IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A4 of 2011

BETWEEN:

10 **AUSTRALIAN EDUCATION UNION**

Appellant

and

DEPARTMENT OF EDUCATION AND CHILDREN'S SERVICES

Respondent

20 **WRITTEN SUBMISSIONS OF THE RESPONDENT**

Part I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. The issue for determination in this case can be stated in terms of the first question reserved by the Industrial Relations Commission of South Australia[1] for the 30 consideration of the Full Bench of the Industrial Relations Court of South Australia, namely:

> Did section 9(4) of the *Education Act 1972* (SA), at the time that it was in force, authorise the Minister to appoint officers to be engaged as teachers, or did section 15 of the Act provide exclusively for the appointment of teachers?

Put slightly differently: between 14 December 1972[2] and 21 February 2005[3] was it the case that only members of the teaching service within the meaning of s15 of the *Education Act 1972* (SA) (the Act) could be appointed to teaching positions, other than 40 those in non-government schools in South Australia?

3. The Full Bench held that s9(4) did authorise the Minister to appoint teachers independently of s15 of the Act.[4] The Full Court of the Supreme Court of South

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1 Pursuant to s214 of the *Fair Work Act, 1994* (SA).
2 The date upon which the relevant Parts of the *Education Act 1972 (SA)* came into operation.
3 The date of cessation of the practice of appointing teachers to teach in government schools pursuant to s9(4) of the Act.
4 *Australian Education Union v Department of Education and Children' Services* [2009] SAIRC 37 at [44] (Jennings SJ and Gilchrist J), [59] (McCusker J).

Australia upheld that conclusion.[5] The question for this Court is: was the Full Court correct in upholding the Full Bench.

4. In the Full Court, Gray J, with whom Nyland J agreed, held that "[i]nsofar as the powers in s15 and s9(4) both relate to the appointment of 'teachers', s9(4) is an auxiliary power to that conferred by s15."[6] The purpose of s9(4), their Honours held, was to provide a "power of additional appointment to address the diverse and unpredictable employment requirements necessary for the proper administration of the Act and the welfare of students. There is no good reason why "teachers" should be excluded from this."[7] Vanstone J considered the words "in addition to" not to be words of limitation. Her Honour held the expression to be conjunctive or expansionary in effect, rather than preclusive.[8]

5. The Respondent[9] contends that the Full Court was correct in its conclusion.

Part III: IS A S78B NOTICE REQUIRED?

6. The Respondent agrees with the Appellant that this matter does not require the issue of a notice under *s78B Judiciary Act, 1903* (Cth).

Part IV: CONTESTED FACTS

7. The Respondent supplements the Appellant's summary of facts by adding:

7.1 The factual background against which the two reserved questions fell for determination was presented to the Full Bench in a statement of agreed facts

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5 *Australian Education Union v Department of Education and Children' Services* [2010] SASC 161 at [1] (Nyland J), [33] (Gray J), and [53] (Vanstone J).

6 *Australian Education Union v Department of Education and Children's Services* [2010] SASC 161 at [1] (Nyland J), [29] (Gray J).

7 *Australian Education Union v Department of Education and Children's Services* [2010] SASC 161 at [1] (Nyland J), [31] (Gray J).

8 *Australian Education Union v Department of Education and Children's Services* [2010] SASC 161 at [52] (Vanstone J).

9 The Department of Education and Children's Services is not the employing authority and is not correctly named as the Respondent in these proceedings. Since 1 September 2009, pursuant to Regulation 4 of the *Fair Work (General) Regulations*[9], the Chief Executive, Department of Premier and Cabinet is the "declared employer" of "public employees" for the purposes of the *Fair Work Act 1994* (SA). Teachers are "public employees" as defined in s4 of the *Fair Work Act 1994* (SA):

> ***public employee*** means—
>
> (a) a public sector employee, within the meaning of the *Public Sector Act 2009*(SA), employed under, or subject to, that Act; or
>
> (b) any other person employed for salary or wages in the service of the State;

The position as of 5 March 2007, when the dispute was notified to the Industrial Relations Commission of South Australia, was that "declared employer" was the Commissioner for Public Employment by virtue of the Regulation 4 of the *Industrial and Employee Relations (General) Regulations* 1994 as it then was.

(including 4 annexures) and a second document entitled, 'Proposed Additions to Statement of Agreed Facts' (including a 2 further annexures).[10]

7.2 Since the enactment of the Act, two particular classes of teacher have been employed under s9(4). Those classes are, temporary or contract teachers, and temporary relieving teachers. A contract teacher was one employed for a specified period of not less than 20 consecutive duty days but not more than one school year. A temporary relieving teacher was a teacher who was employed for half a day or for half days up to a maximum of 19.5 consecutive duty days.

