DECISION

Fair Work Act 2009
s.604–Appeal of decisions

Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of The Kingdom of Saudi Arabia, Cultural Mission
v
Ms Shazlia Saleh, Mr Mohamed Namaoui, Mr Hamoda Dayein, Mr Salwa Elshikh, Mr Elhadi Almahadi, Mr Muhammad Ahmed, Mr Elsayed Ali Eltaher Bashir, Ms Suzanne Maksoud, Mr Mohammed Obaidi, Mr Mohammad Abdul-Hwas, Mr Yassine Belkamel, Mr Zach Kalany, Mr Mu'ammar Ibrahim Najjar, Mr Abdalaal Nassir, Mr Mohamed Ben Mansour, Mr Abdulrazig Osman
(C2024/3320)

Mr Abdelrahman Wedissa and Mr Qusai Mubaidin
v
Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of The Kingdom of Saudi Arabia, Cultural Mission
(C2024/3385)
(C2024/3230)

VICE PRESIDENT ASBURY
VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT DOBSON

BRISBANE, 16 SEPTEMBER 2024

Appeal against decision [2024] FWC 1152 (and order PR774472 in C2024/3230 and C2024/3385) of Deputy President Easton at Sydney on 2 May and 9 May 2024 in matter numbers U2022/4348; U2022/4550; U2022/4553; U2022/4557; U2022/4565; U2022/4568; U2022/4575; U2022/4579; U2022/4695; U2022/5015; U2022/6848; U2022/6904; U2022/7868; U2022/8775 – Application of s 12 of the Foreign States Immunities Act 1985 (Cth) – Whether proceedings "concern" the employment of a person – Interaction of federal statutes – Whether Fair Work Act 2009 (Cth) applies to a foreign State – Whether a foreign State is a "person" for the purposes of the Fair Work Act 2009 (Cth) – Whether unfair dismissal jurisdiction ousted by contract – Whether persons were permanent residents for the purposes of the Foreign States Immunities Act 1985 (Cth) – Whether contract renewal

constitutes a new contract or a continuation of existing contract – Permission to appeal granted – Appeals dismissed save as to two individual employees.

Introduction

[1] The Royal Embassy of Saudi Arabia (the **Embassy** or the **appellant**) is located in Yarralumla in Canberra. Between March and September 2022, the Embassy dismissed 18 individual employees it employed to perform administrative or technical work (the **employees**). The employees had worked for the Embassy for periods of between 9 and 15 years undertaking roles including Academic Supervisor, Academic Advisor, Academic Student Advisor for University Affairs, in the HR Office, Liaison Officer and Group Coordinator, Accountant, Medical Reimbursement Officer, and providing IT support.

[2] Each of the employees applied to the Fair Work Commission (the **Commission**) under s 394 of the *Fair Work Act* 2009 (Cth) (the **FW Act**) seeking an unfair dismissal remedy. The Embassy objected to the jurisdiction of the Commission to deal with the applications. Its objection was on two grounds: that the FW Act did not apply to the Embassy and, alternatively or in addition, because it is a sovereign foreign State and it and its diplomatic mission is "immune from jurisdiction by virtue of the *Foreign States Immunities Act* 1985 (Cth) (the **FSI Act**) and other statues and conventions". With respect to some of the employees, an objection was also raised on grounds that the employees were not permanent residents for the purposes of s 12(6) and (7) of the FSI Act at the relevant time and that the applications were premature because they were commenced prior to the dismissals taking effect.

[3] The jurisdictional objections were dealt with by Deputy President Easton. The Deputy President rejected the jurisdictional objections made by the Embassy apart from those with respect to two individuals, Mr Wedissa and Mr Mubaidin.[1] In relation to Mr Wedissa and Mr Mubaidin, the Deputy President concluded that there was insufficient evidence before the Commission to enable him to be satisfied that they were permanent residents at the time their employment contracts were made and, accordingly, dismissed their applications.[2] A further decision was published with respect to the application of Mr Almahadi which resulted in his application being dismissed for the same reason.[3]

[4] The Embassy seeks permission to appeal and to appeal from the decision to dismiss its jurisdictional objections. Fifteen of the individual employees are respondents to its appeal. Mr Wedissa and Mr Mubaidin seek permission to appeal and to appeal from the decision to dismiss their applications for an unfair dismissal remedy. Mr Alramadi has also sought permission to appeal from the Deputy President's supplementary decision. That appeal is not before this Full Bench. The remaining three appeals were heard together. The Embassy was granted permission to be represented by Tom Brennan SC in the hearing of the appeal. Mr Wedissa was granted permission to be represented by Alicia Lyons of counsel. Mr Mubaidin and the 15 respondents to the Embassy's appeal represented themselves.

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[1] *Saleh & Ors v Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia, Cultural Mission* [2024] FWC 1152.

[2] [2024] FWC 1152 at [89].

[3] *Saleh & Ors v Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of the Kingdom of Saudi Arabia, Cultural Mission* [2024] FWC 1211 at [11].

[5] In its appeal, the Embassy raises a range of contentions which would, if accepted, have significant implications for the application of Australian industrial laws to persons employed in Australia by a foreign State, including (but not only) persons employed to work at diplomatic missions. Its broadest contentions would mean that foreign States are not subject to the FW Act in any circumstances, or at least those parts of the Act which apply only to a national system employer and national system employee. That would include the protections afforded by national minimum wages, the National Employment Standards, modern awards and unfair dismissal provisions. The implications for other aspects of the FW Act, including general protections provisions, and for other Commonwealth legislation which applies generally to employers and employees, such as discrimination legislation, are less clear but potentially significant. The Embassy's narrower contentions would at least mean that employees engaged to work in foreign embassies or consulates in Australia would never be entitled to bring unfair dismissal proceedings.

[6] The circumstance of a person employed to work in the embassy or diplomatic mission of a foreign State seeking to pursue a remedy under Australian law arising from that employment is not novel. Proceedings involving employees working in embassies or consulates have not infrequently been brought before Australian courts and tribunals arising from that employment, including unfair dismissal proceedings, underpayment claims and proceedings seeking the imposition of civil penalties.[4] At least since the enactment of the FSI Act in 1985, the relevant foreign State has often not claimed any immunity or suggested that it is not subject to Australian industrial laws.[5] In those cases in which some form of immunity was claimed, employees have been permitted to pursue claims arising from dismissal in a range of instances, including a gardener at the Kuwait Embassy,[6] a secretary/typist at the Indian Consulate in Sydney,[7] a driver/receptionist at the Libyan Embassy[8], a receptionist at the Italian Consulate in Adelaide,[9] an administrative assistant at the Korean Embassy,[10] the High Commission of Malaysia,[11] the Lebanese Consulate in Sydney,[12] and a worker employed to perform domestic work for the Acting Consul-General of the Republic of Iraq.[13]

[7] The Embassy could not identify a single Australian authority which directly supports its position. Its submissions are likely to mean that a number of these cases were wrongly decided, and that other foreign States have not claimed immunity available to them or submitted themselves to proceedings before a court or tribunal which the court or tribunal did not, in fact, have jurisdiction to determine. The only instance we have been able to identify in which an

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[4] A useful discussion of the subject is found in R Garnett, *The Rights of Diplomatic and Consular Employees in Australia* (2018) 31 Australian Journal of Labour Law 1 from which we have derived assistance in preparing the following description of relevant decisions.

[5] See, for example, *Sidhwa v British Consulate General* [1997] IRCA 129; *Riskalla v Consulate General of Portugal* [2009] NSWIRComm 185; *Gibbs v Embassy of Mexico* [2012] FWAFB 5840; *Mucci v Consulate General of Italy* [2012] FWA 9243; *Kim v Embassy of Algeria* [2016] FWC 4726; *Kumar v Consulate General of India* [2018] FCCA 7; (2018) 329 FLR 90; *Scarati v Republic of Italy (No 3)* [2024] FCA 55.

[6] *Robinson v Kuwait Liaison Office* [1997] IRCA 170; (1997) 73 IR 33.

[7] *Thomas v Consulate General of India* [2002] NSWIRComm 24.

[8] *Hussein v The People's Bureau of the Great Socialist People's Libyan Arab Jamahiriya* [2006] AIRC 486 (*Hussein*).

[9] *Republic of Italy (Ministry of Foreign Affairs and International Cooperation Adelaide Consulate) v Benvenuto* [2018] FCAFC 64; (2018) 261 FCR 19 (*Benvenuto*).

[10] *Saville v Embassy of South Korea* [2005] AIRC 598.

[11] *Adam v High Commission for Malaysia* [2005] AIRC 882 (*Adam*).

[12] *Kassis v Republic of Lebanon* [2014] FCCA 155; (2014) 282 FLR 408.

[13] *Buenaobra v Alesi* [2018] FWC 4311.

Australian court or tribunal has found a foreign State to be immune from suit in an employment claim is a decision of a single Commissioner of the Australian Industrial Relations Commission finding that the Commission was not a court for the purposes of the FSI Act.[14] That decision does not assist the Embassy. It is inconsistent with later authority[15] and the Embassy did not press a submission that the Commission is not a court for the purposes of the FSI Act.

[8] It is correct to say that there is no authority binding upon us which directly stands in the way of most of the Embassy's contentions and the submissions it advances do not appear to have been raised in the same manner in earlier proceedings. However, given the nature of the arguments advanced by the Embassy, it is notable that no authority directly supports its position. The Embassy claims that the exposure of a foreign State to unfair dismissal proceedings represents an affront to its dignity as a foreign State and would be fundamentally inconsistent with Australia's international obligations. The fact that such a proposition does not appear to have occurred to many other foreign States, or the courts and tribunals which have considered claims against them, is sufficient to make us pause before accepting those contentions.

[9] We have decided to grant permission to appeal with respect to the Embassy's appeal and the appeals brought by Mr Wedissa and Mr Mubaidin. For the reasons which follow, the bulk of the Embassy's submissions cannot be accepted. The FW Act applies to a foreign State and foreign States are not generally immune from being subject to unfair dismissal proceedings. The Embassy's appeal must be dismissed save that the decision of the Deputy President should be varied to include a conclusion that Suzanne Maksoud and Mohamed Ben Mansour were not permanent residents for the purposes of s 12(6) and (7) of the FSI Act and the Embassy has immunity with respect to their applications. For different reasons, the appeals of Mr Wedissa and Mr Mubaidin must also be dismissed.

Unfair dismissal jurisdiction

[10] The applications made by the employees seek an unfair dismissal remedy under Part 3-2 of the FW Act. Part 3-2 is entitled "Unfair Dismissal". A number of aspects of the Embassy's submissions focus on the form and application of Part 3-2.

[11] Section 380 provides that, for the purposes of Part 3-2, an employee is defined as a "national system employee" and an employer as a "national system employer". A "national system employee" is defined in s 13 as "an individual so far as he or she is employed, or usually employed, as described in the national system employer in s 14, by a national system employer". A "national system employer" is defined in s 14 as follows:

> **14 Meaning of national system employer**
>
> (1) A national system employer is:
>
> (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
> (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
> (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

[14] *Christodulakis v French Consulate* (1999) 91 IR 365.

[15] *Adam* at [36]; *Hussein* at [10]-[11].

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
(i) a flight crew officer; or
(ii) a maritime employee; or
(iii) a waterside worker; or
(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, ***Australia*** includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of ***Australia*** in section 12).

Note 2: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:
(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
(ii) is a body established for a local government purpose by or under a law of a State or Territory; or
(iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and
(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and
(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or
(b) revoke or amend such an endorsement.

(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:

(a) generates, supplies or distributes electricity; or
(b) supplies or distributes gas; or
(c) provides services for the supply, distribution or release of water; or
(d) operates a rail service or a port;
unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

[12] The relevant part of the definition for present purposes is s 14(1)(f) that refers to a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory.

[13] The object of Part 3-2 is set out in s 381 as follows:

381 Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:
(i) the needs of business (including small business); and
(ii) the needs of employees; and
(b) to establish procedures for dealing with unfair dismissal that:
(i) are quick, flexible and informal; and
(ii) address the needs of employers and employees; and
(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

[14] Section 394(1) of the FW Act confers a right on a person who has been dismissed to apply to the Commission for an order granting an unfair dismissal remedy. The concept of a person having been "dismissed" is defined in s 386(1) such that a person has been dismissed if the person's employment with his or her employer has been terminated on the employer's initiative or the person has resigned from his or her employment, but was forced to do so because of the conduct, or course of conduct, engaged in by his or her employer. The definition in s 386(1) makes clear that the capacity to apply for an unfair dismissal remedy arises where a person's employment has been terminated by the employer or the person was forced to resign from his or her employment.

[15] The capacity of the Commission to make an order granting a remedy for unfair dismissal arises if the Commission is satisfied that the person was protected from unfair dismissal and was unfairly dismissed.[16] A person is "protected from unfair dismissal" if the person has completed the minimum employment period (being a period of six months or 12 months in the case of small business employers) and a modern award covers the person, an enterprise agreement applies to the person in relation to the employment or the person's annual rate of earnings is less than the high income threshold.[17]

[16] Whether a person has been unfairly dismissed is governed by s 385 which provides as follows:

> **385 What is an unfair dismissal**
>
> A person has been ***unfairly dismissed*** if the FWC is satisfied that:
>
> (a) the person has been dismissed; and
> (b) the dismissal was harsh, unjust or unreasonable; and
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
> (d) the dismissal was not a case of genuine redundancy.
>
> Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.

[17] In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable for the purposes of s 385(b), the Commission is required to take into account the matters set out in s 387. Those factors include whether there was a valid reason for dismissal related to the person's capacity or conduct, whether the person was notified of that reason, whether the person had an opportunity to respond to any reason related to the capacity or conduct of the person, whether the person had been warned about any unsatisfactory performance before the dismissal (if the dismissal related to performance), and any other matters the Commissioner considered relevant.

[18] If the Commission is satisfied that a person was protected for unfair dismissal and has been unfairly dismissed, the Commission may order the person's reinstatement or the payment of compensation. Section 390 provides as follows:

> **390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.
>
> (3) The FWC must not order the payment of compensation to the person unless:

[16] *Fair Work Act* 2009 (Cth), s 390(1).

[17] *Fair Work Act* 2009 (Cth), ss 382-384.

> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies.

