HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, KIEFEL AND BELL JJ

AUSTRALIAN EDUCATION UNION APPELLANT

AND

DEPARTMENT OF EDUCATION AND CHILDREN'S SERVICES RESPONDENT

Australian Education Union v Department of Education and Children's Services
[2012] HCA 3
29 February 2012
A4/2011

ORDER

1. *The Chief Executive, Department of Premier and Cabinet of South Australia be substituted as respondent for the Department of Education and Children's Services in the proceedings in this Court, in the Full Court of the Supreme Court of South Australia and in the Industrial Relations Court of South Australia.*

2. *Appeal allowed.*

3. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 28 May 2010 and, in their place, order that:*

   (a) *the appeal be allowed;*

   (b) *the order of the Full Court of the Industrial Relations Court of South Australia be varied so as to answer question 1 as follows:*

   Question 1: Did s 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 s 15 of the Act provide exclusively for the appointment of teachers?*

Answer: *Section 9(4) of the* Education Act *1972 (SA), at the time that it was in force, did not authorise the Minister to appoint officers to be engaged as teachers and s 15 of the Act provided exclusively for the appointment of teachers.*

and;

(c) the matter be remitted to the Full Court of the Industrial Relations Court of South Australia for further consideration of question 2.

4. The respondent, the Chief Executive, Department of Premier and Cabinet of South Australia, pay the appellant's costs in this Court and in the Full Court of the Supreme Court of South Australia.

On appeal from the Supreme Court of South Australia

Representation

R J Whitington QC with M B Manetta and A P Durkin for the appellant (instructed by Australian Education Union (SA))

M G Hinton QC, Solicitor-General for the State of South Australia with K Hodder for the respondent (instructed by Crown Solicitor (SA))

CATCHWORDS

Australian Education Union v Department of Education and Children's Services

Statutes − Acts of Parliament − Interpretation − Statutory powers and duties − Construction − Conferral and extent of power − Minister purportedly appointed persons as temporary "contract teachers" under s 9(4) of *Education Act* 1972 (SA) − Section 15 empowered Minister to appoint "officers of the teaching service" on permanent or temporary basis − Section 9(4) empowered Minister to appoint such officers and employees "in addition to" employees and officers of teaching service as Minister considered "necessary for the proper administration of this Act or for the welfare of the students of any school" − Meaning of "in addition to" − Whether Minister empowered to appoint officers as teachers under s 9(4) − Whether s 15 provided exclusively for such appointments.

Words and phrases – "in addition to", "officers and employees", "officers of the teaching service".

Education Act 1972 (SA), ss 9(4), 15.

FRENCH CJ, HAYNE, KIEFEL AND BELL JJ.

Introduction

1 A teacher appointed as an officer of the teaching service of South Australia by virtue of s 15 of the *Education Act* 1972 (SA) ("the Act") may be appointed on a permanent or temporary basis and, in any event, is appointed on terms and conditions which include terms and conditions set out in Pt III of the Act. For many years the Minister of Education of South Australia ("the Minister") also appointed persons as temporary "contract teachers", purportedly under a general power to appoint "officers and employees" conferred by s 9(4), which was found in Pt II of the Act. That subsection was repealed in 2007[1]. This appeal raises the disputed question whether it was ever open to the Minister to appoint persons as teachers under that subsection.

2 The question arises because the long service leave entitlements of officers and employees appointed under s 9(4) were less favourable than the entitlements enjoyed by officers of the teaching service appointed under s 15. That difference in terms and conditions of appointment underpinned a long running dispute between the Australian Education Union ("the Union") and the Department of Education and Children's Services ("the Department").

3 In this appeal, from a decision of the Full Court of the Supreme Court of South Australia[2], the Union contends, contrary to the conclusion of that Court, that s 9(4) did not authorise the Minister to appoint anybody as a teacher. The Union contends that the only mechanism which the Act provided for the appointment of teachers was that found in s 15.

