

**Public Service Broadcasting:
A Comparative Legal Survey**

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Preface

At the very heart of the idea of Public Service Broadcasting (PSB) is the goal of serving the needs and interests of the public. This goal is reflected in the ownership, funding and programming of public service broadcasting organizations, which ultimately, need to serve the public. Public service broadcasting represents a public sphere for discussion and the dissemination of information and ideas, essential for the proper functioning of a democratic society. In that sense, PSB is of the public, for the public and by the public.

Three conditions are necessary for public service broadcasters to fulfill their mandate in the public interest. First, the independence of public service broadcasters must be guaranteed through appropriate structures such as pluralistic and independent governing boards. Second, public service broadcasters must be guaranteed funding which is adequate to serve the needs and interests of the public, and to promote the free flow of information and ideas. Third, public service broadcasters must be directly accountable to the public, especially as regard the discharge of their missions and the use of public resources.

A number of key questions immediately spring to mind in relation to national broadcasters funded out of the public purse. To what extent and in what ways is the 'public' reflected? How are countries around the world trying to ensure that these national broadcasters do serve the public interest? What structures are employed to ensure that ownership does mean 'public' ownership? How can funding mechanisms be true 'public' funding? How can programming which really fulfils a public need be promoted? Does our national broadcaster truly reflect the aspirations and desires of the people? Is the notion of public service properly reflected in all the structures and functions of our national broadcaster? Is it Public Service Broadcasting or State Broadcasting?

UNESCO and AIBD have been helping publicly funded broadcasters in the Asia-Pacific region to find out the answers to some of these questions. A key part of these ongoing efforts has been to try to learn from the experiences of various well-established PSB organisations all over the world, in relation to their status, legal framework, sources of funding and administrative structures.

The present book on Public Service Broadcasting by Mr. Toby Mendel illustrates the ways in which selected national, publicly funded broadcasters operating, in terms of their broadcasting obligations, governance structure and funding arrangements. In selecting the various national broadcasters, an attempt has been made to ensure representation from all continents of the world, and particularly from countries which have a particularly strong commitment to public service broadcasting. Special emphasis has been placed on the strategies which have

evolved over the years to ensure that publicly funded broadcasters are not undermined by two critical phenomena: external control (political or other), particularly over editorial independence, and inadequate public funding. The book also speaks about alternative strategies, which have been employed to try and bring the audience back to their own domain.

This joint publication of UNESCO and AIBD is a notable contribution to the ongoing Europe-Asia-Pacific Dialogue on Public Service Broadcasting initiated by AIBD at the 2nd International Conference on Public Service Broadcasting 29 November to 1 December 1999, in Manila, the Philippines. The author, Mr. Toby Mendel is currently the Head of Law Programme at the ARTICLE 19 and has worked closely with UNESCO in a number of countries in the Asia-Pacific region as an expert on broadcasting legislation.

We believe that this book will be a useful reference to all the national broadcasters of Asia-Pacific region. It should serve as an authoritative source of information from countries around the world, as a friend for broadcasters to help them solve some of the issues they are currently facing in their own organizations. Knowing others always means knowing ourselves.

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Introduction¹

National broadcasters funded out of the public purse have historically formed a vital component of the broadcasting sector in most countries and the rationale for these broadcasters – which can offer alternative programming to that provided by the commercial sector – remains strong. At the same time, two key issues continue to pose a threat to the success of publicly-funded broadcasters. The first is ongoing attempts in many countries by the governing authorities to exert control over such broadcasters, undermining their independence and the quality of their news and other programming. The other is the ever-present desire of governments to cut budgets, which has resulted in increased pressure on the level of public funding received by these broadcasters, and a consequent search for alternative sources of funding.

This study looks at the way in which national, publicly-funded broadcasters are organised and paid for in six countries where support for these broadcasters remains strong, namely Australia, Canada, France, Japan, South Africa and the United Kingdom. The focus is on the legal and practical arrangements under which these broadcasters operate, including broadcasting obligations, governance

¹ I would like to extend my thanks to Charlotte Kreder and Nick Devlin, interns at ARTICLE 19 who assisted with the research for this study.

structures and funding arrangements. The study pays particular attention to the ways in which these countries have dealt with the threats noted above, namely how they have guaranteed the editorial independence of these broadcasters, while at the same time ensuring their accountability to the public and providing them with public funds.

In the past, a central broadcasting organisation supported by public funding has often been the only national broadcast medium and such organisations continue to occupy a dominant position in much of the world. In many countries, the commitment to publicly-funded broadcasting remains strong and this is reflected in public support, government funding and viewing statistics. There are a number of good reasons for this. These broadcasters have the potential to ensure that quality programmes covering a wide range of interests, and responding to the needs of all sectors of the population, are broadcast. They can provide an effective complement to commercial services, satisfying informational needs and interests that the market does not respond to. At their best, they ensure diversity in programming and make an important contribution to satisfying the public's right to know. They also serve as a focal point for promoting a sense of national identity and fostering a democratic and rights-respecting culture.

In many countries, however, the government exerts a great deal of control over state-funded broadcasters, using them as a mouthpiece for government rather than as an independent source of information for the public. It is only when the independence of these broadcasters is guaranteed – in law and in practice – that they can truly operate as servants of the public interest, providing high quality information from a variety of sources to the public.

The rapid proliferation of commercial and other forms of broadcasting is posing a new and dynamic challenge to publicly-funded broadcasters. Technological developments have completely altered the nature of broadcasting with households in many countries now having access to tens, if not hundreds, of channels. Digital technology allows limited frequency ranges to accommodate far more signals, opening up the airwaves to ever increasing numbers of broadcasters. The ongoing development of satellite and cable networks has also had a significant impact on access to broadcasting all over the world. These developments are complemented by the rapidly falling costs of starting up a broadcasting enterprise. The Internet promises even more exciting and profound changes and virtually everyone who has access to fairly basic equipment will effectively be in a position to operate as a broadcaster in the near future.

These developments pose a particular threat to broadcasters, which remain under government control. Many citizens prefer to tune in to independent commercial broadcasters, where they are available, than to a national broadcaster, which is effectively a government mouthpiece. This can lead to a significant erosion of support for publicly-funded broadcasting, to the longer-term detriment of the greater public interest. It is perhaps ironic that in these circumstances, declining

viewing statistics mean that government control no longer delivers the desired result, so that ultimately, even government support for publicly-funded broadcasters wanes.

Publicly-funded broadcasters are also facing new challenges as the dominant understanding of the role of government changes. Moves to downsize government and privatise or commercialise government-run industries have been very popular. These changes have affected even activities once deemed core public functions such as responsibility for roads and monopoly utilities. At the same time, demands on certain public functions, for example in relation to medical services and education, are increasing, putting further pressure on scarce resources.

Given these developments, it is natural that the question of the extent and nature of direct public support for national broadcasters is coming up increasingly frequently and some countries are exploring new ways of satisfying the need for an alternative to commercially-driven programming. One approach is to impose public service obligations on private broadcasters. Many countries already impose some such obligations on all licensed broadcasters but the overall trend is towards relaxing regulation and it is becoming increasingly difficult for national governments to effectively impose regulatory conditions.

Another approach is to look for alternative ways of providing public funding for programming which serves various public needs and interests. In some countries, independent programme producers, who are not linked to a specific broadcaster, may receive public funding for individual programmes. Alternatively, private broadcasters may apply for funding for programmes, which fulfil a public service role. Community broadcasters are also playing an increasingly important role in satisfying needs, which other forms of broadcasting do not. It is increasingly common for publicly funded broadcasters to be required to include within their overall broadcasting, a certain proportion of programmes from independent producers.

Despite the growing importance of these alternative models, and the new challenges described above, the vast majority of countries world-wide still rely heavily on a national publicly-funded broadcaster or broadcasters to satisfy the public's needs in this area. Support for such broadcasters remains strong where they have managed to maintain their independence from government and other influences and where they are able to produce quality programming which complements that provided by the private sector.

Broadcasting organisations, which meet these, conditions are frequently referred to as “public service broadcasting organisations” and a set of attributes has come to be associated with them. The first section of this study provides a brief overview of those attributes. The second section looks at a number of international standards relevant to public service broadcasting organisations, particularly as derived from the human right to freedom of expression as

elaborated by various courts and official bodies.

These sections are followed by a series of country sections analysing the public service broadcasting organisation(s) in the relevant country. Each country section is organised under five main headings, Introduction, Services Provided, Public Service Mandate, Governing Structure (covering Internal Governance and Regulatory Mechanisms) and Financing. Under the section on Services Provided, the study describes the main services, including programme channels, offered by national public service broadcasting organisations. The section on Public Service Mandate includes an outline of the special legal and administrative obligations placed on public service broadcasting organisations. The section on Governing Structure is divided into two sub-sections, describing first the governing structure of the broadcasters themselves and second any external bodies, which exercise power over them. Finally, a brief description of the main sources of funding for these public service broadcasting organisations is provided.

The country sections are followed by a section containing two tables comparing the various arrangements regarding public service broadcasting organisations in the six countries studied. This is followed by a section assessing the goals of public service broadcasting organisations, and the pros and cons of the different arrangements in the various countries.

Features of Public Service Broadcasting organisations

State-funded broadcasters exist in almost every country in the world. Only some of these, however, conform to the standards commonly associated with public service broadcasting. This section outlines the attributes, which have come to be associated with public service broadcasting organisations.

Public service broadcasting organisations are generally associated with a number of features, derived in large part from the guarantee of freedom of expression, as outlined below. In addition, these features flow from the fact that public funds are being spent on broadcasting which engages certain general principles relating to public spending. Eric Barendt notes six key features of public service broadcasting organisations:

1. general geographical availability;
2. concern for national identity and culture;
3. independence from both the State and commercial interests;
4. impartiality of programmes;
5. range and variety of programmes; and

6. substantial financing by a general charge on users.²

These are largely reiterated in a White Paper on the future of the BBC, produced by the UK government in 1994.³

The first feature is a direct consequence of the public nature of the service. It would not be appropriate to offer a public service to only part of the population, for example those living in cities, although different regions will not necessarily receive identical services. It is also a significant justification for public service broadcasting organisations since it serves to ensure that the public's right to know is satisfied in equal measure throughout the whole territory.

The second feature has been, and indeed remains, closely associated with public service broadcasting organisations, being an explicit obligation in many countries. It reflects the role of these broadcasters in building a sense of national identity, belonging and participation. To this extent, it can be seen as essential to the larger project of promoting a national democratic and rights respecting culture. At the same time, this feature is perhaps more controversial, both because it represents a restriction on editorial freedom and because it might lead to chauvinism. However, it is no longer understood in the narrow sense of promoting the dominant culture and in many States includes the idea of promoting multiculturalism as an aspect of nationhood.

A key goal of public service broadcasting organisations is to provide quality broadcasting which meets the informational, entertainment and educational needs of the population while respecting and promoting diversity. Satisfaction of this goal is impossible if public broadcasters are expected to compete for funds in the same way as commercial broadcasters. Commercial dependency would inevitably lead to public broadcasters subjecting programme production and scheduling decisions to popularity tests rather than making such decisions in the public interest. Although many public service broadcasting organisations now operate on a blend of public and commercial funding, relying entirely on private funding would clearly undermine the ability of such broadcasters to promote pluralism and other goals noted above. As a result, independence from commercial interests has always been an important justification for public service broadcasting organisations.

In many countries, the greatest threat to public broadcasting comes from attempts by government to control the state-funded quality broadcaster to achieve its own ends. State-funded broadcasters have often been accused of being mouthpieces of government, to the detriment of the public interest and the right of citizens to receive a diverse range of information. It seems clear that it is inappropriate for a particular government or branch of the State apparatus to exercise influence over a

² *Broadcasting Law: A Comparative Survey* (1995, Oxford, Clarendon Press), p. 52.

³ *The Future of the BBC: Serving the nation, Competing world-wide*, Cmnd. 2621, pp. 6-7.

public service broadcasting organisation, given that the latter is funded through public monies, and this is now well established as a matter of international and comparative law (see below). It may be noted that there is a tension between these two types of independence as freedom from commercial pressures necessarily leads to dependence on public funding with the attendant risk of State interference.

Impartiality is closely related to independence. If it is inappropriate for the government to use public funds to promote its particular viewpoint, it is equally inappropriate, given its public mandate, for a public service broadcasting organisation to promote a certain position or support a particular political party.

The fifth feature of public service broadcasting organisations is that they should provide a variety of programmes, including shows of an educational and informative nature. In this public service broadcasting organisations may be contrasted with private broadcasters in a number of countries, which are increasingly oriented towards low-cost options such as films and game shows. The obligation of diversity in programming derives from the public's right to know and serves to ensure that the public has access to information about a wide variety of issues and concerns.

Barendt posits a general fund on users as the sixth feature of public service broadcasting organisations. As is clear from the following analysis, not all jurisdictions fund public service broadcasting organisations through a general charge on users or a television license fee. Instead, in many countries the national legislative body, or parliament, directly votes funds for these broadcasters. A license fee has the advantage of being more stable and also less susceptible of government interference, although public bodies ultimately set the rate of the license fee and where relevant apportion it among public broadcasters. At the same time, license fees may be difficult and/or costly to collect and may be difficult to introduce for political reasons, where they are not already in place. In addition, a general charge may lead to the public broadcaster being forced to compete for ratings, in order to justify the general charge, rather than concentrate on quality and diversity.

International Standards

The Guarantee of Freedom of Expression

The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, binding on all States as a matter of customary international law. It guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁴

The *International Covenant on Civil and Political Rights* (ICCPR) is an international treaty, ratified by over 145 States, which imposes legally binding obligations on States Parties to respect a number of the human rights set out in the UDHR.⁵ Article 19 of the ICCPR guarantees the right to freedom of opinion and expression in terms very similar to those found at Article 19 of the UDHR. Guarantees of freedom of expression are also found in all three major regional human rights systems, at Article 9 of the African Charter on Human and Peoples' Rights,⁶ Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷ and Article 13 of the American Convention on Human Rights.⁸

Freedom of expression is among the most important of the rights guaranteed by the ICCPR and other international human rights treaties, in particular because of its fundamental role in underpinning democracy. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which stated, "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated." The European Court of Human Rights has stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.⁹

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasting organisations. The Inter-American Court of Human Rights, for example, has stated: "It is the mass media that make the exercise of freedom of expression a reality."¹⁰ The European Court of Human Rights has referred to "the pre-eminent role of the press in a State governed by the rule of law."¹¹ The media as a whole merit special protection under freedom of expression in part because of their role in making public "information and ideas on matters of public interest. Not only does [the

⁴ Article 19, UDHR, adopted by the UN General Assembly on 10 December 1948, Resolution 217A(III).

⁵ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁶ Adopted 26 June 1981, in force 21 October 1986.

⁷ Adopted 4 November 1950, in force 3 September 1953.

⁸ Adopted 22 November 1969, in force 18 July 1978.

⁹ *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, Para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

¹¹ *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”¹²

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, these obligations do apply to state-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, state-funded broadcasters are in a special position to satisfy the public’s right to know and to guarantee pluralism and access and it is therefore particularly important that they promote these rights.

Pluralism

Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights, but that they must take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

An important aspect of States’ positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”¹³ The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”¹⁴

One of the key rationales behind public service broadcasting organisations is that they make an important contribution to pluralism. Indeed, the German Federal Constitutional Court has held that variety is a constitutional obligation for public service broadcasting organisations.¹⁵ For this reason, a number of international instruments stress the importance of public service broadcasting organisations and their contribution to promoting diversity and pluralism. Although not all of these instruments are formally binding as a matter of law, they do provide valuable insight into the implications of freedom of expression and democracy for public

¹² European Court of Human Rights, *Thorgeirson*, note 11, para. 63.

¹³ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, 17 EHRR 93, para. 38.

¹⁴ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 34.

¹⁵ See *Fourth Television case*, 87 BverfGE 181 (1992). In Barendt, *op cit.*, p. 58.

service broadcasting.

