HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

ALAN DAVID JOHN KLEIN APPELLANT

AND

MINISTER FOR EDUCATION RESPONDENT

Klein v Minister for Education
[2007] HCA 2
1 February 2007
P31/2006

ORDER

Special leave to appeal is revoked.

On appeal from the Supreme Court of Western Australia

Representation

C P Shanahan SC with N J Mullany for the appellant (instructed by Butcher Paull & Calder)

B W Walker QC with D J Osborn for the respondent (instructed by Blake Dawson Waldron)

CATCHWORDS

Klein v Minister for Education

Statutes – Interpretation – Meaning and effect of s 175 of *Workers' Compensation and Injury Management Act* 1981 (WA) – Application to public authority – Section 175(1) deemed a principal who contracts with a contractor to be the employer of a worker employed by the contractor, and made principal jointly and severally liable to pay compensation for which contractor was liable to the worker – Section 175(3) provided that a principal was not liable unless work on which worker was employed at the time of disability was "directly a part or process in the trade or business of the principal" – Pt IV Div 2 contained provisions constraining awards of common law damages in actions for damages against a worker's employer brought independently of the Act – Minister contracted with company to provide security at schools – Appellant was employed as security guard by company – Appellant was injured while pursuing intruder at school – Appellant sued Minister as occupier of premises at which appellant injured – Whether s 175(1) deemed the Minister to be the appellant's employer – Whether work on which appellant was employed at time of injury was "directly a part or process in the trade or business" of Minister – Whether effect of deeming provision was to apply constraints on damages in Pt IV Div 2 to appellant's claim.

Practice and procedure – Grant of special leave to appeal – Whether matters of statutory interpretation arose without reconsideration of the law as stated in *Hewitt v Benale Pty Ltd* (2002) 27 WAR 91 – Whether special leave should be revoked – Relevance of common ground between the parties – Relevance of refusal by High Court to permit enlargement of grounds of appeal – Relevance of supervening amendment of the legislation – Relevance of duty to quell the controversy brought to the Court by the parties.

Words and phrases – "deemed employer", "directly", "directly a part or process in the trade or business of", "employee", "principal".

Workers' Compensation and Injury Management Act 1981 (WA), Pt IV Div 2, ss 6, 175(1), 175(3), 175(7).
Interpretation Act 1984 (WA), s 8.
Occupiers' Liability Act 1985 (WA), s 5.
Workers Compensation for Accidents Act 1900 (NZ), s 15.

1 GLEESON CJ. The facts and issues, and the course of proceedings in this Court, appear from the reasons of Kirby J.

2 I feel no difficulty about deciding the question of construction considered by the primary judge, and the Court of Appeal of the Supreme Court of Western Australia, upon the assumption, made in both those courts and accepted by the parties in their written submissions in this Court, that *Hewitt v Benale Pty Ltd*[1] was correctly decided. The Justices who refused special leave to appeal in that case regarded the statutory language, upon which the decision was based, as intractable. At the least, the construction adopted in *Hewitt* was fairly open, the decision has been followed in later cases, and its correctness has been assumed and acted upon by the Parliament of Western Australia. There is no occasion to re-open the issue it decided.

3 In my view, the conclusion reached by the Court of Appeal in the present case was correct, for the reasons advanced in argument in this Court on behalf of the respondent, which largely reflected the reasons given by Wheeler JA. The work on which the appellant was engaged was directly a part or process in the respondent's trade or business within the terms of s 175(3) of the *Workers' Compensation and Rehabilitation Act* 1981 (WA), having regard to s 6 of that Act. The outcome does not turn upon a distinction between "core" and "incidental" aspects of the respondent's powers. As was submitted by the respondent, the word "directly" prescribes the required close nexus between the relevant work and the relevant exercise of a power or performance of a duty of a statutory authority. In the present case, that nexus was satisfied, having regard to the nature of the work and the width of the authority's statutory powers.

4 I would dismiss the appeal with costs.

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1 (2002) 27 WAR 91.

5 GUMMOW, HAYNE AND HEYDON JJ. As originally enacted[2], the *Workers' Compensation and Injury Management Act* 1981 (WA) ("the Act") dealt with the subjects of rights and liabilities relating to payment of workers' compensation, and the compulsory insurance of employers against liability for work-related death and injury. The Act dealt with the subject of common law remedies for such death or injury only by provisions directed against the recovery and retention of both workers' compensation entitlements and damages recovered independently of the Act.

6 In 1993, the Act was amended by the *Workers' Compensation and Rehabilitation Amendment Act* 1993 (WA), ("the 1993 Amendment Act") by inserting, among other provisions, Div 2 of Pt IV (ss 93A-93F)[3]. That Division was entitled "Constraints on awards of common law damages".

7 The purposes of the Act as originally enacted, and the Act as amended by the 1993 Amendment Act, were radically different. As originally enacted the Act was remedial and beneficial to workers. As amended, the Act had those beneficial purposes, but also had purposes of constraining recovery of damages in actions brought against employers independently of the Act.

8 Special leave was granted in this matter to permit the agitation of questions about the construction of s 175, a provision contained in the Act as originally enacted. Section 175 was contained in Div 2 of Pt X of the Act. Part X of the Act concerned insurance; Div 2 of Pt X concerned insurance by principals, contractors, and sub-contractors. Section 175 provided:

> "**175. Principal contractor and sub-contractor deemed employers**
>
> (1) Where a person (in this section referred to as the principal) contracts with another person (in this section referred to as the contractor) for the execution of any work by or under the contractor and, in the execution of the work, a worker is employed by the contractor, both the principal and the contractor are, for the purposes of this Act, deemed to be employers of the worker so employed and are jointly and severally liable to pay any compensation which the

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2 As the *Workers' Compensation and Rehabilitation Act* 1981 (WA).

3 Division 2 of Pt IV was subsequently amended and now comprises ss 93A-93S.

contractor if he were the sole employer would be liable to pay under this Act.

...

(3) The principal is not liable under this section unless the work on which the worker is employed at the time of the occurrence of the disability is directly a part or process in the trade or business of the principal.

...

(7) Where the disability does not occur in respect of premises on which the principal has undertaken to execute the work or which are otherwise under his control or management, subsections (1) to (6) inclusive do not apply."