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7.3 The document entitled 'Proposed Additions to Statement of Agreed Facts' and related annexures details the service records of two teachers each employed periodically during the relevant period as contract teachers or temporary relieving teachers.

7.4 From time to time since 1972, the calculation of the entitlements of teachers appointed under s9(4) and the treatment of those teachers, as a consequence of the application of the different regime, have been the subject of debate. That said, the issue as to the power of the Minister to appoint teachers to government schools
20 otherwise than in the exercise of the power contained in s15 of the Act did not arise until around 2005 when the Minister announced that henceforth he would not resort to the power contained in s9(4).

7.5 A teacher appointed to the teaching service under s15(1) is entitled to long service leave calculated in accordance with Part III Division III of the Act as amended. Section 22(2) of the Act deals with interruption to service, occasioned by events other than resignation and dismissal, without affecting long service leave entitlements.

30 7.6 Assuming the appointment of a teacher pursuant to s9(4) to be valid, such teacher is not a member of the teaching service nor a member of the public service.[11] Consequently any entitlement to long service leave for such teacher is not calculated in accordance with either the Act nor, prima facie, the *Public Service Act, 1967* (SA) and its successors. The question of whether a teacher appointed pursuant to s9(4) is entitled to long service leave, as of when, and on what conditions, potentially requires in the individual case a consideration of the terms of the teacher's contract of service, the terms of any applicable award or industrial agreement, the subsequent application of the *Public Service Act 1967* (SA) and/or its successors to such

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10 Notification of the dispute was given pursuant to section 19(1)(e) of the *Fair Work Act 1994* (SA) to the Industrial Registrar of the Industrial Relations Commission of South Australia on 5 March 2007. On 30 May 2007 the Commission agreed that there would be a referral of a question of law to the Industrial Relations Court of South Australia for determination pursuant to section 214 of the *Fair Work Act 1994* (SA) and the Commission referred two questions of law on 21 August 2007.

11 Section 8(1)(h) of the *Public Service Act, 1967* (SA) excluded any teacher appointed under the *Education Act, 1915* (SA) except insofar as the Governor may proclaim otherwise under s8(2). By operation of Sch 1 cl 1(1)(i) of the *Public Sector Management Act 1995* (SA) an officer or employee appointed by the Minister under the Act was excluded from the public service. This clause was amended by the *Statutes Amendment (Public Sector Employment) Act 2006* (SA) No. 41 of 2006 whereby the reference to "the Minister" was replaced with "the employing authority". Currently section 25 (2) (k) of the *Public Sector Act 2009* (SA) excludes an employee appointed by the employing authority under the Act from the public service.

teachers by reason of relevant amendment or the extension of the application thereof by proclamation, and, absent such proclamation, the possibility that the *Long Service Leave Act, 1987* (SA) applies to employees of the Crown whom otherwise have no entitlement.

7.7 The point is that in a given case it may be an oversimplification to state that the essential difference between a teacher appointed to the teaching service and a teacher appointed under s9(4) is the more generous nature of the period of interruption allowed officers of the teaching service (2 years)[12] without losing continuity of service for the purposes of calculating long service leave.[13] In most cases, particularly those arising in more recent times this will be the case, but it will not necessarily be so in all cases extending back to 1972.

Part V: APPLICABLE STATUTORY PROVISIONS

8. The Respondent accepts that the applicable legislation is as assembled by the Appellant and annexed to its written submissions.

9. The resolution of this appeal concerns the interrelationship of s9(4) and s15 of the Act. Both formed part of the Act when first enacted. The Act was the product of an extensive and detailed revision of its predecessor, the *Education Act 1915-1971* (SA) (the 1915 Act).[14] The 1915 Act did provide for the employment of teachers, the terms and conditions of their employment and their deployment but did not do so through the mechanism of a teaching service to which teachers were appointed.

10. As to s9(4):

10.1 In its original form it appeared in Part II of the Act entitled, "The Minister and the Department". It provided:

> The Minister may appoint such officers and employees (in addition to the officers of the Department and of the teaching service) as he considers necessary for the proper administration of this Act or for the welfare of the students of any school.[15]

10.2 The section was amended in 1986.[16] The words, "officers of the Department and of", were struck out and the words, "employees and officers of the Department and", substituted. Section 9(4) then read until its repeal in April 2007:[17]

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12 See s22(2) of the Act. As to the origins of the generous period of interrupted service see the speech of the Minister for Education upon the Second Reading of the *Education Bill*, Parliament of South Australia, House of Assembly, Hansard, 15 November 1972 at 3108.

