ADDRESS BY C.C. HALTON, SECRETARY TO THE DEPARTMENT OF COMMUNICATIONS TO THE AUSTRALIAN COMMUNICATIONS LAW ASSOCIATION ON 5 DECEMBER 1986

Ladies and gentlemen, I would like to thank your Association for inviting me to address this luncheon today. I will speak about the Government's policy of minimum regulation and the challenges this raises in the field of communications.

It is well known now that the various methods of communications available to us are coming together driven significantly by advances in data processing and data transmission.

In the "old days" the worlds of broadcasting, film, music, computing, publishing and telecommunications were self contained, separate in their traditions and practices. Today, these industries are finding themselves sub-industries of an overriding area of activity - information and communications. They continue to operate under different regulations and conventions, yet the continuing progression towards convergence of technology blurs regulatory distinctions and makes traditional structures seem inequitable or contradictory.

We are frequently confronted with conflicting "scenarios" for the future. For several decades technological optimists have emphasised the wonders of the so-called communications revolution. Pessimists have talked about the "electronic nightmare".

When television was first introduced into Australia it was seen as the beginning of a new communications era in this country. Television was regarded as the most effective means of communication known, with both a potential to contribute positively to the development of a better society or if uncontrolled, a threat to Australian society, as each new technological innovation is introduced there are similar references to new communications eras and similar predictions of dire consequences or untold benefits.

In the past decade or so technologies have developed which pose acute dilemmas for Governments. Some of the more dramatic technological developments have been in the areas of biotechnology, the new energy sciences, and communications and information technology.

Regulators have had difficulty in keeping pace with the problems which technological change presents. A recent writer (Weeramantry) described those responsible for the law as "the sleeping sentinels" because they are not equipped to deal with the issues arising from the rapid rate of scientific and technological advance. One of the major challenges for Government is to ensure that the benefits of technology are maximised and the negative consequences minimised.

The commercial application of satellites, lasers, digital techniques and optical fibres over the last 15 years, has created an environment where convergence is not only feasible but attractive on both social and economic grounds. As long ago as 1974 the 15th edition of the Encyclopaedia Britannica identified the 'technology of information processing and of communication systems' as the fifth of eight major fields of technology. Unfortunately the encyclopaedia is not required reading for regulators.

Recent Developments

The difficulties that regulators have in keeping pace with the problems raised by technological change are illustrated by the Federal Communications Commission's (FCC) hearings on computers. In its Computer I decision (1971) the FCC sought to distinguish between "data processing" and "communications services". It also adopted distinctions between "hybrid communications" and "hybrid data processing" services, both of which were mixed services involving elements of both data processing and communications capabilities.

The Computer II decision (1980) attempted to draw new boundary lines between "basic" and "enhanced" services. Corporations providing enhanced

services were required to do so through a fully separated subsidiary. The 1986 Computer III decision eliminated this structural separation.

Rather than drawing distinctions like these between services, the Japanese have adopted a regulatory approach based on a split between infrastructure (or facilities) and services. Convergence of technology however, makes these apparently simple distinctions, increasingly difficult to maintain.

The weakness of the present legal and regulatory framework developed in a more stable less dynamic period have received considerable attention. In a field which is broad and rapidly changing, it is very difficult to capture each piece, fit it neatly into some master plan and ensure that the pieces stay in place. The social, economic and technical regulatory issues associated with existing and new communications technologies and services have to be addressed in a manner which provides flexibility and does not inhibit new solutions.

The Department provides policy advice to the Minister for Communications on all matters related to the provision of postal, telegraphic, telephonic and other like services, including television and radio, which are subject to Commonwealth legislation for which the Minister is responsible. The Department also is responsible for the broadcasting infrastructure and has a planning, licensing and regulatory function in the administration of the electromagnetic spectrum.

The Department's statement of purpose now requires it to pursue 'economic and technological regulation to the minimum extent necessary' to achieve the Government's objectives. This reflects the Government's general stance on regulation, as well as the corporate view of deparmental management.

The key to the Government's approach is to look at the purpose which is served by regulation: Is regulation necessary? Do the benefits outweigh the costs? Do the regulations enhance efficiency? Do they, in general, serve the community? Cannot self-regulation achieve the same ends?

VAEIS: New Service: New Rules

The self regulatory framework which the Government has adopted for the introduction of the new video and audio entertainment and information services - commonly referred to as VAEIS - demonstrates how the use of today's technology to provide new services fits with an approach which stresses the minimum level of economic and technical regulation. In the broad context of meeting the challenge of regulating new applications of technology, the significance of the approach to VAEIS should not be underestimated.