9 Section 175(3) qualified the operation of s 175(1). The particular questions sought to be raised in the appeal to this Court focused particularly upon s 175(3), and what is meant by "directly a part or process in the trade or business of the principal" when, as in the present case, the principal is a public or statutory authority. Section 6 of the Act provided that "[t]he exercise and performance of the powers and duties of a local government or other public, or statutory authority shall, for the purposes of this Act, be treated as the trade or business of such local government or other authority."

10 To focus upon what is meant, in s 175(3), by "directly a part or process in the trade or business of the principal" when the principal is a public or statutory authority, assumes that the provisions of s 175(1) of the Act would otherwise be engaged in a relevant respect. Section 175(1) could be engaged in this case if, and only if, the deeming effected by that provision ("both the principal and the contractor are, for the purposes of this Act, deemed to be employers of the worker so employed") applied to those provisions of Div 2 of Pt IV which constrained awards of common law damages in actions for damages against a worker's employer brought independently of the Act.

11 The Full Court of the Supreme Court of Western Australia held in *Hewitt v Benale Pty Ltd*[4] that the deeming, by s 175(1), of both principal and contractor to be employers of the worker, applied to enlarge the reach of the expression a "worker's employer" when that expression is used in the provisions of Div 2 of Pt IV and, in particular, in s 93B(1), which identifies the application of the

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4 (2002) 27 WAR 91.

division "to the awarding of damages against a worker's employer independently of this Act". The consequence of reading the Act in this way was that the constraints on damages, provided by Div 2 of Pt IV, were applied to actions, like the present, where an injured worker brought action, independently of the Act, against a person who, although not the worker's employer, was deemed by s 175 to be an employer of that worker. An application was made for special leave to appeal to this Court against the orders made in *WMC Resources Ltd v Koljibabic*, a case heard and determined by the Full Court at the same time as *Hewitt v Benale Pty Ltd*. That application was refused[5].

12 After the conclusion of the litigation that culminated in that unsuccessful application for special leave, the Western Australian Parliament amended Div 2 of Pt IV of the Act. In particular, the *Workers' Compensation Reform Act* 2004 (WA) ("the 2004 Reform Act") inserted a new sub-s (5)[6] in s 93B to provide:

> "(5) In the context of a cause of action arising on or after the day on which section 79 of the *Workers' Compensation Reform Act 2004* comes into operation, a reference in the other subsections of this section to the worker's employer does not include a reference to a person who is the worker's employer only because of section 175."

That change to the Act was evidently made on the assumption that, conformably with the Full Court's decision in *Hewitt v Benale Pty Ltd*, s 175 would otherwise operate to deem certain persons to be employers and thus curtail the rights of workers to make claims against those persons independently of the Act. The change made to s 93B, by the 2004 Reform Act, left the assumed operation of s 175 unaffected in respect of causes of action arising before the day on which s 79 of the 2004 Reform Act came into operation (14 November 2005).

13 To construe s 175, it would be necessary to examine the place that the provision occupied in the Act as a whole, both when the Act was first enacted, and as it has been amended from time to time. It is only against that understanding that it would be possible to say what is meant by the reference to the deeming, for the purposes of the Act, of the principal and the contractor to be employers of the worker. The assumption underpinning the Full Court's decision in *Hewitt v Benale Pty Ltd* was that the expression "for the purposes of this Act,

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5 *Koljibabic v WMC Resources Ltd* [2003] HCATrans 427.

6 This sub-section was later amended by s 13 of the *Workers' Compensation Legislation Amendment Act* 2005 (WA) to include reference to s 175AA.

deemed to be employers" should be given an ambulatory operation[7]. The decision proceeded on two related bases. First, "the purposes of this Act" were not confined to those purposes for which the Act was originally enacted (of providing for compensation for injured workers and requiring insurance against the risk of liability to pay compensation or damages for such injuries). Secondly, "the purposes of this Act" were not limited by the immediately succeeding words of s 175(1) creating joint and several liability in those deemed to be employers "to pay any compensation which the contractor if he were the sole employer would be liable to pay under this Act".

14 The particular questions advanced in the present matter, about what is meant by "directly a part or process in the trade or business of the principal" when that principal is a public or statutory authority, cannot be addressed without considering the validity of the conclusion reached, and the assumptions which underpinned the reasoning, in *Hewitt v Benale Pty Ltd*. In particular, the qualification provided by s 175(3), to the ambit given to the deeming which is worked by s 175(1), is necessarily affected by whether s 175 is to be understood as a section amplifying and extending rights to recovery of workers' compensation, or is to be understood as a section which does that but also cuts down the availability of causes of action and remedies independent of the Act.

15 The Western Australian legislature's evident reliance on the correctness of the decision in *Hewitt v Benale Pty Ltd*, coupled with the closing of the class of cases in which issues of the kind sought to be agitated in this matter can arise, make it inappropriate for this Court now to consider whether to disturb the state of the law as stated in *Hewitt v Benale Pty Ltd*.

16 Special leave to appeal should be revoked. The matters which lead to the revocation of leave not having emerged at the time the application for special leave was heard and granted, the costs of the proceedings in this Court should lie where they fall.

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7 (2002) 27 WAR 91 at 104-105 [74]-[76] per Hasluck J.

17 KIRBY J. Originally, this appeal, brought by special leave[8], concerned the meaning of the adverb "directly" in s 175(3) of the *Workers' Compensation and Rehabilitation Act* 1981 (WA) ("the Act"). That issue was presented by a decision of the Court of Appeal of Western Australia[9]. That decision was adverse to the entitlement of Mr Alan Klein ("the appellant") to bring proceedings against the Minister for Education of Western Australia ("the Minister") for damages for personal injury. The Court of Appeal, proceeding on the basis that the Minister was the appellant's deemed employer pursuant to ss 6 and 175 of the Act, treated the case as subject to restrictions imposed by the Act[10] limiting the availability of common law damages against an employer to circumstances which concededly did not apply in the appellant's case[11].

