cable providers, for-profit-entities, to deliver a not-for-profit service in exchange for the privilege of holding a cable concession.¹³⁷⁰ In such context regulation

¹³⁶⁵ This is required of TSBs in other jurisdictions. Discussed further in Section 6.3.1.

¹³⁶⁶ Restrictions of these kinds are applied in other jurisdictions. Discussed further in Section 6.3.2.

¹³⁶⁷ See 2010 Policy, above n 1009, [122].

¹³⁶⁸ See Section 5.2.4.6.

¹³⁶⁹ See Section 5.2.5.

¹³⁷⁰ See Section 5.2.5.

seems essential to ensure the not-for-profit nature of the community channels. However, this situation is not analogous to that of not-for-profit licensees of Terrestrial TSBs.¹³⁷¹

5.3.4.2. Government Funding

Canadian policy has encouraged TSBs to raise funds through their own means. However, they also receive government funding. As noted, since 2007 the CRFC, an independent body similar to Australia's CBF, has distributed government funding to community and campus radio broadcasters.¹³⁷² The CRFC receives funding from the Canadian Content Development Fund (CCD), a government program for supporting the production of Canadian programming funded by compulsory contributions from commercial broadcasters.¹³⁷³ In order to ensure some stability of funding for community and campus stations, the CRTC has issued directions regarding the portion of the CCD that is to be assigned to CRFC.¹³⁷⁴ These guidelines entered into force in 2011 and specify that commercial broadcasters with revenues above 1.25 million Canadian dollars (CAD) per year must contribute to the CDC CAD\$1000.00 plus 0.5% of their revenues in excess of CAD\$1.25 million.¹³⁷⁵ Of these contributions, 15% is assigned to CRFC while the rest is devoted to other CCD programs.¹³⁷⁶ In addition, in cases of transfer of ownership and control, commercial broadcasters are required to contribute to the CDC a minimum of 6% of the value of the transaction.¹³⁷⁷ This contribution is split in 0.5% to the CRFC and 5.5% for various other programs funded by the CDC.¹³⁷⁸ While the CRFC is authorized to seek additional funding from other sources, it is primarily dependent on the funding it receives from the CDC.¹³⁷⁹

¹³⁷¹ While Canadian policy applies the same rules to community channels which are operated by not-for-profit groups this is probably because those channels are in practice rare and the need have not arisen to develop a separate framework for them.

¹³⁷² See Section 5.2.3.

¹³⁷³ 2010 Policy, above n 1009, [93].

¹³⁷⁴ Ibid, [96]-[99].

¹³⁷⁵ *Radio Regulations 1986* (Can) s 15(2)(c) .

¹³⁷⁶ Ibid, s 15(5).

¹³⁷⁷ 2010 Policy, above n 1009, [106].

¹³⁷⁸ Ibid, [109].

¹³⁷⁹ See CRTC, *Community Radio Fund of Canada's Structural and Operational Plan*, Broadcasting Regulatory Policy 2011-431 [11] '*CRFC Plan Policy*'; CRFC, *Our Funders* <www.communityradiofund.org/en/our-funders>.

The CRFC is subject to regulation by the CRTC.¹³⁸⁰ The Structural and Operational Plan of the CRFC had to be approved by the CRTC. Among other elements, this plan establishes that the CRFC should present annual reports to the CRTC as well as to the relevant stakeholders.¹³⁸¹ The CRTC also requires the CRFC to reserve a seat with voting powers on its board of directors for a representative of the commercial sector.¹³⁸² Following the plan, the CRFC distributes annual grants to community and campus radio stations.¹³⁸³ Grants decisions are made by selection committees whose members must be independent from the CRFC and from any potential awardees.¹³⁸⁴ Awards decisions are based both on merit and need.¹³⁸⁵ Separately to these grants, the CRTC also provides some funding to support the production of local spoken word content and the provision to youth of internship opportunities with community and campus stations.¹³⁸⁶

In addition to CRFC funding, CRTC policy establishes that campus stations should have access to funds from student levies.¹³⁸⁷ This is an additional source of funding that is not available to community stations which, as explained, has been used as a justification for applying different regulation to the two types of stations.

While not eligible for CRFC funding, native broadcasters have access to funding from the ‘Northern Aboriginal Broadcasting’ (NAB) program which is a successor of the NNABP and its administered by the Department of Canadian Heritage as part of its ‘Aboriginal People’s Program’.¹³⁸⁸ The NAB provides funding for both the production of programming and transmission equipment.¹³⁸⁹ However, southern indigenous TSB

¹³⁸⁰ This is distinct from the case of the Australian CBF who is not regulated by ACMA.

¹³⁸¹ See CRFC, *Structural and Operational Plan and the CRFC CCD Program: Developing Canadian Local Content*, Submitted to the CRTC in 2010, 42 ‘CRFC Plan’.

¹³⁸² CRFC Plan Policy, above n 1379, [8]

¹³⁸³ CRFC Plan, above n 1381, 35; See also CRFC, *Our Programs* <www.communityradiofund.org/en/our-programs/available-programs>.

¹³⁸⁴ CRFC Plan, *Ibid*, 38.

¹³⁸⁵ *Ibid*, 35

¹³⁸⁶ See CRFC, *Our Programs* <www.communityradiofund.org/en/our-programs/available-programs>.

¹³⁸⁷ 2010 Policy, above n 1009, [17].

¹³⁸⁸ See *Northern Aboriginal Broadcasting – Aboriginal Peoples’ Program* <www.pch.gc.ca/eng/1267292195109/1305897413896>.

¹³⁸⁹ *Ibid*.

initiatives are not eligible for funding from this program.¹³⁹⁰ In addition to the NAB, APTN, the not-for-profit indigenous television network, benefits from a CRTC policy that makes it mandatory for most cable service provider to carry the network as part of their basic service.¹³⁹¹ Despite carriage being mandatory, the policy requires cable providers to pay CAD\$0.31 per subscriber per month to APTN in order to finance the operations of APTN.¹³⁹²

As explained, independent not-for-profit groups who provide a cable community channel service when the cable provider opts not to provide one itself has access to funding from the provider's mandatory contribution. However, there are no specific funding schemes for over-the-air community television or for ethnic or religious broadcasting. In addition to specific funding schemes, all types of TSBs in Canada may receive government funding on an ad-hoc basis from other sources, such as provincial governments or general cultural programs.¹³⁹³

5.3.5. Content Regulation

As explained above, a characteristic of Canadian broadcasting policy is the imposition of specific content requirements upon broadcasters to pursue different policy goals. In order to foster diversity of content, community and campus radio stations are required to devote at least 5% of their musical selections to 'specialty' music.¹³⁹⁴ In addition, community

¹³⁹⁰ Lack of government funding has been identified as a reason indigenous broadcasting has been slow to develop in southern Canada. See Fairchild, above n 385, 146

¹³⁹¹ CRTC, *Order Respecting the Distribution of the Aboriginal Peoples Television Network*, Public Notice 1999-70.

¹³⁹² CRTC, *Distribution of the Programming Service of Aboriginal Peoples Television Network Incorporated Known as the Aboriginal Peoples Television Network (APTN) by Licensed Broadcasting Distribution Undertaking*, Broadcasting Order 2013-373. The carriage fee was originally CAD \$0.15 per subscriber but the CRTC has increased the fee due to financial need by APTN. This funding scheme has been subjected to some criticism because it forces cable providers to pay to carry a service without major appeal to their clients with the cost normally being passed on to the subscribers. See Widdowson, Frances and James Lawrance Davidson, 'Policy Development and Aboriginal Broadcasting: A Case Study of the Aboriginal Peoples Television Network' (Paper Presented at the Annual Meeting of the Canadian Political Science Association, 2009).

¹³⁹³ As has been noted, the province of Quebec has been historically active in providing funding for French language community radio stations.

¹³⁹⁴ 2010 Policy, above n 1009, [72].

stations are required to devote a minimum of 20% of their musical selection to genres other than pop, rock and dance, the genres most popular in Canadian commercial radio.¹³⁹⁵ This requirement does not apply to campus stations, but in lieu, English-language campus stations are restricted in the number of ‘hits’ they can broadcast in their musical programming to a maximum of 10% of their total musical selections.¹³⁹⁶ Campus and community stations are also required to devote 15% of their broadcast week to locally produced spoken-word content.¹³⁹⁷ This serves the double purpose of increasing diversity and fulfilling audiences’ need for local content.

Other types of TSBs are also subject to content requirements to ensure they fulfil the roles assigned to them by CRTC policy. Community television stations are required to devote a minimum of 60% of their programming to local content¹³⁹⁸ and ethnic stations are required to devote minimums of 60% and 50% of their programming to ethnic programming and programming in non-Canadian languages respectively.¹³⁹⁹

TSBs are also subject, like all broadcasters in Canada, to requirements regarding minimum levels of Canadian content. As a general rule all radio stations in Canada are required to devote minimums of 35% of their popular music selections and 10% of their special interest music selections to Canadian pieces.¹⁴⁰⁰ However, those native broadcasters who are exempted from the licence requirement are also exempted from complying with these minimums.¹⁴⁰¹ An exception has also been made for ethnic radio stations; during their ethnic programming periods, these stations are only required to devote a minimum of 7% of their musical selections to Canadian selections.¹⁴⁰² For

¹³⁹⁵ Ibid, [64]-[68]; in Dunbar and Leblanc, above n 980, s 10(h) it was speculated that the reason advertising remains restricted for campus stations is that being unrestricted in relation to the broadcast of music from popular genres allows them to attain wider appeal. However, considering campus stations are subject to a ‘hits’ restriction as discussed below, it is not clear that one type of station is more threatening to the viability of commercial broadcasters than the other.

¹³⁹⁶ CRTC, *Standard Conditions of Licence for Campus and Community Radio Stations*, Broadcasting Regulatory Policy 2012-304 [8].

¹³⁹⁷ 2010 Policy, above n 1009, [50].

¹³⁹⁸ Community Media Framework, above n 1062, [120].

¹³⁹⁹ Ethnic Broadcasting Policy, above n 211, [16] and [26].

¹⁴⁰⁰ *Radio Regulations 1986* (Can) s 2.2(3)(b) and (8).

¹⁴⁰¹ See Section 5.2.4.3.

¹⁴⁰² *Radio Regulations 1986* (Can) s 2.2(4).

campus and community stations, the special interest music minimum is a little higher, being 12% instead of the generally applicable 10%.¹⁴⁰³ Although the requirements in this area are higher for community and campus stations, special interest music may also represent a larger proportion of their programming because of their need to comply with the diversity requirements described above. For this reason, a higher minimum in relation to special interest music selections does not necessarily mean that community or campus stations are required to broadcast more Canadian music than commercial and other types of TSB stations in general.

In the case of television the general requirements are that stations must devote a minimum of 55% of their broadcast year and a minimum of 50% of their evening broadcast periods to Canadian programming.¹⁴⁰⁴ Strangely, while the evening period requirement is the same, the current regulations require ethnic television stations and remote television stations to comply with a higher overall minimum of Canadian programming, namely, 60% of their broadcast year.¹⁴⁰⁵ This is contrary to the nature of ethnic broadcasting and Canadian policy for ethnic radio, which grants them concessions in the area of Canadian content. It also seems odd for higher requirements remote stations when their financial context may instead require that they be given relief from obligations. A possible explanation for this is that, while the general requirement was reduced from 60% to 55% in 2011, the policies for ethnic broadcasting and remote television have not been substantially revised since 1999 and 2010 respectively. It is possible that the CRTC will, in the future, reduce the requirements for ethnic and remote stations to the same level as the general rule. The regulations also specify that the CRTC can reduce the minimum requirement for ethnic and remote stations in their individual licence conditions, which allows it to address any cases where the minimum is too burdensome for them to comply with.¹⁴⁰⁶ For all other third sector television stations the general rule applies.

¹⁴⁰³ *Ibid* s 2.2(3)(a).

¹⁴⁰⁴ *Television Broadcasting Regulations 1987* (Can) s 4(6) and (7)(b).

¹⁴⁰⁵ *Radio Regulations 1986* (Can) s 4(8)(a).

¹⁴⁰⁶ *Ibid* s 4(8). In the case of remote community television stations, the CRTC has specifically expressed that it will consider them giving special concessions in relation to the Canadian content rules. See Community Media Framework, above n 1062, [141].

Although Canadian policy is characterized by content regulation, it should also be noted that there are areas where the CRTC has opted against implementing specific obligations. For example, although native broadcasters are expected to contribute to the promotion of indigenous cultures and languages, no specific requirements relating to the broadcast of indigenous content or content in indigenous languages are imposed on them.¹⁴⁰⁷ The CRTC has also stated that it expects campus and community stations to provide airplay to local and emerging artists but has refrained from imposing specific quotas in this area.¹⁴⁰⁸ In addition, although all stations, especially community and campus ones, are expected to provide original programming, there are no minimum quotas for the amount of content that stations need to produce themselves.

5.3.6 Governance and Participation Regulation

5.3.6.1. Structural Requirements

CRTC policy establishes that community radio stations must be:

owned, operated, managed and controlled by a not-for-profit organization that provides for membership, management, operation and programming primarily by members of the community served.¹⁴⁰⁹

Campus and native stations, however, are subject to more specific requirements. CRTC policy establishes that the board of director of campus stations must include:

campus representatives, including a balanced representation from the student body and representation from the administration of the post secondary institution, station volunteers and the community at large.¹⁴¹⁰

¹⁴⁰⁷ As explained, the CRTC considered that imposing such requirements was not viable. See Section 5.2.4.3.

¹⁴⁰⁸ 2010 Policy, above n 1009, [80].

¹⁴⁰⁹ Ibid, [13].

Providing representation on the board of directors to members of the general public may seem like an odd requirement for a station which is defined by its links with an educational institution. However, this can be explained by the reality that campus stations have historically served in Canada many of the roles commonly associated with community radio, such as the provision of access opportunities to general audiences.

In the case of native stations, CRTC policy requires that they must be ‘owned and controlled by a non-profit organization whose structure provides for board membership by the native population of the region served’.¹⁴¹¹

The CRTC has not provided exact guidelines regarding the structural measures that licensees must adopt to fulfill their governance requirements. However, applicants are required to detail their ownership structure in their broadcasting licence application forms which allows the CRTC to assess the adequacy of the structure before issuing a licence.¹⁴¹² In the case of campus stations, the application form requires prospective licensees to detail the means they intend to use to ensure that the composition of their board meets the requirements of the CRTC policy.¹⁴¹³

Ethnic and religious broadcasters as well as community television licensees who can be either for-profit or not-for-profit are not subjected to any special governance requirements. However, as already noted, religious groups are required to be registered as charities if they wish to request donations through the airwaves.¹⁴¹⁴ As explained, although ethnic and religious stations are not required to provide representation to multiple groups in their ownership and management structures, the CRTC may impose

¹⁴¹⁰ Ibid, [17].

¹⁴¹¹ Native Policy, above n 1211, s 2.

¹⁴¹² CRTC, *Application to Obtain a Broadcasting Licence to Operate a Campus or Community Radio Undertaking (Including Low-Power)*, Form 114 s 2(1); CRTC, *Application to Obtain a Broadcasting Licence to Operate a Type B Native Radio Undertaking (Including Low-Power)*, Form 103 s 2(1).

¹⁴¹³ CRTC, *Application to Obtain a Broadcasting Licence to Operate a Campus or Community Radio Undertaking (Including Low-Power)*, Form 114 s 2(2).

¹⁴¹⁴ See Section 5.2.4.5.

licence conditions that require them to provide programming aimed at multiple ethnic and religious groups.¹⁴¹⁵

5.3.6.2. Participation Requirements

Community and campus stations are expected by the CRTC to provide access and participation opportunities to members of the communities they have been licensed to serve, as well as to involve independent volunteers in the production of their programming. However, the CRTC has opted not to impose any specific quotas in relation to access programs or programming produced by volunteers.¹⁴¹⁶ This approach contrasts with the one adopted in relation to the cable community channels which, as noted, are currently required to comply with specific access requirements.¹⁴¹⁷ Although not subject to specific requirements, prospective campus and community licensees must describe in their application forms the measures they will use to facilitate access and participation by volunteers and to promote the availability of participation opportunities.¹⁴¹⁸

Community television stations and ethnic, religious and native broadcasters are not necessarily expected to provide access opportunities or engage volunteer participation; accordingly, they are not subject to any special rules in this area.

5.3.7. Participation of Third Sector Groups in Other Sectors

As discussed, the broadcast licensing system in Canada is not price based and broadcast licence fees are based on a station's profits.¹⁴¹⁹ This means that access to commercial licences is not necessarily beyond the financial reach of third sector groups. In addition and as explained, ethnic and religious broadcasters and community television stations are

¹⁴¹⁵ See Sections 5.2.4.4 and 5.2.4.5.

¹⁴¹⁶ 2011 Implementation Policy, above n 1127, [17].

¹⁴¹⁷ See Section 5.2.5.

¹⁴¹⁸ CRTC, *Application to Obtain a Broadcasting Licence to Operate a Campus or Community Radio Undertaking (Including Low-Power)*, Form 114 s 6(7).

¹⁴¹⁹ See Section 5.3.2.

not required to be not-for-profit. This means that the boundaries between commercial and third sector broadcasting may not always be clear in Canada, as some stations may operate under a for-profit structure and licence despite having a third sector orientation.

There are no specific requirements for over-the-air commercial or State stations to provide access opportunities to independent not-for-profit groups. However, and as explained, the cable community channel policy has been used throughout Canadian history to ensure access opportunities for community groups and it remains an important element of Canadian broadcasting policy.¹⁴²⁰

5.3.8. Conclusion

This overview has demonstrated that terrestrial TSB in its different forms occupies an important part in Canadian broadcasting policy despite other measures, such as the community cable channels, also being important. Also notable is that in recent years a number of measures have been adopted to increase and stabilize government funding for the sector which in the past had been irregular. Since these measures are relatively recent, it is too soon to say how effective they will be in aiding the development of the sector. However, the fact that they have been adopted is an indication that not all TSBs can attain self sustainability and that TSB is a worthy investment for governments.

Although some sub-categories have been eliminated, thereby simplifying the system, separating the third sector into different classes of stations with specific policies for each remains a key characteristic of Canadian TSB policy. TSB regulation in Canada is currently focused primarily on the areas of content and, to a lesser degree, governance. As explained, this all contrasts with the position in Australia, where financial regulation plays a larger role and a general policy is applied to the whole sector. The next chapter will compare and analyze the two approaches in order to determine how the experiences of these two countries can aid in the endeavor of identifying a policy framework for supporting the development of TSB.

¹⁴²⁰ See Section 5.2.5.

Chapter 6 – Regulatory Issues in Third Sector Broadcasting

6.1. Access to the Spectrum

6.1.1. Access Fees

As all broadcasters, TSBs require access to spectrum if they want to deliver their services terrestrially. In view of the potential of the sector to aid in the fulfillment multiple human rights, it is desirable that TSBs be able to gain access to spectrum they require. However, this goal needs to be balanced against equally legitimate considerations, such as the need to ensure that sufficient spectrum is available for the other broadcasting sectors and other uses such as telecommunications services, as well as the States' economic interest in raising income through spectrum access fees. This section of the chapter will provide recommendations regarding how to regulate access to spectrum by TSBs while balancing these considerations.

As explained in Section 2.1.1, TSB can play a very valuable role in lowering the barriers to participation in broadcasting and creating opportunities to exercise their freedom of expression through their airwaves for persons or groups for whom these opportunities are not available in the two traditional sectors. However, excessive spectrum access fees or broadcasting licence fees can impede TSBs from fulfilling this role and, therefore, act as an insurmountable barrier to the development of the sector. In this respect, Steve Buckley, former president of AMARC, the main international representative of TSBs, has stated that 'license fees should be waived or nominal for community broadcasters so as not [to] exclude communities with few resources'.¹⁴²¹ Similarly, the UN, OAS and ACHPR rapporteurs on freedom of expression and the OSCE representative on freedom of the media in a joint declaration has stated that TSBs should benefit from 'concessionary' fees.¹⁴²²

¹⁴²¹ Buckley, Steve, 'Community Broadcasting: Good Practice in Policy, Law and Regulation ' (Paper presented at the UNESCO World Press Freedom Day 2008)

¹⁴²² UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4.

As explained in Sections 4.2.2 and 5.3.3, both Australia and Canada currently offer free spectrum access to TSBs.¹⁴²³ The experiences of both countries are testimony to the importance of free spectrum access for TSBs. For example, Spurgeon and McCarthy have observed that ‘but for free spectrum access, the Australian community broadcasting sector would not be as well-developed as it is’.¹⁴²⁴ As discussed in Sections 4.3.3.1 and 4.3.4, the Australian broadcasting framework provides other options for persons interested in not-for-profit broadcasting. These include narrowcasting licences and non BSB community licences. While these forms of broadcasting licences are less administratively burdensome to acquire and operate than regular community licences, they do not provide free spectrum access.¹⁴²⁵ The fact that these alternatives are rarely used and that regular community licences are clearly preferred by Australian TSBs suggests that broadcasting licences being accessible to third sector actors is not normally sufficient for third sector stations to emerge if the licences are not accompanied by free or affordable spectrum access.

As noted in Section 3.1.2.3, many commentators have argued that access to the spectrum should be purely market based. The main arguments against providing spectrum for free or at reduced rates to TSBs (or broadcasters in general) is that granting the privilege of accessing spectrum without requiring the payment of the real market value in return is unfair and can lead to the economically inefficient use of the spectrum.¹⁴²⁶ The Australian policy of providing free spectrum for TSB (and PSB) has been questioned for this very reason.¹⁴²⁷

As also explained in Section 3.1.2.3, given the economic power and spectrum demands of telecommunications firms, it is a real possibility that broadcasters would not be able to attain access to spectrum in a free market. In Section 2.1.1.2, it was explained that in deference to the public’s right to information, sufficient broadcasting frequencies should

¹⁴²³ In the case of Canada this does not apply to ethnic and religious broadcasters because those licence classes are not strictly not-for-profit.

¹⁴²⁴ Spurgeon and McCarthy, above n 785, 6.

¹⁴²⁵ See Sections 4.3.3.1 and 4.3.4.

¹⁴²⁶ See for example Coase, above n 420; Hazlett, above n 416.

¹⁴²⁷ See Productivity Commission, above n 599, ch 10.

be allocated to allow a reasonable diversity of outlets. In Section 2.1.6, it was noted that, despite the increased availability of alternative platforms, terrestrial broadcasting remains important for a large number of persons around the world, both as an outlet to exercise their freedom of expression and as a basic means to access information. In light of these considerations, States can be said to have an obligation under international human rights law to guarantee the availability of spectrum for broadcasting services as long as terrestrial broadcasting remains necessary for the fulfillment of the right to expression and information of a significant part of their population.

When broadcasters (of any sector) are granted access to the spectrum for free or below market price, this means that the social worth of their service has been preferred over the economic value of the spectrum needed for its delivery.¹⁴²⁸ In this relation the ITU notes:

Spectrum allocation, assignment and pricing practices are modified to be consistent with the government's policies [sic] objectives resulting in trade-offs against purely economic or technical considerations.¹⁴²⁹

In the case of commercial broadcasters, restricted spectrum rights which allow use of spectrum only for the purpose of commercial broadcasting can be assigned through an auction. Although this mechanism allocates the right to use spectrum specifically for commercial broadcasting in accordance with the market value of that right, it does not account for the lost opportunity of allocating spectrum to a more lucrative purpose, such as telecommunications.¹⁴³⁰ As noted, an auction system is presently used in Australia for assigning commercial broadcasting licences, but not in Canada, where commercial licences are assigned through a merit-based system.¹⁴³¹ Auctioning spectrum that can be used exclusively for commercial broadcasting is a compromise between the social desirability of broadcasting services and efficiency concerns.

¹⁴²⁸ See Section 3.2.1.4.

¹⁴²⁹ ITU and infoDev, 'ICT Regulation Toolkit', <www.ictregulationtoolkit.org>, module 5.

¹⁴³⁰ See Australian Government, above n 421, 92.

¹⁴³¹ See Sections 4.1.5 and 5.1.5.

While this solution may be adequate for commercial broadcasters, a key argument of this thesis is that it should not be extended to TSBs. Given the not-for-profit nature of the sector, most TSBs are unlikely to be able to obtain access to spectrum through an auction process, even if they were competing only with commercial broadcasters. Additionally, a system whereby access is granted to the highest bidder is unlikely to be compatible with the nature and purpose of the third sector. In this respect, the OAS Special Rapporteur on Freedom of Expression has stated:

When the money offered or the economic criterion is the princip[al] or exclusionary factor for the granting of **all** radio or television frequencies, it jeopardizes equal access to the radio spectrum and discourages pluralism and diversity. Although these criteria could be considered objective and non-discretionary, when they are used to assign **all** radio frequencies they result in the exclusion of broad segments of society from the process of access to the media. (emphasis added).¹⁴³²

Providing spectrum for free or at nominal fees to TSBs means that the State sacrifices not only the opportunity of allocating the spectrum for purposes other than broadcasting, but also the higher fees it could collect by allocating it to commercial broadcasters. While this sacrifice is significant, as explained throughout Chapter 2, supporting TSBs in this manner can be justified in recognition of the capacity of the sector to contribute to social policy goals, including the fulfillment of States' obligations under international human rights law. This view has been supported by the European Parliament which has stated:

The service provided by community media is not to be assessed in terms of opportunity cost or justification of the cost of spectrum allocation but rather in the social value it represents.¹⁴³³

¹⁴³² Inter-American Standards, above n 52, [65]

¹⁴³³ European Parliament, above n 2, art 19.

While ensuring spectrum is available for broadcasting in general is an obligation for States where significant portions of the population still depend on terrestrial broadcasting for the fulfillment of their human rights, whether to support TSB with free spectrum or nominal access fees is a policy decision which requires balancing the desirability of supporting the sector against economic considerations. Although supporting TSB in this manner is a policy choice and not an obligation, the option warrants serious consideration. In particular, policy makers should pay heed to whether there are, within their jurisdictions, TDGs or audiences with special needs who would greatly benefit from the service of TSBs. As already acknowledged, when TSBs are afforded access to the spectrum on conditions that are more advantageous in comparison to commercial broadcasters, this can justify subjecting them to a *quid pro quo* in the form of additional regulation and special social responsibility burdens.¹⁴³⁴ Such special regulation can be used to ensure the public sacrifice made in support of the sector produces the desired results.

6.1.2. Spectrum Reserve

In addition to affordable access fees, or the complete waiver of such fees, the development of TSB may require spectrum to be reserved specifically for the sector. As noted in the previous section, depending on the context, States may have an obligation under IHRL to ensure the availability of terrestrial broadcasting services by reserving a reasonable number of frequencies for them. However, in addition to reserving frequencies for broadcasting in general, it is also advisable to make specific reserves for each of the three broadcasting sectors.¹⁴³⁵ Specifically in relation to TSB, AMARC, the main representative of TSBs, has advocated that spectrum always be reserved for the sector:

¹⁴³⁴ See Section 3.3.

¹⁴³⁵ See for example Inter-American Standards, above n 52, [109].

National spectrum management plans must include, in all broadcasting bands, a significant and equitable amount of spectrum reserved for community and other non-commercial media.¹⁴³⁶

In similar vein, the OAS Special Rapporteur on Freedom of Expression has stated:

Given the existing conditions of exclusion, the States must take positive measures to include the non-commercial sectors in the communications media. These measures include ensuring broadcast spectrum frequencies for the different types of media, and providing specifically for certain frequencies to be reserved for the use of community broadcasters, especially when they are not equitably represented in the spectrum.¹⁴³⁷

Establishing separate reserves at the frequency planning stage for the different sectors of broadcasting ensures the ‘sectoral diversity’ of broadcasting.¹⁴³⁸ In the case of TSB, a spectrum reserve ensures that opportunities will remain open for the future development of the sector. Where TSB is not already firmly established, the capacity and interest of a country’s population to engage in TSB can be expected to progressively increase as the sector develops and persons become familiar with it and its potential. However, if all available spectrum has been allocated for purposes other than TSB, freeing capacity for the establishment of new TSBs would be very difficult.

As in the case of access fees, whether to reserve spectrum for the third sector is ultimately a matter of weighing its potential social value against all other valid claims relating to the spectrum. Even when a reserve is established, it can be difficult to determine the adequate number of frequencies to allocate to the sector. For example, Argentinean law reserves 33% of the spectrum allocated to broadcasting for TSB.¹⁴³⁹ In contrast, the law of Chile only reserves 5% of the country’s broadcasting spectrum for

¹⁴³⁶ AMARC, above n 80, principle 7.

¹⁴³⁷ Inter-American Standards, above n 52, [109]; See also UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 37, art. 7(d).

¹⁴³⁸ See Section 2.1.1.2.

¹⁴³⁹ Argentinean Law, above n 14, art. 89(f)

TSB.¹⁴⁴⁰ In both cases, these percentages refer to the portion of the spectrum reserved for broadcasting, not to the whole of the countries' usable spectrum.