For example, a *Resolution of the Council and of the Representatives of the Governments of the Member States*, passed by the European Union, recognises the important role played by public service broadcasting organisations in ensuring a flow of information from a variety of sources to the public. The European Union includes 15 member States broadly committed to market integration and monetary union. The Protocol notes that public service broadcasters are of direct relevance to democracy, social and cultural needs, and the need to preserve media pluralism. As a result, funding by States to such broadcasters is exempted from the general provisions of the Treaty of Amsterdam.¹⁶ For the same reasons, the 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.¹⁷

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague 1994, promotes very similar principles. This resolution notes the importance of public service broadcasting to human rights and democracy generally and the role of public service broadcasting organisations in providing a forum for wide-ranging public debate, innovative programming not driven by market forces and promotion of local production. As a result of these vital roles, the resolution recommends that member States guarantee at least one comprehensive public service broadcasting organisation, accessible to all.

Independence and Funding

The State's obligation to promote pluralism and the free flow of information and ideas to the public, including through the media, does not permit it to interfere with broadcasters' freedom of expression. Although licensing of broadcasters is necessary to ensure the orderly use of the airwaves, licensing procedures are governed by the guarantee of freedom of expression and they may not, as a result, be used as a vehicle for government control over broadcasters, including state-funded broadcasters. This follows from a case before the European Court of Human Rights which decided that any restriction on freedom of expression through licensing was subject to the strict test for such restrictions established under international law.¹⁸ In particular, any restrictions must be shown to serve one of a small number of legitimate interests and, in addition, be necessary to protect that interest. Similarly, in the preamble to the European Convention on Transfrontier Television, States: "[Reaffirm] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters."¹⁹

¹⁶ Official Journal C 030, 5 February 1999, clause 1.

¹⁷ Clause 5.

¹⁸ *Groppera Radio AG and Ors v. Switzerland*, 28 March 1990, 12 EHRR 321, para. 61.

¹⁹ 5 May 1989, European Treaty Series No. 132.

An important implication of these guarantees is that bodies, which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of state-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments.

Perhaps the most important of these is Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, passed by the Committee of Ministers of the Council of Europe, a body currently comprised of 41 States, committed to human rights and the social advancement of its members. The very name of this Recommendation clearly illustrates the importance to be attached to the independence of public service broadcasting organisations. The Recommendation notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.²⁰

Several Declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasting organisations. The 1996 *Declaration of Sana'a* calls on the international community to provide assistance to state-funded broadcasters only where they are independent and calls on individual States to guarantee such independence. The 1997 *Declaration of Sofia* notes the need for state-owned broadcasters to be transformed into proper public service broadcasting organisations with guaranteed editorial independence and independent supervisory bodies.²¹

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, noted above, reiterates these principles, including the need for independent governing bodies, and for editorial independence and adequate funding. These recommendations, particularly the requirement of effective independence from government – including financial independence – are reiterated in a number of resolutions and recommendations of the Parliamentary Assembly and other Ministerial Conferences on mass media policy of the Council of Europe.²²

ARTICLE 19, Global Campaign for Free Expression, an international human rights NGO focusing on freedom of expression, has adopted a set of recommendations drawn from international law and practice relating to broadcasting, entitled, *Measures Necessary to Protect and Promote Broadcasting Freedom*.²³ Recommendation 1 reflects the principles noted above, stating: “The

²⁰ Articles 9-13.

²¹ Clause 7.

²² For the former, see Res. 428(1970), Rec. 748(1975) and Rec. 1147(1991) and for the latter see Res. No. 2 (1st Conference, 1986) and Res. No. 2 (5th Conference, 1997).

²³ ARTICLE 19, *Who Rules the Airwaves? Broadcasting in Africa* (London: Article 19, 1995), pp.

independence of the governing body of the public broadcaster should be guaranteed by law.”

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft-broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”²⁴

Similarly, the Supreme Court of Ghana noted: “[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham.”²⁵ As regards the governing body, the National Media Commission, the Ghanaian Supreme Court stated that it was their role, “to breathe the air of independence into the state media to ensure that they are insulated from Governmental control.”²⁶

Many of the standards set out above reflect both the idea of independence of governing bodies and the related but slightly different idea that the editorial independence of public service broadcasting organisations should be guaranteed, both in law and in practice. Recommendation 2 of the ARTICLE 19 *Measures* states: “The principle of editorial independence should be guaranteed by law.” In practice, editorial independence is often promoted by ensuring a clear separation between the governing body, with overall responsibility for the broadcasting organisation, and managers and editors, who have responsibility for day-to-day and editorial decision-making. The governing body may set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision.

This approach is reflected in Article 1 of Recommendation No. R(96)10 of the Council of Europe, which notes that the legal framework governing public service broadcasters should guarantee editorial independence and institutional autonomy as regards programme schedules, programmes, news and a number of other matters. The Recommendation goes on to state that management should be solely responsible for day-to-day operations and should be arranged in such a way as to minimise the risk of political interference, for example by restricting its lines of accountability to the supervisory body and the courts.²⁷ In a related vein, Articles

133-140.

²⁴ *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

²⁵ *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

²⁶ *Ibid.*, p. 13.

²⁷ Articles 4-8.

20-22 of the same Recommendation note that news programmes should present the facts fairly and encourage the free formation of opinions. Public service broadcasting organisations should be compelled to broadcast messages only in exceptional circumstances.

Similarly, true independence is only possible if funding is secure from arbitrary government control and many of the international standards noted above reflect this idea. In addition, public service broadcasting organisations can only fulfil their mandates if they are guaranteed sufficient funds for that task. Articles 17-19 of Recommendation No. R (96) 10 of the Council of Europe note that funding for public service broadcasting organisations should be appropriate to their tasks, secure and transparent. Funding arrangements should not render the broadcasters susceptible to interference, for example with editorial independence or institutional autonomy.

ARTICLE 19's Recommendation 3 deals with funding, stating: "Public service broadcasting should be adequately funded by a means that protects the broadcaster from arbitrary interference with its budgets." Similarly, the Italian Constitutional Court has held that the constitutional guarantee of freedom of expression obliges the government to provide sufficient resources to the public broadcaster to enable it to discharge its functions.²⁸

²⁸ Decision 826/1998 [1998] Guir. cost. 3893.

AUSTRALIA

Introduction

Australia has two separate public service broadcasting organisations, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS). The ABC provides information and entertainment services of general interest on both radio and television, while the much smaller SBS provides specialised services focused on fulfilling the media needs of Australia's culturally diverse population. Both broadcasters are public corporations operating under Charters enacted by Australia's federal Parliament. While ultimately accountable to the government for the way in which they spend public funds, both the ABC and the SBS are independent of governmental control and enjoy substantial creative and editorial freedom. This section will examine the specific services, mandate, governance and financing of both broadcasters separately in turn.

THE AUSTRALIAN BROADCASTING CORPORATION

I. Services Provided

The ABC provides a national television network (ABC-TV), available on terrestrial reception throughout the nation. The system has production facilities and transmission centres in all State capitals, as well as the national capital, Canberra, and the City of Darwin, and reception is available to virtually all Australians. ABC-Radio also operates six distinct audio-broadcast services. Metropolitan Radio, a network of nine stations, one in each State capital, as well as one in each of Darwin, Canberra and Newcastle, provides a core service of news, current affairs, talk, information, sport and entertainment programmes. Regional Radio, a national network of around 70 AM and 180 FM stations, as well as State and national satellite services, provides a mix of local, regional, State and national programming for audiences outside the capital cities. The ABC also operates four speciality radio networks. The Radio National network features programmes on the arts, religion, politics, the law, news and current affairs, science and technology, history, health, adult education and social change, economics and international affairs. Classic FM is, as the name suggests, dedicated to classical music. Triple J is a youth network featuring predominantly popular music, but also carrying news and current affairs, comedy and special features. Finally, ABC runs News Radio, a continuous news and current affairs

service, with live broadcasts of both Houses of Parliament when they are sitting.²⁹

II. Public Service Mandate

The Charter of the ABC, set out in Section 6 of the 1983 *Australian Broadcasting Corporation Act* (ABC Act),³⁰ establishes the functions of the Corporation, which are “to provide within Australia innovative and comprehensive broadcasting and television services of a high standard as part of the Australian broadcasting and television system consisting of national, commercial and public sectors.” More specifically, the Charter calls upon the ABC to provide broadcasting programmes that “contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of the Australian community,” in part by promoting music, drama, and other performing arts in Australia. It also requires the ABC to provide educational broadcasts as a substantial component of its programming.

The ABC has a subsidiary international mandate, (i) to promote and encourage international awareness of Australia, and Australian outlooks on world affairs, by transmitting information and entertainment programmes to foreign viewers; and (ii) to enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs while abroad. In this way, the public service broadcasting organisation acts both as a mirror to the nation and as a window for the world into Australian life and culture.

The ABC’s Charter defines its role in the context of a broader competitive media environment. To this end, it instructs the corporation to take account of the broadcasting services provided by the commercial and public sectors of the Australian broadcasting and television system in formulating its own programming complement. The Charter also imposes responsibility on the ABC, as the provider of an independent national broadcasting and television service, “to provide a balance between broadcasting programmes and television programmes of wide appeal and specialised broadcasting programmes and television programmes.” Consistent with its public role, the ABC is required to have regard for the multicultural character of the Australian community throughout its operations.³¹

More specifically, several requirements in relation to programming are imposed on the ABC. Its enabling statute requires the ABC to develop and maintain an independent service for the broadcasting of news and information, and the ABC is required to broadcast daily, from all national radio and television stations, regular sessions of news and information relating to current events within and outside

²⁹ A comprehensive summary of the ABC’s services, mandate, and funding situation may be found at the corporation’s website, <http://www.abc.net.au>

³⁰ Act No. 6 of 1983. On the web at: http://www.austlii.edu.au/au/legis/cth/consol_act/abca1983361/.

³¹ Section 6(2).

Australia.³²

Section 4 of the *Parliament Proceedings Broadcasting Act* (1946),³³ requires the ABC to broadcast the proceedings of the Senate, the House of Representatives or a joint sitting of both Houses of the Commonwealth Parliament on such days and during such periods as the Joint Committee on the Broadcasting of Parliamentary Proceedings determines. The proceedings are to be broadcast from medium wave radio stations in each State capital city and Newcastle, and from such other radio stations as may be prescribed.

III. Governing Structure

A. Internal Governance

The ABC Act empowers it to carry out all the functions necessary to the operation of a national broadcaster. Internally, the ABC is governed by a Board of Directors, established by the Act,³⁴ which consists of a managing director who is appointed by the Board for five years, and between six and eight other Directors who are appointed by the Governor General (that is, the Cabinet). Prior to appointment, the qualifications of potential Directors must be assessed for experience relating to the provision of broadcasting services or in communications or management, expertise in financial or technical matters, and cultural or other interests relevant to the oversight of a public service broadcasting organisation.³⁵ Unqualified political appointees are ineligible. Directors may only be terminated for cause, which is defined to include misbehaviour, or physical or mental incapacity, bankruptcy, failure to comply with their obligations, or absence from three consecutive Board meetings without leave of the Chairman.³⁶

According to Section 8 of the Act, the Board is required “(a) to ensure that the functions of the Corporation are performed efficiently and with the maximum benefit to the people of Australia; (b) to maintain the independence and integrity of the Corporation; (c) to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognised standards of objective journalism,” as well as to ensure the Corporation’s general compliance with the broadcast regulation framework. In order to have the benefit of additional expert opinion, Section 11 enables the Board to establish an Advisory Council to advise it on matters concerning broadcasting and television programmes. The Council’s recommendations are

³² Section 27.

³³ Act No. 20 of 1946. On the web at:
http://www.austlii.edu.au/au/legis/cth/consol_act/ppba1946366/.

³⁴ Section 7.

³⁵ Section 12.

³⁶ Section 18.

purely for the information and guidance of the Directors, and have no binding authority. The Board can also establish Advisory Councils in relation to any State, Territory or region of Australia.

B. Regulatory Mechanisms

The federal government of Australia has jurisdiction over broadcasting, and therefore ultimate legislative control over the ABC. However, the terms of the ABC's Charter, mandating it to provide comprehensive and independent news and information broadcasting for all Australians, combined with the terms under which Directors of the corporation are appointed, ensure the ABC a large measure of editorial independence from the government. These provisions are respected in practice, and government manipulation of the public service broadcasting organisation would violate longstanding customary political norms.

Recently, the High Court of Australia has ruled that the basic democratic institutions of Australia, as established by its constitution, create an implied freedom of political communication, which the elected government cannot abrogate.³⁷ Although this judicially created freedom is relatively untested, and has never been applied in the context of government control over public service broadcasting, it nonetheless introduces a further safeguard for the independence of Australia's public service broadcasting organisations.

Although political control is not presently an issue in Australian broadcasting, fears have been raised that the quality and integrity of the service may be compromised by inadequate funding. The most important lever of power presently, discussed below, is the government's control over the public grants on which the ABC is dependent.³⁸

Under Section 78 of the ABC Act, the Minister for Communications is empowered to direct the ABC to broadcast certain matters free of charge if he is of the opinion that this is in the national interest. However, if he does so, the Minister must cause a statement containing particulars of and reasons for the direction to be laid before the Commonwealth Parliament. Except in relation to the broadcasting of matter in the national interest or as provided for in other legislation, the ABC is not subject to direction by the Government.

The public also has some limited measure of control over the ABC's conduct, through formal statutory procedures for dealing with public complaints. According to the ABC Act, upon receiving a written complaint alleging that an error of fact has occurred in a programme, the ABC must refer the complaint to a

³⁷ *Australian Capital Television Pty Ltd. v. Commonwealth of Australia*, (1992) 108 ALR 577, *Nationwide News Pty Lt. v. Wills*, (1992) 108 ALR 681.

³⁸ ABC Board Call for Adequate Base Funding, Media Release, 21 April 1997.

community affairs officer as soon as is practicable. The officer will assess the seriousness of the complaint and on that basis decide whether or not to investigate further. A further investigation must consider whether the complaint is justified and the findings must be reported to the principal community affairs officer. If the officer decides that the complaint is justified, he or she must inform the complainant and the managing director of the ABC, who is then required to ensure that the ABC broadcasts a prompt retraction or apology in appropriate terms.

As the national broadcast regulator, the Australian Broadcasting Authority (ABA) also has a limited measure of control over the ABC. The ABC is required to develop codes of practice relating to programming matters and to submit these codes to the Australian Broadcasting Authority.³⁹

Under the *Broadcasting Services Act* (1992),⁴⁰ the Broadcasting Authority can hear complaints concerning both the ABC and the SBS. This is a procedure of last resort, however, coming into play only if a complaint has first been made directly to the ABC or SBS to the effect that it has contravened an established code of practice and the complainant either has not received an answer within 60 days or has, in his or her opinion, received an inadequate response. Only then may an aggrieved party lodge a complaint with the ABA, which must in turn investigate unless it is satisfied that the complaint is frivolous or vexatious, was not made in good faith, or pertains to a matter that is not covered by a code of practice.

The ABA has, however, very limited powers to deal with complaints concerning national broadcasters. The 1992 Act provides that if, after investigating a complaint, the ABA is satisfied that the complaint was justified and that action should be taken to encourage compliance with the relevant code of practice, the ABA may recommend to the national broadcaster that it comply with the code or take such other action as is suggested, including broadcasting or otherwise publishing an apology or retraction. The ABA has no direct power to enforce compliance with its recommendations. If, however, appropriate remedial action is not taken by the national broadcaster within 30 days, the ABA can report the matter to the Minister, who must ensure that a copy of the report is laid before both Houses of Parliament within seven sitting days.⁴¹

Pursuant to Section 19 of the ABC Act, the ABC is required to prepare an annual report. The annual report must contain particulars of each broadcast made as a result of a Ministerial direction, codes of practice, any gift, devise or bequest accepted by the ABC during the year, any advice received from the Advisory Council, a summary of activities of the community affairs officers, and any actions taken in response to complaints.

³⁹ ABC Act, Section 8.

⁴⁰ Act No. 110 of 1992. On the web at:
http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/.

⁴¹ *Broadcast Services Act* 1992, Sections 150-152.

IV. Financing

Part IV of the ABC Act deals with financial matters. The ABC is prohibited from broadcasting commercial advertising and, as a result, is largely dependent on government funds.⁴² In the year to 30 June 1999, the ABC received about AUS\$ 600 million or about 80% of its funding from the government, the remaining 20% coming from its own activities, such as network services and concerts. The Board annually submits estimates of the receipts and expenditure of the ABC for the following fiscal year to Parliament, which then votes an annual allocation to the ABC.

