

IS A SPECIFIC LEGAL FRAMEWORK FOR INDIGENOUS THIRD SECTOR BROADCASTING NECESSARY? A LOOK AT THE AUSTRALIAN EXPERIENCE

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In recent years there has been a strong call for the legal recognition of third sector (non-state, non-commercial) forms of broadcasting. The establishment of a dedicated spectrum frequency allocation, a specific licensing processes and a special regulatory framework for these forms of broadcasting can be deemed a requirement of the principle of equality and the internationally recognised right to freedom of expression.

Since forms of broadcasting which can be considered third sector can be very different in nature and purpose from each other, it may also be necessary to give specific legal recognition to different categories of third sector broadcasting, such as Indigenous broadcasting and provide them with their own frequencies reserve, licensing and regulatory frameworks.

Australia does not have at present a specific legal framework for Indigenous broadcasting. However, the desirability of recognising the Indigenous sector as a separate category of broadcasting has been widely debated in the country. This article looks at the Australian experience and discusses the reasons why providing legal recognition to Indigenous broadcasting would be desirable. Although the focus is on the Australian experience, the exercise also serves to illustrate why the possibility of recognising Indigenous broadcasting as a separate legal category should at least be taken into consideration by policy makers from any country with significant Indigenous populations within its territory.

I Introduction

The Australian 'third' or non-state, non-commercial broadcasting sector, known within the country as the 'community broadcasting sector', is among the most developed in the world. While in most countries around the world third sector broadcasting is still struggling to obtain legal recognition, the sector has been legally recognised in

Australia since the decade of the 1970s. In terms of audience numbers, relevance within the whole broadcasting system and legal and political recognition of its role and worth, the status of the Australian third sector is, comparatively speaking, enviable.¹

Despite this, Australia has yet to give specific legal recognition to different sub-sectors of third sector broadcasting. At present, all forms of third sector broadcasting are encapsulated in Australia under the single label of 'community broadcasting'.² The term 'community broadcasting' is most commonly associated with the third sector at the global level. However, it may be undesirable to stretch this label and apply it to all forms of third sector broadcasting. The third sector is, in itself, very diverse and broadcasting initiatives within the sector vary greatly in nature and purpose. For this reason, it is argued that it may be necessary to give legal recognition to the differences that exist within the third sector and establish specific legal categories for forms such as religious, ethnic, academic related and Indigenous broadcasting.³

Indigenous broadcasting outlets have flourished in Australia in the absence of a dedicated legal framework. Despite this, the creation of a specific Indigenous broadcasting license category, with a regulatory framework distinct from that applicable to general community broadcasting, has been consistently advocated for by representatives of the sector. The same has also been recommended in various reports prepared by, or at the request of, the Australian government. The present article takes a look at the Australian experience in order to illustrate that, while it is possible for a healthy Indigenous broadcasting sector to develop in the absence of specific legal recognition, establishing a specific framework for the sector is desirable. The blind application of general

rules, not designed with the needs of the sector in mind, often generates unnecessary barriers for its development. This can be avoided by the establishment of specific policies and regulations which take into account the special role of Indigenous broadcasting and the specific needs of the sector.

Part II of the article provides a brief clarification of the concept of Indigenous broadcasting as it would be used within the article. Part III explains the importance of Indigenous broadcasting within Australia and the role the sector plays in assisting Australian Indigenous peoples in the fulfillment of their internationally recognised human rights. Part IV discusses the reasons to distinguish Indigenous broadcasting from general community broadcasting and other forms of third sector broadcasting such as ethnic broadcasting. Part V briefly explains the concept of broadcast licences and discusses whether it is necessary to impose a licence requirement upon Indigenous broadcasters. Part VI provides some historical background relating to the Australian Indigenous broadcasting sector, as well as a brief overview of the present status of Indigenous broadcasting in Australia. Part VII argues in favour of the establishment of a specific legal category and policy framework for Indigenous third sector broadcasting by explaining the potential benefits the introduction of such framework could carry for Indigenous broadcasters. Finally, the conclusions of the exercise are presented.

II What Is Indigenous Broadcasting?

Within the context of this article the term 'broadcasting' without further specification is used to refer to traditional free-to-air terrestrial broadcasting. When other forms of broadcasting such as satellite, cable or internet based broadcasted are alluded to, this is specified.

In the broadest sense, Indigenous broadcasting refers to any form of broadcasting in which members of Indigenous peoples participate in production or transmission, or which is specifically targeted to Indigenous peoples, or whose content directly concerns Indigenous peoples. In this sense, Indigenous broadcasting will include the works of Indigenous content producers when transmitted by state or non-Indigenous controlled private broadcasters, content by non-Indigenous producers targeted primarily toward Indigenous peoples, and content about Indigenous peoples such as documentaries.

In the context of this article the term 'Indigenous broadcasting' is used to refer to a much narrower concept. Specifically, 'Indigenous broadcasting' in this article refers specifically to a third sector ('terrestrial') broadcasting outlet which is controlled by Indigenous peoples. 'Third sector' means that the outlet must be independent from the state and any form of political control and that profit making should not be its primary goal. 'Controlled by Indigenous peoples' means that the broadcasting licence must be issued to Indigenous persons, entities which can be considered representative of them, or any type of association or corporation where all or the large majority of members or partners are Indigenous persons. Broadcasting in Indigenous languages is not essential for an outlet to be considered Indigenous as Indigenous peoples should be free to use whichever language they wish in their media.

For reasons of time and space the scope of this article is limited to terrestrial third sector broadcasters controlled by and aimed primarily at serving Indigenous peoples and the question of whether creating a specific legal framework for those services is necessary or convenient. However, no implication is made that Indigenous participation in other forms and sectors of broadcasting is not also necessary in order to satisfy an Indigenous population's communication needs. Part VI.D briefly discusses Indigenous participation in the other sectors of Australian broadcasting in order to explain the role of Indigenous third sector broadcasting stations within the wider context of services broadcasting Indigenous content or aimed at serving Indigenous audiences.

Canada is one of the few states which features a specific licence category for Indigenous broadcasting. Indigenous broadcasters are known in Canada as 'native broadcasting undertakings' and are defined as follows:

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 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.⁴

While closely approximating the concept of Indigenous broadcasting used in this article, the Canadian definition

includes as additional elements that 'native' broadcasters content must be oriented to the Indigenous population and be reflective of the specific Indigenous audience each outlet is licensed to serve. Any broadcasting service of any type must serve the needs of and cater primarily to the interests of the specific audiences it is licensed to serve. In this sense, the content of Indigenous broadcasters can be expected to be distinct from those of non-Indigenous outlets.⁵ If specific regulation for Indigenous broadcasting is implemented this may cover matters of content.⁶ However, as has been noted by Eric 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.⁷ 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.⁸

In the context of this article, Indigenous broadcasting refers to broadcasting controlled by peoples which are Indigenous to the country in which the broadcasting is taking place. Broadcasting by immigrants who are members of Indigenous peoples of other countries fall within the concept of ethnic broadcasting.⁹ However, the concept of Indigenous broadcasting includes outlets which transmit across borders and serve Indigenous peoples with trans-frontier presence.

III Why Does Indigenous Broadcasting Matter?

The establishment of Indigenous broadcasters can be used to address deficiencies in the service provided by mainstream outlets to Indigenous populations. In Australia, Indigenous broadcasters have been considered to provide a 'first level of service' when they are the only broadcasting outlets servicing Indigenous populations inhabiting remote areas of the country.¹⁰ Even where other mass media outlets are accessible, Indigenous broadcasters may be the only ones providing information to Indigenous peoples in their own languages.¹¹ It has been acknowledged that the lack of a perfect understanding of the language used by the hegemonic society can become a serious impediment to effective political participation and negatively impact the social situation of Indigenous persons due to a lack of access to information.¹² In this regard, it is notable that even the International Labour Organization ('ILO') *Convention 107*, which is today derided for its assimilationist ideology, recognised the importance of having mass media in the

languages of Indigenous peoples in order to allow them access to information regarding their rights.¹³

Despite the ability of Indigenous broadcasters to provide basic services where other broadcasting sectors have failed to do so, this should not be seen as the only or even the main role of Indigenous broadcasters. Indigenous peoples have a right to establish their own broadcasting outlets which is independent of the level of service they may receive from other broadcasting services and is not limited to Indigenous communities living separated from the hegemonic society. In this sense, the United Nations' ('UN') *Declaration on the Rights of Indigenous Peoples* acknowledges that: 'Indigenous peoples have the right to establish their own media in their own languages'.¹⁴

Indigenous peoples in Australia or in any other part of the world, have a need for Indigenous controlled broadcasting outlets which is independent of the state or non-Indigenous private services that provide programming in Indigenous languages or are targeted towards Indigenous peoples. This was acknowledged in the report of the *Digital Dreaming* review, the second major Australian government review of the country's Indigenous media sector:

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.¹⁵

The role Indigenous controlled broadcasting outlets can play in the fulfillment of the internationally recognised human rights of Indigenous peoples has been well documented. Among many potential benefits, Indigenous broadcasting outlets can compensate for a lack of representation of Indigenous peoples in the mainstream media. Lack of visibility in the media can help perpetuate the marginalisation of traditionally disadvantaged groups which Indigenous peoples, including in Australia, unfortunately usually are.¹⁶ In contrast, presence in the media can raise the awareness of the general population regarding the issues affecting Indigenous peoples and help draw the attention of decision makers to these issues.¹⁷

In relation to representation in the media, a study of the community radio sector in Australia, of which Australian Indigenous broadcasters are presently considered part,

noted that in 'areas such as the participation of Indigenous people, the community radio sector is playing an essential role in compensating for their under-representation in the broader media industry'.¹⁸

While this representation in the media is important, control of such representation is even more so. This is one of the main advantages of Indigenous broadcasting: it provides Indigenous people control over their own representation in the media. In this sense, Indigenous broadcasting initiatives can help combat negative stereotypes that may have been perpetuated by media representation from sources external to the groups.¹⁹ For this reason, having control over their own representation can be a source of empowerment for members of Indigenous peoples.