On 2 September, 1986 the Minister for Communications announced that the Government had decided that a moratorium on pay-TV (i.e. subscriber services to households) would apply for at least four years. He also said that video and audio entertainment and information services to non-domestic environments would be introduced once guidelines had been determined.

VAEIS can be delivered by one or a combination of technolgies, such as terrestrial microwave multipoint distribution systems, AUSSAT transponders or Telecom's cable and microwave network. They can be authorised under the Radiocommunications Act 1983 and/or the Telecommunications Act 1975.

Club Superstation and Sky Channel are the first operational examples of VAEIS delivered via the AUSSAT system. The Minister for Communications has recently obtained expressions of interest from entrepreneurs wanting to distribute VAEIS services through MDS.

The 2 September, 1986 announcement foreshadowed the development of guidelines setting out content and technical licensing requirements for these new services, which would form the basis of a self-regulatory code of practice to be observed by service providers.

After a round of consultations with interested parties, these guidelines were tabled in Parliament on 17 October, 1986. Service providers give the Minister a written undertaking to comply with these guidelines before approval is given for the commencement of a service.

The primary aims of the guide-

lines are to protect the public interest and to provide for similar program standards where there are similarities in the nature of entertainment programs being offered by both free-to-air broadcasting services and the new services.

To meet the two primary aims, the guidelines refer to relevant Australian Broadcasting Tribunal standards as the basis for content and advertising requirements. Service providers are expected to observe the spirit and intent of these standards. Given the specific nature of some services, however, some standards will not apply in all cases.

Content requirements in the guidelines cover:

- Prohibition on cigarette advertising and restrictions on alcohol and gambling advertising
- Program classification
- Maintenance of levels of Australian content appropriate to the nature of the respective services
- Provisions to inhibit the removal from free-to-air broadcasting services of profitable areas of programming already available to the general public
- Annual reporting requirements.

In addition to these guidelines, service providers are, of course, subject to relevant Commonwealth, State and Territory laws - in particular those concerning copyright, gaming and betting, defamation, obscenity and blasphemy, trade practices, privacy and consumer protection.

Avenues for complaints are also outlined in the guidelines and service providers are required to report on compliance with the guidelines and to keep a complete record of all material transmitted for a period of six weeks after transmission.

The onus is on the providers to comply with the spirit and intent of the guidelines and thus ensure the success of the self-regulatory scheme.

We expect that the guidelines will be reviewed after 12 months - not only to see how well they are protecting the public interest but also if they are facilitating the introduction of new and varied services. It is against this backdrop that the success of any such self-regulatory approach must be assessed.

Television: Review of Existing Rules

A number of areas of existing social, economic and technical regulation also need scrutinising in terms of the Government's minimum regulation objective. For example, the arrangements surrounding ownership and control of broadcasting licences.

A report, Ownership and Control of Commercial Television: Future Policy Directions, by the Forward Development Unit (FDU) of the Department, suggests that the current system of ownership and control rules currently regulate the interests of many people who neither "own", nor "control", nor "influence" commercial television companies and therefore can have no effect upon program decisions. You will know that one of the Parliament's objectives in commercial broadcasting policy is to ensure diversity of choice of quality programs. The FDU report says that, to the extent that there is a need to regulate at all, that regulation should affect those who take programing decisions.

As the FDU report points out, current legislation in the Broadcasting Act 1942 also requires the Australian Broadcasting Tribunal (ABT) to apply artificial and inflexible criteria to many ownership transactions. This imposes a considerable regulatory burden on affected persons and on the ABT.

The FDU's report suggests there is a clear need to review enforcement provisions and associated administrative procedures, to simplify the regime and to make it more appropriate to modern commercial practice.

As you may know, the Minister has already invited comments on the FDU report. I hope that the comments will address such fundamental questions as "What principles should underlie the economic and social regulation of broadcasting?" If the answer to that

question includes "encourage competition" and "discourage monopolies", such principles would be likely to produce a very different regulatory regime from that first introduced thirty years ago.

ACS: New Services: Which Rules

The policy decisions this year on ancillary communications services illustrate how we are responding to the regulatory issues raised by converging technology. New technology is increasingly enabling the electromagnetic spectrum to be used in ways more efficient and previously available in theory but not in practice. The term "ancillary communications services" (ACS) refers to additional communications services carried on the same signal as a main broadcast service, and which depend for their existence on the transmission of the main service. Although ACS cannot be transmitted independently of the primary (or host) service, they may be quite distinct from it in content or purpose.

