IN THE HIGH COURT OFAUSTRALIA
ADELAIDE REGISTRY

No. A4 of 2011

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

AUSTRALIAN EDUCATION UNION
Appellant

-and-

DEPARTMENT OF EDUCATION AND CHILDREN'S SERVICES
Respondent

APPELLANT'S SUBMISSIONS

PART I. Certificate for Publication

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

PART II. Concise Statement of Issues

2. The issues presented by this appeal are:

(a) first, whether, on a true construction of the *Education Act 1972* (SA), the Minister of Education was entitled, for over thirty years, to appoint persons to be teachers in the public education system under a general power of appointment contained in s.9(4) of the Act, or whether the Minister was instead confined to making such appointments under the specific power of appointment to the Teaching Service contained in s.15 of the Act; and

(b) secondly, whether, more broadly, the courts should approach the interpretation of statutory grants of power with a view to promoting the purposes of the Executive by assuming the desirability of widely flexible executive power.

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PART III. Certificate regarding Notice of a Constitutional Matter

3. The appellant has considered whether any notice should be given under s.78B of the *Judiciary Act 1903* (Cth) and determined that none is required.

PART IV. Citations of Judgments Below

4. *Australian Education Union v. Department of Education & Children's Services* (Full Court of the Industrial Relations Court of South Australia) [2009] SAIRC 37. Internet - http://www.austlii.edu.au/au/cases/sa/SAIRC/2009/37.html.

5. *Australian Education Union v. Department of Education & Children's Services* (Full Court of the Supreme Court of South Australia) [2010] SASC 161. Internet - http://www.austlii.edu.au/au/cases/sa/SASC/2010/161.html.

PART V. Summary of Facts

6. For a period of over thirty years since the passage of the Act, the Minister has purported to appoint teachers engaged on a temporary basis (formerly called *"contract teachers"* and now known as *"temporary teachers"*) by exercising the power conferred by s.9(4) rather than that conferred by s.15.

7. The practice was the subject of a protracted dispute between the applicant and the respondent and was ultimately discontinued by the respondent in 2005. All temporary appointments are now made under s.15.[1]

8. The effect of the practice has been to exclude teachers appointed under s.9(4) from the teachers' long service leave régime provided for in Part III of the Act – which is confined to persons appointed under s.15. This, in turn, has significantly reduced the potential entitlements of appointees under s.9(4) by excluding them from the more generous treatment of interruptions of service for the purpose of calculating continuous service pursuant to Part III of the Act (s.22) and, as well, from the other protections and benefits afforded to teachers appointed to the Teaching Service established by Part III.

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[1] By an amendment to the Act in 2006, s9(4) was relocated and redesignated as s.101B under a Part of the Act headed *Miscellaneous*. Cf. *Statutes Amendment (Public Sector Employment) Act 2006* (SA), ss.30, 41.

9. It is common ground that, if the appointments are not authorised by s.9(4), and are to be taken as having been made under s.15, the result is that significant numbers, probably thousands[2], of persons purportedly appointed under s.9(4) will have an been denied an entitlement (or a greater entitlement) to long service leave.[3]

10. The action below was brought by the appellant on behalf of two temporary relief teachers purportedly appointed under s.9(4) as well as by way of a test case to settle the status of all persons affected by the controversy over thirty years.

11. The proceedings were instituted by Notification of Dispute in the Industrial Relations Commission of South Australia by the two teachers who claimed long service leave entitlements as members of the Teaching Service. The parties agreed to state two questions of law on agreed facts. They were:

(1) Did s.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 s.15 of the Act provide exclusively for the appointment of teachers?

(2) In consequence of the Court's answer to Question (1), are the long service leave entitlements of Mr. Nouhad Jawhari and Mrs. Kerry Margaret Oakes governed by the provisions of the *Public Service Sector Management Act 1995*, or Division 3 of Part III of the *Education Act 1972?*

12. The Commission referred the questions to the Full Court of the Industrial Relations Court which unanimously answered Question (1) in the affirmative and reserved for further consideration Question (2). The appellant obtained leave to appeal from the Full Court of the Supreme Court. The Full Court unanimously dismissed the appeal.

