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

excluding a corporation that had the object stated in the section as an object in its memorandum or articles of association. CDRSB was clearly not touched by the section on this interpretation as Clause 3 of its memorandum provides that no portion of its income and property shall be paid or transferred by way of dividend, bonus or otherwise to the members. The Tribunal's narrow interpretation was rejected unanimously both at first instance and on appeal in favour of the view that it was the objects that the corporation in fact had that were relevant for the purposes of the section. In the Full Court Lockhart J said:

> "... In my opinion the whole of the evidence as to the proposed business or function or the business or function actually being carried on by the Corporation may be examined by the Tribunal to determine its objects for the purposes of sub-section 81(4)."

At first instance, in a finding that was not subsequently disturbed, Sheppard J characterised the objects of CDRSB as follows:

> "In summary then, what the members of (CDRSB) and (CDRSB) itself hope to achieve from the grant of the licence is that more extensive broadcasting of race descriptions and racing results in the Australian Capital Territory will result in more off-course betting with the TAB and increase attendances at race meetings with the consequence of increased revenue to the racing, trotting and grey hound clubs ... There can be no question that the evidence establishes that the prime purpose of the company in seeking a licence is to foster racing in the Australian Capital territory ... The consequence will be increased revenue to the Authority and to the clubs."

The question therefore is whether such objects were within the section. Sheppard J held that they were.

It was clear that the section prevents a licence being granted to a corporation the objects of which include the acquisition by it of profit or gain for the benefit of its members, but this was not felt to be the case here. To reach the conclusion he did, Sheppard J, found that the sub-section had a wider application, extending to a corporation the objects of which included the acquisition by its members of profit or gain for the benefit of those members. Sheppard J was impelled to this interpretation by what he perceived as the policy of the B&T Act which he said required public broadcasting stations to operate "entirely in a non-commercial context". He said:

> "The words of a statutory provision must govern its construction. Nevertheless, the provision should be construed against the apparent policy of the enactment and not given a construction contrary to that policy unless the words can bear no other meaning ... It is the object or purpose of the company which is at the heart of the matter. In my opinion, the meaning the provision was intended to have was that the company was not to have as an object the acquisition, either by itself or by its members, of profit or gain for the benefit of those members. Such a construction does not involve any forcing of the language. All that is required is that the words "acquisition of profit or gain" be understood as meaning the acquisition of profit or gain either by company or by the members themselves. Such a meaning will give effect to the policy of The Act as I understand it."

The success of CDRSB's appeal was partly based on the Full Court Judges failing to discern this legislative policy. Lockhart J said:

> "For myself, I have difficulty discerning the legislative policy which his Honour found but to the extent that I can discern any legislative policy underlying sub-secion 81(4), I doubt if it goes so far that the holders of public broadcasting licences must operate entirely in a non-commercial context especially where they may derive revenue from sponsors and have to meet heavy establishment and running costs. Legislative policy is an elusive creature when one seeks to construe the Broadcasting and Television Act."

He continued:

> "But even if it be correct that the policy of the legislature is as found

by his Honour, in my opinion it would not lend to the construction of the sub-section which his Honour adopted."

Lockhart J construed the section according to what he held it means "in its ordinary and natural sense" which is he said:

> "That a public broadcasting licence shall not be granted except to a corporation the objects of which ... include the acquisition of profit or gain by it for the benefit of its members. I emphasise the words 'by it'. It is a provision designed to ensure that a corporation, the objects of which permit its funds or property to be applied in favour of its members whether by distribution of profits, return of capital or otherwise, is not eligible to hold a public broadcasting licence."

Fox J delivered a judgment to similar effect and Morling J agreed with both his brothers.

As a piece of statutory interpretation there is much to be said for this result. The interpretation given by the full court is that which most easily arises from the words of the section and the policy argued for by Sheppard J is not obviously manifest in the Act. That Sheppard's response in a broader context is more appropriate, however, is equally clear. If his exposition of policy is not fully supported by the statute, this in no way undermines its lucidity and perceptiveness.

The impetus behind public broadcasting is reformist. The intention is to reassert broadcasting values that center on service to listeners - particularly those not adequately served by other sectors. The overriding imperative is to be, and to remain, responsive to those listeners' needs and requirements. That this decision leaves open the possibility of other needs and requirements intervening is given eloquent expression in a hypothetical situation constructed by Sheppard in his judgment:

> "Suppose a shopping centre consisting of an art gallery, a bookshop, a record shop, a gourmet food restaurant, a wine cellar and an antique dealer. Further, suppose the proprietors of these businesses form a company in order to seek a public broadcasting licence, the purpose of which is to improve the community's knowledge of art, good books, good music, fine food and wine and antiques. In its application it projects a broadcasting station which will provide frequent talks and information about these matters. Each of the members of the company becomes a sponsor of it and, from time to time, has its name, address and nature of its business announced. Could there be any doubt that each business would gain from the station's activities or that a principal purpose of the station was to foster that gain."

The forces that would shape programming policy in such station are clear and differ little from those which operate throughout commercial broadcasting and increasingly in the ABC.

As indicated above, legislative reform is proposed. The wording of a new s84(1) or equivalent has yet to be revealed but the intention is that it will extend to profit or gain whether derived directly or indirectly. Whatever the final form the amendments take, it is to be hoped they give better statutory expression to the true nature of public broadcasting.

Chris Toppea

NEWS

GOVERNMENT WAIVES SALES TAX ON SATELLITE EARTH STATIONS

The Federal Government has announced that it will waive Sales Tax on Earth Stations domestic use brought to receive AUSSAT'S HACBSS and R.C.T.S Services. The saving will be at least $500.00, on those stations ranging in price from about $2,250.00.

The exemption will not apply to Earth Stations designed to receive signals from satellites other than AUSSAT.