18 At all stages in these proceedings below, both parties accepted that the prohibition and limitations on the bringing of such proceedings against a deemed employer such as the Minister, provided by the Act, applied to the case. However, the appellant submitted that, on the particular facts of his case, he was not employed at the time of the occurrence of his disability in work which was "*directly* a part or process in the trade or business of the [Minister]"[12], and for that reason, fell outside s 175 of the Act. That argument was accepted at trial[13]. It was on that basis alone that the primary judge (Nisbet DCJ) concluded that, in relation to the Minister, the appellant was not "caught by the provisions of Division 2 [of Pt IV] of the … Act"[14]. That was the conclusion which was reversed by the Court of Appeal[15] in an unanimous decision (Wheeler JA; Steytler P and Pullin JA concurring). The issue so presented became the sole question argued on the application for special leave to appeal. It was the only

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8 Granted by Gummow and Hayne JJ and myself. See *Klein v Minister for Education* [2006] HCATrans 469.

9 *Minister for Education v Klein* [2005] WASCA 185.

10 Pt IV, Div 2 of the Act (s 93E), which was inserted by the *Workers' Compensation and Rehabilitation Amendment Act* 1993 (WA), limits the recovery of damages to cases where the degree of disability is not less than 30%. See further these reasons below at [26].

11 The concession was repeated before this Court in the argument of the appeal. See [2006] HCATrans 576 at 970.

12 The Act, s 175(3) (emphasis added).

13 *Klein v Minister for Education* [2004] WADC 153.

14 (2004) 37 SR (WA) 328 at 338 [33].

15 [2005] WASCA 185.

ground upon which special leave to appeal was granted. Unsurprisingly, it alone was addressed in the written submissions of both parties.

19 During oral argument of the appeal a second issue emerged as a result of questioning by the Court. This was whether, apart from the meaning of the word "directly" in s 175(3) of the Act, a true construction of the Act might yield a conclusion that Pt IV, Div 2 did not apply to the relationship between the appellant and the Minister in any case. If that were so, the importation of the Act's prohibition and limitations on the bringing of an action for damages for personal injury against the Minister would not apply. The appellant would be entitled to proceed with his action, uninhibited by the provisions of the Act. This issue addressed attention, not to the word "directly" in s 175(3) of the Act but to the word "employer" in s 93B(1) of the Act, by which Pt IV ("Civil proceedings in addition to or independent of this Act") is applied:

> "… to the awarding of damages against a worker's *employer* independently of this Act in respect of a disability suffered by a worker [and] caused by the negligence or other tort of the worker's *employer* [in respect of which] compensation has been paid or is payable … under this Act"[16].

20 Both parties to the appeal resisted the new point when members of the Court presented it to them[17]. Eventually, however, sensing the way the wind was blowing, the appellant sought leave to amend his notice of appeal to raise this alternative attack on the application of Pt IV, Div 2 to his action for damages[18]. The Court considered the application. By majority, the application for leave to amend the notice of appeal was refused[19]. Ominously, the appellant was then put on notice that he had to argue the question whether the grant of special leave should be revoked.

21 A majority of this Court has now decided that special leave should be revoked[20]. I disagree. In my opinion, the Court should decide the appeal which

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16 The Act, s 93B(1) (emphasis added).

17 See [2006] HCATrans 576 at 1252 (appellant); [2006] HCATrans 576 at 2813-2821 (respondent).

18 [2006] HCATrans 576 at 1635.

19 [2006] HCATrans 576 at 2246 per Gleeson CJ.

20 Reasons of Gummow, Hayne and Heydon JJ ("joint reasons") at [16].

the parties came to argue. The suggested ground of revocation of special leave does not enjoy merit. It should not be entertained[21].

22 It follows that there are now two issues for decision in this appeal. The first is whether special leave should be revoked. If this issue is decided in the negative, a second issue arises, namely, whether the Court of Appeal erred in a material way in the decision challenged in the appeal. Both of those issues should be answered in the negative.

The facts

23 The appellant was employed as a security guard in Western Australia by Falcon Investigations and Security Pty Ltd ("Falcon"). In February 1999, Falcon contracted with the Minister to provide security to designated public schools in the State. The appellant's work was carried out as part of Falcon's contract with the Minister. During the night of 1 November 1999, at a primary school in Perth, responsibility for which fell within Falcon's contract, the appellant chased a youth whom he had seen smashing windows in the school. The intruder fled into knee-high grass within the school grounds. Whilst pursuing him, the appellant fell, occasioning injury. However, he restrained the intruder who, like himself, was injured as a consequence of running into a mound of concrete that had been deposited in the grass on the school grounds, but which was obscured by the height of the grass and a lack of lighting. The appellant's injuries were found to include a fractured patella. He was unable to return to his employment with Falcon.

24 The appellant sued the Minister in the District Court of Western Australia. His amended statement of claim made no reference to any duty on the part of the Minister arising from the Minister's status as his employer. It did not include any claim against Falcon, as his employer. The claim was pleaded against the Minister solely as occupier of the school premises in which the appellant had been injured. Relevantly, it relied on a claim based on s 5 of the *Occupiers Liability Act* 1985 (WA), concerned with the duty of an occupier of land to protect an entrant upon the land "in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on the premises and for which the occupier is by law responsible"[22].

25 It was on this footing that the Minister was liable in law to pay damages to the appellant. He rejected a defence of

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21 cf reasons of Gleeson CJ at [2].

22 *Occupiers Liability Act* 1985 (WA), s 5(1). By s 4(1) the provisions of s 5(1) apply "in place of the rules of the common law".

contributory negligence[23]. He awarded damages in an amount just over $100,000. None of these issues is now in contest.

26 The sole defence that remained alive, until this case reached this Court, was that propounded by the Minister at trial, namely that he had contracted with Falcon for the execution of security work; that this extended to the security of the premises in question; and that the work on which the appellant was employed when he suffered his disability was "directly a part or process" in the Minister's "business of the provision of educational services". On this basis, the Minister said that he was "the deemed employer" of the appellant pursuant to s 175 of the Act and, in consequence, that the appellant had no entitlement to an award of damages against him as "the deemed employer". The Minister claimed that the appellant's action had failed to comply with s 93E(3) of the Act, which limited the award of damages in such cases to those involving a serious "degree of disability[24]". It was common ground that the appellant's disability was not of the specified degree of seriousness.