As explained in Sections 4.2.2 and 5.3.3, neither Australia nor Canada have specific spectrum reserves for TSB.¹⁴⁴¹ In the case of Canada, the lack of a spectrum reserve means that TSBs are required to compete directly against commercial broadcasters in the same licensing processes.¹⁴⁴² This forces the CRTC to weigh the merits of services of very different natures against each other and has become a barrier to the establishment of TSBs in areas where frequencies are scarce.¹⁴⁴³ While in Australia ACMA makes separate calls for applications for commercial and community stations, the lack of a spectrum reserve has also been a matter of concern for the country's TSBs. While Australia was undergoing the transition to digital terrestrial television, TSB representatives expressed serious concerns that the development of community television would be unable to continue due to the lack of a spectrum reserve for it during the transition.¹⁴⁴⁴ The Australian government acknowledged the validity of these concerns and a temporary spectrum reserve was established to ensure the continued viability of community television during the transition.¹⁴⁴⁵ However, it has recently been decided that this reserve will not continue after December 2015, placing the future of CTV services in Australia in doubt.

The Australian and Canadian experiences indicate that the third sector can attain high levels of development without a dedicated spectrum reserve. However, the experiences of both countries also indicate that the importance of a spectrum reserve for the sector increases as the level of competition for spectrum increases. In this sense, even if a country's third sector has attained a developed stage without the benefit of a spectrum

¹⁴⁴⁰ Chilean law, above n 15, art. 3.

¹⁴⁴¹ In the case of Australia, ACMA can be required through ministerial direction to reserve spectrum for community or State broadcasters (BSA, above n 30, s 31). However, there are no ministerially mandated reserves for TSB in the present. See www.acma.gov.au/theACMA/ministerial-directions

¹⁴⁴² See Section 5.3.2.

¹⁴⁴³ See Sections 5.2.2 and 6.2.2.

¹⁴⁴⁴ See Department of Communications, Information, Technology and the Arts, above n 596.

¹⁴⁴⁵ See Ibid; Jolly, Rhonda, 'Media of the People: Broadcasting Community Media in Australia' (2014) Parliament of Australia Parliamentary Library, Research Paper Series 2013-14, 15.

reserve, the lack of such a reserve may still threaten its continuity. In this respect, it is important to bear in mind that the early development of TSB in Australia and Canada took place in a different historical context, where competition for spectrum from the telecommunications sector was not as intense as it is today. A spectrum reserve may be essential for the development of the sector in jurisdictions where TSB is in an emergent stage.

6.1.3. Relation with Digital Multiplex Operators

As explained in Section 1.1, one viable model that could be adopted in relation to digital broadcasting is the assignment of spectrum capacity to multiplex operators, who are then given the freedom to decide whose content to carry. Where such a model is adopted, States effectively delegate some of their traditional functions in relation to broadcast licensing to the multiplex operators. In such cases, multiplex operators become intermediaries between TSBs and their access to the spectrum. Although a discussion of temporary issues arising from the digital transition is outside the scope of this thesis, the option of allocating spectrum to private multiplex operators is an unavoidable issue in considering the future of TSB.

The 2013 Joint Declaration of the UN, OAS and ACHPR rapporteurs on Freedom of Expression and the OSCE Representative on Freedom of the Media stated that transferring the decision making to multiplex operators does not exempt States from their obligation to promote diversity:

The promotion of diversity should be a mandatory criterion to be taken into account in decision-making in relation to the specific services that are provided on digital multiplexes, whether, or to the extent, that these decisions are taken by multiplex operators or regulators.¹⁴⁴⁶

¹⁴⁴⁶ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 38, art. 3(e).

When Australia transitioned to digital television, spectrum capacity for digital television was directly assigned to the incumbent analogue commercial and State broadcasters. However, access to spectrum for digital radio services is controlled by a multiplex operator.¹⁴⁴⁷ In Canada where a two tiered system is used – that is, broadcast licences and spectrum access are granted in parallel but via separate processes - the transition to digital has not modified the traditional State role.¹⁴⁴⁸

The above cited 2013 Joint Declaration outlines some measures which can be implemented to ensure that the digital transition does not impede access to spectrum by TSBs. These include authorizing TSBs to continue broadcasting using analogue technology even if broadcasters from other sectors are required to transition to digital,¹⁴⁴⁹ and imposing a ‘must carry’ obligation on multiplex operators in relation to TSBs.¹⁴⁵⁰ Before the decision was made to allocate spectrum to the sector, both of these measures were considered as alternatives to allow community television to continue in Australia following the digital transition.¹⁴⁵¹ In the case of digital radio, a different formula has been devised, whereby ‘joint ventures’ of existing broadcasters in a service area have the first option to the multiplex licences.¹⁴⁵² TSBs are granted the opportunity to participate in these ‘joint ventures’ through ‘digital community radio broadcasting representative companies’.¹⁴⁵³ Since the transition to digital radio in Australia is still ongoing, it remains to be seen whether this opportunity for representation will be sufficient to ensure that third sector radio stations obtain access to spectrum capacity in the multiplexes.

It is beyond the scope of this thesis to assess the desirability of governments transferring the power to decide whose content get broadcast through the spectrum to private multiplex operators. However, it is clear that TSBs would be very unlikely to attain

¹⁴⁴⁷ See <www.acma.gov.au/Industry/Broadcast/Spectrum-for-broadcasting/Broadcast-planning/digital-radio-licensing>.

¹⁴⁴⁸ This means that, as before the transition, Digital stations require a broadcast licence from the CRTC and approval to use a frequency from Industry Canada. See Section 5.3.2.2.

¹⁴⁴⁹ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 38, art. 3(d)(i)

¹⁴⁵⁰ Ibid, art. 3(g)(v).

¹⁴⁵¹ See Department of Communications, Information, Technology and the Arts, above n 596.

¹⁴⁵² See *Radiocommunications Act 1992* (Cth) ss 102C(2), 102D(2)

¹⁴⁵³ See Ibid, s 102C(5).

access to the spectrum if the decision lies solely in the hands of a commercial entity for whom economic considerations can be expected to be the priority. As noted in the previous section, the Australian experience indicates that lack of certainty regarding their ability to access spectrum after the digital transition has been a significant cause of concern for the country's third sector. For this reason, if transferring decision making to commercial operators is desired but the continuity of TSB is to be ensured in recognition of its role in contributing to the fulfilment of human rights, then measures such as subjecting multiplexes to 'must carry' rules in relation to TSBs need to be considered. Allowing TSBs to continue broadcasting using analogue technology is only a viable alternative if their audiences also maintain analogue receivers; if audiences have fully transitioned to digital only receivers, there is no point in continuing analogue transmissions.¹⁴⁵⁴

6.2. Licensing Framework

In Chapter 2, it was argued that TSB should be legally recognized as a distinct form of broadcasting. It was explained that one way in which the sector can be supported is through the creation of a specific licence category for TSB with special licence conditions aimed at aiding the development of the sector. In addition, Chapter 3 explained that, when TSBs benefit from privileged access to spectrum, government funding or regulatory concessions, then it can also be justified, as a quid pro quo, to incorporate restrictions or requirements into TSB licences over and above those that apply to other licence categories. Sections 6.4 to 6.7 will make recommendations regarding the regulatory framework that should apply to broadcasters licensed under a special TSB category. Before proceeding to this, however, this section will discuss and make recommendations regarding the framework that should be used for the issue and renewal of broadcasting licences created specifically for TSB services.

¹⁴⁵⁴ In Australia the delay in transitioning to digital transmission by community television stations while many households have already transitioned to digital receivers has negatively affected the audience levels of the sector [See Community Broadcasting Association of Australia et al, *Community Broadcasting and Media Year 2015: A five-year plan to create the world's most innovative, accessible community media sector* (2009)]

6.2.1. Eligibility

Eligibility for TSB licences is normally limited to registered not-for-profit organizations.¹⁴⁵⁵ Eligibility can be open to not-for-profit entities in general or limited to specific types of entities. For example, the laws of Sweden and Poland provide closed lists of the type of legal entities that are eligible.¹⁴⁵⁶ In this respect, the law of Chile is noteworthy in that it lists a wide range of organizations as eligible, such as sports clubs and trade unions, but specifies that other types of private, not-for-profit entities are also eligible.¹⁴⁵⁷ In the UK, instead of a list of eligible entities, the legislation provides a list of entities which are disqualified from holding community licences, such as non-incorporated bodies and those who already hold non-community broadcast licences.¹⁴⁵⁸

As explained in chapter 4, in Australia the BSA only requires that a non CTV community licensee must be a company formed in Australia or its external territories.¹⁴⁵⁹ This does not expressly exclude for-profit or commercial entities from eligibility.¹⁴⁶⁰ However, as the Act requires community stations to be operated on a not-for-profit basis, it is unlikely that ACMA would deem organizations incorporated using for-profit legal structures as suitable to hold community licences.¹⁴⁶¹ All incorporated not-for-profit organisations are eligible for licences.¹⁴⁶² ACMA has, however, expressed a preference for prospective licensees to be structured as either incorporated associations or companies limited by

¹⁴⁵⁵ As discussed in Sections 3.3.1 and 6.3.1, this serves the purpose of protecting the not-for-profit nature of TSB.

¹⁴⁵⁶ Broadcasting Act of December 29, 1992 (Consolidate Unofficial Text) (Poland), art. 39b trans <www.krrit.gov.pl/Data/Files/_public/pliki/office/broadcasting-act_10-08-2011.pdf> ‘*Polish Law*’; *The Swedish Radio and Television Act (2010)* (Sweden), ch 12(4) trans <www.radioochtv.se/Documents/Styrdokument/Radio%20and%20Television%20Act.pdf?epslanguage=sv> ‘*Swedish Law*’

¹⁴⁵⁷ Chilean law, above n 15, art. 9.

¹⁴⁵⁸ UK Order, above n 9, ss 6-7; See also Ofcom, Notes of Guidance for Community Radio Licence Applicants and Licensees, s 4.3.

¹⁴⁵⁹ See Section 4.3.2.1.

¹⁴⁶⁰ See Section 4.3.2.1.

¹⁴⁶¹ See Australian Communications and Media Authority, above n 798, 3.

¹⁴⁶² Non incorporated not-for-profit groups are not considered ‘companies’ under Australian law and are therefore not eligible for community licences. See Australian Communications and Media Authority, above n 804, 9.

guarantee, as it considers these types of structures more suitable for the fulfillment of the policy goals set for community stations.¹⁴⁶³

As noted in Section 4.3.3.3, CTV licences are the only type of TSB licence for which Australian legislation establishes a specific eligibility requirement, this being that licensees can only be companies limited by guarantee. The purpose of this requirement is to ensure that CTV licensees are subject to the higher accountability and reporting requirements specified by the law for companies limited by guarantee.¹⁴⁶⁴ It is unclear why these accountability requirements were thought necessary for CTV licensees and not for other types of TSBs, but the higher value of television air-time and the higher production costs associated with television may provide the rationale for this special treatment.

In Canada, eligibility for community, campus and native radio licences is expressly restricted to not-for-profit organizations.¹⁴⁶⁵ However, no particular type of entity is specified in any of the CRTC policies. On the other hand, commercial entities are eligible to hold ethnic and community television licences, since these types of services are not third sector specific and thus can operate for-profit.¹⁴⁶⁶

In both Canada and Australia, TSB stations are required, as an additional condition of eligibility, to comply with structural governance requirements that ensure the opportunity for community members to participate in the administration of the service.¹⁴⁶⁷ These types of requirements form part of the regulation of the governance of TSBs which is discussed further in Section 6.7. As will be discussed in Sections 6.8.2 and 6.8.4, Canada

¹⁴⁶³ In practice, most non-indigenous community radio station licensees are incorporated associations, while most indigenous broadcasters are controlled by the special indigenous corporations provided for in Australian law. However, some TSB licensees are registered as cooperatives. See Australian Communications and Media Authority, above n 798, 3; Australian Communications and Media Authority, above n 801, 24.

¹⁴⁶⁴ See Explanatory Memorandum, *Broadcasting Legislation Amendment Bill (No2) 2002* (Cth), 7.

¹⁴⁶⁵ See Section 5.3.2.1.

¹⁴⁶⁶ Ibid.

¹⁴⁶⁷ See Sections 4.3.9 and 5.3.6; See Also Section 6.7.

also imposes special structural requirements as eligibility conditions for campus and native radio stations.

If TSBs are to be recognized as a distinct legal class, differentiated from the commercial sector by their not-for-profit nature, then ideally TSB licensees should be registered, not-for-profit entities. Legal structures designed for commercial purposes are unlikely to be adequate for TSB purposes. As discussed in Section 3.4, rules applicable to not-for-profit organizations are usually designed to promote some of the same goals as TSB regulation, such as preventing special policy concessions from being exploited for private profit and ensuring that any funds raised by the organizations are used for their declared purposes. Where this is the case, requiring TSB licensees to be not-for-profit organizations reinforces the objectives of the broadcasting regulatory framework.

Neither Australia nor Canada allow individuals or non-incorporated groups to apply for TSB licences. This alternative is, however, provided in some other jurisdictions such as Ireland and Uruguay.¹⁴⁶⁸ While it is normally preferable for TSB licensees to be registered not-for-profit entities, providing prospective TSB licensees with other alternatives may be valuable in certain cases. In some jurisdictions, the procedures for the incorporation of not-for-profit organizations are excessively complex and expensive, making the requirement to incorporate a significant burden for prospective TSBs.¹⁴⁶⁹ Where the requirement to incorporate as a not-for-profit entity would be too burdensome, allowing prospective TSBs to apply as individuals, rather than as incorporated groups or commercial entities, would aid the development of the sector.

In India, an interesting condition of eligibility is that prospective licensees must have a proven history of community work within their licence area.¹⁴⁷⁰ In Uruguay, while this is not an eligibility requirement, it is taken into account for selection in a competitive

¹⁴⁶⁸ Irish Law, above n 75, s 64; Uruguayan Law, above n 12, art. 6.

¹⁴⁶⁹ For a Discussion See Irish, Leon E., Robert Kushen and Karla W. Simon, *Guidelines for Laws Affecting Civic Organizations* (Open Society Institute, 2nd ed, 2004).

¹⁴⁷⁰ Indian Policy, above n 11, art. 1(a).

licensing process.¹⁴⁷¹ While a history of community or social work can be taken into account as an indication of an applicant's commitment and capacity to provide a community service, such background should not be an eligibility condition. Both the Australian and Canadian experience clearly demonstrate that TSB initiatives do not always come from those that have already participated in other areas of the voluntary sector; high quality TSB services can be provided by groups created for the sole purpose of TSB.

6.2.2. Licensing Process

The processes used for the licensing of TSB stations in Australia and Canada were described in Sections 4.3.2 and 5.3.2, respectively. As explained in those Sections, in Australia applications are specific to community licences; prospective TSBs do not compete against commercial broadcasters in the same comparative process.¹⁴⁷² In contrast, in Canada the licensing processes are not separate and TSB and commercial broadcasters directly compete against each other.¹⁴⁷³

Weighing the merits of commercial and TSB applications against each other is difficult, as the services are completely different in nature and purpose. In addition, commercial applicants normally possess greater financial resources, which could give them an advantage over those proposing to provide TSB services.¹⁴⁷⁴ For these reasons, the model followed in Australia, where separate applications are made for each sector, is preferable.

The CRTC has acknowledged that comparing proposals for commercial and TSB services is not ideal.¹⁴⁷⁵ However, it considers it to be unavoidable in areas where frequencies are scarce.¹⁴⁷⁶ As discussed in Section 6.1, this is an issue which ideally

¹⁴⁷¹ Uruguayan Law, above n 12, art. 8(c).

¹⁴⁷² See Section 4.2.2.

¹⁴⁷³ See Section 5.2.2.

¹⁴⁷⁴ See Section 2.1.1.1.

¹⁴⁷⁵ See CRTC, *Achieving a Better Balance: Report on French-language Broadcasting Services in a Minority Environment*, Public Notice 2001-25, 169.

¹⁴⁷⁶ *Ibid.*

should be dealt with by the adoption of a specific spectrum reserve for TSB. This policy, which effectively moves the decision between the different types of services from the to the frequency planning stage, relieving the licensing authority from the need to weigh the merits of proposals for services of completely different natures against each other at the licensing stage. As will be discussed in Section 6.8, separate frequency reserves and licensing procedures can also be established for special types of TSBs such as ethnic or indigenous broadcasters.

As explained in chapters 4 and 5, in Australia, the ACMA initiates the call for licences, while in Canada the process is normally commenced by a prospective broadcaster who first needs to identify a suitable frequency with Industry Canada.¹⁴⁷⁷ It is not desirable to require prospective TSBs to identify suitable frequencies, especially as the need to hire engineering experts to assist in locating a frequency can be a significant economic barrier to the establishment of new TSB outlets.¹⁴⁷⁸ Moreover, a general call for applications may generate interest in establishing a TSB station where such interest had not previously existed. For this reason, licensing authorities should be proactive in identifying where the establishment of a TSB service will be beneficial and issuing calls for applications. Despite this, licensing authorities may not always be able to identify all the areas where a TSB service would be viable and where sufficient interest in establishing one exists. For this reason, there is also value in licensing authorities being open to receiving proposals from persons who are interested in TSB and who have been able to independently identify a free and suitable frequency. However, the identification of frequencies by potential applicants should be an alternative only, not the sole mechanism for determining available frequencies.¹⁴⁷⁹

6.2.3. Licensing Criteria

¹⁴⁷⁷ See Sections 4.3.2.2 and 5.3.2.2.

¹⁴⁷⁸ Inter-American Standards, above n 52, [66].

¹⁴⁷⁹ This means that licensing authorities should generally be proactive in making call for applications where a TSB service is needed and frequencies are available instead of being merely reactive.

As explained in Section 6.1.1, price-based spectrum distribution is not compatible with the desired role of TSB in lowering the economic barriers to participation in broadcasting. For this reason, a comparative hearing or beauty contest system, despite its flaws, is the most viable alternative for the issuing of TSB licences. As already noted, both Australia and Canada use this type of system for TSB licensing.¹⁴⁸⁰ When issuing broadcasting licences through this mechanism, it is essential that the licensing criteria be prescribed *ex ante* and clearly defined.¹⁴⁸¹ This provides both certainty to applicants and transparency to the public.¹⁴⁸² The rest of this sub-section discusses what criteria should be used to decide between competing TSB applications and how they are to be assessed.

6.2.3.1. Capacity to Deliver the Service

As noted in Chapter 2, the capacity to deliver the proposed service is a criterion commonly used in comparative processes for the assignment of broadcasting licences in general.¹⁴⁸³ When TSBs compete against commercial broadcasters in the same licensing process, a licensing criterion based on capacity to deliver the service can become a significant barrier to the establishment of TSBs, as commercial entities normally have better financial resources and are in a better position to demonstrate capacity.¹⁴⁸⁴ This is one reason why the licensing processes for TSB and commercial broadcasters should be separate. However, where prospective TSBs compete only against each other, taking into consideration the capacity of the applicants to deliver their proposed service seems reasonable.

In Australia, ACMA assesses the capacity of prospective community broadcasters in three areas: management, technical and financial. In relation to management capacity, ACMA assesses whether the governance structure of the applicant will allow it to fulfil its requirements in relation to operating not-for-profit and representing a community

¹⁴⁸⁰ See Sections 4.3.2.2 and 5.3.2.2.

¹⁴⁸¹ See Inter-American Standards, above n 52, [63].

¹⁴⁸² See *Ibid.*, [63].

¹⁴⁸³ See Section 2.1.1.1.

¹⁴⁸⁴ *Ibid.*

interest.¹⁴⁸⁵ To establish technical capacity, applicants need to demonstrate the equipment they will use is compliant with the technical requirements¹⁴⁸⁶ of the licence and that the applicant has technical experience with broadcasting or, failing that, that the applicant has access to support from an employee, volunteer or other third party with the required technical expertise.¹⁴⁸⁷ As to financial capacity, applicants need to present financial plans that explain how they will ensure the station's sustainability for the duration of the licence.¹⁴⁸⁸ In Canada, the CRTC assesses the management and financial capacity of prospective licensees through similar means, while Industry Canada verifies the adequacy of the applicants' technical plans.¹⁴⁸⁹ Similar means of verifying capacity are also used in the U.K.¹⁴⁹⁰

Requiring applicants to submit their managerial, technical and financial plans is a reasonable requirement.¹⁴⁹¹ However, licensing authorities should take into account the nature of TSB and the limited resources of the sector and, accordingly, not impose excessively complex requirements.¹⁴⁹² Successful experience in other types of third sector initiatives can be considered as an indicator of an applicant's capacity. For example, in Uruguay, whether applicants have a successful background in social or community work is taken into account as a selection criterion.¹⁴⁹³

In relation to the use of capacity as a licensing criterion, AMARC has observed:

¹⁴⁸⁵ Australian Communications and Media Authority, above n 804, 15-16. This is discussed further in Section 6.7.1

¹⁴⁸⁶ Technical requirements include elements such as transmission power, transmission frequency and signal quality.

¹⁴⁸⁷ Australian Communications and Media Authority, above n 804, 16-17.

¹⁴⁸⁸ Ibid, 16.

¹⁴⁸⁹ See for example CRTC, *Application to Obtain a Broadcasting Licence to Operate a Campus or Community Radio Undertaking (including low-power)*, Form 114 s 3 <www.crtc.gc.ca/eng/forms/efiles/fl14s.htm>.

¹⁴⁹⁰ See Ofcom, above n 1458, ss 2.4 and 4.9.

¹⁴⁹¹ It falls outside the scope of this thesis to discuss in-depth the matter of the nature and composition of broadcast licensing authorities. However, the ideal would be for licensing to be in charge of an independent statutory body whose members have expertise in the different fields required (i.e engineering and economy) to properly assess the applicants' proposals. See Committee of Ministers of the Council of Europe, *Recommendation to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector* CM/R(2000)23.

¹⁴⁹² See Inter-American Standards, above n 52, [66].

¹⁴⁹³ Uruguayan Law, above n 12, art. 8(c).

The economic capacity of the proponent should not be a deterrent nor a selection criterion, although there must be a reasonable requirement for the station to demonstrate that it is sustainable.¹⁴⁹⁴

As discussed in Section 4.2.1, it was argued in the Australian Parliament's SCESA Second Progress Report on All Aspects of Television and Broadcasting that financial capacity should not be a licensing criterion for community stations. It was argued that it was preferable to licence stations where the need for them existed and to require licensees to surrender the licence if they became unable to continue delivering the service.¹⁴⁹⁵ A similar approach was taken by the CRTC in Canada when it first began to issue campus licences.

In competitive scenarios, where multiple groups compete for a single TSB licence, taking into account the capacity of different groups is valid. However, capacity should never be the sole criterion, as the international human rights obligations of States require authorities to also balance other considerations such as each applicant's potential contribution to diversity and the needs of the specific audiences to which each proposed service is aimed.¹⁴⁹⁶ However, in non-competitive scenarios where a single TSB applicant exists, it is preferable to issue a licence even if the applicant's capacity is uncertain. In areas that are underserved by other broadcasting services, flexibility regarding capacity concerns can greatly aid the development of TSB. Both Canada and Australia have addressed this through the implementation of developmental licences, which prospective TSB licensees can access in order to build up and demonstrate their capacity before being issued with a regular licence. These licences are discussed in Section 6.2.6.

6.2.3.2. Community Needs and Potential Contribution to Diversity

¹⁴⁹⁴ AMARC, above n 80, principle 11 .

¹⁴⁹⁵ Standing Committee on Education, Science and the Arts, above n 582.

¹⁴⁹⁶ Both the Australian and Canadian systems require the respective licensing authorities to do this.

The needs of the community to be served and the potential contribution of the proposed service to diversity are used as selection criteria for the licensing of TSBs in various jurisdictions, including Australia and Canada.¹⁴⁹⁷ As discussed throughout Chapter 2, TSB can play an important role in addressing needs that are not met by mainstream outlets and in improving the diversity of content available to the population in fulfillment of the public's right to information. For this reason, these two criteria must be taken into account when licensing TSBs. This is especially the case when TSBs have been granted special concessions or support because of their expected contribution to community needs and/or diversity.

Although separate, these criteria are strongly related. The 'community needs' criterion refers to those broadcasting needs which licensing authorities have identified and which are not already being served by existing broadcasting services.¹⁴⁹⁸ The potential contribution to diversity of a proposed service should be assessed on the basis of the distinctiveness of its proposed output in relation to that of existing outlets.¹⁴⁹⁹ A service which will address an unmet community need is self-evidently likely to contribute to the general diversity of content available to the population of the licence area.

Although there is a strong correlation between these two criteria, they will not always coincide. For example, a service proposing to broadcast in an indigenous, minority or immigrant community language where no other broadcasting outlets are doing so may address an important need of a sector of the licence area's population. However, if the focus is to bring information already available on other services to those who cannot access it due to a language barrier, the proposed service will not contribute to the overall diversity of content available to the general public.

As noted in Section 1.3.1, TSB stations can be licensed to serve a geographic community or a specific community of interest. However, unless separate licensing processes are

¹⁴⁹⁷ See Section 4.3.2.3 and 5.3.2.3; See also Ofcom, above n 1458, s 2.3(b)-(d).

¹⁴⁹⁸ As already noted, this is the approach adopted by ACMA. See Section 4.3.2.3.

¹⁴⁹⁹ As already noted, this is the approach adopted by ACMA. See Section 4.3.2.3; See also CRTC, Broadcasting Decision 2013-68.

established for TSBs aiming to serve general and special audiences, the needs and diversity of content available to the whole of the population of the licensed area would need to be considered by the licensing authority. ACMA has stated that although it considers the interest of the whole community of the licence area, this does not always mean that services aimed at general audiences will be preferred over those aimed at a specific sub-group.¹⁵⁰⁰ However, in practice, applicants proposing to serve special interest communities may be at a disadvantage unless the general needs of the community are deemed to be sufficiently catered for.¹⁵⁰¹ The CRTC is also willing to license services aimed at special interest communities.¹⁵⁰² In Canada, such services may have an advantage in certain cases because they are likely to have less impact on the viability of existing broadcasters, including commercial broadcasters. For this reason they may be licensed in markets which the CRTC considers are unable to support additional general services.¹⁵⁰³

Weighing the desirability of improving diversity of content in general against the special programming needs of specific groups within the licence area is not an easy process. Licence areas where both specific and general programming needs are under-served are even more challenging for licensing authorities than those where there are adequate services. As will be discussed in Section 6.8, a possible solution is reserving spectrum for specific types of TSBs, such as ethnic and indigenous broadcasters, and establishing separate processes for applications for those types of broadcasters. While the decision would remain difficult, making an *a priori* reservation may be easier than making a decision during the licensing process, where the licensing authority must also take into account the specifics of each case and weigh additional factors such as the capacity of the applicants. While a special reserve for different types of TSBs would be ideal, this may not be possible: spectrum may be scarce or the demand for these particular types of TSB services may not be sufficient to justify a special reserve. In these cases other

¹⁵⁰⁰ See Section 4.3.2.3.

¹⁵⁰¹ As noted in Section 4.2.7.2, the need to compete against general community broadcasters has been identified in Australia as a barrier to the establishment of special interest services such as indigenous broadcasters.

¹⁵⁰² See for example CRTC, Broadcasting Decision 2013-68.

¹⁵⁰³ As explained in Section 5.3.2.3, the potential impact upon the viability of existing broadcasters is a licensing consideration in Canada.

alternatives can be considered. As noted in Section 4.3.2.3, in Australia, the relevant Minister can issue directions to the ACMA to prioritize a specific community interest for licensing. A licensing authority could also be empowered to call exclusively for a specific type of TSB service if it has identified a need for one. Such solutions allow special cases to be addressed where a clear need for a special interest TSB exists in a specific instance, but the need is not general enough to justify creating a special licensing framework or establishing a separate spectrum reserve.

Given that TSB has great potential to contribute to the needs of both general and specific groups, both need to be taken into account in TSB licensing. Despite the measures that can be taken to remove delicate decisions from the licensing process itself, the reality is that licensing authorities will sometimes find themselves in the position of having to decide between concerns about diversity, the needs of the wider community and the needs of more specific groups. These situations are simply unavoidable in merit-based comparative processes.

In terms of assessment, requiring applicants to present a plan specifying the type of programming they propose to broadcast is a practical mechanism for assessing their potential contribution to diversity or the way in which they would address community needs. It is possible that applicants may embellish their proposals to improve their chances of being awarded a licence. This is an unavoidable risk in a comparative process. For this reason it is desirable to establish - through regulation or individual licence conditions - requirements which ensure that licensees fulfil the minimum expectations policy makers have set for them in the areas of diversity of content or service to special need audiences. Section 6.6 will discuss examples of conditions which can be used for this purpose.