13. In a joint judgment in the Industrial Relations Court, Senior Judge Jennings and Judge Gilchrist held that s.9(4) called for a generous construction that allowed the Minister a *"flexibility"* in fulfilling his obligations under the Act, which s.15 did not necessarily allow.[4] In a separate judgment, Judge McCusker, whilst acknowledging the force of the appellant's position, held that s.9(4) was an auxiliary power and did

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2 FC [41]
3 FC [9]
4 IRC [39]-[40]

not necessarily cover the same subject matter as s.15.[5] All three judges held that the rule in *Anthony Hordern*[6] was merely a guide that should be displaced in the context of the Act.

14. On appeal in the Full Court, Gray J (with Nyland J concurring) held that s.9(4) was an auxiliary power to s.15, that the two sections did not deal with the same subject matter for the purpose of the rule in *Anthony Hordern*, and that s.9(4) was designed to accord a desirable measure of *"flexibility"* to the Minister.[7] Gray J held that, while the Act created a scheme for the provision of education consisting of a Department with departmental officers and a Teaching Service with officers of that service, Parliament equipped the Minister with a broad power in s.9(4) to appoint additional officers to address the diverse and unpredictable employment requirements necessary to the proper administration of the Act, and that there was no good reason why teachers should be excluded from that process.[8] In doing so, he rejected the appellant's arguments that Part III created a code (and, therefore, an exclusive means for the employment of teachers in State schools), thereby leaving s.9(4) to do other work.

15. In separate reasons, Vanstone J, while rejecting a series of arguments put by the respondent and confessing some attraction for the appellant's position, held the matter to be finely balanced and settled in favour of the ordinary language of s.9(4), declining to find in it any words of limitation[9] and also (implicitly) displacing the rule in *Anthony Hordern*.

PART VI. Summary of Argument

16. The Full Court erred in law in holding that s.9(4), as a matter of statutory construction, permitted the appointment of teachers. The Full Court erred (a) because the language of the subsection properly excludes such appointments; (b) because application of the rule of construction that the grant of a specific and qualified power implies a denial of a power to do the same thing in an unqualified

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5 IRC [55]-[57]

6 *Anthony Horden & Sons Ltd. v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1,7

7 FC [29], [32]

8 FC [29], [31]

9 FC [52]

way under a general power excludes such appointments; and (c) because the courts should not, by recognising as a matter of policy the need for administrative flexibility, empower the Executive to circumvent or override discernible statutory schemes prescribed by the Legislature.

Language of Limitation

17. The Full Court erred in law in holding that, on its own language, s.9(4) authorised the appointment of teachers to government schools and ought to have held that the words *"(**in addition to** the officers of the Department and of the teaching service)"* excluded from the purview of the subsection the appointment of persons to be teachers in public schools.

18. Parts II and III of the Act respectively distinguish between *"The Minister and The Department"* on the one hand and *"The Teaching Service"* on the other: that is, between the governmental and the vocational arms of the public educational establishment. There is a further schematic distinction, in Divisions 1 and 2 of Part II, between *"The Minister"* and *"The Department"*: that is, between the Executive and the bureaucracy. These three distinctions give rise to three corresponding classes of functionary: bureaucrats, teachers, and other ministerial appointments.

19. The Act plainly contemplates the continuance of the Department and its officers appointed under the normal Public Service procedures (s.11). It also contemplates the establishment of something called *"the teaching service"*[10] (whose officers are to be appointed under s.15) which is to constitute the corps of teachers in the public school system. The creation of this Teaching Service implies that the service is to be the exclusive source of such teachers. The Act also contemplates that further officers (or employees) may be required, in addition to those two categories of officer, and allows for their appointment under s.9(4).

20. The words *"in addition to"*, found in the latter provision, are words of limitation. Consistently with the threefold division referred to above, they mean *"along with"* or *"apart from"* and define something that is at once separate from, and outside of, the two classes of appointment parenthetically identified (bureaucrats and teachers)

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[10] Defined in s. 5.

next to which the **additional** appointments, provided for in the subsection, form a third *"miscellaneous"* class.