[19] The Embassy emphasises that, pursuant to s 390(3)(a), the Commission must not order the payment of compensation to a person unless it is satisfied that reinstatement of the person is inappropriate.

[20] An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by reappointing the person to the position in which the person was employed immediately before the dismissal or appointing the person another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.[18] An order for the payment of compensation is limited by a compensation cap to the total amount of remuneration received by the person or to which the person was entitled during the 26 weeks immediately before the dismissal or half the high income threshold (whichever is lesser).[19]

Foreign States Immunities Act 1985 (Cth)

[21] Under international law, foreign States and their agencies are generally entitled to immunity from the jurisdiction of the courts of other countries. In Australia, the extent to which foreign States are immune from proceedings in Australian courts and tribunals is governed by the FSI Act. The FSI Act was enacted in 1985 following the Australian Law Reform Commission's report on *Foreign State Immunity* (Report No 24) which recommended that foreign State immunity be subject of legislation.

[22] The starting point of the FSI Act is found in s 9 which confers a general immunity on foreign States in the following terms:

> **9 General immunity from jurisdiction**
>
> Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

[23] The section refers to a "court" of Australia. The term "court" is defined in s 3(1) of the FSI Act to include "a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers". As we have mentioned, the Embassy pressed at first instance that the Commission was not a "court" for the purposes of the FSI Act.

[24] However, it is not necessary to further address that matter. The Deputy President found that the Commission is a "court" for the purposes of the FSI Act.[20] In that respect, the Deputy President's decision is consistent with earlier authority.[21] Whilst formally reserving its position, the Embassy did not press a submission on appeal that the Commission is not a court for the

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[18] *Fair Work Act* 2009 (Cth), s 391(1).

[19] *Fair Work Act* 2009 (Cth), s 392(5) and (6).

[20] [2024] FWC 1152 at [44].

[21] *Adam* at [36]; *Hussein* at [10]-[11].

purposes of the FSI Act and, in our opinion, the conclusion of the Deputy President is correct. The Commission is a tribunal that that has functions or powers of a kind similar to judicial functions or powers.

[25] The general immunity conferred by s 9 of the FSI Act is subject to various exceptions set out in ss 10-22. A foreign State loses immunity if one of the exceptions applies. The exceptions cover circumstances in which a foreign State submits to the jurisdiction of an Australian court and in relation to proceedings concerning commercial transactions, contracts of employment, personal injury and damage to property, ownership, possession and use of property, copyright, patents and trademarks, membership of corporate bodies, arbitrations, actions *in rem*, bills of exchange and taxation.

[26] Of most direct relevance, for present purposes, is s 12 which provides as follows:

> **12 Contracts of employment**
>
> (1) A foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.
>
> (2) A reference in subsection (1) to a proceeding includes a reference to a proceeding concerning:
>
> (a) a right or obligation conferred or imposed by a law of Australia on a person as employer or employee; or
> (b) a payment the entitlement to which arises under a contract of employment.
>
> (3) Where, at the time when the contract of employment was made, the person employed was:
>
> (a) a national of the foreign State but not a permanent resident of Australia; or
> (b) an habitual resident of the foreign State;
> subsection (1) does not apply.
>
> (4) Subsection (1) does not apply where:
>
> (a) an inconsistent provision is included in the contract of employment; and
> (b) a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision.
>
> (5) Subsection (1) does not apply in relation to the employment of:
>
> (a) a member of the diplomatic staff of a mission as defined by the Vienna Convention on Diplomatic Relations, being the Convention the English text of which is set out in the Schedule to the *Diplomatic Privileges and Immunities Act 1967*; or
> (b) a consular officer as defined by the Vienna Convention on Consular Relations, being the Convention the English text of which is set out in the Schedule to the *Consular Privileges and Immunities Act 1972*.
>
> (6) Subsection (1) does not apply in relation to the employment of:
>
> (a) a member of the administrative and technical staff of a mission as defined by the Convention referred to in paragraph (5)(a); or
> (b) a consular employee as defined by the Convention referred to in paragraph (5)(b);

> unless the member or employee was, at the time when the contract of employment was made, a permanent resident of Australia.
>
> (7) In this section, permanent resident of Australia means:
>
> (a) an Australian citizen; or
> (b) a person resident in Australia whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia.

[27] The Embassy's submissions primarily concerned the extent of the exception to general immunity conferred by subsection (1) (when read with subsection (2)) and the "exceptions to the exception" found in subsection (4) where an inconsistent provision is included in the contract of employment and subsection (6) where a member of the administrative and technical staff of a mission is not a permanent resident of Australia at the time when the contract of employment was made. The Embassy does not submit that any of the employees were members of the diplomatic staff or consular officers for the purposes of subsection (5).

[28] Part III of the FSI Act deals with service and judgments. Relevantly, s 29 deals with the power to grant relief and provides as follows:

> **29 Power to grant relief**
>
> (1) Subject to subsection (2), a court may make any order (including an order for interim or final relief) against a foreign State that it may otherwise lawfully make unless the order would be inconsistent with an immunity under this Act.
>
> (2) A court may not make an order that a foreign State employ a person or re-instate a person in employment.

[29] Section 29(2) is potentially relevant in that it contemplates that a foreign State might be the subject of an order that it employ a person or reinstate a person in employment in proceedings in relation to which it is not immune but prevents such an order being made.

[30] Finally, s 6 of the FSI Act provides:

> **6 Savings of other laws**
>
> This Act does not affect an immunity or privilege that is conferred by or under the *Consular Privileges and Immunities Act 1972*, the *Defence (Visiting Forces) Act 1963*, the *Diplomatic Privileges and Immunities Act 1967* or any other Act.

[31] The Embassy relied on s 6 of the FSI Act to the extent that it preserves immunities and privileges conferred by other legislation.

Permission to appeal

[32] The Embassy and Mr Wedissa and Mr Mubaidin require permission to appeal in accordance with s 604(1) of the FW Act. In addition, because the proceedings at first instance involve applications for unfair dismissal remedies under Part 3-2 of the FW Act, s 400(1) of the Act dictates that the Commission must not grant permission to appeal unless it considers that it is in the public interest to do so. The test imposed by s 400(1) of the Act has been described as

a stringent one.[22] The threshold for a grant of permission to appeal in relation to unfair dismissal proceedings is higher than that pertaining to appeals generally.[23]

[33] Notwithstanding that the threshold is high, we are satisfied that it is in the public interest to grant permission to appeal in the appeal by the Embassy and the appeals by Mr Wedissa and Mr Mubaidin. As we have described, the Embassy's appeal raises a number of novel contentions that would, if accepted, have significant implications with respect to the application of Australian industrial laws to foreign States who employ persons in Australia. Those contentions should be considered by the Full Bench. The appeals by Mr Wedissa and Mr Mubaidin also raise novel, albeit more confined, issues in relation to the operation of s 12(6) and (7) of the FSI Act which overlap with issues raised in the Embassy's appeal.

Section 12 of the FSI Act

[34] The first contention advanced by the Embassy is that Saudi Arabia is immune from the jurisdiction of the Commission by operation of s 9 of the FSI Act and that this immunity is not lifted by s 12(1). The contention, as it was explained in oral submissions, primarily involves a submission that s 12(1) and (2), properly construed, do not countenance unfair dismissal proceedings being brought against a foreign State. The Embassy sought to bolster that submission by reference to the conflict it alleges would be created with Australia's international obligations if unfair dismissal proceedings could be brought against a foreign State, at least with respect to employees working in an embassy or diplomatic mission. It is appropriate to first consider the construction of s 12 of the FSI Act.

[35] The essential submission of the Embassy is that unfair dismissal proceedings do not fall within the type of proceedings caught by s 12(1) of the FSI Act because the unfair dismissal claims are not proceedings concerning "the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia". Separately, the Embassy submits that unfair dismissal proceedings are not proceedings concerning "a right or obligation conferred or imposed by a law of Australia on a person as employer or employee" for the purposes of s 12(2)(a) of the FSI Act. It is necessary to consider the application of s 12(1) and 12(2)(a) of the FSI Act in turn.

[36] Dealing first with s 12(1), the Embassy placed significant emphasis on judicial consideration of the words "in so far as the proceeding concerns" in s 12(1). Similar language is found in s 11(1) (dealing with commercial transactions), s 13 (dealing with personal injury and damage to property), s 14 (dealing with the ownership, possession and use of property), s 15(1) (dealing with copyright, patents and trademarks) and s 16(1) (dealing with memberships of bodies corporate, unincorporated bodies or partnerships). The phrase has been subject of consideration by the High Court on a number of occasions, particularly as it appears in s 11(1) which operates to lift the immunity otherwise conferred by s 9 in proceedings in so far as the proceeding concerns a commercial transaction.

[37] The Full Bench was taken through the development of the jurisprudence with respect to the phrase "proceeding concerns", particularly as it appears in s 11(1) of the FSI Act, in a trilogy

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[22] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54; (2011) 192 FCR 78 at [43] (Buchanan J with whom Marshall and Cowdroy JJ agreed).

[23] *Workpac Pty Ltd v Bambach* [2012] FWAFB 3206; (2012) 220 IR 313 at [14]; *Barwon Health – Geelong Hospital v Colson* [2013] FWCFB 4515; (2013) 233 IR 364 at [6].

of High Court judgments. The first case is *PT Garuda Indonesia Ltd v Australia Competition and Consumer Commissio*n [2012] HCA 33; (2012) 247 CLR 240 in which the Court considered whether Garuda was immune from proceedings brought under trade practices legislation. The Embassy noted that the plurality considered whether the relevant proceedings concerned a commercial transaction by reference to the case pleaded by the ACCC and that the proceeding "concerned" a commercial transaction in an immediate sense having regard to the relief sought by the ACCC.[24]

[38] Later, in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31, the High Court considered whether proceedings seeking to enforce a foreign judgment was a proceeding which concerned a commercial transaction for the purposes of s 11(1) of the FSI Act. In that context, French CJ and Kiefel J explained that the term "proceeding" should be broadly understood. Their Honours said (at [36]):

> The term "proceeding" is apt to refer to any application to a court in its civil jurisdiction for its intervention or action; that is, some method permitted by law for moving a court to do some act according to law (36). In the context of s 9 and foreign State immunity, it may be understood to refer to a process by which the jurisdiction of an Australian court is invoked, in which a foreign State is named as a party and in which judicial power may be exercised against the foreign State and its interests.

[39] Although their Honours refer to a process in which "judicial power" may be exercised, we do not read the judgment as suggesting that s 9 of the FSI Act is limited to a proceeding in a judicial tribunal. As we have referred to, a "court" is defined in s 3(1) of the FSI Act to include "a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions and powers. Section 9, and s 12, of the FSI Act are plainly capable of applying to proceedings in a tribunal or body with functions of a kind similar to judicial functions and powers. The Embassy made no submission to the contrary and accepts that the Commission is such a tribunal.

[40] French CJ and Kiefel J accepted that the concept of a "proceeding concerns" should be given a "wider meaning" and extends to registration of a foreign judgment where that judgment is based upon a commercial transaction.[25] Gageler J similarly concluded (at [135]):

> The preferred construction is first to construe "proceeding", in s 9 and elsewhere in Pt II of the Immunities Act, to extend to any application for the making of an order in civil jurisdiction, thereby extending the general immunity conferred by s 9 to an application for registration of a foreign judgment under s 6(1) of the Foreign Judgments Act. It is next to construe "concerns", in s 11(1) and elsewhere in Pt II of the Immunities Act, to look to the source of rights in issue in the proceeding; thereby excepting from the general immunity that is conferred by s 9 an application for registration of a foreign judgment where the rights determined by that foreign judgment arose out of a commercial transaction.

[41] The Embassy emphasises the focus on the source of the rights in issue in the proceedings when assessing whether a proceeding "concerns a commercial transaction".[26]

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[24] *PT Garuda Indonesia Ltd v Australia Competition and Consumer Commissio*n [2012] HCA 33; (2012) 247 CLR 240 at [42]-[43] (French CJ, Gummow, Hayne and Crennan JJ).

[25] *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31 at [80-]-[81] (French CJ and Kiefel J).

[26] See also at [187]-[188] (Nettle and Gordon JJ).

[42] Finally, in *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* [2024] HCA 21, the High Court considered winding up proceedings brought with respect to a separate entity of a foreign State. The Embassy referred to the discussion of the general structure and operation of the FSI Act provided by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ as follows (at [18]):

> Sections 10 to 21 of the Immunities Act create exceptions to the general immunity from jurisdiction which s 9 confers. Together, they "set out exhaustively the circumstances in which the general rule of immunity is to be relaxed". Like s 9, ss 10 to 21 are addressed to the immunity from jurisdiction of a "foreign State". Apart from s 10, which is headed "Submission to jurisdiction", each is expressed in terms that a foreign State is not immune in a proceeding in so far as the proceeding concerns one or more identified subject-matters. For present purposes, it is necessary to note the subject-matters of only some of them.

[43] Particular emphasis was placed on the reference to the need for a proceeding to concern "one or more identified subject-matters" before the immunity conferred by s 9 is lifted.

[44] The Embassy submitted that the effect of the jurisprudence in relation to the phrase "proceeding concerns" in the FSI Act is encapsulated by three propositions: firstly, it addresses the claim made; secondly, it is necessary to look to the conduct of the foreign State which gives rise to the legal rights that the claimant seeks to vindicate in the claim; and, thirdly, it is necessary to ask whether conduct is properly characterised as falling within the subject matter of the section. The ultimate submission advanced by the Embassy is that a proceeding concerns employment for the purposes of s 12 of the FSI Act only if the substantive rights which the claimant seeks to vindicate are based on the contract of employment.

[45] In our opinion, the submission misunderstands the operation of s 12(1) of the FSI Act. There is no issue that the unfair dismissal applications are proceedings for the purposes of s 12(1) in that they involve applications for the making of orders in a civil jurisdiction. The authorities to which we have referred indicate that the connecting term "concerns" connotes a relationship between the proceedings and the subject-matter identified in one or other of ss 11-21. It is necessary then to identify the subject-matter of s 12(1).

[46] It is apparent from the text and context of the section that the subject-matter identified in s 12(1) of the FSI Act is the "employment of a person". So long as there is a relevant relationship between a proceeding and the employment of a person, s 12(1) lifts the immunity otherwise conferred by s 9 (subject to the remaining subparagraphs of s 12). It is true that s 12(1) does not operate with respect to any employment by a foreign State. The requisite connection to Australia must exist. The connection to Australia required is that the employment must be "under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia".