27 As has been said, the appellant's reply to this defence, virtually to the end of the proceedings, was not that a potentially "deemed employer", such as the Minister, was not the "employer" for the purposes of Pt IV, Div 2 of the Act, including s 93E(3). It was that those provisions did not apply on the particular facts because the Minister was not liable as a "deemed employer" by reason of the fact that the "work on which the worker [was] employed at the time of the occurrence of the disability" was not "directly a part or process in the trade or business of the [Minister]".

The decisional history

28 *In the District Court*: The primary judge, after a review of authority[25] in Western Australia[26], concluded in terms that adopted a meaning of the word "directly" that the appellant urged on this Court:

> "… I have difficulty in seeing how the engagement of a security patrolman to patrol the defendant's capital assets is in any way a part or process in the trade or business of the principal: namely the defendant, in providing public education. True it is that a serious enough break-in with theft of equipment or an arson would disrupt the defendant's operations,

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23 (2004) 37 SR (WA) 328 at 333-334 [16].

24 The Act, s 93E(3), was later amended.

25 (2004) 37 SR (WA) 328 at 337 [33].

26 (2004) 37 SR (WA) 328 at 336-337 [29]-[31].

> but it is no more part of the defendant's trade or business than the provision of security by way of night patrols by security patrolmen in a used car yard could be said to be part or process in the trade or business of selling second-hand cars, and certainly, in my opinion, it cannot be said that a security patrolman is performing work which is directly a part or process in the trade or business of this defendant."

29 It was on this basis that the appellant succeeded at trial. However, the Minister appealed to the Court of Appeal.

30 *In the Court of Appeal*: Wheeler JA saw the resolution of the issue in the appeal as depending upon particular provisions appearing in s 6 of the Act by which the "trade or business" of a public authority, such as the Minister, is defined:

> "The exercise and performance of the powers and duties of a … public, or statutory authority shall, for the purposes of this Act, be treated as the trade or business of such … [an] authority".

31 Both the primary judge[27], and Wheeler JA in the Court of Appeal[28], noted that, whilst the *Education Act* 1928 (WA) ("the Education Act") did not contain provisions in the nature of a list of powers and duties of the Minister, it did include a number of relevant provisions indicating what those powers and duties included. Thus the long title of the Education Act was "[a]n Act to consolidate and amend the law relating to public education *and for incidental and other purposes*" (emphasis added). Section 5 of that Act constituted the Minister as a body corporate capable (relevantly) of "acquiring, holding [and] leasing … real … property" and "doing and suffering all such other acts and things as may be necessary or expedient for carrying out the purposes of this Act".

32 Moreover, by s 9 of the Education Act, the Minister is granted specific powers, including a power to "continue and *maintain* and *carry on* any Government schools … deem[ed] necessary or convenient for public education and the purposes of this Act" (emphasis added). These provisions convinced both the primary judge[29] and Wheeler JA[30] that the Minister's engagement of Falcon and its security services, for the purpose of protecting government schools, became part of the Minister's "trade or business" by reason of s 6 of the

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27 (2004) 37 SR (WA) 328 at 336 [24].

28 [2005] WASCA 185 at [8].

29 (2004) 37 SR (WA) 328 at 336 [27].

30 [2005] WASCA 185 at [9].

Act. Before this Court, the appellant did not contest the correctness of that determination.

33 *The point of disagreement*: The point of disagreement between the Court of Appeal and the primary judge concerned the latter's conclusion that it was necessary to characterise, and to separate, the Minister's powers and duties into "core" or "essential" functions and "ancillary" or "incidental" functions[31]. Wheeler JA concluded that such a differentiation involved error which had no foundation in the language of the Act[32]:

> "The legislative policy [of s 6] seems to be that anything which a public authority lawfully does is to be regarded as its trade or business. One can understand readily why this might be so. Public authorities evolve over time: some are amalgamated; some are abolished and part or all of their functions given to different authorities; the services which they deliver and the way in which they deliver them will change according to budgetary requirements and public views as to what is considered appropriate for governmental activity".

34 Applying the statutory criterion of "directly", as stated in s 175(3) of the Act, her Honour concluded[33]:

> "… [T]he powers of the [Minister] specifically include the power to … maintain government schools as deemed necessary for the purposes of the Act. That power necessarily involves … a complex set of actions, and would encompass the power to cause schools to be constructed, to be cleaned, to be repaired, and to be secured as necessary. Those powers are therefore powers which, for the purposes of the Act, are to be treated as the trade or business of the [Minister] … The work in which the respondent was engaged was directly a part, therefore, of that trade or business … It is enough for the Court to know that the Minister is empowered to carry out the functions set out in the Act and that he has determined that it is appropriate to do so by engaging security services."

35 It was on this footing that the judgment entered by the primary judge in favour of the appellant was set aside. The appeal to this Court comes from the Court of Appeal's orders giving effect to that conclusion.

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31 cf reasons of Gleeson CJ at [3].

32 [2005] WASCA 185 at [15].

33 [2005] WASCA 185 at [17].

Special leave should not be revoked

36 *Deciding the appeal*: There are a number of reasons why I would not join in the order, now made by the majority, to revoke special leave:

- No party sought such an order and, to the contrary, both parties asked this Court to decide the appeal;
- Both parties have incurred considerable costs, in this Court and in the courts below. The costs of the appeal have now been fully expended;
- The supposed question of legal doubt, presented as a ground for revoking the grant of special leave, is decided by the repeated authority of the highest court of Western Australia, to which belongs the last word about the interpretation of the legislation of that State, save in the exceptional cases in which this Court grants special leave to permit an appeal against such an interpretation;
- The disposition of the question whether such special leave should be granted was considered by a Full Court of this Court, which refused special leave to challenge it; and
- The disposition is, in any case, apparently correct and any doubts about it do not warrant the refusal now to decide the present matter, especially when the suggested interpretation is not available to help resolve the appeal.

37 *The position of the parties*: Neither party wanted to argue the point which the majority now finds decisive for the revocation of special leave. In the unexpected turn of events, the appellant ultimately sought leave to add the ground suggested by questions from the Court. However, it was a reluctant request, arising from exigent circumstances, and it was never formalised. The Court refused to permit the added ground.