4 The Union's contention is correct. As explained in these reasons, s 9(4), properly construed, authorised the appointment of officers and employees, other than employees and officers of the Department and officers of the teaching service. The appointment of officers of the Department was authorised by s 11 of the Act. The appointment of teachers was authorised by s 15. Section 9(4) did not apply to the appointment of officers of "the teaching service". The appeal against the decision of the Full Court of the Supreme Court should be allowed.

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1 That subsection was replaced by s 101B(1) of the Act.

2 *Australian Education Union v Department of Education and Children's Services* (2010) 270 LSJS 47.

Statutory framework and legislative history

5 The Act was enacted after a detailed review of the *Education Act* 1915-1971 (SA), which it repealed. Part II of the Act, entitled "The Minister and the Department", devolved on the Minister the "general administration of [the] Act and the administration and control of the teaching service."[3] The distinction between the "general administration of [the] Act" and the "administration … of the teaching service" is significant. It informs the purpose of the general power of appointment of employees and officers which was conferred on the Minister by s 9(4) of the Act and supports the distinction between that power and the specific power of appointment of teachers to the teaching service conferred by s 15.

6 Section 9 set out a miscellany of powers conferred upon the Minister including the establishment and maintenance of government schools[4] and their temporary or permanent closure or sale[5], the establishment of institutions for the proper education and training of teachers[6], the establishment and maintenance of accommodation for teachers or students[7], the acquisition of land for the purposes of the Act[8], and the provision of transport for children to and from any school[9]. The Minister was also empowered to establish any school, college or centre for the purpose of providing, inter alia, technical education[10]. The Department, which had already been established under the *Public Service Act* 1967 (SA) ("the Public Service Act"), was continued in existence by s 11(1) of the Act. The office of Director-General of Education as the permanent head of the Department was established. Section 11(4) provided:

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3 Act, s 6.

4 Act, s 9(1).

5 Act, s 9(3).

6 Act, s 9(5).

7 Act, s 9(6).

8 Act, s 9(7).

9 Act, s 9(8).

10 Act, s 9(9).

> "There shall be such other officers of the Department as may be necessary or expedient for the proper administration of this Act."

It was amended in 1986 to read[11]:

> "There shall be such employees in the Department as may be necessary or expedient for the proper administration of this Act."

7 Section 9(4), as originally enacted, 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."

The subsection was amended in 1986 to read[12]:

> "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."

The power so conferred was wide but limited to the purposes expressed in the words "the proper administration of the Act" and "for the welfare of the students at any school." The latter term, it may be said immediately, does not on its face or in context, relate to the provision of teachers at a school.

8 The term "officers of the Department", in parentheses in the original version of s 9(4), referred to officers appointed pursuant to Div IV of the Public Service Act. They were officers of the kind referred to in s 11(4) of the Act. The replacement of that term by "employees and officers of the Department" followed the repeal of the Public Service Act and its replacement by the *Government Management and Employment Act* 1985 (SA). The latter Act did not reproduce the definition of "officer" found in the Public Service Act but defined "employee" relevantly as "a person appointed to the Public Service

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11 The amendment was effected by the *Education Act Amendment Act* (1986) (SA), s 7.

12 The amendment was effected by the *Education Act Amendment Act* 1986 (SA), s 5.

(including a Chief Executive Officer)"[13]. The class designation "employees and officers of the Department" appearing in parentheses in s 9(4) as amended alluded to persons appointed to the Public Service under the new regime.

9 Part III of the Act was entitled "The Teaching Service". "[T]he teaching service" was defined as the teaching service "constituted" under Pt III of the Act[14]. Division I of Pt III, entitled "Appointment to the Teaching Service", consisted only of s 15. The relevant parts of that section were[15]:

> "(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.
>
> …
>
> (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."

A "teacher" was defined in s 5 of the Act, unless the contrary intention was shown, as "any person who gives, or is qualified to give, instruction at any Government or non-Government school". That definition should be read with Pt IV of the Act which provided for the registration of teachers. Section 63(1)(a) prohibited any unregistered person, without the authority in writing of the Teachers Registration Board, from holding "any office or position in a Government or a non-Government school in which he is required to administer

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13 *Government Management and Employment Act* 1985 (SA), s 4 and Pt 3, Div 5 entitled "Employment in the Public Service".