In the late 1990s the ABC, along with state-funded broadcasters in several other countries, has had to endure a series of reductions to its funding base. In an April 1997 press release, the Board of the ABC publicly called on the government to make a firm commitment to stable funding.⁴³ The Board indicated that unless its funding uncertainties were ameliorated, the Corporation would have to consider austerity measures including the production of less news and current affairs programming, the reduction of overall Australian content, and the closure of regional radio stations. These financial pressures mean that while the ABC enjoys freedom of expression in its programming, its ability to exercise that freedom, and thus fulfil its public service mandate, is threatened by changing economic realities.

THE SPECIAL BROADCASTING SERVICE CORPORATION

The SBS is Australia's unique multicultural and multilingual public service broadcasting organisation, founded in 1975 to serve Australians of diverse ethnic backgrounds and to promote cultural awareness. The *Special Broadcasting Service Act* (SBS Act)⁴⁴ establishes SBS as a corporation with a Charter, at Section 6, setting out what the Australian people through the Parliament require as a national speciality broadcaster. The SBS's Charter specifies that its principal function is to "provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in so doing so, reflect Australia's multicultural society."

I. Services Provided

⁴² Section 31.

⁴³ ABC Board Call for Adequate Base Funding, note 38.

⁴⁴ Act No. 180 of 1991. On the web at:
http://www.austlii.edu.au/au/legis/cth/consol_act/sbsa1991254/.

The SBS operates a television channel, SBS TV, which broadcasts a combination of purchased and specially produced programming. Half of the SBS's scheduled programming is in languages other than English, and its weekly viewership extends to some 4.6 million Australians. The SBS also operates five radio channels, Radio Melbourne 1 and 2, Radio Sydney 1 and 2, and the National Radio Network. All programmes start with news and contain a mixture of current affairs, talks, views, sports, community information and music.

II. Public Service Mandate

The SBS's Charter states that its principal function is to provide multilingual and multicultural radio and television services that inform, educate, and entertain all Australians and, in doing so, reflect Australia's multicultural society. The Charter clearly specifies SBS's public service obligations in the performance of its functions. According to the Charter, the SBS must "contribute to meeting the communications needs of Australia's multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities; and increase awareness of the contribution of a diversity of cultures to the continuing development of Australian society; and promote understanding and acceptance of the cultural, linguistic and ethnic diversity of the Australian people; and contribute to the retention and continuing development of language and other cultural skills; and as far as practicable, inform, educate and entertain Australians in their preferred languages; and make use of Australia's diverse creative resources; and contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the ABC and the public broadcasting sector; and contribute to extending the range of Australian television and radio services, and reflect the changing nature of Australian society, by presenting many points of view and using innovative forms of expression."

III. Governing Structure

A. Internal Governance

Internally, the SBS is governed by a Board of Directors, which consists of the Managing Director and between four and eight non-executive directors.⁴⁵ The latter are appointed on a part time basis, by the Governor General, for not more than two five-year terms. In appointing non-executive directors, the Governor General shall have regard to the need to ensure that the directors collectively possess an appropriate balance of expertise in the areas required to govern the SBS effectively, including an understanding of Australia's multicultural society and the needs and interests of the SBS's culturally diverse audience. The directors

⁴⁵ Section 8.

themselves are expected to originate from a diversity of cultural perspectives. As with the ABC Board, directors may only be removed for cause and are otherwise independent of the government.

Powers and responsibilities mirror those of the ABC Board, discussed above. Pursuant to Section 50, the SBS is required to establish a community advisory committee to assist it in fulfilling its duty to be aware of, and responsive to, community needs and opinions on matters relevant to the Charter.

According to Section 47, the Board is required to establish a corporate plan that sets the objectives of the SBS and outlines its strategies and policies. The corporate plan must also set out revenue, expenditure and borrowing forecasts, performance indicators and targets, and the measures that the Board proposes to adopt to ensure that it is aware of and responsive to community needs and opinions on matters relevant to the Charter. A copy of the corporate plan must be given to the Minister. Section 51 states that if the Board is of the opinion that matters have arisen which may prevent or significantly affect the achievement of the objectives, strategies, policies, or revenue or expenditure forecast set out in the corporate plan, the Board must notify the Minister immediately, and give reasons for their opinion.

B. Regulatory Mechanisms

Section 13 of the SBS Act guarantees that the broadcaster is independent from government interference in editorial and creative programming decisions. The responsible Minister may give written directions to the SBS Board in relation to the performance of its functions. This power is, however, circumscribed by certain restrictions. Pursuant to Section 11, the Minister may only give a direction after consultation with the Board, and then only in relation to the proper performance of the SBS's mandate. He must not give any directions in relation to the content or scheduling of programmes to be broadcast. Section 12 enables the Minister, when he is of the opinion that the broadcasting of a particular matter by the SBS would be in the national interest, to direct the SBS to broadcast that matter from all, or specified, SBS broadcasting stations. In this case, the SBS must broadcast the matter free of charge, in accordance with the direction. The Minister may direct that a matter be broadcast in a specific language.

The Board is required to prepare an annual report to Parliament, pursuant to Section 91 of the Act. The report must contain a number of particulars, including ministerial directions and any broadcasts made as a result of ministerial directions, gifts, devises, bequests accepted by the SBS during the year, how the programming activities during the year have related to the Charter obligations of the SBS, and the revenue earned from advertising or sponsorship during the year.

The SBS Board is required to establish codes of practice relating to programming

matters, and to inform the ABA of them. However, the SBS is not subject to programme standards determined by the ABA. Nevertheless, if a citizen files a complaint on the grounds that the SBS has failed to comply with one of its own codes of practice, and fails to receive a satisfactory response, he or she may lodge a complaint with the ABA. The process is similar to that which applies to the ABC, discussed above.

IV. Financing

As with the ABC, the principal source of revenue for the SBS is an annual public grant.⁴⁶ Unlike its larger sibling, however, the SBS is permitted to broadcast five minutes of commercials per hour as a supplemental source of income. Section 45 of the SBS Act permits the SBS to broadcast advertisements and sponsorship announcements before or after programmes and during natural programme breaks, provided they do not exceed five minutes in any hour of broadcasting. The Board is required to develop and publicise guidelines on the kinds of advertisements and sponsorship announcements that it is prepared to broadcast and may develop guidelines on other matters relating to advertisements and sponsorship announcements, including placement and duration, and the kind of advertisements and announcements that that may be carried on particular kinds of programmes. It is also required to develop and publicise guidelines on the kinds of community information and community promotional material that it is prepared to broadcast.

In the year to June 1999, the SBS received about AUS \$90 million or 77% of its funding from government sources, the remainder coming mainly from advertisements.

⁴⁶ SBS Act, Section 56.

Canada

Introduction

Under the Canadian constitution, broadcasting is a matter of federal jurisdiction given its transcendent national significance. The broadcast regulatory regime was placed in proper context by the Federal Court of Appeal when it stated that, “the importance of broadcasting to the life of the country is reflected in Section 3(b) of the *Broadcasting Act*, which [provides] that ‘the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fibre of Canada.’”⁴⁷

The cornerstone of the regulatory regime is the 1991 *Broadcasting Act* (BA)⁴⁸ which defines the basic mandate and philosophy for broadcasting in Canada, and creates an independent administrative agency, the Canadian Radio-Television and Telecommunications Commission (CRTC) to implement and administer the nation’s broadcasting policy. The BA also establishes the Canadian Broadcasting Corporation (CBC) as Canada’s public service broadcasting organisation. This section will discuss the public mandate of the CBC, its services, and funding structures, as well as the regulatory relationships between the CBC as public service broadcasting organisation, the CRTC as broadcast regulator and Parliament as the ultimate arbiter of broadcast policy and practice.

I. Services Provided

The CBC was first created by Parliament in 1936 to provide a national radio service, to some extent in response to fears of emergent American broadcasting growing to dominate the Canadian airwaves. Today, the CBC produces an extensive array of information and entertainment programming on terrestrial and cable television, AM and FM radio, and international short wave, available in both official languages, French and English.

The CBC presently operates two main television networks, CBC Television in English, and La Télévision de Radio-Canada in French, which offer general and special interest programmes, two financially self-sustaining cable news and information television networks, CBC Newsworld in English, and RDI (Le Réseau de l’information) in French. In radio, the CBC operates four national network services, French and English AM networks offering information and general interest programmes, as well French and English FM systems which

⁴⁷ *Re Canadian Broadcasting League and C.R.T.C.*, (1979) 101 DLR (3d) 669 (Fed. CA), p 676.

⁴⁸ S.C. 1991, c. 11. On the web at: <http://canada.justice.gc.ca/FTP/EN/Laws/Chap/B/B-9.01.txt>.

specialise in classical music and cultural programmes.

In order to serve the unique needs of the geographically remote northern regions, the CBC operates radio and television services to the North in English, French and eight aboriginal languages. The CBC also broadcasts an international short-wave service known as Radio Canada International, which provides programming in seven languages.

II. Public Service Mandate

The public service mandate of the CBC is set out at Section 3(1)(l) and (m) of the BA. The national public service broadcasting organisation is established to, “provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains.” More specifically, “the programming provided by the Corporation should be predominantly and distinctly Canadian, reflect Canada and its regions to national and regional audiences while serving the special needs of the regions, actually contribute to the flow and exchange of cultural expression, be in English and French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities, strive to be of equivalent quality in English and French, contribute to shared national consciousness and identity, be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and reflect the multicultural and multiracial nature of Canada.”

For its part, the CBC describes its mission as “the telling of Canadian stories and the reflection of Canadian realities.” In furtherance of its mandate to inform Canadians on matters of public importance, the CBC has formulated a Journalistic Policy Handbook which governs its news and current affairs programming, and is intended to guarantee that the corporation lives up to its “duty to provide consistent, high-quality information upon which all Canadians may rely.” The CBC’s corporate goals are also informed by its role as a public service broadcasting organisation and it continues to insist that its schedules be driven by considerations of public service rather than market imperatives.⁴⁹

III. Governing Structure

A. Internal Governance

The CBC is a crown corporation, wholly owned by the Canadian government, and by consequence the Canadian people. This means that the federal government

⁴⁹ CBC materials available through their Internet site, <http://www.cbc.ca>.

controls the terms and conditions of the CBC's existence and operation through its legislative authority. Since it is a creature of statute, the CBC does not have a share structure, and its governance is based not on general companies legislation, but rather on the specific terms of the BA which delineate its structures of corporate governance. This is of significance, since the BA also explicitly provides for the CBC's freedom of expression, discussed below, making the values of creative and journalistic independence paramount to political or financial interests. This affords the CBC a measure of protection from influence by its 'owners' external interests which private broadcasters, governed by traditional corporate law principles, do not enjoy.

A Board of Directors of up to twelve members, comprised of prominent citizens from the fields of law, medicine, accounting, business and the arts, representing all regions of the country, is charged with principal oversight of the CBC's performance. Day to day operations, however, is handled by the professional staff and officers of the Corporation. Directors are appointed by the Governor in Council (that is, the federal Cabinet) for renewable five-year terms. All Directors, including the Chairperson and the President, hold office during good behaviour, and may only be removed for cause.⁵⁰ Just as with private corporations, Directors owe an obligation of good faith and due diligence to the CBC and its public service mandate, not the interests of the government, and therefore are not permitted to have outside activities or dealings in the broadcasting industry which might give rise to conflicts with the CBC's interests.

As a matter of company policy, the CBC retains an internal Ombudsman, fully independent of the Corporation's management, to review serious unresolved public complaints related to the discharge of its mandate. Although the Ombudsman reports directly to the President, he or she does not possess any statutory or otherwise binding authority.

B. Regulatory Mechanisms

As a corporate entity, the CBC is bound by all laws of general application, which relate to its operations. Two bodies, however, have a specific measure of control over the CBC, Parliament and the CRTC. Since Parliament has the jurisdiction to regulate the broadcast system, it has the prerogative to establish general principles relating to this field. Furthermore, the BA makes the CBC formally accountable to Parliament for the conduct of its affairs,⁵¹ and specifies, at Section 71, that the CBC shall submit an annual report to Parliament, through the Minister of Canadian Heritage, on its operations. This accountability, however, is circumscribed by strong guarantees of journalistic freedom.

⁵⁰ BA, Section 36(3).

⁵¹ Section 40

Despite the extensive powers which the BA grants the government over the CBC, to say nothing of the broadcaster's substantial financial dependence on the public purse, the CBC is firmly independent, and operates what many argue is Canada's finest broadcast news service. CBC journalists pay considerable attention to domestic politics and are often at the forefront of critical investigations into the conduct of government. This independence is not merely a product of fortunate happenstance, but is clearly established in the BA. Most importantly, Section 46(5) states that, "[T]he Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence."

In considering whether the CBC constitutes a branch of government for the purposes of being bound by the *Charter of Rights and Freedoms*, the Alberta Court of Queen's Bench made the following observations as to the broadcaster's independence:

Even in respect of financial matters dealt with in ss. 53 to 70 of the *Broadcasting Act*, Parliament has taken great pains to ensure that the CBC functions as an autonomous body within its mandate. Parliament in its wisdom enacted in 1991 specific provisions aimed at protecting the journalistic, creative and programming independence of the C.B.C. Parliament recognized that the broadcast media must be free from government interference – a touchstone of a democratic society.⁵²

As discussed above, Parliament has the power to appoint the CBC's Directors, and although party patronage may play a role in the selection of directorial candidates, political interference by the directors would be inconsistent with the spirit, if not the letter, of both the BA as well as the *Charter of Rights and Freedoms*. Political interference with the operation programming of the CBC would be certain to provoke widespread public and political outrage. It is interesting to note that until recently Perrin Beatty, a former cabinet minister in the Conservative government of Brian Mulroney, continued to serve as President of the CBC, notwithstanding the fact that the present Liberal government is well into its second term of office.

The CRTC, Canada's general broadcast regulator, is an independent agency, vested with administrative and quasi-judicial authority,⁵³ operating at arms-length from government and reporting directly to Parliament through the Minister of Canadian Heritage. Its mission statement declares its purpose to be "ensuring that Canadian communications contribute fairly and equitably to Canada's economic, social and cultural prosperity through regulation, supervision and public dialogue."⁵⁴ The CRTC consists of thirteen full-time and six part-time

⁵² *National Party of Canada v. Canadian Broadcasting Corporation*, (1993) 106 DLR (4th) 568 (Alta. QB), pp. 572-573, affm'd (1993) 106 DLR (4th) 575 (Alta. CA).

⁵³ Pursuant to Section 17 of the BA, the CRTC has the authority to determine questions of fact or law in relation to matters within its jurisdiction, which creates a certain accountability of the CBC before the Commission.

⁵⁴ CRTC public information materials, available on the Internet at www.crtc.gc.ca.

commissioners, appointed by Cabinet for renewable five-year terms. Its task is to “regulate and to supervise all aspects of the Canadian Broadcasting system with a view to implementing the broadcasting policy,”⁵⁵ and it is required to meet at least six times per year.

Under Section 28 of the BA, the Cabinet has the power to override CRTC decisions⁵⁶ but in practice it is rare for this to happen. More importantly, the BA now specifies that the Cabinet can only take such action if it is satisfied that the decision derogated from the attainment of the policy objectives for the Canadian broadcasting system set out in the Act. This provision imposes an obligation on the Cabinet to observe certain principles of natural justice and substantially fetters what would otherwise be a purely discretionary decision-making power. Section 28(5) of the Act now requires that the Cabinet produce reasons for overturning a CRTC licensing decision. Should the Cabinet attempt to use these powers to attempt to politically influence the CBC, this would almost certainly fall foul of the guarantees of freedom of expression and the press contained in Section 2(b) of the *Canadian Charter of Rights and Freedoms*.

The CRTC has no power as a censor of specific CBC programmes, or those of any other broadcaster, but sets overall standards by issuing, renewing and even revoking broadcast licenses, consistent with the purposes of the BA and the public interest. It should be noted, however, that the most severe of these sanctions, license revocation, has never been applied. The CRTC may also issue guidelines and statements, which are not necessarily binding but provide guidance to broadcasters.⁵⁷ Given the public nature of the CRTC’s work, it regularly hears submissions from individual citizens on the past performance of broadcasters, including the CBC, as well as the need and desire for future services. Indeed, pursuant to Section 18 of the BA, the CRTC is compelled to hold public consultations in the case of license applications and renewals.