[47] The latter part of s 12(1) identifies the connection to Australia that is required. It does not, in our view, mean that the subject-matter of the provision is limited to the contract of employment itself, much less that, to fall within s 12(1), proceedings must necessarily seek to enforce rights or obligations created by the terms of the contract. The question was considered by Moore J in *Robinson v Kuwait Liaison Office* (1997) 73 IR 33 (*Robinson*). Mr Robinson was a gardener employed by the Kuwait Liaison Office who lodged an application under s 170EA of the *Industrial Relations Act* 1988 (Cth) (the **1988 Act**) concerning the termination of his employment.

[48] Moore J concluded that a claim concerning termination of employment under s 170EA of the 1988 Act fell within s 12(1) of the FSI Act. Section 170EA permitted application to be made concerning termination of employment. A remedy could be granted if the termination contravened a provision of the Act, including if the termination occurred without there being a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service.[27] In relation to the application of the FSI Act to those proceedings, Moore J concluded as follows (at 41-42):

> I turn now to consider the question of whether the application of Mr Robinson under s 170EA is a proceeding in which the immunity generally conferred by s 9 of the Immunities Act does not arise because of s 12. The operation of s 12 depends on the foreign State being an employer and it is not in issue that the Kuwait Liaison Office was Mr Robinson's employer. In issue is whether the proceedings arising from the application under s 170EA involve "a proceeding concern(ing) the employment of a person under a contract of employment". The use of the word "concerning" indicates that the proceedings must be about or relate to the employment: see *Sungravure Pty Ltd v Middle East Airlines Airlibian SAL* (1975) 134 CLR 1; *Australian Securities Commission v Lord* (1991) 33 FCR 144. The reference to the "contract of employment" in s 12(1) is not intended to limit the operation of s 12 to contractual claims. Rather it is intended to remove any ambiguity or uncertainty about what "employment" means. It does not mean, for example, employment in the sense of engagement under a contract for services. That s 12(1) is not limited to contractual claims is made clear by s 12(2)(a) which indicates that a proceeding to which s 12(1) applies includes a proceeding concerning a right or obligation conferred or imposed on a person by an Australian law. It is, however, necessary that the right or obligation be imposed by virtue of the person being an employer and employee. Section 3 of the Immunities Act defines "law of Australia" and it plainly includes a Commonwealth statute. Part 3 of Div VIA of the Act imposes certain obligations on employers who are proposing to terminate the employment of an employee. Those obligations effectively limit the circumstances and the manner in which employment can lawfully be terminated. Part 3 also confers on an employee the right found in s 170EA to institute proceedings to seek a remedy. There is no reason to doubt, in my opinion, that proceedings arising from an application under s 170EA are proceedings of the type referred to in s 12(1).

[49] The Embassy submitted that s 12(1) of the FSI Act lifts the immunity conferred by s 9 only with respect to a cause of action which directly sought to enforce the terms of a contract of employment. The submission cannot be reconciled with the reasoning in *Robinson*. Moore J expressly concluded that the operation of s 12(1) is not limited to contractual claims. The reference to a "contract of employment" in s 12(1) has another purpose, namely, it is intended to remove any ambiguity about what "employment" means in that context. That is, employment refers to employment under a contract of employment and does not extend to contractors or persons working under another type of legal relationship.

[50] To the extent the Embassy submitted that *Robinson* is wrong, we disagree. Nothing in the subsequent consideration of s 11 of the FSI Act suggests that *Robinson* was wrongly decided. The authorities to which we have referred suggest that s 11(1) requires examination of the source of the rights in issue in the proceedings was the conduct of a foreign State in a commercial transaction. The authorities do not suggest that the rights at issue must themselves be derived from the legal instrument which constituted the commercial transaction. That is apparent from the fact that proceedings alleging contraventions of trade practices and other legislation were found to fall within s 11(1) of the FSI Act so long as the conduct subject of the

[27] *Industrial Relations Act* 1988 (Cth), s 170DE(1).

proceedings arose out of a commercial transaction.[28] Applying that reasoning to s 12(1), so long as a proceeding arises out of employment with a relevant geographical connection to Australia, a connection exists and the proceeding "concerns" the employment of a person under a contract of employment even if the cause of action sought to be pursued owes its existence to legislation, such as the FW Act.

[51] One aspect of the Embassy's submission should be mentioned. The Embassy accepted that s 12 of the FSI Act operated with respect to proceedings beyond those directly enforcing contractual claims. However, the Embassy suggested that s 12 extends beyond contractual claims because of the operation of s 12(2)(a) and that s 12(1) itself only operated with respect to causes of action which have their source in the terms of a contract of employment. The Embassy's submission assumes that s 12(2) extends the operation of s 12(1) to types of proceedings which would not otherwise be caught by s 12(1). That submission is inconsistent with *Robinson*. Moore J regarded s 12(2) as illustrating the type of claims which fall within s 12(1). In our opinion, that must be correct. It is beyond argument that s 12(2)(b), in referring to "a payment the entitlement to which arises under a contract of employment", falls within s 12(1) even as narrowly construed by the Embassy. In that context, s 12(2) must be intended to illustrate the breadth of the operation of s 12(1). With respect, Moore J was correct to regard s 12(2) as illustrating that s 12(1) is not limited to contractual claims.

[52] The Embassy did not otherwise submit that unfair dismissal proceedings did not concern the subject matter of the employment of a person. So much is clear from the provisions of Part 3-2 of the FW Act set out above. Section 394(1) provides for a person to apply for an unfair dismissal remedy if he or she has been "dismissed" meaning that his or her employment has been terminated on the employer's initiative or the person resigned because of the conduct of the employer.[29] For that reason, an application to the Commission for an unfair dismissal remedy is a proceeding that concerns the employment of a person for the purposes of s 12(1) of the FSI Act.

[53] In the alternative, even if the unfair dismissal proceedings are not a proceeding that concerns the employment of a person for the purposes of s 12(1) of the FSI Act, in our opinion, it is a proceeding concerning a right or obligation conferred or imposed by a law of Australia on a person as employer or employee for the purposes of s 12(2)(a). The Embassy sought to distinguish *Robinson* in that respect as a result of the differences between the termination of employment provisions then under consideration and the current unfair dismissal regime. The termination provisions then contained in the 1988 Act had a different structure to the present provisions. The Embassy submitted that these differences were significant in applying s 12(2)(a) of the FSI Act because the 1988 Act conferred rights and imposed obligations directly whereas the current unfair dismissal provisions provide for a right to apply to the Commission for a remedy.

[54] The 1988 Act provided that an employer "must not" terminate the employment of an employee in various circumstances, for example, without giving a requisite period of notice, unless the employee had been given the opportunity to defend himself or herself against allegations related to the employee's conduct or performance, unless there is a valid reason or valid reasons for the termination, on various prohibited grounds or in contravention of an order

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[28] See, for example, *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266 at [111] (Jackman J); *DDI22 v Qatar Airways QCSC (No 3)* [2024] FCA 351 at [127] (Halley J).

[29] *Fair Work Act 2009* (Cth), s 386(1).

of the Commission.[30] As has been explained, the current unfair dismissal provisions confer a right on a person who has been dismissed to apply for an unfair dismissal remedy.[31] The Commission can grant a remedy if, amongst other things, it is satisfied that the dismissal was harsh, unjust or unreasonable.[32] In considering whether it is satisfied a dismissal was harsh, unjust or unreasonable, the Commission is required to take into account the matters listed in s 387. Those matters overlap substantially with the grounds of contravention in the 1988 Act, including whether there was a valid reason for the dismissal and whether the person was given an opportunity to respond.[33]

[55] However, the differences between the termination of employment provisions in the 1988 Act and the current unfair dismissal regime are more limited than a superficial reading might suggest. Although framed as statutory commands, the consequence of the court being satisfied that a contravention of one of the termination provisions of the 1988 Act had occurred was to open an avenue for a discretionary remedy to be awarded, including a declaration a contravention had occurred, reinstatement or compensation.[34] In that respect, the provisions of the 1988 Act are not dissimilar to the current provisions. A person was conferred with a right to apply for a discretionary remedy which turns upon a decision-maker being satisfied a standard has been breached. Yet, Moore J found that proceedings arising from an application under s 170EA are proceedings of the type referred to in s 12(1) without recourse to s 12(2)(a).

[56] The current unfair dismissal provisions provide for persons to be "protected from unfair dismissal".[35] Persons who are protected from unfair dismissal are conferred with a right to apply for a remedy which can be granted if the Commission is satisfied the dismissal was unfair taking into account standards of conduct set out in s 387 (such as that there is a valid reason for dismissal, the employee is notified of the reasons and provided with an opportunity to respond, whether there has been an unreasonable refusal to allow a support person or warnings as to unsatisfactory conduct). A remedy may be granted by order of the Commission. Contravention of such an order gives rise to contravention of a civil remedy provision or an offence.[36]

[57] It is, in our opinion, to take an overly narrow view of s 12(2)(a) to suggest that an application for an unfair dismissal remedy is not a proceeding concerning a right or obligation conferred or imposed by a law of Australia on a person as employer or employee because the FW Act does not impose a simple statutory command with respect to dismissal. The unfair dismissal provisions of the FW Act confer and impose rights and obligations on employers and employees by conferring a right on an employee to seek a remedy arising from dismissal based upon an assessment by the Commission of fairness judged against standards of conduct set out in the legislation. Even if (contrary to our earlier conclusion), the unfair dismissal proceedings do not fall within s 12(1), the proceedings fall within s 12(2)(a) of the FSI Act.

[58] The Embassy relied on the existence of s 29(2) of the FSI Act as being inconsistent with unfair dismissal proceedings being able to be brought against a foreign State. In short, it suggested that the fact that an order that a foreign state employ a person or reinstate a person in

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[30] *Industrial Relations Act* 1988 (Cth), ss 170DB, 170DC, 170DE, 170DF and 170G.

[31] *Fair Work Act* 2009 (Cth), s 394.

[32] *Fair Work Act 2009* (Cth), s 390(1)(b).

[33] *Fair Work Act* 2009 (Cth), s 387(a) and (c).

[34] *Industrial Relations Act* 1988 (Cth), s 170EE(1) and (2).

[35] *Fair Work Act* 2009 (Cth), s 382.

[36] *Fair Work Act 2009* (Cth), ss 405 and 675.

employment cannot be made is inconsistent with unfair dismissal provisions applying to a foreign State. The fact that the FSI Act denies a court (or a tribunal) the capacity to make one type of order that might be available in proceedings with respect to a foreign State does not necessarily mean that the Act intends those proceedings not be otherwise able to be brought at all. Again, the question was considered in *Robinson* where Moore J observed (at 42):

> It was not suggested that any of the qualifications on the operation of s 12 contained within the section had any relevance to the proceedings brought by Mr Robinson. It may be accepted that s 29 of the Immunities Act will preclude the Court, if this point is ever reached, from ordering the Kuwait Liaison Office to reinstate Mr Robinson. To this extent the rights of Mr Robinson conferred by s 170EE of the Act are modified by the Immunities Act and the only order, if any, the Court would have power to make is an order for compensation under s 170EE(3).

[59] In *Robinson*, the denial of access to one of the remedies available under s 170EE of the 1988 Act did not mean that proceedings could not be brought against a foreign State if the proceedings were otherwise of a type contemplated by s 12(1). In our opinion, the same conclusion applies with respect to the current provisions.

[60] The Embassy points out that s 390(3)(a) of the FW Act provides that the Commission must not order the payment of compensation unless it is satisfied that reinstatement is inappropriate. It submits that s 390(3)(a) means that the Commission must always consider the appropriateness of reinstatement. We do not believe that this feature of the current legislation leads to a different conclusion. Section 29(2) of the FSI Act has the effect that the Commission could not order the reinstatement of the individual employees. That means that reinstatement is necessarily inappropriate for the purposes of s 390(3) and the Commission could then, if it considered it appropriate to do so, order the payment of compensation.[37] Section 29(2) does not, in our opinion, provide a basis to read down s 12(1) so as not to apply to unfair dismissal proceedings under the FW Act.

[61] It is also relevant to observe that the Australian Law Reform Commission (**ALRC**) report that preceded the enactment of the FSI Act does not support a narrow reading of the type of claims which fall within s 12(1). The ALRC report recommended:[38]

> The whole of the proposed section should apply to all relations between employer and employee as such. The employee should be able, where the foreign state employer is not immune on the contract, to sue not only on the contents of the contract but also over any rights or duties imposed by law on an employer or employee in respect of the employment relationship, including pension rights arising under such a contract.

[62] For these reasons, the unfair dismissal proceedings brought by the individual employees are proceedings falling within s 12(1) and (if necessary) s 12(2)(a) of the FSI Act and, subject to the remaining subsections of s 12, Saudi Arabia is not immune with respect to those proceedings.

Australia's international obligations

[63] The Embassy sought to support its construction of s 12(1) of the FSI Act by reference to Australia's international obligations, in particular with respect to diplomatic immunity. The

[37] See also *Thomas v Consulate General of India* [2002] NSWIRComm 24 at [44].

[38] Law Reform Commission Report No. 24, *Foreign State Immunity*, at [99].

submissions were advanced at two levels. At the first level, the Embassy referred to s 6 of the FSI Act which indicates that that Act is not intended to affect an immunity or privilege that is conferred by other legislation, including the *Diplomatic Privileges and Immunities Act* 1967 (Cth). The privileges and immunities extended to foreign diplomatic and consular personnel and to diplomatic and consular premises are generally dealt with in the Vienna Convention on Diplomatic Relations (the **VCDR**).

