

20 March 2009

Regulatory Burdens Review  
Productivity Commission  
GPO Box 1428  
Canberra City ACT 2601

Dear Sir / Madam

## REGULATORY BURDENS REVIEW

This submission is provided to the *Productivity Commission for its Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services (Discussion Paper)*.

The structure of the submission is as follows. It provides details on:

1. The Australian Subscription Television and Radio Association (ASTRA).
2. The media regulatory framework which is burdened with restrictive regulations which protect the FTA networks and undermine Australia's economic efficiency and productivity.
3. The costs, unintended consequences and regulatory burdens that one part of this protectionist framework imposes on the economy namely the anti-siphoning list which restricts access to sports rights.

### 1. ASTRA

ASTRA was formed in 1997 to underpin and propel the new era in competition and consumer choice that new services such as subscription broadcasting and narrowcasting have brought to broadcasting, communications and entertainment in Australia.

These were new categories of broadcasting services introduced by the Broadcasting Services Act 1992 (BSA). These new services added to the mix of existing categories of service, those being the national broadcasting services; commercial broadcasting services (commercial television and radio); and community broadcasting services.

ASTRA's membership includes the major subscription television (STV) platforms as well as the many channels that provide programming to these platforms. Other members include communications companies such as OPTUS and Telstra. A complete list of ASTRA members can be found at [www.astra.org.au/members.asp](http://www.astra.org.au/members.asp).

STV channels provided by ASTRA members are broadcast on the FOXTEL, AUSTAR and OPTUS STV platforms. These channels are available to well over two million residential subscribers and are directly accessible by more than seven million people.



Since its inception, over \$A9 billion dollars has been invested in infrastructure, capital, facilities, productions, programs and services in order to establish and develop the STV industry. ASTRA's members are responsible for the bulk of this investment which has been distributed throughout metropolitan, regional and remote Australia. Consequently, the sector has created an enormous number of jobs, investment, infrastructure and production content throughout Australia and has made substantial contribution to Australia's digital economy.

The industry continues to invest heavily in its own growth and the growth of the Australian digital economy and the communications and broadcast sectors through its continuing investment in content and delivery.

## **2. Overall media regulatory framework**

The regulatory system for television broadcasting provides protections for the free to air (FTA) networks, discriminates against new players such as STV and creates significant economic inefficiencies.

Numerous commentators and regulators have noted the broad protections enjoyed by the FTA networks. For instance, Graeme Samuel has said,

*There is out right prohibition on new entry into free-to-air television markets. Existing free-to-air broadcasters also have first rights of refusal over the most popular sporting content, with competition from pay-TV precluded by anti-siphoning legislation. Other potential competitors have spectrum available but are defined as data-casters and subject to extensive limitations on the type of content they can offer.<sup>1</sup>*

The section below outlines these FTA protections, and their costs, burdens and detrimental economic impact, in more detail.

In addition, Attachment A contains a direct comparison between FTA and STV regulation with particular reference to content and advertising in a broader sense than that touched on in the body of this correspondence. There is no comparison here regarding technical regulation between the two sectors, although it should be noted that the regulation of the energy performance of the industry's set top boxes is likely to become a significant burden in the future.

### **FTA's gifted spectrum**

The FTA networks were each gifted (i.e. allocated without competitive auction) 7Mhz of spectrum to provide digital services. Such spectrum is the equivalent of "breach front property". The Productivity Commission has estimated that the value of the FTA's analogue spectrum to be worth \$200 million a year.<sup>2</sup> The digital spectrum gifted to the FTA networks in 1998 is also extremely valuable. The gifting of digital spectrum to the FTA networks is economically inefficient. As is widely accepted, the most economically efficient way of allocating spectrum *is best achieved through a decentralised competitive market rather than administrative means.*<sup>3</sup>

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<sup>1</sup> Samuel, Graeme (2005) *Cartels, Media and Telecommunications – The Rapidly Changing Face of Australian Competition Regulation*, Deakin Law School Oration

<sup>2</sup> Productivity Commission (2000), p196

<sup>3</sup> Productivity Commission, (2002) *Inquiry into Radio Communications*

### **Delayed analogue switch-off**

The Government delayed the switch-off of the analogue television signal from 2008 (which was the date the 1998 amendments to the BSA mandated for switch off) to 2013. This means that the networks are able to continue to utilise valuable analogue spectrum for an additional five years which prevents the spectrum from being used for new services and implicitly new competitors.