In theory, the CBC is treated like a private broadcaster by the CRTC, and it remains accountable to the Commission for its licensing and renewals. However, the BA enables the CBC to request a consultation with the CRTC if the Commission proposes to attach any conditions to one or more of the CBC’s broadcast licenses. If the CBC is satisfied that these conditions would unreasonably impede its operations, it may refer the condition to the Minister of Communications for consultation. Similarly, no licence issued to the CBC may be suspended or revoked by the CRTC except on application by, or with the consent of, the CBC.⁵⁸ As a result, the CBC’s appearance before the CRTC for periodic license renewals is largely *pro forma*, although it serves the arguably useful

⁵⁵ BA, Section 5.

⁵⁶ The Cabinet must refer the impugned decision back to the CRTC for reconsideration before finally vetoing it. See, for an article on a related topic, D. Kaufman, “Cabinet Action and the CRTC: An examination of Section 23 of the Broadcasting Act” (1985) 26 *Les Cahiers de Droit* 841.

⁵⁷ Section 6.

⁵⁸ Section 24.

purpose of exposing the CBC's senior management to public scrutiny, accountability and criticism.

The CBC's relative immunity from the CRTC's jurisdiction is tempered by the power of the Commission, under Section 25 of the BA, when it is satisfied that the CBC has contravened or failed to comply with any condition of a licence, order, or regulation, to address a report to the Minister of Communications, who will provide a copy to each House of Parliament. Section 26(1)(b) of the BA also empowers the Cabinet to issue directions to the CRTC respecting the reservation of channels or frequencies for the use of the CBC. The CBC is also subject to the Cabinet's discretionary power to issue orders, through the CRTC, directing all or some broadcast licensees to broadcast a specific programme deemed to be of singular public importance.⁵⁹

IV. Financing

CBC is primarily financed by public funds. It submits a yearly corporate plan to the Minister of Communications, which includes the budget of the Corporation for the following fiscal year. This budget may then be approved or rejected by the Treasury Board and subsequently Parliament. Once the estimates for a financial year have been approved, the CBC submits a summary of the corporate plan, modified to accord with the actual funding which it has been allocated.

In 1999, 66% of the CBC's budget flowed from a federal grant, amounting to a total of CDN\$ 935 million. The Corporation obtained a supplementary 23% of its revenue from commercial advertising on CBC Television and a further 11% came from "other revenues".⁶⁰ These levels are not fixed, and in fact, the level of public funding has fallen significantly during the era of general government restraint and cutbacks since the 1990s. Friends of Canadian Broadcasting, a public-interest advocacy group concerned with "the quality and quantity of Canadian programming in the Canadian audio-visual system," has severely criticised successive governments for financially undermining the CBC's ability to fulfil its mandate.⁶¹ Indeed, given the extensive reductions to CBC staffing and programmes as a result of diminishing resources, there is much merit to the view that securing adequate provision of financial support is the key challenge facing Canadian public broadcasting today.⁶²

⁵⁹ Section 26 (2). An order of this sort has to be laid before each house of Parliament within fifteen days of its having been made.

⁶⁰ Information published on the CBC website, note 49. The provisions concerning funding of the CBC are found in Sections 54 to 71 of the BA.

⁶¹ See the Friends Of Canadian Broadcasting website at <http://www.friendscb.org>.

⁶² The impact of the cutbacks is detailed on the Friends website.

France

Introduction

In France, unlike in most jurisdictions, public service broadcasting is undertaken by a number of different public companies. These are established and regulated by the 1986 Law relating to freedom of communication⁶³ (1986 Law). Different companies are responsible for programming, broadcasting, production of programmes and maintaining archives. The main regulatory body, the Conseil Superior de l'Audiovisuel (CSA) is an independent statutory body, established under a 1989 Law.⁶⁴ Laws governing broadcasting are subject to Article 11 of the Declaration of the Rights of Man of 1789⁶⁵, which guarantees freedom of dissemination of thought and opinion. The Conseil constitutionnel (Constitutional Court) has applied Article 11 to broadcasting regulation on a number of occasions, modifying or striking out inconsistent provisions.⁶⁶

There have been a number of important changes to broadcasting in France recently. Between 1945 and 1982 the State had a complete monopoly over the broadcasting sector.⁶⁷ Until 1964 the government exercised direct control over broadcasting and it was only in 1982 that value of regulatory independence was formally and practically recognised with the establishment of an independent High Authority. Broadcast regulation became a bit of a political football as the Chirac government replaced the High Authority with another body in 1986, substantially amending its mandate, and the Rocard government in turn replaced this authority with the CSA in 1989. Both the 1986 and 1989 laws were challenged before the Constitutional Court, which recognised the constitutional principle of pluralism of sources of information and held that specific provisions of these laws needed to be assessed against this principle. In both cases, a number of changes to the laws were required.⁶⁸

I. Services Provided

Until 1974, public broadcasting in France was undertaken by a single government office. In that year, the institution was divided into seven separate “national programming companies”, each responsible for a different activity. There are now six national programming companies, five established by the 1986 Law and a

⁶³ Law No. 86-1067 of 30 September 1986, as subsequently modified. On the web, in French, via: http://www.legifrance.gouv.fr/html/frame_codes_lois_reglt.htm.

⁶⁴ Law No. 89-25 of 17 January 1989. The changes introduced in 1989 were incorporated into the 1986 Law. References to the 1986 Law will be as amended.

⁶⁵ Affirmed in the Preamble to the Constitution of the Fifth Republic (1958).

⁶⁶ See below.

⁶⁷ Private radio broadcasters did exist prior to the war.

⁶⁸ See Decision 86-217 of 18 September 1986 and Decision 88-248 of 17 January 1989.

further one by a law of 1994,⁶⁹ three of which are television companies and three radio companies as follows:

- France 2, with a mandate to undertake television programming throughout the whole metropolitan territory;
- France 3, with a mandate to undertake television programming with a national or regional character throughout the whole of the metropolitan territory;
- La cinquième, with a particular mandate to undertake programming which promotes culture and learning;
- Radio-France, with a general mandate to undertake radio programming;
- Radio-France-Outre-Mer, with a mandate to develop television and radio programmes to be broadcast in overseas departments and territories; and
- Radio-France-Internationale, with a mandate to undertake international radio programming.

In addition, a publicly funded satellite channel, La Sept-ARTE, has a cultural and European programming remit.⁷⁰

The 1986 Law also establishes a number of other companies with functions relevant to broadcasting. Article 51 establishes Télédiffusion de France (TDF), a joint venture company with the majority of the capital belonging to public persons, is responsible for actual transmission of programmes. Its primary task is to broadcast public sector channels but it can also provide services to commercial companies. Maintenance of, and access to, archives is, pursuant to Article 49, the responsibility of the Institut national de l'audiovisuel (INA), also a public company. Programme production is undertaken by another joint venture, the Société française de production et de création audiovisuelles (SFPCA), whose work is intended primarily for public channels.⁷¹

II. Public Service Mandate

The notion of even commercial broadcasting as a public service rather than simply a commercial exercise is still very strong in France. The main elements of the public service mandate are contained in Article 1 of the 1986 Law, entitled Article premier. This Article provides, among other things, for the CSA to guarantee the independence and impartiality of public service broadcasting organisations and to ensure that all broadcasters promote quality and diversity of programming, national audio-visual production and the French language and culture.

Many of the public service obligations established by the 1986 Law are imposed

⁶⁹ Article 44 of the 1986 Law and Article 2 of Law No. 94-88 of 1 February 1994. The latter established La cinquième.

⁷⁰ Article 45 of the 1986 Law.

⁷¹ Article 52.

on both private and state-funded broadcasters. For example, regulations approved in consultation with the Conseil d'Etat (the highest administrative court) and with advice from the CSA may deal with advertising, broadcasting of programmes of French and European origin during peak hours and contributing to the development of audio-visual programme production.⁷² Article 15 makes the CSA responsible for ensuring that programmes broadcast by either public or private companies do not harm children or adolescents. Article 14 strictly forbids political advertising. Additional obligations are imposed on private broadcasters through special provisions in the 1986 Law, various decrees pursuant to that law and licensing documents. Télévision française 1 (TF1), a public channel, which was privatised in 1986 and remains the leading channel, is subject to particularly stringent public service obligations.⁷³

A number of other public service obligations relate only to national programming companies. These include respect for pluralism, special duties relating to broadcasting during election campaigns, promotion of orchestras and choirs, a general educational, social and cultural mission, the conservation and exploitation of national audio-visual archives, a duty to broadcast parliamentary debates and messages by political parties, unions and professional bodies, and a duty to carry religious programmes on Sunday.⁷⁴ Under Article 20, national programming companies are generally required to contribute to the development of national audio-visual activities.

III. Governing Structure

A. Internal Governance

The five national programming companies established pursuant to Article 44 of the 1986 Law, noted above, all have the same status. They are subject to the relevant body of commercial law as *sociétés anonymes* – except inasmuch as those laws conflict with the 1986 Law, for example concerning structure and capital requirements – but the State is the only shareholder. A *cahier des charges*, or charter, defines the programme obligations of these companies, particularly as this relates to their educational, cultural and social missions. *Cahiers des charges* are fixed by decree, adopted by the Prime Minister or President, upon advice by the CSA, and have the status of secondary legislation or regulations. Both the *cahiers des charges* and the CSA advice must be published in the *Journal officiel de la République française*, the equivalent of an Official Gazette.⁷⁵

⁷² Article 27.

⁷³ See Articles 58 to 69 of the 1986 Law. See also Barendt, *op cit.*, p. 18.

⁷⁴ See Articles 13, 16, 44, 48, 49, 55 and 56 respectively. Only Radio-France is responsible for promoting orchestras and choirs and only France 2 is bound to broadcast religious programmes.

⁷⁵ Articles 46 and 48.

The various *cahiers des charges* are broadly similar in nature, taking into account the different mandates of the various national programming companies, and represent for the most part an elaboration of the obligations set out in the 1986 Law. For example, the *cahiers des charges* approved by decree on 16 September 1994 for France 2 and France 3, require those channels to ensure the provision, to all sectors of the public, of information, cultural and entertainment programmes, according to their respective mandates. These *cahiers des charges* also elaborate a number of general programme obligations, requiring France 2 and 3, for example, to protect children and teenagers, promote honesty, independence and pluralism, particularly for news and political programmes, respect the principle of equality, human dignity and the recommendations of the CSA, and contribute to the promotion of French language and culture. The *cahiers des charges* also specify in some detail a number of obligations provided for in the 1986 Law, for example regarding government messages, electoral campaigns, Parliamentary debates, opinions by trade unions, religious programmes and special programmes of an educational or social nature.

The 1986 Law also provides for the establishment of Boards of Directors for the Article 44 programming companies. Each has 12 members with a 3-year mandate as follows, one person representing each chamber of Parliament, four persons representing the State, four qualified persons nominated by the CSA and two persons representing the workforce. The Presidents are nominated by the CSA – France 2 and France 3 share the same President – and may also be removed by the CSA.⁷⁶ This structure is designed to ensure that the national programming companies are broadly representative of society as a whole and to prevent undue influence by any particular political constituency.

The other public service broadcasting companies, TDF, INA and SFPCA and the two national programming companies not provided for in Article 44, are all subject to general company law although either all or a majority of the share capital is held by the State. Some, like the INA and TDF, are governed by *cahiers des charges*, while others, like the SFPCA, are set up as ordinary private companies. The INA also has a Board of Directors, appointed in the same way as the Article 44 programming companies.⁷⁷

B. Regulatory Mechanisms

Three bodies exercise some regulatory authority over public service broadcasting organisations in France, parliament, the government and the CSA. Parliament has overall authority for the legal framework for broadcasting but otherwise limited direct control. It also exercises considerable financial power (see below) and may determine the manner of broadcast of parliamentary debates.

⁷⁶ Article 47 of the 1986 Law.

⁷⁷ See Articles 45, 49-52 and Article 2 of the 1994 Law.

The main source of government regulatory authority over broadcasters is its power to issue various decrees, such as those establishing the *cahiers des charges*, noted above. A number of the public service obligations noted above are established by government decree, including regulations regarding advertising and the broadcast of French programmes during peak hours. Under Article 54 of the 1986 Law, the government may also require programme companies to broadcast any declaration or communication it deems necessary.

The CSA is the main regulatory body for both public and private broadcasters. As noted above, the structure and authority of this regulatory body has been the subject of some attention in recent years and the present body was established by amendments to the 1986 law introduced in 1989. Its independence is guaranteed by Article premier and an attempt has been made to provide structural guarantees for that independence. It is composed of nine members, appointed by the President of the Republic but nominated in equal proportion by the three Presidents of the Republic, National Assembly and Senate respectively. The term of office is six years and may be neither renewed nor abrogated. The President of the CSA is designated by the President of the Republic.⁷⁸ Pursuant to Articles 5 and 8, members of the CSA are subject to strict conflict of interest and professional secrecy rules which prevent them from engaging in activities deemed incompatible with their mandate (for example, holding elected office) or expressing their opinion on matters which have been or are being considered by the CSA. The CSA is funded entirely out of the State budget.⁷⁹

The CSA has a range of powers regarding public service obligations, the content of the *cahiers des charges* of national programming companies and the appointment of Presidents of the Boards, noted above. Apart from appointing the Presidents of the Boards and nominating members to these bodies, the CSA has no power to interfere with the management of the national programming companies. The CSA has direct power to establish rules in three areas: broadcasting during election periods, the right of reply, and broadcasting of messages by political parties, national unions and professional bodies.⁸⁰ It also has the right to be consulted on a number of issues noted above under public service role such as the rules regarding advertisements. An attempt in 1989 to give the CSA significant powers over advertising and sponsorship was ruled unconstitutional.⁸¹

Article 18 of the 1986 Law requires the CSA to address an annual report to the President of the Republic, the Government and the Parliament. The report must contain information concerning its activities, the way the law has been applied and the extent to which public service broadcasting organisations have respected their

⁷⁸ Article 4.

⁷⁹ Article 7.

⁸⁰ Articles 16, 54 and 55.

⁸¹ Decision 88-248 of 17 January 1989. See Barendt, *op cit.*, p. 66.

obligations. The report may also recommend modifications of a legal or regulatory nature and formulate observations on the way the license fee and advertising revenue is shared between the various public service broadcasting organisations.

The CSA has certain powers to ensure that national programming companies respect the law. Under Article 20 of the 1986 Law, its President may bring a case in the name of the State for breach of obligations, which it has been entrusted with ensuring. In case of a grave breach of the obligations of a public service broadcasting organisation, the CSA may make public observations thereon, addressed to the Board of Directors. It may also, in case of a grave breach of obligations in the *cahier des charges*, direct the relevant President to take such measures, as it deems necessary within a fixed period of time.⁸²

Amendments to the 1986 Law introduced in 1994 considerably enhanced the CSA's enforcement powers over national programming companies.⁸³ It may now order them to conform to their legal obligations and, where such orders or the law have not been complied with, and a warning has been issued, suspend a portion of the programme for up to one month or impose a fine. It may also order them to broadcast a message to the effect that they have breached their obligations. Refusal to do so may lead to a fine. The company can appeal such CSA decisions to the Conseil d'Etat within two months.⁸⁴

IV. Financing

The primary source of funding for public service broadcasting organisations in France is the annual licence fee paid by TV owners, currently about \$150 per year, accounting for approximately 70% of total revenues. The fee is expected to total almost 11 billion francs in 1998, an increase of 7% over the previous year. The vast majority of the remaining revenue comes from a combination of advertising and sponsorship of programmes, and national programming companies may also sell audio-visual works to which they have the rights.

Parliament sets the rate of the license fee each year and also approves the distribution of this fee among the various national programming companies and INA.⁸⁵ This distribution should take into account the proposed budget and resources of the company, the effort made to promote production and the public service obligations being undertaken. The proportion of the total budget provided out of the license fee varies between companies, expected to range in 1998 from a low of 48% for France 2 to a high of 99% for Radio-France-Internationale and La Sept-ARTE (see table). It is perhaps significant that the two most popular

⁸² Article 13.

⁸³ Law No. 94-88 of 1 February 1994.

⁸⁴ Article 3 of the 1994 Law.

⁸⁵ Article 53 of the 1986 Law. The other public broadcasting companies operate on a commercial basis, mainly by charging the national broadcasting companies for services.

public channels derive a large proportion of their revenue from advertising.