Media controlled by Indigenous peoples can also allow for true cultural exchange between different Indigenous peoples and between Indigenous peoples and the mainstream society in ways media about Indigenous peoples produced by other groups could never. In this sense Indigenous broadcasting has been identified as serving a role of reconciliation for the Australian society:

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.²⁰

It has also been noted that Indigenous broadcasters have become an important resource in the plight of Australian Indigenous peoples for the preservation of their cultures and languages.²¹ The Canadian policy framework for the Indigenous broadcasting sector also highlights the role it can play in this area stating that it 'has a distinct role in fostering the development of Aboriginal cultures and, where possible, the preservation of ancestral language'.²²

Preserving traditional cultures refers to much more than the simple record-keeping of cultural productions such as songs or stories for historical and sociological study. Indeed, it has been noted that a common shortcoming of initiatives to include Indigenous content in mainstream broadcasters has been the prioritisation of the rehearsing of traditional material over the promotion of contemporary Indigenous production.²³ Representing Indigenous cultures as living realities and not as something left in the past is essential.²⁴ In relation to this, authors like Neunfeldt and

Oien, and Johnston have commented on the importance contemporary Indigenous musical production has for the identity formation process of Australian Indigenous communities and how Indigenous broadcasters have proven to be valuable outlets for such productions.²⁵

In relation to language preservation, revitalising the use of a language that has declined after years of assimilationist policies is not something that can be achieved overnight. However, multiple authors seem convinced that there is an intrinsic relation between language usage in broadcasting and its preservation.²⁶ The Australian National Language Policy Report also recognised that broadcasting had a major role to play in any maintenance and revival efforts for Indigenous Australian languages (especially because many of these lacked written forms).²⁷ Since assimilationist policies have impeded many Indigenous languages from going through their natural evolution processes, revitalisation efforts often require the adaptation of the languages for use in contemporary life.²⁸ This adaptation is not something that can be done through a top-down process or by the work of linguistic experts in classrooms. The revitalisation process cannot work unless the peoples themselves are allowed to lead it. Media creation by those who use or want to use an endangered language in daily life is essential to shape these languages onto their contemporary selves. This highlights the importance of broadcasting outlets that do not only contain programs for Indigenous peoples but which are also controlled by them.

Beyond its cultural and social contributions, the Australian Indigenous broadcasting sector has been noted to provide direct benefits to the individuals who participate in it. The sector serves as a direct source of employment and also assists Indigenous persons in developing skills useful for accessing jobs in other fields, including the mainstream media. Government reports have considered this to be one of the main roles of the Australian Indigenous broadcasting sector.²⁹

The above are only some examples meant to illustrate the importance of Indigenous broadcasting for Australian Indigenous peoples. This list was not meant to be exhaustive. Instead, its goal is simply to clarify why it is desirable to aid the development of the sector and to eliminate any unnecessary barriers that may impair such development.

IV What Is Different about Indigenous Broadcasting?

A Distinguishing Indigenous Broadcasting from General Community Broadcasting

The importance of distinguishing Indigenous broadcasting from general community broadcasting has been discussed in Australian government reports. For example, the *Digital Dreaming* report stated:

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 recycling approaches prepared with quite different types of broadcasting in mind.³⁰

Similarly, a report of the 2010 review of government spending in Indigenous broadcasting and media found that 'Indigenous broadcasting is fundamentally different to community broadcasting and should be treated separately and be regulated differently'.³¹

Among the reasons to distinguish Indigenous broadcasting from general community broadcasting, the *Digital Dreaming* report highlighted the different socio-economic realities of both sectors' intended audiences. As noted by the report, the context in which they operate means that attracting private funding and volunteers is normally more difficult for Indigenous broadcasters than for non-Indigenous community broadcasters.³² In addition, since their audiences tend to be in comparatively economically disadvantaged positions, Indigenous broadcasters are often required to prioritise providing them with opportunities to develop skills relevant to accessing paid employment.³³ This differentiates them from general community broadcasters for whom generating such opportunities is not normally a primary concern.

The *Digital Dreaming* report also considered that the roles of the community and Indigenous sector were fundamentally different, stating:

The non-Indigenous community sector is quite different from the Indigenous sector. It provides alternatives to the mainstream media, whereas Indigenous radio provides communities with their first level of service.³⁴

The labeling of the role of the general community sector as an 'alternative' to mainstream media is not completely accurate. In reality, the role of general community broadcasting, as well as all other forms of third sector broadcasting, is complementary rather than alternative to the services that must be provided by the state and commercial sectors. Despite this mislabeling of the role of general community broadcasters, the review was correct in pointing out that, if Indigenous broadcasters fulfill basic needs not attended to by other services, then this warrants for them to receive special consideration in regulation and policy.

These observations from reports prepared at the request of the Australian government serve to illustrate how the Australian Indigenous broadcasting sector has particular conditions and needs which are different from those of non-Indigenous community broadcasters. This makes it undesirable to blindly apply to Indigenous broadcasters' general rules which are created without adequate consideration of the circumstances which surround Indigenous broadcasting. The potential negative effects that such blind extrapolation from general rules may have, as well as the potential benefits of addressing the needs of Indigenous broadcasting through a specific framework, are discussed in Part VII.

B Distinguishing Indigenous Broadcasting from Ethnic Broadcasting

Indigenous broadcasting is sometimes considered to be a form of ethnic broadcasting. For example, in a paper published by the United Nations Educational, Scientific and Cultural Organization ('UNESCO') division for Freedom of Expression, Democracy and Peace it was recommended that ethnic, religious and educational broadcasting receive recognition as categories distinct from general community broadcasting.³⁵ Indigenous broadcasting however, was considered to form part of the concept of ethnic broadcasting.³⁶ In the broadest sense, ethnic media can be defined as any media that is produced by or for a specific ethnic group.³⁷ In this sense, Indigenous broadcasting and broadcasting which focuses on the ethnicity of hegemonic societies could be considered forms of ethnic media. However, the Canadian policy, among the few which explicitly recognises ethnic broadcasting as a legal category, uses a more restrictive concept. In this policy, an ethnic program is defined as:

A program in any language that is specifically directed toward any culturally or racially distinct group, other than

one whose heritage is Aboriginal Canadian, from France or from the British Isles.³⁸

Similarly, a discussion paper, issued in 1982 by the Australian Department of Communications, used a working concept of ethnic radio which identified it as a service with programming, in community languages or in English, directed towards specific ethnic communities, or programming dealing generally with multicultural issues of concern to various ethnic communities but excluding programming directed towards the dominant group or the Australian Aboriginal communities.³⁹

Under these more restrictive notions, ethnic broadcasting refers only to broadcasting targeted towards immigrant or refugee communities or citizens of foreign ethnicities. This is the sense in which the term ethnic broadcasting is used within this article.

While, like Indigenous peoples, foreign ethnic communities tend to have special circumstances which warrant a special regulatory framework for the broadcasting services intended to serve them, their specific needs will not necessarily be the same as those of Indigenous peoples. For this reason, although Indigenous broadcasting may fall within the sociological concept of ethnic broadcasting, it may be convenient at the legal and policy levels to develop separate frameworks for the ethnic and the Indigenous third sector broadcasting sub-sectors. In this sense, the *Out of the Silent Land* review, the first review of the Australian Indigenous media sector, highlighted the importance of recognising ethnic and Indigenous broadcasting as two different sectors.⁴⁰ The *Digital Dreaming* report acknowledged that there were some similarities between the realities of Indigenous and ethnic broadcasters but still considered both types of broadcasters to represent separate sectors.⁴¹

One reason to give special consideration to Indigenous broadcasting is its role in culture and language revival efforts. Both ethnic and Indigenous broadcasters commonly serve the role of encouraging culture and language maintenance. However, and as explained above, in the case of endangered Indigenous cultures and languages, maintenance is not sufficient and special revival efforts are necessary. In this sense, the Australian *National Language Policy* report noted that the endangered nature of the Australian Aboriginal languages required special measures to be taken to support their use, additional to those already recommended in the

same report in relation to other languages other than English spoken in the country.⁴² If Indigenous broadcasters are serving an additional role of assisting the state in culture and language revival efforts, this is another reason to give them special consideration in the policy making process.⁴³

In addition to the different circumstances that may surround both sectors and the additional role Indigenous broadcasting may play in culture revival, separate bodies of international law are (slowly) emerging, relating to the specific and differentiated rights of immigrants and refugees and Indigenous peoples.⁴⁴ This is another reason why it may be desirable to establish separate frameworks for both sectors. Maintaining separate frameworks can facilitate for states the monitoring of their compliance with their different international obligations. The ways in which a dedicated legal framework can assist states in complying with their international obligations regarding Indigenous peoples are discussed in Part VII.

V Broadcast Licences: What Are They and Are They Necessary?

Access to broadcasting activity, when this is not a complete state monopoly is, in most places including Australia, restricted by a licence requirement. The main justification used worldwide for imposing a licence requirement on 'over-the-air broadcasting' is the issue of 'interference' and the resulting 'spectrum scarcity'.⁴⁵ 'Spectrum', in this context, refers to the frequencies usable for radio communications. What 'interference' means in practice is that, if multiple parties transmit simultaneously in the same frequency through the same space, then they may render each others' signals impossible to decode by their intended receivers. Because of the interference issue, national and international regulation of radio waves transmission has historically been deemed a necessity for the viability of radio communications.⁴⁶ In addition to broadcasting, radio frequencies are also used for many other purposes, for example, military communications, Global Positioning System services and cellular communication services.

'Spectrum scarcity' refers to a situation where there is more demand for the use of radio frequencies than a country can allocate within its allotted spectrum while respecting its international obligations.⁴⁷ At the national level, government have traditionally dealt with the problem of interference and spectrum scarcity by establishing a general prohibition

for the dissemination of radio waves and then establishing a system of exceptions to that general prohibition. In this sense, a 'broadcasting licence' refers to an authorisation to engage in radio transmissions, in exemption of a general prohibition to do so, for the specific purpose of broadcasting. While other justifications have also been employed to justify a licence restriction for broadcasting, 'spectrum scarcity' is the strongest and most commonly invoked one.⁴⁸ It is debatable whether it is justifiable to require licences for broadcasting through platforms such as cable or the internet where no technical issues of spectrum scarcity exist. However, that is a matter outside of the scope of the present article.