38 No party, by its process or arguments can impose on this Court an incorrect application of the law[34]. Each judge has a right to adopt a construction of legislation that has not been advanced by the parties or put in issue by the pleadings in the record if that course appears necessary to resolving the matter in contest in accordance with law. Subject to considerations of procedural fairness

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34 *Roberts v Bass* (2002) 212 CLR 1 at 54 [143]-[144]; *Gattellaro v Westpac Banking Corporation* (2004) 78 ALJR 394 at 409 [93]; 204 ALR 258 at 278-279; *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 181 [60].

and disqualification by the parties' conduct, Lord Wilberforce's *dictum* in *Saif Ali v Sydney Mitchell & Co*[35] is correct:

> "Judges are more than mere selectors between rival views – they are entitled to and do think for themselves."

However, in these proceedings, the question is not one of entitlement but whether the present case is an occasion for its exercise, as was held to be the case in *Chief Executive Officer of Customs v El Hajje*[36].

39 Ordinarily, it is left to the parties to define the controversy which they bring to the courts for resolution. Indeed, in Australia so much is implicit in the constitutional function of federal courts[37]. In the absence of a clear error in the exposition of the governing law, it would be normal in such circumstances for a court to proceed on the basis that an unchallenged exposition of the law is correct.

40 Both parties had incurred considerable costs in the litigation; and substantial costs in this Court. Whilst those of the Minister are a burden on the taxpayer, the costs incurred by a litigant such as the appellant normally secure for him an expectation that, once special leave is granted, the Court will decide the matter on the merits. In my opinion, that is what the Court should do[38]. Both parties agreed that, notwithstanding supervening amendments to the Act, because s 175(3) remains part of the Act, its meaning still presents live questions. Its significance therefore extends beyond the consequences for the parties to this appeal. In such circumstances, a revocation of special leave should be reserved to the clearest case, which this is not. Because the revocation of special leave has occurred after the appeal has been heard in its entirety, it will not save the Court's time or release a hearing day for use by other parties[39].

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35 [1980] AC 198 at 212. See *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 317; *Project Blue Sky Inc* (1998) 194 CLR 355 at 366 [13]; *Coleman v Power* (2004) 220 CLR 1 at 94 [243].

36 (2005) 224 CLR 159 at 171 [28]; cf at 181 [60], 185 [73], 187 [78].

37 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355 [45] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 278 [340] per Gummow and Hayne JJ.

38 cf *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 74-75 [59].

39 cf *South-West Forest Defence Foundation v Department of Conservation and Land Management (WA)* (1998) 72 ALJR 837 at 840 [22]; 154 ALR 405 at 410.

41 *Earlier decisions of the courts*: The refusal by this Court to allow the addition of a ground of appeal, based on the meaning of "employer" in s 93B of the Act[40], leaves standing the concluded authority of the courts of Western Australia on that legal point.

42 Of course, upon questions of statutory interpretation (perhaps especially by the time it reaches this Court) competing arguments can usually be advanced for the contending constructions[41]. But it is not as if the legal issue now said to warrant the revocation of special leave had been dealt with in a cursory or obviously unsatisfactory way by the courts of Western Australia. On the contrary, the appellate court of that State had, on at least three occasions, reaffirmed the conclusion that is now said to be in such doubt as to require the revocation of the grant of special leave.

43 The Full Court did so in *Hewitt v Benale Pty Ltd*[42]. That appeal was decided at the same time as an appeal in *WMC Resources Ltd v Koljibabic*[43]. Upon its establishment, the Court of Appeal reaffirmed these decisions in the later appeals in *Marsden v Unimin Australia Ltd*.[44] The reasoning of the Full Court in *Jones v Westfarmers Ltd*[45] also proceeded on a similar footing.

44 In these circumstances, whilst allowing for possibilities inherent in any human institution of repeated error in the courts below, it would not be unreasonable for this Court to accept, for the purposes of the present appeal, that the approach and conclusion of the appellate court of Western Australia were correct. At least, it would not be unreasonable to treat them as correct, and as establishing the settled meaning of the statutory provisions in question given that no-one was suggesting otherwise.

45 Two further considerations lend force to this approach. The first, recorded by Scott J in his reasons in the Full Court in *Hewitt*[46], is the fact that the New

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40 See joint reasons at [10]-[11].

41 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

42 (2002) 27 WAR 91 at 109-111 [94]-[102]; cf reasons of Gleeson CJ at [2].

43 (2002) 27 WAR 91 at 97 [26], 106-109 [87]-[93].

44 [2004] WASCA 143. See also [2004] WADC 153 at [29]; *Price v Resolute Resources Ltd* (2002) 29 SR (WA) 371.

45 [2003] WASCA 225 at [70]-[71].

46 (2002) 27 WAR 91 at 100 [45] per Scott J.

South Wales Court of Appeal, construing corresponding provisions in the New South Wales legislation in *OP Industries Pty Ltd v MMI Workers' Compensation (NSW) Ltd*[47], came to a like conclusion about the meaning of the phrase "for the purposes of the Act"[48]. Like the Western Australian courts, the New South Wales Court of Appeal did not limit the operation of the phrase to the recovery of statutory compensation. All of the judges in that case took the view that, to impose such a restrictive construction on that phrase would give rise to complications that the legislation was intended to overcome. Similar conclusions have been reached by the Supreme Courts of Queensland[49] and Victoria[50], where comparable statutory provisions operate.

46 Additionally, as noted in the joint reasons in these proceedings, since the series of decisions of the appellate courts just referred to, the Parliament of Western Australia has amended the Act on a footing that can only be understood as accepting the correctness of the appellate decisions concerned[51]. That is surely an additional reason for this Court to treat the Western Australian decision as correctly made and to proceed with the resolution of this appeal on that basis.

47 *Disposition by this Court*: There is a still further consideration. Although the decision in *Hewitt* was not itself the subject of an application to this Court, special leave to appeal was sought in the companion proceedings in *Koljibabic*. The application was argued in full by well represented parties before a special

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47 (1998) 17 NSWCCR 193 (NSWCA).