Proportion of Budget from Public Sources

	1997	1998
INA	54.7	57.9
France 2	47.9	47.6
France 3	60.7	60.2
La Sept-Arte	98.4	98.8
La Cinquième	95.4	96.1
Radio France	92.4	92.5
RFO	94.2	93.2
RFI	98.6	98.9
Total	69.1	69.0

Advertising revenues are strictly controlled for national programming companies. An overall limit to the amount that may be raised from advertising has been set by Parliament since 1987. A number of provisions in the 1986 Law restrict the content of advertisements or subject it to government control. Article 73 provides that cinematographic works may not be interrupted by advertisements. Article 48 requires the *cahiers des charges* to specify how advertisements may be broadcast and the maximum amount of advertising that is permitted. Examples of the latter are an average of six minutes an hour and an absolute limit of twelve minutes an hour for France 2 and five and ten minutes, respectively, for France 3.⁸⁶ The *cahiers des charges* often require advertisements to be in French. These restrictions are justified as safeguarding public order and security, and promoting truth, decency, respect for the human person and the interests of consumers and minors. A Decree of 27 March 1992 also establishes a number of general principles concerning advertising, forbidding advertisement of certain products, requiring advertisements to be clearly recognisable and restricting interruptions of regular programmes.⁸⁷

National programming companies may have non-news programmes sponsored, but only where such programmes correspond to their educational, social and cultural missions.⁸⁸ The 1992 Decree defines sponsorship as the financing of television programmes by a sponsor in order to promote its brand, its image, its name or its activities. Sponsorship must not contain specific promotional

⁸⁶ Articles 60 and 62 of their respective *cahiers des charges*.

⁸⁷ See Articles 8, 9, 14, 15 and 16 of the 1992 Decree. Advertisements of tobacco, alcohol, books, cinema and the press are forbidden, except in overseas departments and territories. Interruptions are permitted only where this will not harm the integrity and value of the programme.

⁸⁸ Article 48 of the 1986 Law.

references nor encourage viewers to purchase the sponsor's products.⁸⁹ Certain types of companies may not engage in sponsorship and sponsored programmes must be clearly identified.⁹⁰

⁸⁹ Articles 17 and 18.

⁹⁰ Articles 18 and 19. Companies which vend alcoholic drinks, tobacco products or prescription drugs may not sponsor programmes.

Japan

Introduction

Japan's public service broadcasting organisation, the Nippon Hoso Kyokai, or NHK, traces its roots to 1926, when it was created out of three city-based radio broadcasters. Since then, it has grown into possibly the world's best-funded public service broadcasting organisation, with a total expenditure in 1999 exceeding 625 billion yen or nearly US\$6 billion. NHK currently operates as a classical public service broadcasting organisation, as established pursuant to the *Broadcast Law* of 1950, as amended.⁹¹

I. Services Provided

NHK operates 5 national television and 3 national radio services. It also provides a worldwide service, consisting of NHK World TV, NHK World Premium and NHK World Radio Japan. NHK operates two terrestrial television services, General TV and Educational TV. The former, the heart of NHK's television service, presents a balance of news, education, culture and entertainment programming. In 1997, the breakdown was approximately 41% news, 19% education, 29% culture and 11% entertainment. The other terrestrial channel, Educational TV, provides mainly educational (77%) and cultural (20%) programming. The three other television services are subscription satellite services, which, between them have attracted over 9 million viewers. DBS-1 focuses on news, documentaries and sports, while DBS-2 is more oriented towards entertainment, the arts and culture. Hi-Vision is a high-definition sound and picture service, which began broadcasting in 1994.

Radio 1 is a channel of news, current affairs and practical information. It prides itself in providing up-to-date news services and in being flexible enough to respond rapidly and effectively to disasters and other emergencies. Radio 2 is oriented towards educational programming, as well as broadcasting in foreign languages. FM Radio is NHK's music channel, focusing on classical music, as well as regional programming.⁹²

II. Public Service Mandate

NHK is subject to a number of obligations binding on all broadcasters in Japan, as well as specific public service broadcasting obligations. Pursuant to Article 3-2 of

⁹¹ Law No. 132 of May 2, 1950. On the web at:
http://www.mpt.go.jp/policyreports/english/laws/Bc_index.html.

⁹² The above information comes from NHK's website, <http://www.nhk.or.jp>.

the *Broadcast Law*, broadcasters shall not disturb public security, good morals and manners, and shall be politically impartial and accurate as regards news and present controversial matters from a variety of viewpoints. Broadcasters must provide for a variety of programming, including cultural, educational, news and entertainment material. Wherever possible, broadcasters should provide sound messages to help blind persons understand television programmes, and visual images to assist deaf persons. Pursuant to Article 3-3, broadcasters are required to establish, and make public, broadcasting standards applicable to each type of programming. Article 6-2 provides that in the event of a disaster, broadcasters must conduct programming so as to minimise the harmful effect of the disaster.

The general purposes of NHK, set out at Article 7 of the Broadcast Law, are to provide abundant, high-quality domestic programming for the public welfare, which can be received all over Japan, as well as to conduct international broadcasting. Article 44 elaborates the additional public service obligations of NHK, to supplement those binding on all broadcasters, set out at Article 3-2. These additional obligations include satisfying the wishes of the people, enhancing the level of civilisation, providing local, as well as national, programmes and striving towards popularising modern civilisation, as well as preserving excellent features from the past. The international service shall promote international friendship and economic interchange by promoting an understanding of Japan and Japanese culture, and provide entertainment to Japanese nationals abroad.

III. Governing Structure

A. Internal Governance

NHK is, pursuant to Article 8 of the Broadcast Law, a juridical person, with its head office in Tokyo.⁹³ Pursuant to Article 11, the Articles of Corporation shall provide for a Board of Governors and a Board of Directors. Article 24 provides, in addition to these bodies, for a President, a Vice-President and not more than three auditors as officers of NHK. A form of independence for all broadcasters, including the NHK, is established by Article 3, which prohibits anyone from interfering with or regulating broadcast programmes, except as provided for by law.

The role of the Board of Governors is to decide on management, policy and other important matters relating to the NHK.⁹⁴ In particular, pursuant to Article 14, the Governors shall decide on the budget and other financial planning matters, the plan of broadcasting stations, the broadcasting standards provided for in Article 3-

⁹³ Article 10.

⁹⁴ Article 13.

3 and remuneration of officers. The Governors also appoint the President, by a vote of not less than 9 of the 12 Governors, and the auditors, and approve the appointment, by the President, of the Vice-President and Directors.⁹⁵

There are 12 Governors, who appoint their own Chair.⁹⁶ Pursuant to Article 16, Governors are appointed by the Prime Minister, with the consent of both Houses of the Diet, from among people capable of making fair judgements and having wide experience and knowledge of relevant issues, including the fields of education, culture, science and industry. At least one Governor shall be appointed from each of the eight districts listed in the Annex. No one may be appointed a Governor who has been sentenced to imprisonment, has, within the last two years, been dismissed for cause from the public service, is a national public servant or staff member of any political party, or who has a substantial interest in any broadcasting or related enterprise. Pursuant to Article 20, no more than 4 Governors shall belong to any one political party.

The Prime Minister may dismiss Governors who no longer satisfy the conditions of appointment⁹⁷ and may, under Article 20, and with the consent of both Houses of the Diet, dismiss Governors who are deemed unable to perform their duties, have acted contrary to their official obligations or are guilty of malfeasances which render them unfit to be Governors. Outside of these limited conditions, Article 21 protects Governors from being dismissed against their will.

The Board of Directors, which shall include the Directors, President and Vice-President, shall deliberate on matters relating to the execution of important NHK business.⁹⁸ Pursuant to Article 26, the President shall represent NHK and also act as Chair of the Board of Directors. The prohibitions on individuals being Governors, set out in Article 16, apply *mutatis mutandis* to the President, Vice-President, Directors and auditors.⁹⁹ The Board of Governors have the power under Article 29 to dismiss a President or auditor who is deemed unable to perform, or to have acted contrary to, his or her duties, or who is guilty of a malfeasance which renders him or her unfit to be the President or an auditor. For the same reasons, and with the consent of the Governors, the President may dismiss the Vice-President or a Director.

B. Regulatory Mechanisms

Pursuant to Article 3-4, all broadcasters are required to establish a Consultative Organization on Broadcast Programs to oversee quality and service. This advisory body must be consulted in relation to the development or amendment of the

⁹⁵ Article 27.

⁹⁶ Article 15.

⁹⁷ Article 19.

⁹⁸ Article 25.

⁹⁹ Article 27(5).

broadcast standards provided for in Article 3-3, and the broadcaster is legally required to take this body's comments into account. To facilitate the Consultative Organization's work, broadcasters are required to provide it with a variety of information, including information as to how its comments have been taken into account by the broadcaster.

These requirements are spelt out in greater detail in Article 44-2 specifically in relation to NHK, which is required to establish a central advisory body and regional bodies with responsibility for monitoring both domestic and international programming. Members of these bodies shall be nominated by the President, with the consent of the Board of Governors, from among persons of learning and experience in the relevant geographic area. In addition, NHK is required to conduct regular scientific listening polls, which it shall make public.¹⁰⁰ Finally, pursuant to Article 9(6), NHK is required to take into account any views received from persons of learning or having any relation to broadcasting, as long as the view contributes to the development of broadcasting.

Article 4 of the *Broadcast Law* provides for a right of reply for anyone affected by the broadcasting of untrue matter, as well as for an obligation of correction whenever the broadcaster discovers incorrect material in its broadcasts. To give effect to this right, which may be claimed at any time within three months of the original broadcast, Article 5 provides for the archiving of broadcast material for three months.

Pursuant to Article 33, the Minister of Posts and Telecommunications may order NHK to conduct international broadcasting. The Minister also has the power to order NHK to undertake research designed to develop and improve broadcasting, pursuant to Article 34. Both of these powers are subject to a requirement that their cost be borne by the State.¹⁰¹

The NHK requires the prior approval of the Minister of Finance to issue bonds, and may not, without the prior approval of the Minister of Posts and Telecommunications, transfer or lease any part of its broadcast equipment.¹⁰² Similarly, pursuant to Article 43, the NHK cannot abolish any of its broadcasting stations, or suspend them for more than 12 hours, without the consent of the Minister of Posts and Telecommunications. The same Minister, pursuant to Article 2-2, is responsible for developing a basic broadcasting plan setting out a number of matters in relation to broadcasting stations. The NHK may provide candidates for elective office with an opportunity to broadcast their views or make campaign speeches, provided they grant similar access to all other candidates.¹⁰³

The NHK shall prepare an annual budget of revenues and expenditures, as well as

¹⁰⁰ Article 44(2).

¹⁰¹ Article 35.

¹⁰² Articles 42 and 47.

¹⁰³ Article 45.

an annual report, and present them to the Minister of Posts and Telecommunications. The latter shall report to the Diet through the Cabinet on these reports, providing his views, along with the auditors' views.¹⁰⁴

IV. Financing

The NHK is, pursuant to Article 9(4), prohibited from making a profit. It is also, pursuant to Article 46, prohibited from broadcasting commercial advertisements. Instead, under Article 32, anyone with equipment capable of receiving NHK broadcasts must pay NHK a fee and this forms the vast bulk of the organisation's revenues. According to its 1999 Annual Report, NHK received almost 98% of its total operating income of 635 billion yen in 1999 from receiving fees. In 1998 over 36 million households paid the basic receiving fee with another 9 million paying subscriptions for NHK's satellite services.¹⁰⁵

¹⁰⁴ Articles 37 and 38.

¹⁰⁵ NHK website, <http://www.nhk.or.jp>.

South Africa

Introduction

Like many public institutions in South Africa, the South African Broadcasting Corporation (SABC) has undergone a number of changes in recent years to bring it into line with the new democratic dispensation and to ensure that it serves the needs of all the citizens of South Africa. A completely new *Broadcasting Act*,¹⁰⁶ the key legislation governing the SABC, was adopted in 1999 (the 1999 Act), replacing the former 1976 Act, and the changes introduced by the new law have yet to be fully implemented. Formally, under the 1999 Act, the SABC has been transformed into a limited liability company with a share capital and subject to the Companies Act, although Section 7 recognises that the normal rules for companies will need to be modified to take into account the special nature of the SABC as a corporation. In particular, to begin with at least, the State will own one hundred percent of the shares of the SABC, a deviation explicitly authorised by Section 19(1) of the Act from the normal rule requiring at least seven shareholders. Section 9 provides for the effective division of the SABC into public service and commercial operations, to be separately administered under a single corporate structure. The latter is to be treated like any other commercial broadcasting operation while the former is subject to special statutory obligations.

The Independent Broadcasting Authority (IBA), established by a law passed in 1993 (the IBA Act).¹⁰⁷ The IBA has broad regulatory powers over broadcasters, particularly in relation to licensing, and the 1993 law completely restructured the regulation of private broadcasting. The IBA also has some powers in relation to the SABC. As a result of these significant changes, the SABC is very much in a state of transition. The full effect of many of the changes remains to be seen. At the same time, financial pressures have meant that the SABC, unlike the other public service broadcasting organisations surveyed herein, receives most of its funding from advertising, rather than the public purse. The longer-term goal is to divide the service into public and commercial operations, with the latter subsidising the former. Whether this will be a success, and to what extent, remains to be seen.

I. Services Provided

As noted above, the 1999 Act provides for the effective division of the SABC into commercial and public service operations. At the moment, it remains unclear

¹⁰⁶ No. 4 of 1999, assented to 23 April 1999. On the web at: <http://www.parliament.gov.za/acts/1999/act4-99.html>.

¹⁰⁷ *The Independent Broadcasting Authority Act*, No. 153 of 1993, assented to 18 October 1993. On the web at: <http://iba.org.za/actaaa.htm>.

which of the services presently offered by the SABC will form the public service wing and which will be regarded as commercial. Indeed, Section 1 of the 1999 Act contributes to this confusion, defining ‘public service broadcasting’ as any service, including a commercial service, operated by the SABC, while Section 9(1) provides for a distinction between the ‘public service’ and ‘commercial service’ operated by the SABC. In terms of licensing, the IBA is required to distinguish between ‘public’, ‘commercial’ and ‘community’ broadcasting services.¹⁰⁸

The SABC currently offers three television channels, SABC 1, SABC 2 and SABC 3, providing over 80% geographical coverage of South Africa, although a far smaller proportion of the population actually have access to television, due to low rates of television set ownership and lack of electrification in some rural areas. In 1998, the total daily SABC television audience was estimated at approximately 14 million viewers, out of a total population of over 40 million,¹⁰⁹ with SABC 1 having the largest share, SABC 2 the next largest and SABC 3 the smallest. It would appear that the plan is to retain SABC 2 as a public service broadcasting operation while SABC 1 and 3 will be run on a commercial basis.

SABC also provides 19 radio stations through its national network. These include eleven stations – one in each of the eleven official languages (9 African languages, as well as English and Afrikaans) – an international service, a couple of regional stations and a number of English language stations broadcasting primarily music. Together, the SABC radio stations attract about 14 million listeners daily, the bulk of which tune in to the 9 African language stations.¹¹⁰

II. Public Service Mandate

Section 8 of the 1999 Act sets out the objectives of the SABC as a whole, which by-and-large govern both its public service and its commercial operations. Sections 10 and 11 set out more detailed obligations relating, respectively, to the public service and commercial operations. Pursuant to Section 8, and in line with obligations on many public service broadcasting organisations, the SABC is required to make its services available throughout the territory of South Africa, on a free to air reception basis, and to provide programming that informs, educates and entertains. Pursuant to Article 8, the SABC is also obliged to maintain libraries and archives of materials relevant to its objectives, to collect news and information, to establish and subscribe to news agencies, to carry out research on new technologies, and to nurture South African talent and train people in production skills.

¹⁰⁸ Section 5(1) of the 1999 Act.

¹⁰⁹ Presentation by Enoch Sithole, Senior General Manager: Audience Services, SABC.

¹¹⁰ The above information comes from the SABC website, <http://www.sabc.co.za>.

Pursuant to Section 10, the public service must make services available in all official languages, reflect both the unity and cultural and multilingual diversity of South Africa, and enrich the country's cultural heritage, both traditional and contemporary. The public service must strive to be of high quality in all languages, providing significant amounts of news and public affairs programming that meets the highest standards of journalism, and is fair, impartial, balanced and independent from government, commercial and other interests. In addition, the public service must provide significant amounts of educational programming, national and minority sports programming, as well as services targeting children, women, the youth and the disabled. Finally, the public service must broadcast both its own programmes as well as those commissioned from the independent sector.

