he notice seeking applications for the hird commercial television licence for he Perth Metropolitan Television area, ad the subsequent enquiry, being invalid nd void.

The Full Federal Court dismissed the ppeal, and a cross-appeal relating to the inister's duty to consult with existing icensees in relation to the development f television services in Australia by the ntroduction of a third licence in Perth.

All three members of the Court held hat on its proper construction, the B&T ct did not make consultation under s11C 1) a pre-condition of the validity of the otice and the enquiry. The majority, omposed of Beaumont and Sheppard JJ, con-idered that s11C(1)(a) imposed a statu-ory obligation on the Minister to formu-ate a policy in the area of the evolu-ion, growth or expansion of television ervices in Australia. Such obligation as independent of the Minister's other tatutory functions, such as his obliga-ion to issue a notice pursuant to s82 1). In performing his duty the Minister ad to consult with the existing licens-es. However, their Honours made it clear hat his failure to consult did not result in invalidity.

Mr Justice Sweeney considered that hen deciding whether or not to publish a otice under s82(1) of the B&T Act, the inister was discharging his responsibili-y to plan the development of television ervices in Australia. It was only in ar-iving at a decision to publish the notice hat the Minister had to consult with ex-sting licensees, not in deciding to pub-ishing it.

It is understood that TVW is seeking pecial leave to appeal to the High Court gainst this decision.

obyn Durie

FREEDOM OF INFORMATION DECISIONS

The following casenote concerning the Victorian Freedom of Information Act has been reprinted with the kind permission of the publisher of the Victorian Judgments Bulletin.

Ryder v Booth; Swinburne Ltd. v Booth; State Superannuation Board of Victoria v O'Connor (unreported Victorian Court of Appeal) Young CJ; Gray, King, JJ, June 26, 1985.

These appeals were heard together. The common issue was whether personal medical reports which each respondent had sought could properly be withheld by the State Superannuation Board because they came under the heading of "exempt" documents under s35(1) of the Act.

In each case, the Full Court dismissed appeals from County Court orders granting access to the reports.

Section s35 states:

> "A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister, and -
>
> (a) the information would be exempt matter if it were generated by an agency or a Minister; or
>
> (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minster to otain similar information in the future.

Section 30(1) states:

> "Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act -
>
> (a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has

taken place between the officer and a Minister, in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the Government: and

(b) would be contrary to the public interest.

The Court found the reports were confidential communications within the meaning of s35(f), and that they were used by the Board as part of its "deliberative processes".

The Court rejected an argument that to claim exemption under s30(1), it was unnecessary to satisfy the requirement in (b) that the disclosure would be contrary to the public interest.

Gray J said:

> "Although there are some difficulties in construing the related provisons of Sections 30(1) and 35(1), I prefer a construction of the sections which requires both limbs of Section 30(1) to be satisfied before an external document can be exempted under 35(1)(a)".

The "public interest" in the present context had 2 aspects: [1] the public interest in persons having access to documents, including confidential documents, which concern them but which are in the hands of an agency; [2] the public interest in the efficent and economical conduct of a government agency, Gray J said.

It was held that the appellants had failed to prove that the disclosure would be contrary to the public interest after a balancing of the two considerations. Gray J said this involved the negative conclusion that the evidence, at its highest from the appellants' viewpoint, did not show that the disclosure of the reports would affect the operations of the Board in any significant way.

As to whether disclosure would be contrary to "the limited aspect of public interest which is the subject of s35(1)-(b)," Gray J said the subsection was a "wordy" one which would have achieved its purpose if it had read: "the disclosure of the document would impair the ability of the agency to obtain similar information in the future". Thus, the onus was on the agency "to prove, upon the balance of probabilities, that disclosure would result in the impairment stipulated". This was clearly a question of fact.

Young CJ said:

> "The paragraph is not concerned with the question whether the particular doctor whose report is disclosed will give similar information in future but whether the agency will be able to obtain such information. There may well be feelings of resentment amongst those who have given information 'in confidence' at having the confidence arbitrarily destroyed by the operation of the legislation, but it is another thing altogether to say that they or others will not be sufficient to show that some people may be inhibited from reporting so frankly if they know that their report may be disclosed. More is required to satisfy the onus cast upon the agency by s55(2) of the Act".