[64] For the purposes of considering the relevance of s 6 of the FSI Act when construing the remainder of the provisions of that Act, it is necessary to bear in mind that only some aspects of the VCDR have been given force of domestic law. Section 6 of the FSI Act refers only to other legislation. Subject to certain adjustments, the provisions of Articles 1, 22 to 24 and 27 to 40 of the VCDR have been given the force of law in Australia.[39] Other parts of the VCDR are not part of domestic law. The Embassy relied on the following aspects of the VCDR that have been implemented in Australian law as being inconsistent with the application of unfair dismissal legislation to employees working at a diplomatic mission of a foreign State: Article 22(2), which places the receiving State under a special duty to protect the premises of a diplomatic mission from any "infringement of its dignity"; Article 24, pursuant to which the archives and documents of the mission are inviolable; Article 27(2), under which the official correspondence of the mission is inviolable; Article 31(2), which provides that "a diplomatic agent is not obliged to give evidence as a witness"; and Article 38(2), which requires the receiving State to "exercise its jurisdiction over [members of the staff of the mission (other than diplomatic agents)] in such a manner as not to interfere unduly with the performance of the functions of the mission".

[65] None of those provisions provide a basis, in themselves, to confine the operation of s 12(1) of the FSI Act to exclude unfair dismissal proceedings. Article 22(2) of the VCDR provides as follows:

> The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

[66] It was suggested that the requirement to respond to unfair dismissal provisions impairs the dignity of the mission because the proceedings would necessitate a close factual examination of the reasons for each termination and the internal process by which it was affected. The Embassy submits that any assessment by an organ of the receiving State of the internal workings of a diplomatic mission infringes the inviolability and dignity of the foreign State and its mission and interferes unduly with the performance of its functions.

[67] We do not accept that responding to unfair dismissal proceeding undermines the dignity of the mission for the purposes of Article 22(2) of the VCDR. Article 22 is concerned with the inviolability of mission premises.[40] Nothing in responding to unfair dismissal proceedings violates the premises of the Saudi Arabian embassy. It is clear from s 12 of the FSI Act that Parliament has determined that a foreign State is not immune from domestic law in respect of the employment of certain staff and that some intrusion into the operations of a mission is permissible. The Embassy accepts that proceedings to enforce a contract of employment (with the requisite geographical connection to Australia) or under Australian laws which confer rights

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[39] *Diplomatic Privileges and Immunities Act* 1967 (Cth), s 7(1).

[40] Denza, *Introductory Note to Vienna Convention on Diplomatic Relations*, 2009 at p4.

or impose obligations is permissible. Many of those proceedings are likely to involve equal or greater intrusion into the operations of a diplomatic mission than unfair dismissal proceedings.

[68] Articles 24, 27(2), 31(2) and 38(2) of the VCDR are concerned with the protection of documents or correspondence of a mission, the obligation of a diplomatic agent to give evidence as a witness or interference in the functions of the mission. Those articles again provide no reason to read s 12(1) of the FSI narrowly. Articles 24, 27(2) and 31(2) are not infringed by mere fact of susceptibility to unfair dismissal proceedings. An issue would only arise if an attempt was made to obtain compulsory orders requiring the production of documents or the attendance of a witness in those proceedings. In that respect, no different issue arises in unfair dismissal proceedings than any other type of proceedings in relation to which a foreign State is not immune by reason of the FSI Act. Article 38(2) of the VCDR contemplates that a receiving State will have jurisdiction over diplomatic staff in a manner that may interfere with the performance of the functions of a mission so long as it is not "undue".[41] Again, the mere susceptibility to potential unfair dismissal proceedings cannot be said to have that effect.

[69] The second level at which the Embassy relies upon Australia's international obligations is that, as a matter of statutory interpretation, the FSI Act and the FW Act should be construed consistently with Australia's obligations under international law and that, if construed consistently with international obligations, s 12(1) of the FSI Act should be read as not operating with respect to unfair dismissal proceedings. We accept that it is appropriate to endeavour to construe legislation consistently with international law. It is sufficient, in that respect, to refer to the observation of French CJ and Kiefel J in *Firebird Global* as follows (at [44]):

> The construction contended for by Firebird suffers from the additional disadvantage that it does not give full effect to the jurisdictional immunity of a foreign State which is recognised by international law. Section 9 ought, so far as its language permits, to be construed in conformity with international law. Especially is this so where the statute implements or codifies Australia's obligations under international law.

[70] As is acknowledged in that passage, the presumption that legislation is intended to be consistent with international law can be applied only so far as the language of the legislation permits. If the language is clear, it must be obeyed even if contrary to international law.[42]

[71] There are difficulties in the approach adopted by the Embassy to the presumption in favour of construing legislation in conformity with international law. It points to alleged inconsistencies between the practical operation of unfair dismissal proceedings and the privileges referred to in the VCDR. One difficulty with the approach is that the FSI Act expressly provides that a foreign State will be subject to proceedings, including concerning employment under a contract of employment. The Embassy accepts that a foreign State could be the subject of a range of proceedings in relation to the employment of staff at a diplomatic mission which have the potential to interfere with the operations of a diplomatic mission in a manner that is just as substantial as, or more substantial than, unfair dismissal proceedings. Proceedings alleging contravention of the general protections provisions in Part 3-1 of the FW Act unarguably fall within s 12(2)(a) of the FSI Act and can be brought against a foreign State. Where arising from a dismissal, those proceedings necessarily involve examination of the

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[41] Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th Edition, 2015), p340-341.

[42] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at [247] (Kiefel J); *CPCF V Minister for Immigration and Border Protection* [2015] HCA 1; (2015) 255 CLR 514 at [8] (French CJ).

reasons for the dismissal and, leaving aside s 29(2) of the FSI Act, give rise to the potential for reinstatement.[43] It is difficult to justify reading down s 12(1) of the FSI Act to specifically exclude unfair dismissal provisions where other proceedings with not dissimilar features are nonetheless able to be brought.

[72] A further difficulty with its approach is that the Embassy seeks to utilise aspects of international law dealing with diplomatic immunity and the operation of diplomatic missions to support a construction of s 12(1) of the FSI Act that would prevent unfair dismissal proceedings being brought against a foreign State, or separate entity of a foreign State, in any context. Section 12 of the FSI Act itself expressly deals with the extent to which employment claims can be brought with respect to staff of a diplomatic mission in s 12(5) and (6). The Embassy does not submit that s 12(5) and (6) operate with respect to the individual employees (other than those it contends were not permanent residents at the time when their contracts of employment were made). Where the FSI Act expressly deals with the extent to which the immunity is lifted for employment claims of staff at diplomatic missions, there is no justification for further reading down s 12(1) by reference to Australia's international obligations in relation to diplomatic staff.

[73] The Embassy relies specifically on Article 7 of the VCDR which provides as follows:

> Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

[74] It referred to academic commentary suggesting that the freedom to "appoint the members of staff of the mission" extends to a freedom to dismiss.[44] Although Article 7 of the VCDR is not incorporated into domestic law, the Embassy submits that it is part of Australia's international obligations and the FSI Act must be construed such that unfair dismissal proceedings cannot be brought against a foreign State to avoid infringing that obligation.

[75] Both parties referred to the decision of the Supreme Court of the United Kingdom in *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777 (*Benkharbouche*). That case involved proceedings brought by domestic workers employed at the London embassies of Sudan and Libya arising from the termination of their employment. Those claims were precluded by the *State Immunity Act 1978* (UK) in a manner not replicated by Australian law. However, the individual employees contended that the *State Immunity Act 1978* (UK) was incompatible with rights under the Charter of Fundamental Rights of the European Union or Convention for the Protection of Human Rights and Fundamental Freedoms. That question, in turn, depended on whether the exclusion of proceedings with respect to the termination of employment of staff at a diplomatic mission was consistent with international law.

[76] The Court concluded that international law did not require immunity to be conferred on the foreign States with respect to the claims in an employment context of a private law character and there was no principle of international law that deprived the employment tribunal of jurisdiction to consider the unfair dismissal claims of the two employees.[45] The character of the employment as being of private or sovereign character will generally depend on the nature of

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[43] *Fair Work Act 2009* (Cth), s 545 (2)(c).

[44] Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th Edition, 2015), p51.

[45] *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777 at [75].

the relationship between the parties and the functions which the employee is employed to perform.[46] The Court identified three categories of employees: diplomatic agents, administrative and technical staff and staff in the domestic service of the mission. The employment of administrative and technical staff might be purely ancillary and supportive or might, in some cases, involve an exercise of sovereign authority.[47]

[77] In this case, it appears to be accepted that the individual employees were administrative and technical staff. The Embassy tentatively suggested that it was for the employees to prove that their roles did not involve work touching upon the sovereign authority of Saudi Arabia. We do not accept that submission. It was the Embassy that was seeking the dismissal of the proceedings at a preliminary stage on jurisdictional grounds. It was for it to demonstrate an absence of jurisdiction. In any event, the Embassy relies upon international law not merely to defeat the claims by the individual employees. It relies upon Australia's international obligations as a basis to construe s 12(1) of the FSI Act so as to preclude unfair dismissal proceedings being brought against a foreign State by any employee in any circumstances.

[78] In *Benkharbouche*, the Court considered Article 7 of the VCDR. Lord Sumption explained (at [70]):

> The Secretary of State submits that there is indeed a special rule applicable to embassy staff. He says that such a rule is implicit in the international obligations of the United Kingdom under the Vienna Convention on Diplomatic Relations, the European Convention on State Immunity, and the state of customary international law reflected in the United Nations Convention. The Vienna Convention on Diplomatic Relations has been ratified by almost every state in the world and may for practical purposes be taken to represent a universally binding standard in international law. Article 7 provides that a sending state may "freely appoint" members of the staff of a diplomatic mission. The staff referred to include the technical, administrative and domestic staff as well as the diplomatic staff: see article 1. The argument is that the freedom to appoint embassy staff must imply a freedom to dismiss them. Article 32 of the European Convention on State Immunity and article 3(1) of the United Nations Convention both provide that they are not to prejudice the privileges and immunities of a state in relation to the exercise of the functions of its diplomatic missions and persons connected with them. In my opinion, however, article 7 of the Vienna Convention has only a limited bearing on the application of state immunity to employment claims by embassy staff. I would accept that the right freely to appoint embassy staff means that a court of the forum state may not make an order which determines who is to be employed by the diplomatic mission of a foreign state. Therefore, it may not specifically enforce a contract of employment with a foreign embassy or make a reinstatement order in favour of an employee who has been dismissed. But a claim for damages for wrongful dismissal does not require the foreign state to employ anyone. It merely adjusts the financial consequences of dismissal. No right of the foreign state under the Vienna Convention is infringed by the assertion of jurisdiction in the forum state to carry out that adjustment. Therefore, no right under the Vienna Convention would be prejudiced by the refusal of the forum state to recognise the immunity of the foreign state as regards a claim for damages.

[79] On that view, Article 7 of the VCDR has a limited impact on employment claims with respect to embassy staff. Applying the reasoning of Lord Sumption, the only impact of Article 7 is that a receiving State may not make an order which determines who is to be employed by the diplomatic mission of a foreign State. Proceedings seeking damages arising from dismissal (or to adjust the financial consequences of dismissal) are not inconsistent with Article 7 of the

[46] Ibid at [54].

[47] Ibid at [55].

VCDR. Given that s 29(2) of the FSI Act prevents a reinstatement order being made, the only possible remedy available in unfair dismissal proceedings is an order for compensation. In those circumstances, consistently with the reasoning in *Benkharbouche*, no inconsistency arises with Article 7 of the VCDR as a result of construing s 12(1) as permitting (subject to ss 12(5) and (6)) unfair dismissal proceedings to be brought against a foreign State by employees engaged to work at a diplomatic mission.

[80] For these reasons, we do not believe that reference to Australia's international obligations assists, or compels acceptance of, the Embassy's construction of s 12(1) and (2) of the FSI Act.

Inconsistent contractual provision

[81] The second contention advanced by the Embassy is that, even if s 12(1) of the FSI Act lifts the immunity otherwise conferred by s 9 with respect to unfair dismissal claims under Part 3-2 of the FW Act, s 12(1) does not apply to the applications made by the employees by operation of s 12(4). That is because, it submitted, inconsistent provision is made in the work contracts entered into by the individual employees for the purposes of s 12(4)(a) and there is no law of Australia that avoids the operation of, or prohibits or renders unlawful the inclusion of, the provision for the purposes of s12(4)(b).

[82] The evidence before the Deputy President indicated that each of the individual employees was engaged under a standard contract written in the Arabic language. The Deputy President found that the contracts signed by each of the individual employees were in identical terms save for the date and personal details of each employee such as their nationality, role and pay.[48] Two translations of the standard contract were in evidence before the Deputy President, although the Deputy President found that, except for the title, there are no material differences between the two translations.[49] The title is of no present relevance and no party suggested that the Deputy President was incorrect to observe that there were no material differences between the translations.

[83] The provision of the work contract upon which the Embassy relied is Article 21. The translation of Article 21 set out in the Deputy President's decision is as follows:

> Article 21: The Arabic copy shall be considered the original copy, and any dispute arising between the parties of the contract regarding any of its Articles shall be presented to the Ministry of Civil Service in the Kingdom of Saudi Arabia, and its decision on the matter shall be considered final.

[84] The Deputy President rejected the submission that Article 21 of the work contract constituted an inconsistent provision for the purposes of s 12(4) of the FSI Act. The Deputy President gave four reasons for that conclusion: (1) the provision that "any dispute … shall be referred to the Ministry of Civil Service" did not require the parties to refer any or all disputes to the Ministry or amount to an agreement to confer exclusive jurisdiction on the Ministry; (2) the Ministry of Civil Service in the Kingdom of Saudi Arabia is not a court and, if the Embassy's submission is correct, then no dispute about a term of the work contract could ever be raised in a court; (3) an unfair dismissal claim is not a dispute about an article of the work contract for

[48] [2024] FWC 1152 at [13].

[49] [2024] FWC 1152 at [15].

the purposes of Article 21; and (4), even if s 12(4)(a) is engaged, s 12(4)(b) applies to the inconsistent provision because it is not possible to contract out of the provisions of the FW Act.[50]

[85] The Embassy submitted that each of the conclusions is wrong. With respect, we disagree with the first and second aspects of the reasoning of the Deputy President with respect of the application of s 12(4) of the FSI Act. However, for the reasons which follow, we agree with the third and fourth aspects of the conclusions of the Deputy President. The consequence is that s 12(4) of the FSI Act does not operate to render the lifting of immunity by s 12(1) inapplicable to the unfair dismissal claims advanced by the employees.