III. Governing Structure

A. Internal Governance

As noted above, under the 1999 Act, the SABC is a limited liability corporation with a share capital, subject to the Companies Act, with appropriate modifications. It is governed by a Board and an Executive Committee, formed from a subset of the Board, both of which are subject to the objectives and other binding rules set out in the legislation. Section 6(2) formally guarantees the freedom of expression, and journalistic, creative and programming independence, of the SABC and the Board is explicitly tasked with protecting this freedom and independence.¹¹¹

Section 12 provides that the Board shall consist of 12 non-executive members, along with the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer. The 12 non-executive members are appointed by the President on the advice of the National Assembly in a manner, which ensures transparency, openness, and public participation in the nominations process, after publication of a shortlist of candidates.¹¹² Pursuant to Section 14, the Executive Committee is appointed by the Board and consists of the Chief Executive Officer, along with six other Board members. It is accountable to the Board and performs such functions as may be determined by the Board.

Viewed collectively, Section 13 requires members of the Board to have suitable qualifications, expertise and experience in various broadcasting areas, to be committed to fairness, freedom of expression, the objects of the SABC and accountability, and to represent a broad cross-section of the population. Individually, Board members must, pursuant to Section 16, be citizens and

¹¹¹ Section 13(11).

¹¹² Section 13.

permanent residents of South Africa, not be determined by a court to be mentally ill, and not have been convicted of a serious crime, a crime of dishonesty or an offence under the Act. The appointing body has the power under Section 15 to remove a Board member on account of misconduct or inability to perform his or her duties, after due inquiry and upon recommendation of the Board. The Act also sets out strict conflict of interest rules at Section 17 and, if a conflict of interest issue arises at any point, the Board member involved must leave the proceedings and let the remaining members determine the appropriate course of action.

The Act simply states that the Board controls the affairs of the SABC¹¹³ and that the Executive Committee is accountable to the Board.¹¹⁴ It would appear from this that the Board, and the subset thereof which comprises the Executive Committee, effectively exercise direct control over the affairs of the SABC. It is unclear how this relates to the general guarantee of freedom of expression and of journalistic, creative and programming independence, which it is the duty of the Board to protect. Presumably, the latter would prevent the Board from interfering in day-to-day activities of the SABC and, in particular, in programming and news choices, but allow it to set policy and overall direction and goals for the SABC.

B. Regulatory Mechanisms

The SABC is clearly subject to regulation by Parliament, which may amend or even repeal its enabling legislation. Other persons or bodies with some power over the SABC include the Minister responsible for the Act (the Minister of Communications) and the IBA. Other relevant bodies include the Frequency Spectrum Directorate and the South African Broadcast Production Advisory Body, both established by the 1999 Act.

The Minister has overall responsibility for broadcast policy development under Section 3(2) of the 1999 Act, as well as a number of specific responsibilities in relation to SABC. The Minister has the power to approve the extent of the subsidy provided by the commercial to the public service operation, as recommended by the Board,¹¹⁵ as well as to approve any financial regulations drawn up by SABC, after consultation with the Minister of Finance, and to approve surplus fund investment.¹¹⁶ Significantly, the Minister, with the concurrence of the Minister of Finance, must determine the total value and number of shares in SABC¹¹⁷ and must, along with the Minister of Finance, approve any borrowing by the SABC.¹¹⁸ The Minister may also direct the SABC as to how to draw up its annual statements and Annual Report.¹¹⁹

¹¹³ Section 13(11).

¹¹⁴ Section 14(3).

¹¹⁵ Section 11(d).

¹¹⁶ Section 18.

¹¹⁷ Section 19(2).

¹¹⁸ Section 23.

¹¹⁹ Sections 20(2) and 28(1)(g).

The IBA has significant powers in relation to the SABC. Section 6(2) gives it overall responsibility for ensuring compliance with the Charter, which comprises most of the significant provisions in the 1999 Act relating to the Corporation. Pursuant to Section 3(5)(f) of the 1999 Act, all broadcasters, including the SABC, must comply with the Code of Conduct, set out in Schedule 1 of the IBA Act, which is enforced by the IBA. The Code deals with matters such as obscenity, violence, accuracy and impartiality in relation to news and so on. According to Section 21, the SABC is required to obtain a license from the IBA, although the IBA is required, upon payment of the license fee, to issue such license.

Section 37 of the 1999 Act provides for the establishment of a Frequency Spectrum Directorate (FSD) within the Department of Communications. The FSD is responsible for policy development in relation to the radio frequency spectrum and for ensuring that the spectrum is used in an efficient manner to meet the needs of all users. Inasmuch as the SABC is a significant user of frequencies, the work of the FSD affects it. At the same time, the FSD must co-operate with relevant bodies, presumably including the SABC, in the performance of its functions. Pursuant to Section 38 of the 1999 Act, the Minister must establish the South African Broadcast Production Advisory Body to advise him or her on how to develop local television and radio production. This clearly overlaps with the role of the SABC in developing local talent and in providing programming in all official languages.

The SABC must provide the Minister with an annual financial statement and with an annual report. The latter must include a report on the work of the Corporation during the previous year, along with certain financial information, such as a description of the value of all property owned by the Corporation. The Minister must table these reports in Parliament, within seven days in the case of the annual report.¹²⁰

IV. Financing

Pursuant to Section 8 of the 1999 Act, the SABC may fund its activities through advertisements, subscription, sponsorship, licence fees or any other means. The Act does not clarify whether a less extensive list of types of funding is applicable to the public service operations but does provide that the SABC shall include free to air programming within its total services.¹²¹ In addition, Section 11(d) of the Act provides that the commercial services shall subsidise the public services. As the separation between the various services is not yet formalised, it remains unclear precisely how this will work.

¹²⁰ Articles 20 and 28.

¹²¹ Section 8(g).

Section 27 of the 1999 Act also provides for a licence fee to be levied on all private owners of television sets, as well as certain categories of businesses. In practice, this contributed a scant 13.5% to the operating costs of the SABC in 1999, due to a combination of high rates of piracy and low fees. A further 206 million rand, or about 10% of total revenue, came from general government funding sources while the remaining 76.5% of revenue came from advertising and other commercial activities.¹²² SABC would thus appear to benefit from only a very meagre level of public contribution.

¹²² Group Chief Executives' Statement, on website, <http://www.sabc.co.za>.

United Kingdom

Introduction

The British Broadcasting Corporation (BBC) was founded in 1926 under a Royal Charter (Charter) and continues to enjoy the same status to this day. From its inception in 1926 until 1954, the BBC had a monopoly on broadcasting. Even after 1954, the monopoly continued with respect to radio broadcasting, seen as the BBC's traditional market, but an independent television station was licensed. Prior to 1981, this independent television broadcaster was under the same duty to provide broadcasting as a "public service for disseminating education, information and entertainment" as the BBC.¹²³ In 1973, local commercial radio was finally authorised.

Royal Charters are granted for a number of years, the most recent for a 10-year period dating from May 1996.¹²⁴ Royal Charters are grants from the Sovereign to undertake certain activities, often on an exclusive basis but in practice prerogative powers, including the grant of Royal Charters, are exercised by the executive. The BBC's Charter is drafted by the Secretary of State for National Heritage. Procedurally, a Charter is similar to secondary legislation or regulations and is hence not subject to mandatory Parliamentary scrutiny. Significantly, decisions made by bodies established under a Charter cannot be subjected to judicial review. The fact that the Charter is periodically renewable and has the status of secondary legislation means that at least formally, the BBC is less secure than public service broadcasting organisations who operate under a statutory mandate.

A Licence Agreement (Agreement) between the Secretary of State for National Heritage and the Board of Governors of the BBC specifies in further detail the governance and public service obligations of the BBC. The Agreement is technically a contract between the Minister and the Governors, the most recent having been signed in 1996.¹²⁵ As such, if either party wished to seek a legal remedy for any breach, it would probably be pursuant to contract law. The present Agreement provides at Clause 18 that it is not binding unless it has been approved by a resolution of the House of Commons.

As noted, the most recent Charter and Agreement date from 1996. Although formally no particular process is required for either of these documents to be formalised, the government in fact undertook a reasonably broad-ranging consultative process, involving a report by the House of Commons National Heritage Select Committee and a White Paper prior to the adoption of the 1996

¹²³ Television Act 1963, s. 2(1)(a).

¹²⁴ On the web at: http://www.bbc.co.uk/info/BBCcharter/index_cf.htm.

¹²⁵ On the web at: http://www.bbc.co.uk/info/BBCcharter/index_af.htm.

Charter and Agreement.¹²⁶ The government introduced a number of changes in response to concerns about the accountability of the BBC, for example by incorporating programming standards requirements directly into the Agreement¹²⁷ and by requiring greater detail in the BBC's Annual Report. Similarly, the new instruments instituted a number of changes to governance, clarifying the roles of the Governors, National Councils and the Foreign and Commonwealth Office

I. Services Provided

The Agreement authorises the BBC to provide a range of broadcasting services, including two terrestrial television channels and five sound programme services for general reception throughout the United Kingdom, one additional sound programme service for each of Scotland and Northern Ireland and two for Wales and a number of local sound programme services.¹²⁸ These services are referred to as the Home Services. The BBC is also responsible for the World Service, which broadcasts and delivers services to audiences overseas in a number of different languages. All of these services are provided by the BBC as a single corporate entity.

II. Public Service Mandate

The public service mandate of the BBC is guaranteed by a number of provisions in both the Charter and Agreement. Article 3(a) of the Charter establishes the general public service obligation, namely to provide sound and television broadcasting programmes of information, education and entertainment as public services. The BBC is also under an obligation to ensure that it remains under constant and effective review from outside, including by public meetings and seminars.¹²⁹ Any material changes to programming services must be preceded by an "appropriate process of public consultation."¹³⁰

Far more detailed public service and content obligations are spelt out in the Agreement. Clause 3 provides that the Home Services shall respect high general standards, particularly regarding their content, quality and editorial integrity, and cover a wide range of subjects. Clause 5 elaborates on these standards, providing that the BBC should do all it can to ensure that the Home Services are balanced and serve the tastes and needs of different audiences, do not improperly exploit susceptibilities, do not contain abusive treatment of religious views, do not offend

¹²⁶ See note 3.

¹²⁷ They had been contained in an Annex to the Agreement which the BBC had voluntarily accepted.

¹²⁸ Clause 2. The specific services were included for the first time in the new Agreement. As of 1994, the BBC operated 38 local radio stations in England. See White Paper, note 3, p. 17.

¹²⁹ Charter, Article 6.

¹³⁰ Agreement, Clause 4.3.

against good taste or decency, or offend public feeling, and are not likely to incite to crime or lead to disorder. In addition, controversial subjects should be treated with due accuracy and impartiality and should not, outside of limited exceptions, contain material expressing the opinion of the Corporation on current affairs or matters of public policy. The BBC is required to draw up a code giving guidance as to how these requirements may be observed in its services and programming, in particular as regards impartiality.

The BBC is also subject to the jurisdiction of the Broadcasting Standards Commission (BSC).¹³¹ The BSC has a duty to draw up codes dealing with a range of issues including unjust or unfair treatment, infringement of privacy, standards of taste and decency, and portrayal of violence and sexual conduct.¹³² The BSC has the power to monitor programmes and to publish reports on its findings. It also has a mandate to consider and adjudicate on complaints relating to a breach of the above.¹³³ In case of breach, the BSC may order the BBC to publish the decision in such manner as it may direct.¹³⁴ In 1996, the BSC's precursors (the Broadcasting Complaints Commission and the Broadcasting Standards Council) notified the BBC of a total of 685 complaints against it. During the same period, 78 complaints were upheld in part or in whole.¹³⁵

A number of specific duties are set out for the Homes Services. These include stimulating the arts and a diversity of cultural activity, providing comprehensive, authoritative and impartial coverage of news and current affairs and wide-ranging coverage of sporting and other leisure interests, broadcasting programmes of an educational nature, including a high standard of original programmes for children, reflecting the lives and concerns of audiences, and providing a reasonable proportion of local programmes for national audiences in Northern Ireland, Scotland and Wales and in the English regions outside London and the South East. In addition, the BBC must transmit daily an impartial account of the proceedings in both Houses of Parliament.¹³⁶

The Agreement provides that the World Service shall share the general commitment of the BBC to “maintaining high standards of editorial integrity and programme content and quality.” Clause 9.4 provides that the BBC, in agreement with the Foreign and Commonwealth Office, shall publish long-term objectives, which include the provision of accurate, unbiased and independent news reporting and provide a “balanced British view of those developments, and an accurate and effective representation of British life, institutions and achievements.”

The BBC is also required to establish and maintain an archive containing a

¹³¹ Established by Section 106 of the Broadcasting Act 1996, c. 55. On the web at: <http://www.hmsso.gov.uk/acts/acts1996/1996055.htm>.

¹³² *Ibid.*, Sections 107(1) and 108(1).

¹³³ *Ibid.*, Sections 109 and 110.

¹³⁴ *Ibid.*, Section 119.

¹³⁵ See BBC, Annual Report and Accounts, 1996/97, p. 65.

¹³⁶ Agreement, Clause 3.

representative selection of the programmes broadcast and to make reasonable arrangements for access thereto by the public, either with or without charge.¹³⁷ Finally, Clause 12 of the Agreement requires the Corporation to make appropriate arrangements to maintain a research and development programme in pursuance of its general objectives.

III. Governing Structure

The BBC is a body corporate, governed by a Board of Governors, as provided for in the Charter. The independence of the BBC is noted in the preamble to the Charter and explicitly guaranteed in Clause 2.1 of the Agreement in the following terms:

The Corporation shall be independent in all matters concerning the content of its programmes and the times at which they are broadcast or transmitted and in the management of its affairs.¹³⁸

Three National and a number of English Regional Councils assist and advise the Corporation, particularly in their respective geographic areas. In addition, the Secretary of State – and in relation to the World Service, the Foreign and Commonwealth Office – is given substantial powers over the operation of the BBC. A series of obligations to publish information, most importantly in an Annual Report to be tabled before Parliament, also constitute part of the governance structure of the BBC.

The governing structure, both internal and regulatory, is not conducive to ensuring respect for independence in practice, notwithstanding the formal guarantee. Too much power is concentrated in the hands of the government, both directly and indirectly through its powers of appointment of the Governors. Crude interference in the running of the BBC is rare – though not unknown – but more subtle pressure undoubtedly exists and has been the subject of some debate. Despite this, it would appear that there was little support during the White Paper process in 1994 for reducing government control by establishing an independent broadcasting council to take over functions currently exercised by government or by making the BBC subject to the jurisdiction of the existing independent broadcasting regulators.¹³⁹

A. Internal Governance

The Charter provides for the establishment of a Board of Governors. Article 7 sets out their functions, which include approving clear objectives and monitoring

¹³⁷ Agreement, Clause 11.

¹³⁸ This formal guarantee of independence was added to the most recent Agreement.

¹³⁹ See White Paper, note 3, p. 38.

compliance with those objectives, ensuring that the Corporation meets the highest standards of probity, propriety and value for money, and setting the overall strategy for the various services (Home, World and Commercial). For the Home Services, this strategy should “ensure that the Corporation’s services, programmes and other activities reflect the needs and interests of the public.” The Governors are also responsible for ensuring appropriate consultation with the various Councils and due regard for the views of listeners, for monitoring fulfilment of legal and contractual obligations, and for appointing a Director General and other senior members of management.¹⁴⁰ Neither the Charter nor the Agreement sets out the appropriate relationship between the Governors and BBC officers and staff in any detail, although their respective roles have become clearer in recent years.¹⁴¹ These instruments do not guarantee the Director General any security of tenure and indeed a former Director General, Alasdair Milne, was summarily dismissed in 1987. Although it is clear that Governors have a legal right to assume control over programme matters, in practice they do so only in exceptional circumstances.¹⁴²

The Governors are appointed under the Royal Prerogative – in practice the Prime Minister – for up to five years and are eligible for re-appointment.¹⁴³ No formal conditions are attached to this power except in respect of National Governors, as detailed below. Power to appoint the Chair and Vice-Chair of the Board is again part of the Royal Prerogative. Individuals cease to be Governors if they resign, are terminated under the Royal Prerogative,¹⁴⁴ have interests which conflict with their governing duties, become bankrupt, suffer from a mental disorder or absent themselves from meetings for longer than three months without the consent of the Corporation.