13 By way of comparison, from 17 July 2005 (the commencement date of the *Public Sector Management Act 1995* (SA)) a public sector employee is permitted an interruption in service of 3 months without losing continuity of service for the purposes of the calculation of their long service leave entitlements; *Public Sector Management Act, 1995* (SA), Sch 2, cl 12. This remains the position; *Public Sector Act 2009* (SA), Sch 1, cl 10.

14 Parliament of South Australia, House of Assembly, Hansard, 15 November 1971, at 3107.

15 The second reading speech for the Act offers no assistance in the proper interpretation of section 9(4). Clause 9 of the Bill was not mentioned in the speech at all: Parliament of South Australia, House of Assembly, Hansard, 15 November 1972, at 3107.

16 *Education Act Amendment Act 1986* (SA), s5.

> The Minister may appoint such officers and employees (in addition to the employees and officers of the Department and the teaching service) as he considers necessary for the proper administration of this Act or for the welfare of the students of any school.[18]

11. The "officers of the teaching service" referred to in s9(4) are those appointed under s15 (and, by virtue of s4(7) of the Act as originally passed, any persons holding office as teachers under the repealed 1915 Act). The "officers of the Department" referred to in the original version of s9(4) were those officers appointed pursuant to Division IV of the *Public Service Act 1967*(SA), and referred to in s11(4) of the Act. The change in terminology to "employees of the Department" can be explained by the repeal of the *Public Service Act 1967* and its replacement with the *Government Management and Employment Act 1985* (SA)[19] which did not reproduce the definition of an "officer" found in the earlier Act, but instead referred to "employment in the Public Service".[20]

12. As to s15:

12.1 It is and has always been in Part III of the Act entitled, "The Teaching Service". Originally it provided:

> (1) Subject to this Act, the Minister may appoint such teachers to be officers of the teaching service as he thinks fit.
> (2) An officer may be so appointed on a permanent or temporary basis.
> (3) The first appointment of an officer to the teaching service may be made upon probation.
> (4) The probation shall be for such period not exceeding two years as may be determined by the Minister.
> (5) No officer appointed on a permanent basis (other than an officer appointed on probation) shall be dismissed or retired from the teaching service except in accordance with the provisions of this Act.
> (6) An officer appointed on a temporary basis or appointed on probation shall hold office at the pleasure of the Minister.

12.2 There have been a number of amendments to sub-ss (4), (5) and (6) of s15, so that prior to the repeal of s9(4) in 2007, s15 read:

> (1) Subject to this Act, the Minister may appoint such teachers to be officers of the teaching service as he thinks fit.
> (2) An officer may be so appointed on a permanent or temporary basis.
> (3) The first appointment of an officer to the teaching service may be made upon probation.
> (4) The probation shall be for such period of effective service (not exceeding two years of effective service)[21] as may be determined by the Minister.

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17 *Statutes Amendment (Public Sector Employment) Act 2006* (SA), s30. A similar provision can now be found in section 101B(1) of the current consolidation of the Act. Section 101B(1) currently provides:

> The employing authority may appoint such other officers and employees (in addition to the employees and officers of the Department and the teaching service) as appear to the employing authority to be necessary for the proper administration of this Act or the welfare of the students of any school.

This is identical to s 9(4) except for the substitution of the words "employing authority" for "Minister" and the addition of the word "other".

18 This amendment commenced on 1 December 1987.

19 That Act was later replaced by the *Public Sector Management Act 1995* (SA).

20 *Government Management and Employment Act 1985* (SA), Division V. See also, the speech made on the second reading of the *Education Act Amendment Bill*; Parliament of South Australia, House of Assembly, Hansard, 21 August 1986 at 553.

21 Section 12(a) of the *Education Act Amendment Act 1979* (SA) deleted the words "*such period not exceeding two years*" and inserted in lieu thereof the words in bold.

(5) No officer appointed on a permanent basis[22] shall be dismissed or retired from the teaching service except in accordance with the provisions of this Act.
(6) An officer appointed on a temporary basis[23] shall hold office at the pleasure of the Minister.

13. Both "teacher" and "the teaching service" are defined in s5 of the Act (as it stood prior to the repeal of s 9(4)) as follows:

teacher means a person who gives or is qualified to give instruction in any course of —
pre-school education; or
primary education; or
secondary education;
the teaching service means the teaching service constituted under Part 3, and includes the teaching service as constituted under the repealed Act.[24]

14. Originally the definitions of "teacher" and "the teaching service" read as follows:

teacher means any person who gives, or is qualified to give, instruction at any Government or non-Government school.
the teaching service means the teaching service constituted under Part III of this Act.