21. If that were not so, and s.9(4) merely empowered the appointment of more officers of the Department, it would add nothing to s.11(4). Likewise, if it empowered the appointment of additional officers of the Teaching Service, it would add nothing to s.15(1).[11] Parliament does not legislate in vain and the rule is that the Court should prefer an interpretation that gives the subsection some work to do.[12] Properly understood, what s.9(4) allows for is the employment of public servants (or the engagement of private contractors) to perform miscellaneous (non-teaching and non-bureaucratic) services as required by the Department or individual schools; for example, groundsmen, cleaners, counsellors, security guards and the like.

22. By contrast, s. 15 is the specific provision dealing with the appointment of teachers in public schools. It enables the appointment of teachers on both a permanent and a temporary basis. The succeeding sections of Part III deal with classification, promotion and transfer, discipline and suspension, reclassification and retirement. Part III also establishes the Teachers Classification Board, the Teachers Salaries Board and the Teachers Appeal Board. One would not expect to find powers dealing with, or affecting, the composition of the teaching corps outside of Part III and, conversely, it would be odd if these provisions were not intended to apply to all persons teaching in public schools.

Rule of Statutory Construction: Expressum Facit Cessare Tacitum

23. Even if s.9(4), properly construed, would on its face otherwise permit the contested appointments, the rule *expressum facit cessare tacitum* ought to have been applied to

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11 In this regard, there is no relevant distinction to be drawn between *"teachers"* and *"officers of the Teaching Service"*. The point of the language is not to highlight the possibility of a non-officer class of teacher-appointees in contradistinction to the Teaching Service. Rather it highlights the difference between the teaching profession as a whole, public, private, employed or unemployed, on the one hand, and the body of teachers employed in public schools on the other. Parliament could just as well have chosen the phrase *"public-school teacher"* instead of *"officer in the Teaching Service"*. They are intended to mean the same thing and, consequently, there is no scope in the Act for a teacher in a public school to be other than an officer in the Teaching Service. Neither the Court nor the respondent was able to identify any relevant distinction between teachers in public schools and officers of the Teaching Service – and there is none.

12 The maxim of construction: *ut res magis valeat quam pereat.*

exclude such appointments and there was no sound reason for the Court to displace the rule in construing the Act.

24. The rule is to the effect that, where a statute ostensibly confers two powers which are each capable of achieving the same object, one of which is a specific power, subject to limitations and restrictions, and the other a general, unqualified, power, the general power is implicitly excluded by the presumed intention of Parliament that the specific power alone is to be used to achieve the object in question. "*An affirmative grant of such a power, so qualified, appears necessarily to imply a negative. It involves a denial of a power to do the same thing in the same case free from the conditions and qualifications presented by the provision.*"[13]

25. The rule is an aid to discerning the true meaning to be attributed to the words of the enactment.[14] It is an application of a wider proposition that, whenever there is a particular enactment and a general enactment in the same statute, and the latter in its most comprehensive sense would overrule the former, the particular enactment must be taken to be operative.[15] In *MIMIA v. Nystrom*, Gummow and Hayne JJ held (omitting citations):

> *"Anthony Hordern and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power', or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restriction in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions."*[16]

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13 *Anthony Horden & Sons Ltd. v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 8; *MIMIA v Nystrom* (2006) 228 CLR 566, 589 [59]; see also *R v. Wallis ex p. Employers Association of Wool Selling Brokers* (1949) 78 CLR 529, 550: *"An enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course."*

14 *Ainsworth v. Criminal Justice Commission* (1992) 175 CLR 564, 575

15 *Pretty v. Solly* (1859) 26 Beav. 606,610; 53 ER 1032, 1034; *Refrigerated Express Lines (A/Asia) Pty. Ltd. v. Australian Meat and Live-Stock Corporation (No. 2)* (1980) 44 FLR 455, 469