There is a significant ‘opportunity cost’ to the economy caused by not being able to use such spectrum for new services such as wireless broadband and mobile broadcasting. European Studies suggest that the social gains from re-deploying analogue television spectrum are substantial.

*It is forecast that retail mobile phone tariffs would substantially decline if a transition to digital television led to enhanced availability of (broadcasting) spectrum for wireless telecommunications. Consumer surplus gains offset transitional costs by at least 2-to-1 and as much as 45-to-1. These net benefits are conservatively estimated in that other services (apart from mobile telephony) could (prove to be) more socially valuable and because we ignore the considerable increase in video choices (that) the transition could provide.<sup>4</sup>*

In the United Kingdom an Ofcom study also found that the re-deployment of spectrum for new services would generate an estimated economic benefit arising from the use of such spectrum of £42 billion based on calculations of consumer and producer surplus and increasing in GDP.<sup>5</sup>

While the opportunity cost of delaying the redeployment of spectrum will vary across jurisdictions, there is unquestionably a large cost to Australia in delaying switch-off that can be measured in terms of the opportunity cost of not using the ‘analogue spectrum’ for new services for Australians.

### **No fourth commercial television licence**

The amendments to the BSA in 2006 extended the prohibition on a fourth commercial network until at least 2013. This protection of the FTA networks means reduced choice for consumers. Further, it means that the Commonwealth has not realised any monies from the auction of a licence for this unused spectrum.

There are no such restrictions to competition for STV licensees and the development of alternate technologies such as IPTV offer continuing competitive tension for established businesses.

### **Anti-siphoning regime**

The FTA networks also continue to enjoy the protections of the anti-siphoning list, which is the longest such list in the world. The anti-siphoning list essentially provides the FTA networks with a ‘first right’ to both FTA and STV rights to more than 1350 sporting events in a non-Olympic year and as importantly to negotiations control over the whole process of rights acquisition.

STV is unable to purchase any rights to events on the anti-siphoning list until either a FTA network has purchased those rights (in which case our sector can negotiate with the FTA network for access to events that it has bought but will not broadcast) or the FTA networks have passed up on purchasing the rights.

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<sup>4</sup> <http://www.ictregulationtoolkit.org/en/Publication.2955.html>

<sup>5</sup> [http://www.ofcom.org.uk/research/radiocomms/reports/economic\\_spectrum\\_use/](http://www.ofcom.org.uk/research/radiocomms/reports/economic_spectrum_use/)

The purpose of the legislation is to ensure that events of ‘national importance or cultural significance’ are available on FTA television. But while intended as a ‘consumer protection’ mechanism it in fact operates as an ‘industry protection’ mechanism for the FTA networks. Moreover the anti-siphoning list effectively appoints the FTA networks as the gate keepers to over 1350 sports events.

Seventy seven percent of the events on the anti-siphoning list are not shown on FTA television; only 16% is shown live with a further 7% shown on delay or as highlights.

From an economic point of view the fact that all available programming is not shown or only partially shown live, to a national audience reduces consumer access and choice. Further, it means that the economy’s capital is not being used efficiently, which diminishes economic welfare. If the list were reduced in length there would be more live sport on both FTA and STV broadcast over the same communications infrastructure. Utilising the nation’s communications infrastructure resources more intensively would boost productivity.

ASTRA has proposed to Government that it reduce the length of the anti-siphoning list by implementing a “Use it or Lose it scheme”. Under this approach events not broadcast live and nationally by the FTA networks would be removed from the list by the Minister for Broadcasting, Communications and the Digital Economy. Events the Minister removed from the list would go onto the open market and these rights would be available for both the FTA networks and STV to bid for.