14 Act, s 5.

15 By operation of the *Statutes Amendment (Public Sector Employment) Act* 2006 (SA), s 31(2) and (3), the term "the employing authority" was substituted for "the Minister" in s 15(4) and (6) of the Act respectively. That term refers to the Director-General or a person designated for the purpose by proclamation: see Act, s 5 definition of "employing authority". The change occurred after the end of the period relevant to this appeal, being 14 December 1972 to 21 February 2005.

or teach any course of instruction in primary or secondary education". The power conferred by s 15 to appoint teachers was therefore linked to the protective regulatory provisions of Pt IV of the Act.

10 In the Second Reading Speech for the Education Bill which became the Act, the Minister made no specific reference to s 9. Of s 15 he said[16]:

> "Clauses 15 to 17 provide for the teaching service. Under clause 15, an officer appointed on a temporary basis or appointed on probation shall hold office at the pleasure of the Minister."

There was nothing in the Second Reading Speech to support the proposition that the Act authorised the appointment of persons as teachers in government schools who were not officers of the teaching service.

11 The other provisions of Pt III covered retrenchment and retirement of officers[17], long service leave[18], retiring age[19] including the mandatory retiring age, which was 65 years[20], discipline[21], and the classification of officers[22]. Part III of the Act, as enacted, also established a "Teachers Salaries Board", abolished in 1991[23], to fix maximum and minimum salaries and other remuneration payable to officers of the teaching service[24] and a "Teachers Appeal

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16 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 15 November 1972 at 3108.

17 Act, Div II, ss 16-17.

18 Act, Div III, ss 18-24.

19 Act, Div IV, s 25.

20 Act, s 25(1).

21 Act, Div V, ss 26-27.

22 Act, Div VI, ss 28-33.

23 *Industrial Conciliation and Arbitration (Commonwealth Provisions) Amendment Act* 1991 (SA), s 53(b).

24 Act, s 37.

Board"[25] ("the Board") to exercise such jurisdiction as might be conferred upon it by the Act[26]. The Board could, inter alia, hear appeals against a decision by the Director-General to take disciplinary action against an officer or by the Minister to dismiss an officer[27]. As appears from the preceding, the power of appointment under s 15 was linked not only to the regulatory provisions of Pt IV of the Act but to the statutory scheme in Pt III providing for the terms and conditions of officers of the teaching service.

12 Of particular significance from the perspective of the Union was the provision, in Pt III, made under s 22(2) of the Act, for long service leave entitlements where there had been an interruption of service. In effect, s 22(2) provided that, where the service of a person employed under the Act was interrupted otherwise than by resignation or dismissal for misconduct and the person was subsequently appointed as an officer of the teaching service within two years after the date of that interruption, that person's service before and after the interruption would be taken into account as though that person's service were continuous. The benefit of s 22(2) appears to extend to temporary teachers appointed under successive contracts pursuant to s 15.

Procedural history

13 In May 2003, the Vice President of the South Australian Branch of the Union wrote to the Minister concerning the appointment of contract teachers under s 9(4) and the impact of "appointment type" on long service leave entitlements. The Union asked that in future contract teachers be appointed as "officers of the teaching service" on a temporary basis pursuant to s 15(2) of the Act.

14 The Government ultimately responded favourably to the Union's representations. On 21 February 2005, the Director of Human Resources and Industrial Relations Services at the Department wrote to the Union advising that, in future, contract teachers would be known as "temporary teachers" and "temporary relieving teachers" and would be appointed under s 15 of the Act on a temporary basis.

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25 Act, s 45.

26 Act, s 49.

27 Act, s 26.

15 In spite of that change of position, the Department and the Union continued to dispute the entitlements of those teachers previously purportedly appointed under s 9(4). On 5 March 2007, the Secretary of the South Australian Branch of the Union wrote to the Industrial Registrar of the Industrial Relations Commission of South Australia ("the Commission") notifying a dispute and requesting a voluntary conference pursuant to s 200 of the *Fair Work Act* 1994 (SA). The Union asserted in its notice that the power to appoint teachers, including temporary teachers, stemmed from s 15 of the Act and that they were all officers of the teaching service and entitled to the benefit of s 22(2) of the Act.