Alternatives that have been proposed to a licensing system include the use of a 'spectrum commons' model. This model proposes dealing with the interference problem through the establishment of technical standards for the transmission and reception devices which allow multiple users to transmit in the same frequencies without preventing the decoding of each other's signals.⁴⁹ Following this model no prior authorisation is required for radio transmissions. Instead, any person is allowed to release them provided the equipment used complies with the established standards. The technical viability of this model, that is the question of whether technical standards can indeed be sufficient to deal with the problem of scarcity, is contested among experts in the field.⁵⁰

The other main alternative to licensing is a 'property rights' model.⁵¹ This model proposes the use of permanent property rights instead of temporary licences. On the property rights model the state only directly intervenes in the first assignment of rights over frequencies, for example, by auctioning them to the highest bidder.⁵² After the first assignment, transmission rights on the specific frequencies become the property of the assignees and they 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. The aim of the property rights model is for the market, rather than government policy, to be the main force which determines how radio frequencies are used. The 'property rights' model is favoured by multiple economists who argue that it provides better incentives for the technically and economically efficient use of the radio spectrum over traditional licensing.⁵³ However, concern has also been expressed that if the determination of how radio frequencies are used is left to the market alone, then more profitable services such as cellular communications could end up fully dominating the spectrum in detriment of the

availability of broadcast outlets.⁵⁴ It has been argued that the availability of alternate delivery platforms for audiovisual content such as the internet or cable makes it unnecessary to reserve spectrum for broadcasting and guarantee the availability of broadcast outlets through the issuance of purpose specific licences.⁵⁵ This may however, not always be the case as many persons around the world, even in comparatively developed countries such as Australia, still lack access to such alternatives. In the specific case of the Australian Indigenous population, it has been noted that limited access to the internet is one reason why traditional broadcast outlets remain especially important for them.⁵⁶

Another argument is that, even if a licence requirement is considered to be necessary in general, certain broadcasting services can be excluded from such requirement. In particular, it has been suggested that the licence requirement could be omitted in relation to third sector broadcasting services using frequencies for which there is not high enough demand.⁵⁷ For example in Canada, exemptions to the licence requirement have been introduced for certain Indigenous broadcasting services operating in remote areas of the country.⁵⁸

The process used for the licensing of community broadcasters in Australia has been identified as being burdensome for Indigenous broadcasting services which often count with limited resources.⁵⁹ In this sense, the ability to start transmissions without having to go through an administrative process for authorisation could be of great aid to the sector. Lacking the required technical qualifications however, it is not possible for the author of this article to attempt to determine whether the spectrum conditions in remote Australia will allow for the introduction of a licence exemption system similar to that used in Canada or whether the implementation of a 'spectrum commons' system would be viable throughout the whole of the country. The use of a 'property rights' system seems, at first sight, as though it could be detrimental to the communication needs of Australian Indigenous peoples; however, it is also not within the scope of this article to debate the merits of that model. For the purposes of this article it would be assumed that Indigenous groups wanting to engage in traditional over-the-air broadcasting in Australia would continue to be required to obtain a licence to do so as they are in the present. Assuming this scenario, the article will discuss the potential reasons why, as long as Indigenous broadcasting requires a licence, creating a specific licence category for them may be desirable.

VI Historical Background and Present Status of Indigenous Broadcasting in Australia

A Historical Background

As in most other countries, Australian policy regarding Indigenous peoples started as one of assimilation. This means the use of Indigenous peoples' languages was discouraged and English was promoted as the primary language of the land. The assimilationist policy resulted in multiple Australian Indigenous languages becoming extinct.⁶⁰

The shift towards a policy of multiculturalism began in the decade of the 1970s. In this decade the first Australian government initiatives for the introduction of broadcasting services specifically targeted at Indigenous populations took place. These first initiatives were not for Indigenous controlled outlets, but for state controlled services.⁶¹ The initial purpose was not to promote Indigenous culture or language maintenance, but to provide a basic service and education to Indigenous populations with no or limited knowledge of the English language.⁶² For this reason, these first initiatives only concerned services for the Indigenous population in remote or rural areas; the needs of Indigenous Australians residing in urban centres were disregarded.⁶³

The 1974 Priorities Review Staff *Report on Radio* was the first government report to acknowledge the potential of Indigenous broadcasting to contribute to cultural maintenance. The same report also recommended for the government to directly support Indigenous broadcasting through funding.⁶⁴

In the late 1970s content from independent Indigenous producers began to have presence in the Australian airwaves through some of the general purpose community stations which allowed access to airtime to Indigenous groups.⁶⁵ In 1981 the Australian Broadcasting Commission ('ABC') (the state broadcaster) also began carrying some content produced by independent third sector Indigenous groups.⁶⁶ During the early 1980s some 'pirate' (that is, unlicensed) community based Indigenous television stations appeared due to the lack of licensed services.⁶⁷ Despite this, it was not until 1985 that the first third sector radio station specialising solely in serving Indigenous communities was licensed.⁶⁸

One relevant impetus behind the change in focus from state controlled services for Indigenous peoples to Indigenous

controlled broadcasting was the adoption of the Australian government's multiculturalism policy, which recognised the desirability of preserving Indigenous languages and cultures.⁶⁹ Because of this recognition, the cultural role took prominence in Indigenous broadcasting policy.⁷⁰ The policy objective of cultural maintenance required more direct participation from the Indigenous communities than the initial goal of mere dissemination of basic information. This contributed to the government's decision to support independent Indigenous broadcasting.⁷¹

The first major government review of the Indigenous media sector took place in 1984, resulting in the *Out of the Silent Land* report.⁷² Following the recommendations of this report, the Broadcasting for Remote Aboriginal Communities Scheme ('BRACS') was introduced in 1987.⁷³ Under this scheme, the government provided remote Indigenous communities with basic radio and television communication equipment for two purposes: (1) the terrestrial retransmission of ABC and commercial content fed through a satellite service,⁷⁴ which secured access for the community and also allowed the community not to rebroadcast objectionable content if desired,⁷⁵ and (2) the production of their own content and its broadcast through the retransmission facilities in replacement of the satellite feed.⁷⁶

It is generally accepted that the scheme fell short of expectations, primarily due to inadequate funding for training and equipment maintenance.⁷⁷ Among other disappointments, it has been acknowledged that in many cases, BRACS stations were only used for retransmission, failing in the goal of incentivising the production of, and serving as an outlet for, Indigenous community content.⁷⁸ Despite all its shortcomings however, the BRACS scheme achieved 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.⁷⁹ Many of the Indigenous broadcasters currently in operation in Australia were originally established under the BRACS scheme.⁸⁰

In 1999 the second major review of the Indigenous media sector took place, resulting in the *Digital Dreaming* report.⁸¹ This report acknowledged the need for special Indigenous broadcasting services and highlighted that just providing Indigenous peoples with equality of access to the mainstream broadcasting services would be insufficient.⁸² Because of their different background and cultural realities, the review

considered that forcing Indigenous peoples to rely solely on mainstream broadcasting services for the satisfaction of their communications needs would amount to discrimination.⁸³ Moreover, the review considered that Indigenous peoples' broadcasting needs could only be fulfilled by Indigenous controlled broadcasting services.⁸⁴

In 2000 the Australian Productivity Commission presented a report of an inquiry on the whole broadcasting system of the country. This report noted that Indigenous broadcasters provide a 'first level of service', regardless of whether they are located in remote areas where they are the only service available or in urban areas where there are other outlets.⁸⁵ Indigenous persons inhabiting in urban areas were considered by the report to have a basic need for broadcasting services in their own languages that was only being fulfilled by Indigenous broadcasters.⁸⁶ This finding is significant as it evidences that Indigenous broadcasters located in urban centres also warrant special consideration in policy.

The third and most recent major review of the Australian Indigenous media sector took place in 2010 through an independent review commissioned by the Australian government regarding its investment in Indigenous broadcasting and media. The report made multiple recommendations relating to the establishment of a specific licence category for Indigenous broadcasters with specific conditions.⁸⁷ As will be discussed in the next sub-section, it remains to be seen whether any of these recommendations will be implemented.

B Legal Status of Indigenous Broadcasting in Australia

Initially Indigenous broadcasters except those established under the BRACS scheme were licensed as 'Category S' public broadcasters.⁸⁸ The term 'public broadcaster', confusingly, does not refer in this case to state services. Instead, this was the term used by the Australian government before 1992 to refer to third sector broadcasting services.⁸⁹ The denomination 'Category S' was not a legal classification. Instead, it refers to a frequency planning system established through guidelines issued by the Minister for Post and Telecommunications in 1978. Under these guidelines three different categories of 'public broadcasting' licences were established: 'Category E' for educational bodies, 'Category S' for 'special interests' stations and 'Category C' for 'community groups'.⁹⁰ In addition to Indigenous

broadcasters, 'Category S' was also shared by other types of outlets such as ethnic and religious broadcasters.⁹¹ These categories were not meant to be used to introduce specific regulation for each type of broadcaster; instead, they were only intended to aid the government in securing diversity by preventing all licences going to broadcasters of the same type.⁹² This theoretically facilitated the access of Category S services to licences as calls for licence applications were made for specific categories, meaning Category S services only had to compete with each other for licences but not with general community or educational broadcasters at the licensing stage.⁹³ Broadcasters established through BRACS had a different status as they were not originally licensed as 'public broadcasters' but through a special 'limited' licence category.⁹⁴

This situation changed with the introduction of the *Broadcasting Services Act 1992* (Cth) ('BSA'). The BSA which, with multiple amendments, remains in force to this day replaced the concept of 'public broadcasting' with that of 'community broadcasting' and phased out the use of the categories system.⁹⁵ *The Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (Cth) provided for the conversion of all licences issued through the BRACS scheme onto community broadcasting licences under the BSA.⁹⁶ With this, all Indigenous broadcasters became legally community broadcasters. After these changes, broadcasters previously licensed through BRACS came to be referred to as the Remote Indigenous Broadcasting Services ('RIBS').⁹⁷

The only specific reference to Indigenous broadcasting in the original BSA was a provision which specified that the prohibition to air advertisements and the maximum time limit for sponsorship announcements will only apply to RIBS in relation to announcements for which they had received a consideration in cash or in kind.⁹⁸ For all other community licensees (including non-RIBS Indigenous broadcasters), these rules apply regardless of whether consideration has been received or not. It is possible that since the current RIBS are the successors of the BRACS stations, which also served retransmission purposes, the provision was introduced to prevent RIBS being responsible for the advertisements in retransmitted content.