48 Like the provision under consideration in this case, cl 1, Sched 1 of the *Workers' Compensation Act* 1987 (NSW) provides that a person or body may, in certain circumstances, be "deemed" an employer "for the purposes of the Act". In *OP Industries Pty Ltd v MMI Workers' Compensation (NSW) Ltd* (1998) 17 NSWCCR 193 the New South Wales Court of Appeal construed the phrase "for the purposes of the Act" in such a way as not to limit its operation to the recovery of statutory compensation. Beazley JA and Fitzgerald AJA took the view that to impose a restrictive or narrow construction of that term would leave open complications that the clause was intended to overcome. Meagher JA expressed the same view.

49 *Workers' Compensation Act* 1916 (Qld), ss 8, 9A(1)(b); cf *Workers' Compensation Board of Qld v Boyne Smelters* [1996] QCA 255.

50 *Workers Compensation Act* 1958 (Vic), s 3.

51 *Workers' Compensation Reform Act* 2004 (WA), s 73, inserting s 93B(5) into the Act.

leave panel of this Court[52]. Special leave was refused. Giving the Court's reasons, McHugh J observed[53]:

> "The language of section 175(1) of the [Act] is intractable. The duty of courts is to give effect to the purpose of Parliament derived from the language of the statute. It is true that the construction favoured in the Full Court can lead to potential injustice to a deemed employee in certain circumstances. However, the contrary construction urged by the applicant results in consequences that are also unlikely. In these circumstances, the purpose must be derived from the statutory text. The applicant's construction would, it seems to us, require major surgery on the legislative language."

48 Whilst the disposition of a special leave application does not create a binding legal principle of this Court, it might be thought that the rejection of the suggested point of statutory uncertainty, in such strong terms, would at least sustain a conclusion that this Court, in the present appeal, could safely proceed to decide the matter on the basis of the settled exposition of the meaning of the Act thereby confirmed.

49 *The decision is apparently correct*: Having regard to the refusal by this Court, as now constituted, to permit a ground of appeal to contest the correctness of the interpretation of the Act adopted in *Hewitt*, and the associated cases, it would not be proper to embark on a detailed analysis of that authority. However, in view of the Court's disposition that now takes effect, and becomes the legal principle for which this matter stands, it is appropriate to notice some of the main elements of the reasoning of the courts below, in order to appreciate why that reasoning does not warrant doubt or hesitation on our part.

50 The essential question is whether the deemed employment for which s 175(1) of the Act provides created a relationship with the deemed "employer" that attracted the prohibition and limitations on the bringing of civil damages proceedings against the deemed "employer" under Pt IV, Div 2 of the Act.

51 Against such a construction, the workers opposing it in the earlier cases invoked various canons of interpretation to resist its consequences. These included the principle, long established in this Court, obliging a strict approach to statutory provisions that would have the effect of modifying long established common law rights (such as the right to bring a civil damages action against a

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52 Comprising McHugh and Heydon JJ and myself. See [2003] HCATrans 427.

53 [2003] HCATrans 427 at 637.

party otherwise liable[54]). As well, the arguments invoked the principle that beneficial or remedial legislation, as the Act could generally be described, should not ordinarily be construed so as to prejudice the party which it is intended to benefit[55]. Further, the principle that deeming provisions (such as s 175(1)) should normally be construed strictly and confined in their operation, was called in aid[56].

52 All of these, and other principles of construction, were carefully considered in the courts below before the favoured interpretation was adopted. In the end, however, as E M Heenan J pointed out in *Hewitt*[57], the duty of a court is to uphold the purpose of Parliament as expressed in the language of the legislation. The pull of particular canons of construction "must … be restrained within the confines of 'the actual language employed' and what is 'fairly open' on the words used"[58].

53 *Foundations for the interpretation*: The essential foundation of the view of the legislative phrase preferred in both the Western Australian and other State appellate courts was, as this Court observed in refusing special leave in *Koljibabic*, the "intractable" language of the Act. The language of s 175(1) creates the relationship with the "deemed employer" there provided as one "for the purposes of this Act." On the face of things, that expression refers to the entire Act. Had something more limited been intended, a more restrictive phrase would have been used, or a provision such as s 93B(5), since enacted, would have been included in earlier drafts of the Act[59].

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54 *Hewitt* (2002) 27 WAR 91 at 114-115 [113], citing *Bishop v Chung Bros* (1907) 4 CLR 1262 at 1275; *Hocking v Western Australian Bank* (1909) 9 CLR 738 at 746. See also more recently *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30].

55 *Hewitt* (2002) 27 WAR 91 at 118 [124]-[125], citing *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384; *Bird v The Commonwealth* (1988) 165 CLR 1 at 9.

56 *Hewitt* (2002) 27 WAR 91 at 117 [120]. See also *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696.

57 *Hewitt* (2002) 27 WAR 91 at 116 [118].

58 *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638. See also *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

59 Joint reasons at [12]-[13].

54 It is also necessary to note the presumption expressed in s 8 of the *Interpretation Act* 1984 (WA), that a written law:

> "… shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent, and meaning"[60].

By using the words it did in s 175(1) of the Act, the Parliament of Western Australia sought to enliven the relationship of deemed employment for all purposes for which employment was relevant in the Act, including in Pt IV, Div 2. Whilst in this case, the presumption is contained in a statute, it can also be traced to a longstanding common law rule of statutory interpretation[61].

55 The restrictions introduced by Pt IV, Div 2 of the Act were controversial[62], and on one view, harsh. They were not, as such, restrictions on a worker's statutory workers' compensation rights. On the face of things, they do not, therefore, enliven the principle favouring a beneficial construction of such statutory rights. Nevertheless, they constituted a deliberate reduction of the common law rights of "workers", such as the appellant, to recover damages independently of the Act. If by chance Falcon had been uninsured, the appellant would, inferentially, have been foremost in his claim for statutory workers' compensation benefits under the Act against the Minister. On the face of things, he would have enjoyed that entitlement. In such circumstances, to restrict his entitlement otherwise, to pursuing a civil damages action against the Minister, represents no more than the opposite side of the coin. A court giving meaning to the Act is obliged to do so with a neutrality grounded in the statutory language[63].