[86] Section 12(4)(a) of the FSI Act provides that the lifting of immunity in s 12(1) does not apply where an inconsistent provision is included in the contract of employment. What is meant by a contract of employment containing an "inconsistent provision" is not immediately clear. However, history and authority indicate that s 12(4) requires examination of whether the contract of employment of an employee contains a provision which is inconsistent with the local court having jurisdiction over the claims advanced. In *Republic of Italy (Minister of Foreign Affairs and International Cooperation – Adelaide Consulate) v Benvenuto* [2018] FCAFC 64 (*Benvenuto*), White J (with whom Allsop CJ and Besanko J agreed) concluded (at [47]):

> Accordingly, I consider it appropriate to proceed on the basis that s 12(4)(a) requires an enquiry as to whether there is a provision in the contract of employment which is inconsistent with the local court having jurisdiction over disputes arising from, or in relation to, the contract. An actual inconsistency with the Australian courts having jurisdiction is required. It is not sufficient that courts of the foreign State could hear and determine the dispute. Nor is it sufficient that matters exist which may attract the doctrine of *forum non conveniens*. If an inconsistent provision of the requisite kind is included in the contract of employment, the enquiry under subs (4)(b) is whether there is a law of Australia which negates in one or other of the specified ways the effect of that provision.

[87] There is a question as to whether s 12(4) of the FSI Act could operate with respect to an implied term or only in relation to the express terms of a contract of employment. As was the case in *Benvenuto*, it is unnecessary to determine that question.[51] The Embassy relied only on Article 21 as constituting an "inconsistent provision" for the purposes of s 12(4). It did not rely on an implied term of the work contracts.

[88] The first basis upon which the Deputy President concluded the work contracts did not contain an inconsistent provision for the purposes of s 12(4) of the FSI Act was that the provision that "any dispute … shall be referred to the Ministry of Civil Service in the Kingdom of Saudi Arabia" did not require the parties to refer any or all disputes to the Ministry and amount to an agreement to confer exclusive jurisdiction on the Ministry. The Embassy submitted that this conclusion misconstrued Article 21. The Embassy referred to *Mobis Parts Australia Pty Ltd v XL Insurance Company SE* [2016] NSWSC 1170. In that matter, Ball J considered whether a clause indicating that the place of jurisdiction of any dispute "shall be Bratislava" constituted an exclusive contract clause. His Honour concluded (at [36]):

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[50] [2024] FWC 1152 at [66]-[71].

[51] *Benvenuto* at [57] (White J).

> Although cl 12.9 does not in terms state that the courts in Bratislava have exclusive jurisdiction to hear any claim in relation to the policy, that is its effect. The parties agree that "[t]he place of jurisdiction for any dispute arising out of this Policy shall be Bratislava." The ordinary meaning of the word "shall" in the context in which it appears is mandatory. It cannot be read as giving either party a choice concerning where proceedings should be brought. The agreement between the parties is that the place of jurisdiction "for any dispute" is Bratislava. Consequently, it must follow that the parties agree that the place of jurisdiction for the current dispute under the Master Policy is Bratislava.

[89] For the same reasons, it appears to us that Article 21 is an exclusive jurisdiction clause with respect to the disputes to which it applies. The provision that disputes regarding the article of the work contract "shall be presented to the Ministry of Civil Service" uses mandatory language consistent with the provision dealt with in *Mobis Parts Australia*. It requires that any dispute arising regarding any of the articles of the work contract must be referred to the Ministry of Civil Service.

[90] The second basis upon which the Deputy President concluded that the work contract did not contain an inconsistent provision for the purposes of s 12(4) of the FSI Act was that the Ministry of Civil Service is not a court.[52] The Embassy submitted that this reasoning was "regrettably chauvinistic" in that it was said to imply criticism of the standards of justice in Saudi Arabia. The submission is unjustified and unfortunate. Nothing in the reasoning of the Deputy President alleged any deficiency in the standards of justice in Saudi Arabia. The Deputy President suggested no more than that the Ministry of Civil Service is not a court and, if the Embassy's submission were accepted, no court process would be available in the event of a dispute in relation to the terms of the work contract.

[91] We do agree, however, that there was no evidence before the Deputy President as to the nature of procedures and remedies available if a dispute is referred to the Ministry of Civil Service. Furthermore, an exclusive jurisdiction provision need not involve reference of disputes to a judicial tribunal. An inconsistent provision for the purposes of s 12(4) of the FSI Act could, in theory, arise from compulsory referral to arbitration or some other method of dispute resolution so long as, properly construed, the provision is inconsistent with a local court having jurisdiction. That is the only question.

[92] The third basis upon which the Deputy President concluded that the work contracts did not contain an inconsistent provision is that an unfair dismissal claim is not a dispute of a type referred to in Article 21. Mr Wedissa embraced that reasoning, and we agree with the conclusion. Article 21 operates with respect to "any dispute arising between the parties of the contract regarding any of its Articles". The Embassy submits that any of the claims for unfair dismissal is "necessarily within the terms of the Article because it put in issue the Representative of the Kingdom of Saudi Arabia's entitlement to terminate the contract under Article 2, 16 or 19". The submission, in our opinion, involves a misunderstanding of the nature of unfair dismissal proceedings.

[93] An application under s 394 of the FW Act enlivens the jurisdiction of the Commission to grant an unfair dismissal remedy. The Commission can grant a remedy under s 390(1) if satisfied that the person is protected from unfair dismissal and has been unfairly dismissed. Leaving aside the various jurisdictional hurdles to access the jurisdiction, the central question the Commission must consider in assessing whether a person has been unfairly dismissed is

[52] [2024] FWC 1152 at [68].

whether the dismissal was harsh, unjust or unreasonable for the purposes of s 385(b). In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission is directed to take into account the matters listed in s 387, including whether there was a valid reason for dismissal (subsection (a)), aspects of the procedure adopted in dismissing the person (subsections (b)-(g)) and any other matters the Commission considers relevant (subsection (h)).

[94] The assessment of whether there was a valid reason for dismissal or whether a dismissal was otherwise harsh, unjust or unreasonable does not involve the determination of a common law claim which turns upon the existence of a contractual right to dismiss.[53] The phrase "harsh, unjust or unreasonable" has a long history.[54] The classic statement of the basis upon which an industrial tribunal would intervene in a case of dismissal involved consideration of whether "the employer's action was harsh or unjust or that the employer has abused his right to dismiss his employee".[55] As that formulation makes clear, the intervention of an industrial tribunal to order reinstatement or the other remedies in the case of an unfair dismissal is exercised regardless of the legal right of an employer to dismiss an employee.[56] An unfair dismissal claim is not, in our opinion, a dispute caught by Article 21. It is not apt to describe an unfair dismissal claim as being a dispute regarding any of the articles of the work contract.

[95] Finally, even if Article 21 of the work contracts represents an inconsistent provision for the purposes of s 12(4)(a) of the FSI Act, the Deputy President found that s 12(4)(b) applies because it is not possible to contract out of the unfair dismissal provisions of the FW Act.[57] We also agree with that conclusion.

[96] Section 12(4)(b) of the FSI Act was considered in *Benvenuto*. White J concluded that s 545(3) of the FW Act has the effect of avoiding the operation of a provision purporting to preclude an employee enforcing an amount due under an award. Section 545(3) of the FW Act provides that a State or Territory Court may order an employer to pay an amount required to be paid under a fair work instrument. In considering s 12(4)(b) of the FSI Act, White J said (at [68]):

> Before its dissolution on 30 June 2017, the IRCSA was "an eligible State or Territory court" for the purposes of s 545(3). The Clerks' Award is "a fair work instrument" as defined in the FW Act. Section 45 of the FW Act, pursuant to which the Respondents brought their claims, is a civil remedy provision. It was not open to the parties by their contract to negate the effect of s 545(3) by agreeing that the IRCSA did not have the jurisdiction vested in it by a law of the Commonwealth: *Josephson v Walker* (1914) 18 CLR 691 at 700; *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* [2002] FCA 1406 at [23]-[35]; *Metropolitan Health Service Board v Australian Nursing Federation* [2000] FCA 784, (2000) 99 FCR 95 at [17]-[25]. Accordingly, if the Respondents' contracts of employment included a provision to the effect that Australian courts were not to have jurisdiction in relation to disputes concerning rights and obligations arising under the contracts, s 545(3) would have the effect of avoiding

[53] See, for example, *Livingstones Australia v ICF (Aust) Pty Ltd* [2014] FWCFB 1276; (2014) 240 IR 448 at [66].

[54] Described in detail in *Toms v Harbour City Ferries Pty Ltd* [2015] FCAFC 35; (2015) FCAFC 229 FCR 537 at [9]-[25] (Buchanan J).

[55] *In re Barrett and Women's Hospital, Crown Street* [1947] AR 565 at 566 (Kinsella J); *Western Suburbs District Ambulance Committee v Tipping* [1957] AR 273 at 276-277 (De Baun J and Cook J).

[56] *Beahan v Bush Boake Allen Australia Ltd* (1999) 93 IR 1 at 26 referring to *Re Loty & Holloway and Australian Workers' Union* [1971] AR (NSW) 95 at 99 (Sheldon J).

[57] [2024] FWC 1152 at [71].

> the operation of that provision in relation to claims under the FW Act and under the Clerks' Award.

[97] In our opinion, the same conclusion applies with respect to the unfair dismissal jurisdiction of the Commission. Section 394(1) of the FW Act confers a right on a person who has been dismissed to apply to the Commission for an order under Division 4 of Part 3-2 granting a remedy. A private contract cannot remove or modify that right.[58] A contract of employment which purported to provide that an employee could not apply to the Commission under s 394(1) of the FW Act would not be effective to achieve that outcome. To use the language of s 12(4)(b) of the FSI Act, the FW Act has the effect of avoiding the operation of such a provision by directly conferring a right on the employee to apply for a remedy.

[98] Mr Brennan sought to distinguish the reasoning of White J on the basis that the proceedings in *Benvenuto* involved alleged contraventions of s 45 of the FW Act which is a civil remedy provision. We do not accept that is a relevant distinguishing feature. The reasoning of White J focused on the conferral of jurisdiction on a State or Territory court by s 545(3) of the FW Act to order a person to pay an amount payable under a fair work instrument. His Honour concluded that it was the avoidance of the conferral of jurisdiction which triggered the application of s 12(4)(b) of the FSI Act rather than the fact that the provision involved was a civil remedy provision. In any event, Part 3-2 permits the Commission to make coercive orders the contravention of which gives rise to a breach of a civil remedy provision[59] and an offence.[60] There is not the slightest indication that Parliament intended that the jurisdiction be capable of being avoided by contract.

[99] We also do not accept the submission of the Embassy that this reading of s 12(4)(b) of the FSI Act "strips s 12(4) of the FSI Act of any sensible operation". There does not appear to be any impediment to an inconsistent contractual provision precluding enforcement of ordinary contractual claims. Whether statutory claims are capable of being excluded by contract is a matter requiring the construction of the relevant statute. It is possible other statutory claims could be excluded by contract. That is not the case with recourse to unfair dismissal protection under Part 3-2 of the FW Act.

[100] For these reasons, s 12(4) of the FSI Act does not overcome the lifting of immunity which arises by operation of s 12(1) with respect to the unfair dismissal claims brought by the individual employees.

Should the FW Act be read down?

[101] The third contention advanced by the Embassy is that Saudi Arabia is not a "person" for the purposes of the definition of a "national system employer" in s 14(1)(f) of the FW Act and, as a result, not an "employer" for the purposes of s 380. The consequence of the submission, if it is correct, is that a foreign State is not subject of Part 3-2 of the FW Act at all. Indeed, if the submission is correct, all parts of the FW Act which operate with respect to a "national system employer" would not apply to any foreign State.

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[58] *NSW Trains v James* [2022] FWCFB 55; (2022) 316 IR 1 at [137].

[59] *Fair Work Act* 2009 (Cth), s 405.

[60] *Fair Work Act* 2009 (Cth), s 675. See also *Technical and Further Education Commission v Pykett (No 1)* [2014] FCA 727 at [27].

[102] As has been recorded above, s 14(1)(f) of the FW Act specifies that a "national system employer" includes:

> (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

[103] Although not directly applicable in the current matter, ss 30D(1) and 30N(1) also extend the definition of "national system employer" to any "person" in a State that is a "referring State" so far as the person employs, or usually employs, an individual.

[104] There are several authorities in which it has been found that a foreign State is a "person" and a "national system employer" for the purposes of the FW Act, including with respect to persons employed to work within embassies or diplomatic missions.[61] In *Benvenuto*, White J said (at [20]):

> Nevertheless, other provisions within the FW Act do indicate that the Republic was bound by the Clerks' Award in respect of the respondents' employment. Section 47(1)(a) in Pt 2-1 of the FW Act provides that "[a] modern award applies to an employee [or] employer … if … the modern award covers the employee [or] employer". Section 42 defines the terms "employee" and "employer" for the purposes of Pt 2-1 as a "national system employee" and a "national system employer" respectively. The effect of ss 30B and 30D of the FW Act is to extend the reach of the term "national system employer" to include any person in a "referring State" so far as "the person employs, or usually employs, an individual". For the purposes which are presently relevant, South Australia is, a referring State — see *Fair Work (Commonwealth Powers) Act 2009* (SA), s 5. In my view, it is by this scheme of provisions that the Republic was bound by the Clerks' Award in its employment of the respondents.

[105] If that reasoning is applied to this matter, Saudi Arabia is a person and national system employer for the purposes of the FW Act and, therefore, by operation of s 380, Part 3-2 applies to it. If a foreign State is a "person" for the purposes of the definition of a "national system employer" in s 30D(1) of the FW Act, there is no reason it would not be a person for the purposes of s 14(1)(f). There was no dispute that the Embassy is carrying on an activity in a Territory. However, it does not appear that the specific arguments now advanced by the Embassy were put in *Benvenuto* or the other authorities to which we have referred. In those circumstances, it is appropriate to address the contentions advanced by the Embassy.

[106] The initial challenge faced by the Embassy's submission is found in the *Acts Interpretation Act 1901* (Cth) (**AI Act**). Section 40A of the FW Act provides that the AI Act as in force on 25 June 2009 applies to the FW Act. Section 22(1)(a) of the AI Act, as it existed on 25 June 2009, provided as follows:

> … expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.

[107] The same provision is now made in s 2C(1) of the AI Act.