16 *MIMIA v Nystrom* (2006) 228 CLR 566, 589 [59]

26. The ultimate question in the case of a statute to which the rule may be taken to apply is whether the Act confers only one power (the special and restricted power) to take the relevant action. A proper enquiry to address in applying the rule is whether *"ostensibly"*, that is, on its face, all appointments made under the specific power (s.15) could be made under the general power (s.9(4)).[17] The answer to that question in this case is: yes.[18]

27. Section 15 contains a power specifically addressed to the appointment of teaching staff, both permanent and temporary. It is a specific and restricted power to appoint qualified teachers to teach in the Teaching Service of the public school system. The power is contained in Part III of the Act, which, as originally enacted and at all relevant times, has included provisions relating to the retrenchment of teachers in the Teaching Service with associated rights of appeal, special provisions as to long service leave and the calculation of continuous service in respect of such leave, and provision for a retiring age. Part III also makes provision for disciplinary action against members of the Teaching Service, including associated rights of appeal to a Teachers Appeal Board, classification of teachers within the Teaching Service, with rights of review and appeal to a Classification Board and thence to the Appeal Board, as well as a Teachers Salaries Board to set the pay and conditions of members of the Teaching Service.

28. It is submitted that Vanstone J correctly directed herself when she observed that all s.15 appointments could be made under s.9(4) potentially leaving s.15 moribund.[19] However, it is submitted that Her Honour then failed to take the next logical step indicated by the rule of statutory construction and the sense of the Act.

29. There is no reason why, for the purposes of the rule of statutory construction, any limitation of qualification should actually attach to the mode of exercise of the power as opposed to the régime consequential upon the exercise of the power. In any event, there *are* relevant limitations and qualifications on the exercise of the section 15 power in that the Minister can only use that section to appoint from amongst persons

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17 *MIMIA v Nystrom* (2006) 228 CLR 566, 589 [59]
18 FC [48]
19 FC [48]

who are qualified *"teachers"* and then only to appoint them to teaching positions in public schools (that is, officers in the Teaching Service).

30. It cannot be suggested that s.15 does not confer a restricted power for the purposes of the applicable rule of statutory construction on the basis that it provides for appointments as the Minister *"thinks fit"*. That would be to misstate the enquiry. The Minister may only appoint *"as he thinks fit"* to the Teaching Service in public schools qualified teachers (as defined). On the other hand, under s.9(4) the Minister's power is, on its face, general and unrestricted. The Minister can appoint anyone to any position for the proper administration of the Act or the welfare of students.

31. In the Full Court, Gray J (Nyland J concurring) held that the two powers of appointment, those in s.15 and s.9(4), do not relevantly deal with the same subject matter.[20] Critically, this approach begs the question what counts as the same subject matter for the purposes of the rule of statutory construction. Gray J characterised the s.9(4) as *"auxiliary"*[21] and addressed to the *"range of unpredictable exigencies that may confront an education system"*.[22] Gray J reasoned in relation to s.9(4) in the following way.[23]

(1) Because the power to appoint under s.9(4) is available to appoint persons in addition to the Teaching Service, the power must include the power to appoint teachers to public schools. However, this assumes the answer to the question for decision.

(2) His Honour added that the s.9(4) power is therefore auxiliary to the s.15 power. This is merely a consequential proposition.

(3) Then his Honour found that the purpose of the s.9(4) auxiliary power is to provide flexibility to the Minister in teaching appointments.

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20 FC [29]

21 FC [29]

22 FC [31]-[32]. Neither the Court nor the respondent could postulate any exigency touching the service of teachers that was not already amply catered for in s.15, and the fact that the practice has been discontinued suggests that there never was one. The only possible qualification is the provisions in s.25 for compulsory retirement, and this is an example of a statutory prescription which is intended to apply to all public school teachers.

23 FC [29]-[32]

(4) His Honour held that flexibility is desirable from the Minister's point of view.