Part VI: THE RESPONDENT'S ARGUMENT

15. At issue is whether s9(4), properly construed, authorised the Minister to appoint teachers or whether s15 provides an exclusive power for the appointment of teachers. This question requires this Court to determine the proper interpretation of s9(4) "at the time that it was in force", that is, at all times between 14 December 1972[25] and 31 March 2007.[26]

16. The starting point is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and legislative purpose.[27] Context and legislative purpose cast light upon the sense in which the words of the statute are to be read.[28] Further, s22(1) of the *Acts Interpretation Act 1919* (SA) requires that a construction that would promote the purpose or object of Act, whether or not it is expressly stated, is to be preferred.

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22 The words "*(other than an officer appointed on probation)*" were deleted by s 12(b) of the *Education Act Amendment Act 1979* (SA) and replaced with the words *(other than on officer on probation)*, which were in turn deleted by s 2(a) of the *Education Act Amendment Act 1980* (SA).

23 The words "*or appointed on probation*" were deleted by s 2(b) of the *Education Act Amendment Act 1980* (SA).

24 These definitions were substituted by the *Education Act Amendment Act 1976 (No 2)* (SA), s 3(f) and (g).

25 See section 2(1) and *Government Gazette*, 14 December 1972, 2628.

26 Section 9(4) was deleted by s 30 of Act No 41 of 2006, which came into operation on 1 April 2007.

27 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at 35, [4] (French CJ), 46-7 [7] (Hayne, Heydon, Crennan and Kiefel JJ).

28 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41 (2009) 239 CLR 27 at 35, [4] (French CJ), 46-7,[7] (Hayne, Heydon, Crennan and Kiefel JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

A. Some general observations

17. The Act is the primary mechanism through which the primary and secondary educational needs of all children of the State of South Australia are to be met.[29] Part II of the Act, entitled, "The Minister and the Department", burdens the Minister with the very great responsibility of meeting those needs.[30] For this purpose he is given powers that are broad and extensive and the assistance of a Department.[31] The diverse matters of the content and structure of courses, the various modes of teaching, the varied circumstances and needs of both students and teachers, and the administrative, logistical and financial support required all demand that the Minister be given broad powers in order to discharge his responsibilities. It is in s9 that the bulk of the Minister's powers are located; the breadth of language used therein reflects the nature of the Minister's responsibilities. It also suggests that the powers should be read widely.

18. Part III of the Act creates the teaching service. During the relevant period the Minister[32] was empowered to appoint such teachers to be officers of the teaching service as he thought fit.[33] An appointment could be either temporary or permanent.[34] Section 16 empowered the Minister to retrench officers of the teaching service where a reduction in staff was necessary in the interests of economy. However, an officer could appeal a decision to retrench him or her to the Teachers Appeal Board. Section 17 empowered the Minister to transfer or retire an incapacitated officer but only after receiving a recommendation from the Director-General. Again, officers were given the protection of a review by the Appeal Board. Long service leave benefits were secured for officers of the teaching service by ss 19-24. Section 25 allowed officers to retire on reaching the age of 55. Section 26 provided for the disciplining of officers of the teaching service. The Director-General could reprimand, fine, reduce remuneration, transfer or suspend for cause.[35] The Minister could dismiss on the recommendation of the Director-General.[36] An appeal lay to the Appeal Board.[37] The Director-General could suspend pending an investigation.[38] Section 28(1) empowered the Director-General to reclassify a position. Decisions made on reclassification applications could be referred to a review panel established by the Minister.[39] Section 53 prescribed a procedure for the appointment of persons to promotional positions and allowed officers of the teaching service an appeal to the Appeal Board against an adverse recommendation.

19. The combined effect of these provisions makes it reasonably clear that the purpose of Part III was to ensure the establishment and maintenance of a high quality teaching service. It did so by granting rights to officers of the teaching service and powers to the

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29 Higher education (except as provided for by a State university), vocational education and training, adult community education and education services for overseas students are provided for by the *Training and Skills Development Act 2008* (SA).

30 Ss 6 and 9.

31 Ss 7-13.

32 As of 1 April 2007 the employing authority has been the Chief Executive of the Department. Where these submissions refer to powers vested in the Minister they should be read as referring to the position prior to 1 April 2007.

33 S 15(1).

34 S 15(2).

35 S 26(2).

36 S 26(3).

37 S 26(5).

38 S 27.

39 Ss 29 & 30.

Minister, the Director-General and to review bodies that act as checks and balances calculated to promote a professional teaching service of high standard. Further, that corpus of teachers was to be available in order that the Minister could at all times discharge his responsibilities.

B. Section 9(4)

i. The ordinary and grammatical sense of the language of s9(4)

20. The Appellant contends that the phrase "*in addition to the employees and officers of the Department and the teaching service*" are words of limitation to be construed as providing for the appointment of officers and employees who are not teachers, as all teachers are appointed under s15, and are not officers of the Department, as officers of the Department are appointed under s11(4) of the Act.