Individual licence conditions can also be used to directly require licensees to comply with the promises made in their original proposals. While this is valid, the Canadian experience suggests that it is not always practical to require licensees to adhere exactly to

promises made at the time of licensing, particularly in the case of long term licences.¹⁵⁰⁴ Unexpected changes in market conditions or the financial situation of licensees may render broadcasters of any sector unable to deliver a service in accordance with their original plans, even if these plans were sincere when presented. In addition, and as will be discussed in Section 6.4, many TSBs depend on government funding, which is not always stable. These TSBs are especially at risk of running into unforeseen financial difficulties during their licence term. This relationship between financial resources and the ability to fulfil obligations regarding diversity of content and satisfying community needs is the reason why it is legitimate to take into consideration the financial capacity of the applicants in the comparative processes.

6.2.4. Licence Duration

The duration of broadcast licences (of any sector) should be specified from the moment they are issued.¹⁵⁰⁵ Their duration should not be excessively short since, as noted by the OAS Special Rapporteur on Freedom of Expression, ‘excessively short time limits would make it difficult for community or social radio stations to truly carry out their projects’.¹⁵⁰⁶ However, it is also undesirable for licences to be issued for excessively long terms, as States have a duty to periodically review whether spectrum is being optimally used for the public good.¹⁵⁰⁷

In Australia, community licences are issued for a fixed term of five years, which is the same term for which commercial licences are issued.¹⁵⁰⁸ In Canada, the CRTC is authorized to issue licences for any term up to seven years.¹⁵⁰⁹ Short term licences are sometimes issued at renewal when there are concerns regarding a licensee’s past

¹⁵⁰⁴ See Task Force on Broadcasting Policy, above n 309, 184.

¹⁵⁰⁵ See for example Access Airwaves, above n 6, principle 22.3.

¹⁵⁰⁶ Inter-American Standards, above n, [71].

¹⁵⁰⁷ See for example Supreme Court of Mexico, Decision, Action of Unconstitutionality 26/2006, 2007.

¹⁵⁰⁸ See Section 4.3.2.4.

¹⁵⁰⁹ See Section 5.3.2.4.

performance.¹⁵¹⁰ Other examples of licence terms in jurisdictions around the world include five years in India,¹⁵¹¹ any term up to a maximum of five years in the U.K,¹⁵¹² and 10 years in Argentina, Chile, Poland and Uruguay.¹⁵¹³

Establishing a single term for which all TSB licences are to be issued - as done in Australia - relieves regulators from having to determine a licence term in each individual case and justify that decision to licensees, unsuccessful applicants and the public. Conversely, providing the licensing authority with some flexibility, as in the Canadian system, may allow it to address specific issues, such as concerns regarding an applicant's capacity to sustain its service long term. The Australian and Canadian experiences do not provide any definitive indication regarding which system is better; however, in neither country has the duration of licences been identified as an issue of concern for any of the stakeholders. If flexibility is preferred, then ideally, a minimum and maximum term should be set *a priori* in order to ensure licences are not excessively short or long. A system of shorter term development licences, such as that used in Australia and Canada, can cater for new entrants when concerns exist regarding their capacity to provide the service.

In relation to the duration of TSB licences, there is no 'one size fits all' ideal term. The needs of each jurisdiction are different, so there may not be a single term which would be adequate for all cases. However, terms ranging between five and ten years, such as those observed in the jurisdictions analysed in this thesis, seem to offer an appropriate balance between the need of stations to have sufficient time to develop their projects with certainty and the States' interest and duty in reassessing periodically the best uses of radio frequencies.

6.2.5. Licence Renewal

¹⁵¹⁰ See CRTC, *Revised Approach to Non-Compliance by Radio Stations*, Broadcasting Information Bulletin 2011-347, [8].

¹⁵¹¹ Indian Policy, above n 11, art . 4(i).

¹⁵¹² Ofcom , above n 1458, s 1.21.

¹⁵¹³ Argentinean Law, above n art 39; Chilean Law, above n 15, art 10; Polish Law, above n 1456; Uruguayan Law, above n 12, art . 9.

As explained in Sections 4.3.2.4 and 5.3.2.4, both Australia and Canada have mechanisms in place to review the performance of TSB licensees after their licences have come to term. Both the CRTC and ACMA are empowered to convene a public hearing and to receive submissions from the public regarding the performance of a licensee, as well as to refuse the renewal of a licence if they deem it in the public interest.¹⁵¹⁴ However, neither country requires, as a matter of standard procedure, for TSB licensees to participate in a new comparative hearing against other parties who may be interested in the licence. In contrast, in the U.K, licences can only be renewed for a single term. After this, a new call for applications is made and the licensee must compete in a comparative process against potential new entrants.¹⁵¹⁵ Certainty that they will retain their licences as long as they deliver their services satisfactorily is beneficial for TSB licensees, as it allows them to engage in longer term planning. However, it deprives other groups who may also be interested in TSB of the opportunity to access licences. The OAS rapporteur on Freedom of Expression and the Supreme Court of Mexico consider that allowing other interested parties to compete for a licence after it has reached its term is a requirement of freedom of expression.¹⁵¹⁶ The opposite view - that broadcast licences should always be renewed except in cases of non compliance - has been expressed by the Article XIX Campaign, an international NGO which focuses on Freedom of Expression.¹⁵¹⁷

Comparing existing broadcasters with potential new entrants in the same process is difficult. Existing broadcasters have had the opportunity to demonstrate their capacity to provide their service, while the capacity of other applicants would be unproven.¹⁵¹⁸ However, prospective new entrants can easily identify the shortcomings of the incumbents and present proposals which address them. In the commercial sector this problem can be addressed by using an alternative to comparative hearings, such as an

¹⁵¹⁴ See Sections 4.3.2.4 and 5.3.2.4.

¹⁵¹⁵ See Community Radio Amendment Order 2010 (U.K), s. 5.

¹⁵¹⁶ Inter-American Standards, above n 52, [76]; Supreme Court of Mexico, Decision, Action of Unconstitutionality 26/2006, 2007.

¹⁵¹⁷ Access Airwaves, above n 6, principle 22.5.

¹⁵¹⁸ See *Citizens Communications Center v. Federal Communications Commission* 447 F.2d 1201 (D.C. Cir., 1971), [3]; *Central Florida Enterprises v. Federal Communications Commission*, 598 F.2d 37 (U.S. App. D.C., 1978), [84].

auction system. However, as already explained, this option is not viable for TSB licences. There is also a risk that the power to decide whether to renew or not a licence could be abused by governments to reward or punish licensees for their editorial decisions.¹⁵¹⁹ In addition, the mere knowledge that retaining their licence after its expiration depends on a government decision may lead licensees to exercise undesirable self-censorship.¹⁵²⁰ For this reason, a system in which renewal is expected unless a licensee breaches the applicable regulations or its licence conditions could be considered a guarantee for freedom of expression. Renewals can also be considered preferable because they guarantee uninterrupted service to audiences. If a new licensee was selected in replacement of an incumbent, audiences may be deprived of services for some time until the new licensee can start operations, which would be detrimental to their right to access information.¹⁵²¹ Finally, a system where renewal is the norm reduces the cost of regulation as it relieves licensing authorities from the expense of conducting new comparative assessments every time a licence comes to term.

Although the benefits of an expectation of renewal are considerable, it is not appropriate to grant licensees an indefinite right to have their licence renewed as long as they comply with the applicable conditions. Doing this would be akin to making the licence a form of property (albeit non-transferable).¹⁵²² If all frequencies available for broadcasting in a service area were allocated and licensees' rights were permanent, all other persons would be permanently excluded from even aspiring to participate in broadcasting. This would not be acceptable under freedom of expression.¹⁵²³

¹⁵¹⁹ See Inter-American Standards, above n 52, [76].

¹⁵²⁰ See *Citizens Communications Center v. Federal Communications Commission* 447 F.2d 1201 (D.C. Cir., 1971), [36].

¹⁵²¹ Interruptions to the service could also be avoided by providing an incumbent which fails to win renewal with a short-term licence extension until the new licensee is ready to start operations. However, authorities may find it undesirable to allow licensees who no longer have a vested interest in maintaining a level of service to retain their licences to continue broadcasting.

¹⁵²² For this reason, those who favor market based distribution of the spectrum also tend to favor perpetual expectancy of renewal. See Sidak, J. Gregory, 'An Economic Theory of Censorship' (2004) 11 *Supreme Court Economic Review* 81, 96-100; Eisenach, Jeffrey A., *The Equities and Economics of Property Interests in TV Spectrum Licences*, 4-6 <www.nab.org/documents/newsRoom/pdfs/011614_Navigant_spectrum_study.pdf>.

¹⁵²³ See Comment, 'Implications of *Citizens Communications Center v. FCC*' (1971) 71(8) *Columbia Law Review* 1500, 1514-5; Supreme Court of Mexico, Decision, Action of Unconstitutionality 26/2006, 2007, 52.

In addition to the above, the needs of audiences can change over time. For example, a station may have been licensed specifically to provide youth or elderly oriented programming, but the need to cater to these age groups may change due to demographic shifts in the licence area. A general community station may have been licensed in a service area, but licensing an ethnic or indigenous station could become necessary due to changes in the composition of the area's population. Licensing authorities should be obliged to consider if the services proposed by other parties would better serve the needs of the licence area's population, even if the incumbent licensee has successfully fulfilled the requirements of its licence. The licensing authority may not always have the knowledge or capacity to identify how the needs in the licence area may have changed since a licence was last issued or renewed. Analyzing competing proposals can assist the authority to identify these changes. Subjecting the renewal decision to a public process open to public participation can also help identify any changes to community needs. However, persons may be more interested to participate in the processes if they are also allowed to present their own proposals.¹⁵²⁴ Even if the incumbent licensee is selected for renewal, the competitive process can reveal issues which may be addressed through modifying its licence conditions.

While conducting new licence hearings each time a licence comes to term represents a financial and administrative burden for Sates, this is a burden they must borne in recognition of their duties toward the public and the rights of prospective broadcasters. It is certain that, all other things being equal, avoiding interruptions in the service is preferable. This justifies giving preference to incumbents where the proposals are otherwise equal but not negating to all the opportunity to present competing proposals. If a renewal aspirant has delivered a valuable service throughout the duration of its licence, then this should be considered within the comparative process as a strong indicator of capacity. This provides an incentive for licensees to deliver the best possible

¹⁵²⁴ See *Citizens Communications Center v. Federal Communications Commission* 447 F.2d 1201 (D.C. Cir., 1971) [36]–[37].

service for the duration of their licence.¹⁵²⁵ Conversely, a guaranteed renewal subject only to compliance with the minimum licence requirements would incentivize complacency.

While conducting licence renewals through a public and, if other applications are received, competitive process is normally the ideal, the licensing authority should not always be required to follow this process. In areas where there exists no competition for licences, conducting a renewal hearing may be an unnecessary burden for both the licensing authority and the TSB licensees. Considering that TSBs servicing this type of area tend to operate with very limited resources, a streamlined renewal process is more appropriate. For this reason, it is advisable to provide the licensing authority with the flexibility to forego a formal renewal hearing for licences in undeserved markets when no concerns regarding the incumbent's performance have arisen.¹⁵²⁶

6.2.6. Developmental Licences

As discussed in Sections 4.3.3.2 and 5.3.2.5, Canada has implemented a system of developmental licences for community and campus radio while Australian law allows for the issuing of special 'temporary' community broadcasting licences. These two types of licences serve a similar purpose: allowing prospective TSBs to be established through a simplified licensing procedure. In both cases, one of the most notable features is that an applicant's capacity is not taken into consideration as a licensing criterion.¹⁵²⁷ For this reason, developmental or temporary licences can be used by prospective TSBs to build up and demonstrate their capacity to provide the service before applying for a regular licence. In this manner, establishing special licences of this type can greatly aid the development of the sector if a more complex system is preferred for the issuance of regular licences. In addition, issuing developmental licences through an expedited

¹⁵²⁵ See *Citizens Communications Center v. Federal Communications Commission* 447 F.2d 1201 (D.C. Cir., 1971) [35].

¹⁵²⁶ As noted, the CRTC is empowered to omit conducting a public hearing if it is satisfied that the public interest does not require it to convoke one. See BA, above n 30, s 18(2).

¹⁵²⁷ See Sections 4.3.3.2 and 5.2.3.5.

process can ensure that services start operating as soon as possible where there is a need for them.

Neither of the two countries offer successful developmental licensees an automatic transition to regular licences. In both cases, developmental licensees applying for a regular licence are required to follow the standard licensing procedures and compete against other applicants.¹⁵²⁸ This is appropriate, as other parties who may be interested in a TSB licence also have a right to have their proposals judged on their merits. Applicants' successful performance as a developmental licensee should, however, be taken into consideration as a clear indicator of capacity.

As noted in Section 5.2.3.5, the current term of Canadian developmental licences is five years. In the past, the term of these licences was three years.¹⁵²⁹ The CRTC increased the term after concluding that sometimes three years was insufficient for licensees to build a viable service.¹⁵³⁰ In the case of Australia, the term for 'temporary' licences is significantly shorter as it is for a maximum of one year.¹⁵³¹ For the developmental licences to provide a real opportunity for prospective TSBs to build capacity they must be of a reasonable length.¹⁵³² While the short length of temporary licences has not been identified as a major issue in Australia, this may be because licensees are allowed to re-apply indefinitely and the licensing process is not burdensome.¹⁵³³ This contrasts with the position in Canada, where developmental licensees are always required to apply for a regular licence if they want to continue broadcasting after the expiration of their developmental licence.¹⁵³⁴

6.2.7. Exemptions from the Licensing Process

¹⁵²⁸ See Sections 4.3.3.2 and 5.2.3.5.

¹⁵²⁹ 2000 Campus Policy, above n 1061, [69]; 2000 Community Policy, above n 1061, [61].

¹⁵³⁰ 2010 Policy, above n 1009, [38].

¹⁵³¹ See Section 4.3.2.2.

¹⁵³² 2010 Policy, above n 1009, [38].

¹⁵³³ See Section 4.3.2.2.

¹⁵³⁴ See Section 5.2.3.5.

As noted in Section 5.2.2 , the CRTC has exempted native broadcasters in certain remote areas and low-power religious broadcasters from the requirement to obtain a broadcast licence. In Australia, the concept of ‘open narrowcasting’ licences serves a similar purpose, as narrowcasting is a ‘class licence’ and those with proposals which fall under this category are not required to apply for individual licences.¹⁵³⁵ These exemptions, however, do not confer automatic access to spectrum. In Canada, exempted applicants need to identify a suitable frequency and obtain approval from Industry Canada,¹⁵³⁶ while narrowcasters in Australia need to obtain a transmitter licence under the *Radiocommunications Act* or negotiate carriage with a third party with transmitter rights if they want to deliver their services over the air.¹⁵³⁷

Exempting TSBs from undergoing a licensing process can aid the development of the sector by reducing the costs of entry. As with other measures of support, this can be justified in recognition of the potential of TSBs to advance social policy goals. The Australian and Canadian experiences indicate that providing exemptions is viable for areas where there is no competition for licences and, even in competitive areas, for low-power or special interest services with limited market impact.¹⁵³⁸ However, the Australian experience also evidences that the benefits of an exemption from the licensing process are seriously diminished if the cost of accessing the spectrum is not feasible for TSBs. As has been explained, the cost of the ‘apparatus’ licence required to operate a transmitter is a major barrier which has kept the narrowcasting licence category option from being a viable alternative for TSBs in Australia .¹⁵³⁹ In contrast, in Canada, where those exempted from broadcast licences only require technical approval in order to operate transmitters, TSBs more readily benefit from the available exemptions.

As discussed in Section 4.3.4, ACMA has proposed to facilitate the use of the narrowcasting licence class by RIBS by establishing reduced apparatus fees in remote

¹⁵³⁵ See Section 4.3.4.

¹⁵³⁶ See Section 5.3.2.6.

¹⁵³⁷ See Section 4.3.4.

¹⁵³⁸ While not exempted from the licence requirement, Canada has implemented an abbreviated licensing process for proposals with limited market impact. See Section 5.3.2.2. In the case of Australia the narrowcasting ‘class’ licence extends to the whole of the country’s territory.

¹⁵³⁹ See Section 4.3.4.

areas. While it is not clear if this proposal will ever be implemented, such a scheme of reduced fees for areas where frequencies are not scarce is a viable alternative to aid the establishment of TSBs if charging higher fees is deemed necessary in other areas.

In their 2013 joint declaration, the UN, OAS and ACHPR rapporteurs on freedom of expression and the OSCE representative on freedom of the media recommended, as a measure which can be taken to ensure the continuity of TSB after the transition to digital broadcasting, ‘allowing certain types of broadcasting services to be provided without a licence in certain designated spectrum bands’.¹⁵⁴⁰ Unlike the measures adopted in Australia and Canada, this would require spectrum to be specifically reserved for use by unlicensed TSBs. Designating a special frequency band that can be freely used for non-profit broadcasting purposes would be an even greater aid for TSBs than a mere exemption from the licensing requirement. This measure would exempt them not only from the administrative licensing procedure but also from other applicable costs such as the frequency search or transmitter fee costs applicable in Canada and Australia respectively. Implementing the rapporteurs’ recommendation will not always be technically feasible. However, if spectrum conditions permit, it should be considered, as it would greatly reduce the barriers of entry to TSB.

6.3. Financial Regulation

As the ‘private, not-for-profit’ sector, TSBs should operate strictly on a not-for-profit basis and be independent from both government and commercial interests. This ensures that TSBs are effectively a separate sector distinct from the commercial and State broadcasting sectors. The financial regulation of the sector is one tool which can be used to ensure TSBs adhere to these ideals. This section will assess the desirability of subjecting TSBs to financial regulation for these purposes.

6.3.1. The Not-For-Profit Principle

¹⁵⁴⁰ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 38, art 3(d)(ii).

As discussed in Chapter 1, the most essential characteristic of TSBs is that they are services which are operated on a not-for-profit basis. This is a principle that is recognised in both Australia and Canada.¹⁵⁴¹ For this reason, when TSBs benefit from more favorable conditions in comparison to commercial broadcasters, one of the main concerns is to prevent these special concessions from being exploited for private gain. In order to ensure that TSB licences are not used for private profit, TSBs should be prohibited from distributing profits to members of the licensee organisation.¹⁵⁴² As explained in Section 3.3.1, the mechanism most commonly used to secure compliance with this principle is to restrict the eligibility for TSB licences to registered not-for-profit legal entities which, in most cases, are prohibited from distributing profits to their members. This provides a strong safeguard against the threat of TSB licensees being exploited for private profit.¹⁵⁴³ However, even when licences are restricted to not-for-profit entities, TSBs are sometimes subjected to additional financial regulation.

South African legislation stipulates that any surplus generated by a TSB station can be used only for the benefit of the community served by the station.¹⁵⁴⁴ In other jurisdictions, stations are more specifically restricted to reinvest any surplus only in the broadcasting service itself.¹⁵⁴⁵ While Canada has no specific regulation in this area for terrestrial TSBs,¹⁵⁴⁶ in Australia, ACMA has issued guidelines that interpret the not-for-profit principle as requiring all surpluses generated by community stations to be reinvested in the broadcasting service itself.¹⁵⁴⁷ As was discussed in Section 4.3.1, Australian legislation does not only prohibit TSBs from operating for profit, but also

¹⁵⁴¹ As explained in Section 5.2.4, in the case of Canada, the not-for-profit principle only applies to the TSB specific licence categories, community radio, campus radio and native broadcasting.

¹⁵⁴² Buckley, above n 1421.

¹⁵⁴³ In addition to prohibiting the distribution of profits to members, an ideal regulatory framework for non-profit entities will also contain measures against other types of tactics that might be employed by organizations to circumvent their obligation not to operate for profit, such as assigning excessive wages to directors.

¹⁵⁴⁴ *Broadcasting Act 4 of 1999* (South Africa), Art. 32(5) 'South African Law'.

¹⁵⁴⁵ See for example Uruguayan Law, above n 12, Art. 10; Chilean Law, above n 15, Art. 13.

¹⁵⁴⁶ As explained in Section 5.3.4.1, a requirement to reinvest all profits from sponsorship in the service itself exists for community cable channels which can be explained by the special nature of these channels. As also noted, a similar requirement was also imposed in the past on the first religious satellite channel.

¹⁵⁴⁷ This is discussed in Section 4.3.1.

from operating ‘as part of a profit-making enterprise’. This additional requirement has been more specifically interpreted by ACMA as meaning that:

It would not be acceptable under the licence condition for a surplus generated by the licensee’s broadcasting service to be distributed to another part of the licensee’s operations for some other purpose not related to the operation of the community broadcasting service.¹⁵⁴⁸

Restricting the use of a surplus to reinvestment in the service itself goes beyond the goal of merely preventing unfair gain and seeks to secure the distinctiveness of the third sector’s content output. Independently of whether private profit or charitable goals are pursued, if their main goal was to maximize income, TSBs may be inclined to adopt programming practices similar to those of the commercial sector. If any surplus can only be reinvested in the service itself, then TSBs must be ends in themselves and cannot be used as fund raising mechanisms for other non-profit or charitable purposes. In this way, such restriction ensures that maximizing income will not be the priority of TSBs and, thus, serves as a safeguard of the distinctiveness of the sector’s programming. When TSBs have received support as part of a policy aimed at increasing the diversity of content available to audiences, restricting their capacity to redirect surpluses to other purposes is a measure that can be used to ensure they fulfil the goals of the policy without constraining their capacity to raise funds. For this reason, implementing a restriction such as this is recommended when TSBs have benefitted from special concessions.

The requirement not to operate as part of ‘a profit-making enterprise’ has also been interpreted by ACMA as prohibiting community stations from assisting other persons in the generation of profit, for example, by providing them with air-time for free or at nominal rates.¹⁵⁴⁹ This interpretation is consistent with the not-for-profit principle of TSB. In order to preserve the nature of the sector and prevent unfair gains, TSBs should

¹⁵⁴⁸ Australian Communications and Media Authority, above n 471, 6.

¹⁵⁴⁹ This is discussed in Section 4.3.1.

be prohibited from circumventing their obligation to operate on a not-for-profit basis by exploiting their licence to help others make profit.

6.3.2. The ‘Diversity of Funding’ Principle

There seems to be consensus among academics, human rights monitoring bodies and representatives of broadcasting’s third sector that TSBs should have access to funding from diverse sources in order to support their activities.¹⁵⁵⁰ As explained in Section 3.3.3, in order for TSB to be a truly distinct sector and fulfil the ideal of ‘sectoral’ diversity, TSBs need to be effectively independent from both government and commercial interests. When they rely solely or primarily on a single source of funding, be this government funding, a single private donor or advertising revenue, this presents a threat to the independence of TSBs.¹⁵⁵¹ In this sense, the principle of diversity of funding is regarded as a guarantee for the independence of the sector.¹⁵⁵² One measure which can be used to ensure compliance with this principle is imposing caps on the amount of funding TSBs can derive from a determinate source or from any single source.

In the U.K., regulations once prohibited community radio stations from obtaining more than 50% of their annual income from any single source.¹⁵⁵³ This restriction has now been lifted and there are currently only limits on the percentage of income they can derive from advertising.¹⁵⁵⁴ Neither Australia nor Canada has implemented restrictions in this area. As noted in Section 5.2.4.1.3, in 1992 the CRTC determined that community stations should rely on diverse sources of funding but decided against establishing specific caps. In the early stages of the sector’s development in Australia it was considered desirable for TSBs to rely solely on government funding, but this policy has

¹⁵⁵⁰ See for example Buckley, above n 1421; Price-Davies, Eryl and Jo Tacchi, *Community Radio in a Global Context: A Comparative Analysis* (Community Media Association, 2001), 7; Inter-American Standards, above n 52, [108].

¹⁵⁵¹ Price-Davies and Tacchi, *Ibid*, 7

¹⁵⁵² See Section 3.3.3.

¹⁵⁵³ *Community Radio Order 2004* (UK) (as originally adopted) s 5(2).

¹⁵⁵⁴ Discussed in Section 6.5.1.

been phased out as government sources alone proved to be insufficient to fund the sector.¹⁵⁵⁵

TSBs in Australia and Canada currently have access to funding from multiple sources including government, advertising and sponsorship, the sale of air-time and direct contributions from their audiences.¹⁵⁵⁶ This is a desirable scenario, as there are no valid reasons to completely prohibit TSB from accessing any legal source of funding. Specific forms of funding such as government funding or advertising income can be cause for special concern but, as will be addressed in the following sections, special measures can be taken to protect the independence of TSBs without completely prohibiting them from accessing needed funding.

As explained throughout Chapter 2, the potential of TSBs to contribute to the fulfillment of human rights makes it undesirable to impose any unnecessary barriers on the development of the sector. Imposing specific limits on the amount of income TSBs can derive from each source can be a valuable measure to secure the independence of TSBs. However, implementing such limits can also seriously impair the development of a sector if it is not feasible for the stations to comply with them. For example, indigenous broadcasters in Australia, despite being free to pursue funding from other sources, are in practice almost completely dependent on government funding because the amount of income they can generate from other sources is negligible.¹⁵⁵⁷ In such a context, a cap on the amount of funding they could derive from government grants would have impeded their development.

While diversity of funding is the ideal to be strived for, this goal needs to be weighed against the financial realities of the sector as well as those of governments. Where sufficient funding from multiple sources are available, enforcing diversity of funding through statutory caps is justifiable. However, if the context is one where diversity of funding is not feasible for most third sector stations, then it is preferable to assume the

¹⁵⁵⁵ Discussed in Section 4.2.5.

¹⁵⁵⁶ See Sections 4.3.7 and 5.3.4.

¹⁵⁵⁷ See Aboriginal and Torre Strait Islander Commission, above n 513, 19.

risk that reliance on a source of funding may pose to the independence of the stations, rather than impede the development of the sector through unrealistic statutory limits that prevent TSBs from accessing the funds they need to survive.¹⁵⁵⁸ Additionally, if governments are not capable of providing sufficient funding for the whole sector, then it may be preferable to allow those TSBs with the capacity to generate the majority of their funds through their own commercial activity to do so. This eases the burden on the public purse and allows governments to concentrate their financial support on the stations that need it the most.

While diversity of funding is important, the Australian and Canadian experiences indicate that subjecting TSBs to income caps is not essential to ensure their independence or to ensure they fulfil policy goals such as contributing to diversity of content. There are no indications that the absence of restrictions on the amount of funding they can derive from a single source have seriously compromised the independence of TSBs in either country. However, it should be noted that both countries have special controls in other areas, such as the distribution of government funding and the broadcast of advertisements, which help protect the independence of TSBs. In the case of Canada, content regulation is also used to ensure that TSBs contribute to diversity of content. These alternative measures for addressing concerns regarding the independence and distinctiveness of the third sector are discussed in the three following sections.

6.4. Government Funding

The reality is that many TSBs require direct support in the form of government funding in order to be able to deliver their services. As explained in Chapter 2, the potential of TSB to aid governments in fulfilling their obligations under IHRL means policy makers should seriously consider providing support to the sector including through direct funding. Especially in the earliest stages of development of TSB within a country or

¹⁵⁵⁸ If diversity of funding is regarded as feasible for the majority but not the whole of the sector, it may be appropriate to impose it as a requirement but provide exemptions for special cases, such as the aforementioned indigenous broadcasters in remote Australia.

region, direct government funding may be of great value in assisting stations until they become self sustainable. However, as noted in the previous section, there is concern regarding the impact that overreliance on government funding can have on the independence of third sector stations and the sector as a whole. In relation to TSBs and government funding, the OAS Special Rapporteur on Freedom of Expression has warned that:

The law must include sufficient guarantees to prevent such media from becoming dependent on the State through government funding.¹⁵⁵⁹

Beyond the actual risk to the stations' independence, fear of government retaliation can lead TSBs to exercise self-censorship in detriment to the role they are desired to play in increasing diversity of content and providing outlets to alternative voices. Moreover, the mere possibility of government influence can reduce the credibility of stations in the eyes of their audiences. These risks are especially present in the case of traditionally disadvantaged groups, where distrust of government may be a pre-existing issue.¹⁵⁶⁰ For these reasons, it is desirable to take measures to prevent even the appearance of government wielding influence over the sector through its funding arrangements. The following sub-sections discuss measures which can be implemented in order to foster the impartiality and stability of government funding distribution and thereby protect the independence of TSBs.

6.4.1. Stability of Funding

Stability of government funding is vitally important for the development of TSB. Foreseeability of expected future funding allows TSBs to engage in long term planning and ensures that the level of funding is not manipulated in order to reward or punish TSBs for their editorial decisions. However, the provision of funds to TSBs does not depend solely on political will but also on the actual availability of resources. Ensuring

¹⁵⁵⁹ Inter-American Standards, above n 52, [108].