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[61] See, for example, *Kassis v Republic of Lebanon* [2014] FCCA 155; (2014) 282 FLR 408 at [8] and *Scarati v Republic of Italy (No 3)* [2024] FCA 55 at [25] (McElwaine J).

[108] Ms Lyons, who appeared for Mr Wedissa, submitted that a "body politic" in s 22(1)(a) of the AI Act includes a domestic or foreign body politic and thereby includes a foreign State. As such, a foreign State is a person for the purposes of s 14(1)(f) of the FW Act applying s 22(1)(a) of the AI Act. The Embassy is carrying on an activity of a governmental nature in, relevantly, the ACT and fits within the definition of a "national system employer" in s 14(1)(f). Mr Brennan contended that this submission is "just wrong". It is not.

[109] The Embassy submits that the term "body politic" in s 22(1)(a) of the AI Act should be construed as limited to a body politic in and of Australia and as not extending to a foreign body politic. In that respect, reliance was placed on s 21(1)(b) of the AI Act that, at the relevant time, provided that, unless contrary intention appears:

> … references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth.

[110] Applying this definition, the Embassy contends that the "jurisdiction" should be construed as limited to a body politic in and of the Commonwealth. In effect, it submitted that the reference to a body politic in the AI Act extends only to the Commonwealth and State and local governments in Australia.

[111] The submission misunderstands s 21(1)(b) of the AI Act. The Full Bench was referred to *BHP Group Ltd v Impiombato* [2022] HCA 33; (2022) 276 CLR 611 (*Impiombato*). In *Impiombato,* an argument was advanced that the reference to "persons" in s 33C(1) of the *Federal Court of Australia Act* 1976 (Cth) does not extend to non-residents of Australia by reason of s 21(1)(b) of the AI Act. That argument was rejected. For example, Kiefel CJ and Gageler J said (at [35]-[36]):

> Section 21(1)(b) of the Acts Interpretation Act says nothing in terms about how statutory references to "persons" are to be understood. It is not concerned with the meaning of any particular statutory expression.
>
> The concern of s 21(1)(b) of the Acts Interpretation Act with "references to localities jurisdictions and other matters and things" in a Commonwealth statute is not with the manner of expression of a statutory reference but more substantively with the subject matter to which statutory reference is made. Its instruction that all such references are to be "construed" as "references to such localities jurisdictions and other matters and things in and of the Commonwealth" is a requirement that the statute be construed to ensure that a connection exists between the subject matter to which the statute refers, on the one hand, and the Commonwealth of Australia understood compositely as a geographically bounded polity, on the other hand. The "exact nature" of the requisite connection is not prescribed. That is left by the provision to be determined in the construction of the particular statute: "to be implied or imported upon a consideration of the context and the subject matter".

[112] Their honours explained that the concern of s 21(1)(b) of the AI Act is not with the manner of expression of a statutory reference, but with the subject matter to which statutory reference is made and ensuring that there is sufficient connection between the subject matter to which the legislation refers and the Commonwealth of Australia as a geographically bounded polity. Looked at in that manner, we do not consider that s 21(1)(b) of the AI Act provides any foundation to read down the reference to a "body politic" in s 22(1)(a) of the AI Act or "person" in the context of s 14(1)(f) of the FW Act to exclude a foreign State. Section 21(1)(b), rather,

requires examination of whether the subject matter to which the FW Act is sought to be applied has sufficient connection to Australia.

[113] The subject matter of the FW Act is, broadly speaking, employment. There can be no doubt that it is directed at employment which has a relevant connection to Australia. The geographical application of the FW Act is dealt with in Division 3 of Part 1-3. Division 3 of Part 1-3 permits regulations to be made prescribing that a provision of the Act does not apply to "a person or entity in Australia" if the Minister is satisfied that "there is not a sufficient connection between the person or entity and Australia".[62] Explicit provision is also made to extend the operation of the FW Act extraterritorially to Australian ships, Australia's exclusive economic zone, the waters above the continental shelf and by regulation to Australian employers and Australian-based employees.[63]

[114] Otherwise, s 21(1)(b) of the AI Act requires that an appropriate connection be identified between the employment said to be subject to the FW Act and Australia. In *Fair Work Ombudsman v Valuair Ltd (No 2)* [2014] FCA 759; (2014) 224 FCR 415, for example, Buchanan J examined whether the FW Act (and a modern award made under the Act) applied to the employment of cabin crew by foreign corporations in Singapore and Thailand where the employees performed some work in Australia. His honour concluded:[64]

> The respondents argued that in order for the FW Act to apply the applicant must show that the employment relationship itself, between TET and Valuair and their cabin crew employees supplied to Jetstar, may be said to be "in and of Australia".
>
> I accept the respondents' contention that the FW Act and the Award apply to employment relationships rather than simply to particular work, so that it is necessary first to identify an appropriate connection linking the employment relationship sufficiently with Australia. In my view, the applicant's approach ignored the overall employment relationship and the contractual setting which underpinned it and should not be accepted.
>
> The Award, those parts of the FW Act which give it force and those parts of the FW Act which enact National Employment Standards all depend in the first instance upon a relationship of employment — that is, a relationship based upon and arising from a contract of employment; not a relationship arising from a contract of a different kind. Under a contract of employment, the performance of work is usually part of the consideration provided by an employee, just as the payment of wages or salary is usually part of the consideration provided by an employer. However, those circumstances (performance of work and financial reward in return) are not themselves sufficient to identify a contract of employment. They are also hallmarks of a contract "for services" of an individual kind which is a common method for the provision of labour in Australia. It is therefore important, at the outset, to establish the existence of a contract of employment. It is upon that legal circumstance, not just the performance of work, that awards operate.

[115] Buchanan J concluded, in relation to the operation of the FW Act and the modern award, as follows:[65]

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[62] *Fair Work Act* 2009 (Cth), s 31.

[63] *Fair Work Act* 2009 (Cth), ss 33-35.

[64] *Fair Work Ombudsman v Valuair Ltd (No 2)* [2014] FCA 759; (2014) 224 FCR 415 at [74]-[76] (Buchanan J).

[65] Ibid at [84]-[85]. See also at [87].

> TET and Valuair are foreign corporations. Their cabin crew employees are not resident in Australia. The contracts of employment in the present case were made outside Australia and they are regulated by the laws and practices of either Singapore or Thailand. Payment of wages is made and tax, social security and other liabilities on both employer and employee are acquitted outside Australia. Tours of duty commence and finish at the home base outside Australia. The time on duty in Australia of any of the cabin crew represents only a small proportion of overall working time, and is transient.
>
> It is, in my respectful view, incorrect to postulate that the contracts of employment, or the employment relationships, are in and of Australia in any respect. It is also incorrect to postulate that the Award operates on those (overseas) contracts of employment

[116] That decision concerned the application of the National Employment Standards and a modern award which apply to an "employment". Part 3-2 of the FW Act, similarly, operates with respect to the termination of an employment relationship.[66] In that context, s 21(1)(b) of the AI Act does not justify reading the reference to a "person" in s 14(1)(f) of the FW Act so as to exclude a foreign body politic. Section 21(1)(b) of the AI Act requires that the subject matter of the legislation, being an employment relationship, have a sufficient connection to Australia so as to justify the conclusion that the employment is one that is in and of Australia (unless subject of the specific extraterritorial extensions in ss 33-35).

[117] The Embassy advanced no submission that the employment of any of the individual employees gave rise to an employment relationship that could be described as not being in and of Australia. That is unsurprising. Each of the individual employees was employed in Australia, under a contract formed in Australia and to perform work in Australia. In our opinion, the employment of each of the individual employees was employment in and of Australia. As we have said, the Embassy did not suggest to the contrary. It is employment to which the FW Act generally, and Part 3-2 in particular, applies.

[118] We note that, in other cases, s 2C(1) of the AI Act has been found to support the conclusion that a reference to a "person" in federal legislation includes reference to a body politic, and a foreign country is, for that reason, a "person". In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1; (2016) 257 CLR 42, for example, the members of the High Court found that the words "person or body" in s 198AHA(1) of the *Migration Act* 1958 (Cth), read with s 2C(1) of the AI Act, were apt to include a body politic, such as the executive government of a country. The section was found to apply to an arrangement between the Commonwealth and the Republic of Nauru because the Republic of Nauru is a body politic and a "person" for the purposes of the section.[67] The same approach should be adopted in this matter to s 22(1)(a) of the AI Act as it applies to the FW Act. The submission of the Embassy that s 22(1)(a) of the AI Act (and later s 2C(1)) should be read so as not to refer to a foreign body politic cannot be accepted.

[119] To the extent that the Embassy sought to identify contrary intention for the purposes of the AI Act, it raised two matters. First, the Embassy contends that, if the reference to a "person" in s 14(1)(f) included reference to a foreign State, it would also extend to the Commonwealth and there would be no purpose served by the reference to the Commonwealth in s 14(1)(b) and

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[66] *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200 at 205-206; *Mahony v White* [2016] FCAFC 160; (2016) 262 IR 221 at [22]-[23]; *Khayam v Navitas English Pty Ltd (t/as Navitas English)* [2017] FWCFB 5162; (2017) 273 IR 44 at [75].

[67] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1; (2016) 257 CLR 42 at [44] (French CJ, Kiefel and Nettle JJ), [73] (Bell J), [177] (Gageler J) and [363]-[364] (Gordon J).

(c). We do not accept that submission. Section 14(1)(f) operates with respect to a person who carries on an activity in a Territory. Section 14(1)(b) and (c) operate with respect to the Commonwealth and a Commonwealth authority whether carrying on an activity in a Territory or not. It is not correct to say that subparagraphs (b) and (c) serve no purpose if s 14(1)(f) extends to a body politic.

[120] In any event, it is readily apparent that s 14(1) has been drafted to capture employers to the extent permitted by Commonwealth legislative capacity and thereby allow for the legislation to have as comprehensive coverage as possible. In that context, there is obvious potential for the subsections in s 14(1) to have overlapping application. A body corporate in which the Commonwealth has a controlling interest or established under a Commonwealth law might, depending on its activities, fall within subparagraphs (a), (c) and/or (e). A trading corporation that employs flight crew, maritime employees or waterside workers would fall within subparagraphs (a) and (d). The possibility of overlap provides no justification to read down individual subparagraphs within s 14(1).

[121] Secondly, the Embassy submitted that, if a "person" in s 14(1)(f) of the FW Act extends to a foreign State in the conduct of its diplomatic mission, then Part 3-2 conflicts with Australia's international obligations under the VCDR. The Embassy asserts that the *Diplomatic Privileges and Immunities Act* 1967 (Cth), the FSI Act and the FW Act must be read harmoniously in accordance with the approach in *Commissioner of Police (NSW) v Eaton* [2013] HCA 2; (2013) 252 CLR 1. That is achieved by construing a "person" in s 14(1)(f) to not extend to a foreign State. In the alternative, even if s 22(1)(a) of the AI Act operates to render a foreign body politic a "person" generally for the purposes of s 14(1)(f) of the FW Act, the Embassy submitted that the reference to an employer in s 380 should be read down to exclude a foreign State to avoid conflict with Australia's international obligations and other legislation.

[122] The approach in *Eaton* suggests that multiple statutes which share the same field of operation should be construed in a way that best achieves a harmonious result.[68] The only parts of the *Diplomatic Privileges and Immunities Act* 1967 (Cth) upon which the Embassy relies is the implementation in domestic law of Articles 24, 27(2), 31(2) and 38(2) of the VCDR.[69] For the reasons set out above, we do not believe that those provisions give rise to an inconsistency with the application of unfair dismissal provisions to a foreign State. For the reasons we have also set out above, Australia's other international obligations do not provide a basis to otherwise read down the FSI Act or the FW Act in the manner contended for by the Embassy.

Were the employees permanent residents?

[123] The final issue raised in the Embassy's appeal, and the appeals by Mr Wedissa and Mr Mubaidin concerns the application of s 12(6) of the FSI Act. By reason of s 12(6), s 12(1) lifts the immunity with respect, relevantly, to a member of the administrative and technical staff of a mission only if the employee was, at the time the contract of employment was made, a permanent resident of Australia. For that purpose, a "permanent resident of Australia" is defined in s 12(7) as an Australian citizen or a person resident in Australia "whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia".

[68] *Commissioner of Police (NSW) v Eaton* [2013] HCA 2; (2013) 252 CLR 1 at [78] (Crennan, Kiefel and Bell JJ).

[69] *Diplomatic Privileges and Immunities Act* 1967 (Cth), s 7(1).

The relevant time at which the person must be a "permanent resident" as defined is, in accordance with s 12(6), at the time the contract of employment was made.

[124] The Deputy President found that all the employees were permanent residents at the time their contracts of employment were made with the exception of three employees, including Mr Wedissa and Mr Mubaidin. The Embassy's appeal put in issue whether five further employees were permanent residents at the time the contract of employment was made: Mohamed Ben Mansour, Suzanne Maksoud, Mohamed Namaoui, Yassine Belkamel and Mohammad Abdul-Hwas. Mr Wedissa and Mr Mubaidin appealed the finding of the Deputy President that they were not permanent residents. There is no issue that the remaining 10 individuals were permanent residents at the relevant time.

[125] The submissions raise a question as to the construction of s 12(7) of the FSI Act and as to the application of that subsection to the circumstances of those particular employees. In relation to the question of construction, the Embassy's submissions appear to have developed. At first instance, its submission was that s 12(7)(b) excludes a person from being a permanent resident if any limitation as to time, in whatever form, applies to the person's continued presence in Australia. It was put on behalf of the Embassy that this may be because the person's visa "expires on a specified date or that a visa expires on the occurrence of a specified event that will necessarily occur".

[126] The Deputy President did not accept that submission. The Deputy President concluded as follows:[70]

> In my view the Respondent's submission states the test too highly. In essence the Respondent submitted that any limitation on a person's continued presence in Australia activates the immunity. At its crudest, the Respondent's argument seems to be that any contested applicant whose presence in Australia at the relevant time was subject to a visa, is not able to pursue their claim because their visa might expire or be cancelled at a time in the future.
>
> …
>
> As outlined above, the terms "permanent resident of Australia" and "limitation as to time" are to be understood in the context of legislation that seeks to ensure that a foreign State employer is not immune from the jurisdiction of Australian courts in respect of proceedings concerning the employment of a person whose contract of employment has a defined nexus with Australia. The requirement that the person be a permanent resident of Australia at the time the contract was made is one such nexus. Treating the employment of nationals of a third state as local employment/local contracts is appropriate when setting the boundaries of the immunity from local employment laws afforded to foreign states.
>
> In this context, the "limitation as to time" must relate directly to the time that the person is entitled to be present in Australia, be identifiable and specific as to the limitation imposed on the person's time.