In 2000, an amendment to the BSA, relating to the transition of the country's broadcasting system to digital technology, made an addition to the list of objects of the Act 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'.⁹⁹

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.¹⁰⁰ Despite the introduction of this provision however, Indigenous broadcasting continues to be officially considered as a form of community broadcasting.¹⁰¹

The most significant steps toward the legal recognition of the specific needs of the Indigenous broadcasting sector were taken in the *Broadcasting Legislation Amendment Act (No 2) 2002* (Cth). This Act created the CTV community licence sub-category meant to be used for the licensing of third sector television services.¹⁰² However, the CTV category was defined as applying only to community television services 'not targeted, to a significant extent, to one or more remote Indigenous communities'.¹⁰³ What this means in practice is that, under Australian legislation, third sector television services intended to serve remote Indigenous communities are considered community television services but no CTV services. The purpose of this, somewhat odd, legislative construct, according to the amendment's explanatory memorandum, was to exempt RIBS from the additional conditions established by the amendment for CTV licensees.¹⁰⁴ These conditions were expected to be too burdensome for RIBS to be able to comply with.¹⁰⁵

The same amendment also provided for the creation of a specific code of practice for community broadcasters servicing remote Indigenous communities.¹⁰⁶ Upon the registration of such a code, the general community broadcasting codes of practice would cease to apply to RIBS.¹⁰⁷ However a RIBS code of practice has not so far been registered so they remain subjected to the general community broadcasting codes of practices.¹⁰⁸

Under the present framework, prospective Indigenous broadcasters need to apply for community broadcasting licences when the licensing authority makes a public call for application.¹⁰⁹ Unlike when the ministerial guidelines were in place, calls for applications do not distinguish between general or special interest services. This can make it more difficult for Indigenous broadcasters to access licences, especially in the urban areas where there is more competition for them.

Broadcasting licences are not assigned directly to Indigenous communities. However, the Australian legal system provides a framework for special Indigenous corporations.¹¹⁰ These corporations are forms of legal organisations which may be more suitable for the needs of Indigenous peoples than other forms of incorporation provided by Australian legislation. These special corporations are eligible for community broadcasting licences and most Indigenous broadcasters in Australia use them for holding their licences.¹¹¹

C Recognition of Indigenous Broadcasting through Funding Practice

While Indigenous broadcasting is yet to receive proper legal recognition in Australia, the sector has received some form of recognition in the government's funding practices. Initially, the Special Broadcasting Service ('SBS')¹¹² managed government funding for Indigenous and ethnic broadcasting, while government funding for general community broadcasting was managed by the department of communications. Indigenous and ethnic broadcasters were prioritised for funding over general services as they were perceived as cheaper alternatives to secure the provision of services that the government would otherwise need to run itself.¹¹³ However, the distribution of funding through the SBS had the unfortunate consequence of subjecting Indigenous broadcasting to the SBS code of practice which prohibited the broadcast of political content.¹¹⁴

In 1985 the funding of Indigenous broadcasting was transferred to the Public Broadcasting Foundation ('PBF').¹¹⁵ The PBF was a private, non-profit body controlled by representatives of the Australian third sector created by the government, with the purpose of serving as the entity, through which all its funding for third sector broadcasting could be channeled.¹¹⁶ The PBF continues in this role although it has been renamed the Community Broadcasting Foundation ('CBF').

Under the present system, the government issues general grants for community broadcasting and specific grants for three special interest sectors, Indigenous broadcasting, ethnic broadcasting and radio for the print handicapped. These grants are then distributed to broadcasters by the CBF. The CBF counts with four grants advisory committees, one for each type of government grant.¹¹⁷ These advisory committees determine the conditions of eligibility for each type of grant and the award criteria. The members of the committees are

nominated by the representative bodies of each sector. In the case of the Indigenous sector, it is the Australian Indigenous Communications Association ('AICA').

In addition to funding channeled through the CBF, Indigenous broadcasting receives additional government funding through a special government program called the Indigenous Broadcasting Program ('IBP').¹¹⁸ In the present, the IBP has become the main source of funding for the sector.¹¹⁹ The Indigenous sector is the only one of the Australian third sector broadcasting sub-sectors for which a special funding program have been established. This indicates a degree of recognition by the government of its special needs.

D Indigenous Participation in the Other Sectors of Australian Broadcasting

As explained above, the term 'Indigenous broadcasting' is used in this article to refer to a specific form of third sector broadcasting. It should be noted however, that content that concerns, is targeted to, or is produced by Indigenous peoples is present (to different degrees) in all sectors of Australian broadcasting. *Imparja* is a notable Indigenous controlled television service which is commercial in nature, although it has also benefitted from government support in terms of funding and subsidised access to satellite transmission capacity in order to deliver its services.¹²⁰ Indigenous content also has a significant presence in the programming of many general community stations.¹²¹

Some Indigenous controlled services operate under the 'narrowcasting' licence category. The procedures for accessing and renewing narrowcasting licences are simpler in comparison to those for community licences.¹²² The licence conditions of the narrowcast category are also more flexible than those of the community category.¹²³ However, the narrowcast category does not grant free access to spectrum as the community one does. Instead narrowcasters who wish to provide an over-the-air service by their own means are required to obtain a separate 'apparatus' licence under the *Radiocommunications Act 1992* (Cth) in order to begin transmissions. The fees applicable to apparatus licences are high and beyond the economic capacity of most Indigenous broadcasters.¹²⁴ Alternatively, those licensed as narrowcasters can negotiate the carriage of their service through third parties such as cable or satellite operators. These platforms however, would not always be adequate

to reach the intended audiences. In addition, third parties normally charge market prices. This means that, even when adequate alternatives exist for delivery, these may not be affordable for prospective Indigenous broadcasters. For these reasons, most Indigenous broadcasters require free access to spectrum in order to bring their service to their audiences.

In addition to the delivery issues, most sources of government funding available to Indigenous broadcasters require applicants to be licensed as community broadcasters. This means that those who opt for narrowcasting licences forfeit their eligibility for potential sources of funding. These carriage and funding considerations mean that community broadcasting licences are normally seen as preferable by prospective Indigenous broadcasters, despite the simplicity of the procedure for obtaining narrowcasting licences.

In 2009, the Australian Communications Media Authority ('ACMA') (the authority in charge of issuing broadcasting licences in the country), presented a proposal to facilitate the licensing of RIBS as narrowcasters. This included modifying government policy to allow Indigenous narrowcasters to apply for funding and creating a special apparatus licence category with reduced fees for non-commercial services operating in (both Indigenous and non-Indigenous) remote Australia.¹²⁵ This proposal, if followed, would have eliminated the two main barriers inhibiting the use of narrowcasting licences by Indigenous broadcasters in remote Australia. However, the narrowcasting licence category may have still remained less than ideal for Indigenous broadcasters. If licensed as narrowcasters, RIBS would no longer have been represented by the Community Broadcasting Association of Australia ('CBAA'), which is the main representative body of community broadcasters, but instead would have had the Australian Narrowcast Radio Association ('ANRA') as their peak body. While debate exists regarding whether the CBAA adequately represents the Indigenous sub-sector,¹²⁶ ANRA – an industry body that does not focus on third sector broadcasting – would have clearly been a completely inappropriate body to represent RIBS.¹²⁷ In addition, while it would have reduced some administrative burdens for RIBS, the move to the narrowcasting category could have also proven detrimental to the goal of being recognised as a special class of broadcasting with a specific third sector licence category and code of practice, which is an aspiration of some members of the Australian indigenous broadcasting sector.¹²⁸

In the state sector, the ABC and the SBS have sometimes served as outlets for Indigenous content. There have also been calls for the establishment of an independent state television service aimed specifically at serving the needs of Indigenous peoples.¹²⁹ In 2005, the service known as National Indigenous Television ('NITV') started operations.¹³⁰ NITV was initially established (with the support of the state) as a private company but its purpose was to provide an Indigenous oriented public broadcasting service, in order to complement the services of the ABC and SBS.¹³¹ The 2010 *Investment Review* recommended for NITV to become a government owned company as a first step toward becoming an independent statutory authority.¹³² Despite this, the NITV service became part of the SBS in 2012. While part of the SBS, the staff of NITV is comprised predominantly by Indigenous Australians and its content is developed primarily by Indigenous producers.¹³³ Establishing an independent Indigenous service, as recommended by the *Investment Review*, may hold greater symbolic value as an official recognition of the special broadcasting needs of Indigenous peoples. However, operating as part of the SBS offers NITV administrative advantages and is more cost-effective for the government than funding a third public service broadcaster.