¹⁵⁶⁰ See Section 2.1.4.1; See also Castells I Talens, Antoni, above n 331.

stable funding for the sector requires financial commitments that not all governments may be in a position to make. In this respect, both the Australian and Canadian governments have experienced difficulties in providing their respective third sectors with sufficient and stable funding, with levels of funding varying greatly throughout the years.¹⁵⁶¹ Policy makers in both countries have primarily addressed this issue by relaxing or eliminating restrictions in other areas, such as the broadcast of advertisements, in order to facilitate the raising of funds by TSBs themselves.¹⁵⁶² It is evident that providing a stable source of funding would be an even bigger challenge for countries with fewer resources.

The concerns regarding stability of funding which apply to TSBs are similar to those which apply to public service broadcasters.¹⁵⁶³ For this reason, in Europe, where the public service broadcasting tradition is strongest, some countries have opted to use the same schemes that are used to fund public service broadcasters to fund TSBs and devote a percentage of the public broadcasting remit to TSB.¹⁵⁶⁴ Another model that has been used is reserving a fixed percentage of commercial broadcasters' licence fees for TSB funding.¹⁵⁶⁵ In Australia, all funding for the sector still comes from the general government budget and is allocated by the Parliament on yearly or multi-yearly bases. However, and as explained in Section 5.3.4.2, since 2011 Canada has implemented a special funding scheme aimed at making funding for campus and community stations more stable. This scheme requires fixed percentages of commercial broadcasters' profits and of transactions for the transfer of commercial broadcasting licences to be devoted to the development of the sector.¹⁵⁶⁶

The implementation in Canada of the special funding scheme is relatively new and the actual impact it will have on the development of the Canadian third sector remains to be seen. However, in Canada there is the specific case of the indigenous third sector

¹⁵⁶¹ See for example Standing Committee on Communications, Information, Technology and the Arts, above n 635, 29-50; 2010 Policy, above n 1009, [83].

¹⁵⁶² See Sections 4.2.4 and 5.2.4.1.3.

¹⁵⁶³ See Rumphorst, above n 47, 4.

¹⁵⁶⁴ Kern European Affairs, above n 54, 31.

¹⁵⁶⁵ Murphy et al., above n 1069, 10.

¹⁵⁶⁶ Details of the scheme were explained in Section 5.3.4.2.

television station APTN which, as explained, has benefitted since 1999 from its own special funding scheme.¹⁵⁶⁷ A stable source of funding has allowed this station to provide a national reach service. As the concentration of indigenous populations outside Northern Canada is too small, a full time national indigenous broadcasting service would not have been viable without this special funding scheme. This is indicative of the impact that guaranteed stability of funding can have on the development of the sector.

The scheme used in Canada to support APTN guarantees stable funding to a specific station. This is an alternative when the goal is to support a specific service aimed at an audience with special needs. However, establishing a specific funding scheme for each individual third sector station in a country is not practical. Schemes like those discussed in the preceding paragraphs do not guarantee funding to individual stations; they only determine the amount of funding that will be available to distribute among eligible stations. However, when combined with a transparent method of distribution with clear guidelines, such schemes can provide stations with greater foreseeability in respect of government funding and become a strong guarantee of the independence of the sector. The next sub-section analyzes possible methods for distributing funds to individual TSB stations.

6.4.2. Method of Distribution

While stability of funding for the sector in general is important, the method of distributing funds to individual TSB stations must also be addressed. If the distribution system is purely discretionary, this presents an opportunity for government interference with stations, or at least generates a situation where the public may question the independence of TSBs, which is undesirable for stations and governments alike.

In the early stages of the sector's development in Australia, one potential measure suggested by a government working group was diversifying the distribution of funding through multiple government agencies in order to minimise the influence a single agency

¹⁵⁶⁷ See Section 5.3.4.2.

could wield over TSBs.¹⁵⁶⁸ However, as explained in Sections 4.2.5 and 4.3.7, the system which was ultimately adopted, and which has been in place since 1984, is the delegation of the distribution of funds to a private, not-for-profit organisation controlled by representatives of the sector, currently, the CBF.¹⁵⁶⁹ This model, as far as can be verified, was peculiar to Australia until Canada introduced a similar system with the creation of the CRFC in 2007.¹⁵⁷⁰

The main advantage of the CBF and CRFC distribution model over other potential solutions is that it not only reduces the risk of government influence, it allows the members of the sector to devise the eligibility and distribution guidelines. Members of the sector can be presumed to have a better understanding of the conditions in which the sector operates and, hence are the best qualified to determine such guidelines.¹⁵⁷¹

When first implemented, the Australian system of distribution was characterised by controversy and infighting between the different sub-sectors of TSB. Special interest groups, such as ethnic and indigenous broadcasters who had been historically prioritised by the government for funding, regarded themselves as disadvantaged by a system which placed responsibility for distribution in an organisation controlled primarily by representatives of the general community broadcasting sector.¹⁵⁷² As explained in Section 4.2.5, this situation was remedied after the system was modified to allow the indigenous and ethnic sub-sectors to be represented by specific committees which are tasked with formulating distribution guidelines for grants issued by the Australian government for each specific sub-sector.¹⁵⁷³

TSBs in Australia and Canada appear to be satisfied with the system of distribution currently used in their respective countries, with complaints focusing instead on the level

¹⁵⁶⁸ See Priorities Review Staff, above n 561.

¹⁵⁶⁹ See Sections 4.2.5 and 4.3.7.1.

¹⁵⁷⁰ See section 5.3.4.2.

¹⁵⁷¹ In the case of the CRFC, the guidelines are elaborated by sector representatives but need to be approved by the CRTC as the CRFC benefits from a more formal funding scheme.

¹⁵⁷² Discussed in Thornley, above n 460, 60.

¹⁵⁷³ See <www.cbf.com.au/files/3813/8724/4299/CBF_Organisational_Chart.pdf>

and stability of the funding.¹⁵⁷⁴ In this sense, delegating the distribution of funds to the sector itself can be an adequate solution to prevent both the actual threat and the appearance of government interference, while allowing those best qualified to determine eligibility and distribution guidelines. If this kind of distribution system is to be implemented, allowing each relevant TSB sub-sector to have adequate representation within the distribution body is essential.

While delegating distribution to an independent body that is representative of the sector is ideal, such a system is only viable in jurisdictions such as Australia and Canada, where the sector is already established and has organised representation. In jurisdictions where the third sector is in an emergent stage, a different solution would need to be sought. In cases where delegating distribution to the sector is not feasible, a government entity would inevitably need to be tasked with distribution. One possibility is to delegate the distribution of funds to a statutory public service broadcasting entity. This model was used in Australia when the SBS was in charge of the distribution of funds for ethnic and indigenous broadcasters.¹⁵⁷⁵ As discussed in Section 4.2.6, however, distribution by the SBS proved problematic. The SBS required stations which accepted its funding to adhere to its own standards of political neutrality. This limited the stations' freedom of expression. However, this situation can be avoided by providing that the PSBs will not be responsible for the conduct of TSB stations. This way, a PSB body can distribute funds to TSBs without subjecting them to its own mandate. If an independent statutory body has been tasked with issuing broadcast licences, another possibility is delegating the distribution of TSB funding to this body.

For the task of distributing funds to TSBs, independent statutory bodies would always be preferable to bodies which are not politically independent. However, where no suitable independent body exists, distribution would need to be the responsibility of a regular government department.¹⁵⁷⁶ Independently of the entity that is charged with

¹⁵⁷⁴ See Section 4.2.5; 2010 Policy, above n 1009, [83]-[86].

¹⁵⁷⁵ See Section 4.2.5.

¹⁵⁷⁶ As noted in the case of Canada, funding for indigenous broadcasters is distributed by the Department of Canadian Heritage which is a regular government department. See Section 5.3.4.2.

responsibility for distribution, specific measures need to be implemented to ensure the transparency of the process. For example, the call for applications and the selection process itself must be public and the eligibility and selection guidelines must be clear and set in advance.¹⁵⁷⁷

6.4.3. Government Advertising

A specific form of government funding is government advertising. Like other forms of government funding there is a risk that a government's capacity to select the outlets in which to place its advertisements could be motivated by a desire to influence the editorial decisions of TSBs. The OAS special rapporteur on freedom of expression has noted:

Steps should be taken to prevent government advertising from creating government dependency among the private audiovisual media, whether they are non-profit or for profit.¹⁵⁷⁸

Despite the risk of abuse, TSBs should not be prohibited from accessing funds from government advertising. Government advertisements are not only potential sources of funding for TSBs; given the ability of TSBs to reach audiences neglected by the mainstream media, they can also be valuable outlets for government campaigns that require community outreach, such as those concerning crime or disease prevention.¹⁵⁷⁹ As will be discussed in Section 6.5.1, there are good reasons why policy makers may decide to restrict the capacity of TSBs to broadcast conventional advertisements. In Australia, regulation in this area was formerly very strict and, for a time, community stations were completely prohibited from carrying government advertising. As noted in Section 4.2.4, this was opposed not only by the stations themselves, as they desired the opportunity to raise income through the broadcast of government advertisements, but also by government agencies that wanted the capacity to place advertisements on community

¹⁵⁷⁷ Both the CBF and the CRFC follow this model by making public calls for applications for the available grants and publicizing the eligibility criteria in their web pages.

¹⁵⁷⁸ Inter-American Standards, above n 52, [132].

¹⁵⁷⁹ See Sections 2.1.4.1 and 2.3.5.

stations. It is not clear whether there was ever a conscious decision to prohibit government advertising on community stations or whether this was simply the result of interpreting the prohibition on advertising in light of a definition of ‘advertisement’ that had been designed for the commercial sector.¹⁵⁸⁰ In the case of Canada, the advertising restrictions that existed in the past, and the few that remain in force, do not make any distinction in regards to whether the advertisement comes from the government.

Now that the concept of sponsorship has been broadened in Australia, government advertising is broadcast on community stations and is even referred to as ‘advertisement’ rather than as ‘sponsorship’.¹⁵⁸¹ Government advertisements are counted toward the station’s sponsorship air-time cap but it has been suggested that, in the case of indigenous broadcasters who have special financial needs and a special role in reaching indigenous audiences, government advertising should also be excluded from counting toward that cap.¹⁵⁸² It remains to be seen whether this recommendation will be adopted. In Canada, the issue is less relevant because the restrictions on advertising are negligible.

As will be explained in Section 6.5.1.1, ‘sponsorship’ is normally defined as announcements that acknowledge financial contribution, but do not encourage audiences to engage in any determinate action. The goal of sponsorship announcements is usually to generate good will from audiences towards the sponsor.¹⁵⁸³ If this is the case, then it is not clear whether government ‘sponsoring’ is a desirable practice. Government announcements which seek to modify audience behavior would seem preferable to those that merely seek to improve a government’s image and generate good will toward it by being acknowledged as a station’s sponsor. Regulations on government expenditure may even prevent them from engaging in simple ‘sponsoring’.¹⁵⁸⁴ For this reason, and setting aside the debate as to whether it is valid or convenient to limit TSBs to the broadcast of

¹⁵⁸⁰ See Sections 4.2.8 and 6.5.1.1.

¹⁵⁸¹ See, for example, Standing Committee on Communications, Information, Technology and the Arts, above n 635 50-54; Stevens, above n 384, 46.

¹⁵⁸² Stevens, *Ibid*, 46

¹⁵⁸³ See Hitchens, Lesley, ‘The Role of Sponsorship Regulation in Non-Commercial Broadcasting.’ (2004) 15(2) *Entertainment Law Review* 33.

¹⁵⁸⁴ In the case of Australia, mere government sponsoring may not be compatible with the applicable guidelines. See Financial Management Group, above n 870.

sponsorship announcements, if such restrictions are imposed, an exception should be made for government advertisements. There are no weighty reasons to prohibit TSBs from accessing funding from government advertisements. This has been acknowledged by the OAS special rapporteur on freedom of expression who has noted:

Discrimination in the distribution of advertising based on the model under which the media operate is unacceptable. In this respect, the exclusion of community or alternative broadcast media in the allocation of the advertising budget due to the mere fact that they operate under non-commercial criteria constitutes unacceptable discrimination under the American Convention.¹⁵⁸⁵

Government advertising expenditure should normally be based on the normal market considerations such as the rates charged and the stations' audience numbers.¹⁵⁸⁶ However, when deciding whether to place government advertisements on TSBs, these should not be the sole criteria. If TSBs can enable the government to reach audiences not reached by other services, such as TDGs, then this also warrants consideration. In addition, the general potential of the sector to contribute to the fulfillment of human rights can also justify supporting TSBs through the allocation of government advertising, even when they do not command the largest audiences. For example, the sub-sector's need for support and its special role in reaching indigenous audiences were cited in the review of the Australian Government Expenditure in Indigenous Broadcasting and Media as reasons why indigenous broadcasters should be given special consideration in the distribution of government advertising.¹⁵⁸⁷

6.5. Advertising, Sale of Air-Time and Calls for Donations

¹⁵⁸⁵ Office of the OAS Special Rapporteur on Freedom of Expression, *Principles on the Regulation of Government Advertising in the Inter-American System for the Protection of Human Rights* (2010) <www.oas.org/en/iachr/expression/topics/advertising.asp>.

¹⁵⁸⁶ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 184.

¹⁵⁸⁷ See Stevens, above n 384, 58.

As explained in Section 3.4, there may be valid justifications for restricting the kind of activities TSBs can engage in, in order to raise funds to support their activities. They include protecting commercial broadcasters from potentially unfair competition and ensuring the distinctiveness of the third sector. However, TSBs need funds in order to operate and government funding is not always sufficient to fully support the sector. Even if sufficient government funding were available, allowing TSBs to raise additional funds through their own activities is still desirable in order to foster diversity of funding and ensure the independence of the sector. The broadcast of advertisements, the selling of air time to third persons and donations from their audiences can all be valuable sources of income for TSBs. This section aims to assess to what degree, if any, TSBs should be restricted in these areas.

6.5.1. Advertising

The broadcast of advertisements is one of the most controversial issues in TSB regulation. The selling of air-time for advertising spots has traditionally been the main source of income for commercial broadcasters. For this reason, this is the area where commercial broadcasters are the most sensitive in relation to the potential threat of unfair competition from TSBs. In addition, the influence of the advertising industry is blamed for many of the shortcomings of the commercial sector, and policy makers may wish to shield TSBs from this influence in order to ensure the distinctiveness of the sector's programming.¹⁵⁸⁸ Although these concerns are valid, access to income from paid advertisements can be essential for the viability of TSB operations. The World Association of Community Broadcasters (AMARC), the main representative of broadcasting's third sector, has opposed any blanket prohibition on the broadcast of advertisements by TSBs, stating:

The clear non-profit purpose of these media is confused with the necessary obtaining of the money needed to support its operation.

¹⁵⁸⁸ See notes 250 and 251 and text accompanying.

Financing of a radio station through advertising is one of the most important methods of funds collection available, and its prohibition has become a restriction to the exercise of freedom of expression.¹⁵⁸⁹

The UN, OAS and ACHPR special rapporteurs on freedom of expression and the OSCE Representative on Freedom of the Media have also expressed in a joint declaration that TSBs should have access to advertising.¹⁵⁹⁰ While the ideal would be for the third sector to be completely independent from the advertising industry, the reality is that other sources of funding will not always be sufficient to support the sector. Even in cases when advertising income is not completely essential for the viability of the sector, it may still be desirable to allow it in order to ensure diversity of funding for TSBs and prevent them from becoming reliant solely on funds from governments or large private donors which could compromise their independence.¹⁵⁹¹ With these considerations in mind, one of the most difficult tasks confronting any policy maker working in the area of TSB regulation is the need to balance the financial needs of TSBs with the interests of commercial broadcasters and the desire to ensure the distinctiveness of TSB. When seeking to balance these competing interests, the option exists to impose qualitative or quantitative restrictions on the broadcast of advertisements by TSBs without prohibiting it. Both types of restrictions have been utilized in Canada and Australia. The two following sub-sections discuss the desirability of these types of restrictions, based on the Canadian and Australian experiences.

6.5.1.1. Qualitative Restrictions

Qualitative restrictions are measures which restrict the content of commercial announcements. In both Australia and Canada, the initial regulations for the sector

¹⁵⁸⁹ Gómez, Gustavo, Carolina Aguerre and Analía Eliades, *The Invisible Gags: New and Old Barriers to Diversity in Radio Broadcasting* (AMARC, 2009).

¹⁵⁹⁰ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression et al, above n 4.

¹⁵⁹¹ Buckley, above n 1421; Price-Davies and Tacchi, above n 1550, 70; See also Section 6.3.

contained significant qualitative restrictions on the broadcast of commercial announcements by TSBs which were later progressively relaxed. In both countries, conventional advertising was initially prohibited, but TSBs were allowed to acknowledge financial contributions from third parties in their broadcasts without directly promoting their products or services.¹⁵⁹² Over time the broadcast of these acknowledgements was subjected to different levels of restrictions, all aimed at differentiating them from the conventional advertisements associated with the commercial sector.¹⁵⁹³ These types of restricted announcements were known in Canada as ‘restricted advertisements’ and in Australia as ‘sponsorship’ announcements. The latter is the term most commonly used to refer to this type of announcement.¹⁵⁹⁴

Restricting the commercial announcements allowed to TSBs to ‘sponsorship’ announcements initially seems like an attractive option. Measures such as prohibiting the direct promotion of products or services, or requiring the announcements to be broadcast only between programs, clearly differentiate the commercial mentions present in TSB programming from the typical ‘spot’ advertisements found in commercial broadcasting.¹⁵⁹⁵ This preserves, at the least, the appearance of distinctiveness between the two sectors. While an on air acknowledgement can generate good will on the part of audiences towards a ‘sponsor’, they are not exactly equivalent to conventional advertisements. This means that, when restricted only to ‘sponsorship’ announcements, TSBs are in less direct competition with commercial broadcasters. However, conventional advertisements are the type of commercial announcements potential advertisers are more familiar with and which they may consider to be far more effective. For this reason, prohibiting TSBs from broadcasting conventional advertisements can seriously impair their ability to attract needed income.¹⁵⁹⁶

¹⁵⁹² See Sections 4.2.4, 5.2.4.1.3 and 5.2.4.2.2.

¹⁵⁹³ See for example *Broadcasting Amendment Act (No.3) 1987* (Cth) s 33 (b), inserting *Broadcasting Act 1942* (Cth) s 119AB (3B)(a); 1985 Review, above n 1077, s 1.

¹⁵⁹⁴ See Hitchens, above n 1583.

¹⁵⁹⁵ See *Ibid.*

¹⁵⁹⁶ This was the primary reason why Australian TSBs opposed this type of restriction. See Australian Broadcasting Tribunal, above n 626.

Canada has eliminated all special content restrictions for the broadcast of commercial announcements by terrestrial TSBs; thus they are now authorised to broadcast any type of advertisement allowed to be broadcast by commercial broadcasters. Restrictions subsist for community cable channels, which are normally only allowed to broadcast ‘sponsorship announcements.’¹⁵⁹⁷ However, as already noted, the situation of these channels is not analogous to that of over-the-air TSBs.¹⁵⁹⁸

In Australia, TSBs are still technically restricted to ‘sponsorship’ announcements. However, as explained in Section 4.3.7.2, restrictions on the content of sponsorship announcements has been relaxed to the point where they are allowed to be identical to conventional advertisements as long as they are accompanied by a ‘tag’ which acknowledges that the announcement is being broadcast in consideration of financial support received from a ‘sponsor.’¹⁵⁹⁹

In both countries, the elimination of restrictions was the product of lobbying from sector representatives and a demonstrated need for additional financial resources for the sector.¹⁶⁰⁰ In the case of Australia, there is also evidence that the restrictions were difficult to enforce, as the line between sponsorship announcements and advertisements was not always clear. This imposed a burden on regulatory authorities, for whom the task of distinguishing between the two in individual cases was difficult, and on TSBs, whose ability to generate funding through sponsorship was hindered by confusion and uncertainty regarding the content allowed in the announcements.¹⁶⁰¹

Despite the advantages of restricting commercial announcements by TSBs, namely, protecting commercial broadcasters and preserving the distinctiveness of TSB, the detrimental impact that these measures may have on the ability of TSBs to raise funds can be excessive. For this reason, this type of restriction should be imposed only in contexts where TSBs have access to adequate funding from other sources. In most cases,

¹⁵⁹⁷ See Section 5.2.5.

¹⁵⁹⁸ See Section 5.3.4.1.

¹⁵⁹⁹ See Australian Communications and Media Authority, above n 877..

¹⁶⁰⁰ See Sections 4.2.4, 5.2.4.1.3 and 5.2.4.2.2.

¹⁶⁰¹ See Section 4.2.4.

quantitative restrictions such as those discussed in the next sub-section would be preferable. Quantitative based measures also have the advantage of greater clarity, which provides certainty to TSBs and facilitates the work of regulators.

A less common type of qualitative restriction is to only allow advertisements that relate to businesses located within the service area of the licence. This measure has been implemented in Chile, where it has been criticized for restricting the capacity of TSBs to raise funds.¹⁶⁰² As noted in Section 5.2.4.6, community television stations in Canada are restricted to local advertisements, this being one of the few restrictions on the broadcast of advertising by TSBs that remain in place in that country. The potential benefit of this measure is that it limits the impact of the activities of TSBs on the commercial sector while allowing TSBs to serve as advertising outlets for small local businesses which may not be able to afford to advertise in the commercial media. The potential of TSBs to contribute to local economies by providing small businesses with affordable advertising outlets should not be disregarded. However, restricting TSBs to soliciting advertising only from local businesses can impair their viability if local advertising income is not sufficient. Thus, this restriction is a viable option only where lack of access to national advertising would not be excessively detrimental to the viability of TSBs.

6.5.1.2. Quantitative Restrictions

An alternative to qualitative restrictions is to allow TSBs to broadcast advertisements without restrictions of content and form over and above those applied to commercial broadcasters and instead subject them to quantitative restrictions. One form of quantitative restriction is limiting the amount of air-time that TSBs can devote to advertisements.¹⁶⁰³ If commercial broadcasters are also restricted in this area, a lower maximum can be established for TSBs than that allowed to commercial broadcasters.¹⁶⁰⁴ As discussed throughout Chapter 5, advertising air-time caps were used throughout the

¹⁶⁰² Chilean Law, above n 15, Art. 13.

¹⁶⁰³ For a Discussion See AMARC, above n 82, 21-4.

¹⁶⁰⁴ See for example Broadcasting Authority of Ireland, *Rules on Advertising and Teleshopping* (2010), ss 4.5 and 4.6.

years in Canada, but have been progressively eliminated to the point where only campus radio stations and community television stations are currently limited in this area.¹⁶⁰⁵ In Australia, however, sponsorship air-time caps remain in place for the whole of the sector and, given qualitative restrictions are now negligible, have become the primary measure aimed at protecting commercial broadcasters and the distinctiveness of TSB programming.

In Canada, the tendency toward the elimination of quantitative advertising restrictions has been motivated by the financial needs of the sector and the confidence of policy makers that content regulation is sufficient to protect commercial broadcasters and secure the distinctiveness of programming.¹⁶⁰⁶ The financial needs of the sector have also been acknowledged in Australia and, as noted, the sponsorship air-time caps for community radio and television were increased as a result.¹⁶⁰⁷ However, Australian policy makers have decided against eliminating or further increasing the caps. A possible explanation for the differences in the approaches adopted in the two countries is that, unlike Canada, Australia has not implemented content regulation requiring TSB stations to broadcast content distinct from that of commercial broadcasters.¹⁶⁰⁸ In the absence of content regulation, Australian policy makers may consider quantitative advertising restrictions essential for protecting commercial broadcasters and ensuring the distinctiveness of community stations' programming.

Another type of quantitative restriction is restricting the amount of income that can be derived from the broadcast of advertisements. For example, in the U.K., community radio stations are allowed to broadcast advertisements as long as the income derived from this source does not exceed 50% of their total annual income.¹⁶⁰⁹ Quantitative restrictions based on percentage of income have also been used in other European countries.¹⁶¹⁰ However, neither Australia nor Canada has ever imposed a restriction of this kind. In the

¹⁶⁰⁵ See Section 5.3.4.1.

¹⁶⁰⁶ 2000 Community Policy, above n [50]-[51].

¹⁶⁰⁷ See Section 4.2.4.

¹⁶⁰⁸ Discussed further in Section 6.7.

¹⁶⁰⁹ Ofcom, Regulation of Community Radio Key Commitments Guidance on Changes to Key Commitments and Ensuring Compliance (2010), s 3.3.

¹⁶¹⁰ See AMARC, above n 82, 21-4; Murphy et al., above n 1069.

case of Canada, representatives of the Canadian commercial broadcasting sector campaigned for the introduction of a 50% advertising income cap, but the CRTC ultimately decided against it.¹⁶¹¹

Since neither country has implemented income based caps, the study of the Australian and Canadian experiences does not permit an assessment of their desirability or a clear conclusion to be reached as to whether they are more or less preferable than caps based on air-time. While caps on the percentage of income derived from advertising seem to prioritize protecting the independence of TSBs and caps on advertising air-time seem to prioritize protecting commercial broadcasters, both types of measures can serve both purposes. Air-time based restrictions will, however, be more practical for TSB stations to comply with, as licensees will not always have full certainty regarding the income they will be receiving from other sources when selling air-time to advertisers. In either case, the level set in the caps is more important than their type.

AMARC, the main international representative of TSBs is not, in principle, opposed to TSBs being restricted in relation to the broadcast of advertisements.¹⁶¹² Restricting TSBs in this area is legitimate when they benefit from special concessions. However, if caps are set excessively low, they can impede the financial viability of TSBs and become major barriers for the development of the sector. For this reason, any caps established need to balance the policy ideals against the actual capacity of TSBs to derive income from sources other than advertising.

Despite the elimination of restrictions, the Canadian third sector remains distinct in nature and the removal of restrictions has not impaired the viability of the country's commercial sector. As noted, Canadian policy makers have opted to advance their goals through content regulation instead of restrictions on advertising. Content regulation will, however, not always be preferable to advertising restrictions. As will be discussed in Section 6.6, excessive content regulation can also impair the viability of TSBs, as well as

¹⁶¹¹ 1992 Policies, above n 961, s A(4).

¹⁶¹² AMARC, above n 80, Principle 12.

truncate their freedom of expression. However, the content regulation in place in Canada is not excessive. In this sense, the Canadian experience evidences that, while legitimate, restricting TSBs in their capacity to broadcast advertising is not always necessary.

If other rules are sufficient to advance the desired policy goals, then removing unnecessary advertising restrictions can aid the development of the sector by providing more flexibility to TSBs and relieving them from administrative burdens. However, it should be noted that the advertising restrictions in Canada were progressively relaxed as the sector became more established. In contexts where the third sector is less established and where audiences and potential licensees may not fully understand the nature of TSB and its role, regulation in this area may be more important. In this sense, advertising regulation may be advisable in the earlier stages of development of a country's third sector, but any restrictions that are implemented in this area should be reconsidered if and when the financial needs of the sector warrant it or when TSBs have demonstrated their commitment to not-for-profit ideals.

Regulation in this area does not need to be identical for all TSBs. As noted, Canadian policy formerly distinguished between two different categories of community stations, depending on whether there were other stations operating in the same market in the same official language.¹⁶¹³ Stations which were the only one in their language in their market were subjected to more flexible advertising regulation.¹⁶¹⁴ In both Australia and Canada, indigenous broadcasters in remote areas have been identified as requiring special consideration.¹⁶¹⁵ These stations usually operate in markets where there are no commercial broadcasters to whom they could provide unfair competition and which are of little interest to advertisers. In contexts in which competition is not an issue and in which there is not much potential for advertising, an advertising restriction serves no purpose other than creating unnecessary administrative burdens for the TSBs and

¹⁶¹³ See Section 5.2.4.1.2.

¹⁶¹⁴ See Section 5.2.4.1.3.

¹⁶¹⁵ Productivity Commission, above n 400, 286; CRTC, Native Policy, above n 1211, s 5.

regulators.¹⁶¹⁶ For this reason, a system of exemptions, or a different regulatory framework, should be considered for stations in non-competitive markets.

6.5.1.3. Non-Paid Advertising

When commercial broadcasters are restricted in the amount of air-time they can devote to advertisements, the purpose is normally to protect the quality of their service and minimize the nuisance that advertising breaks may cause to audiences.¹⁶¹⁷ For these purposes, it may not be relevant whether the stations have received consideration for the broadcast of an advertisement. However, in the case of TSB regulation, it is essential to distinguish between paid and non-paid advertising.

As explained in Section 4.2.4, the viability of the Australian third sector was hindered in the past by an excessively broad prohibition of advertising that even included the promotion of the station itself and its programs. The ability of TSBs to serve their audiences was also impaired by the prohibition, which also extended to the promotion of community events, even when no payment had been received in exchange.¹⁶¹⁸ As noted in Section 4.2.4, the indications are that there was never a real intention to ban community stations from engaging in these activities. Instead, the ban was in all likelihood an unfortunate consequence of inappropriately interpreting the prohibition of advertisement in light of a definition of ‘advertisement’ that had been designed for the commercial sector. In the case of Canada, the goal of restrictions was always expressly to limit the ‘commercial activity’ of TSBs.¹⁶¹⁹ For this reason, self-promotion or non-paid community announcements were never banned.