Gray J said further indication that the Act required disclosure of the reports in question was clearly implied by s33(4) which provided a procedure for giving access to a nominated medical practitioner (instead of the patient) where the contents of a medical report could be prejudicial to a person's well-being.

It was put that as the s35(1)(a) point was not raised at first instance it could not be argued on the appeal. However, Young CJ and Gray J said where the point might have been met by evidence in the Court below; Sydney Harbour Trust Commissioners v Wailes 5 CLR 879 per Isaacs J at p889. Gray J did not consider that evidence before the County Court "would have been significantly different if the additional ground had been argued". King, J dissented on this point.

In stating that the purpose of the Act was "to create a general right of access to documentary information in the hands of Government agencies," Gray J observed that "difficulties of construction should be resolved with the stated intention of the legislature in mind".

Young CJ noted that while the Court had been referred to the 2nd Reading Speech of the Premier in the Legislative Assembly when the Bill for the Freedom of Information Act was being considered, this merely "expressed the principles and philosophy of the Bill, it was of no assistance in interpreting the sections with

which the Court is concerned, for it did not refer to those particular sections or clauses".

Gray J also said that statements contained in cases that were said to recognize the public interest in ensuring that sources of confidential information were not dried up by disclosure of documents being ordered (see Alfred Crompton Amusement Machines Ltd [1974] AC 405, 433-4; Conrho Ltd v Shell Petroleum Co. Ltd. [1980] 1 WLR 627, 638) had little relevance to the question whether the trial judge's finding in this case could be supported.

RIGHT DECISION - WRONG RESULT

The Definition of Public Broadcasting

The clarification given to s81(4) of the Broadcasting and Television Act 1942 ("B&T Act") and a recent decision by the full court of the Federal Court (Canberra & the District Racing and Sporting Broadcasters Ltd. v Canberra Stereo Public Radio Incorporated and Anor Unreported 16 October 1985) may, in light of forthcoming amendments, prove to be of no more than academic interest from a strictly legal point of view. However, it serves to focus attention on an essential question in the definition and operation of public broadcasting.

From its inception, one of the principle tenets of the public sector, was that broadcasting should be carried on for its own sake, and any notion that commercial considerations should influence programming decisions was, and continues to be, an anathema. Public Broadcasters readily accepted what political reality dictated: first, that they would not be able to sell on-air advertising but would be restricted to bland acknowledgments of sponsorship assistance, and secondly, that they should operate on a non-profit basis. Section 81(4) gave legislative shape to this second aspect:

> "A public broadcasting licence or public television licence shall not be granted except to a corporation formed within the limits of the Commonwealth or a territory, not being a corporation the objects of which include the acquisition of profit or gain for the benefit of its individual members."

That this was an imperfect rendering of the policy it was intended to embody was recognised early, and Mark Armstrong, in his Broadcating Law and Policy in Australia comments that it

> "Imposes no limit on the extent to which a public station may operate commercially or make a profit. For example, an educational public station could be oerated with the principle object of producing a profit for the university which actually controls it, provided the university avoided membership of the licensee. The effect of s81(4) is more symbolic than legal".

More than one aspirant licensee has appeared with the object of exploiting the earning power of a licence for non-broadcasting ends. These have invariably been laudable and non-commercial, including raising money for charities and cultural groups. But the dangers were dramatically illustrated early in Public Broadcasting's history when an intended public station, admittedly not licensed under present provisions, turned into a surrogate commercial operator. In consequence such proposals have been opposed by more established parts of the public broadcasting movement, and more significantly have been received with little favour by the Australian Broadcasting Tribunal.

The issue was not clearly raised until 1 February 1985 when the Tribunal granted a Public Broadcasting Licence, serving Canberra, to Canberra and District Racing and Sporting Broadcasters Ltd. (CDRSB). The driving force behind this association is the Australian Capital Territory Gaming and Liquor Authority with other members including horse racing, harness racing and grey hound racing clubs. The Authority operates the Canberra TAB and distributes a percentage of its takings to racing clubs in the Territory. In seeking to provide a racing and sporting service to the public in Canberra, members of CDRSB were keenly aware of the adverse effect the cessation of regular sporting broadcasts in the area had had on their incomes.

An unsuccessful applicant for the licence, Canberra Stereo Public Radio Incorporated, sought review of the Tribunal decision on the basis that CDRSB was precluded from holding a licence by virtue fo s81(4) of the Act. The Tribunal held that the section was limited in its effect to