32. The suggestion in the reason of Gray J at paragraph 29 appears to be that because the power to appoint under s.9(4) is only available in respect of positions that are not positions in the Teaching Service (by use of the words *"in addition to"*), the two sections cannot deal with the same subject matter. In other words, Gray J's reasoning appears to be that the subject matter of s.15 is the appointment of public school teachers to the Teaching Service and the subject matter of s.9(4) is the appointment of public school teachers outside of the Teaching Service or to an auxiliary group of teachers.

33. However, on this approach, the reasoning is reduced to the proposition that the subject matter of s.15 is appointments under s.15 and the subject matter of s.9(4) is appointments under s.9(4). If that were the correct approach then it would seem to follow that two separate provisions could never be found to deal with the same subject matter and the rule of construction to the effect that the specific provision overrides the general could never have any application on the basis of common subject matter.

34. The structure of the Act further favours the construction advanced by the applicant in that Part III amounts to a self-contained code which provides in detail for the rights and obligations of the Teaching Service, including appointment, retirement, retrenchment, career classification, promotion and discipline, as well as the Teachers Salary Board and the Teachers Appeal Board to govern pay and conditions and grievances. It is not to be supposed that having created such a comprehensive régime, the Parliament intended to arm the Minister with the means to circumvent it by a sidewind and impose terms and conditions, inconsistent with Part III, on the employment of teaching staff in government schools. Nor can it be supposed that the Parliament intended the possibility of there being two parallel teaching services – the official corps of teachers governed by Parliamentary sanction as well as a separate and inferior *"phantom"* teaching service governed by executive order. It is no answer to say, as the respondent contended below, that the authorities can be trusted not to abuse s.9(4).

35. Simply put, there was no rational reason for Parliament carefully to construct an elaborate régime of terms and conditions for the employment of teachers in the State Teaching Service, if it were also intended at the same time to confer an unlimited power on the State to employ teachers in public schools on any terms and conditions which the Minister saw fit to impose. The generality of the power in s.9(4) should be confined accordingly.

36. The respondent contended below, in an argument which found favour with the Full Court, that s.9(4) was necessary as a separate source of power to s.15, in order to provide the Minister with flexibility of appointment. The appeal of flexibility as to the purpose underlying s.9(4) is misplaced.

37. In the first place, it assumes the answer to the very question for decision because s.9(4) can only provide flexibility in the manner described it if is first decided that it permits the appointment of teachers to public schools. Flexibility in this context means no more than the power to appoint teachers to public schools untrammelled by the strictures of Part III of the Act. It may very well suit the Minister and the Executive Government to have flexibility in the exercise of their powers but that is not the question for determination. The question for determination, as recognised by Vanstone J[24], is whether Parliament, by the enactment, intended to permit such flexibility.

38. Secondly, neither the respondent nor the Court was able to identify any degree of flexibility afforded by the one provision which was not already accommodated by the other. The several cases extracted by the Court from the Casual Teachers Award[25] and the further examples of the need to contract out of obligations of service anywhere in the State, and the potential need to abrogate requirements of probation or service *"at the pleasure"* of the Minister, are all permissible for appointments under s.15. The Act gives the Minister a broad regulation-making power (consistent with the Act) to provide for the terms and conditions of employment for the teaching service and *"any other matter whatsoever affecting their employment"*.[26]

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24 FC [48]
25 FC [32]
26 s.107(2)(d)

39. Moreover, the Act does not contain any discriminating criterion to choose between the two types of teaching appointments. It provides no guide as to when it is proper to appoint under s.9(4) or under s.15. One cannot, therefore, postulate that any particular appointment or batch of appointments will be improper on the ground that it should have been made under the other power. Why should the Minister have not made all appointments under s.9(4)? There is nothing to suggest, for example, that it is supposed to be an emergency power or an extraordinary power of some other kind. Why should it not be the norm? The respondent conceded below that appointments made for the sole purpose of avoiding the (long service) provisions of Part III would be an abuse of power. But the retort must be: why? The Act, in the respondent's view, allows the Minister just such an election; and, indeed, it begs the question why precisely the Minister did for so long appoint teachers under s.9(4), if not for that very reason.

