submission for consideration by Cabinet.

Section 36

The Tribunal then considered the question as to the extent to which s.36(1) had a role to play in relation to Cabinet documents. It commenced its discussion by pointing out that s.32 and a number of Tribunal decisions made it clear that, notwithstanding that the legislation made specific provision in relation to a class of documents, s.36(1) had to be applied if the facts called for its application. A limitation which the Tribunal had, however, sought to emphasise was that s.36 did not permit the making of 'disguised class claims'.

With this in mind, the Tribunal concluded that a document which did not fall within s.34(1) might nevertheless contain deliberative processes information the disclosure of which would be contrary to the public interest because it would breach the necessary confidentiality applying to the deliberations and processes of Cabinet. It therefore considered that, *always subject and having regard to the information contained in the document in question*, it was open to find that reasonable grounds of the kind made in the present certificate might exist under s.36.

The documents

Before analysing the documents in issue, the Tribunal considered the position with regard to what it referred to as 'co-ordination comments'. It found that a system existed for the addition to draft Cabinet proposals of submissions of co-ordination comments under the heading 'consultation'. It therefore followed that a co-ordination comment, prepared in proper form, would go before Cabinet as part of a Ministerial submission that was finalised and approved and would therefore come within the terms of s.34(1)(a).

The first document considered by the Tribunal was a memorandum of response to a request from an officer of the respondent for an input on certain matters for a particular Cabinet submission. Although it held there were no reasonable grounds for certificated claims under s.34(1)(a) or (d), the Tribunal found that the material in the document was drawn on in preparing a Cabinet submission, was reflected in a co-ordination comment and was itself the subject of particular comment in the submission. In view of this, it concluded that there were reasonable grounds for considering that it would be contrary to the public interest for the document to be disclosed.

The Tribunal also upheld certificated claims in respect of nine further documents.

RECENT DEVELOPMENTS

REVIEW OF VICTORIAN FOI ACT

The Legal and Constitutional Committee has received a reference from the Victorian Government to review the Freedom of Information Act. The Committee's terms of reference are as follows:

The Governor in Council under Section 4F of the *Parliamentary Committees Act* 1968 refers the following matter to the Parliamentary Legal and Constitutional Committee:

The *Freedom of Information Act*, in particular:

(a) examination of
— whether certain statutory officers are being adversely affected in the proper performance of their public duties by the accessibility of the documents of their agencies, and
— whether, there should be provision for exemption of agencies from the application of the Act and if so, which agencies,

(b) problems posed by voluminous and expensive applications and in particular whether limits need to be placed on such applications and especially
— whether access charges should be related to the cost of providing that access,
— whether members of Parliament should continue to have free access,
— whether the Act should provide a power to agencies to limit unreasonably voluminous requests, and
— the extent to which departmental priorities are being affected by Freedom of Information requests including relevant comparisons with the Commonwealth *Freedom of Information*.

(c) consideration of the means to preserve Cabinet confidentiality and to safeguard the confidentiality of working and other documents leading up to or forming part of the Cabinet process to ensure effective Government administration, and

(d) consideration of the interrelationship between the *Freedom of Information Act* and the *Public Records Act* for access to public records and in particular, the introduction of a general open access right for all non-personal documents based on the ten-year time limit referred to in section 28(2) of the *Freedom of Information Act*.

The Committee is required to report to Parliament by 31 December 1988.

Any person interested in making a submission to the Committee should forward it to The S cretary, Legal and Constitutional Committee, 19th Floor, Nauru House, 80 Collins Street, Melbourne 3000.

LITERATURE REVIEW

LEGAL AND CONSTITUTIONAL COMMITTEE 11TH REPORT ON SUBORDINATE LEGISLATION

In its 11th report on subordinate legislation the Legal and Constitutional Committee examined the Freedom of Information (Exempt Offices) Regulations 1987 and the Public Service (Unauthorised Disclosure) Regulations 1987. Its recommendations were that both should be disallowed by the Parliament.

Under s.14(1) of the *Subordinate Legislation Act* 1962 the Committee may report to Parliament where it considers that a statutory rule:

- does not appear to be within the powers conferred by the Act under which the statutory rule was made; does not appear to be within the general objectives, intention or principles of the Act under which the statutory rule was made;
  makes unusual or unexpected use of the powers conferred by the Act under which the statutory rule was made having regard to the general objectives, intention or principles of that Act; or

contains any matter or embodies any principles, which matter or principles should properly be dealt with by an Act and not by subordinate legislation.