[127] On appeal, the Embassy submitted that this construction is wrong. In oral submissions, the Embassy contended for a construction of s 12(7)(b) which differed from its approach at first instance. Leaving aside Australian citizens, in its oral submissions at least, the Embassy submitted that a "permanent resident" is a person who holds what is now referred to as a "permanent visa" rather than a "temporary visa". If a person holds a visa that is described as a

[70] [2024] FWC 1152 at [79] and [81]-[82].

"temporary visa", the Embassy says the person is not a permanent resident for the purposes of s 12(7) of the FSI Act even if the visa does not contain any limitation as to the time the person can remain in Australia. It submits that the history of the *Migration Act* 1958 (Cth) (**Migration Act**) and associated regulations bears out that this is the distinction sought to be made by s 12(7)(b).

[128] The Embassy suggests that the concept of a "permanent resident" had an established meaning when the FSI Act was enacted in 1985. Section 14A(2) of the Migration Act, which was inserted by the *Migration Amendment Act 1983* (Cth), defined a "permanent resident" to mean (with certain exceptions) "a person (including an Australian citizen) whose continued presence in Australia is not subject to any limitation as to time imposed by law". Until 1992, the Migration Act made provision for a system of entry permits which were granted and permitted a person to enter Australia or to remain in Australia or both. What was then s 6(6) of the Migration Act provided for temporary or permanent entry permits as follows:

> (6) An entry permit that is intended to operate as a temporary entry permit shall be expressed to authorize the person to whom it relates to remain in Australia for a specified period only, and such a permit may be granted subject to conditions.

[129] The *Migration Reform Act 1992* (Cth) amended the Migration Act to replace the entry permit system with the current visa system which commenced from 1 September 1994.[71] Section 29(1) of the Migration Act now provides for the Minister to grant a non-citizen permission, to be known as a visa, to travel to and enter Australia or remain in Australia. Section 30 of the Migration Act now provides:

> **30 Kinds of visas**
>
> (1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.
>
> (3) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:
>
> (a) during a specified period; or
> (b) until a specified event happens; or
> (c) while the holder has a specified status.

[130] The Embassy submitted that the *Migration Regulations 1994* (Cth) (**Migration Regulations**) reflects the bifurcation between permanent and temporary visas. Part 1 of Schedule 1 of the Migration Regulations deals with permanent visas and Part 2 of Schedule 1 deals with temporary visas. It should be added that Part 3 of Schedule 1 deals with bridging visa.

[131] Section 12(7) of the FSI Act does not appear to have been subject of consideration by any court or tribunal and there is no authority to which we were referred which provides guidance in relation to its application. There is some force to the historical analysis of Migration Act and the Migration Regulations made by the Embassy in its submissions. However, we do not accept that the application of s 12(7) of the FSI Act is quite as simple as the Embassy

[71] See description in *Degning v Minister for Home Affairs* [2019] FCAFC 67; (2019) 270 FCR 451 at [59]-[60] (Thawley J) (*Degning*).

suggests. We do not accept that a person is a "permanent resident" for the purposes of s 12(7) if he or she holds what is currently called a "permanent visa" under the Migration Act and Migration Regulations and not a "permanent resident" if he or she holds what is currently referred to as a "temporary visa".

[132] Whilst s 12(7) of the FSI Act adopted substantially the same wording as s 14A of the Migration Act as it existed in 1985, it is necessary to look at that provision in context. The context includes that s 6(6) of the Migration Act then required that a temporary entry permit be expressed to authorise a person to remain in Australia "for a specified period only". Any other entry permit was a permanent entry permit.[72] That is, a temporary entry permit, by definition, meant that the presence of the holder in Australia was subject to a limitation as to time. At that time, the operation of s 12(7) of the FSI Act may have aligned with the distinction between a permanent and temporary entry permit, but that was because the holder of a temporary entry permit was necessarily subject to a limitation as to time.

[133] It is also unclear that there was any intention to adopt the definition from, or maintain a link to, the Migration Act. The ALRC report recommended as follows:[73]

> The expression 'permanent resident' is in popular use in Australia but is not defined in the *Migration Act* (Cth). It is recommended that it be defined in the proposed act as meaning 'an Australian citizen or a person resident in Australia whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia'.

[134] The amendments to the Migration Act which took place in 1993 very substantially changed the mechanisms by which non-citizens are granted permission to enter and remain in Australia. It was open to Parliament to amend s 12(7) of the FSI Act to align the definition of "permanent resident" with the distinction between a permanent visa and a temporary visa under the Migration Act as amended.[74] That did not occur. In those circumstances, in our opinion, the definition in s 12(7) of the FSI Act must be applied in accordance with its terms. That is, it is necessary to examine whether a person's presence in Australia is, as a matter of substance, subject to a limitation as to time. That is particularly so because s 30 of the Migration Act now provides that a "temporary visa" may permit a person to remain in Australia not merely "during a specified period", but also until a specified event happens or while the holder has a specified status. This has broken the link between the designation of a visa as "temporary" and a limitation as to time.

[135] The Embassy accepted that its construction would mean that the executive government could create a visa called a "temporary visa" which permitted a person to remain in Australia without any limitation as to time and that person would nonetheless not be a "permanent resident" as defined in s 12(7) of the FSI Act. That concession demonstrates that the construction for which the Embassy contends cannot be reconciled with the text of the FSI Act. As we have said, in our opinion, s 12(7) of the FSI Act must be applied in accordance with its terms.

[136] The submissions of the parties did not otherwise address the construction of the phrase "subject to a limitation as to time imposed by or under a law of Australia" in s 12(7) of the FSI

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[72] *Degning* at [54] (Thawley J).

[73] Law Reform Commission Report No. 24, *Foreign State Immunity*, at [99] footnote 56.

[74] See *Australian Citizenship Act* 2007 (Cth), s 5(1)(a).

Act in detail. As has been recorded, the Deputy President concluded the "limitation as to time" must relate directly to the time the person is entitled to be present in Australia and be identifiable and specific as to the limitation imposed on the person's time.[75] The Embassy submitted that this construction is inconsistent with the plain meaning of s 12(7) and involves reading into s 12(7) the word "direct" which is no part of the definition. Otherwise, the Embassy relied upon the submission that a "permanent resident" was simply a person with a visa designated as a permanent visa.

[137] There is some, albeit limited, authority dealing with similar phrases. In *Li v So* [2019] VSC 515; (2019) 349 FLR 352, Croft J considered the meaning of the reference to a person's presence in Australia being "subject to a time limit imposed by law" in the definition of a "foreign person" in s 21A of the *Foreign Acquisition and Takeovers Act 1975* (Cth). His Honour observed (at [95]-[96]):

> The plaintiff argues that s 30(2) of the *Migration Act 1958* (Cth) provides three possible bases by which a temporary visa may be limited: the holder may remain during a specified period; or until a specified event happens; or while the holder has a specified status. Whilst the first of these three conditions may be said to impose a time limit, the second and third do not: the "specified event" may not happen, and the "specified status" may never change. Consequently, the plaintiff submits that it does not necessarily follow that her presence in Australia was "subject to a time limit imposed by law" simply by virtue of holding a temporary resident visa. Consequently, in the absence of further evidence, the Defendant has failed to discharge his onus of establishing his allegation of illegality.
>
> … I do not accept the plaintiff's submission regarding the appropriate characterization of s 30(2)(a) of the *Migration Act 1958* (Cth). I consider all three conditions contemplated by s 30(2)(a) render the holder of a temporary resident visa "a person whose presence in Australia is subject to a time limit imposed by law". Irrespective of the precise event which terminates the holder's right to remain in Australia, all three conditions render the holder subject to a temporal limitation. Such is inherent in the very nature of a "temporary resident visa".

[138] On that view, a limitation as to time does not require that there be a specific date on which the entitlement of a person to be present in Australia will end.[76] It is, according to that reasoning, sufficient that the entitlement of a person to remain in Australia have a temporal limitation in the sense that the entitlement to remain will end upon the occurrence of a specified event. We agree that it would take a too narrow view of s 12(7) of the FSI Act to construe the words "limitation as to time" to require that the period during which a person is entitled to be present in Australia be measured in a precise number of days, weeks, months or years.

[139] The circumstances in *Li v So* were that the plaintiff was present in Australia on what was referred to as a "temporary resident visa". The details of the visa class are not disclosed in the judgment and the defendant appeared to rely solely on the pleaded position of the plaintiff.[77] It appears to have been assumed that the plaintiff's visa only entitled her to remain in Australia until her application for a permanent visa was determined. In those circumstances, the observations of Croft J were obiter.

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[75] [2024] FWC 1152 at [82].

[76] See also *Van der Zanden v Chief Commissioner of State Revenue (NSW)* [2022] NSWCATAD 283 at [32]-[39]; *Griglio v Chief Commissioner of State Revenue (NSW)* [2024] NSWCATAD 212 at [32]-[38].

[77] *Li v So* [2019] VSC 515; (2019) 349 FLR 352 at [93] (Croft J).

[140] To the extent that Croft J suggested that a person's presence in Australia is subject to a limitation as to time in all circumstances in which his or her entitlement to remain is until a specified event happens or while the person is the holder of a visa which has a specified status, the construction may be too broad. In our opinion, an entitlement to remain until a specified event occurs is likely to represent a limitation as to time. If a person is entitled to remain while he or she holds a visa with a specified status, whether the condition represents a temporal requirement may depend on the nature of the status. If the status is held by the person indefinitely, it might not be possible to say that the person's presence in Australia is subject to a limitation as to time.

[141] Having said that, the question of construction makes a difference only in the cases of a small number of the individual employees to which it is necessary to turn.

Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas

[142] In relation to Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas, the Deputy President found that each of those individuals was a New Zealand citizen at the time they initially made a contract of employment with respect to their employment with the Embassy.[78] Although there was some uncertainty within the documents, the Deputy President determined the preliminary question on the basis that each of Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas held a Special Category Visa subclass 444 at the time their contracts of employment were signed. The grounds of appeal did not appear to challenge that factual proposition, but rather contended that the subclass 444 visa did not mean that the three individuals were permanent residents for the purposes of the FSI Act.

[143] Section 32 of the Migration Act provides for there to be a class of temporary visa known as special category visas. The criterion for a special category visa includes that a person is a New Zealand citizen and holds a New Zealand passport unless the person is a behaviour concern non-citizen or a health concern non-citizen.[79] The Embassy did not provide the Full Bench with versions of the Migration Regulations as they existed in 2011 when each of Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas signed contracts of employment with the Embassy. The Migration Regulations as they existed in 2011 provided that a subclass 444 visa permitted the holder to remain in Australia while the holder is a New Zealand citizen.[80]

[144] The Deputy President recorded the following summary of the requirements of a subclass 444 visa as follows:[81]

> It seems to be accepted that a subclass 444 visa is a "temporary visa [that] allows you to visit, study, stay, and work in Australia if you are a New Zealand citizen and meet the eligibility criteria". It allows the holder to stay "from the time you are granted the visa until you leave Australia, unless it ceases because of other reasons. These may include if we grant you a permanent visa, you become an Australian citizen, or we cancel the visa. When you leave Australia your visa will cease. You must apply for a new SCV if you want to enter Australia again.

[78] [2024] FWC 1152 at [97], [101] and [103].

[79] *Migration Act* 1958 (Cth), s 32(2)(a).

[80] *Migration Regulations* 1994 (Cth), Schedule 2, clause 444.511.

[81] [2024] FWC 1152 at [98].

[145] The summary appears to be derived from the Home Affairs website which was referred to by the Embassy in its submissions at first instance. It is unclear whether it reflects the requirements of the Migration Regulations as they apply now or in 2011. It appears most likely to be a current document. The Department of Home Affairs did not exist in 2011.

[146] On the information available to the Full Bench, in 2011 a subclass 444 visa permitted a person to remain in Australia for so long as the holder remained a New Zealand citizen. Although the visa is referred to as a temporary visa, we are unable to accept that this requirement represents a limitation as to time. The status of being a New Zealand citizen is something that is held indefinitely. The Deputy President was correct to find that Mr Namaoui, Mr Belkamel and Mr Abdul-Hwas were permanent residents as defined in s 12(7) of the FSI Act at the relevant time.

Ms Maksoud and Mr Mansour

[147] It is convenient to deal with the position of Ms Maksoud and Mr Mansour together. Ms Maksoud signed a contract of employment with the Embassy on 26 April 2009 and Mr Mansour signed a contract of employment on 11 November 2007. The Deputy President found that, at those dates, Ms Maksoud held a subclass 309 Spouse (Provisional) visa and Mr Mansour held a subclass 820 Spouse visa.

[148] With respect to Ms Maksoud, the conditions of a subclass 309 visa as of 26 April 2009 were that the visa remained in effect as follows:

> **309.5 When visa is in effect**
>
> 309.511 Temporary visa permitting the holder to travel to, enter and remain in Australia until the end of the day on which:
>
> (a) the holder is notified that the holder's application for a Spouse (Migrant) (Class BC) visa or a Partner (Migrant) (Class BC) visa has been decided; or
> (b) that application is withdrawn.

[149] The precise period of time during which the visa would remain in effect is unknown because it is contingent the happening of one of the specified events set out in clause 309.511 of the Migration Regulations. However, Ms Maksoud's continued presence in Australia was subject to a limitation as to time in that it would end upon the determination of her application for a Spouse or Partner visa. In accordance with the reasoning set out above, Ms Maksoud was not a permanent resident as defined in s 12(7) of the FSI Act.

[150] With respect to Mr Mansour, the conditions of a subclass 820 Spouse visa as of 11 November 2007 were that the visa remained in effect as follows:

> **820.5 When visa is in effect**
>
> 820.511 Temporary visa permitting the holder to travel to and enter Australia until:
>
> (a) the holder is notified that his or her application for a Subclass 801 (Spouse) visa has been decided; or
> (b) that application is withdrawn.