ACS are either broadcasting or non-broadcasting in nature, depending on the audience and the material being transmitted. They will therefore be licensed either under the Broadcasting Act, or under the Radiocommunications Act.

As potential ACS service providers develop their business plans, some interesting problems are bound to arise for the policy makers and for the regulators.

Radio Frequency Management

The introduction of new technology and services may also place increasing pressure on spectrum space and increase the likelihood of interference. The Department is developing a spectrum plan, based on the existing Australian table of frequency allocations, for adoption under the Radiocommunications Act and is establishing technical standards for some equipment likely to cause interference. Technical standards for cellular radio, cordless telephones and radio controlled toys are currently available for public comment.

Use of the spectrum by governments, companies, groups and individuals is regulated by the issue of licences and our basic objective is to ensure interference-free communications because the relevant parts of the electromagnetic spectrum are both finite and of vital importance to all radiocommunications. Without them 20th century transport, business, entertainment and social activities would be virtually impossible.

The Way Ahead

I mentioned earlier that it is very difficult to capture each piece of technology and fit it neatly into some master plan. At present traditional broadcasting services are regulated under the Broadcasting Act and other services like VAEIS are regulated under the Radiocommunications and Telecommunications Acts. If we were to move to some "Communications Master Plan", what would it look like?

Technology is being used in increasingly subtle ways and criteria and definitions developed in the past are not always an adequate guide. When is a service directed at a particular group of people "broadcasting" or simply a radiocommunications or telecommunications service?

How can we accommodate minimum regulation for person-to-person services, services to the general public and services designed for identified end-users?

Within such a framework, how do you ensure protection of the public interest?

Do the policy principles and assumptions developed in earlier days, still form an adequate basis for planning?

A question, then, I would like to put to you is what is the minimum level of regulation given the competing demands of:

- The dynamic nature of technological change
- Difficulties in adjusting the legal framework to technological change
- The desire to provide a flexible framework for encouraging incentive and opportunity for entrepreneurial

initiative and investment in new services, generating new employment opportunities

- Protection of the public interest

Obviously, duplicating existing regulatory regimes is not an acceptable answer. In addition, we need to maximise our use of existing legislation such as that relating to trade practices, defamation, consumer protection, obscenity and blasphemy.

So far as VAEIS are concerned, I am confident that the policy framework which has been adopted is a reasonable, pragmatic solution. The services are exciting and innovative applications of state of the art communications technology - and the adoption of a self-regulatory framework for both terrestrial and satellite applications is no mere coincidence. With the FDU report, too, the same trend is there - to prune existing regulations back as a means of making the regime more flexible and more appropriate to modern circumstances.

It is not only the domestic environment which provides regulatory challenges, we are seeing a trend towards the internationalisation of business activity. Companies are being bought and sold across national boundaries - a globalisation of mergers and acquisitions. This globalisation is occurring in finance, advertising, communications and entertainment. Technology is increasingy ensuring that no country can be comfortably isolationist. The associated legal issues - such as copyright, national sovereignty, content regulation - have already received considerable attention.

The world economy is becoming increasingly oriented to the production of services. Technology now enables worldwide networks to develop which link services, such as banking, with investment advice and credit rating services. Any service which can be reduced to electronic information can now be traded instantaneously anywhere in the world.

Conclusion

Farsighted technically literate lawyers and lawmakers are needed to develop regulatory frameworks designed to promote co-operation in an emerging international economy.

In meeting these challenges, the focus should be on the goals we are trying to serve. In achieving our objective of minimum regulation, whether by means of self-regulation, some legislative provisions or through deregulation, the policy goals should remain of paramount importance. To meet those policy goals through a minimum of regulation is my Department's objective.

GUIDELINES FOR PROVISION OF VIDEO AND AUDIO ENTERTAINMENT AND INFORMATION SERVICES

Preamble

Set out below are the VAEIS guidelines issued by the Minister for Communications.

"1. On 2 September, 1986 the Minister for Communications announced the policy framework for the introduction of Video and Audio Entertainment and Information Services. This announcement foreshadowed the development of guidelines setting out content and licensing requirements for these new services, which would form the basis of a self-regulatory code of practice to be observed by service providers. The Minister for Communications has now determined the Guidelines which are to apply.

2. For the purposes of these Guidelines, the following definitions apply:

- VIDEO AND AUDIO ENTERTAINMENT AND INFORMATION SERVICES (VAEIS) are transmissions of programs by telecommunications technology on a point to multipoint basis to identified categories of non-domestic environments. VAEIS may be funded by advertising revenue and/or charge for service and/or lease of equipment.

- NON-DOMESTIC ENVIRONMENTS include hotels, motels, registered clubs,