Despite being congruent with aspirations expressed by Indigenous communities, the introduction of NITV in 2007 was also cause for controversy because of its detrimental impact upon another service, Indigenous Community Television ('ICTV') which had been in operation since 2001.¹³⁴ Despite its name, ICTV was not a CTV or community broadcasting service licensed under the BSA. The service was transmitted through the satellite broadcasting capacity controlled by Imparja who received government support as the only Indigenous commercial television service. Although the intention expressed by Imparja at the time of its licensing was to offer substantial Indigenous content, commercial pressures lead the service to focus primarily on mainstream content.¹³⁵ Imparja managed to reconfigure its satellite transmission capacity to provide a second channel which it devoted to broadcasting content provided by third sector producers from Indigenous communities.¹³⁶ That channel is what came to be known as ICTV. The creation of the ICTV service allowed Imparja to continue to receive government subsidies for their satellite transmission and offered an outlet for third sector Indigenous producers.¹³⁷ The government had also initially financially supported both Imparja and the independent producers as a more economic alternative to

the establishment of a state Indigenous broadcasting service analogous to the ABC and SBS.¹³⁸

With the introduction of NITV, the satellite capacity previously used by ICTV was transferred to NITV. This decision caused some discontent among Indigenous third sector content producers.¹³⁹ Although NITV also acquires content from independent producers, the differences in nature between the two services means it is a less ideal outlet for them in comparison to ICTV. NITV is envisioned as a service with a mandate to serve the whole country. For this reason, content that is able to appeal to multiple Indigenous communities and also the mainstream population is preferred for acquisition over content of a local nature produced by Indigenous communities for (and only for) themselves which was the type of content predominantly produced for ICTV.¹⁴⁰ In addition, as a government service acquiring content with public funds, NITV is expected to apply quality standards when deciding on the acquisition of content. Since the producers which fed content to ICTV were unqualified, working with very limited resources, they were not always able to meet NITV standards.¹⁴¹ ICTV continued as a service through internet streaming and as a weekend satellite service until 2013 when it managed to obtain satellite capacity to resume its full time service. During the time ICTV was not available as a full time service, the situation was lamented by part of the Indigenous production sector who valued it as an outlet for its content.¹⁴²

As explained, the scope of this article is limited to terrestrial third sector broadcasters controlled by and aimed primarily at serving Indigenous peoples. For this reason and for reasons of time and space, this article does not discuss the whole range of services that may be necessary to fully satisfy the needs of Australian Indigenous peoples in relation to broadcasting services.

The remaining sections of this article argue in favor of establishing a specific licence category and framework for Indigenous broadcasting. It is necessary to clarify that, if such a licence is created, this should not impair the ability of Indigenous organisations to access other types of licences such as commercial or narrowcasting licences if a particular organisation deems them more adequate for its purposes. Neither should the creation of an Indigenous licence category preclude the participation of Indigenous groups in general community broadcasting stations, something which would likely remain the most adequate means to deliver Indigenous

third sector content in areas where the concentration of the Indigenous population is not sufficient to support a full time Indigenous service. Likewise, the creation of an Indigenous licence is a separate matter from the creation of an independent state broadcasting service aimed at serving Indigenous peoples or the need to allocate satellite capacity for a service such as ICTV. In the case that an Indigenous licence is created, this would not be a reason to give any less attention to those other matters.

VII Why Have a Specific Legal Framework for Indigenous Broadcasting

A Specific Spectrum Reserve

One benefit of recognising Indigenous broadcasting as a legal category is that a specific spectrum reservation could be made for the sector. In this sense, the Productivity Commission *Broadcasting Inquiry* report included among its recommendations that: 'spectrum should be reserved for Indigenous broadcasters to provide a primary service for Indigenous communities, where appropriate'.¹⁴³

In spectrum management, the distribution of frequencies is made in three stages: the allotment stage where the geographic distribution of the frequencies take place, the allocation stage where frequencies are reserved for specific purposes (for example, commercial broadcasting or telecommunications) and the assignment stage where specific persons or entities are granted temporary rights to make radio transmissions on a specific frequency (what is normally known as the licensing stage).¹⁴⁴

Reserving frequencies for Indigenous broadcasting means moving the decision between the competing interests of Indigenous peoples and other groups interested in broadcasting licences from the assignment stage up to the allocation stage. While deciding between these competing interests will always be complicated, doing so in the planning stages may be preferable to forcing the licensing authority to weigh the potential benefits of services of very different natures with very different audiences in mind, in each individual case.

As UNESCO 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'.¹⁴⁵

Especially in the areas where high competition for licences exists, the lack of reserved frequencies can be a serious barrier to the development of Indigenous broadcasting. The *Out of the Silent Land* report noted that, even when the special 'Category S' denomination existed, the need to compete in licence tenders with ethnic and religious services could create an undesirable barrier for the access to terrestrial licences by prospective Indigenous broadcasters.¹⁴⁶ After the category system and the 'S' classification were eliminated, both the *Digital Dreaming* report and the *Broadcasting Inquiry* report noted the undesirability of forcing Indigenous broadcasting initiatives to compete against all other types of third sector broadcasters in the same licensing process and listed this among their reasons to recommend the establishment of a specific framework for the sector.¹⁴⁷

For the reasons discussed above, if the goal is to provide Indigenous peoples the opportunity to control their own broadcasting services, the best way to secure that this goal is met is by specifically reserving frequencies for Indigenous broadcasting.¹⁴⁸

B Specific Licensing Procedure

Establishing an Indigenous broadcasting licence category with its own special licensing procedure can aid the development of the sector. For example, the *Out of the Silent Land* report recommended the use of a simplified licence procedure for broadcasters aiming to serve remote Indigenous communities.¹⁴⁹ Due to less competition for frequencies and a comparative lack of interest in establishing broadcasting services in these remote areas, it was considered unnecessary to use the same administrative controls used in urban areas. Offering simplified procedures was also seen as way to incentivise the establishment of Indigenous broadcasters. The complexity of the licensing procedures was identified as a deterrent to the establishment of such services, especially considering the economically disadvantaged position of the communities concerned.¹⁵⁰ As commented previously, BRACS was implemented as an attempt to address the issues identified in the *Out of the Silent Land* report. It used a different licensing system for remote Indigenous broadcasters than the applicable system for other forms of third sector broadcasting.¹⁵¹

Even in the present, the unnecessary complexity of licensing procedures remains signalled as a barrier to the establishment of broadcasting services by and for Indigenous communities

inhabiting in remote Australia. As noted, ACMA has made a proposal to facilitate the licensing of RIBS through the less complex narrowcasting class licence.¹⁵² However, this proposal remains under discussion.

Eliminating any unnecessary barriers to the establishment of Indigenous broadcasters seems to be mandated by Australia's obligation under international human rights law to combat the inequalities which exist in the access to mass communications.¹⁵³ Special simplified licensing procedures can significantly facilitate the establishment of Indigenous broadcasters, reducing the gaps which exist between disadvantaged Indigenous communities and other groups in relation to access to information and communications outlets.

The reports discussed only recommended the use of simplified procedures for broadcasters aiming to serve remote Indigenous communities. The lack of competition for licences in these areas would facilitate the implementation of an abbreviated licensing procedure. Evidently, a simplified procedure could not be used in cases where Indigenous broadcasters are expected to compete with services of other types in the same tenders. However, if some frequencies are reserved specifically for Indigenous broadcasting as discussed in the previous subsection, then it is feasible to use simplified procedures for the assignment of licences in those frequencies, even in the areas where competition for spectrum is high.¹⁵⁴

There may be reasons to be more careful on the assignment of licences in areas where spectrum is in high demand even when frequencies have been reserved for Indigenous broadcasting. The economic value of the licences will be higher and so will the risk of sham applications aiming to use the Indigenous licence category as a backdoor for commercial broadcasting. In relation to this, the *Digital Dreaming* report recommended the creation of two separate Indigenous broadcasting licence categories for stations located in competitive and non-competitive markets.¹⁵⁵ This is also a feasible solution if concerns such as those described exist.

C Specific Licence Conditions

One of the main advantages of having a dedicated legal framework for the Indigenous sector is that specific licence conditions for it can be established. Indiscriminate application of rules designed with general community

broadcasting in mind can impose unnecessary burdens in the sector and can also leave specific issues of the sector unaddressed. This has been highlighted in the Australian government reports discussed.

Financial regulation is one of the areas where it may be necessary to distinguish between the general and the Indigenous sector. The regulation of general third sector broadcasting tends to focus on preventing the use of licenses for commercial purposes. In Australia, commercial broadcasters are required to pay for their access to spectrum while community (third sector) licences are issued for free. For this reason, as highlighted above, there is concern that community licences would be used as a backdoor for commercial broadcasting or become a source of unfair competition to commercial outlets. To prevent this, community licensees are subjected to certain special regulations. Most notably, community broadcasters in Australia are prohibited from broadcasting advertisements and are restricted in the amount of air-time they can devote to sponsorship announcements to a maximum of five minutes in an hour for radio and seven minutes in an hour for television.¹⁵⁶

Broadcasters located in economically disadvantaged Indigenous communities are unlikely to be used for commercial purposes regardless of whether restrictions are in place. Even those Indigenous broadcasters located in areas of high commercial interest may not represent a threat of unfair competition to commercial broadcasters if by the nature of their content they are unlikely to attract general audiences (for example, due to broadcasting primarily in Indigenous languages).

For the above reasons, multiple reports have recommended against applying to Indigenous broadcasters the same rules created for general community broadcasters in relation to advertisement and sponsorship. For example, the *Digital Dreaming* report recommended the application of a different sponsorship time limit for Indigenous stations;¹⁵⁷ the Productivity Commission *Broadcasting Inquiry* report recommended that 'a new licence category for Indigenous broadcasters should be created, with appropriate conditions relating to advertising';¹⁵⁸ and the 2010 *Investment Review* recommended the establishment of a special exemption, only for Indigenous broadcasters, where announcements paid by the government are not counted towards the sponsorship limit (as they are at present for all community

licensees).¹⁵⁹ In addition, the exclusion of RIBS from the CTV category was meant to exempt them from regulation aimed at securing the non-commercial nature of third sector television in urban centres, but which were considered too burdensome and unnecessary for RIBS.¹⁶⁰

The *Broadcasting Inquiry* report considered that the tight advertisement prohibition and sponsorship regulations imposed on community broadcasters were unnecessary for Indigenous broadcasters. Due to the relatively low economic status of the communities they serve, they were deemed unlikely to attract significant advertisement revenue in any case.¹⁶¹ Even when this is the case, the application of restrictions of this kind can create unnecessary administrative burdens. For example, the obligation to report to ACMA on time devoted to sponsorship which, despite representing only paperwork, can constitute a significant burden for Indigenous broadcasters as they tend to have very limited economic and human resources.¹⁶² As stated previously, the *Digital Dreaming* report provided the potential solution of creating separate licence conditions for Indigenous stations in competitive and non-competitive markets.¹⁶³ This allows the facilitation of access by eliminating barriers where they are unnecessary while maintaining those barriers where they are required in order to prevent the risk of abuse

In addition to financial regulation, another area where it may be convenient to apply specific rules is in matters of internal governance of the stations. In this sense, the *Investment Review* recommended the creation of a specific Indigenous broadcasting licence with specific internal governance protocols.¹⁶⁴ The need to consider the different needs of general and Indigenous third sector broadcasters was also made evident by the creation of CTV licences. CTV licences, unlike regular community licences, can only be issued to companies limited by guarantee (a type of legal entity used in Australia for non-commercial purposes).¹⁶⁵ Such a requirement may be a good measure to secure minimum internal governance standards in general cases but is not adequate for the needs of Indigenous peoples whom are probably better served by the use of the special type of legal organisation allowed to them under Australian law.¹⁶⁶ Fortunately, law makers appropriately distinguished between the two sub-sectors when creating the CTV licence sub-category.