One Governor shall be designated as the National Governor for each of Northern Ireland, Scotland and Wales, selected for “his knowledge of the culture, characteristics and affairs of Our People [in the relevant location] and his close touch with the opinion in that country.”¹⁴⁵ Meetings of the Board must be held in each of these localities as well as in England. The Secretary of State prescribes the quorum and decisions are taken by a simple majority vote.

Pursuant to Articles 14 and 15 of the Charter, the power to appoint officers, as well as the power to fix rates of remuneration and conditions of employment, is vested in the Corporation, subject to a general duty to seek the views of employees on matters affecting them.

Most of BBC’s radio broadcasting and approximately 75% of its television output

¹⁴⁰ The present Charter is the first time these responsibilities have been made explicit.

¹⁴¹ See White Paper, note 3, p. 39.

¹⁴² See Barendt, *op cit.*, p. 68.

¹⁴³ Charter, Articles 8(1) and 8(2).

¹⁴⁴ No conditions are attached to this power.

¹⁴⁵ Charter, Article 8(3).

is original programming made for audiences in the UK.¹⁴⁶ The Broadcasting Act 1990 requires the BBC to procure at least 25% of its television broadcasts from independent producers¹⁴⁷ and in 1997 it exceeded that target by nearly 4%.¹⁴⁸

B. Regulatory Mechanisms

The Charter establishes a number of mechanisms to help ensure that the BBC is responsive to public needs and accountable to the public. In general these fall into three categories: the role of the oversight Councils, powers granted to the Secretary of State or other government ministers, and obligations on the BBC itself, particularly to provide information to viewers and Parliament.

Article 12 of the Charter mandates the establishment of three National Broadcasting Councils, one each for Northern Ireland, Scotland and Wales, while Article 13 provides for Regional Advisory Councils in each area of regional television output in England. The Corporation bears the costs of the various Councils. The role of these Councils is to advise the BBC on local matters but they have no formal powers over the Corporation.

The Chair of each of the National Councils is the respective National Governor from the Board of Governors and these National Governors appoint the remaining Council members, after consultation with various representative bodies. These Councils regulate their own procedure and other internal matters, such as hiring. The Secretary of State may, in an emergency and where it is in the public interest, suspend one or more of the National Councils by notice in writing. The National Councils exercise the following functions, with full regard to the distinctive culture of their respective areas: monitoring public opinion and ensuring that the views of audiences are given due consideration, advising the BBC with a view to reflecting the interests of national audiences, assisting the BBC in formulating objectives for programmes specifically aimed at national audiences, and advising the BBC on potential programme makers from these regions. Each National Council must make an annual report to the BBC and, if requested by the Corporation, special reports.

The Chairs of the Regional Councils are nominated by the BBC and members are appointed by the Corporation with a view to ensuring broad representation of the public. The Regional Councils have a general mandate to advise the BBC on objectives for programmes primarily for reception in their region, monitor the extent to which such objectives have been met and advise on other matters affecting the interests of persons in their regions.

¹⁴⁶ See White Paper, note 3, p. 14.

¹⁴⁷ Chapter 42, Section 186.

¹⁴⁸ See Annual Report, note 135, p. 40.

Both the Charter and the Agreement grant substantial powers to various government ministers, frequently the Secretary of State, to regulate or require certain action of the BBC. Pursuant to Article 5 of the Charter, the Corporation must provide such broadcasting as may be required under any licence granted by the Secretary of State for Trade and Industry or an agreement with the Secretary of State or Secretary of State for Foreign and Commonwealth Affairs.

The Secretary of State also has the power, under Article 20(2), to require the BBC to satisfy him or her that provisions in the Charter have been observed and, should it fail to do so, to revoke the Charter. The Agreement may, pursuant to Clause 15, be revoked by the Secretary of State where, in his or her opinion, the BBC has not observed its obligation to transmit programmes efficiently, for any breach of its provisions which has not been remedied within a reasonable period of time, or should the BBC enter into an agreement for voluntary winding up.

The Secretary of State has, in addition, the power to give directions on the maximum or minimum number of hours of broadcasting,¹⁴⁹ to require the BBC to establish such additional stations as may be specified,¹⁵⁰ and to refrain from broadcasting any matter or matter of any class.¹⁵¹ The precursor to this last provision was used in 1988 to prevent broadcasters, including the BBC, from broadcasting any words or pictures of representatives of proscribed organisations, including Sinn Fein. The issue was the subject of an unsuccessful appeal to the European Commission on Human Rights.¹⁵² An even more draconian power is that of the Secretary of State, pursuant to Clause 8.3 of the Agreement, to direct that the stations of the BBC be taken possession of in the name of Her Majesty, where in his or her opinion an emergency exists which renders this in the public interest.

Any minister may require the BBC to broadcast any announcement or, where the minister considers that an emergency has arisen, any other matter. In both cases the cost shall be borne by the BBC.¹⁵³ Clause 9 of the Agreement grants the Foreign and Commonwealth Office (FCO) significant powers in respect of the World Service. The BBC is required to conform to “objectives, priorities and targets” as may be agreed from time to time with the FCO.¹⁵⁴ The BBC shall provide additional services, such as monitoring transmissions or recording material, as may be agreed with the FCO. The BBC is also required to agree general long-term objectives with this Office and to publish these objectives.¹⁵⁵ Finally, the BBC is required to consult and co-operate with this Office regarding

¹⁴⁹ Clause 6.

¹⁵⁰ Clause 7.

¹⁵¹ Clause 8.2.

¹⁵² See ARTICLE 19, *The British Broadcasting Ban: An Update*, Censorship News No. 6, October 1991. See also Nelson, V., *The Law of Entertainment and Broadcasting*, (1995, London, Sweet & Maxwell), pp. 483-4.

¹⁵³ Clause 8.1.

¹⁵⁴ Previously, the FCO prescribed actual languages and hours of World Service broadcasts.

¹⁵⁵ See above under Public Service Mandate.

international developments and the relevant policies of the government with a view to planning and preparing its programmes “in the national interest.”

The main reporting obligation on the BBC is the publication of an Annual Report to include the audited accounts along with information relating to finance, administration, objectives, editorial standards and measures taken to ensure compliance with these standards, research and consultation undertaken, complaints from viewers, and an analysis of programming. The reporting obligations in the present Charter and Agreement are more detailed than in former versions. The Annual Report, along with those prepared by the National Councils, is submitted to the Secretary of State who in turn presents them to Parliament.¹⁵⁶ The BBC is also required to make available to all licence holders an annual Statement of Promises to Audiences, describing its services, standards and objectives.

IV. Financing

Funding for the Home Services Group, which includes the Home Services and its worldwide commercial activities, and the World Service are accounted separately. In both cases, the most significant source of funding derives from public sources. Under Article 16 of the Charter, the Home Services has the exclusive right to collect the Licence Revenue which in 1999 provided £2.2 billion, or some 82% of the total budget of the Home Services Group. A further 17% came from commercial activities – which have expanded significantly in recent years – with the remaining 1% coming from various other sources.¹⁵⁷ According to Clause 10.1(b) of the Agreement, Licence Revenue funds may not, without prior approval of the Secretary of State, be blended with revenue from any other source for the purposes of any services, thereby effectively precluding the BBC from advertising during its broadcasts. Fully 89% of the funding for the World Service comes directly from grants-in-aid provided by Parliament.¹⁵⁸

Over 62% of the Licence Revenue is spent on television, 35% for BBC1, 19% for BBC2 and 8% for regional television. Another 21% goes on the various radio stations and the remaining 17% is spent on fee collection and other costs.

The issue of funding for the BBC has been a matter of considerable debate recently and the latest White Paper concluded that this issue should be kept under review.¹⁵⁹ One consequence of this is the inclusion, in the Agreement, of Clause 10.2, providing that the Secretary of State may review the means of financing the Home Services at any point after 1 April 2002. Clause 18, however, provides that any change in the method of funding would need to be approved by Parliament. In

¹⁵⁶ Charter, Article 18. See also Agreement, Clause 4.

¹⁵⁷ See Annual Report, note 135, p. 78.

¹⁵⁸ See Annual Report, *ibid.*, p. 90 and Agreement, Clause 10(7).

¹⁵⁹ Note 3, p. 29.

particular, the idea of further exploiting commercial activities is being stressed. This is reflected, for example, in an amendment to the Broadcasting Act 1990, introduced in the Broadcasting Act 1996, which allows the BBC to undertake independent, commercial broadcasting activities, either alone or in conjunction with private broadcasters, where licensed by the Independent Television Commission (the private broadcast regulator).¹⁶⁰ This is reinforced by Article 3(u) of the Charter, which allows the BBC to enter into joint ventures with other companies, subject to prior approval by the Secretary of State, to achieve any of the objects of the Corporation.

¹⁶⁰ Note 131, Section 73 and Schedule 2, Paragraph 7.

Comparative Tables

The two tables that follow provide a snapshot comparative view of the six public service broadcasting organisations reviewed in this study. The first table compares their guarantees of independence, the structure of the board, accountability and complaints mechanisms, and public service obligations, while the second table compares their sources of funding.

Comparative Matrix

Matrix Comparing Public Service Broadcasters

	Australia (ABC)	Canada	France (br
1. Independence			
1.1 Formal guarantees	None in Act, may be protected by implied constitutional guarantee of freedom of political communication	Enjoys freedom of expression and journalistic, creative and programming independence as well as formal protection under the constitutional guarantee of freedom of expression	The independe broadcasters subject to a n such as the n national secu
2. The Board			
2.1 Number/term	6-8 Directors and the Managing Director; 5 years renewable	Up to 12 members; 5 years renewable	12 members
2.2 Powers/role	Ensure that ABC performs efficiently, maintain its integrity and independence, ensure news is accurate and impartial, ensure compliance with broadcasting regulations	Oversight of performance but not day-to-day matters	Different broa different rela governing bo their individu
	Governor General (i.e. Cabinet)	Governor in Council (i.e. Cabinet)	One from ea

2.3 Appointments			Parliament, 4 State, 4 nom broadcast re representing Presidents a broadcast re
2.4 Conditions on members	Must have experience relating to broadcasting or other related matters	Must be prominent citizens from the fields of law, medicine, accounting, business and the arts	No formal cri appointments
2.5 Membership Criteria	Members must declare any conflicts on interest with respect to specific matters and remove themselves from the debate	Must represent all regions of the country, obligation of good faith and due diligence to the CBC, conflict of interest restrictions	Structure des membership society as a
2.6 Removal	Misbehaviour, physical or mental incapacity, bankruptcy, failure to comply with obligations, absence from three consecutive meetings without leave	Only for cause	No formal co law, presuma body could re
2.7 Remuneration	As determined by the Remuneration Tribunal	Rate fixed by the by-laws of the CBC	Not set out in legislation
3. Accountability Mechanisms			
3.1 Advisory bodies	Board shall establish one to advise on matters concerning broadcasting and may establish others in relation to regions or States, recommendations are not binding	Not required	Not required

3.2 Annual report	Must include particulars of any Ministerial directions to broadcast, gifts, advice from Advisory Council, summary of complaints and responses	Must submit a corporate plan to the Minister outlining objectives and expected performance, and an annual report to Parliament with financial statements and complete auditor's report, statement on objectives and extent to which they have been met and overall performance	The broadcast... an annual re... Government... the activities... broadcasters... way the law... the extent to... have been m... include recor... including in r... fee
3.3 Broadcast regulator	Has complaints jurisdiction but not licensing powers	Does license CBC but may not suspend or revoke the license and must consult with CBC regarding any license conditions, may address a report to Parliament in relation to a failure to respect the license	Has significa... including app... Presidents a... governing Ch... obligations in... or even susp... which do not... guarantee th... impartiality o
4. Complaints Mechanisms			
4.1 Internal	Must establish internal procedure and submit codes of practice to the broadcast regulator for approval	As a matter of policy there is an internal Ombudsman with power to make recommendations but no binding authority	Varies, depe... and the prac... public broad... and 3 have in... who commun... parties and n
4.2 External	Only if internal procedure is deemed inadequate may individual complain to broadcast regulator, latter cannot enforce decision but may report matter to Minister	No external complaints mechanism but generally subject to jurisdiction of regulator regarding license conditions	Broadcast re... complaints fr... though this is... provided for
5. Public Service Mandate			
5.1 General requirements	Provide innovative and comprehensive broadcasting services of a high standard, inform and entertain, take account of services provided by the commercial sector	Provide a wide range of programming that informs, enlightens and entertains, which is available throughout Canada by the most appropriate and efficient means	Provide, to a... public, of info... entertainment... contribute to... national audi... production

5.2 National identity	Contribute to a sense of national identity, including through music, drama and other performing arts	Provide programming that is predominantly and distinctly Canadian, and reflects Canada and its regions to national and regional audiences, contribute to shared national consciousness and identity, contribute to the flow and exchange of cultural expression	Strict rules governing broadcasting French and English during peak hours orchestras and religious programming
5.3 Special groups	Reflect the cultural diversity of the Australian community, provide a balance between programmes of wide appeal and specialised programmes, have regard for the multicultural character of Australia	Serve the special needs of the regions, be in equivalent quality in English and French and reflect the different needs of each language group, reflect the multicultural and multiracial nature of Canada	Programmes for children or adolescents and pluralism
5.4 News	Maintain an independent news and information service, broadcast daily, from all national stations, regular sessions of news and information relating to current events within and outside Australia, broadcast certain sessions of both Houses of Parliament	Provide consistent, high-quality information upon which all Canadians may rely	Must broadcast debates and parties, union bodies, provincial and political
5.5 Other obligations	Substantial educational programming		Conservation audio-visual educational programming

Financing (%)

All countries for 1999 except France which is for the year 1998.

	Aust.	Cda	Frn	Jpn	SA	UK
Advertisements	3	23	25		76	
License Fee			70	98	14	82
Government Subsidy	80	66			10	
Other	17	11	5	2		18

Comparative Analysis

One fundamental principle underlies the development of democratic broadcasting policy: the airwaves belong to the people and must be used for their benefit. Today, with technology providing a previously unimaginable abundance of broadcasting opportunities, it is widely understood that the public interest is best served by an integrated broadcasting policy that combines the diversity, skills and resources of both public and private broadcasting. As the German Constitutional Court observed, the press can “neither be at the mercy of the state nor of any single social group.”¹⁶¹ Similarly, the European Court of Human Rights has held that Austria’s State monopoly on broadcasting was an unjustified violation of freedom of expression, noting that the media is incapable of fulfilling its essential purposes of informing the public “unless it is grounded in the principle of pluralism, of which the state is the ultimate guarantor.”¹⁶²

The Rationale for Public Service Broadcasting Organisations

Although the public monopolies which characterised the early development of radio and television have largely disappeared, at least in democratic countries, the essential role that public service broadcasting organisations can and should play in ensuring a free flow of information and ideas to the people is still widely recognised. Notwithstanding technological developments and the capacity of private broadcasters to satisfy an ever-growing range of needs and interests, there remain important areas where these services need to be supplemented by public service broadcasting.

Fundamentally, market and other private sector forces do not lead to the satisfaction of all public informational needs and, as a result, need to be supplemented by public service broadcasting. In part this is a result of economic forces, as certain types of programming are either too costly or attract too small an audience to generate cost-recovery revenues. But in part it is also because of the leadership role public service broadcasting organisations play by providing a focal point for quality news, by building a shared sense of national identity, and by instilling democratic and other important social values.

There are a number of ways States can promote public service broadcasting which supplements the programming provided by the private sector. Possibilities include regulatory frameworks which impose public broadcasting obligations on private broadcasters, providing funding for selected areas of programme production and supporting the development of community broadcasters. No doubt all of these are

¹⁶¹ *Television I Case* (1962) 12 BverfGE 205, in D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1997) pp. 404-406.

¹⁶² *Informationsverein Lentia and Others v. Austria*, note 13, p. 16.

important in contributing to the free flow of information and ideas to the public. However, only national public service broadcasting organisations can provide a central leadership and nation-building role, and this is one reason why such broadcasting organisations are so ubiquitous around the world.