### **3. Unintended consequences / regulatory burdens**

This section of ASTRA’s response to the Discussion Paper provides an outline of the costs and unintended consequences of the anti-siphoning list as well as the regulatory burdens imposed on our sector by the list.

#### **Poorly designed legislation is costly and has unintended consequences**

The Commission says in its Discussion Paper that it is, *interested in hearing about regulations that are poorly designed that may impose greater costs than are necessary to achieve their underlying objective.*<sup>6</sup>

The anti-siphoning list provides a text book example of legislation and regulations which are poorly designed and which imposes greater costs than are necessary to achieve its underlying objective.

The underlying objective of the anti-siphoning list is to ensure that sports of ‘national importance or cultural significance’ are shown on FTA television. The list, however, covers over 1350 events the vast majority of which are not currently broadcast by the FTAs and which further cannot be argued to be of events such significance. Specifically, the FTA networks only broadcast 23% of events on the list (ie 77% of events are not broadcast on network television).<sup>7</sup>

Put simply the list is far too long. It covers events the FTAs do not broadcast. If the list was reduced down to that 23% of events that the FTAs do currently broadcast the policy objective of

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<sup>6</sup> *Productivity Commission for its Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Service, pg 12*

<sup>7</sup> Results of ASTRA’s monthly monitoring of coverage of listed events on the anti-siphoning list (Averaged 2001–2006).

keeping these events on FTA television would be met, while all the costly unintended consequences of maintaining the full list of 1350 events would be removed.

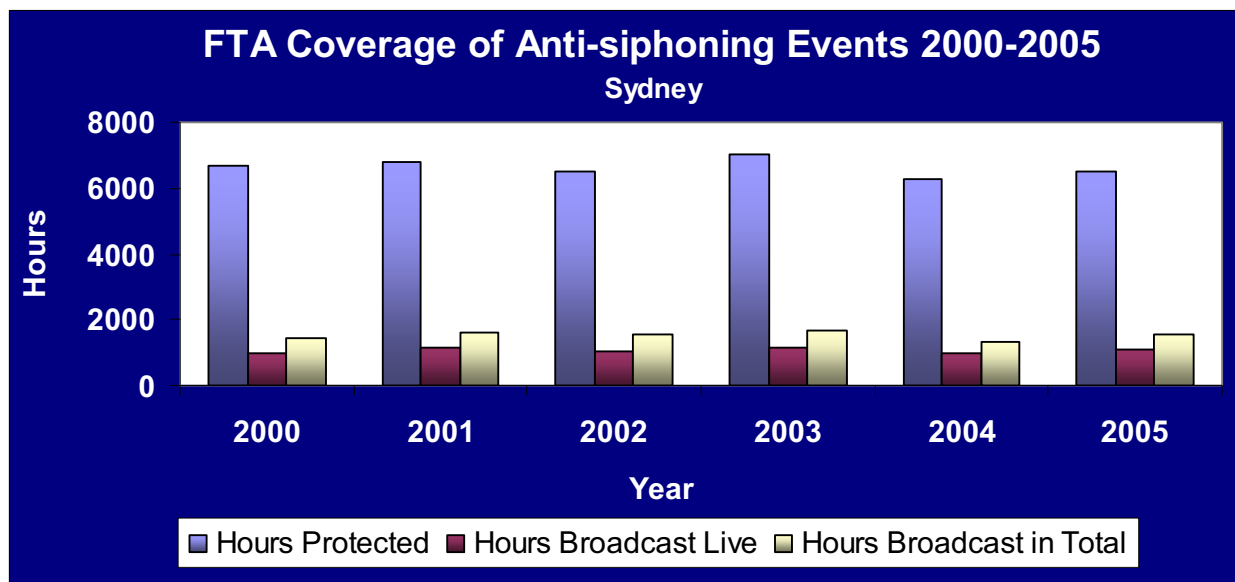
It is clear that the anti-siphoning regulations do not pass the Regulation Taskforce check list for best practice regulatory design. One of the key criteria for best practice regulation is that there be *the minimum necessary (regulation) to achieve its objectives*.<sup>8</sup> The unnecessarily long anti-siphoning list embodies the opposite approach and leads to the following costs and unintended consequences, it:

1. Reduces total consumer access to sport
2. Appoints the FTA networks as brokers for sports rights
3. Reduces the value of sports rights to sporting codes
4. Imposes a competitive disadvantage on STV

Each of these points is discussed in more detail below.