56 The argument that s 175 of the Act should be treated as creating a special category of "deemed employers", without application to other parts of the Act, hardly squares with the application of the definition of "employer" in s 175 to provisions in other sections of the Act, such as s 92, where that definition was always intended to apply[64]. As E M Heenan J remarked, "[t]he question then

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60 As Scott J concluded in *Hewitt* (2002) 27 WAR 91 at 98 [35].

61 *Lake Macquarie Shire Council v Abadare County Council* (1970) 123 CLR 327 at 331; cf *Coleman v Power* (2004) 220 CLR 1 at 95-96 [245]-[249].

62 *Hewitt* (2002) 27 WAR 91 at 116 [118].

63 *Hewitt* (2002) 27 WAR 91 at 118 [123].

64 (2002) 27 WAR 91 at 118 [123]. See also at 104-105 [74]-[77].

becomes, whether there is anything to differentiate Div 2 of Pt IV from all other provisions in the Act including Div 1"[65].

57 In these circumstances, if this Court were to pause long enough to notice the reasons given in *Hewitt* and the other cases mentioned above, a fair reading would, I believe, convince us that the suggested ambiguity is not ultimately established. Certainly, there is not such an uncertainty as to warrant this Court's revoking a grant of special leave and depriving the parties of their normal expectation, where an appeal has been fully heard, that the Court will quell the controversy between them by a decision reached on the legal and factual merits. After all, the most that is involved is the interpretation of legislation that has now been amended in part. There are many occasions where this Court has decided matters within the confines of the arguments and assumptions presented by the parties, whilst reserving particular points, unpleaded or unargued, to a case where it is necessary to decide them[66].

58 *Conclusion*: *appeal should be decided*: It is for these reasons that I respectfully disagree with the conclusion of the majority that special leave should be revoked. My conclusion in this regard obliges me to decide the merits of the appeal. In the circumstances, I can do so briefly.

The appeal fails on the merits

59 *Appellate misstatement conceded*: The appellant strongly attacked a passage in the reasons of Wheeler JA and the Minister conceded that this passage contained a legal error. The passage in question follows earlier reasoning quoted above[67]. Wheeler JA stated[68]:

> "It may well be that, once the operation of s 6 is correctly understood, there is little for the word 'directly' to do in s 175(3), so far as public authorities are concerned. That is, it would normally be the case that work was either part of the trade or business of a public authority within the meaning of s 6, or it was not. It may be that there are some activities, which are so peripheral to the exercise of the authority's statutory powers that, although they are necessarily to be implied as

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65 *Hewitt* (2002) 27 WAR 91 at 118 [123] per E M Heenan J.

66 See, eg, *Weiss v The Queen* (2005) 224 CLR 300 at 317-318 [46] (reserving possible constitutional questions). See also *Nudd v The Queen* (2006) 80 ALJR 614 at 637 [111]-[112]; 225 ALR 161 at 190.

67 See above, these reasons at [30], [33]-[34].

68 [2005] WASCA 185 at [16].

> arising from the conferral of legal personality upon an authority, they would not be regarded as powers 'of' the authority, as opposed to powers which necessarily belong to any legal person. However, in my view, issues of that kind do not arise in the present case."

60 It was Wheeler JA's statement that "[i]t is enough for the Court to know that the Minister is empowered to carry out the functions set out in the Act and that he has determined that it is appropriate to do so by engaging security services" that the appellant latched on to. He complained that this effectively erased the requirement of demonstrating that the work on which the worker is employed at the time of the occurrence of the disability is "directly a part or process in the trade or business of the principal". According to the appellant, the insertion into the statutory text of the adverb "directly", demanded attention. Because the Court of Appeal implicitly denied that necessity, and acknowledged "little … operation" for the word to perform, it erred in law in its interpretation of s 175(3) of the Act.

61 In his submissions, the Minister accepted that the foregoing passages indicated legal error. He submitted that the Court of Appeal should have identified "the work" on which the worker was employed and then considered whether such work was "directly" a part or process of the Minister's trade or business, including the maintenance of government schools. According to the Minister, "the work" on which the appellant was employed at the time of his injury was protecting and securing (and thus contributing to the maintenance of) public schools, including the one on whose premises he was injured. Such work was "directly" a part or process of the Minister's "trade or business", as defined by s 6 of the Act. According to the appellant, the requirement of directness in s 175(3) imported notions that "the work" in question should be referable to the "core activities in the trade or business of the principal and not merely generic services"; that it should be functionally referable to such activities; and that it should be immediately referable to the work of the Minister, because it is "the work" which is the responsibility of the principal (here the Minister) and which cannot be carried out by others.

62 *A verbal error is sustained*: I am prepared to accept the common ground between the parties that, in the expression of the reasoning that sustained the conclusion of the Court of Appeal, that Court omitted express consideration of whatever requirement was imported by the word "directly", as it appeared in s 175(3). The word appears in the sub-section. Seemingly, it is a deliberate insertion. It imports an additional qualification[69]. It is expressed in an ordinary adverb of everyday use. Indeed, in the present context, the word has a long history.

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69 cf reasons of Gleeson CJ at [3].

63 When the United Kingdom Parliament enacted the *Workmen's Compensation Act* 1897 (UK)[70], and provided liability to pay compensation benefits in certain circumstances to the workmen of a contractor "in respect of any accident arising out of and in the course of their employment"[71], no reference was made to an exemption where the work on which the workman was employed at the time of the occurrence of the accident was directly a part or process in the trade or business of the principal (there called "the undertaker"). The only qualification expressed was to the effect that the section would not apply:

> "… to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively".

64 The origin of the word "directly" can apparently be traced to the *Workers' Compensation for Accidents Act* 1900 (NZ). By that Act, the New Zealand Parliament provided in s 15 for "Liability in cases of contracting or sub-contracting". After providing for the joint and several liability of a principal and contractor[72], the Act went on to specify certain qualifications[73]:

> "The principal shall not be liable under this section except in cases where the work to be executed under the contract, and in which the worker is employed, –
>
> (a) Relates *directly* to the land, building, vessel, or other property of the principal; or
>
> (b) Is *directly* a part of or a process in the trade or business of the principal
>
> …".