16 On 21 August 2007, the Commission referred two questions of law to the Industrial Relations Court of South Australia ("the IRC") for determination. The questions of law were:

> "1. Did section 9(4) of the *Education Act 1972*, 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 to [sic] the appointment of teachers?
>
> 2. In consequence of the court's answer to question 1, are the long service leave entitlements of any teachers purportedly appointed pursuant to section 9(4) governed by the provisions of the *Public Sector Management Act 1995*, or Division 3 of Part 3 of the *Education Act 1972*?"

A statement of agreed facts was filed in the IRC. Additions to the statement of agreed facts filed related to two named persons who had been appointed as contract teachers purportedly pursuant to s 9(4) of the Act.

17 On 29 May 2009, the Full Court of the IRC concluded that s 9(4) had provided authority for the Minister to appoint officers to be engaged as teachers independently of s 15 of the Act[28]. The Union appealed to the Full Court of the Supreme Court.

18 The Full Court of the Supreme Court (Nyland, Gray and Vanstone JJ) dismissed the appeal on 28 May 2010 and ordered that the Union pay the

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28 *Australian Education Union v Department of Education and Children's Services* [2009] SAIRC 37 at [44] per Jennings SJ and Gilchrist J, [59] per McCusker J.

Department's costs of the appeal[29]. The respondent in the IRC and in the Full Court of the Supreme Court was designated as the "Department of Education and Children's Services". It was also so designated in the proceedings in this Court. The Department is not a body corporate. It was not in dispute that the proper respondent, both in this Court and in the courts below, was the Chief Executive, Department of Premier and Cabinet.

19 Special leave to appeal to this Court was granted on 11 February 2011 (Gummow, Crennan and Kiefel JJ).

Grounds of appeal

20 There were two grounds of appeal:

> "1. The Court erred in law in holding that s 9(4) of the *Education Act 1972* (SA) authorised the Minister of Education to appoint officers to be engaged as teachers independently of s 15 of the Act and ought to have found that the Minister was never empowered to appoint teachers under s 9(4) of the Act.
>
> 2. The Court erred in law in permitting a miscellaneous legislative provision to be used by the Minister so as to permit the Minister to appoint teachers in public schools without having to observe the rights and obligations attaching to such appointments under Part III of the Act."

The decision of the IRC

21 Jennings SJ and Gilchrist J published a joint judgment[30]. Their reasoning involved the following steps:

- Although s 15 of the Act permits the Minister to appoint members of the teaching service on a temporary basis, it does not necessarily give the Minister all of the flexibility necessary to fulfil the Minister's obligations under the Act[31].

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29 *Australian Education Union v Department of Education and Children's Services* (2010) 270 LSJS 47.

30 *Australian Education Union v Department of Education and Children's Services* [2009] SAIRC 37.

31 [2009] SAIRC 37 at [39].

- Part III of the Act confers detailed rights on members of the teaching service which might be thought unnecessarily prescriptive in respect of the ad hoc appointment of relief teachers in diverse circumstances[32].

- The width and generality of the powers conferred upon the Minister by Pt II of the Act indicated a parliamentary intention to empower the Minister, subject to the Act, to do whatever is necessary to make proper provision for primary and secondary education in South Australia[33].

Jennings SJ and Gilchrist J held that s 9(4) required a "generous construction that allows for flexibility."[34]

22 McCusker J, in a separate concurring judgment, saw s 9(4) as a provision supplementary to s 15 and held that the two provisions served distinct and different purposes which were not repugnant to each other[35]. McCusker J concluded that s 9(4) of the Act authorised the Minister to appoint teachers to schools[36].

23 The IRC answered the first question posed to it as follows:

> "Section 9(4) of the *Education Act 1972*, at the time it was in force, authorised the Minister to appoint such teachers as he considered necessary for the proper administration of the Act or for the welfare of the students of any school independently of s 15 of the Act."

The parties were given liberty to apply as to question 2.

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32 [2009] SAIRC 37 at [40].