#### **Less sport on television**

As discussed above, the purpose of the anti-siphoning list is to support the public's access to a selection of sporting events of national importance or cultural significance and events traditional broadcast on FTA television. However as is clearly evident in the following table, the vast majority of events on the list are not shown on FTA television.



Further, monitoring reports published by the Australian Communications and Media Authority (ACMA) also confirmed the significant lack of coverage of 'listed' events.<sup>9</sup>

In some cases the FTA networks will on-sell some of the rights that they have purchased to STV. However, in other cases the FTA networks do not on-sell the rights and do not broadcast the game.

<sup>8</sup> Regulation Taskforce 2006, *Rethinking Regulation*, p 8 9

<sup>9</sup> ACMA monitored and investigated the operation of the anti-siphoning scheme from 2006 to September 2008.

A good example of this is the soccer (i.e. football). When soccer was last on the anti-siphoning list Network Seven bought the rights to the soccer. It only showed 1 game out of the 32 domestic games that it could broadcast.

As the Productivity Commission has noted:

*There is some evidence that the anti-siphoning rules can have perverse effects of reducing rather than increasing total consumer access to broadcast sport<sup>10</sup>.*

### **FTAs gatekeepers and brokers of sports rights**

Another costly unintended consequence of the anti-siphoning regime is that it effectively appoints the FTA networks as the gatekeepers to over 1350 sporting events in Australia and anoints them as broker of these rights.

There are many examples of where this occurs. A good example is the 2007- 2011 rights to the Australian Football League (AFL). In early 2006 Network Ten and Seven obtained the rights to all AFL games, including 8 weekly games. The Networks did not want to broadcast all eight weekly games (for programming reasons) - instead, they only wanted to broadcast two weekly games each. FOXTEL therefore had to open negotiations with Ten and Seven over the rights to broadcast the 'surplus' 4 weekly games.

In this case FOXTEL was unable to deal directly with the underlying rights holder (the AFL) but had to negotiate with two of its fiercest competitors for the rights to broadcast AFL games which Seven and Ten did not want to broadcast.

These negotiations are complicated by the different incentives of Seven and Ten versus the actual rights owner - the AFL. The incentive of Networks Ten and Seven is to protect the value of the AFL games they will broadcast to maximise ratings and advertising revenue. Their incentive, therefore, is to seek to sell the rights to games they will not broadcast to STV for a price and on terms that advance their commercial interests including, for instance, seeking to delay when STV could broadcast games so our sector's games do not compete with games that either Ten or Seven broadcasts. Other elements in their sale consideration is a "cherry picking" of a perceived "quality" of one game over another. On the other hand the AFL's incentive is to balance ensuring it gets broad coverage of live matches (including a mix of coverage on FTA and STV), a good price for its rights (to continue funding the code), increasing club membership and achieving good attendances at their grounds.

The section on regulatory burdens outlines the significant burden imposed on STV as a result of having to negotiate with its competitors who have different incentives from the underlying rights holders.

### **Detrimental to sporting organisations**

The anti-siphoning list also has the unintended consequence of harming sporting organisations. The lack of competition for broadcast rights to events on the anti-siphoning list means that the FTA networks do not pay as much and sporting organisations do not receive as much as potentially

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<sup>10</sup> Productivity Commission (2000).

they would in a more competitive market. The Productivity Commission has already pointed out that the anti-siphoning list harm(s) sporting organizations.