There is no legitimate reason to impose special restrictions on TSBs in relation to self-promoting or donating air-time for the promotion of community activities or events. The

¹⁶¹⁶ Ibid.

¹⁶¹⁷ Anderson, Simon P., ‘Regulation of Television Advertising’ <economics.virginia.edu/sites/economics.virginia.edu/files/anderson/tvadreg081705.pdf>; See Also Ofcom, ‘Regulating the Quantity of Advertising on Television’ (2011) <stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/ad-minutage>.

¹⁶¹⁸ See Section 4.2.4.

¹⁶¹⁹ See note 1619 and text accompanying.

ability to promote the stations and their programming is essential for the third sector to be able to attract audiences. Providing a free outlet to community groups who may not be able to afford to advertise in the mainstream media is one of the ways in which TSBs can fulfil their role in broadening access to broadcasting. For this reason, this practice should be encouraged rather than prohibited. If restricting these activities is considered necessary for the purpose of protecting audiences from the nuisance caused by advertising interruptions, TSBs should only be restricted to the same degree as commercial broadcasters, as there is no policy justification for treating them more strictly in this area.¹⁶²⁰

A different but related issue concerns advertising or sponsorship announcements that are included in programming from other stations which are rebroadcast or simultaneously broadcast by TSBs. As noted, in Australia all TSBs except RIBS are prohibited from broadcasting conventional advertising even when this is contained in programming originating from other stations and no consideration is received in exchange for the broadcast.¹⁶²¹ In addition, sponsorship announcements contained in networked or rebroadcast programming are counted toward a station's cap even when no payment is received.¹⁶²² In Canada, when advertising in Type B community stations was still restricted, the CRTC allowed these stations to exclude up to 60 minutes per week of advertising contained in programming rebroadcast from other TSBs from counting toward their weekly advertisement air-time cap.¹⁶²³ The purpose of this concession was to encourage cooperation within the third sector.

When a third sector station broadcasts advertisements as part of programming acquired from, or broadcast simultaneously with, other stations and receives no consideration there is no risk of unfair profiting or of the independence of the station being compromised.

¹⁶²⁰ In the contrary it may be desirable to give special consideration to TSBs in order to promote the practice of donating air-time for the promotion of community activities and events.

¹⁶²¹ See Section 4.3.3.4.

¹⁶²² Australian Communications and Media Authority, above n 877, 3 and 16-17.

¹⁶²³ See 1992 Policies, above n 961, s A(6)(b).

However, there may be an impact on the commercial sector.¹⁶²⁴ In addition, there may be a desire to limit the amount of commercial advertising in the third sector, independently of whether payment is received, in order to preserve its distinctive image. In this sense, it may be valid to impose some restrictions on the broadcast of commercial advertisements, even those for which payment is not received. Despite this, the obligation to edit advertisements out of programming originating from other stations can be a significant burden for TSBs operating with low resources. For this reason, while such a restriction can serve legitimate purposes, it will not always be desirable to implement it. In each jurisdiction, policy ideals would need to be balanced against the financial realities of the sector. As evidenced by the Australian and Canadian experiences, this is an area where it may be convenient to distinguish between different types of TSBs and to provide exceptions for those TSBs with lower resources or that operate in areas where there is no or limited commercial presence.

6.5.2. Sale of Air-Time for Purposes Other than Advertising

Although advertising is the primary reason for which broadcast outlets of any sector sell air time, air-time can also be sold to parties external to the stations who wish to broadcast their own programs. As in the case of advertising, restricting the capacity of TSBs to sell air-time for general purposes is a measure which can be used to protect commercial broadcasters from potentially unfair competition. In addition, concerns have been expressed that, if TSB stations are freely allowed to sell air-time, then their air-time could end up being controlled by the same economic interests that dominate the commercial sector, to the detriment of diversity of content and the distinctiveness of the third sector.¹⁶²⁵ However, the sale of air-time can also be a valuable source of income for TSB stations.

In Canada, the sale of air-time by TSBs, except in the case of advertising, has never been restricted; neither has the issue ever been raised as a point of concern. In Australia,

¹⁶²⁴ Businesses may not need to purchase advertising in local commercial stations if their advertisements are already contained in programming rebroadcast by a third sector station.

¹⁶²⁵ See Fraser and Restrepo Estrada, above n 185, 70; Kern European Affairs, above n 54, 33.

however, the issue has received more attention. As noted in Section 4.3.7.3, whether community stations should be allowed to sell-air time was contested judicially, with the New South Wales Administrative Decisions Tribunal concluding that the practice of selling air-time was not per se incompatible with community stations' requirement to operate not-for-profit.¹⁶²⁶ Despite this, Australian legislators have established certain restrictions on the sale of air-time, but only for CTV stations.¹⁶²⁷

When considering whether TSB stations should be allowed to sell air-time it may be relevant to distinguish between the sale of air-time to other not-for-profit groups and its sale to commercial actors. For the purposes of preserving the distinctiveness of the third sector's output, it does not seem relevant whether all of the programming of a third sector station is produced by a single entity or by multiple non-profit groups who have paid to access air-time. For this purpose, the concern would be only whether all content has been produced in pursuance of not-for-profit goals and not whether some of the content producers were required to pay for air-time.

Australian regulation requires all third parties who purchase access time in a community station to comply with the regulations applicable to the station, as well as with its licence conditions.¹⁶²⁸ If all programming is required to comply with the same conditions, and regulations such as advertising caps or content quotas apply to the whole of the station's air-time, including that sold to third parties, then restricting the capacity of TSBs to sell air-time to other not-for-profit groups is not necessary. The Australian experience evidences that selling air-time to other not-for-profit groups can be an important source of income for TSBs.¹⁶²⁹ Authorizing this practice also creates opportunities for not-for-profit groups who do not have the capacity to operate a full-time broadcast station to exercise their freedom of expression through the airwaves, thereby fulfilling the goal of broadening participation in broadcasting. In addition, since not-for-profit groups are often

¹⁶²⁶ *Khan v Cumberland Community Radio Inc t/as 2CCR-FM* [2006] 222 NSWADT

¹⁶²⁷ See Section 4.3.7.3.

¹⁶²⁸ Australian Communications and Media Authority, above n 877, 16.

¹⁶²⁹ See Section 4.3.7.3.

unable to afford to purchase air-time on commercial stations, the potential impact on the viability of commercial broadcasters is limited.

Australian legislation does not restrict the total amount of air time TSBs can sell to other not-for-profit groups. However, as noted in Section 4.3.7.3, stations under the CTV sub-category are restricted in the total amount of air-time they can sell to any single entity, whether for profit or not-for-profit, to 8 hours in a day.¹⁶³⁰ Restricting the amount of air-time that can be sold to a single not-for-profit entity can be justified as a measure to protect the independence of the stations. In addition, this can ensure that multiple groups have the opportunity to access air-time on TSB stations, thus fostering diversity of content.

The sale of air-time by TSBs to commercial actors is a more sensitive issue. When TSBs sell air-time to commercial entities this may have a more significant impact on the activities of commercial broadcasters than when they only sell it to other not-for-profit groups. In addition, allowing the air-time of TSBs to be controlled by commercial interests may seem, at first, detrimental to the goals pursued through the support of the sector. Australian legislators clearly seem to be more concerned about CTV stations selling their air-time to for-profit than to not-for-profit groups, as they have imposed specific maximums of 2 hours of air-time per day that can be sold to a single for-profit entity and 8 hours in a day that can be sold to for-profit entities in general.¹⁶³¹ The declared purpose of these measures is to ensure the distinctiveness of CTV stations by preventing their commercialization.¹⁶³² It is not clear why regulation in this area was deemed necessary for CTV stations and not for other type of stations, but is likely that the higher production costs of television in comparison to radio and the higher value of television air-time influenced the decision.

The ideal is clearly for the air-time of TSBs to be fully controlled by not-for-profit actors. If TSBs have been granted concessions in deference to their not-for-profit nature, then

¹⁶³⁰ BSA, above n 30, s 87A(4).

¹⁶³¹ Ibid, s 87A(2)-(3).

¹⁶³² Ibid, s 87A(1).

prohibiting them from selling air-time to commercial actors is justified. This measure can help ensure that TSBs are, in effect, a sector distinct from commercial broadcasting. However, in circumstances of financial need, the sale of air-time to commercial actors can be used by TSBs to cross-subsidize non-profit programming that would otherwise not be possible. For this reason, in cases where TSBs need the income to support their operations, completely prohibiting them from selling air-time to commercial actors is not desirable. In these cases, establishing a reasonable cap is preferable to an absolute prohibition on TSBs accessing this source of revenue.

6.5.3. Requesting Donations through the Broadcasting Service

One potential source of income for TSBs is donations from audiences who value their service. While the circumstances where stations can subsist only on donations are rare, donations can provide an additional source of funding which contributes to the ideal of diversity of funding without causing detriment to commercial broadcasters. However, when TSBs use their broadcasts to directly request financial support from their audiences, concerns may exist in relation to the potential risk of exploitation. As will be discussed in Section 6.8.3, these concerns are particularly sensitive in the case of religious broadcasters.

In Australia, TSB stations were initially prohibited from requesting donations through their broadcasts.¹⁶³³ This was a consequence of the excessively broad interpretation given in the past to the advertising prohibition. As already noted, it is unlikely that there was a true intent for that prohibition to be so broad. Currently, Australian legislation expressly excludes from the advertising prohibition and the sponsorship air-time cap, material ‘that is likely to induce public support, whether financially or otherwise’ for a community licensee or its services.¹⁶³⁴ In the case of Canada, TSB stations have never been specifically prohibited from requesting financial support from their audiences. However,

¹⁶³³ See Section 4.2.4

¹⁶³⁴ BSA, above n 30, sch 2 cl 2(2)(c).

the CRTC requires any entity that wishes to request donations through the airwaves, including broadcasting licensees themselves, to be registered as a charity.¹⁶³⁵

There are no reasons to prohibit per se the practice of TSBs requesting financial support from their audiences through their broadcasts. Other measures such as the obligation to reinvest all income in the service itself, or controls regarding the use of funds received from donations, can address any concerns in this area. As will be discussed Section 6.8.3.3, special regulation can be implemented if there are specific concerns in relation to religious broadcasters.

6.6. Content Regulation

As already explained, persons who engage in broadcasting for not-for-profit purposes have the same freedom of expression rights as those who participate in broadcasting with commercial goals. For this reason, TSBs should never be completely prohibited from broadcasting any kind of content which broadcasters from other sectors are allowed to broadcast. However, if TSBs have been supported with the expectation that they will contribute to diversity of content or help address needs unattended by the other sectors, then it can be justified to subject them to special requirements aimed at ensuring they fulfil this expectation. For example, TSBs may legitimately be required to comply with content caps or positive content quotas not applied to commercial broadcasters. As discussed throughout Chapters 4 and 5, content regulation has been a key element in the Canadian strategy for the sector, while TSBs in Australia have been subjected to very little regulation in this area. While subjecting TSBs to special content regulation is legitimate, excessive regulation can also truncate the stations' freedom of expression and too burdensome requirements can impede their viability. The following sub-sections will assess the desirability of subjecting TSBs to special content regulation in different areas.

6.6.1. Content of General Interest and Content of Specific Interest to the Community a Station Has Been Licensed to Serve

¹⁶³⁵1993 Religious Policy, above n 1263, s III(A)(1).

As has been explained, TSBs are often licensed to serve a specific geographic community or a community of interest.¹⁶³⁶ For this reason, they are sometimes restricted to broadcasting content which is of interest to that specific community. For example, Indian regulations for community radio specify that their programming ‘should be of immediate relevance to the community’¹⁶³⁷ and South African legislation establishes that community stations must:

Provide a distinct broadcasting service dealing specifically with community issues which are not normally dealt with by the broadcasting service covering the same area.¹⁶³⁸

In contrast, the UK *Community Radio Order (2004)* acknowledges that community stations can also be of service to persons outside the communities they have been specifically licensed to serve:

It is a characteristic of every community radio service that it is intended primarily to serve one or more communities (whether or not it also serves other members of the public).¹⁶³⁹

Restricting TSBs to broadcasting only for specific audiences minimizes their ability to negatively impact the viability of commercial broadcasters. In the case of underserved audiences, this also ensures that TSBs target specific programming needs which have been neglected by the other sectors. However, and as explained in Section 2.1.1.2, one of the main reasons to support TSB is its potential to increase the diversity of content available to the general public.¹⁶⁴⁰ Prohibiting TSBs from broadcasting content of general interest deprives the public of this benefit.

¹⁶³⁶ Discussed in Section 1.3.1.

¹⁶³⁷ Indian Policy, above n 11, s 5(i)

¹⁶³⁸ South African Law, above n 1544, Art. 32(4)(a).

¹⁶³⁹ UK Order, above n 9, s 3(2).

¹⁶⁴⁰ See Section 2.1.1.2.

While TSBs in both, Australia and Canada, are expected to serve the needs of the specific communities they have been licensed to serve, neither country prohibits them from broadcasting content of interest to general audiences. In the case of Australia, it has been judicially determined that the obligation of TSBs to provide content of interest to the community they are licensed to serve cannot be interpreted as a prohibition on broadcasting content with appeal to persons outside that community, because all communities also share interests with the larger society of which they are part.¹⁶⁴¹ The experiences of both countries suggests that the goals of protecting commercial broadcasters and ensuring that the broadcasting needs of specific communities are attended to do not require a measure as extreme as prohibiting TSBs from broadcasting content of general interest.

Although TSBs should be expected to prioritise the specific needs of the communities they are licensed to serve, there is no legitimate reason that warrants prohibiting them from providing programming of wider interest or from commenting on issues of general interest. Limiting them in this manner deprives the general population of access to alternative views in matters of general concern to the detriment of the goal of diversity of content.¹⁶⁴² In addition, the role of TSB, including community broadcasting, should not be seen only as that of allowing communities to provide programming for themselves. As noted in Section 2.1.4.1, TSBs are also valuable tools for communities, in special TDGs, to communicate their views, interests and concerns to the wider society and to pursue their social advancement. A prohibition of broadcasting content aimed at general audiences unjustifiably inhibits them from fulfilling this role.

Positive content requirements can be used to ensure that TSBs address the specific needs of their audiences without resorting to prohibiting the broadcast of content of general interest. For example, in Hungary, community radio stations are required to commit to devoting a specific minimum proportion of their programming to content aimed

¹⁶⁴¹ *3AW Southern Cross Radio Pty Ltd v Inner North East Community Radio Inc* (1994) ATPR 41-313

¹⁶⁴² See Inter-American Standards, above n 52, [112].

specifically at the community they are licensed to serve.¹⁶⁴³ As will be discussed in Sections 6.8.1 and 6.8.2, in the case of ethnic and indigenous broadcasters, minimum requirements for content in non-national or in indigenous languages can be used to ensure these broadcasters serve the special needs of their audiences.

With the exception of the minimum foreign language programming requirement for ethnic stations in Canada, neither Canada nor Australia impose specific quotas on TSBs regarding content that must relate to the specific interests of the communities they are licensed to serve. Both countries rely on governance and ‘representativeness’ regulation to ensure TSBs comply with their obligation to serve their communities’ needs, the idea being that community participation in the station’s management and content production ensures that their output will address community interests.¹⁶⁴⁴ In Australia, the code of practice for community television requires each station to prepare a written a policy specifying how it will ensure that it meets the interests of its community.¹⁶⁴⁵

While establishing a specific quota for content that addresses the specific interests of the community a third sector station is licensed to serve would seem desirable from a theoretical point of view, it may be difficult to implement in practice. In cases such as ethnic and indigenous broadcasters a language-based quota may be viable, but language is not the only determinant of whether content is of specific interest to a community. In most cases, determining which content can be considered of specific interest to a community for the purposes of monitoring compliance with a quota may prove too complicated, and therefore counterproductive, for both stations and regulators. In this sense, governance and ‘representativeness’ rules such as those used in Australia and Canada and discussed in Section 6.7 are more practical mechanisms for pursuing the same goal. Surveying community opinion regarding whether a station has satisfactorily addressed their needs when evaluating a station’s performance for the purpose of licence

¹⁶⁴³ *Act CLXXXV of 2010 On Media Services and Mass Media* (Hungary), Art. 66(2)(e) trans <www.euractiv.fr/sites/default/files/dokumentum.pdf> ‘*Hungarian Law*’.

¹⁶⁴⁴ Discussed further in Section 6.8

¹⁶⁴⁵ Australian Community Television Alliance, above n 880, code 2(2).

renewal is another alternative that is more practical than a specific quota. Such a mechanism is used in Ireland.¹⁶⁴⁶

6.6.2. Political Content

In India, community stations are prohibited from broadcasting news or commenting on current affairs.¹⁶⁴⁷ In other jurisdictions, such as in Italy, political content is expressly listed among the type of content community television stations are expected to broadcast.¹⁶⁴⁸ In Canada the broadcast of political content by third sector stations has never been raised as an issue of concern. In Australia, however, the matter has received more attention. As already noted, in Australia the 1975 report of the Working Party on Public Broadcasting expressed the view that TSBs should not be subjected to any restrictions relating to the broadcast of political content.¹⁶⁴⁹ Despite this, when the first experimental third sector ethnic stations were established in the country, they were prohibited from broadcasting political content.¹⁶⁵⁰ During the time where distribution of government funds to ethnic and indigenous TSB was in charge of the SBS, those stations who opted to accept this funding were required not to broadcast any political content.¹⁶⁵¹

Prohibiting TSBs to broadcast political content it is an unjustified restriction on freedom of expression. It is also contrary to the right to freedom of information of audiences, as it deprives them of the contribution alternative voices can make to the political debate. When TSBs receive government funding there may be concern on the part of the government that its funding of stations could be misinterpreted as an endorsement of the views broadcast by them. This concern was one of the reasons why the Australian government was wary of authorising political debate in the first experimental ethnic

¹⁶⁴⁶ Irish Law, above n 75, s 72(6)(c)(ii).

¹⁶⁴⁷ Indian Policy, above n 11, Art. 5(vi).

¹⁶⁴⁸ *Legislative Decree No. 44 of 15 March 2010 on the Implementation of Directive 2007/65/EC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (Italy)*, Art. 4(3) trans <www.uni.lu/content/download/31290/371510/file/Italy_translation.pdf> 'Italian Law'.

¹⁶⁴⁹ See Section 4.2.6.

¹⁶⁵⁰ See Section 4.2.7.1.

¹⁶⁵¹ See Thornley, above n 460, 300.

stations.¹⁶⁵² In addition, the fear that government funding practices may interfere with the editorial decisions of TSBs may lead policy makers to ban all political content from the sector. While these concerns are valid, they can be more adequately addressed by regulating the mechanisms of distribution of government funding to prevent abuses than by prohibiting political content in the sector.¹⁶⁵³

6.6.3. Content Originating From Other Stations

Another area in where TSBs are sometimes subjected to special regulation is the simultaneous broadcasting or the rebroadcast of content from other stations.¹⁶⁵⁴ For example, the law of Hungary prohibits TSBs from rebroadcasting content originating from commercial stations or to network with them.¹⁶⁵⁵ The law of Chile goes further as it even prohibits TSBs from networking with each other.¹⁶⁵⁶ Prohibiting stations of any sector to voluntarily share their content with each other is a restriction on freedom of expression. However, there may be legitimate reasons to restrict the capacity of TSBs to broadcast content originating from other stations. Prohibiting TSBs from networking with or rebroadcasting programming from other stations can be a mechanism to ensure that TSBs provide local programming. Prohibiting them from networking with commercial broadcasters from other areas also serves as a measure of protection for commercial broadcasters in the area of service of a TSB station and helps to preserve the distinctiveness of the sector. While these goals are legitimate, not all TSB stations have the capacity to generate content to fill a full time schedule. For this reason, prohibiting TSBs from acquiring content from other stations can result in their audiences receiving less programming and spectrum being inefficiently left idle for part of the day.

¹⁶⁵² Discussed in Dugdale, above n 330.

¹⁶⁵³ See Section 6.4.2.

¹⁶⁵⁴ This refers to cases in which the originating station has authorized or is willing to authorize the broadcast of its content by a third sector station. TSBs will be required to respect the rights of the broadcast signals 'proprietors' under the applicable legislation.

¹⁶⁵⁵ Hungarian Law, above n 1643, Art. 64(2).

¹⁶⁵⁶ Chilean Law, above n 15, Art. 15; See also the Sweden Law, above n 1456, ch 14(4).

As noted in Section 4.2.6, various Australian government reports have expressed differing views relating to the desirability of TSBs networking with other stations. However, no specific regulations have ever been implemented in this area for TSBs, despite them having existed for the commercial sector.¹⁶⁵⁷ By contrast, in Canada, this is one area where TSBs have received regulation, although the networking with or the rebroadcast of content from other stations has never been completely prohibited.¹⁶⁵⁸ As already noted, in the past Canada had a policy under which type A community stations were freely allowed to network and acquire programs from other stations, while type B stations were only allowed to network with other community stations or with a national news service.¹⁶⁵⁹ Distinguishing between stations operating in different contexts, as was done in Canada, can be appropriate. If stations operate in areas where no commercial services are available, the concerns relating to the protection of commercial broadcasters do not arise. On the contrary, the retransmission by TSBs of content originating from commercial stations from other areas can be a valuable service for audiences for which commercial broadcasting services are not easily accessible.

As explained, the CRTC eventually replaced the restrictions on the broadcast of acquired programming by type B community stations with a principle under which stations had to make a non-legally binding promise that any acquired or networked programming would be used to complement, rather than replace, locally originated programming.¹⁶⁶⁰ Ideally, just establishing such a principle as an expectation for TSBs would suffice. However, in practice, more specific regulation may be sometimes required. For example, where the sector is in emerging stages and a culture of third sector production is just developing, it may be convenient to directly specify that TSB stations have an obligation to produce some of their content themselves. Italian legislation specifies a minimum percentage of their content that community stations need to originate themselves: 50% for television and 30% for radio.¹⁶⁶¹ As already noted, a similar formula was used in the past in Canada

¹⁶⁵⁷ See Section 4.1.5.

¹⁶⁵⁸ See Section 5.2.4.1.4.

¹⁶⁵⁹ See Section 5.2.4.1.4.

¹⁶⁶⁰ See Section 5.2.4.1.4

¹⁶⁶¹ Italian Law, above n 1648, Arts. 4(1)(n) and 4(1)(bb)(1).

for campus radio stations, which were required to produce two-thirds of their content themselves.¹⁶⁶²

In order for the sector to adequately fulfill its multiple roles, it is necessary for each TSB station to generate at least a substantial portion of its own programming. However, completely prohibiting TSBs from broadcasting content originating from other stations can be more detrimental than beneficial to diversity of content and the quality of the service received by audiences. The Australian and Canadian experiences show that, even in countries where the financial conditions of the sector are relatively privileged, it is not feasible to expect all TSB stations to generate 100% of their content. In some cases, it may be desirable to impose upon TSBs a binding obligation to generate at least some of their content. If TSBs have benefitted from measures of support, then it is justifiable for their requirements in this area to be higher than those applied to other broadcasters. Either a maximum cap for networked or acquired content or a minimum positive requirement for programming produced can be used to ensure that TSB stations engage in content production. However, these caps or minimums must bear a realistic relationship to the production capabilities of the sector in each country.

6.6.4. Content Associated With the Commercial Sector

TSBs are sometimes specifically restricted from broadcasting content which is available in abundance on the commercial sector or are directly required to broadcast desirable content which has been neglected by commercial outlets.¹⁶⁶³ The purpose of regulation in this area is to protect commercial broadcasters and to ensure the distinctiveness of, and an effective contribution to diversity from, the third sector. As already noted, throughout its history Canadian TSB policy has been characterized by the use of content regulation for pursuing these goals.¹⁶⁶⁴ The complex rules that have been implemented throughout the years for different types of TSBs have included maximum caps for the broadcast of musical pieces considered ‘hits’, minimum quotas for spoken word content (which is

¹⁶⁶² See Section 5.2.4.2.3.

¹⁶⁶³ See for example the provision of the South African Legislation cited in note 1638.

¹⁶⁶⁴ See Section 5.3.5.

deemed lacking in the country's commercial sector), and minimum quotas for the broadcast of music from genres other than those which predominate in the country's commercial sector.¹⁶⁶⁵

Under Australia's co-regulatory system, the responsibility of regulating in this area falls to the representatives of the sector themselves. However, neither the community radio or community television codes of practice restrict the broadcast of types of content associated with the commercial sector or specify an obligation to broadcast content neglected by it. Despite the lack of regulation in this area, the Australian third sector has managed to establish for itself an identity distinct from that of the country's commercial sector as audience studies evidence.¹⁶⁶⁶ There are also no indications that the country's third sector has impeded the viability of commercial broadcasting. It should be noted, however, that Australian TSBs are subjected to stricter regulation in other areas, such as advertising, in comparison to their Canadian counterparts.¹⁶⁶⁷

Many of the potential benefits of TSB which were discussed in Chapter 2 depend upon the sector offering content which is distinct from that offered by commercial outlets. For this reason, if the sector has been favoured by special policies or government funding, it is reasonable to expect TSBs to contribute to diversity by providing distinct programming. As the Australian experience shows, specific regulation is not always necessary to ensure that this expectation is met. However, implementing some regulation in this area can be valid if deemed necessary. As has been mentioned in relation to other areas, specifying requirements regarding distinctiveness of programming may be more necessary where the sector is in early development stages and where the difference between it and commercial broadcasters may not be entirely clear in the minds of licensees and audiences. As in most areas of regulation, any requirements relating to distinctive content must be proportionate to the capacity of the sector to provide it and the needs of their audiences. The way in which Canadian policy has consistently treated

¹⁶⁶⁵ See Section 5.3.5.

¹⁶⁶⁶ See Meadows, et al., above n 185.

¹⁶⁶⁷ As explained in Section 6.5.1.2, the absence of content regulation may be the reason why Australia has not eliminated the sponsorship air-time caps for community stations.

anglophone and francophone stations in relation to musical diversity requirements is an example of how different rules can be necessary for TSBs that operate in different contexts.¹⁶⁶⁸

A system of specific content requirements such as that used in Canada seems to prioritise diversity of content, while advertising restrictions as used in Australia seem to prioritise the protection of commercial broadcasters. However, both types of measures can serve both purposes. After comparing the experiences of the two countries there is not sufficient evidence to say that either of the measures is more effective than the other for either of those two purposes. In this sense both types of measure can be valid alternatives and they can also coexist with each other if policy makers deem it necessary. In fact, both types of measure coexisted in the past in Canada and still do in the case of campus radio stations.¹⁶⁶⁹

Although distinctiveness of programming is desirable for the third sector, it should be borne in mind that the programming decisions of the commercial sector are normally based on providing the content which is able to attract the largest audiences.¹⁶⁷⁰ For this reason, any restrictions in this area may negatively impact the ability of TSBs to attract audiences and, by extension, to generate funding from advertising or sponsorship. As discussed in Section 5.2.4.1.1., representatives of the Canadian third sector have expressed concern that a prohibition on broadcasting content that is popular in the commercial sector could end up marginalizing TSBs. As noted in a study by Kern European Affairs, including some mainstream content commonly associated with the commercial sector among its programming can allow TSBs to attract larger audiences, thereby increasing exposure for their more distinctive content.¹⁶⁷¹ In addition to licensees' freedom of expressions rights, this is another reason why it is not desirable to completely prohibit TSBs from broadcasting any type of content on the sole basis that it is associated with, or deemed to be in abundance in, the commercial sector. While

¹⁶⁶⁸ Discussed in Sections 5.2.4.1.4 and 5.2.4.2.3.

¹⁶⁶⁹ See Sections 5.3.4.1 and 5.3.5.

¹⁶⁷⁰ See Section 2.1.4.1.4

¹⁶⁷¹ Kern European Affairs, above n 54, 33.

ensuring the distinctiveness of TSBs in programming in relation to commercial broadcasters through caps or quotas is valid, these must be set at appropriate level balancing the goal of improving diversity of content against the sector's practical need to attract audiences.

6.6.5. National and Local Content Quotas

As explained in Section 2.3.5, one of the characteristics of TSB is that it can attain levels of localism not possible for the other two sectors and generate local content in markets where local production is not attractive for commercial broadcasters or viable for public ones. TSBs can also contribute to national production where commercial broadcasters favour the importation of foreign content. For this reason, regulation is sometimes implemented to require TSBs to prioritise national or local content. For example, the legislation of Uruguay establishes that the programming of community stations must be preferably national or local¹⁶⁷² and the law of Hungary requires community radio stations to devote 50% of their content to Hungarian music.¹⁶⁷³

Neither Canada nor Australia impose obligations on TSBs in relation to national content that are significantly higher than those required of commercial broadcasters.¹⁶⁷⁴ In Canada, the CRTC has considered that requiring campus and community stations to comply with higher Canadian music quotas than commercial broadcasters would be excessively burdensome for them in light of their special diversity obligations.¹⁶⁷⁵ In Australia, although specific national content quotas are established for commercial television stations, the community television code of practice only establishes that stations must ensure that a 'significant proportion' of their programming is Australian

¹⁶⁷² Uruguayan Law, above n 12, Art. 4.