The Productivity Commission Inquiry report also noted that the community radio broadcasting code of practice,

prepared primarily by and for the general community broadcasting sector, was inadequate for the regulation of Indigenous broadcasting.¹⁶⁷ This code focuses on issues such as sponsorship and the rights of volunteers which are not of major interest to the Indigenous sector as they do not generally rely as much on sponsorship or volunteers.¹⁶⁸ The 2010 *Investment Review* recommended the creation of a separate code of practice for Indigenous broadcasters (not only RIBS as currently prescribed by the BSA).¹⁶⁹ The creation of a specific code of practice for the Indigenous sector could allow for specific issues relating to Indigenous broadcasting, to be addressed.

Specific licence conditions can also be used to ensure that the sector meets the relevant policy goals. For example, the *Investment Review* recommended to include, among the conditions of a specific Indigenous broadcasting licence category, minimum quotas for Indigenous content and for Indigenous staff employment.¹⁷⁰ As already explained, determining what exactly constitutes Indigenous content is difficult and content quotas should not be used to prevent the participation of Indigenous broadcasters on debates of issues of general interest. However, if adequate care is taken, conditions of that kind can be implemented to ensure services are truly Indigenous if sham applications are a large concern.

D Specific Government Funding Arrangements

Creating a specific licence category for Indigenous broadcasting could also facilitate the implementation of special funding arrangements for the sector. As commented, the Australian government has created a special program for funding Indigenous broadcasting. However, the 2010 *Investment Review* recommended the establishment of a more straight forward system where funding is directly linked to the issuance of Indigenous broadcasting licences.¹⁷¹

The implementation of such a system has multiple advantages. Directly linking government funding with the issuance of a licence avoids a situation in which capacity to provide a service is a condition for licensing. Rather, capacity is dependent on government funding that cannot be applied for until having obtained a license. 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 licences.¹⁷² In addition, if continued funding is made dependent upon the renewal of the licence

and compliance with the relevant licence conditions, then Indigenous broadcasters would count with greater certainty, rather than if their funding is dependent on the discretion of an administrative authority. Establishing specifically what is expected of Indigenous broadcasters in the form of licence conditions, and making funding dependent upon compliance, also facilitates for the state the monitoring of whether its funds are being used in congruence with its policy goals. This also has the added benefit of decreasing the risk of governments attempting to influence the content of Indigenous broadcasters through funding practices, as funding conditions would have been pre-established from the moment of licensing.

In its submission to the 2010 *Investment Review*, the Indigenous Remote Communication Association ('IRCA') submitted that a specific funding program was necessary for remote Indigenous broadcasters.¹⁷³ If separate licence categories are created for remote and non-remote Indigenous broadcasters, following the recommendations of the *Digital Dreaming* review, then this would facilitate the planning of specific funding for the two types of Indigenous stations. However, if a single Indigenous licence category was created with a determinate amount of funding attached to it, this would also not preclude the possibility of creating a specific program to provide additional funding to remote broadcasters, as they usually possess greater financial needs and play a special role.

E Specific Sector Representation

Sector representation is especially important in Australia as the country uses a co-regulatory system where representatives of the sector themselves prepare the codes of practice which would be applied to the sector.¹⁷⁴ As explained, being considered just additional members of the community sector has subjected Indigenous broadcasters to a code of practice which may not be the most adequate for their needs.¹⁷⁵ In addition, lack of recognition as a separate sector has also had the potential of negatively affecting the capacity of Indigenous broadcasters to advocate for addressing the issues which are of relevance or are important to the sector.

Obviously, a lack of legal recognition of the sector does not impede Indigenous broadcasters from organising themselves, establishing representative bodies or coordinating lobby efforts. However, if an Indigenous broadcasting licence category is created, this could significantly increase the

effectiveness of such endeavors. Once the sector has legal recognition, an official representative body can be created which the government will be likely to, at least, listen to with more care. In addition, the official representation of the sector will, if good policies are followed, have to be consulted each time new legislation or measures are taken which can affect the sector. If this enhanced legal status is obtained, it can empower the members of the sector to persuade the government into addressing other issues affecting the sector.

In its submission to the 2010 Investment Review, the CBAA advised against the creation of a separate licence category for RIBS.¹⁷⁶ However, and interestingly, the CBF supported the creation of an Indigenous licence category, despite the fact that it may also be considered a representative of the community centre whereby its main function relates to fund distribution.¹⁷⁷ Since Indigenous third sector producers also participate in the general community broadcasting sector, it could be deemed more coherent to keep representation unified under a single body. However, because their needs are so distinct, stations fully devoted to Indigenous broadcasting could greatly benefit from having their own peak body. If such a body is created, the CBAA would need to keep in mind that it would continue to represent the interests of Indigenous producers which provide content to general community stations.

VIII Conclusion

The Australian experience evidences that an Indigenous broadcasting sector can flourish even when subjected to policy and regulatory frameworks that have not been specifically designed to aid its development. The Australian experience also shows however, that being subjected to rules designed for general broadcasters and which do not take into account their specific needs, have created significant challenges for Indigenous broadcasters. Given the potential of Indigenous broadcasting to aid Indigenous peoples in the fulfillment of their internationally recognised human rights, avoiding any unnecessary barriers to its development is paramount. Establishing a specific licence category and regulatory framework for Indigenous broadcasting is a mechanism which allows the specific needs of the sector to be addressed. It also allows for Indigenous broadcasting to be exempt from any general rules which are inadequate for it and which may unnecessarily hinder its development. For this reason, and as long as free-to-air broadcasting remains relevant as a means of communication and a source

of information, the establishment of such a framework deserves serious consideration by policy makers in Australia or anywhere where significant Indigenous populations exist.

The creation of a specific licence category would have intrinsic value as a symbol of recognition of the distinctiveness of the Indigenous broadcasting sector. Whether it actually advances the development of the sector however would ultimately depend on the conditions that are attached to such a licence. Evidently, the introduction of an Indigenous licence category could hinder the development of the sector if it generates additional restrictions for Indigenous broadcasters without providing them with any concessions. The implementation of an Indigenous licence category is recommended as a tool to assist policy makers with a genuine will to address special needs of the sector. Where this will exists, creating the category can facilitate the fulfillment of the desired policy goals. The conditions of an Indigenous licence category would need to be developed in consultation with the sector.

It falls outside the scope of this article to attempt to determine the specific conditions that should be contained in an Indigenous broadcasting licence if one was to be created in Australia. However, as explained, the distinct nature of the sector warrants for it to receive special consideration in areas such as financial and governance regulation. Since the conditions of specific stations vary, even within the Indigenous sector, it may be necessary to distinguish in regulation between Indigenous broadcasters operating in remote areas and those operating in areas where spectrum scarcity and competition among broadcasters are greater concerns. In relation to this, the potential drawbacks of adding further complexity to the system with different licence conditions for different types of Indigenous broadcasters would need to be weighed against the benefits of addressing their different circumstances more specifically.

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- 1 Division for Freedom of Expression, Democracy and Peace, United Nations Educational, Scientific and Cultural Organisation ('UNESCO'), *Legislation on Community Radio Broadcasting: Comparative Study of the Legislations of 13 Countries* (2003).
- 2 In comparison, Canada – a country in which third sector broadcasting has a similar level of development – recognises community, ethnic, native and campus as separate licence classes. See Canadian Radio-television and Telecommunications Commission ('CRTC'), *Campus and Community Radio Policy* (Broadcasting Regulatory Policy, 2010-499) (Ottawa: CRTC, 2010); CRTC, *Regulatory Amendments to Implement the Ethnic Broadcasting Policy and New Television Content Categories* (Public Notice, 2000-92) (Ottawa, CRTC, 2000) ('CRTC Ethnic Broadcasting Policy'); CRTC, *Native Broadcasting Policy* (Public Notice, 1990-89) (Ottawa: CRTC, 1990) ('CRTC Native Broadcasting Policy'); CRTC, *Religious Broadcasting Policy* (Public Notice, 1993-78) (Ottawa: CRTC, 1993). Although it is not considered a separate licence class, Canada also has a specific policy regarding religious broadcasting: see, CRTC, *Religious Broadcasting Policy*, Public Notice 1993-78.
- 3 See UNESCO, above n 1, 99.
- 4 CRTC *Native Broadcasting Policy*, above n 2, s 2.
- 5 Being third sector broadcasters, Indigenous broadcasters should, if good practices are followed, be granted free access to the spectrum which can justify imposing special social obligations upon them.
- 6 Discussed further in Part VI.C.
- 7 Eric Michaels, 'Aboriginal Content: Who's Got It – Who Needs It?' (1991) 4 *Visual Anthropology* 277.
- 8 This debate regarding whether content or control should be the determinant element of the Indigenous nature of a broadcasting service can also be observed in Aboriginal and Torres Strait Islander Commission ('ATSIC'), *Digital Dreaming: A National of Indigenous Media and Communications: Executive Summary* (ATSIC, 1999) ('*Digital Dreaming*').
- 9 See Part IV.B.
- 10 See, eg, Australian Government Productivity Commission, 'Broadcasting Inquiry Report' (Report No 11, Australian Government Productivity Commission, 2000) 283 ('Broadcasting Inquiry Report').
- 11 Ibid 286.
- 12 See, eg, Mary Myers, *Voices from Villages: Community Radio in the Developing World* (Center for International Media Assistance, 2011); Gustavo Gomez, Carolina Auguerre and Analia Eliades, 'The Invisible Gags: New and Old Barriers to Diversity in Radio Broadcasting' (Paper, Asociacion Mundial de Radio Comunitarias, August 2009) <<http://legislaciones.amarc.org/mordazas/Summary.pdf>>.