*“The anti-siphoning provisions reduce competition in the negotiation of rights to listed events, affecting the price and nature of broadcast rights. Given that subscription content providers are prevented from competing in an already limited (free-to-air TV) market, this reduction in competition is substantial. The provisions reinforce the market power of the small number of free-to-air broadcasters when they deal with event organisers for broadcast rights inhibiting competition and reducing the potential benefits to these sporting bodies of exclusive rights.”<sup>11</sup>*

### **Disadvantages STV**

The anti-siphoning list has also clearly had a detrimental impact on the STV sector by making it more difficult for it to obtain sports rights, attract customers and build a competitive business to the networks.

### **Regulatory burden**

The anti-siphoning rules impose a significant regulatory burden on the STV sector because they appoint the FTA networks as the gatekeeper and broker over a long list of sports rights. This in turn means that our sector must negotiate for those sports rights that our competitors, the FTA networks, have bought (but do not intend to use). These negotiations are more complex, drawn out and burdensome than if STV could negotiate directly with the underlying rights holder who will have a far more holistic view of the sale of broadcast rights and the implications for the respective Codes including for the future of their game.

This is particularly the case as noted above because the FTA networks have different incentives from the underlying rights holders. The FTA network’s incentive is to sell any rights to STV for a price and on conditions that advances their commercial interests, including seeking to delay when STV broadcasts games so that these games did not compete with their games. On the other hand the underlying rights holders incentive is to balance ensuring that it gets a good price for its rights and as much live coverage, as widely available as possible whilst maintaining club memberships, ground attendances, and grass roots growth for the future of their game.

The AFL rights negotiations between FOXTEL and Network Seven and Ten for the 2007-2011 period is a good case in point. The impact of the anti-siphoning list on the negotiations process is best illustrated by providing a chronology of the negotiating process as follows:

Date	Negotiation Progress
Feb 2005	Network Seven and Ten announce a strategic alliance to acquire broadcast rights to the AFL for the next broadcast rights term rights (2007/11)
March 2005	FOXTEL commences discussions with Network Nine, the only remaining FTA party we could approach, on working together to bid for those same AFL rights (2007/11)

<sup>11</sup> Productivity Commission, (2000), p29.

March Dec. 05	FOXTEL and Nine negotiate terms of a bid by Nine which will grant to FOXTEL certain AFL matches. Network Nine submits its bid for AFL matches (2007/11).
23 Dec. 05	AFL announces that it has accepted Network Nine's bid, subject to Seven/Ten exercising a last matching right (i.e. their right to make a final offer for the AFL) which Seven had acquired from the AFL some years before.
January 06	Seven and Ten announced that they will match the Nine offer, and as a consequence, the AFL has to accept the Seven and Ten bid
Feb/March 06	FOXTEL commences discussions with Seven/Ten. FOXTEL makes an offer for games they won't show based on the same conditions that FOXTEL had agreed to have with Nine if they were successful in the bid (and Seven/ Ten did not "match" the Nine offer).
March- August 06	FOXTEL and Networks Seven and Ten in negotiations over rights to AFL. FOXTEL makes an offer to both networks during this period.
August 06	FOXTEL announces the closure of its dedicated AFL channel (Fox Footy Channel) because it has no certainty of obtaining the AFL rights (2007-11) from Seven and Ten or in fact any level of optimism that it might see attached FOXTEL press release on Fox Footy closure.
August Dec 06	FOXTEL and network Seven and Ten continue with discussions around terms re the AFL.
Dec 06	FOXTEL puts another offer to network Seven and Ten for the AFL rejected by both parties.
January 07	FOXTEL tried again to negotiate with networks Seven and Ten to the AFL.
February 07	Agreement finally reached between FOXTEL and networks Seven and Ten (it was agreed just prior to the weekend of the AFL pre-season competition starting).