¹⁶⁷³ Hungarian Law, above n 1643, Art. 66(4)(h).

¹⁶⁷⁴ In the contrary, in Canada ethnic broadcasters are subject to special concessions in this area and remote native broadcasters are completely exempted from all Canadian content quotas. See Sections 5.2.4.3 and 5.2.4.4.

¹⁶⁷⁵ See 2011 Implementation Policy, above n 1127, [6]-[11].

without specifying a quota.¹⁶⁷⁶ The community radio code of practice only imposes a quota of 25% Australian music in relation to musical programming.¹⁶⁷⁷

In relation to local content, Canada has implemented some specific regulation for TSBs. Most notably, in the case of community television stations which are required to devote a minimum of 60% of their programming to local content.¹⁶⁷⁸ As already explained, community and campus radio stations also have a specific requirement to devote 15% of their programming to locally oriented spoken-word content.¹⁶⁷⁹ In the case of Australia, TSBs have never been subjected to specific local content quotas.¹⁶⁸⁰ As explained in Section 4.2.6, this is notable because commercial broadcasters in Australia have been regulated in this area and, in the present, the law specifically requires ACMA to establish local content requirements for commercial radio stations. As also noted in that Section, a possible explanation for why Australian policy makers decided against introducing a local content quota for the third sector when they did so for the commercial sector could be that TSBs were already producing high levels of local content despite the lack of an obligation to do so, which made regulation unnecessary.

The Australian and Canadian experiences show that heavy regulation is not always necessary to ensure that the third sector provides satisfactory levels of national and local content. If the sector is already producing high levels, introducing specific quotas and monitoring compliance with them may be an unnecessary burden both for stations and regulators. The nature of the sector, especially those stations that follow the participatory community broadcasting model, means national and local content would normally have a significant presence even in absence of regulation. However, if deemed necessary, imposing specific requirements can be justified. These requirements can be higher than

¹⁶⁷⁶ See Section 4.3.8.

¹⁶⁷⁷ Ethnic and classic music stations are subjected to lower quota of 10%. For comparison purposes, the commercial radio code of practice establishes a sliding scale of quotas going from 25% to 5% depending on the music genres played by the stations.

¹⁶⁷⁸ See Section 5.2.4.6.

¹⁶⁷⁹ See Section 5.3.5.

¹⁶⁸⁰ However, the Community Television Broadcasting Code of Practice, Australian Community Television Alliance, above n 880, code 2.5 establishes that stations must ensure that non-local programming is only broadcast when relevant to the community they are servicing.

those imposed on commercial broadcasters if TSBs have benefitted from measures of support.¹⁶⁸¹

6.7. Governance and Participation Regulation

As discussed throughout Chapter 2, one of the reasons why it is desirable to support TSB is the potential of the sector to broaden participation in broadcasting. For this reason, TSBs are sometimes subjected to regulation aimed at ensuring they provide participation opportunities to members of their audiences or, at the least, that TSB stations are representative of the communities they have been licensed to serve. The following sub-sections discuss some examples of regulatory measures which can be implemented for these purposes and assess their desirability.

6.7.1. Structural Requirements

Special structural requirements might be imposed on TSBs. For example, South African legislation provides that community radio licensees:

must be managed and controlled by a board which must be democratically elected, from members of the community in the licensed geographic area.¹⁶⁸²

As will be discussed further in Section 6.8, Canada has specific structural requirements for native, religious and campus stations. However, for general community stations, the only structural requirement is that membership in the licensee organization must be open to members of the community it serves.¹⁶⁸³ As already explained, this is also a key criteria used by ACMA in Australia when it assesses the basic adequacy of prospective

¹⁶⁸¹ As will be explained in Section 6.8.1.1.1., an exception to this rule is the case of ethnic broadcasters who, given their nature require special consideration in relation to national and local content obligations.

¹⁶⁸² South African Law, above n 1544, Art. 32(3). This means the board must be both elected by the community and formed by community members.

¹⁶⁸³ See note 1409 and text accompanying.

community licensees during the application process.¹⁶⁸⁴ The 2010 ACMA Community Participation Guidelines elaborate on this requirement by specifying that licensees' membership policies should not allow arbitrary refusals and should provide rejected applicants with the possibility of appeal.¹⁶⁸⁵ As already explained, in the case of CTV licensees ACMA is empowered to establish additional structural requirements.¹⁶⁸⁶ The Community Television Code of Practice is notably specific in this area, establishing that licensees' boards must be constituted by a minimum of 7 and a maximum of 12 members with special qualifications.¹⁶⁸⁷

Since spectrum is limited, it is reasonable to require TSB licensees to be representative of their audiences when they have been privileged with the possibility to access it in more favourable conditions. Structural requirements such as an open and inclusive membership policy can be adequate measures to secure that representation. The main issue in this area is one of balancing the need of TSBs for flexibility in their self-organization with the desirability of clear rules. Specific rules detailing the structure licensees must adopt, such as that observed in the Australian community television code of practice, have the benefit of providing greater certainty to licensees and regulators. However, and as already noted, there exists great diversity within the third sector, even among those TSBs that operate in similar contexts and aim to serve similar audiences.¹⁶⁸⁸ For this reason, it may be difficult to design a 'one size fits all' structure which would be adequate for all TSBs, or even for all stations of a determinate TSB sub-sector. Indeed, overly prescriptive structural regulation could prove counterproductive to the development of the sector.

A method such as that used in Australia where prospective licensees are free to design their own structure and the regulator then assesses the adequacy of that structure with their representativeness obligations has the disadvantage of being too subjective. Despite this, such method would normally be preferable to a rigid rule which could inhibit the

¹⁶⁸⁴ See Section 4.3.2.1.

¹⁶⁸⁵ Australian Communications and Media Authority, above n 801, 11.

¹⁶⁸⁶ See Section 4.3.3.

¹⁶⁸⁷ Australian Community Television Alliance, above n 880, code 1(1)(b).

¹⁶⁸⁸ Discussed throughout Chapter 1.

development of TSB initiatives. Specifying structural requirements through individual license conditions, as is done in Canada and Australia for community television stations, is another alternative preferable to setting a rigid rule for all stations. However, such method assumes that the regulator has an adequate understanding of the third sector, its role, and the needs of licensees. For this reason, this method may not be convenient in contexts where the sector is in emerging stages and the regulatory entity has insufficient experience dealing with it.

The other issue to consider in relation to structural regulation is the burden that complex requirements can impose on TSBs. In general, the nature of the third sector is such that it would normally be undesirable to impose regulation which would require TSBs to seek assistance from legal specialists they may not be able to afford to hire.¹⁶⁸⁹ For this reason, the financial realities of the sector in each specific context must be considered before imposing complex structural regulation. As noted in Section 4.2.7.2, the main reason why Australian legislators decided to exclude RIBS from the CTV licence category was that they considered it would be too burdensome for them to comply with the stricter governance regulations imposed on the CTV class. This exemplifies why allowing prospective licensees to design their own structure or establishing individual requirements through licence conditions is preferable to establishing a rigid format for all TSBs.

6.7.2. Access Requirements

One way in which TSBs can fulfil their role in broadening participation in broadcasting is by providing access opportunities for persons or groups who are not affiliated with the licensee organization to produce and broadcast their own programs. For example, the law of Uruguay requires TSBs to provide access air-time for independent groups which are part of the community they are licensed to serve but are not directly involved in the station.¹⁶⁹⁰

¹⁶⁸⁹ See Inter-American Standards, above n 52, [66].

¹⁶⁹⁰ Uruguayan Law, above n 12, Art. 4.

Neither Australia nor Canada subject terrestrial TSB stations to specific quotas regarding the air-time they must allocate for access by external parties.¹⁶⁹¹ Despite the lack of specific requirements, TSBs in both countries are expected to provide opportunities for community access and their performance in this area can be taken into consideration when stations are assessed for licence renewal purposes.¹⁶⁹² Expecting or directly requiring stations to provide such access opportunities is justified when they have been supported with the goal of broadening participation in broadcasting.

As noted, in Section 6.5.2, selling air-time to other not-for-profit groups is one possible source of income for TSBs. In its Community Participation Guidelines, ACMA has noted that, provided the fees charged are reasonable, selling air-time to community groups is one way in which stations can fulfil their obligation to provide access opportunities.¹⁶⁹³ Whether TSBs should be expected to provide free access air-time is something that needs to be determined considering the financial reality of stations, the degree to which they have been supported with government funding, and the economic capacity of the groups in need of access.

As discussed throughout Chapters 4 and 5, policy makers in both Australia and Canada have found it difficult to balance the issue of the liability of licensees for compliance with broadcasting regulation and other applicable legislation with the goal of broadening participation. Making licensees fully responsible for ensuring that all content broadcast through TSBs is compliant with law and regulation likely facilitates the labour of regulators. However, if access is provided to independent persons, licensees will not have full control over the content broadcast through the station. As discussed in Section 5.2.4.1.6., Canadian policy makers have found difficult to harmonize imposing upon licensees an obligation to ensure that their programming is balanced, with the reality that licensees of TSB stations based on an access model do not have the same level of

¹⁶⁹¹ As already explained, cable community channels in Canada are subjected to specific community access quotas. See Section 5.2.5.

¹⁶⁹² See Australia Communications and Media Authority, above n 801, 20-22; 2010 Policy, above n 1009, [10].

¹⁶⁹³ Australian Communications and Media Authority, *Ibid*, 23.

editorial control as other broadcasters. The CRTC declined to make special concessions for TSBs in this area and the issue ultimately lost relevance rather than being resolved.¹⁶⁹⁴ In the case of Australia, concern has been expressed about the potential liability of community licensees for matters such as defamation and how this may discourage them from seeking participation from the general public.¹⁶⁹⁵ However, no solution has ever been presented.

If TSB stations are obliged to provide access to independent groups, then providing licensees with special concessions or protections regarding liability issues may be necessary. This issue is distinct from the case of sold-air time where stations are free to sell or not air-time to any third party. If licensees are directly obligated to provide access to independent, external parties, or if whether they do so is a factor which affects their licence renewal possibilities, then they cannot be expected to assume liability for the actions of these independent actors.

6.7.3. Volunteer Participation Requirements

TSBs can also be directly required by regulation to provide community members, beyond those that are formally members or employees of licensee organizations, to participate as volunteers in the operation of the stations. For example, under the law of Ireland, TBSs are required to ‘facilitate’ the participation of community members in the production and transmission of programming.¹⁶⁹⁶ As explained in Section 2.3.3, TSBs can play a valuable role in training members of their communities and providing them with skills that can aid them in the pursue of paid employment and enable them to effectively communicate through the media, including for the advocacy of their human rights. Imposing specific requirements regarding volunteer participation is a potential measure to ensure TSBs fulfil this role.

¹⁶⁹⁴ Discussed in Section 5.2.4.1.6.

¹⁶⁹⁵ See Working Party on Public Broadcasting, above n 587.

¹⁶⁹⁶ Irish Law, above n 75, s 72(6)(a).

As discussed throughout Sections 5.2.4.1 and 5.2.4.2, community and campus stations in Canada have always been expected to allow volunteer participation in the production of content. Currently, it is a requirement that at least part of their local programming be produced by independent volunteers.¹⁶⁹⁷ Despite this, and as explained, the CRTC has always decided against establishing a specific quota for volunteer produced programming.¹⁶⁹⁸ In the case of Australia, participation from community members is also expected on TSBs. The 2010 ACMA Community Broadcasting Participation Guidelines and Community Radio Code of Practice deal with the participation requirement in greater detail than has been done in Canada.

According to the Participation Guidelines, membership in the licensee organization can be made a requirement for participation in the stations' activities but only if the membership policies are sufficiently open and inclusive and membership fees are not excessive.¹⁶⁹⁹ However, if their membership policies are restrictive, the guidelines provide that licensees have an obligation to seek participation from non-member volunteers. In any case, they must also have a policy which actively encourages general community members to become members of the licensee organization and participate in its activities.¹⁷⁰⁰ The Community Radio Code of Practice also requires stations to set in advance the grounds for the dismissal of volunteers, prohibiting their arbitrary dismissal.¹⁷⁰¹

As was explained in Chapter 1, the participatory model commonly associated with the label 'community broadcasting' is just one of the many models TSB stations can follow. Being open to participation by independent volunteers is not an essential characteristic for a service to be considered third sector. However, if TSBs have received special support as part of a government policy aimed at providing members of disadvantaged

¹⁶⁹⁷ See Section 5.3.6.2.

¹⁶⁹⁸ While specific participation requirements have not been implemented for terrestrial TSBs, cable community channels are subjected to specific requirements in this area. See Section 5.2.5

¹⁶⁹⁹ Australian Communications and Media Authority, above n 801, 16.

¹⁷⁰⁰ *Ibid*, 12.

¹⁷⁰¹ Community Broadcasting Association of Australia, above n 880, code 2.3.

communities with the opportunity to train and develop skills , then it is appropriate to require them to be open to volunteer participation.

As discussed in Section 5.2.4.1.5, community stations in Canada opposed a requirement for all of their content to be produced by volunteers. Stations considered they needed the flexibility to also resort to pay employees which the CRTC accepted. The work of TSBs may require to involve persons with expertise in certain areas and volunteers with the required expertise will not be available in all cases.¹⁷⁰² Engaging some paid employees can also give stability to a TSB station. The nature of volunteerism means high turnover is common among voluntary staff which can hinder the work of TSBs.¹⁷⁰³ For these reasons, while establishing specific requirements in relation to volunteer participation is legitimate TSBs should not be completely prohibited from engaging paid staff in their operations.

Any requirements established in relation to volunteer participation should consider the actual capacity of the stations to attract volunteers. The experience of indigenous broadcasters in Australia indicates that not all TSBs have the capacity to attract high volunteer participation rates, as this always depends on the context that they operate.¹⁷⁰⁴ When participation requirements are to be established, a system such as that used in Australia where a series of guidelines detail the conduct to be expected from stations may be preferable to a specific quota for content produced by independent volunteers, since the actual participation level ultimately depends on the community. Especially in the cases where the sector is in emerging stages and the level of community interest in TSB is not known, conduct requirements would be preferable as identifying an appropriate quota for volunteer produced content that would be realistic for TBSs to comply with would not be practical.

¹⁷⁰² See Girard, Bruce, *Empowering Radio Good Practices in Development & Operation of Community Radio: Issues Important to its Effectiveness*, Program on Civic Engagement, Empowerment & Respect for Diversity, World Bank Institute (2007) 16.

¹⁷⁰³ See *Ibid*; See also Fraser and Restrepo Estrada, above n 185, 53.

¹⁷⁰⁴ The disadvantaged socio-economic conditions typical of the audiences of indigenous broadcasters in Australia means they normally cannot afford to participate in broadcasting unless they receive remuneration for their time. Aboriginal and Torres Strait Islander Commission, above n 513, 29-30.

6.7.4. Accountability and Transparency

Several authors have included a requirement of being ‘accountable’ to the community as an essential element of the definition of community broadcasting.¹⁷⁰⁵ Reference to an accountability requirement can also be found in the laws of the U.K. and Ireland.¹⁷⁰⁶ Requiring stations to be accountable to the communities they are licensed to serve is a mechanism which can be used to ensure they are actually representative of them. In this sense, special regulation for accountability purposes can be justified under the same bases as structural or participation rules.

As discussed throughout Chapters 4 and 5, the issue of accountability has received more attention in Australia than it has in Canada. TSBs in Canada have never been required to be accountable toward the communities they are licensed to serve. However, in Australia, whether a licensee’s formative documents contain provisions which would make them accountable to the community is, according to its guidelines, one of the key elements ACMA takes into account when assessing an applicant’s suitability for a community broadcasting licence.¹⁷⁰⁷

Transparency is normally considered a requirement for accountability to be possible. Accordingly, one of the criteria that the ACMA assesses before issuing community licenses is whether the prospective licensee structure for decision making, including administrative and programming matters, would be transparent to the community represented.¹⁷⁰⁸ As noted in Section 4.3.9, the community radio and community television codes of practice establish the requirement for stations to elaborate and make available to the public written policies regarding the procedures to be followed for matters such as the resolution of internal conflicts, the encouragement of community participation and the identification and addressing of community needs.

¹⁷⁰⁵ See for example Buckley et al., above n 46, 206; Myers, n 6, 7; Kern European Affairs, above n 54, 1

¹⁷⁰⁶ UK Order, above n 9, s 3(5); Irish Law, above n 75, s 64(a).

¹⁷⁰⁷ See Section 4.3.2.1.

¹⁷⁰⁸ Ibid.

Elaborating public written policies regarding their internal processes can greatly enhance the transparency of the operation of TSBs, thereby facilitating their accountability. Transparency also benefits the stations themselves as it improves their credibility with the community they serve. In this respect, it is notable that the Australian community stations voluntarily decided to self regulate in this area. According to ACMA this decision was made as an acknowledgement that existing regulation was insufficient to guarantee their compliance with their obligations as community licensees. In lights of transparency, it would always be desirable for TSBs to publicize written policies for the different areas of their operations. However, the obligation to formulate such policies could prove excessively burdensome for those TSBs operating with lower resources. For this reason, a rigid rule of always requiring all stations to develop such written policies may not be adequate. Providing exceptions for TSBs operating with lower resources or imposing the requirement to elaborate written policies through individual licence conditions only on those licencees which can afford it should be considered. A general requirement without possibility of exceptions may inhibit the development of the sector in areas of most need.

In addition to regulating the internal structure of TSB licencees or imposing transparency requirements, another method of accountability is to provide opportunities for communities members to provide feedback when a TSB licencee is to be subjected to a non-contentious licence renewal process or to a comparative hearing against new parties interested in the licence. This method of accountability is used in Argentina (for all private broadcasters).¹⁷⁰⁹ The CRTC accept interventions from the general public during licence renewal processes which allows opportunities for audiences to make TSBs accountable.¹⁷¹⁰ In the case of Australia, because ACMA is authorized to renew licences without conducting a reassessment, the opportunity for making stations accountable through audience intervention is not always available.¹⁷¹¹ Considering the impact their decisions can have on freedom of expression and the right to information, accepting participation from the general public while making broadcasting related decisions should

¹⁷⁰⁹ See Argentinean Law, above n 14, Art 2.

¹⁷¹⁰ However and as noted, the CRTC can omit calling for a public hearing if it deems convoking one is not necessary in the public interest, in which case audiences may lose the opportunity to express their concerns regarding the licensees performance. See Section 5.3.2.4.

¹⁷¹¹ See Section 4.3.2.4.

be considered good practice for broadcasting regulators. While providing the public an opportunity to participate is always important, it may be especially so when the accountability of TSB stations is a concern.¹⁷¹²

6.8. Legal Recognition and Separate Regulation for Different Types of Third Sector Broadcasters

The previous sections have made recommendations regarding the development of a general regulatory framework for TSB. However, an issue that needs to be addressed when formulating TSB policy is whether a single framework should apply to the whole sector or whether separate licence categories or differentiated regulation is necessary for different types of TSBs. In this relation and as discussed in Section 1.3, ethnic, indigenous and religious broadcasting and broadcasting linked with academic institutions are sometimes considered special forms of TSB which may require special consideration in policy or regulation. As explained in Chapters 4 and 5, Canada has specific policies for these categories of broadcasting and, while Australia does not, it has given some recognition to ethnic and indigenous broadcasting in the form of specific funding schemes.

The establishment of separate frameworks can allow policy makers to support specific types of TSBs or address particular concerns they may have in relation to specific forms of TSB. However, this also increases the complexity of the regulatory system which can create unnecessary burdens and costs for regulatory authorities. This is illustrated by the Canadian experience: Special frameworks have aided the development of ethnic and indigenous broadcasting in the country but, as discussed in Section 5.2.6, the CRTC has also aimed to simplify its TSB policy by adopting measures such as eliminating some licence sub-categories and adopting a joint policy for campus and community stations that only distinguishes between the two in a few areas. The latter is indicative that

¹⁷¹² However, and as explained in Section 6.3.5, convoking a renewal hearing may not be desirable in areas where there are no competition for licences unless specific concerns exist regarding a licensee's performance.

sometimes the drawbacks of increased complexity outweigh the benefits of specific regulation.

The aim of this section is to assess the desirability of implementing differentiated regulation for ethnic, indigenous and religious broadcasting and broadcasting linked with academic institutions. For this purpose, the following sub-sections will discuss each of these four TSB sub-sector separately and detail the special needs these types of broadcasters may have and specific concerns policy makers may have in relation to them. It would be explained how creating specific framework can aid in advancing multiple policy goals. However, it should be borne in mind that, in each case, policy makers would need to weight the potential benefits of differentiated regulation against the general undesirability of creating additional costs or burdens for regulators as well as the costs associated with the designing of the special framework themselves.

6.8.1. Ethnic Broadcasting

6.8.1.1. Reasons Why Ethnic Broadcasting May Require Special Consideration

6.8.1.1.1. Reliance on Imported Content

Ethnic broadcasters often need to import content from their audiences' countries of origin in order to adequately serve them. For this reason, the indiscriminate application of national or local content quotas may present a significant barrier for ethnic broadcasters to deliver their services, even if the same quotas are not particularly burdensome for other broadcasters to comply with. As was discussed in Section 6.6.5, in some cases imposing higher national or local content quotas on TSBs in comparison to commercial broadcasters may be justified. However, in the case of ethnic TSBs, a relaxation of national or local content requirements would seem more appropriate.

As explained in Section 5.3, while Canada's initial ethnic broadcasting policy did not make any special concessions for ethnic broadcasters in relation to Canadian content

requirements, the present policy allows ethnic stations to broadcast much lower minimum levels of Canadian music in comparison to those required of non-ethnic broadcasters.¹⁷¹³ This change was introduced in light of evidence that the regular quotas were difficult for ethnic stations to comply with. As explained in Section 5.2.4.4, although stations have requested them, the policy makes no concessions in this area for ethnic television stations.¹⁷¹⁴ In the case of Australia, the Community Radio Code of Practice establishes that ethnic stations may broadcast lower levels of Australian music than the minimum required of other stations.¹⁷¹⁵

It would be very rare to find a case where the need to encourage domestic production is so compelling that it would not permit exceptions to national production quotas for ethnic broadcasters. This does not mean that ethnic broadcasters should never be subjected to minimum levels of national or local content. Indeed, a case can be made that it is undesirable for ethnic broadcasters to rely exclusively on imported content. In relation this, the Canadian ethnic broadcasting policy specifies that ethnic stations are expected to provide locally oriented programming and that the stations' plans for local programming will be a criterion for consideration during the licensing and renewal processes.¹⁷¹⁶ However, no specific quotas are imposed.

As noted in Section 2.1.4.1, an advantage of the third sector is that it can provide domestic ethnic content when it may not be viable for commercial services to do so and, in doing so, play an essential role in providing ethnic audiences with local information in their own native languages. In light of this, specifying obligations for ethnic broadcasters relating to national or local content is not unreasonable. Requiring ethnic stations to comply with a minimum level of nationally produced content can help develop a domestic industry for the production of ethnic content which could eventually attain commercial sustainability, and a local content requirement can ensure that the special needs of ethnic communities in relation to local information are met. Requirements can

¹⁷¹³ See Sections 5.2.4.4 and 5.3.5.

¹⁷¹⁴ However, as is always the case in Canada, the CRTC is empowered to vary requirements in a per case basis at the request of stations and attending to their specific circumstances.

¹⁷¹⁵ Community Broadcasting Association of Australia, above n 880, code 5.2.

¹⁷¹⁶ Ethnic Broadcasting Policy, above n 211, [39]-[41].

be general and flexible as they are in Canada or, alternatively, take the form of specific quotas. However, if specific quotas are implemented, the minimum levels established should be realistic in relation to the ethnic broadcasters' capacity for local production and consideration must be paid to whether the ethnic communities in question also have needs or desire for imported content.

6.8.1.1.2. Broadcast in Non-national Languages

As was noted in Section 1.3.2, the exclusive broadcast in languages other than the national language(s) is not an essential characteristic of ethnic broadcasting. However, the reality is that ethnic broadcasters often broadcast content in non-national languages and may need to do so in order to adequately serve the needs of their audiences. Accordingly, any general restrictions on the use of non-national languages in broadcasting which are indiscriminately applied to ethnic broadcasters can seriously impair their ability to serve their audiences.

As was discussed in Section 4.1.8, in the past Australia has imposed restrictions regarding the use of languages other than English in broadcasting. However, since language restrictions have been lifted for all broadcasters in Australia, there has been no need to provide ethnic broadcasters with special rules or exemptions. In Canada, however, where most broadcasters are still limited in the amount of time they can devote to broadcast in non-national languages, ethnic broadcasters are expressly exempted from these restrictions.¹⁷¹⁷

It is doubtful whether there are any legitimate interests which can justify restricting the freedom of broadcasters to use whichever language they desire. As noted in Section 2.3.2, there may be difficulties associated with monitoring broadcasting activity in languages the authorities may not understand.¹⁷¹⁸ However, no evidence has been found that the use of non-national languages has presented a major barrier for Australian or

¹⁷¹⁷ Discussed in Section 5.2.4.4.

¹⁷¹⁸ See Griffen-Foley, above n 359, 54; Casillas, above n 229.

Canadian authorities to secure the compliance by ethnic broadcasters with applicable regulations. It is clear that if broadcasters were restricted to national languages this would be more convenient for the authorities in charge of monitoring and enforcing regulation. However, any difficulties generated by multilingual broadcasting are a burden that must be borne in light of the rights of persons to communicate through broadcasting in their own languages.

As explained in Section 5.2.4.4, the justification that has been provided for the restrictions that Canadian regulation imposes on the broadcast of content in non-national languages by non-ethnic broadcasters is that these are necessary in order to protect ethnic broadcasters from competition and to ensure their viability. However, it is not clear why ethnic broadcasters are accorded more protection from competition in the broadcast of content in non-national languages than in the broadcast of ethnic content in national languages.¹⁷¹⁹ In Australia, where there are no language restrictions, most ethnic third sector content is broadcast by general community radio stations, with only a few TSB stations in the country being fully dedicated to ethnic content.¹⁷²⁰ This can, however, be attributed to factors other than the lack of language restrictions for non-ethnic broadcasters. They include the different market conditions or the lack of a specific ethnic broadcasting licence class which can make it difficult for TSB initiatives seeking to concentrate only on ethnic content to access licences.¹⁷²¹ For this reason, it cannot be said that the viability of dedicated ethnic stations requires non-ethnic broadcasters being subjected to language restrictions. There is insufficient evidence to assert that ethnic TSBs or ethnic broadcasters in general would always require this protection.

Setting aside the legitimacy of generally restricting broadcasters in their capacity to broadcast in non-national languages, if for any reason this was deemed necessary then, as in Canada, a special ethnic broadcasting licence class should be created and exempted

¹⁷¹⁹ There are no restrictions in Canada on the broadcast of ethnic content in national languages by non-ethnic broadcasters. However, this could be due to the fact that it is difficult from a practical point of view to determine when content is ethnic. Language, on the other hand, is an easily identifiable element.

¹⁷²⁰ National Ethnic and Multicultural Broadcasters' Council, Submission to the Australian Parliament Joint Standing Committee on Migration Inquiry into Multiculturalism (2011), 14.

¹⁷²¹ See Section 4.3.2.3.

from these restrictions. This would be necessary to ensure that the rights of audiences which have a need for broadcasting services in non-national languages are not impaired by the measures.

Another issue is whether ethnic broadcasters should be required to use non-national languages in their broadcast. As noted, Canada requires broadcasters licensed as ethnic to devote at least 50% of their schedules to content in non-national languages.¹⁷²² Since Australia does not recognise a distinct 'ethnic' licence category, there are no regulatory requirements in this area. As has been explained, ethnic communities may have special needs in relation to broadcasting services even if their native language is a national language. A station that serves primarily ethnic communities which share the national language(s) may not use foreign languages in their broadcast, but may still require special consideration in areas such as national content quotas. For this reason, it is not always appropriate to require ethnic broadcasters to broadcast solely or primarily in non-national languages.

As has been noted, in Australia and Canada ethnic broadcasters do not normally serve a single community, but orient their programs toward a multiplicity of distinct ethnic communities. The rationale employed by Canadian policy to justify a minimum non-national language programming requirement is the need to ensure that the linguistic diversity of the country is represented on the airwaves in circumstances where frequency scarcity and the production capacity of the different groups do not allow for each ethnic community to be entitled to an entire broadcasting service.¹⁷²³ In pluralistic countries such as Canada and Australia, where language diversity is great, requiring ethnic broadcasters to serve multiple communities and provide multilingual programming may be justified. However, if regulation is deemed necessary to ensure multiple linguistic groups are represented, then a quota requiring a minimum number of languages to be represented in the station programming schedule may be more effective than a quota that

¹⁷²² Ethnic Broadcasting Policy, above n 211, [26].