21. For the Appellant's interpretation of s 9(4) to be accepted, the use of the phrase "*in addition to the employees and officers of the Department and the teaching service*" as contained in parenthesis must be interpreted in such a way that appointments made pursuant to s 9(4) do not and cannot include teachers of any type. Hence it is submitted that "in addition to" be construed as meaning "apart from".

22. The Macquarie Dictionary definition of "*in addition to*" is "*as well as*".[40] This phrase was considered in *Wheeler v Kelly*.[41] There this Court considered that the words mean no more than "*as well as.*"[42] The Respondent contends that, as in *Wheeler v Kelly*, there is no obvious reason to read these words other than as supplementary, conjunctive or expansionary in their intended operation *i.e.* as meaning "as well as".[43]

23. The Appellant contends that reason to read the words "in addition to" as meaning "apart from" is to be found in s15 and s11(4) of the Act. This submission should not, with respect, be accepted.

23.1 As to s15, the Appellant contends that the fact of the creation of the teaching service indicates that it is to be the sole repository of teachers in South Australia from which appointment to government schools may occur. However, there is nowhere in the Act a command to the Minister to the effect that he may not employ a teacher to teach in a government school who is not a member of the teaching service. It must be observed that s15(1) is not a power to appoint teachers to teach in schools. It is a power to appoint teachers to the teaching service. The "*teaching service*" as defined is not the same as the teaching profession generally.

23.2 The Appellant further contends that if s9(4) can be resorted to as a means of appointing teachers to the teaching service then it adds nothing to the work to be done by s15(1). The Respondent does not contend that s9(4) may be resorted to appoint teachers to the teaching service and the Minister has not done so. The

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40 The Macquarie Dictionary, 2nd Revised Edition (1990 Reprint).

41 *Wheeler v Kelly* [1956] HCA 5; (1955) 94 CLR 206

42 *Wheeler v Kelly* (1955) 94 CLR 206 at 212

43 As the members of the Full Court did; *Australian Education Union v Department of Education and Children's Services* [2010] SASC 161 at [1] (Nyland J), [29]-[30] (Gray J), [52] (Vanstone J).

Respondent contends that s9(4) empowers the Minister to engage teachers to teach in government schools who are not members of the teaching service.[44]

23.3 Good reason exists not to construe s9(4) as the Appellant contends. The contingencies that the Minister is required to account for in the discharge of his responsibilities renders it impractical that everyone that teaches in the government system must be a member of the teaching service. True it is that a member of the teaching service may be a "temporary" appointment.[45] An officer appointed on a temporary basis holds office at the pleasure of the Minister.[46] However, the power to appoint a teacher to the teaching service temporarily would not permit the appointment of a teacher who is greater than 65 years of age, or who does not want to submit to other obligations that attach to being a member of the service.[47] In any event the Respondent submits that the relevant question is not whether there is some sort of employment of teachers which is not properly provided for by s 15(1), rather it is whether the particular words used in the sections and their context in the overall Act requires that s9(4) be read down to exclude the power to appoint persons as teachers. The power to appoint "temporary officers of the teaching service" in s15 does not require that s9(4) be so read down.

23.4 As to s11(4), it is not a power conferred on the Minister. It picks up powers conferred elsewhere such as under the *Public Service Act 1967* (SA)[48] and its successors, the *Government Management and Employment Act 1985* (SA)[49], the *Public Sector Management Act, 1995* (SA)[50], and the *Public Sector Act 2009* (SA).[51] If anything, s11(4) highlights the breadth of the power conferred by s9(4) and the fact that "in addition to" should be construed as meaning "as well as".

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44 The distinction was accepted without criticism in *Cusack v Parsons* (1988) 48 SASR 364. There the issue was whether or not the Teachers Appeal Board had jurisdiction to hear an appeal from a teacher who was not a member of the teaching service (i.e. a teacher appointed under s9(4)). Jacobs J (at 366) said, after discussing the meaning of the word "*teacher*":

> It is important to notice the width of that definition: it embraces all persons with the stated qualifications and is not confined to teachers in departmental or governmental schools, and indeed the Act in Pt IV, dealing with registration of teachers, speaks clearly to all such qualified teachers whether employed in government or non-government schools, or not employed at all. It is equally important to notice, however, that "teachers" in departmental schools are not necessarily officers in the teaching service. They may be "employees" appointed and engaged by the Minister pursuant to cl 9(4). They are there distinguished from "employees of the Department" and in everyday usage (but not in the Act), are sometimes referred to as "contract teachers"."

Millhouse J agreed with Jacobs J. Although Cox J dissented on whether the Teachers Appeal Board had jurisdiction to hear the matter, as to s 9(4), his Honour said (at 374):

> ... the Act thus makes a clear distinction between those teachers who are officers of the teaching service and those who are not.