FOXTEL believes that if it could have negotiated directly for the rights to the four weekly matches with the AFL it would have been able to complete these negotiations at or before the time when the AFL accepted network Nine's bid (i.e. December 05). Instead, the anti-siphoning rules which enshrined STV's competitors (each being Nine and the Ten and Seven networks) as the broker of the AFL rights meant FOXTEL had to negotiate for a year more (i.e. December 05 to February 07) than FOXTEL would otherwise have had to negotiate.

## Conclusion

The application of regulation to media and the burden created by this regulation has the effect of undermining Australia's economic efficiency and productivity as well as continuing a protection of the FTA sector.



A protectionist framework applied to one part of the economy creates additional costs and many unintended consequences and regulatory burdens. In particular, the anti-siphoning list which restricts access to sports rights generates continuing burdens for the STV sector.

Please do not hesitate to contact Matthew Deaner (02 9776 2688) or myself should further information about any aspect of ASTRA's submission be required.

Yours sincerely

Debra Richards  
CEO

## Attachment A

### **FTA and STV REGULATION: Content and Advertising**

The commercial networks have particular content rules because they have a government-protected licensing oligopoly, exclusive use of public spectrum free of charge and universal population coverage.<sup>12</sup>

STV and FTA have the same or similar obligations in relation to many general broadcasting obligations such as:

- the restriction on tobacco advertising;
- broadcasting of political or controversial material;
- broadcasting of election adverts;
- identification of political matter and records of political matter broadcast;
- approval of medicine advertisements;
- compliance with relevant standards;
- restrictions on the broadcasting of RC or X18+ content
- Codes of Practice (Commercial Television Code of Practice and STV Broadcast and Narrowcast Codes of Practice) covering community standards in programming, methods of ensuring the protection of children; classifications; accuracy and fairness in news and current affairs; program promos and news updates; closed captioning; advertising (content; classification; approval and scheduling); complaints handling etc.
- Advertising: Both STV and FTA have obligations in relation to distinguishing ads from program content, classification of ads, placement of ads, compliance with AANA codes in relation to ethics in advertising, advertising to children, food and beverages advertising and marketing. Both sectors adhere to weight management advertising code, therapeutic goods advertising code and alcohol beverages advertising code. Both have obligations with respect to special care for advertising to children.

There are areas of difference in FTA / STV content regulation however STV has not been subject to ongoing regulatory concessions in fact they have been subject to key regulatory imposts which have curtailed the development of its sector, namely the anti-siphoning regime.

The table below sets out some of these differences.

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<sup>12</sup> Note s4 of the BSA in relation to Regulatory Policy: Parliament intends that different levels of regulatory control be applied across the range of broadcasting services .....according to the degree of influence that different types of broadcasting services.... are able to exert in shaping community views in Australia.

	FTA	STV
<b>AUSTRALIAN CONTENT</b>	<p>Australian Content Standard 2005 sets minimum levels of Australian programming to be broadcast by commercial TV - annual minimum transmission quota of 55% Australian programming between 6am and midnight. In addition there are specific minimum annual sub-quotas for Australian (adult) drama, documentary and children's programs<sup>13</sup>.</p>	<p>STV Licence Condition: At least 10% of program expenditure for drama must be spent on new Australian drama programs;</p> <p>This currently applies to 18 drama channels including children's channels, movie channels and general entertainment channels;</p> <p>While not required to, STV produces/commissions/invests in/transmits Australian content across all genres (as well as drama). However Australian made sport, lifestyle, music, news, documentary, arts, programs do not count towards our 10% obligation (our total Australian content equates to hundreds of millions of dollars per year).</p>
<b>CHILDREN'S CONTENT</b>	<p>Children's Televisions Standard 2005 includes obligations on commercial networks to broadcast a min no of hours of children's and preschool programs; restrictions on program promotions; restricts advertising time during children's programs; regulates competitions and advertising of alcohol, etc.</p>	<p>Standards are only introduced where there is market failure which is not an issue in the STV sector. Currently STV provides at least seven dedicated children's channels including Nickelodeon, Nick Jr, The Disney Channel, Playhouse Disney, Cartoon Network, Boomerang and the newly launched CBeebies (from the BBC), as well as general viewing for children available across specific documentary, movie, news, sport, music, arts, knowledge and general entertainment channels.</p> <p>Restrictions relating to children's advertising, placement etc are included in STV Codes of Practice.</p>