65 When the present Act was enacted in Western Australia, s 175(3) was the local attempt to express a qualification similar to that appearing in s 15(3)(b) of the New Zealand Act. Section 175(7) was a local reflection of the provisions contained in s 15(3)(a) of the New Zealand Act. Section 175(7) of the Act states:

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70 60 & 61 Vict c 37.

71 s 4.

72 s 15(1).

73 s 15(3) (emphasis added).

> "Where the disability does not occur in respect of premises on which the principal has undertaken to execute the work or which are otherwise under his control or management, subsections (1) to (6) inclusive do not apply."

66 Viewed in the light of this history, and of the purposes evident in the language of these sub-sections, the object of the restrictions so imposed on the notional type of employment relationship created by the Act becomes a little clearer. By reference to the provisions of s 175(3) of the Act, Hasluck J in *Hewitt*[74] explained the object in language that I find helpful:

> "The effect of that provision [s 175(3)] is that the principal is not liable under the deeming provision unless the work on which the worker is employed at the time of the occurrence of the disability is directly a part or process in the trade or business of the principal. This suggests that the deeming provision is only to apply in circumstances where the work being performed approximates to the worker's usual course of employment. It seems to me that this restriction removes any element of unfairness that might arise if the party contracting out its labour were to be unexpectedly exposed to a liability for damages at common law which arose from work not usually being performed by the actual employer."

67 This approach finds support in the meaning of the word "directly". Dictionary definitions suggest that the word connotes the doing of something without an intermediary, "by a direct process"[75]. The word therefore introduces notions of connection, in a particular way or manner, with the defined work of the principal, here, the Minister. It is not, as such, concerned to limit or expand the definition of the work. In the Act, that function is performed, in the case of a public authority, by the very broad provisions of s 6. Moreover, the element of "directness" has to be discovered within a provision of the Act (s 175) which, of its very nature, is concerned with the "occurrence of … disability" to a person who is the actual employee of someone else, a contractor, and for whom the principal is only a "deemed … employer of the worker"[76].

68 The very engagement of contractors might, in a particular case, suggest the performance of "the work" which, loosely or generically speaking, is outside the "core" function of "the work" of a public authority when viewed globally. However, by s 6 of the Act, that is not the way "the work" of the public authority

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74 (2002) 27 WAR 91 at 105 [77].

75 *New Shorter Oxford English Dictionary* (1993) vol 1 at 680; *Macquarie Dictionary*, 3rd ed (rev) (2001) at 539.

76 The Act, s 175(1).

is defined[77]. By that section, the "trade or business" of the public authority is defined very broadly, by reference to "the exercise and performance of the powers and duties" of the authority. Necessarily "the work", incidental to such exercise and performance, is "a part or process in" the trade or business so defined.

69 The appellant attempted, by reference to judicial elaborations of the word "directly" in a revenue context[78] to argue for a different meaning for the word in s 175(3) of the Act. However, the applicable meaning must be derived from the language of the Act in question here, which must be read as a whole so as to give effect to its provisions.

70 *Conclusion: immaterial error*: When the above approach is adopted, it may be that there was a verbal slip in the last step of the reasons of Wheeler JA for the Court of Appeal. The requirement of s 175(3) of the Act, being in the statute, must be given effect according to its terms. It cannot be ignored or bypassed. Yet in all truth, once the "trade or business" of a public authority is defined in such broad language by reference to that authority's particular "powers and duties" (as s 6 of the Act provides here) the likelihood is that, as Wheeler JA remarked, there will be "little for the word 'directly' to do in s 175(3)"[79]. This is because, typically, as in the present case, the statutory definition of the "powers and duties" of an authority will be very ample, as they are here, and a direct connection to them will not be difficult to prove.

71 Nonetheless, there will be a boundary. It is fixed by the statutory provisions creating the public authority in question and by the outer limits of the defined "trade or business" that can be characterised as that "of" the authority, here the Minister, conformably with the approach required by s 6.

72 The Minister effectively demonstrated the ultimate accuracy of Wheeler JA's description of the ambit of "directly" in s 175(3) by the instance propounded as a case that would be excluded by that word in the sub-section. He suggested that, if an employee of Falcon, for that company's own insurance purposes, had reconnoitred the site of the public school in question, including at night, so as to understand the nature of the work conditions to which Falcon's employees were being sent and for the purpose of renewing Falcon's insurance cover, an injury by falling over concrete rubble in long grass in the school

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77 cf reasons of Gleeson CJ at [3].

78 eg *Textron Pacific Ltd v Collector of Customs (Qld)* (1987) 17 FCR 305 at 309-310.

79 [2005] WASCA 185 at [16].

grounds would not be "directly" part "of" the defined trade or business of the Minister[80]. I accept the illustration. Yet it does tend to reinforce Wheeler JA's point. It is true that, the exclusion being expressed in s 175(3), it cannot be ignored. If that is what the closing words of the Court of Appeal's reasons suggest, they would need to be modified.

73 *Conclusion: Court of Appeal orders correct*: When, however, the question is asked whether the work on which the appellant was employed by Falcon at the time of the occurrence of his disability was "directly a part or process in the trade or business" of the Minister, the answer in this case is plain. The "trade or business" is defined, in the case of such a statutory authority as the Minister, by s 6 of the Act. That section equates the exercise and performance of the powers and duties of the Minister to his "trade or business". Amongst the express and implied powers and duties of the Minister under the Education Act are those concerned with maintaining school premises. Providing security for such premises is clearly "directly a part or process" in the defined "trade or business" of the Minister[81].

74 At the time of the occurrence of his disability, the appellant's work was that of securing the school premises. The exclusion of the Minister from liability as a "deemed employer", provided for in s 175(3) was, therefore, engaged in the circumstances of this case. The Minister was "deemed to be [the] employer of the worker", although he was actually employed by Falcon. As such, the Minister was entitled, by settled law in Western Australia, to invoke the prohibition and restrictions contained in Pt IV, Div 2 of the Act. The Minister's defence to that effect ought to have been upheld by the District Court. The appellant's action for damages against the deemed "employer" was properly dismissed by the Court of Appeal.

Orders

75 To give effect to these conclusions, special leave should not be revoked. The appeal should be determined on its merits in the usual way. It should be dismissed with costs.

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80 [2006] HCATrans 576 at 2435.

81 Reasons of Gleeson CJ at [3].