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

that if individual settlement figures were released it could lead to harassment of the families by individuals trying to cash in on the settlement. He also observed that much of the policy positions for the settlement would be protected by the work-product privilege.

Even though both sides gave in a bit, what the media gained was clearly a victory in terms of the news value of the information. For the first time, press and public learned that the settlement was for $7.7 million, $4.6 million of which was paid by Thiokol. Even more interesting was the fact that none of the families were officially represented by attorneys; the group received informal assistance from Leo Lind, law partner of Steven McAuliffe, whose wife Christa died in the accident. Further, it was the government that negotiated with Thiokol on behalf of the families; there were no direct meetings between Thiokol attorneys and the families. Interestingly, the agreement between the government and Morton-Thiokol contained a standard clause noting that 'neither this Agreement nor its terms and conditions will be disseminated to the public at large, and the United States will use appropriate defenses to its disclosure under the *Freedom of Information.*

The settlement which included a $3.1 million contribution from the government, also becomes somewhat ironic in light of the fact that other families not involved in this settlement have managed to settle directly with Thiokol, with no contribution from the government. Last month the government had itself dismissed as a defendant in a suit brought by the family of Michael Smith after the court ruled the government could not be sued for wrongful death because Smith had been on active military duty at the time of his death. *(NBC v Department of Justice*, Civil Action No. 87-1134 and *Sniffen v Department of Justice*, Civil Action No. 87-1517).

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# SELECTED READING

**Selected Reading**
**Compiled with the assistance of Lee Poh York, Monash University Law Library**

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