33 [2009] SAIRC 37 at [41].

34 [2009] SAIRC 37 at [41].

35 [2009] SAIRC 37 at [57]-[58] citing *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 571 [2] per Gleeson CJ, 592 [70] per Gummow and Hayne JJ; [2006] HCA 50.

36 [2009] SAIRC 37 at [59].

The decision of the Full Court of the Supreme Court

24 The principal judgment in the Full Court was written by Gray J, with whom Nyland J agreed. Vanstone J wrote a separate concurring judgment. The essential elements of Gray J's reasons were as follows:

- Section 9(4) was auxiliary to s 15. The powers conferred by the two provisions did not relevantly deal with the same subject matter[37].

- Section 9(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. The broad powers it conferred upon the Minister indicated that Parliament intended 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[38].

- The purpose of s 9(4) was to provide a power to make additional appointments to address the diverse and unpredictable employment requirements necessary for the proper administration of the Act and the welfare of students. There was no good reason why "teachers" should be excluded from that process[39].

- The section contemplated varying job specifications. An appointee under s 9(4) could contract out of the obligation to serve anywhere else in the State, the requirement for probation could be abrogated, the contract need not be "at the pleasure of the Minister", and the retirement age applicable to Pt III teachers need not apply[40].

25 Vanstone J found the construction question "finely balanced." However, in her Honour's opinion, there was nothing in the language of the section or the

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37 (2010) 270 LSJS 47 at 53 [29].

38 (2010) 270 LSJS 47 at 53-54 [30].

39 (2010) 270 LSJS 47 at 54 [31]. Gray J also referred at 53 [27]-[28] to obiter observations in *Cusack v Parsons* (1988) 48 SASR 364 that contract teachers could be appointed under s 9(4) and were often young recently qualified teachers awaiting appointment as officers of the teaching service.

40 (2010) 270 LSJS 47 at 54 [32].

structure of the Act to indicate that the Minister was to be restricted to appointing teachers under s 15. The words "in addition to" in s 9(4) were conjunctive or expansionary, rather than preclusive[41].

The approach to construction

26 The disposition of this appeal turns upon the correct construction of s 9(4). The process of construction begins with a consideration of the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose. According to the construction adopted by the IRC and the Full Court of the Supreme Court, the power conferred by the subsection extended to the appointment of persons as teachers. On the construction for which the Union contends, the power did not extend to such appointments.

27 There are textual and purposive indicators to be considered in determining the preferred construction. Also applicable is s 22(1) of the *Acts Interpretation Act* 1915 (SA) which relevantly provides:

> "where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object."

28 The reasoning in the IRC was informed by the view that it was desirable that the Minister have flexibility in the appointment of teachers and that Pt III of the Act might be "unnecessarily prescriptive"[42] in its application to the ad hoc appointments of relief teachers in diverse circumstances. This approach, with respect, emphasised a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose[43]. The

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41 (2010) 270 LSJS 47 at 58 [52].

42 [2009] SAIRC 37 at [40] per Jennings SJ and Gilchrist J.

43 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; [1967] HCA 31; *Baker v Campbell* (1983) 153 CLR 52 at 104 per Brennan J; [1983] HCA 39; *Miller v Miller* (2011) 242 CLR 446 at 459-460 [29] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 9; *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1064-1065 [441] per Heydon J; 280 ALR 221 at 349;

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statutory purpose in this case was to be derived from a consideration of the scheme of the Act as a whole, the respective functions of Pts II and III of the Act, and the regulatory requirements of Pt IV of the Act.

29 The Full Court of the Supreme Court, like the IRC, emphasised what their Honours considered to be the benefits flowing from the Minister's construction of s 9(4). Those benefits, expressed in terms of flexibility, were elevated to a statutory purpose. That purpose lacked a foundation in the text of the Act.

30 Textual and contextual indicators of the respective purposes of s 9(4) and s 15 are:

- Section 9(4) provided for the appointment of "officers and employees". Section 15, on the other hand, provided for the appointment of "teachers" as "officers of the teaching service". Section 15, like s 9(4), conferred a power of appointment of "officers" but it was a specific power to appoint teachers.