¹⁷²³ See Ibid, Summary; See also CRTC, *Review of the Broadcasting Policy Reflecting Canada's Linguistic and Cultural Diversity – Call for Comments*, Public Notice 1998-135, [35].

simply requires a minimum amount of time to be devoted to broadcast in any language other than the national language(s).

6.8.1.1.3. Support for Ethnic Broadcasting

As noted in Section 2.4.5, given the special role TSBs can play in addressing the special needs of TDGs and the special obligations governments may have towards these groups, it can be desirable to establish measures that support TSBs aimed specifically at serving these groups. Ethnic broadcasters, as they serve immigrants and ethnic minority communities, clearly fall into this category. One way in which ethnic TSB can be specifically supported is by facilitating access to licences by prospective ethnic TSBs. This can be accomplished through reserving spectrum for the sub-sector. However, as always, whether this is viable depends on the availability of spectrum and the need to balance legitimate competing interests and policy goals.

Another alternative is to subject ethnic broadcasters to a less stringent licensing procedure. Ethnic broadcasters serve special audiences and their appeal may be limited by language or cultural barriers. Because of this, their impact on the viability of other broadcasters is less of a concern than in the case of general community broadcasting stations.¹⁷²⁴ This can make viable to establish an abbreviated licensing process for ethnic stations. For example and as explained in Section 4.3.4 , because they serve special audiences, ethnic broadcasters in Australia - at least those serving a single ethnic group - are eligible for narrowcasting licenses which are easier to access than other types of broadcasting licences.¹⁷²⁵ The limited market impact of ethnic stations can also allow to provide them with more flexibility in relation to the broadcast on advertisements when this is restricted to general community stations. Concessions of this type are another way in which the ethnic sub-sector can be supported.

¹⁷²⁴ See note 1233 and text accompanying.

¹⁷²⁵ However, as noted in that same Section the 'narrowcasting' category is normally undesirable for prospective TSBs because it does not confer free access to spectrum like the 'community' category.

Ethnic broadcasters can also be supported through specific government funding schemes. As discussed in Section 4.2.7.1, , the Australian government has provided specific funding for ethnic TSB over the years in recognition of its contribution in serving audiences the government might otherwise need to serve directly. Government funding may be essential for TSB initiatives aiming to serve the less established ethnic groups. As was explained in Section 2.1.4.1.4, these groups may, indeed, be the ones that have the greatest need for a special broadcasting service while having the least capacity to establish one, which may justify special consideration for funding purposes.

6.8.1.2. A Special Licence Class for Ethnic Broadcasting?

As shown in the preceding sub-section, there are several areas where giving special consideration to ethnic broadcasters may be warranted. The establishment of a licence class with special conditions can be a mechanism to ensure that rules relating to national or local production quotas or language restrictions do not impair the development of ethnic broadcasting. A distinct licence class can also be used to implement special regulation aimed at ensuring specific policy goals are fulfilled, for example, requiring ethnic broadcasters to serve all ethnic groups within their licence area.

The creation of an ethnic licence class can also facilitate the provision of government support to the ethnic sector. Through a dedicated licence class, specific regulatory concessions can be provided to ethnic TSBs. Creating an ethnic licence class also allows for spectrum to be specifically reserved for ethnic broadcasting and may encourage the development of the sector by offering tailored licensing procedures. A specific licence class also streamlines the provision of specific funding for the sub-sector, as it makes clear which stations will be eligible for such funding. This also allows tying the access to funding to compliance by ethnic stations of their specific obligation under the ethnic licence category, making the distribution of funding both more transparent and predictable.¹⁷²⁶

¹⁷²⁶ This same argument has been used in Australia to advocate for the creation of an indigenous licence class (See Section 6.8.2.2)

While the establishment of a special licence class can greatly aid the development of ethnic broadcasting, the same goals can also be pursued through other mechanisms. A system such as that observed in Canada, where the regulator is empowered to exclude individual broadcasters from the application of general regulations, facilitates the exemption of ethnic broadcasters from rules which may be inadequate or inappropriate for them. This approach may be preferable where ethnic broadcasting activity is not common enough to justify the creation of a separate framework.

As explained in Chapters 4.2.7 and 5.3.3, neither Australia nor Canada reserve spectrum for ethnic broadcasting, so ethnic broadcasters compete with non-ethnic broadcasters in the same licensing processes, which sometimes becomes a barrier for the establishment of ethnic broadcasters. Weighing the potential value of general and ethnic services in the same licensing process will always be a challenge for licensing authorities. For this reason a specific spectrum reserve for ethnic broadcasting would be the ideal. However, this will not always be viable or preferable to allocating spectrum to other purposes. It may also not be appropriate if the interest in providing ethnic broadcasting services is not high. In these cases, and if encouraging the establishment of ethnic broadcasters is still desired, the sub-sector can be supported through other mechanisms such as the issuing of licensing guidelines which require licensing authorities to prioritize licensing applicants aiming to serve special needs audiences, such as immigrant or ethnic communities.

As noted, the Australian government has delegated the distribution of its ethnic grants to the CBF, with eligibility conditions for the grants being determined by the ethnic committee of the CBF.¹⁷²⁷ This system allows the distribution of specific funding for the ethnic sector even though no special licence class exists. If no entity akin to the CBF exists, eligibility conditions and distribution could be done by the government directly, but care would be needed to ensure the transparency of funding distribution and to protect the independence of the ethnic broadcasters.

¹⁷²⁷ See Section 4.3.7.1.

For the reasons stated in this section, it is clear that where ethnic broadcasting exists it should not be indiscriminately subjected to rules designed for general broadcasters. It is also evident that, where audiences are in need of ethnic broadcasting, it is desirable to support its development. Establishing an ethnic broadcasting licence category is not essential for supporting the sub-sector or for ensuring that the rules applied to it are appropriate. However, where ethnic broadcasting is common the establishment of an ethnic broadcasting licence category with special conditions should at least be given some consideration as the potential advantages are significant.

6.8.2. Indigenous Broadcasting

6.8.2.1. Reasons Why Indigenous Broadcasting May Require Special Consideration

6.8.2.1.1. Cultural Role

Indigenous broadcasters often serve a special cultural role. Like ethnic broadcasters, indigenous broadcasters can render an essential service to their audiences by providing them with programming in their native language when commercial, State or general community stations have failed to do so. Provision of this content can encourage the maintenance of indigenous languages and cultures. However and as already explained, in cases where an indigenous culture or language is endangered, indigenous broadcasters can also play an important role in aiding revival efforts.¹⁷²⁸ This revival role is not usually undertaken by ethnic broadcasters, who normally serve audiences whose cultures and languages are under no threat of extinction. As discussed in Section 2.1.4.1,6, under conventions such as the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* and the *Convention for the Safeguarding of the Intangible Cultural Heritage* States have an obligation to take positive measures to protect and revive endangered cultures and languages. This is especially the case when the endangered status of a culture or language has been the result of previous assimilationist policies.¹⁷²⁹

¹⁷²⁸ See Section 2.1.4.1.6

¹⁷²⁹ See, Standing Committee on Education and the Arts, above n 233, 8.

Both Australia and Canada have recognised the important cultural role of indigenous broadcasters.¹⁷³⁰ Despite this, neither country has established specific obligations to ensure that indigenous broadcasters fulfill this role.¹⁷³¹ Positive obligations could be justified when indigenous broadcasters have received funding or special concessions as part of State efforts to promote or revive indigenous culture or languages. As explained in Section 2.2.4, determining what would constitute ‘indigenous content’ for the purposes of implementing a positive indigenous content quota is not practical.¹⁷³² In the case of Canada the CRTC has adopted a definition of ‘native program’ but, as noted, no specific quotas have been implemented.¹⁷³³ Instead, indigenous broadcasters are assessed in relation to their projects for supporting indigenous culture and their performance in this area during the licensing and licence renewal stages respectively.¹⁷³⁴ Although specific quotas are more certain and usually more effective in ensuring the fulfillment of a determinate policy goal, the practical difficulties associated with determining the type of content that would count toward the quota mean a more general assessment process, such as that used by the CRTC, is preferable.

Implementing a quota regarding the use of indigenous languages is more feasible than one referring to the broader notion of ‘indigenous content’.¹⁷³⁵ As discussed in Section 5.2.4.3., in the case of Canada the CRTC decided against imposing specific obligations regarding the use of indigenous languages. In the Canadian context, establishing such requirements was deemed impractical because the languages of some Canadian indigenous peoples had become extinct and because in certain service areas multiple language groups co-habit, which requires indigenous broadcasters to resort to the use of a ‘lingua franca’. However, in a different context, a quota for the use of indigenous languages may well be viable and appropriate. Although indigenous peoples should be

¹⁷³⁰ See Sections 4.2.7.2 and 5.2.4.3.

¹⁷³¹ However and as noted in Section 4.2.7.2, the report of review of Australian Government Investment in Indigenous Broadcasting and Media recommended for an indigenous licence category to be created with specific requirements in this area.

¹⁷³² See Michaels, above n 109, 277

¹⁷³³ Native Policy, above n 122, s 2(2).

¹⁷³⁴ See Section 5.2.4.3.

¹⁷³⁵ See Section 2.2.4.

generally free to broadcast in whichever language they like, and to use their broadcasting outlets to communicate with the broader public, a minimum ‘indigenous language’ quota can be desirable where the preservation or revival of a specific language is a concern and where special support has been provided.

6.8.2.1.2. Social and Economic Conditions

As discussed in Sections 4.2.7.2 and 5.2.4.3, in both Australia and Canada, the social and economic conditions under which indigenous broadcasters operate have been proposed as reasons for giving them special consideration. In both countries, most indigenous broadcasters operate in ‘remote’ areas that are underserved by other types of broadcasters.¹⁷³⁶ Such services are of great social value and normally represent less of a threat to the viability of commercial broadcasters than general community stations.¹⁷³⁷ As noted in Section 5.2.4.3., because of this reasoning, type ‘A’ native stations were the first type of TSBs in Canada to be fully exempted from advertising restrictions. For the same reasons, in Australia it has been proposed that the advertising restrictions applicable to community stations be eliminated or relaxed for indigenous stations, or at least those classified at RIBS.¹⁷³⁸

It should be emphasised that the notion of ‘remote’ indigenous broadcasting is peculiar to the particular geographic realities of Australia and Canada and, accordingly, may not be applicable in other contexts. However, their remoteness is not the only reason why each country has given the sub-sector special consideration. The ‘native’ licence class in Canada is not limited to remote indigenous broadcasters, although some benefits - such as the licence requirement exemption - are restricted to remote services. In Australia, the 2010 Government Investment Review recommended the creation of a licence class for all indigenous broadcasters, not only RIBS.¹⁷³⁹ Moreover, Australia’s Productivity Commission *Broadcasting Inquiry Report* also acknowledged that indigenous

¹⁷³⁶ See Sections 4.2.7.2 and 5.2.4.3.

¹⁷³⁷ Ibid.

¹⁷³⁸ Discussed in Section 4.2.7.2

¹⁷³⁹ Ibid.

broadcasters in Australia, even those located in urban areas, provide a first level of service to their audiences as the only source of information in their own language, and therefore deserve special consideration.¹⁷⁴⁰ Even when operating in commercially competitive markets, indigenous broadcasters can have less of an impact than other TSBs on commercial broadcasting if their audiences are limited, for example, because they broadcast primarily in indigenous languages. If this is the case, reducing or eliminating advertising restrictions can be considered.

The economic conditions of indigenous broadcasters may not always be the same in other countries as they are in Australia and Canada; although, unfortunately, it is very common for indigenous peoples to be economically disadvantaged. Even if the specific circumstances of the sector are not the same, the experiences of Canada and Australia are still relevant in that they show that, if an indigenous broadcasting sub-sector operates under social or economical conditions that are significantly different from those of other TSBs, indiscriminately applying the same rules to it can result in excessive or unnecessary burdens for indigenous broadcasters. This is a good reason for considering the implementation of a specific licence category or, failing that, a system that exempts indigenous broadcasters from rules that do not sufficiently take into account the distinctive needs of this sector.

6.8.2.2. A Special Licence Class for Indigenous Broadcasting?

Although Australia is yet to establish an indigenous broadcasting licence class, the desirability of creating one has been canvassed.¹⁷⁴¹ The various Australian Government documents that have considered establishing a licence category for indigenous broadcasting suggest that there are a number of potential benefits of adopting specific regulation.

¹⁷⁴⁰ Productivity Commission, above n 400, 286.

¹⁷⁴¹ Discussed in Section 4.2.7.2.

To begin with, recognising indigenous broadcasting as its own TSB class would enable the express reservation of a portion of the spectrum for the sub-sector. As noted in relation to ethnic broadcasting and as explained in section 2.4.5 a specific spectrum reserve for a TSB sub-sector is a mechanism which can be used to support the development of TSB services aimed toward special needs audiences. In this respect, the special role indigenous broadcasters play in fulfilling the communication needs of their audiences and supporting indigenous cultures and languages can justify the adoption of a reserve which ensures that at least some frequencies are allocated to them. This was recognised by the Australian Productivity Commission¹⁷⁴² and also by UNESCO, who has stated:

Steps should be taken to ensure that indigenous peoples, largely sidelined as they are in the information society, have access to frequencies with a view to propagating their culture, information, ideas and so forth.¹⁷⁴³

As discussed in Section 4.2.7.2, the Australian experience provides evidence that the need to compete directly against other TSBs in comparative processes can be a barrier to the establishment of indigenous broadcasters, especially in areas where spectrum is scarce. As in the other cases, where viable, expressly reserving spectrum for indigenous broadcasters is a measure which can be used to support the development of the sector and relief the licensing authorities from the need to compare services of very different nature against each other during individual licensing hearings.

An indigenous licence category also allows specific licensing procedures and licensing conditions for indigenous broadcasters to be established. They can be exempted from rules which are inappropriate for them and be supported through special concessions and simplified licensing procedures. In addition, an indigenous licence class can facilitate the provision of government funding of the sector. The 2010 Review of Australian Government Investment in Indigenous Broadcasting and Media recommended the

¹⁷⁴² See note 745 and text accompanying.

¹⁷⁴³ UNESCO, above n 7, 100.

creation of a system where funding is directly linked to the issue of indigenous broadcasting licences.¹⁷⁴⁴ The implementation of such a system has several advantages. Directly linking government funding with the issue of a licence avoids a ‘catch 22’ situation in which capacity to provide a service is a condition for licensing, but capacity is dependent on government funding that cannot be applied for until a licence is obtained. In this sense, financial capacity to provide the service can be omitted as a licensing criterion for indigenous broadcasters, even if used for other types of TSB licences.¹⁷⁴⁵ If continued funding is made dependant solely upon whether they comply with their licence conditions and obtain the renewal of their licences, then indigenous broadcasters would have better certainty regarding their prospects of funding than when funding requires a separate government decision. Uncertainty regarding government funding has been identified in Australia as affecting the ability of indigenous broadcasters to engage in long term planning, which is clearly detrimental to the development of the sector.¹⁷⁴⁶ While making funding guaranteed upon the issuance and renewal of indigenous licences would be ideal, this evidently requires a long term financial commitment that not all governments may be able to undertake.

As explained in Section 5.2.4.3, Canada does have a specific licence category for indigenous broadcasting. However, in practice, this licence category has not been used for the purposes which have been cited as supporting the creation of an express indigenous licence in Australia. In particular, there are no specific spectrum reserves for any type of broadcasters in Canada, so indigenous broadcasters must compete against all other types of broadcasters in the same licensing processes.¹⁷⁴⁷ Although the Canadian government provides funding for indigenous broadcasting, this is not directly linked with the issue and renewal of native licences. The general conditions of the native licence class are also substantially the same as those applied to regular community stations, with Canada’s general exemptions system used to provide special concessions only to some

¹⁷⁴⁴ Stevens, above n 384, recommendation 8.

¹⁷⁴⁵ As noted in Section 6.2.3.1, it is debatable whether financial capacity should be a licensing criterion for any type of TSBs.

¹⁷⁴⁶ As explained in Section 6.4.1, the same can be said of all TSBs. However, this issue is particular important for indigenous broadcasters as they tend to be the most dependant on government funding.

¹⁷⁴⁷ See Section 5.3.2.2.

indigenous broadcasters rather than the licence class as a whole.¹⁷⁴⁸ The main distinguishing features of the Canadian native broadcasting licence class are: the specific governance requirement that membership of the board of the licensee organisation must be open to the indigenous population of the service area; and the requirement that programming must reflect the ‘interests and needs’ of the indigenous population.¹⁷⁴⁹ Imposing conditions such as these serves multiple purposes. For governments, it ensures that if indigenous broadcasters are favoured with licences or funding, they will actually represent and serve the indigenous population. For indigenous broadcasters, moreover, it provides clarity regarding the expectations policy makers have of them.

Unsurprisingly, the preceding discussion suggests that, although in theory there is a case for establishing an indigenous licence class, whether the creation of such a licence class actually advances the development of the sector primarily depends on the conditions that are attached to such a licence. It is evident that the introduction of an indigenous licence class would be detrimental to the development of the sector if it generated additional restrictions for indigenous broadcasters without providing them with any concessions. Measures such as spectrum reserve and government funding depend on the capacity and commitment of governments to support the sector. However, the Australian and Canadian experiences indicate that, if indigenous broadcasting wants to be supported in recognition of its potential cultural and social contributions, then establishing a specific licence class can be a valuable tool to facilitate that endeavor.

In Australia, the Digital Dreaming report proposed the creation of two separate indigenous licence classes for outlets operating in competitive and non-competitive markets respectively.¹⁷⁵⁰ The Canadian system actually adopts a similar concept, with a general native licence class and a special system of exemptions for indigenous broadcasters in remote areas. Further differentiating between different types of indigenous broadcasters in ways such as this can facilitate addressing specific situations, but can also introduce unnecessary complexity to the regulatory system. Whether it is

¹⁷⁴⁸ See Native Exemption Order, above n 1355.

¹⁷⁴⁹ See note 1211 and text accompanying.

¹⁷⁵⁰ See Aboriginal and Torres Strait Islander Commission, above n, recommendation 3.43.

appropriate to differentiate between different categories of indigenous broadcaster depends on whether the levels of indigenous broadcasting activity of each type are sufficient to justify separate frameworks.

Over and above the practical effects, the creation of an indigenous licence class can have an intrinsic or symbolic value as a recognition of the distinctiveness and worth of the sector. It can also strengthen the political position of the sector representatives in relation to both broadcasting law reform and policy making. In Australia, the lack of recognition of indigenous broadcasting as a separate sector has been criticized for collocating indigenous broadcasters within the umbrella of organisations that represent the general community sector, when they have quite distinctive interests.¹⁷⁵¹ The matter of official representation assumes more importance in Australia than in other jurisdictions because of the country's co-regulatory system, where representatives of each sector formulate binding codes of practice for that sector.¹⁷⁵² The Australian Productivity Commission, for example, has suggested that the community radio code of practice is not entirely adequate for the needs of the indigenous sector.¹⁷⁵³

While these specific considerations apply to the Australian system, the issue of representation may also be relevant elsewhere. Obviously, a lack of legal recognition of the sector does not prevent indigenous broadcasters from organizing themselves, establishing representative bodies or coordinating lobby efforts. However, if an indigenous broadcasting licence class is created, this can significantly increase the effectiveness of such endeavors. Once the sector has legal recognition, an official representative body can be created which will benefit from improved legitimacy and be in a better position to be, at least, listened to. Moreover, an official representative body will, if good policies are followed, have to be consulted each time new legislation or measures are taken which may affect the sector. If this enhanced legal status is obtained, it can assist members of the sector to persuade the government to properly address the issues affecting the sector.

¹⁷⁵¹ Productivity Commission, above n 400, 286.

¹⁷⁵² See Section 4.1.7.

¹⁷⁵³ Productivity Commission, above n 400, 286.

6.8.3. Religious Broadcasting

6.8.3.1. Should Religious Broadcasting Be Allowed? – Special Concerns Regarding Religious Broadcasting.

As was noted in Section 1.3.4, religious organizations are among the actors that most commonly engage in TSB. As explained in Section 2.1.5, TSB is a valuable alternative for those who want to share or promote religious views and can enable persons to fulfill their right to communicate religious ideas and receive information about different views on matters or religion. However, while participation from religious groups in broadcasting is sometimes viewed positively, it is also sometimes argued that religious organizations should be banned from the control of broadcasting licences, or that religious content should be banned from broadcasting altogether. This Sub-Section briefly analyzes such arguments and presents counterarguments for why religious content should be allowed in broadcasting, as well as why religious organizations should not be completely banned from participation in broadcasting in general. The following sub-sections discuss why, first, it can be desirable to allow religious groups to access TSB licences and, secondly, the reasons why religious TSBs may require a different form of regulation as compared with other TSBs.

Arguments for prohibiting religious content in broadcasting include the belief that it can create or exacerbate religious conflict and divisiveness;¹⁷⁵⁴ that the influential nature of broadcasting allows the medium to be easily exploited for deceptive purposes or abusive proselytism from which the public must be protected;¹⁷⁵⁵ and that the pervasiveness of broadcasting means audiences can be unwittingly exposed to content which offends their

¹⁷⁵⁴See Smith, Rodney K., 'Regulating religious broadcasting: some comparative reflections' (1996) 1996(4) *Brigham Young University Law Review* 905, 938; See also Price, Monroe E., Douglas Griffin and Ibrahim Al-Marashi, 'Policy Recommendations Concerning Broadcasting in Iraq (Iraq and the Making of State Media Policy)' (2007) 25(1) *Cardozo Arts & Entertainment Law Journal* 23.

¹⁷⁵⁵ See for example, Ukah, Asonzeh, 'Banishing Miracles: Politics and Policies of Religious Broadcasting in Nigeria' (2011) V(1) *Journal of Politics and Religion* 39; Reis, above n 121; See also Ofcom, above n 288.

beliefs or to the nuisance of unsolicited proselytism efforts which should be prevented.¹⁷⁵⁶ In relation to the control of broadcast licences by religious groups, it is argued that, in a situation where available frequencies are insufficient to accommodate all religious groups, it is preferable to prohibit access to licences to all than to advantage one or a few groups by granting them broadcast licences.¹⁷⁵⁷ It is also argued that broadcasters fully devoted to programming associated with a particular religion only serve a particular sector of the population and do not contribute to the general public interest, which makes it unjustifiable to allocate a scarce public resource, such as broadcast frequency, to them.¹⁷⁵⁸ At the same time, it is also sometimes deemed undesirable for religious groups to control general purpose broadcasting services. If broadcasters in general are expected to adhere to standards of objectivity or impartiality, religious groups may be deemed incapable, by their very nature, of meeting these standards.¹⁷⁵⁹ There may also be concerns that a religious group could gain too much influence if it also controlled a major source of news and entertainment.¹⁷⁶⁰

In relation to religious broadcasting, regulation of specific issues and State intervention in individual cases is complicated. An underlying issue is that the same rules can affect different groups differently which, in this area, can give rise to claims of discrimination. For example, a prohibition to use broadcasting for fund-raising purposes can have more impact for an emerging minority religious group than for an established group with access to funding from other sources. When States make decisions in individual cases, for example when they sanction a station for abusive proselytism or deceptive practices or when a religious group is chosen above others in a comparative licensing process, this may also produce the impression that they are passing judgment over an individual group,

¹⁷⁵⁶ Gibney, Mark and Jeffrey L. Courtright, 'Arguments For The Elimination Of Religious Broadcasting From The Public Air Waves. (Symposium On The Religion Clauses Of The Constitution)' (1990) 4(3-4) *Notre Dame Journal of Law, Ethics & Public Policy* 765, 800-2; *Murphy v. Ireland* [2003] I Eur Court HR 73 [72].

¹⁷⁵⁷ See *United Christian Broadcasters Ltd v. The United Kingdom* (dec) (European Court of Human Rights), Third Section, Application no. 44802/98; Hardy, and Secret, above n 121, 4.

¹⁷⁵⁸ Gibney and Courtright, above n 1756, 774; See also *United Christian Broadcasters Ltd v. The United Kingdom* (dec) (European Court of Human Rights) Third Section, Application no. 44802/98.

¹⁷⁵⁹ Discussed further in Section 6.8.3.3.

¹⁷⁶⁰ See Reis, above n 121; Price, Griffin and Al-Marashi, above n 1754.

its beliefs or its practices or favouring some groups over others.¹⁷⁶¹ For these reasons, it is sometimes argued that blanket bans on religious broadcasting and the ownership of broadcasters by religious groups are preferable as they are neutral in nature and easier to justify as a restriction on freedom of religion than interventions on a case-by-case basis.¹⁷⁶²

While all of the above concerns are certainly valid, they do not provide sufficient justification for a complete prohibition of religious content in broadcasting. In relation to the argument that religious broadcasting can result in persons being unwillingly exposed to views that may offend their own, it should be noted that persons do not have a right to be protected from exposure to ideas contrary to their own.¹⁷⁶³ On the contrary and as noted in Section 2.1.5, the fulfillment of the right to adopt or change beliefs requires an environment in which a person's convictions can be challenged. Specific content that can incite religious conflict or hatred, or that is deemed 'offensive', can always be restricted through general rules prohibiting hate speech.¹⁷⁶⁴ Other concerns, such as the potential abuse of influence by a religious broadcaster, can be addressed through measures less restrictive than a blanket ban. Examples of these measures are discussed further in Section 6.8.3.4.

It is also inaccurate to claim that blanket bans on religious content are neutral in effect as, in prohibiting the use of one of the most effective mediums for the purposes of religious proselytizing, they implicitly protect the religious status quo, whatever this may be.¹⁷⁶⁵ In relation to the issues relating to the potential adverse consequences of control of general

¹⁷⁶¹ See Gibney and Courtright, above n 256, 794.

¹⁷⁶² See *Murphy v. Ireland* [2003] I Eur Court HR 73 [77]; *Ibid*, 806.

¹⁷⁶³ *Murphy v. Ireland* [2003] I Eur Court HR 73 [72]; See also, *Appel-Irrgang v. Germany* (dec) (European Court of Human Rights) Fifth Section Application no. 45216/07.

¹⁷⁶⁴ See ICCPR, above n 134, Art. 20(2).

¹⁷⁶⁵ In this relation Smith notes: especially where they are in a majority, nonproselyting religions often seek to use broadcasting regulation to limit the capacity of minority religions to gain converts from among adherents of the majority religion. Majority religions do so by regulating broadcasting in a manner that limits the access of minority religions to the media or by increasing their own share of time on the media. (Smith, above n 1754, 911); See also Price, Monroe, 'Religious Communication and Its Relation to the State: Comparative Perspectives' in A. Sajo (ed) *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing 2007) 85-106 <repository.upenn.edu/asc_papers/52>

broadcast licences by religious groups, special religious broadcasting licences with specific programming requirements can be established if it is deemed undesirable for religious groups to deliver general broadcasting services or if they are deemed incapable of fulfilling the requirements of general broadcasting licences. This is discussed further in Sections 6.8.3.3 and 6.8.3.4.

As to concerns relating to ensuring a proper balance of religious views it is, of course, true that allocating frequencies to all groups who want them may not be. In *United Christian Broadcasters Ltd. v. The United Kingdom*, for example, the ECtHR concluded that, in accordance with the European human rights framework, banning religious groups from holding one of the few licences available in the country for national broadcasting in order to prevent any single religious group from attaining an unfair advantage over the others did not contravene the rights to freedom of expression and freedom of religion.¹⁷⁶⁶ However, it should be borne in mind that, in that case, the ban was not absolute as religious groups remained able to control local terrestrial licences, as well as cable and satellite channels. Accordingly, an absolute ban would be harder to justify.¹⁷⁶⁷ If frequency scarcity does not allow the allocation of multiple frequencies for religious broadcasting, even at the local level, then frequency sharing among religious groups is a viable alternative. This alternative is discussed further in Section 6.8.3.4.

For the reasons explained above, it seems clear that none of the concerns discussed is sufficient to justify a restriction on freedom of expression and freedom of religion as broad as completely prohibiting religious content in broadcasting, or prohibiting the participation of religious groups in broadcasting. There may, however, be legitimate reasons for subjecting broadcasting services controlled by religious groups to special regulation and, in cases of frequency scarcity, to restrict the control of broadcast licences by a single religious group. While the opportunity must exist for religious groups to at least have some level of participation in broadcasting, there are many ways in which this

¹⁷⁶⁶ *United Christian Broadcasters Ltd v. The United Kingdom* (dec) (European Court of Human Rights) Third Section, Application no. 44802/98.