[151] Again, the precise period of time that Mr Mansour was entitled to remain in Australia was unknown. However, like Ms Maksoud, his continued presence in Australia was subject to a limitation as to time because his visa permitted him to enter Australia only until notified that his application for another visa had been decided or that application was withdrawn. Mr Mansour was not a permanent resident as defined in s 12(7) of the FSI Act.

[152] With respect, the Deputy President erred in finding that Ms Maksoud and Mr Mansour were permanent residents as defined in s 12(7) of the FSI Act at the time their contracts of employment were made. By operation of s 12(6), the immunity that otherwise enjoyed by the Embassy is not lifted by s 12(1) in relation to the applications brought by Ms Maksoud and Mr Mansour. The Embassy's appeal is allowed to that extent. The unfair dismissal applications made by Ms Maksoud and Mr Mansour must be dismissed.

Mr Wedissa

[153] The Deputy President concluded that there was insufficient evidence before the Commission to demonstrate that Mr Wedissa was a permanent resident at the time he initially signed his contract of employment with the Embassy on 22 February 2008. As a result, the Deputy President concluded that the Embassy was immune from the jurisdiction of the Commission in relation to his claim and dismissed Mr Wedissa' application for an unfair dismissal remedy.[82]

[154] Mr Wedissa seeks permission to appeal from the Deputy President's decision. Mr Wedissa, for whom Ms Lyons now appears, makes a novel argument to the effect that the terms of the contract of employment mean that a new contract was made each year. The argument appears to have been alluded to at first instance, but was not considered by the Deputy President. In any event, it raises a pure question of law that is either correct or it is not. Permission to appeal should be granted to permit that argument to be advanced.

[155] Mr Wedissa has been living in Australia since 2007. He initially signed a contract of employment to work at the Embassy on 22 February 2008. Mr Wedissa does not contend that he was a permanent resident for the purposes of the FSI Act at that time. He did, however, become a permanent resident in 2009 and later an Australian citizen on 8 December 2011. He had been an Australian citizen for more than 10 years by the time his employment was terminated in 2022. However, the definition is s 12(6) of the FSI Act is clear. It directs attention at the time "when the contract of employment was made".

[156] Mr Wedissa's contention is that a new contract was made each year of his employment and, as a result, he was a permanent resident (by reason of being a citizen) at the time the most recent contract was made prior to his dismissal. He refers to article 2 of the contract of employment which, in the translation set out in the decision of the Deputy President, is in the following terms:

> Article 2: The two parties agreed that the duration of this Contract shall be for (one year) and will be renewed automatically unless either party notifies the other, in writing, of his wish to terminate it at least two months prior to its expiration.

[82] [2024] FWC 1152 at [85]-[89].

[157] Mr Wedissa referred to other clauses of the contract that were said to support the conclusion that a new contract was made each year, including article 8 which made provision for an annual bonus "upon the date of renewal of the annual contract"; article 16 which made provision as to circumstances in which the "contract ends before its term expires"; article 17 which made provision for the payment of two months' salary or "the salary for the remaining period of the contract" in case of termination of the contract in certain circumstances. Article 19 is also relevant. There are a number of different translations of article 19. It is sufficient to refer to the following:

> Article 19: The contract shall conclude at the end of its term, in the event one of the contract parties notifies the other, in writing, of his wish to terminate it at least two months before its expiry.

[158] The Embassy, for its part, pointed to other provisions of the contract which it submitted suggest the contract is ongoing, particularly provisions which conferred entitlements based on multiple years of service. This included article 3 which provided for a period of probation; article 9 which provided for "regular leave … per year"; article 11 which provided for the granting of emergency leave "during the year"; and article 13 which provided for sick leave for a period not exceeding one month with full salary for one year.

[159] Mr Wedissa relied on *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Edwards Dunlop & Co Ltd* (1993) 176 CLR 535 (*CE Heath*). CE Heath concerned, among other things, whether a new contract of insurance was made upon its renewal or whether there had been an extension of the existing contract. Dawson, Toohey and McHugh JJ said (at 545-546):

> In the course of argument considerable attention was devoted to whether the successive renewals of the Blanket Fidelity Policy resulted in a series of new contracts being entered into by the respondent and the appellant. The distinction between the renewal of a policy and the extension of a policy was expressed in the following terms by Mayo J. in *Re Kerr*:
>
> > "Strictly, a 'renewal' is descriptive of a repetition of the whole arrangement by substituting the like agreement in place of that previously subsisting, to be operative over a new period, whereas an 'extension' betokens a prolongation of the subsisting contract by the exercise of a power reserved thereby to vary one of its provisions, that is, by enlarging the period. Upon a renewal similar rights revest ... A contract reserving continuous rights of renewal will, if these be exercised, lead to succeeding contracts in a series, the identity of each contract [being] separate and distinct. On the other hand, the exercise of the right of extension augments the length of time over which the contract operates, without changing its identity."
>
> Whether there is a renewal or an extension of an insurance policy is a question of construction, the term "renewal" often being used to refer to both "renewal" and "extension" in the sense that those words are used above. It is, however, well established that, where a policy is renewable only by mutual consent (i.e. not as of right), the renewal results in a fresh contract rather than the extension of an existing contract. Of course, a policy may expressly stipulate that it is not to continue in force beyond the period of insurance, unless renewed by mutual consent. And where a policy, such as the ordinary form of life policy, expressly provides for continuation beyond the specified period of insurance unless a particular event, such as the non-payment of the premium, takes place, the renewal is an extension of the original contract. But where a policy is silent on the question of renewal, renewal of it will generally constitute a new contract.

> In this case, there is no basis upon which to reach any conclusion other than that each renewal of the Blanket Fidelity Policy required the consent of both the respondent and the appellant underwriters. Accordingly, each renewal when it occurred constituted a new contract.

[160] Mr Wedissa emphasised that, where a contract is renewable only by mutual consent, there is a fresh contract formed rather than the continuation of the existing contract. He submitted that his contract was renewable only by mutual consent in that it is only renewed if both parties determined not to issue the notice two months before the end of the term. It is not renewable as of right. The Embassy submitted that there was no provision of the contract requiring the parties' mutual consent to its renewal. Rather, the Embassy submitted, the contract continues automatically without the need for any consent unless a "particular event" occurs being notice of termination by either party. Both parties accepted that the issue turns on the proper construction of the contract.

[161] The resolution of Mr Wedissa's submissions is not without difficulty. The contract contains provisions that are, to some extent, inconsistent and point to different conclusions. Issues of translation may have contributed to the lack of clarity in the contract. On the one hand, article 2 speaks of the contract having a fixed duration and articles 16 and 17 confer entitlements by reference to the remaining term of the contract. On the other hand, articles 9 and 10 confer entitlements based on service over multiple years. The articles 9, 10, 16 and 17 do not, in our view, assist greatly. There does not appear to be any dispute that the contract has a term or that the employment might continue beyond one term. The dispute is as to whether, upon its renewal each year, a new contract is formed or the operation of the existing contract prolonged.

[162] Reading the contract as a whole, the better view is that a new contract is not made each year by reason of articles 2 and 19. Articles 2 and 19 both indicate that the contract continues in operation without the need for any action to be taken by either party. The express terms of article 19 are that the contract only concludes at the end of its term if notice is given by one of the parties. If no notice is given, the contract does not conclude and rather continues in operation. That is consistent with article 2 that provides that the contract "renews automatically" unless notice is given by either party "of his wish to terminate". Those provisions cannot be reconciled with the submission of Mr Wedissa that a new contract is made each year. Whilst it is within the power of either party to bring the contract to an end, unless notice is given the contract does not terminate.

[163] For these reasons, the relevant date on which Mr Wedissa's contract of employment was made is 22 February 2008. We did not understand it to be suggested that Mr Wedissa was a permanent resident as of 22 February 2008. There was no direct evidence before the Deputy President as to Mr Wedissa' visa status in 2008. The Embassy submitted that it could be deduced that Mr Wedissa held a subclass 866 on 23 March 2009 which permitted him "to travel to and enter Australia for a period of 5 years from the date of grant".[83] The only available conclusion is that Mr Wedissa was not a permanent resident as defined in s 12(7) of the FSI Act at the time his contract of employment was made. The Deputy President was correct to dismiss his application and Mr Wedissa's appeal must be dismissed.

[164] We recognise that this outcome has a harsh, and perhaps surprising, impact on Mr Wedissa given that he has been a permanent resident of Australia since 2009 and an Australian citizen since 2011. However, s 12(6) of the FSI Act sets the time at which the status of an

[83] *Migration Regulations 1994* (Cth), Schedule 2, clause 866.511.

employee of a foreign State must be determined as the time the contract is initially made. The rationale for that approach was explained in the ALRC report as follows:[84]

> Avoiding Unnecessary Distinctions. Two distinctions appearing both in the European Convention and in the United Kingdom Act, and which add significantly to their complexity in this respect, can be dispensed with in an Australian provision. The first involves a distinction, in applying the connecting factors of nationality or permanent residence, between the time when the contract is entered into and the time when the proceedings are brought. Both times are relevant under the United Kingdom provisions. On balance it is sufficient to refer only to the time when the contract is made, both because it is simpler and because that is the time when the intention of the parties is formed. The employee may change status without reference to his employer and, to take the worst case, might even do so simply in order to take advantage of a greater opportunity to sue his employer…

[165] The approach of the legislation can have harsh consequences where the employment continues for a substantial period. However, it must be assumed that such consequences were contemplated by Parliament and considered to be acceptable. The operation of s 12(6) of the FSI Act means that the Embassy is immune with respect to Mr Wedissa's application.

Mr Mubaidin

[166] Mr Mubaidin's appeal was filed one day outside the time stipulated in rule 128(2) of the *Fair Work Commission Rules 2024*. We are satisfied it is appropriate to allow Mr Mubaidin further time to lodge his notice of appeal. Mr Mubaidin is unrepresented and explained that the delay was caused by the need to collect the necessary documents. Whether or not this is an adequate explanation of the delay, Mr Mubaidin should be granted an extension of time. He is affected by many of the issues raised in the other appeals and his situation overlaps with those of other individuals. We allow such further time as is necessary for him to lodge his notice of appeal.

[167] However, Mr Mubaidin's appeal should be dismissed. Mr Mubaidin signed his contract on 25 February 2013. There do not appear to have been documents before the Deputy President to substantiate Mr Mubaidin's visa status as of 25 February 2013. Mr Mubaidin sought to rely on additional documents on appeal. In the circumstances, the Full Bench accepted the additional documents as further evidence on appeal for the purposes of s 607(2) of the FW Act. Mr Mubaidin was unrepresented both before the Deputy President and on appeal. It is appropriate that the additional documents be admitted because they clarified Mr Mubaidin's visa status at the time he entered into his contract of employment with the Embassy.

[168] Among the documents provided by Mr Mubaidin was a notice indicating that he had been granted a Temporary Work (class GD) International Relations (subclass 403) on 28 December 2012. The conditions of a subclass 403 visa as at that time included that the visa would remain in effect as follows:

> **403.5 When visa is in effect**
>
> 403.511 Temporary visa permitting the holder:
>
> (a) to travel to and enter Australia, during a period specified by the Minister:

[84] Law Reform Commission Report No. 24, *Foreign State Immunity*, at [96].

(i) more than once; or
(ii) if the Minister specifies—once only; and
(b) to remain in Australia for a period specified by the Minister.

[169] Clause 403.511(b) of the Migration Regulations indicates that the holder of the visa is only able to remain in Australia for the period specified by the Minister. It is not entirely clear what period was specified in Mr Mubaidin's case. The documents before the Full Bench indicate that his "initial stay date" was 31 January 2014. It is sufficient, for present purposes, that the visa could only entitle Mr Mubaidin to remain in Australia for a period specified by the Minister. Mr Mubaidin's presence in Australia was subject to a limitation as to time imposed by or under a law of Australia.

[170] The consequence is that, by operation of s 12(6), the immunity that was otherwise enjoyed by the Embassy is not lifted by s 12(1) in relation to the application brought by Mr Mubaidin. The Deputy President was correct to dismiss Mr Mubaidin's application for an unfair dismissal remedy. Mr Mubaidin's appeal must be dismissed.

Conclusion

[171] For these reasons, permission to appeal is granted with respect to the Embassy's appeal and the appeals brought by Mr Wedissa and Mr Mubaidin. The contentions advanced by the Embassy to the effect that it is immune from unfair dismissal proceedings under Part 3-2 of the FW Act must be rejected. The appeal succeeds only to the extent that, with respect, the Deputy President erred in concluding that Ms Maksoud and Mr Mansour were permanent residents at the time their contracts of employment were made with the Embassy. The Embassy's appeal is otherwise dismissed. The appeals by Mr Wedissa and Mr Mubaidin are also dismissed.

[172] The Full Bench makes the following orders:

(a) In Matter No. C2024/3385, Mr Mubaidin be allowed further time to lodge his notice of appeal to 24 May 2024;
(b) Permission to appeal is granted in Matter No. C2024/3320, C2024/3385 and C2024/3230;
(c) The appeal in Matter No. C2024/3320 is allowed to the extent that the decision of the Deputy President is varied so as to include a conclusion that Ms Maksoud and Mr Mansour were not permanent residents for the purposes of s 12(6) and (7) of the FSI Act;
(d) The applications for an unfair dismissal remedy made by Suzanne Maksoud in Matter No. U2022/5015 and Mohamed Ben Mansour in Matter No. U2022/9536 are dismissed;
(e) The appeal in Matter No. C2024/3320 is otherwise dismissed; and
(f) The appeals in Matter No. C2024/3385 and C2024/3230 are dismissed.

VICE PRESIDENT

Appearances:

T Brennan SC, counsel, instructed by Norton Rose Fulbright for Saudi Arabian Cultural Mission/Saudi Embassy & Embassy of The Kingdom of Saudi Arabia, Cultural Mission.

A Lyons, counsel, appearing for Mr A Wedissa.

S Saleh, M Namaoui, H Dayein, S Elshikh, E Almahadi, M Ahmed, E.A.E Bashir, S Maksoud, M Obaidi, M Abdul-Hwas, Y Belkamel, Z Kalany, M.I Najjar, A Nassir, M.B Mansour, A Osman and *Q Mubaidin*, for themselves.

Hearing details:

2024.
Sydney (video using Microsoft Teams):
11 July.

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