- The words in parentheses in s 9(4) indicated that appointments under that power were additional to appointments of employees and officers of the Department and the teaching service. The Department argued that the words "in addition to" meant "as well as" and should be read as supplementary, conjunctive or expansionary in their intended operation[44]. However, that synonym begs the essential constructional question. It does not answer it. The appellant's proffered construction of the words "in addition to" as words of limitation used in the sense of "apart from" accords with the division of ministerial responsibilities between "the general administration of [the] Act and the administration and control of the teaching service" reflected in s 6.

- The "teaching service" was, by definition, constituted under Pt III and consisted of teachers appointed under s 15(1)[45].

[2011] HCA 34; *AB v Western Australia* (2011) 85 ALJR 1233 at 1241 [38]; 281 ALR 694 at 703-704; [2011] HCA 42.

44 Reference was made to *Wheeler v Kelly* (1956) 94 CLR 206 at 212; [1956] HCA 5 in which the Court so construed the words "in addition to" in a quite different statutory setting – the *Crown Lands Consolidation Act* 1913-1948 (NSW).

45 Act, s 5.

- The appointment power under s 15 provided for permanent, temporary and probationary appointments. It therefore encompassed the power to make short-term appointments. The Solicitor-General also accepted that it would authorise part-time employment.

- The appointment of teachers under the Act involved the exercise of a specific power linked to a statutory scheme reflected in Pt III providing for their terms and conditions and requiring, by operation of Pt IV, that persons appointed be registered as teachers or otherwise have the authority of the Board to teach.

- The Act, in defining the responsibilities of the Minister, drew a distinction between the "general administration of [the] Act" and the "administration and control of the teaching service." That distinction supports the proposition that s 9(4) and s 15 served different purposes under the Act.

31 The textual and contextual indicators and the purpose of the statutory scheme lead to the conclusion that the authority of the Minister to appoint teachers under the Act was at all times to be found in s 15 and that s 9(4) did not authorise such appointments. Even if it were possible to characterise the power conferred upon the Minister by s 15 as a specific power carved out of a more general power conferred by s 9(4), the interpretative principle enunciated in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[46] would require that the general power be read as not applying to the subject matter of the specific power[47].

32 The Solicitor-General for South Australia submitted that the Court should have regard to a statement made by the Minister in the Second Reading Speech for the *Education (Part-time Remuneration) Amendment Act* 1991 (SA). That Act introduced a new s 101A into the Act which provided for rates of remuneration to be paid to part-time officers and employees. In the course of his

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46 (1932) 47 CLR 1; [1932] HCA 9.

47 (1932) 47 CLR 1 at 7-8; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59] per Gummow and Hayne JJ; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 85 ALJR 891 at 907 [50]-[51] per French CJ, 913-914 [84] per Gummow, Hayne, Crennan and Bell JJ, 940 [236] per Kiefel J; 280 ALR 18 at 39-40, 48, 84; [2011] HCA 32.

Second Reading Speech the Minister referred to "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."[48]

33 In South Australia the use of extrinsic materials in the construction of South Australian statutes is governed by the common law, there being no equivalent in the *Acts Interpretation Act* 1915 (SA) to s 15AB of the *Acts Interpretation Act* 1901 (Cth)[49]. There is no basis at common law or otherwise for resorting to a ministerial statement, about the effect of a law in force at the time of the statement, as an aid to the interpretation of that law.

34 It was not contended before this Court that the appointment of a person as a contract teacher made in mistaken reliance upon the existence of a power to make such an appointment under s 9(4) could not be a valid exercise of the appointment power under s 15. The issue was not raised by the first question considered by the IRC. That question went to the scope of the power conferred by s 9(4) and the exclusivity or otherwise of the power conferred by s 15. The conclusion that question 1 was erroneously answered by the Full Court of the IRC does not involve a conclusion about the validity of appointments purportedly made under s 9(4). A mistake by an administrative decision-maker as to the source of his or her power to make a decision does not necessarily invalidate the decision if it is able to be supported by another source of power. Whether it can be supported by the other source of power will depend upon whether that power is subject to requirements which the decision-maker has failed to meet because of his or her belief as to the source of the power or for some other reason. As Heydon J said in *Eastman v Director of Public Prosecutions (ACT)*[50]:

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48 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 15 November 1990 at 1943.