The Committee first directed its attention to the FoI (Exempt Offices) Regulations. It found that there were a number of technical flaws in the regulations which meant that several of the offices made exempt under the regulations were in fact still subject to the Act. In the case of the Offices of Director of Public Prosecutions and the Auditor-General, the Committee observed that they were still subject to the Act by virtue of the definition of 'departments' in s.5(1). In the case of the Ombudsman, the Committee noted that his office had been expressly declared to be a Prescribed Authority by the Freedom of Information (Prescribed Authorities) Regulations 1983 and that, as these rgulations were still in force, they still applied to the office.

The Committee also came to the conclusion that the provision relied on by the Government to enable it to promulgate these was not within the regulation-making power contained in s.66 of the *FoI Act*. It commented that:

> As the *Freedom of Information Act* is couched in very specific terms, the Committee believes that the general regulation making power contained in s.66 should be interpreted narrowly. Having regard to the stated objects of the Act, the Committee believes that these regulations 'attempt to depart from or vary from the plan which the legislature has adopted to attain its ends' (*Shanahan v Scott*).

In view of this conclusion, the Committee considered that the regulations contravened several provisions of s.14 of the *Subordinate Legislation Act* and recommended that regulations 2 and 5 be disallowed by Parliament.

The Committee next turned its attention to the Public Service (Unauthorised Disclosure) Regulations 1987. In *Re Birrell and Department of the Premier and Cabinet (No. 3)* (reported in this issue) the Administrative Appeals Tribunal ruled that the regulations were not a secrecy enactment which attracted the protection of s.38 of the *FoI Act*. The Committee also had serious doubts about the validity of the regulations. Clearly influenced by the decision in *Birrell*, the Committee reinforced the Tribunal's view that the regulations appeared to be *ultra vires*. It noted that there were significant inconsistencies with regard to the definitions of the persons to whom they applied and that they attempted to extend to persons who were not public servants. The Committee also made the following observations about the regulations.

- that they conflicted with s.28 of the *FoI Act* in breach of s.14(i)(j) of the *Subordinate Legislation Act*;
- that they did not appear to be within the general objectives, intention or principles of the *Public Service Act* contrary to s.14(i)(c)
- that they made unusual or unexpected use of powers conferred by the *Public Service Act* and therefore contravened s.14(i)(d); and
- that they contained matter which should not be dealt with by legislation and therefore contravened to s.14(i)(e).

Criticism was levelled at the Premier for issuing a Premier's Certificate in respect of this statutory rule. The affect of the Certificate was that the preparation of a regulatory impact statement was not required. The Committee had recommended in an earlier report that a Premier's Certificate should only be issued in circumstances where regulations were required because of an emergency or in exceptional circumstances in which the public interest compelled that the statement should be dispensed with. In this case, the Committee saw no reason why a regulatory impact statement should not have been prepared.

In view of its findings, the Committee had no hesitation in recommending that both regulations should be disallowed.

The Victorian Government subsequently took the necessary steps through the Governor-in-Council to prevent the Committee's recommendations from taking effect. The regulations therefore are still in force notwithstanding the serious concerns about their validity.

OVERSEAS DEVELOPMENTS

US FOI CASE RESULTS IN RELEASE OF CHALLENGER PAYOUT

After several months of preparatory sparring, the FOIA appeal filed by several news organisations to force the Justice Department to release the settlement agreements worked out with four of the families of the Challenger astronauts has been settled. The appeal, which looked like it had the potential to break new ground in the area of privacy rights of the relatives of dead persons, was settled a few weeks after the district court judge let the parties know in no uncertain terms that he wanted them to work out an agreement.

As soon as the hearing began February 18, Judge Charles Richey started probing the parties, attempting to find some common ground satisfactory to both sides. The plaintiffs, including NBC News, the Associated Press, and the *Concord Monitor*, quickly let Richey know that they would be satisfied with the aggregate figure of the settlement, the amount paid by Morton-Thiokol, and the terms of the agreement with any information identifying payouts to individual families or family members deleted. The Associated Press added a caveat that it wanted the figures broken out in terms of the payments to military and civilian families. The government's attorney was unwilling to make any commitments until she had time to discuss the issue with her supervisors. She suggested trying to come to an agreement within a matter of days, but Richey indicated that he wanted to reach a settlement within 24 hours if possible.

Having the judge prod them into a settlement may have been the best solution for both sides. The government had withheld the documents under three exemptions, mainly Exemption 5 (discovery privileges) and Exemption 6 (invasion of privacy); the government also claimed Exemption 4 (confidential business information) for materials concerning Thiokol. Richey told the government's attorney that he was going to rule against it on the use of (b)(5) to incorporate a settlement privilege, noting that 'I've already ruled against you before and I'm not going to change my mind'. It also became clear that Richey would not accept an Exemption 4 argument. However, he showed obvious concern about the privacy issues involved, pointing out