45 S 15(2).

46 S 15(6).

47 Examples referred to by the Full Court; *Australian Education Union v Department of Education and Children's Services* [2010] SASC 161 at [32] (Gray J), [48] (Vanstone J).

48 Part III Div IV.

49 Part III Div V.

50 Part VII Div II.

51 Part VII Div III.

24. The Respondent's interpretation of s9(4) of the Act is supported by the distinction drawn in the Act between teachers on the one hand, and "officers of the teaching service" on the other. Just as it is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise[52], where Parliament could have used the same word or group of words but chose instead to use a different word or group of words the clear inference is that it intended to convey a different meaning.[53] It follows that where the word "*teacher*" is used in the Act, it means teacher whereas "*officer of the teaching service*" means something different.

ii. Context

25. As indicated above, s9(4) is positioned amongst the general powers conferred upon the Minister. Those powers are framed in terms conferring the broadest discretion. Those powers and s9(4) should not be read narrowly, minded in particular of the breadth of responsibility given to the Minister.

26. The power to appoint in s 9(4) is conditional upon the Minister being satisfied that such appointment is necessary either for the "proper administration of this Act" or for "the welfare of the students of any school". The former phrase refers to what is done under an Act in order to carry out the purposes of that Act. The persons who do the daily work are administrators. When one speaks of conducting "a matter necessary for the proper administration of the Act", the natural meaning is that that is a reference to actual activities required by the Act to be done in order to carry out some aspect of the overall purposes of the Act. The Act is an "*Act to make proper provision for primary and secondary education in this State; and for other purposes*". The employment of teachers is obviously a matter necessary for the proper administration of the Act. The proper administration of the Act requires the provision of teachers to teach in diverse circumstances.

27. The breadth of the power contained in s9(4) is further illustrated by its exercise also being linked to the welfare of the students in any school.

28. It might be argued that if the Respondent's interpretation of s9(4) is accepted, theoretically the Minister could appoint all teachers pursuant to s9(4) and thereby avoid the more generous long service leave provisions. That ignores the limitation upon the power contained in s9(4). Section 9(4) allows for the appointment of such officers and employees as the Minister considers "*necessary for the proper administration of this Act or the welfare of the students of any school.*" The Minister cannot employ people pursuant to s 9(4) without properly considering whether the employment is necessary for the proper administration of the Act or for the welfare of the students of any school. If the Minister were to appoint a teacher pursuant to s 9(4) for the sole purpose of avoiding the provisions in Part 3 of the Act, that would amount to an abuse of the power in s 9(4) and would be subject to review.

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52 *Registrar of Titles (WA) v Franzon* [1975] HCA 41; (1975) 132 CLR 611 at 618 (Mason J)

53 *Craig Williamson v Barrowcliff* [1915] VLR 450 at 452.

C. *Section 15*

29. Section 15 allows the Minister to appoint such "*teachers to be officers of the teaching service*" as the Minister considers appropriate. To be appointed to the "*teaching service*", a person must be a "*teacher*" as defined in s 5(1).

30. The "*teaching service*" does not mean the teaching profession as it is generally understood – it means the teaching service constituted under Part 3. It follows that while a person must be a teacher to be appointed to the teaching service, not all teachers will be officers of the teaching service. As indicated above, the distinction is important.

D. *Anthony Hordern, ss 9(4) and s15*

31. The Appellant relies on the principle that, having been given a specific power to appoint teachers under s15(1), the Minister cannot avoid the protections afforded to teachers so appointed by instead utilising the more general power of appointment in s9(4).[54] This principle was enunciated by the High Court in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* where Gavan Duffy CJ and Dixon J said:

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.[55]

32. The principle was discussed further in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*.[56] In that case Gummow and Hayne JJ said:

> *Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the "same power", or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the applicability of the other apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions.[57] (footnotes omitted)

33. The Appellant's submission relies on a mis-characterisation of both s15 and s9(4). The power in s15(1) does not include a fetter or limitation on the Minister's power of appointment – the power is to make such appointments as the Minister "thinks fit". The

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54 The rationale for the rule is in part captured in the maxim, *expressum facit cessare tacitum* (when there is express mention of certain things, then anything not mentioned is excluded). It is a 'rule' of construction not of law. The surer guide to construction is the text, its subject, scope and purpose; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at 586-7 [54] (Gummow and Hayne JJ).

55 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; (1932) 47 CLR 1, at 7; See also *R v Wallis; ex parte Employers Association of Wool Selling Brokers* [1949] HCA 30; (1949) 78 CLR 529, at 543-544 and *Leon Fink Holdings Pty Ltd v Australian Film Commission* [1979] HCA 26; (1979) 141 CLR 672, at 678.