- 13 ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No 107)* (1957) art 26.
- 14 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) art 16.1.
- 15 ATSC, above n 8, 10 (emphasis in original). The Australian Broadcasting Corporation ('ABC') and the Special Broadcasting Service ('SBS') are the state broadcasting services in Australia.
- 16 Office of the Special Rapporteur for Freedom of Expression, Inter American Commission on Human Rights, Organization of American States, *A Hemispheric Agenda for the Defense of Freedom of Expression*, OAS Doc OEA/Ser.L/V/II CIDH/RELE/INF 4/09 (25 February 2009) [102]; Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/HRC/11/4 (30 April 2009) [55].
- 17 See, eg, Office of the Special Rapporteur for Freedom of Expression, Inter American Commission on Human Rights, Organization of American States, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, OAS Doc OEA/Ser.L/V/II CIDH/RELE/INF 3/09 (30 December 2009) [106]; Melissa Kay Giles, *Diversity in Action: Minority Group Media and Social Change* (MA Thesis, Queensland University of Technology, 2011).
- 18 Susan Forde, Michael Meadows and Kerrie Foxwell, *Culture, Commitment, Community: The Australian Community Radio Sector* (Griffith University, Griffith Centre for Cultural Research, 2002) 33.
- 19 Giles, above n 17, 65.
- 20 Michael Meadows, 'Silent Talking: Indigenous Media Policy and the Productivity Commission' (2000) 95 *Media International Australia Incorporating Culture and Policy* 29, 42.
- 21 See, eg, Michelle Johnston, 'Noongar Identity and Community Media' (2011) 140 *Media International Australia* 61; Steve Buckley et al, *Broadcasting, Voice and Accountability, A Public Interest Approach to Policy, Law and Regulation* (The World Bank Group, 2008) 17.
- 22 *CRTC Native Broadcasting Policy*, above n 2, s 2.
- 23 Ruth Lysaght, 'Language Image in National Minority Language Television Idents TG4 (Teilifís na Gaeilge, Ireland) and Whakata Maori (Maori Television, New Zealand)' (2009) 4 *Estudios Irlandeses* 45, 48.
- 24 See, eg, *ibid* 49; Johnston, above n 21.
- 25 Karl Neuenfeldt and Kathleen Oien, 'Our Home, Our Land... Something to Sing About: An Indigenous Music Recording as Identity Narrative' (2000) 24 *Aboriginal History* 27; Johnston, above n 21.
- 26 See, eg, Lysaght above n 23, 47; Mark Abley, 'All-Night Walker Sonata' (2007) 81(5) *World Literature Today* 18, 19; Forde, Meadows and Foxwell, above n 18, 48.
- 27 Senate Standing Committee on Education and the Arts, Parliament of Australia, *National Language Policy* (1984) [14.31] ('*Language Policy Report*').
- 28 See Ghil'ad Zuckermann and Michael Walsh, 'Stop, Revive, Survive: Lessons from the Hebrew Revival Applicable to the Reclamation, Maintenance, and Empowerment of Aboriginal Languages and Cultures' (2011) 31 *Australian Journal of Linguistics* 111.
- 29 ATSC, above n 8, 19.
- 30 *Ibid* 16.
- 31 Neville Stevens, *Review of Australian Government Investment in the Indigenous Broadcasting and Media Sector 2010* (7 January 2011) Australian Attorney-General's Department, Ministry for the Arts, 4 <<http://arts.gov.au/sites/default/files/pdfs/broadcasting-review.pdf>> ('*Investment Review*').
- 32 ATSC, above n 8, 19.
- 33 *Ibid*.
- 34 *Ibid*.
- 35 UNESCO, above n 1, 99.
- 36 *Ibid*.
- 37 See Matthew D. Matsaganis, Vikki S. Katz and Sandra J Ball-Rokeach, *Understanding Ethnic Media : Producers, Consumers, and Societies* (SAGE, 2011).
- 38 *CRTC Ethnic Broadcasting Policy*, above n 2, Regulations Amending the Television Broadcasting Regulations, 1987 art. 1.
- 39 Australian Department of Communications, Australian Department of Immigration and Ethnic Affairs and Australian Working Party to Examine Options for the Long Term Development of Ethnic Radio, *The Extension and Development of Ethnic Radio: Discussion Paper* (Australian Government Publishing Service, 1982).
- 40 Task Force on Aboriginal and Islander Broadcasting and Communications, *Out of the Silent Land: Report of the Task Force on Aboriginal and Islander Broadcasting and Communications* (Australian Department of Aboriginal Affairs, 1984) 24 ('*Out of the Silent Land*').
- 41 ATSC, above n 8, 12.
- 42 Senate Standing Committee on Education and the Arts, above n 27, 81–2.
- 43 In other countries, broadcasters serving non-Indigenous national minority groups may also serve the role of assisting in culture and language revival efforts.
- 44 ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169)* (1989); *International Convention on the Protection of the Rights of All Migrant Workers and*

- Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).
- 45 The International Radio Regulations define interference as '[t]he effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radiocommunication system, manifested by any performance degradation, misinterpretation, or loss of information which could be extracted in the absence of such unwanted energy': International Telecommunications Union, *Radio Regulations*, (2012) art 1 [166].
- 46 See *International Telecommunications Convention*, opened for signature 25 October 1973, 1209 UNTS 255 (entered into force 1 January 1975) art 4, which establishes the purposes of the International Telecommunications Union ('ITU').
- 47 Under the ITU system, every state receives an allotment of frequencies over which they have exclusive rights. Member states must abstain from engaging in any activities which interfere with the use of spectrum allotted to other members: International Telecommunications Union, *Constitution of the International Telecommunications Union* (1992) as amended by subsequent plenipotentiary conferences, art 45.
- 48 In the case of Australia, it has historically been considered that s 51(v) of the *Australian Constitution* empowers the state to impose a licence requirement upon broadcasters. Due to the lack of a freedom of expression provision in the *Australian Constitution*, Australian courts have not been obligated to weight the state interest in regulating access to the broadcasting activity against individual expression rights as in other countries.
- 49 For an introduction to the spectrum commons model: see, eg, Stuart Buck, 'Replacing Spectrums Auctions with a Spectrum Commons' [2002] *Stanford Technology Law Review* 2; Yochai Benkler, 'Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment' (1998) 11 *Harvard Journal of Law & Technology* 287; Eli Noam, 'Beyond Spectrum Auctions: Taking the Next Step to Open Spectrum Access' (1997) 21 *Telecommunications Policy* 461.
- 50 In the positive see, eg, Noam, above n 48; Benkler, above n 48. In the negative see Thomas W Hazlett, 'Optimal Abolition of FCC Spectrum Allocation' (2008) 22(1) *Journal of Economic Perspectives* 103.
- 51 For an introduction to this model see Ronald Coase, 'The Federal Communications Commission' (1959) 2 *Journal of Law and Economics* 1.
- 52 Ibid 30.
- 53 See, eg, ibid; Hazlett, above n 49.
- 54 See, eg, Frank La Rue et al, *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade* (2010) art 6(c).
- 55 See Gigi Sohn, 'The Gore Commission Ten Years Later: Reimagining the Public Interest in an Era of Spectrum Abundance' (2009) 17 *CommLaw Conspectus* 657.
- 56 See Ellie Rennie and Julian Thomas, 'Analogue Nation, Digital Community' in Andrew Kenyon (ed), *TV Futures: Digital Television Policy in Australia* (Melbourne University Press, 2007) 364.
- 57 Frank La Rue et al, *Joint Declaration on the Protection of Freedom of Expression and Diversity in the Digital Terrestrial Transition* (2013) art 3(d)(ii).
- 58 CRTC, *Exemption Order Respecting Certain Native Radio Undertakings* (Public Notice 1998-62) (Ottawa, CRTC, 1998).
- 59 See Australian Communications and Media Authority ('ACMA'), 'Remote Indigenous Broadcasting Services: Licensing Arrangements for Radio Providers' (Discussion Paper, ACMA, October 2009) 6 <http://www.acma.gov.au/webwr/_assets/main/lib311201/ribs_discussion_paper.pdf> 'RIBS Discussion Paper'.
- 60 Joseph Lo Bianco, *National Policy on Languages* (Department of Education, 1987) 75.
- 61 The first Australian government initiatives to provide broadcasting for Indigenous communities through the State system are discussed in Peter Westerway, 'Starting Aboriginal Broadcasting Whitefella Business' (2005) 117 *Media International Australia, Incorporating Culture & Policy* 110.
- 62 Philip Batty, '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, 171.
- 63 Westerway, above n 61, 115.
- 64 Priorities Review Staff, *Report on Radio* (Australian Government Publishing Service, 1984).
- 65 Discussed in Susan Forde, Kerrie Foxwell and Michael Meadows, *Developing Dialogues: Indigenous & Ethnic Community Broadcasting in Australia* (Intellect, 2009) 60.
- 66 Task Force on Aboriginal and Islander Broadcasting and Communications, above n 39, 21-2; see also ibid.
- 67 Elinor Rennie, 'Remote Beginnings, Metropolitan Developments: Community and Indigenous Television in Australia' in Linda K Fuller (ed), *Community Media International Perspectives* (Palgrave Macmillan, 2007) 21, 25.
- 68 Forde, Foxwell and Meadows, above n 65, 60.
- 69 See, eg, Senate Standing Committee on Education and the Arts, above n 27, 81.
- 70 Westerway, above n 61, 116; Batty, above n 62, 176.
- 71 Batty, above n 62, 178.
- 72 Task Force on Aboriginal and Islander Broadcasting and Communications, above n 39.
- 73 Paul Scott, '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, 25; Meadows above n 20, 32.
- 74 Scott, above n 73, 26.
- 75 ATSIIC, above n 8, 74. See also ACMA, RIBS Discussion Paper, above n 59, 6.
- 76 Scott, above n 72, 26; ATSIIC, above n 8, 74.
- 77 Scott, above n 72; ATSIIC, above n 8, 20.
- 78 Australian Productivity Commission, above n 10, 286; Meadows, above n 20, 33.
- 79 Ellie Rennie 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, 54.
- 80 Discussed further in Part VI.B.
- 81 ATSIIC, above n 8.
- 82 Ibid 15.
- 83 Ibid.
- 84 Ibid 11–12.
- 85 Australian Productivity Commission, above n 10, 286.
- 86 Ibid.
- 87 Stevens, above n 31, recommendations 4–7.
- 88 ATSIIC, above n 8, 14.
- 89 Phoebe Thornley, *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) 1.
- 90 Minister for Post and Telecommunications, *Guidelines for the Planning of Public Broadcasting in Phase I* (in statement to the House of Representatives, 1978) art 2.
- 91 Ibid 202.
- 92 Minister for Post and Telecommunications, *Development of Public Broadcasting* (statement to the House of Representatives, 1978) 1000.
- 93 However, even the need to compete with other 'S' type services was identified as a potential barrier for the access to licences by prospective Indigenous broadcasters: see Task Force on Aboriginal and Islander Broadcasting and Communications, above n 39, 44.
- 94 *Broadcasting Legislation Amendment Act 1983* (Cth) s 23, inserting *Broadcasting Act 1942* (Cth) ss 81B(1)(c), (7), (9).
- 95 ATSIIC, above n 8, 14.
- 96 *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (Cth) s 6(1).
- 97 See ACMA, above n 58; Stevens, above n 31.
- 98 *Broadcasting Services Act 1992* (Cth) ('BSA') sch 2 s 9(6).
- 99 BSA s 3(1)(n) (emphasis added).
- 100 This interpretation has been made in Rennie and Featherstone, above n 79, 57.
- 101 See Forde, Foxwell and Meadows, above n 65; Stevens, above n 31.
- 102 Presumably 'CTV' stands for community television but this is never stated in the Act.
- 103 *Broadcasting Legislation Amendment Act (No 2) 2002* (Cth) sch 1 s 1, inserting BSA s 6(1) ('2002 Amendment').
- 104 Explanatory Memorandum, *Broadcasting Legislation Amendment Bill (No 2) 2002* (Cth) 3.
- 105 It is not mentioned in the memorandum but the amendment also limited the eligibility for CTV licences to companies limited by guarantee which would have been a barrier to Indigenous broadcasters, since most of them, as explained below, incorporate under an special law.
- 106 *2002 Amendment* s 7, inserting BSA s 123(1)(ba).
- 107 *2002 Amendment* sch 2 s 12.
- 108 See ACMA, above n 58.
- 109 At present, ACMA.
- 110 *Corporations (Aboriginal and Torres Strait Islanders) Act 2006* (Cth).
- 111 Stevens, above n 31, 62.
- 112 The SBS is a state broadcasting service created to attend programming needs not addressed by the ABC the main state broadcaster of Australia.
- 113 Thornley, above n 88, 386.
- 114 Ibid 300.
- 115 Ibid 237.
- 116 See ibid 340.
- 117 CBF, *Organisational Chart* <http://www.cbf.com.au/files/3813/8724/4299/CBF_Organisational_Chart.pdf>.
- 118 See Stevens, above n 31.
- 119 Ibid 34.
- 120 See Rennie and Featherstone, above n 79.
- 121 Community Broadcasting Association of Australia, Submission to Department of the Environment, Water, Heritage and the Arts, *Indigenous Broadcasting and Media Sector Review*, 20 August 2010 <http://www.archive.dbcde.gov.au/__data/assets/pdf_file/0004/137029/Community_Broadcasting_Association_of_Australia_PDF_148_KB.pdf>.
- 122 See ACMA, above n 59.
- 123 In particular, narrowcasting licensees are not subjected to the same restrictions in relation to advertisement and sponsorship applied to community licensees.
- 124 ACMA, above n 59, 8.
- 125 Ibid.
- 126 See Part VII.E.
- 127 See National Ethnic and Multicultural Broadcasters Council,

- Submission to ACMA, *New RIBS Radio Licensing Proposal*, 8 December 2009 <<http://www.nembc.org.au/userfiles/file/3.Advocacy/2.%20Public%20Submissions/NEMBC%20Submission%20to%20ACMA%20re%20RIBS%20Dec%202009.pdf>>.
- 128 The BSA establishes at present the possibility for RIBS to establish their own code of practice but if operating as narrowcasters RIBS will be required to follow the narrowcasting code of practice instead.
- 129 Among other sources, this call can be found in the *Digital Dreaming Review*: ATSIC, above n 8; Australian Productivity Commission, above n 10.
- 130 Rennie and Featherstone, above n 78, 52.
- 131 Ibid; Stevens, above n 31, 7
- 132 Stevens, above n 31, recommendation 13.
- 133 Further information about the NITV and its place within the SBS can be found on its official website: National Indigenous Television <<http://www.nitv.org.au/>>.
- 134 Rennie and Featherstone, above n 79, 55.
- 135 Ibid 54.
- 136 Ibid.
- 137 Ibid.
- 138 Rennie and Thomas, above n 56, 378.
- 139 See Rennie and Featherstone, above n 79, 58; Stevens, above n 31, 49; Christine Guster, 'Remote Indigenous Media Association Oral History Project' (2010) 32 *Oral History Association of Australia Journal* 8.
- 140 Rennie and Featherstone, above n 79, 57; Stevens, above n 31, 50.
- 141 Guster, above n 139, 14.
- 142 Ibid; Stevens, above n 31, 55.
- 143 Australian Productivity Commission, above n 10, recommendation 8.6.
- 144 ITU and InfoDev, *ICT Regulation Toolkit*, s 2.7.2 <<http://www.ictregulationtoolkit.org>>.
- 145 UNESCO, above n 1, 100.
- 146 Task Force on Aboriginal and Islander Broadcasting and Communications, above n 39, 44.
- 147 ATSIC, above n 8, recommendation 2.2; Australian Productivity Commission, above n 10, 285–6.
- 148 In this relation, it is relevant to note that the *Declaration on the Rights of Indigenous Peoples* acknowledges the rights of Indigenous peoples to establish 'their own' media outlets: *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) art 16.
- 149 Task Force on Aboriginal and Islander Broadcasting and Communications, above n 39, recommendation 9.11.
- 150 Ibid 46.
- 151 BRACS scheme discussed above in Part V.A.
- 152 ACMA, above n 59.
- 153 See Office of the Special Rapporteur for Freedom of Expression, Inter American Commission on Human Rights, Organization of American States, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, OAS Doc OEA/Ser.L/V/II CIDH/RELE/INF 2/09 (30 December 2009) [238].
- 154 For the purposes of this article it is assumed that, if created, an Indigenous licence category would confer an expectation of free access to spectrum as community licences do at present. If an Indigenous licence was created were licensees are not guaranteed carriage, this would be more detrimental to the Indigenous sector than remaining under the community category. In addition, if an Indigenous licence does not confer access to spectrum, its creation would have no added value over the narrowcasting category option which is already available to prospective Indigenous broadcasters.
- 155 ATSIC, above n 8, recommendation 3.43.
- 156 BSA sch 2 ss 9(1)(b), (3).
- 157 ATSIC, above n 8, recommendation 3.44.
- 158 Australian Productivity Commission, above n 10, recommendation 8.5.
- 159 Stevens, above n 31, recommendation 12. In addition to different financial circumstances, a specific exception regarding government announcements can be justified by the special role Indigenous broadcasters can play in assisting the government in reaching for its communications populations that are not reached by mainstream media.
- 160 Discussed above in Part V.A.
- 161 This view is also reflected in the Canadian Indigenous Broadcasting Policy: see *CRTC Native Broadcasting*, above n 2, s 5.
- 162 See ACMA, above n 59 (in addition to broadcasters, monitoring the compliance with unnecessary restrictions is also a burden for the regulatory authority).
- 163 ATSIC, above n 8, recommendation 3.4.3.
- 164 Stevens, above n 31, recommendation 5.
- 165 BSA s 81(1)(a).
- 166 Discussed above in Part V.B.
- 167 Australian Productivity Commission, above n 10, 286.
- 168 Ibid.
- 169 Stevens, above n 31, recommendation 4.
- 170 Ibid recommendation 5.
- 171 Ibid recommendation 8.
- 172 Arguably, financial capacity should not be a licensing criterion for any type of third sector broadcasting licences, not only those

for Indigenous broadcasting. However, that is a debate outside the scope of this article.

- 173 Indigenous Remote Communications Association, Submission to the Department of the Prime Minister and Cabinet, *Review of Australian Government Investment in the Indigenous Broadcasting and Media Sector*, 31 August 2010 <http://www.archive.dbcde.gov.au/__data/assets/pdf_file/0018/137007/Indigenous_Remote_Communications_Association_PDF_589_KB.pdf>.
- 174 BSA s 123.
- 175 Discussed above in Part VI.C.
- 176 Community Broadcasting Association of Australia, above n 120.
- 177 Community Broadcasting Foundation, Submission to the Department of the Prime Minister and Cabinet, *Broadcasting and Media Sector Review*, 2 September 2010 <http://www.archive.dbcde.gov.au/__data/assets/pdf_file/0020/137027/Community_Broadcasting_Foundation_PDF_449_KB.pdf>.