49 *Gerhardy v Brown* (1985) 159 CLR 70 at 104 per Mason J, 111 per Wilson J; [1985] HCA 11; *Hoare v The Queen* (1989) 167 CLR 348 at 360-361; [1989] HCA 33.

50 (2003) 214 CLR 318 at 362 [124]; [2003] HCA 28. See also *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 487 per Williams J; [1942] HCA 12; *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 184 per Fullagar J; [1954] HCA 31; *Brown v West* (1990) 169 CLR 195 at 203; [1990] HCA 7; *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426 per Brennan J, 469 per McHugh J; [1993] HCA 56; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 618 per Gummow J; [1997] HCA 38; *Mercantile Mutual*

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"If the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power." (footnote omitted)

Conclusion

35 For the preceding reasons the appeal should be allowed. The following orders should be made:

1. The Chief Executive, Department of Premier and Cabinet of South Australia be substituted as respondent for the Department of Education and Children's Services in the proceedings in this Court, in the Full Court of the Supreme Court of South Australia and in the Industrial Relations Court of South Australia.

2. Appeal allowed.

3. Set aside the orders of the Full Court of the Supreme Court of South Australia made on 28 May 2010 and, in their place, order that:

   (a) the appeal be allowed;

   (b) the order of the Full Court of the Industrial Relations Court of South Australia be varied so as to answer question 1 as follows:

      Question 1: Did s 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 s 15 of the Act provide exclusively for the appointment of teachers?

Life Insurance Co Ltd v Australian Securities Commission (1993) 40 FCR 409 at 412 per Black CJ; *Harris v Great Barrier Reef Marine Park Authority* (1999) 162 ALR 651 at 656 [18] per Kiefel J.

Answer: Section 9(4) of the *Education Act* 1972 (SA), at the time that it was in force, did not authorise the Minister to appoint officers to be engaged as teachers and s 15 of the Act provided exclusively for the appointment of teachers.

and;

(c) the matter be remitted to the Full Court of the Industrial Relations Court of South Australia for further consideration of question 2.

4. The respondent, the Chief Executive, Department of Premier and Cabinet of South Australia, pay the appellant's costs in this Court and in the Full Court of the Supreme Court of South Australia.

36 HEYDON J. Before it was repealed, s 9(4) of the *Education Act* 1972 (SA) ("the Act") referred to two classes of people other than the officers and employees whom the Minister might have appointed under it. One was the "officers of the Department". Relevantly to that class, s 11 as originally enacted provided for a Director-General of Education to be Permanent Head of the Education Department, for Deputy Directors-General of Education and, by s 11(4), "such other officers of the Department as may be necessary or expedient for the proper administration of this Act." The other class referred to in s 9(4) was the "officers of … the teaching service". These officers were appointed pursuant to s 15.

37 Section 15(1) might be described as a "particular" provision since it conferred power on the Minister to appoint "officers of the teaching service". Section 15(2) might also be described as a "particular" provision because it permitted officers of the teaching service to be appointed on a permanent or temporary basis. Section 15 as a whole may be described as a "particular" provision in another sense – it appeared in Pt III of the Act, which contained 40 sections and as originally enacted set up a very detailed regime that related to officers of the teaching service, rather than teachers. After its initial enactment the section was amended, but without changes material to the outcome of this appeal. The enacted regime dealt with the appointment, retrenchment and retirement of the officers of the teaching service, their long service leave entitlements, the disciplinary procedures and outcomes applicable to them, their classification and their remuneration. It also created institutions to administer this regime such as the Teachers Classification Board, the Teachers Salary Board and the Teachers Appeal Board.