<sup>13</sup> 20 hours of first release Australian documentary programs; 260 hours of children's (C) programs; (equates to an hour per weekday); 130 hours of Australian preschool (P) programs; (equates to half an hour per weekday). Of the 260 C hours: at least 50% (130 hours) must be first release Australian (C) programs; 8 hours of repeat Australian C drama programs; at least 25 hours of first release Australian children's C drama (at least 96 hours over a 3 year period). annual drama requirement – the drama scores for all first release Australian drama programs broadcast by a licensee in prime time in any year must total at least 250; (scores relate to format x no.of hours eg score can be made up of more hours of serial or less hours of serial). Three year drama requirement – the drama scores for all first release Australian drama programs broadcast by a licensee in prime time must be at least 860 over three years.

	FTA	STV
<b>LOCAL CONTENT</b>	<p>All regional commercial TV licensees in the five aggregated markets must broadcast material of local significance, to meet minimum quotas comprising a minimum of 720 points per six-week period; and a minimum requirement of 90 points per week.</p> <p>This was imposed because local content had been reduced and Parliament was concerned about loss of local content.</p>	<p>No local content requirements<sup>14</sup>.</p> <p>Although no mandatory requirement exists, Sky News &amp; the Weather Channel provide local content coverage.</p>
<b>OTHER</b>	No specifically applied regulation in relation to terrorism.	STV narrowcasters are subject to Anti-Terrorism standard which places a large regulatory burden upon one of the least influential media sectors.
<b>SPORT</b>	<p>Discussed above. Fundamental anti-siphoning concession to commercial networks. Only limited by automatic delisting 12 weeks before event if not acquired; and UOLI which has never been fully implemented by Government although supported in principle.</p> <p>FTAs also subject to anti-hoarding provisions (must offer to ABC or SBS if don't intend to use) however this has only ever been used for World cup soccer.</p>	STV cannot acquire the right to broadcast a listed event (the anti-siphoning list is one of the longest in the world) unless a national broadcaster or commercial network with coverage of over 50% of population has the right to televise the event.
<b>ADVERTISING</b>	<p>As noted above, STV and FTA are subject to similar obligations in relation to advertising under their relevant Codes.</p> <p>In addition, commercial networks are subject to:</p>	<p>STV are subject to similar Code requirements as FTAs in relation to the content and placement of advertising however STV have been subject to the following additional restrictions:</p> <p>5 year (initial) ban on advertising.</p>

<sup>14</sup> Note that STV are subject to a restriction on providing in a regional area a service in which 3 or more consecutive program items are identical to any 3 or more consecutive program items transmitted by a metro commercial network during prime time.

	FTA	STV
	<ul style="list-style-type: none"> <li>- limits on advertising time (in Code);</li> <li>- specific requirements on advertising to children (Children's Television Standard); and</li> <li>- Television Program Standard 23 – Australian content in advertising: 80% of total advertising time between 6.00am and midnight must be occupied by Australian produced adverts.</li> </ul> <p>Advertisements are classified by Commercials Advice Pty Ltd. Advertising agencies submit advertisements to CAD for classification and are required to answer questions about compliance with the standard. They are also required to declare that the information they supply to CAD is correct.</p>	<p>Remaining condition on licence that subscription revenue must be predominant source of revenue.</p> <p>Although STV is not subject to the TV Standard 23, and are not required under their Codes, majority of STV advertisers have their adverts cleared by CAD.</p>
<b>AREAS OF DIFFERENCE</b>	Commercial networks have limits on advertising time; and classification time zones.	<p>STV Codes have provisions addressing licensee dealings with subscribers; including billing, fault repair, privacy and credit management.</p> <p>Requirements regarding the promotion and use of disabling devices are also covered.</p>