56 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566

57 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566, at 589, [59] (Gummow and Hayne JJ). See also *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30; (2009) 238 CLR 489 at 502-3, [40]-[41] (The Court).

rights and obligations that attach to a teacher on appointment as an officer of the teaching service are not limitations of the power of the Minister to appoint such officers, they are merely consequences that flow from the appointment.

34. Section 9(4) on the other hand, is not a general power of appointment equivalent to some residual prerogative power. Rather, it is a specific power to appoint "such officers and employees (in addition to the officers of the Department and of the teaching service) as [the Minister] considers necessary for the proper administration of this Act or for the welfare of the students of any school". There is no relevant limitation in s15(1) which is avoided by the mechanism of appointing teachers pursuant to s9(4). As between the two powers of appointment, it is s9(4) that is fettered. Section 9(4) is only a "general power" in the sense that it authorises appointments of various types, so long as they are relevantly considered to be necessary.

35. Further, s15 is not a power to appoint teachers – it is a power to appoint teachers *as "officers of the teaching service"*, with all the obligations and entitlements that that entails. There is no provision in the Act which requires all teachers employed as such to be officers of the teaching service – the Minister is given an unfettered discretion as to which teachers will be appointed to that office. The Appellant's contention fixes upon the practical consequence of an appointment under s9(4) i.e. that a teacher who is not a member of the teaching service teaches in a government school. It does not address whether the subject matter of the power is in law substantially the same.[58]

36. In the Respondent's submission, the wording of s9(4) itself contradicts the narrow interpretation advocated by the Appellant. The sub-section specifically contemplates that officers appointed under s9(4) will be "in addition to" the officers of the teaching service, and that their appointment will be necessary, either for the proper administration of the Act or the welfare of students. Both s9(4) and s15(1) were included in the Act, and by these words in s9(4) Parliament's intention that that sub-section provide a power of appointment which would be in addition to that existing in s15(1) was made clear.

37. In the Respondent's submission the existence of two separate powers to appoint persons to teach – one involving an unfettered discretion to appoint teachers as officers of the teaching service (s15(1)), the other involving a more limited power to appoint as officers or employees persons whose appointment the Minister "considers necessary for the proper administration of this Act or for the welfare of the students of any school" (s9(4)) – does not create any conflict. Rather, the co-existence of the two distinct powers is consistent with the purposes of the statute as a whole – that is, it provides to the Minister the flexibility necessary properly to provide for the educational requirements of the students of government schools. The words of Gleeson CJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* are apposite:

> ... The provisions of s 501(2), on the one hand, and ss 200 and 201 on the other, are not repugnant, in the sense that they contain conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations. They create two sources of power, by which a person in the position of the respondent may be exposed, by different processes, and in different

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58 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566, at 589, [61] (Gummow and Hayne JJ).

> circumstances, to similar practical consequences. There is nothing novel, or even particularly unusual, about that. It does not of itself mean that only one source of power is available. ...[59]

E. The 1991 Amendment to the Act

38. Although s9(4) itself was only amended once prior to its repeal, the context in which the provision must be considered, that is the full text of the Act, has changed considerably during the relevant period. Consideration of the proper meaning of s9(4) therefore requires a consideration of the impact, if any, of amendment.[60]

39. The *Education (Part-time Remuneration) Amendment Act 1991* (SA) provided for amendments to the Act which included the insertion of a new s101A. That section clarified the remuneration due to part-time officers and employees, as well as the inclusion of a specific power to make regulations in respect of persons employed under s9(4). In the second reading speech for that amending Act, the Minister for Education stated that:

> The Bill provides for the denial of both retrospective and prospective salary claims and extends to any category of teacher or employee employed on a part-time basis. This includes casual teachers who, unlike the permanent teachers appointed under section 15 of the Education Act ('officers of the teaching service'), are engaged under contracts of service pursuant to section 9(4) of the Act.[61]

40. This statement clearly contemplates that the Act will continue to provide alternative bases for the appointment of teachers – either to the teaching service pursuant to s15(1), or otherwise under s9(4). This of itself may be neither here nor there,[62] but the breadth of application of the inserted provision, s101A, mirrors the breadth of application of s9(4) as contended for by the Respondent.

F. The Dispensing Power of the Executive

41. The Full Court did not elevate the desirability of administrative flexibility to a quasi-rule of construction. The Full Court correctly construed the two sections in context and by adopting the natural and ordinary meaning of the words used in each of the sections.

42. The Full Court was entitled, and indeed obliged, to consider the Act as a whole as well as its subject, scope and purpose.[63] It is well established that in construing a statute, it is to be viewed as a whole.[64] The purpose requires consideration of the language and purpose of the Act and should begin with an examination of the context of the provision

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59 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566, at 571, [2].