38 Section 9(4), on the other hand, was a more general provision. It conferred power on the Minister to appoint such "officers and employees" as he or she considered necessary for two purposes – the proper administration of the Act and the welfare of the students of any school. The appointment of persons other than teachers could have effectuated both purposes. Section 9(4) was one of nine subsections, each of which deals with a disparate subject. Section 9(4) was part of a provision providing for those powers and functions of the Minister which are, to use the adjective in the relevant marginal note, "general".

39 That structure suggested that the correct construction of the Act required that s 9(4) be read as not having permitted the employment of teachers. If s 9(4) were read as having permitted their employment, the elaborate and specific structure of Pt III dealing with the officers of the teaching service who were appointed under s 15 could have been bypassed. If s 9(4) were read as having permitted the employment of teachers, two classes would have existed. The first would have comprised officers of the teaching service, whose affairs were regulated in detail. The second would have comprised other teachers – temporary teachers – whose affairs were not regulated at all. There is no statutory warrant for concluding that teachers could be appointed to government

schools who were not "officers of the teaching service". Hence s 9(4), which provided that the officers and employees capable of being appointed under that provision were "in addition to the officers of the Department and of the teaching service", excluded the appointment of teachers from the powers it conferred. In that context, "in addition" meant "along with" or "apart from" or "distinct from".

40 It is desirable to deal with three specific arguments of the respondent.

41 First, the respondent argued that on the construction which it advocated the statutory scheme was rational because s 9(4) gave the Minister the "flexibility necessary properly to provide for the educational requirements of the students at government schools." However, the respondent did not point to any matter of practical utility flowing from the "flexibility" of s 9(4) which could not be found in s 15, and in particular s 15(2). That weakens the proposition that s 9(4) conferred the flexibility on which the respondent relied.

42 Secondly, the respondent relied on certain statements in *Cusack v Parsons*. Jacobs J (with whom Millhouse J agreed) said[51]:

> "'[T]eachers' in departmental schools are not necessarily officers in the teaching service. They may be 'employees' appointed and engaged by the Minister pursuant to [s] 9(4)."

And in his dissenting judgment Cox J said[52]:

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

But his Honour also suggested that s 9(4) did not permit appointments for teaching purposes[53]:

> "[Section 9(4)] envisages three categories of officers – officers of the teaching service, departmental officers, and other officers considered necessary for administration or welfare purposes …. It is probably also the case that the teaching service established under Pt III consists solely of officers, appointed pursuant to s 15".

43 Decisions of the Full Court of the Supreme Court of South Australia do not bind this Court. In addition, the controversy in *Cusack v Parsons* did not

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51 (1988) 48 SASR 364 at 366.

52 (1988) 48 SASR 364 at 374.

53 (1988) 48 SASR 364 at 375.

concern the relationship between s 9(4) and s 15. The statements about s 9(4) were only dicta. The question whether teaching appointments could be made under s 9(4) has to be decided in this appeal. Even if one adopts the reading of what was said in *Cusack v Parsons* which was most favourable to the respondent, the answer to the question before this Court was not decided in that case. It was simply assumed. "A point of law merely assumed in an opinion, not discussed, is not authoritative."[54]

44 Thirdly, the respondent pointed to the definition of "teacher" in the original form of s 5(1) as meaning "any person who gives, or is qualified to give, instruction at any Government or non-Government school". The respondent submitted that there was thus a distinction between "teachers" and "officers of the teaching service", and that persons who were teachers without being members of the teaching service could be appointed under s 9(4). That argument is flawed, however, because the definition of "teacher" served no function in relation to s 9(4) and s 15. Its function lay in the provision by the Act of a system of registration for teachers generally – those who taught in non-government schools as well as those who taught in government schools. The distinction between "teachers" and "officers … of the teaching service", though real, does not point in the direction which the respondent desires, for ss 9(4) and 15 are concerned only with government schools.

45 For the above reasons, the first part of question 1 should be answered in the negative and the second in the affirmative. The appeal should be allowed. The respondent should pay the appellant's costs in the Full Court and in this Court.

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54 *Matter of Stegall* 865 F 2d 140 at 142 (7th Cir 1989) per Judge Posner, Chief Judge Bauer and Judge Coffey agreeing. See also *Baker v The Queen* [1975] AC 774 at 789.