The overall goal of public service broadcasting organisations should be to provide comprehensive, varied and balanced television and radio programmes of high quality for reception by the entire public. Comprised within that overall goal are a number of specific functions commonly associated with public service broadcasting organisations. These include regular news services, a central educational role, promotion of national culture and identity, entertainment, and serving the needs of minorities and other specialised interest groups.

Perhaps the most essential need is for accurate, impartial and comprehensive information about news and current affairs of public importance upon which the public may rely. Access to a reliable community of information with which to inform their daily decisions, ranging from the political – such as choosing which candidate to vote for – to the most mundane – such as whether to plan a family outing for the day – is essential to basic citizenship and dignity. For this reason, provision of information services is an important obligation of public service broadcasting organisations.

Public service broadcasting organisations also play a key educational and nation-building role. Their programming should promote national self-awareness, both positive and critical, through the rich means offered by broadcasting technology and modern culture. In this way, it should serve to instil democratic values, promote respect for others and build a shared sense of citizenship. More generally, it should also engender knowledge of important issues – both national and international, relating to a wide variety of issues including social, environmental and economic concerns – as well as promote and help develop national culture.

Despite the importance of informational programming, the lion's share of broadcasting in most countries is comprised of music, drama or other forms of entertainment. However, it would be a mistake to see these categories of programming as separate, since it is often through entertainment programming that learning and a sense of cultural identity are fostered, understanding of national history and development expanded, and a vibrant national cultural environment cultivated.

In the modern multicultural era, public service broadcasting organisations are also being called upon to serve the specific needs of indigenous and emergent minority communities, as well as alternative tastes and interests which may not be adequately represented in market-driven commercial broadcasting. The precise manner in which a public service broadcasting organisation fulfils these needs will vary, depending on the context, but options include minority language programming and the development of local services.

Regulatory Challenges

When fulfilling the public's informational needs, public service broadcasting organisations should first and foremost be answerable to their mandate of public service, not the demands of the government or of the commercial marketplace. However, public service programming is costly, requiring resources almost by definition beyond its potential for commercial returns. Therefore, quality public service broadcasting is dependent upon public monies. As recipients of public monies, and trustees of an integral component of the public interest in the airwaves, public service broadcasting organisations must be accountable for their conduct and the use of the resources they are given. At the same time, funding and accountability mechanisms should not lead to undue government control or interference with editorial independence. These key factors set up the central tensions that a proper, rights-promoting, public service broadcasting policy must resolve. These three elements – independence, public accountability and adequate resources – define the challenge of public broadcast regulation.

The jurisdictions surveyed in this study have implemented public service broadcasting regimes that, in practice, allow a relatively high degree of editorial and creative independence, provide sufficient, if not always stellar, levels of funding, and achieve an appropriate level of broadcaster accountability. When sifted for their better elements, they can provide a useful basis of experience and ideas for emerging or transitional democracies, which they may draw upon in establishing their own public service broadcasting systems.

In drawing on the examples presented here, however, a note of caution is in order. This study focuses mainly on the legal framework for public service broadcasting. In most, if not all, of the jurisdictions surveyed, there is a very strong tradition of public service broadcasting, which has become part of the national political culture. This means both that it is difficult for governments in these countries to interfere with the public service broadcasting organisation and that a variety of mechanisms to guarantee responsiveness to the public are in place. In some cases, for example in relation to the BBC in the United Kingdom, this is so even in the absence of strong legal guarantees of independence. Emerging or transitional democracies do not, by definition, have these established traditions and practices. It is, therefore, of fundamental importance in these countries to promote independence, financial security and accountability through legal means, in the hope that this, in turn may help promote a local culture of support for public service broadcasting.

Independence

While public service broadcasting organisations must act responsibly, they must also be free to perform their obligations independently. These organisations can

only properly serve the public interest if they have full creative and editorial freedom to present news, entertainment and other programming to the public without interference by the government, by other political or quasi-governmental institutions, or indeed, by powerful private interests.

To some extent independence is simply an aspect of media freedom, which is widely recognised as an essential component of freedom of expression and information, and an indispensable foundation for a functioning system of democracy and human rights. The European Court has frequently reiterated, “that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.”¹⁶³ There is no doubt that public service broadcasting organisations are included within the scope of this guarantee.

Independence is also, however, fundamental to fulfilment by these broadcasting organisations of their public service role. As public bodies, they are responsible to the public as a whole, not to specific vested interests. The human rights NGO, ARTICLE 19 has emphasised, in relation to state-funded broadcasters, that “governments bear a particular responsibility to ensure that these media serve the twin essential public functions of the media: to inform the public about matters of public interest and to serve as a watchdog of government.”¹⁶⁴

A very positive emerging trend in terms of practical protection for independence is the inclusion of explicit clauses guaranteeing independence and/or freedom of expression in the enabling legislation of public service broadcasting organisations, including in Canada, South Africa and the United Kingdom. These provisions protect both high-level management decisions, as well as specific programming choices and content, from interference or censorship by agents of the State.

In addition, most jurisdictions now have constitutional guarantees of freedom of expression and the media. As a matter of practice, public service broadcasting organisations should enjoy the full benefit of guaranteed media freedom, and should be explicitly empowered to launch legal challenges against State actions that threaten to abrogate that freedom. The Canadian Broadcasting Corporation has, for example, been one of the leading litigants in pursuing constitutional media freedom claims, for example against publication bans and exclusions in criminal trials and Parliamentary proceedings. This adversarial role against the State, which funds and nominally owns it, is entirely consistent with public service broadcasting organisations’ fulfilment of their public obligations.

Although formal and constitutional guarantees are important, in practice the most effective means of promoting independence for public service broadcasting organisations is usually through a Board of Directors or Governors. All of the

¹⁶³ See, for example, *Jersild v. Denmark*, 23 September 1994, 19 EHRR 1, para. 31.

¹⁶⁴ Article 19, *Who Rules the Airwaves? Broadcasting in Africa* (London: Article 19, 1995), p. 28.

public service broadcasting organisations surveyed here are headed by such boards, which have overall legal, policy and other responsibility for the broadcaster. One of the key roles of these Boards is to act as a shield against government interference, while serving as a mechanism of accountability to the public. Indeed, in some jurisdictions –such as Australia and South Africa – the Board is explicitly tasked with promoting and maintaining the independence of the public service broadcasting organisation.

Boards can only play a real role in terms of protecting the independence of broadcasters if they, themselves, are independent of political interference. This is fairly obvious and is clear from a recommendation of the Council of Europe, stating:

The rules governing the status of the boards of management of public service broadcasting organisations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference.¹⁶⁵

A number of means have been employed in various countries to promote the independence of the board, of which the manner in which individuals are appointed to the board is probably the most important. The involvement of a range of individuals, representing all significant political viewpoints rather than just the president or prime minister, in the appointments process is crucial. It is also important that the process allows for input by civil society, as a means of further broadening participation and ensuring against partisan nominations. Also important are conditions on board members, both collectively and individually. These include requirements of specific expertise, prohibitions on the appointment of political figures and those convicted of serious crimes, as well as conflict of interest rules and a requirement that membership collectively represents the society as a whole. Board members' security of tenure should also be guaranteed, to prevent fear of government retaliation from conditioning their actions. Finally, levels of remuneration should not be open to political manipulation.

The independence of the board must be distinguished from editorial independence, which in some ways is the real goal. As a means of bolstering editorial independence, in many countries the governing board's role is restricted to general oversight and it is not supposed to interfere in day-to-day editorial decision-making. This distance allows the board serve as a point of liaison between the broadcaster and governing authorities, without that necessarily compromising editorial independence. A complaint by government that the news was biased against them would probably be inappropriate if directed to the News Editor but might be acceptable if presented to the board.

¹⁶⁵ Council of Europe Recommendation No. R(96) 10 on the guarantee of the independence of public service broadcasting.

Accountability

While public service broadcasting organisations should be independent of government interference, they must also be accountable to the public and mechanisms must be in place to ensure that they remain true to their public service obligations and the public interest. Otherwise, there is a risk that the interests of the board, the management or even the staff may predominate, to the detriment of the wider public. A number of mechanisms are commonly employed to ensure accountability.

At a very general level, most public service broadcasting organisations are subject in the ordinary way to laws of general application that govern the conduct and interaction of individuals and corporations in society as a whole. This includes the general law of contract and tort (including defamation), any laws regarding pornography and hate-speech, labour relations codes and environmental standards, to name just a few. In short, public service broadcasting organisations are expected to behave as ordinary responsible corporate citizens.

More importantly, the boards of the public service broadcasting organisations surveyed here play a leading role in promoting accountability. These boards stand apart from the day-to-day operations of the broadcasting organisation, and are hence able to assess its performance with a relatively high degree of objectivity. At the same time, they can receive input from government without that necessarily constituting an interference with editorial independence. They should also ensure, through a variety of means that they remain in touch with public opinion. These can include polls, surveys, seminars and regular public meetings, in addition to the establishment of advisory bodies (see below).

The boards of public service broadcasting organisations in most countries are also formally accountable, often to the main legislative body or Parliament. This direct accountability is achieved through a reporting mechanism or annual report, which the board is typically expected to present to Parliament or another multiparty body. These annual reports are normally required to include full financial accounting, including externally audited accounts, as well as details of how the broadcasting organisation has fulfilled the various aspects of its mandate, its objectives and the extent to which they have been met and information relating to complaints. Parliament can then call on the members of the board (or the chair) to appear before it to answer questions and provide clarification. This may also serve as an opportunity for elected legislators to provide feedback and their own views to board members.

There is also an increasing trend towards the establishment of consultative bodies to advise public service broadcasting organisations on the needs and reactions of certain key audience segments. Such bodies may be based on regional or minority representation, but they can also be established on an *ad hoc* basis to consider specific aspects of the public service broadcasting organisation and the extent to

which it is fulfilling its mandate. The laws of the United Kingdom, Japan, South Africa and Australia all presently provide for permanent consultative bodies. If carefully constituted to reflect the diversity of the broadcaster's audience, and properly shielded from political or patronage appointments, these bodies can provide a very constructive, non-coercive mechanism of accountability.

The public service broadcasting organisations surveyed here have different relationships with their respective broadcast regulatory bodies, which have general responsibility for issuing licenses and allocating broadcast frequencies. Most public service broadcasting organisations do not, unlike private broadcasters, have to compete for licenses and/or frequencies. Some do have to go through a *pro forma* licensing process, which represents an opportunity for regulators and the public to scrutinise and criticise the broadcasters' performance, rather than a substantive license renewal procedure. In other cases, such as in South Africa, the licensing requirement would appear to go beyond a formality. While these licensing processes have some benefits in terms of promoting accountability, they may also provide an opportunity for government interference. Complex, opaque regulatory systems may afford opportunities for surreptitious censorship on 'technical' grounds. Where this is a possibility, accountability is better served by separate and explicit processes and the license and frequencies of the public service broadcasting organisation are guaranteed by statute.

The idea of direct accountability to the public is becoming increasingly popular, usually in the form of complaints processes. These generally provide members of the public who have outstanding grievances with an opportunity to have their complaint reviewed either internally by the broadcaster, by a neutral third-party, often a national broadcast standards agency, or by both. Australia's model has much to commend it, with the independent Australian Broadcast Authority being empowered to compel apologies and changes in conduct, but only when the ABC fails to deal with complaints in a satisfactory manner internally. It is important, however, that the scope of legitimate complaints be carefully delineated to exclude quarrels over editorial perspective or political issues. In Australia, for instance, complaints may only be upheld if they pertain to the broadcaster's failure to fulfil its own stated aims and obligations.

When considering accountability, it is important not to underestimate informal mechanisms. A host of civil society actors, including other media organisations, consumer groups, academics and non-governmental organisations, can play a role in ensuring that the public service broadcasting organisation remains true to its mandate. Publicity plays a crucial role in this regard, as every public service broadcasting organisation is ultimately dependent on public support for its continued existence and funding.

Funding

In established democracies, the freedom of public service broadcasting organisations from governmental interference is reasonably secure, both in law and conventional practice. The main threat today to the ability of public service broadcasting organisations to fulfil their mandates stems from the financial restraints that are increasingly being placed on them. In these times of austerity, and with prevailing views relating to government downsizing, many public service broadcasting organisations are being called upon to maintain previous levels of service while at the same time the level of public financial support for them is decreasing.

Traditionally, public service broadcasting organisations have been largely funded through public allocations, either from general government resources, or through the collection of a broadcasting fee and this remains the case in all the countries surveyed except South Africa. Both main forms of public funding have their advantages and disadvantages. A general charge on users, or broadcasting fee, is relatively insulated from government interference or manipulation and provides consistent levels of funding over time. It does involve collection costs, although these may be minimised by using existing payment systems, such as electricity suppliers, to collect the fee. More seriously, it has often proved difficult for political reasons to introduce a broadcasting fee for the first in countries where one has not traditionally been collected. In addition, the fee may exert some pressure on broadcasting organisations to maintain high audience levels as a way of justifying fee collection, which can undermine commitment to public service goals.

From among the countries surveyed here, despite their relatively strong commitment, only Japan still provides almost all of the funding for its public service broadcasting organisation from public sources. As an alternative to full government funding, many public service broadcasting organisations now look to commercial activities, mainly advertisements but also spin-off industries such as videos and books, to generate supplementary revenue. At the moment, advertisements are largely restricted to public television services, in part because production costs are far higher for television than for radio.

While there is nothing *per se* wrong with allowing some commercial advertising on the public airwaves, it does carry a number of risks. There are only so many broadcast hours in the day and the more time that is dedicated to quality programming, the better. More serious is the risk that commercial imperatives will result in public service broadcasting organisations that simply mimic the private sector and base their programming choices on popularity rather than quality. This can only lower the quality and diversity of public service broadcasting, undermining the whole rationale for it in the first place. At the same time, financial imperatives and dwindling public resources in many countries mean that public service broadcasting organisations cannot maintain levels and quality of programming unless they are allowed to supplement their income with outside revenue. A balance can be found by allowing a limited amount of commercial

advertising while ensuring that most of the resources come from public sources of funding.

It remains our view that substantial public funding should remain the rule for public service broadcasting. If public service broadcasting organisations are forced to compete in the commercial marketplace, they will simply come to resemble the private broadcasters with whom they are competing, thereby abandoning their mandate and undercutting their *raison d'être*.

Conclusion

Public service broadcasting organisations have the potential to play a crucial role in ensuring the public's right to receive a wide diversity of information and ideas, by supplementing and complementing the programming provided by private broadcasters. At their best, they ensure the provision of quality news and current affairs programming, promote a sense of national identity, foster democratic and other important social values, provide quality educational and informational programming, and serve the needs of minority and other specialised interest groups.

Quality public service broadcasting requires three elements: free and independent broadcasting organisations, with sufficient resources to provide quality news, information, education and entertainment programming, subject to public accountability for the way in which they fulfil their mandates and utilise public resources. Formal guarantees and an independent governing board are the best ways to promote independence. The same board should serve as the key accountability mechanism, supplemented by formal reporting requirements, complaints processes, a variety of means of public input, such as consultative bodies and surveys, and possibly supervision by an independent regulatory body. Funding is perhaps the most controversial and difficult issue facing public service broadcasting organisations. While full public funding has some advantages, the reality is that it is becoming increasingly rare and that most public broadcasters are required to raise at least some funding themselves. Blended public and commercial revenue, with a distinct emphasis on the former, is increasingly becoming the norm for public service broadcasting organisations.

Public service broadcasting organisations can, where these ingredients are guaranteed, make a very significant contribution to the public's right to know and diverse and pluralistic broadcasting to which citizens are entitled. Public service broadcasting organisations play a unique and vital role in satisfying the public interest and ensuring a free flow of information and ideas, and governments and other public actors must be urged to make a solid commitment to funding this essential public resource.

Appendix

Websites of Broadcasting Organisations listed in the Book

Australia

Australian Broadcasting Corporation(ABC)

<http://www.abc.net.au/>

Canada

Canadian Broadcasting Corporation (CBC)

<http://www.cbc.ca>

France

The Conseil Superior de l'Audiovisuel (CSA)

<http://www.csa.fr/>

Japan

Nippon Hoso Kyokai (NHK)

<http://www.nhk.or.jp>

South Africa

The South Africa Broadcasting Corporation (SABC)

<http://www.sabc.co.za/>

The Independent Broadcasting Authority (IBA)

www.iba.org.za

United Kingdom

The British Broadcasting Corporation (BBC)

<http://www.bbc.co.uk/>