60 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* [1995] HCA 44;(1995) 184 CLR 453, at 479 (McHugh and Gummow JJ). As O W Holmes Jr wrote in, 'The Theory of Legal Interpretation' (1898-99) 12 Harv LR 417, "... you let whatever galvanic current may come from the rest of the instrument run through the particular sentence."

61 Parliament of South Australia, House of Assembly, Hansard, 15 November 1990 at 1943.

62 *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at [32] (The Court).

63 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at 587 [54]-[55] (Gummow and Hayne JJ).

64 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

in question, where "context" includes the existing state of the law and the problem that the statute was intended to remedy.[65]

43. The Full Court properly considered those matters in concluding that s9(4) "was designed to allow persons to be appointed who were considered necessary for the education scheme to function, that is, additional to the officers of the Department and the teaching service".[66] The Full Court concluded that the evident purpose was to allow the additional appointees to attend to the proper administration of the Act and the welfare of the students of any school and that it was the intention of Parliament to ensure that the Minister was equipped to do what was necessary for the provision of primary and secondary education in the State of South Australia. The reasoning is, with respect, correct.

44. In the *Trading Hours case*,[67] the result turned on the use of the word "exemption" and the fact that an "exempt shop" was defined by reference to considerations such as floor area and the nature of the goods or services offered for sale rather than trading hours. Further s13 of the relevant Act dealt precisely with trading times. In other words, having regard to the Act as a whole and the context of the relevant provisions, it was found that there was a single method of altering trading hours in a district. That is not this case.

45. *Jarrat v Commissioner of Police (NSW)*[68] is equally unhelpful. It was submitted by the Respondent in that appeal that the plaintiff's appointment was by prerogative and his removal was accordingly not subject to the requirements of procedural fairness. This Court found that in fact the plaintiff's appointment was a statutory one and that the previous common law rules had been modified.[69] The issue was whether the exercise of the statutory power of removal was conditioned on the observance of the rules of natural justice. In the absence of plain words excluding those rules, the answer was yes.[70]

46. *Jarrat* is not authority for the proposition for which the Appellant contends. The issue was not between two alternative statutory powers of appointment. The issues were first, whether the plaintiff's appointment was by prerogative, and secondly, whether his removal was conditioned on compliance with the rules of natural justice.

47. In no sense does resort to s9(4) have the result that s15(1) and the terms and conditions of an officer appointed to the teaching service are dispensed with. Section 9(4) is not a power to appoint teachers to the teaching service and s15 is not an exclusive power to appoint teachers. The two are not in conflict. The object of the teaching service is not subverted.

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65 *Kennon v Spry, Spry v Kennon* [2008] HCA 56; (2008) 238 CLR 366 at 440 [218] (Keifel J) and the authorities cited.

66 *Australian Education Union v Department of Education and Children's Services* [2010] SASC 161 at [30].

67 *Shop Distributive & Allied Employees Association v the Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552.

68 *Jarrat v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 224 CLR 44.

69 *Jarrat v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 224 CLR 44, at 52 [10] (Gleeson CJ); 68 [85] (McHugh, Gummow and Hayne JJ); 95-6 [157] (Heydon J).

70 *Jarrat v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 224 CLR 44, at 56-57[24]-[28] (Gleeson CJ); 70 [85]-[87] (McHugh, Gummow and Hayne JJ); 81 [139], 88-89 [141]-[144] (Callinan J).

G. Conclusion

48. A reading of s15 and s9(4) reveals that, properly construed, these provisions allow the Minister to elect to either appoint teachers to the teaching service (on a permanent or temporary basis) or to appoint teachers to teach outside of the teaching service, depending on the view of the Minister as to the form of appointment that will, in the opinion of the Minister, best meet the requirements of the proper administration of the Act.

49. To promote the objects of the Act, s9(4) should be read widely and in accordance with the natural and ordinary meaning of its words to provide the Minister with power to employ persons to teach without appointing those persons as officers of the teaching service from time to time.

50. The primary object of the Act is to make proper provision for education in the State. A broad interpretation of s9(4) achieves that purpose. This interpretation should be preferred, particularly when regard is had to s22 of the Act*s Interpretation Act 1915*.

51. It should not be assumed that the consequences of being appointed under s 9(4) of the Act, rather than as an officer of the teaching service under s15(1), are to the detriment of the teacher concerned. There are duties and obligations, as well as entitlements, that flow from appointment as an officer of the teaching service that do not apply to a teacher employed under s9(4). An example of this is the expectation that an officer of the teaching service will serve in any part of the State.[71] In contrast a teacher may contract, under s9(4), for service for a particular time, at a particular school.

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71 See for example reg 41(5) of the *Education Regulations 1976*, and reg 8(5) of the *Education Regulations 1997*.