¹⁷⁶⁷ The following commentators have opposed blanket bans on the ownership of broadcast outlets by religious groups: Salomon, above n 141, s 7.56; Access Airwaves, above n 6, Principle 20.1; OSCE, *Guidelines for Review of Legislation Pertaining to Religion or Belief* (2004) s G.

opportunity can be provided. For example, religious groups could be provided with access air-time in public sector broadcasters or, as was done in Australia, in commercial broadcasters.¹⁷⁶⁸ Religious groups could also be allowed to control commercial broadcasting licences or to participate in the commercial sector by purchasing air-time. Because the focus of this thesis is on TSB, it falls outside of its scope to analyze all possible forums for religious participation in broadcasting. The following sub-section discusses, in more detail, why it may be desirable to allow religious TSB.

6.8.3.2. Should Religious Groups Be Allowed to Participate in Third Sector Broadcasting?

Since religious organizations are third sector actors any broadcasting activity by them could theoretically be considered a form of TSB. However, where there are specific licences for TSBs which confer special concessions, there may be special concerns about allowing religious groups to access these licences.¹⁷⁶⁹ If TSB is supported through measures such as free access to spectrum or government funding, then allowing religious groups access to these licences can be seen as providing support to religion, especially if licensees plan to use the services for proselytizing efforts. This may be undesirable for States who strive to remain neutral on matters of religion. States do not have an obligation under IHRL to maintain neutrality in matters of religion.¹⁷⁷⁰ However, it is legitimate for them to strive for this neutrality if this is opted for as a policy decision. Despite this there are reasons why the participation of religious groups in TSB can be desirable even if neutrality has been adopted as a policy goal.

The commercialization of religion is normally seen as undesirable and produces concerns regarding the threat that unethical persons may exploit the susceptibilities of the public for financial gain. If commercial licences are issued at high fees or through market mechanisms, then confining religious groups wishing to engage in broadcasting to this

¹⁷⁶⁸ See Section 4.2.7.3.

¹⁷⁶⁹ Hardy and Secret, above n 121, 77-8.

¹⁷⁷⁰ See UNHRC GC 20, above n 119 [9]-[10]. While a general obligation of neutrality does not exist, an obligation of neutrality may exist specifically in relation to functions undertaken by States in the field of education. However, that is a matter outside the scope of this thesis.

form of licensing fosters the commercialization of religion. By way of contrast, the not-for-profit principle of TSB discourages commercialization. As was discussed in Section 6.3.1, TSBs are often subjected to the requirement to reinvest any profits derived from the service in the service itself. This measure can, in itself, limit the potential for using TSB licences for the financial exploitation of audiences. Moreover, religious TSB can enable participation by poorly-resourced minority groups, while relegating religious content to the commercial sector inevitably favors groups with better resources.¹⁷⁷¹ In addition, concerns about allowing religious groups to participate in TSB may be overstated, as religious broadcasting is not always proselytizing in nature.¹⁷⁷² Religious broadcasters often also seek to address the legitimate special needs of specific communities, and religious TSB can be the only viable alternative to provide these services to minority religious groups who can neither maintain a commercial service or afford to purchase air-time in the commercial sector.

The goals of religious groups may also conflict with some regulatory obligations that may be imposed on TSBs. As was discussed in Section 6.7, TSBs and community broadcasters in particular are sometimes subjected to special requirements in relation to providing access and participation opportunities to their audiences. These types of requirements may be difficult to reconcile with the goals of religious groups who may wish to establish stations for the purpose of engaging in religious proselytizing or to provide a religious service administered by a religious authority. If the general regulations applicable to TSBs are deemed incompatible with the nature of religious broadcasting, a special TSB licence category for religious broadcasting with special conditions can be considered as an alternative to prohibiting religious participation in TSB. The following sub-section discusses reasons why a special framework for religious TSB may be desirable.

6.8.3.3. Reasons for Distinguishing Religious Broadcasting From Other Types of Third Sector Broadcasting

¹⁷⁷¹ See *Murphy v. Ireland* [2003] I Eur Court HR 73 [74]; Smith, above n 1754, 934.

¹⁷⁷² See Section 1.3.4.

Because of its nature, religious broadcasting may not always be compatible with regulations applied to other TSBs or broadcasters in general. For this reason, religious broadcasting may require special consideration in regulation. As noted above, participation and representativeness rules applied to other TSBs may conflict with certain models of religious broadcasting. In this relation, the Canadian policy for religious broadcasters does not impose the same governance and participation requirements on them that apply to community or campus stations.¹⁷⁷³ While in Australia broadcasters who hold community licences are required to comply with participation requirements,¹⁷⁷⁴ there are also alternative routes of access available to persons seeking to engage in forms of religious broadcasting for which a participatory model is not appropriate. As explained in Section 4.3.4, stations whose sole focus is to engage in religious proselytism or to provide religious services are eligible to operate under a narrowcasting licence. While allowing religious groups access to different types of licences is an alternative, if religious broadcasting is to be relegated to a single licence category the rules that apply to this category may require modification to take into account the needs of the sub-sector.

A particular area where religious broadcasting may require special rules is in relation to balance obligations. A programming balance requirement does not seem compatible with religious broadcasting which, by its nature, is biased toward a determinate point of view.¹⁷⁷⁵ As discussed in Section 5.2.4.5, this was acknowledged by the CRTC who initially refused to licence religious broadcasting services, deeming them incompatible with Canadian's broadcasting policy principle of balance when this principle was interpreted as requiring each individual station to be balanced in its programming. When the CRTC finally decided to issue licences for religious terrestrial broadcasting, it became a challenge for it to attempt to ensure balance in the programming of stations who, by their nature, were driven toward non-balanced programming and whose

¹⁷⁷³ See Section 5.3.6.2.

¹⁷⁷⁴ See Section 4.3.9; See Also Section 6.7.

¹⁷⁷⁵ Especially if religion itself is considered matter about which stations are expected to provide balance programming, as was the case in Canada.

audiences also tended to favour non-balanced programming.¹⁷⁷⁶ The Federal Communications Commissions of the United States faced similar challenges when trying to ensure religious stations' compliance with that country's 'fairness doctrine'.¹⁷⁷⁷ In both cases, the issues declined in importance rather than being truly resolved because the countries' policies regarding balance in broadcasting changed. If broadcasters in general are expected to be balanced in their programming providing a special exemption for religious broadcasters may be more viable than attempting to enforce a policy which is contrary to their nature.

As noted in Section 6.8.3.1, protecting audiences from deceptive conduct or exploitation is one of the reasons why religious broadcasting is sometimes prohibited. However, these concerns can also be addressed through specific regulation of the sector without resorting to an excessively restrictive measure such as a blanket ban of religious broadcasting. While Australia has never implemented specific regulation for religious broadcasting, the situation has been different in Canada. As discussed in Section 5.2.4.5, when the CRTC authorized the first satellite religious service in Canada it established a condition whereby any funds solicited through the station could only be used in the service itself, something that it has never required for other types of broadcasters. While in other jurisdictions, including Australia, a similar rule is applied for the third sector in general, this condition can be especially valuable in preventing abuses in religious broadcasting. For this reason, implementing it specifically for religious broadcasters is an alternative if subjecting other types of TSBs to the same requirement is not deemed necessary or desirable.

As also noted in Section 5.2.4.5, the CRTC no longer requires religious broadcasters to reinvest all income in the service itself. However, it requires religious entities who request donations through the airwaves to be registered as 'charities', a type of entity more heavily regulated than other types of non-profits.¹⁷⁷⁸ At present, the CRTC also have specific guidelines for religious content in broadcasting which are aimed at

¹⁷⁷⁶ See Faassen, Mark, 'A Fine Balance: The Regulation of Canadian Religious Broadcasting' (2011) 37(1) *Queen's Law Journal* 303.

¹⁷⁷⁷ See Hardy and Secrest, above n 121, 61-7;

¹⁷⁷⁸ 1993 Broadcasting Policy, above n 1263, s III(A)(1).

preventing the exploitation of audiences and the incitement of religious hatred.¹⁷⁷⁹ While these requirements apply to religious content in broadcasting in general, they could also be implemented as part of the licence conditions of a religious broadcasting specific licence category as discussed in the next sub-section.

6.1.3.4. A Special Licence Class for Religious Broadcasting?

While the Australian experience shows that religious broadcasting may not always require special regulation, the Canadian experience shows that specific regulation can be an effective mechanism both to address specific concerns relating to the sub-sector and to exempt it from general rules that may not be appropriate for it. If balanced programming is expected of broadcasters in general, designating a specific type of station as ‘religious’ and exempting it from this requirement allows traditional models of religious broadcasting, while informing audiences that they should not necessarily expect to find balanced programming in this specific type of station.

If religious groups extending their influence to fields other than religion is a cause for concern, restricting their eligibility for broadcasting licences to a specific licence category where a focus on religious content is required is preferable to their full exclusion from broadcasting. As noted in Section 5.2.4.5, noted, in Canada CRTC policy establishes that television stations licenced for religious purposes are expected to broadcast exclusively religious programming and that both radio and television religious stations can be restricted in their capacity to broadcast mainstream programming. However, in the Canadian context, the goal of these restrictions seems to be protecting the viability of non-religious broadcasters rather than limiting the influence of religious organizations.

While a special licence category is not necessary to implement specific regulation of the sector, it is clearly a tool which can facilitate this effort. Special eligibility conditions can be established for the licence category and maintaining the licences can be made

¹⁷⁷⁹ See Section 5.2.4.5.

dependent upon compliance with programming guidelines or financial regulations. A special licence category can also be used to facilitate frequency sharing arrangements between different religious groups if these are necessary because of frequency scarcity. As noted in Section 5.2.4.5, Canada's religious broadcasting policy establishes that stations can be required to provide multifaith programming when this is necessary to ensure the needs of the community in the licence area are served.

An argument could be made that recognizing religious broadcasting as a licence category is a form of discrimination which favours religious 'world views' over non-religious ones.¹⁷⁸⁰ This is not the case provided that: persons seeking to promote non-religious world views are also allowed to participate in the third sector; and the purpose of establishing a religious licence category is to ensure the adequate regulation of the sub-sector or to address specific concerns, and not to provide advantages to those seeking to promote religious views. If specific funding mechanisms exist to support TSB in general and providing direct government funding to religious TSBs is deemed undesirable, a separate licence category can also be used to exclude religious broadcasters from eligibility to such funding.¹⁷⁸¹

6.8.4. Broadcasting Linked With Academic Institutions

6.8.4.1. Reasons to distinguish Broadcasting Linked With Academic Institutions From Other Types of Third Sector Broadcasting

6.8.4.1.1. Institutional Support

As discussed in Sections 5.2.4.2.2 and 5.3.4.2, the reason most often cited in Canada for treating campus radio stations differently from general community stations is their access to financial support from the educational institutions to which they are linked. Because of

¹⁷⁸⁰ As noted, some groups opposed the establishment of a religious licence category in Canada for this reason. See Section 5.2.4.5.

¹⁷⁸¹ In Canada, religious broadcasters are not eligible for the funding schemes available for campus or community stations.

their access to institutional funding, in Canada campus stations have been considered to be in a stronger financial position than other TSBs. This financial advantage has been cited throughout Canadian TSB policy history as a justification for imposing rules upon campus stations that are more restrictive than those applied to general community stations in certain areas such as the broadcast of advertisements.¹⁷⁸²

As has been explained all throughout this chapter, TSB regulation must ultimately try to strike a balance between government's policy goals and the financial realities of the sector which may require TSBs to resort to sources such as paid advertising in order to subsist or render them incapable of complying with resource demanding regulations. For this reason, if a special sub-type of TSB is considered to have a financial advantage over the rest, this can justify the application of rules to that sub-type which advance government policy but which would be too burdensome for other TSBs to comply with. However, it will not always be the case that stations linked with educational institutions will be in a privileged financial position in comparison to other TSBs. Before imposing stricter regulation, care needs to be taken to verify that the financial advantage exists in reality and is not purely theoretical; and that the resources available are sufficient to enable the institutional linked stations to cope with the more burdensome regulation.

As was explained in Section 4.2.7.5, while in Australia broadcasters linked with educational institutions have never been subjected to special regulation, the country's first TSB licensing policy established a limit to the number of licences which could be issued to educational institutions in each licence area. The concern was that their institutional support would make TSBs linked with educational institutions the strongest contender for licences and that they would dominate the TSB sector.¹⁷⁸³ If concerns exist that a certain type of TSB would have an unfair advantage over other types during the licensing process, this can be a reason to implement different TSB licence categories.

6.8.4.1.2. Training Role

¹⁷⁸² See note and text accompanying

¹⁷⁸³ See Section 4.2.7.4.

In the past, certain broadcasters in Canada who were linked with educational institutions and focused on providing practical experience to students seeking to become professionals in the broadcasting field benefitted from special concessions.¹⁷⁸⁴ In relation to the broadcast of content associated with the commercial sector, they were subjected to regulation that was more flexible in comparison to that applied to other TSBs.¹⁷⁸⁵ As was noted in Section 5.2.4.2.1, very few broadcasters actually opted for the special ‘instructional’ licence class in order to benefit from these concessions and the CRTC ultimately decided to eliminate this special sub-category of campus licence. In addition to the lack of interest, the CRTC noted that developments such as broadband internet had rendered it unnecessary to train students in over the air stations.¹⁷⁸⁶

In theory, a special training role can be a valid reason to give broadcasters linked with educational institutions special regulatory concessions. However, as the Canadian experience evidences, establishing special rules for training stations may be an unnecessary burden for regulators if the demand to use over the air stations for training purposes does not actually exist.

6.8.4.1.3. Representativeness Issues

As noted in Section 5.3.6.1, at present campus stations in Canada are required to provide balanced representation in their board of directors to the institution’s faculty and administration, its student body, the station’s volunteers and the community at large. As discussed throughout Chapter 5, outside the province of Quebec, campus stations historically fulfilled roles in Canada that are commonly associated with community stations elsewhere. For this reason, a requirement to provide representation to the community at large is appropriate for campus stations in the Canadian context. However, the same requirement may not be appropriate for stations linked with academic institutions in other contexts. Special governance conditions ensuring representation for

¹⁷⁸⁴ These were those stations qualified as ‘instructional’.

¹⁷⁸⁵ See Section 5.2.4.2.3.

¹⁷⁸⁶ 2010 Policy, above n 1009, [27].

an institution's students, faculty and administration would be acceptable if this type of station has been favored with special rules in order to protect their distinctiveness from other type of TSBs. Requiring student representation would be appropriate if, as is the case in Canada, funds raised through students' fees are devoted to funding the stations.¹⁷⁸⁷

6.8.4.2. A Licence Class for Broadcasters Linked with Educational Institutions?

The Canadian experience shows how a specific licence category can be used to regulate broadcasters linked with educational institutions while acknowledging the relevant differences between the sector and other TSBs. However, when assessing the desirability of a special licence category for broadcasters linked with academic institutions policy makers will need to carefully assess whether economically or otherwise the sub-sector is truly sufficiently distinct from the rest of the third sector to justify a separate framework.

¹⁷⁸⁷ As noted, having access to funding from student levies is an essential element for a station to be considered 'campus' in Canada. See note and text accompanying.

Conclusion

The preceding chapter provided detailed recommendations regarding how to design a framework which both supports the development of TSB and provides reasonable safeguards that any public investment made in the sector will result in the desired outcomes, while balancing practical considerations and competing policy objectives. This concluding section of the thesis summarises the most important conclusions reached as a result of the analysis undertaken in the thesis. The main conclusions are as follows.

For Profit and Not For Profit Actors Have an Equal Right to Participate in Broadcasting

Under IHRL, for-profit and not-for-profit actors have an equal right to freedom of expression. As the right to freedom of expression includes the right to seek an audience through broadcasting, this means for-profit and not-for-profit actors have an equal right to participate in broadcasting. For this reason, it is not legitimate under IHRL to limit access to broadcasting licences to commercial entities. At the very least, third sector actors should be allowed to participate in broadcasting under the same terms and conditions as commercial broadcasting enterprises. Since their rights are equal as a matter of principle, law and regulation should not arbitrarily distinguish between broadcasters controlled by third sector actors and those controlled by commercial actors. Accordingly, it would be discriminatory to subject TSBs to restrictions or requirements over and above those that apply to commercial broadcasters, unless a valid justification exists for doing so.

Third Sector Broadcasters Have Great Potential to Contribute to the Fulfilment of Internationally Recognized Human Rights

TSBs can contribute to the fulfillment of a number of internationally recognized human rights, primarily freedom of expression and the right to information, but also the rights to

participate in cultural and artistic life, freedom of religion and political rights.¹⁷⁸⁸ TSBs can also make an important contribution to the fundamental right to equality, especially for members of TDGs.¹⁷⁸⁹ The potential of TSB to aid States in fulfilling their obligations under IHRL makes it highly desirable for them to support the development of the sector through measures such as direct government funding, free access to spectrum or simplified licensing procedures.¹⁷⁹⁰ While aiding the development of TSB is not the only measure through which States can pursue the relevant human rights-related goals, TSB has significant advantages over other types of measures such as ownership incentives, access quotas and content quotas which makes taking measures to support the sector worthy of serious consideration.¹⁷⁹¹

Subjecting Third Sector Broadcasters to Special Regulation can be Justified if they Have Also Benefitted from Government Funding or Special Concessions

The rationales most commonly employed to justify the special regulation of broadcasting in relation to other mediums - such as broadcasting licences being a privilege, broadcasting having higher barriers of entry in comparison to other mediums and broadcasting being special due to its pervasive and influential nature - do not provide, by themselves, sufficient justification for differentiating between commercial and TSBs in relation to regulation.¹⁷⁹² However, when TSBs have benefitted from funding or special concessions it is legitimate to subject them to special regulation, including restrictions and requirements over and above those that apply to commercial broadcasters. Such special regulation is justified by the need to protect the public investment made in the sector and to ensure that TSBs fulfil the policy goals for which they have been supported. Legitimate goals which can be pursued through the special and distinctive regulation of TSBs include: preventing any concessions granted from being exploited for private profit; protecting commercial broadcasters from potentially unfair competition; ensuring the sector's contribution to diversity of content; ensuring TSBs fulfil their role in

¹⁷⁸⁸ Section 2.1.

¹⁷⁸⁹ Section 2.1.4.

¹⁷⁹⁰ Section 2.4.

¹⁷⁹¹ Section 2.2.

¹⁷⁹² Section 3.2.

broadening participation in broadcasting; and ensuring that TSBs are independent from both governments and commercial interests and, thus, that they are effectively a sector that is distinct and separate from other the two.¹⁷⁹³

Designing an Appropriate Framework for Third Sector Broadcasting Requires Balancing Multiple Considerations.

An appropriate regulatory framework for TSB needs to carefully balance the goals of supporting the development of the sector and ensuring TSBs fulfil the expectations of policy makers. These goals need to be balanced against legitimate competing objectives, such as protecting the viability of commercial broadcasters and ensuring spectrum is appropriately available for other uses such as telecommunications services. Moreover, the regulatory framework must take into account practical realities, including resource constraints on the part of governments which may limit their capacity to support the sector or to administer a complex regulatory system, and on the part of the TSBs, which may impede them from complying with regulation that is too burdensome.

The Development of the Sector Normally Requires Adopting Special Measures to Provide Third Sector Broadcasters with Access to the Spectrum

Third sector actors are not normally able to afford to pay for access to spectrum or broadcast licences at market prices. For this reason, mechanisms which allow them to attain access through means other than the market should be implemented. The ideal system would be one where a portion of the spectrum is specifically reserved for TSB and free access is granted to those who obtain a TSB licence, issued through a merit-based process, which is separate and distinct from that used for the licensing of commercial broadcasters.¹⁷⁹⁴ Implementing such a system may not always be possible due to practical considerations, specifically frequency scarcity and the legitimate need to allocate spectrum to telecommunications and other broadcasting sectors. However,

¹⁷⁹³ Section 3.4.

¹⁷⁹⁴ Section 6.1.

reserving spectrum for the sector must be given serious consideration in light of the potential of the sector to contribute to the fulfillment of internationally recognized human rights. In the event that decision making relating to whose content is carried being completely delegated to commercial digital multiplex operators, a ‘must carry’ rule may be necessary to ensure access opportunities for TSBs as, otherwise, the operators would base their decision solely on market considerations.¹⁷⁹⁵ As explained throughout this thesis, market-based processes are inappropriate to apply to TSB.

The Ideal is for a Specific Licensing Framework for Third Sector Broadcasters to be Designed Taking Into Account the Special Nature of the Sector

A price based licensing system is not appropriate for TSBs. Weighing the merits of commercial broadcasting and TSB proposals against each other in comparative processes is extraordinarily difficult. For this reason, it is preferable to decide which frequencies would be allocated to which type of broadcasting services at the frequency planning stage and keep the licensing processes separate. The licensing criteria for TSBs should be determined taking into account the nature and role of the sector. It is appropriate to give considerable weight to how the proposals will contribute to the general diversity of content, or otherwise address needs of the licence area’s population which are unmet by the already available services.¹⁷⁹⁶ The prospective licensee’s capacity to deliver the services should also be taken into consideration for comparative purposes. However, where there is inadequate competition or underserved markets it may be preferable to issue a licence even if the capacity of the applicant is not clear.¹⁷⁹⁷ Like all broadcast licences, the duration of TSB licences must be clearly established before they are issued, to provide licensees with certainty.¹⁷⁹⁸ Once the initial term of a TSB licence expires, a new comparative process should normally be conducted where the incumbent licensee, if it so wishes, competes for the licence against prospective new entrants. This allows the licensing authority to consider whether community needs have changed through the term

¹⁷⁹⁵ Section 6.1.3.

¹⁷⁹⁶ Section 6.2.3.

¹⁷⁹⁷ Section 6.2.3.1.

¹⁷⁹⁸ Section 6.2.4.

of a licence, thereby justifying a different type of TSB service. It also provides parties, other than the incumbent licensee, with an opportunity to aspire for a broadcast licence.¹⁷⁹⁹ In addition to the normal licensing processes, establishing special developmental licences or licence exceptions for certain TSBs can be appropriate measures for supporting the development of the sector.¹⁸⁰⁰

The Not-for-Profit Principle is an Essential Element of Third Sector Broadcasting

Third sector broadcasters should always operate on a not-for-profit basis. For this reason, eligibility for TSB licences should normally be restricted to registered not-for-profit entities. Where, however, the requirements for registering not-for-profit entities are excessively burdensome allowing individuals or commercial entities to be TSB licensees would be appropriate¹⁸⁰¹. An additional requirement, that licensees operate TSB services as ends in themselves and reinvest any income derived from the stations' activities on the stations themselves, is appropriate where TSBs have been supported with specific funding schemes or concessions.¹⁸⁰²

Diversity of Funding is the Ideal for Third Sector Broadcasting but it is Not Always Attainable in Practice

When TSBs depend solely or primarily on a single source of funding - be this government grants, advertising income or a single private donor - this can compromise the independence of the broadcaster. In this sense, having access to diverse sources of funding is the ideal, as this protects stations from the influence of both governments and commercial interests. However, this ideal is not always attainable in practice. For this reason, regulatory caps on the amount of funding TSBs can derive from a single source or from specific sources (i.e government funds or advertising) should not be implemented

¹⁷⁹⁹ Section 6.2.5.

¹⁸⁰⁰ Sections 6.2.6 and 6.2.7.

¹⁸⁰¹ Section 6.2.1.

¹⁸⁰² Section 6.3.1.

unless it is certain that they will not impair the viability of TSBs.¹⁸⁰³ Other types of controls can be implemented to safeguard the stations' independence. In relation to government funding, measures that secure the transparency of the distribution system can be used to protect the independence of TSBs.¹⁸⁰⁴ Restrictions on the amount of air-time TSBs can sell to a single person or entity and caps on the amount of air-time they can sell for any purpose or specifically for advertising purposes can be used to protect the stations from undesirable influence from private interests.¹⁸⁰⁵

Broadcasting Advertisements on Third Sector Stations Should Never be Prohibited but Some Regulation May Be Legitimate

TSBs should, in general, be permitted to broadcast advertisements as this is a valuable source of income for the sector and prevents TSBs from being entirely dependant on government funding. However, if TSBs have been supported through funding or concessions not granted to commercial broadcasters, then it is legitimate to impose some restrictions in this area for the purpose of safeguarding the independence and distinctiveness of the third sector and protecting commercial broadcasters from potentially unfair competition. Any regulations adopted in relation to advertising need to consider the financial needs of the stations and the amount of funding available to them from other sources. The stations' actual potential to attract advertising should also be taken into account. If the potential advertising income is negligible then regulation is an unnecessary burden for stations and enforcement authorities alike.¹⁸⁰⁶ As a general rule, if restrictions are deemed necessary, quantitative restrictions are preferable to qualitative restrictions. Quantitative restrictions have the advantage of greater clarity, which provides certainty to TSBs and facilitates the work of regulators.¹⁸⁰⁷ Any special advertising restrictions for the third sector should only apply to paid advertisements as

¹⁸⁰³ Section 6.3.2.

¹⁸⁰⁴ Section 6.4.

¹⁸⁰⁵ Sections 6.5.1 and 6.5.2.

¹⁸⁰⁶ Section 6.5.1.

¹⁸⁰⁷ Sections 6.5.1.1 and 6.5.1.2.

there are no legitimate reasons for TSBs to be more restricted than commercial stations in relation to unpaid advertising.¹⁸⁰⁸

Third Sector Broadcasters Should Never Be Prohibited From Broadcasting Content Permitted in Other Broadcasting Sectors but Content Regulation is Sometimes Appropriate for the Sector

There should, as a general rule, be no prohibitions on the broadcasting of content by TSBs, over and above those that apply to commercial broadcasters. Nevertheless, special content requirements may be imposed where TSBs have been granted concessions in the expectation they will provide certain kinds of content. For example, special requirements can legitimately be imposed on TSBs in relation to national or local content, content deemed to have been neglected by the other sectors, content produced by the stations themselves, or content specifically aimed at the communities the TSBs have been licensed to serve. However, these requirements need to be reasonable, taking into consideration the actual capacity of TSBs to produce the desired content.¹⁸⁰⁹

Reasonable Governance and Participation Requirements are Appropriate When Third Sector Broadcasters Have Benefitted from Measures of Support

One of the goals of supporting TSB is to broaden participation in broadcasting, thereby increasing the number of voices which are able to exercise their freedom of expression through the airwaves and contribute to the information available to the public. For this reason, it is legitimate, where TSBs have been supported in pursuance of this goal, to subject them to special governance or participation requirements. For example, stations can be required to adopt governance measures such as clear and open membership policies which do not allow for arbitrary refusals.¹⁸¹⁰ TSB licensees may also be required to provide access or participation opportunities to persons external to their organization. However, in imposing this kind of requirement, the capacity of TSBs to comply with

¹⁸⁰⁸ Section 6.5.1.3.

¹⁸⁰⁹ Section 6.6.

¹⁸¹⁰ Section 6.7.1.

them must be taken into account. In addition, if TSBs are required by law or regulation to provide access opportunities to independent third parties, they should also be exempted from liability for content broadcast by these persons.¹⁸¹¹

It is Sometimes Desirable to Implement Special Frameworks for Different Types of Third Sector Broadcasters

There are significant potential benefits in establishing specific licence categories, and associated regulatory frameworks, for special types of TSBs such as ethnic, indigenous and religious broadcasters. This facilitates the provision of government support to ethnic and indigenous TSBs, whose audiences may have special needs.¹⁸¹² This also allows exempting these specific TSB sub-sectors from general regulations that may not be appropriate for them. For example, ethnic broadcasters may be exempted from national content quotas and religious broadcasters from balance of programming requirements.¹⁸¹³ However, establishing special regulatory frameworks can also unnecessarily increase the complexity of the regulatory system and generate additional costs and burdens for the regulatory authorities. Whether or not a separate framework should be established is something that needs to be decided on a case by case basis, taking into consideration whether a special sub-type of TSB is sufficiently common within a jurisdiction to justify the implementation of special regulation.¹⁸¹⁴

There Are No ‘One Size Fits All’ Solutions for Third Sector Broadcasting Policy and Regulation

This thesis has made recommendations for designing a best practice policy and regulatory framework for TSB, based on the application of international human rights principles and a comparative analysis of the Australian and Canadian experience with regulating TSB. However, while studying the experiences of two countries with a long history dealing

¹⁸¹¹ Section 6.7.2.

¹⁸¹² Sections 6.8.1.2 and 6.8.2.2

¹⁸¹³ Sections 6.8.1.1.2 and 6.8.3.3.

¹⁸¹⁴ Section 6.8.

with sector provides valuable guidance, there are no universal solutions to the numerous complex issues involved in the designing of a TSB framework. For this reason, when designing a policy or regulatory framework for TSB it is always necessary to give careful consideration to the particular context in which the third sector stations will operate, including the cultural and legal contexts of a particular jurisdiction. Nevertheless, the general principles set out in this conclusion, each of which is derived from the analysis presented in the thesis, provide substantial guidance for jurisdictions seeking to establish a 'best practice' regulatory regime for TSB, or to improve existing regulation.

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