40. Finally, if the respondent's interpretation is right, then s.9(4) would also permit the appointment of non-teachers to teaching positions, which, of course would subvert the entire object of the Act. Yet, there is nothing in the language of the Act that would prevent such a possibility unless the section is construed in the manner contended for by the applicant.

Dispensing Power of the Executive

41. The effect of the reasoning of the Full Court has been to elevate the assumed desirability of administrative flexibility to a quasi-rule of construction. The absence of any evidence of the actual need for s.9(4) to operate as an extraordinary or auxiliary power to appoint teachers – taken with the discontinuance of its use to appoint teachers since 2005 (which gives the lie to any such need) – indicates that the Court has treated the concept of administrative flexibility as a presumptive good, almost as a matter of public policy. Its reasoning, accordingly, has a tendency to ordain an approach to statutory construction to the effect that the language of an enactment is to be construed with a bias towards the desirability of enhancing, rather than containing, executive power.

42. The courts should not readily arm the Executive with a *de facto* dispensing power, by permitting it to use statutory powers of a general, exempting or miscellaneous

kind, to circumvent whole schemes of rights and obligations prescribed by positive enactment. The Government of South Australia has done this before (and been upheld by the Supreme Court) in the matter of shop trading hours under a regulatory scheme ultimately disallowed by this Court.[27] There the Minister sought to circumvent the statutory procedure for broadening shopping hours by issuing all participating shopkeepers with an exemption certificate under a statutory power of exemption. In striking down the exercise of the power, this Court held that the exempting provision could not be used to establish an alternative régime of trading hours.[28] So, too, in the case at bar, the Minister has, for about thirty years, used an auxiliary power to establish an alternative régime of employment for temporary teachers which excludes them from the regime of rights (and obligations) which the Parliament has in terms prescribed for them.

43. Another case is *Jarrat v Commissioner of Police (NSW)*[29] where the asserted prerogative right of the Executive to dismiss a Deputy Commissioner of Police without observing the obligation to accord natural justice (as implicitly directed by the language of the applicable legislation) was denied by this Court. In doing so the Court had regard to the comprehensive nature of the statutory scheme governing the police force as excluding such broad, residual, executive power. [30]

44. These decisions may be sustainable on the particular terms of the statutes in question, but they are also examples of the more general principle for which the appellant contends and which the judgment of the Full Court appears to controvert.

PART VII. Applicable Legislation

(See Annexure)

PART VIII. Precise Orders Sought

43. The appellant seeks the following orders:

(a) that the appeal be allowed;

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27 *Shop Distributive and Allied Employees Association v The Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.

28 At 560.

29 (2005) 224 CLR 44

30 At 70, 89.

(b) that the judgment of the Full Court of the Supreme Court of South Australia be set aside and there be substituted in lieu thereof orders as follows:

(i) that the appeal be allowed;

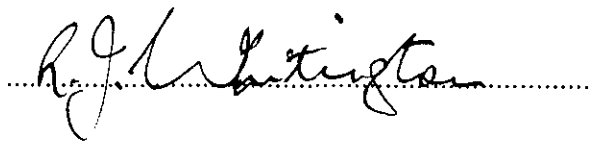
(ii) that the judgment of the Full Court of the Industrial Relations Court of South Australia be varied so as to substitute in lieu of its answer to Question 1. the following answer: *Section 9(4) of the Education Act 1972, at the time that it was in force did not authorise the Minister to appoint officers to be engaged as teachers and that s.15 of the Act does provides exclusively for the appointment of teachers.*

10 (iii) that the appellant have the costs of the hearing before the Full Court of the Industrial Relations Court of South Australia;

(iv) that the matter be remitted to the Full Court of the Industrial Relations Court of South Australia for further consideration of Question 2;

(c) that the appellant have the costs of the appeal in this Court and of the appeal to the Full Court of the Supreme Court of South Australia.

DATED 11 March 2011



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ANNEXURE

APPELLANT'S SUBMISSIONS: PART VII.

APPLICABLE LEGISLATION

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