FEDERAL COURT OF AUSTRALIA

Republic of Italy (Minister of Foreign Affairs and International Cooperation – Adelaide Consulate) v Benvenuto [2018] FCAFC 64

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| Appeal from: | *Republic of Italy v Benvenuto* [2017] SAIRC 31 |
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| File numbers: | SAD 173 of 2017  SAD 174 of 2017 |
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| Judges: | **ALLSOP CJ, BESANKO AND WHITE JJ** |
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| Date of judgment: | 24 April 2018 |
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| Catchwords: | **INDUSTRIAL LAW** – appeals from the Industrial Relations Court of South Australia – immunity of a foreign State from the jurisdiction of Australian courts under s 12(1) of the *Foreign States Immunities Act 1985* (Cth) (the Immunities Act) – application of s 12(4) of the Immunities Act – whether an inconsistent provision is included in the contracts of employment – meaning of “inconsistent provision” – whether a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision – appeals dismissed. |
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| Legislation: | *Conciliation and Arbitration Act 1904* (Cth) ss 49, 61, 123  *Fair Work Act 2009* (Cth) ss 30B, 30D, 33, 34, 35(1), 42, 45, 47(1), 545(3)  *Foreign States Immunities Act 1985* (Cth) ss 9, 10, 11, 12, 17  *Annual Holidays Act 1944* (NSW) ss 8, 13  *Fair Work (Commonwealth Powers) Act 2009* (SA) s 5  *Labour and Industry Act 1958* (Vic) ss 146,149, 157, 160  *Long Service Leave Act 1955* (NSW) ss 7, 12  *Long Service Leave Act 1987* (SA) s 13  *Industrial Arbitration Act 1940* (NSW)  Italian Legislative Decree No 173 of 2000 s 154  *State Immunity Act 1978* (UK) s 4 |
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| Cases cited: | *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31  *Josephson v Walker* (1914) 18 CLR 691  *Metropolitan Health Service Board v Australian Nursing Federation* [2000] FCA 784, (2000) 99 FCR 95  *Miotto v Republic of Italy* [2015] SAIRC 33  *Republic of Italy (Ministry of Foreign Affairs and International Cooperation – Adelaide Consulate) v Benvenuto* [2017] FCA 940  *Republic of Italy v Benvenuto* [2017] SAIRC 31  *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* [2002] FCA 1406 |
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| Date of hearing: | 9 November 2017 |
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| Date of last submissions: | 28 February 2018 |
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| Registry: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 70 |
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ORDERS

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|  | | SAD 173 of 2017 |
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| BETWEEN: | REPUBLIC OF ITALY (MINISTRY OF FOREIGN AFFIARS AND INTERNATIONAL COOPERATION – ADELAIDE CONSULATE)  Appellant | |
| AND: | DANILO BENVENUTO  Respondent | |

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|  | | SAD 174 of 2017 |
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| BETWEEN: | **REPUBLIC OF ITALY (MINISTRY OF FOREIGN AFFIARS AND INTERNATIONAL COOPERATION – ADELAIDE CONSULATE**  Appellant | |
| AND: | ALBINO MIOTTO  Respondent | |

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| JUDGES: | ALLSOP CJ, BESANKO AND WHITE JJ |
| DATE OF ORDER: | 24 april 2018 |

THE COURT ORDERS THAT:

1. The appeals be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1. I have read the reasons to be published of White J. I agree with the orders proposed by him and in the reasons therefor.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop. |

Associate:

Dated: 24 April 2018

REASONS FOR JUDGMENT

BESANKO J:

1. In my opinion these appeals must be dismissed. I have had the advantage of reading the reasons for judgment of White J. I agree with his Honour’s reasons for concluding that the contracts in this case do not contain inconsistent provisions within s 12(4)(a) of the *Foreign States Immunities Act 1985* (Cth). That conclusion is sufficient to dispose of the appeals. I prefer not to express a view about the scope and application of s 12(4)(b) in the absence of an actual provision falling within s 12(4)(a) and a more detailed examination of jurisdiction and proper or applicable law concepts than took place in these appeals.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko. |

Associate:

Dated: 24 April 2018

REASONS FOR JUDGMENT

WHITE J:

1. These appeals raise questions as to the application of the *Foreign States Immunities Act 1985* (Cth) (the Immunities Act) in respect of unpaid wages claims brought by each Respondent in the former Industrial Relations Court of South Australia (the IRCSA).
2. The Respondent to each appeal was formerly employed by the Appellant (the Republic) in its consulate in Adelaide. In April 2015, each commenced proceedings in the IRCSA claiming payment of unpaid wages, unpaid long service leave entitlements for which the *Long Service Leave Act 1987* (SA) (the LSL Act) provides, and unpaid superannuation contributions.
3. In respect of the claims for unpaid wages and superannuation contributions, the Respondents invoked the jurisdiction which was at that time vested in the IRCSA by s 545(3) of the *Fair Work Act 2009* (Cth) (the FW Act) and, in respect of the claim to long service leave entitlements, the jurisdiction vested in the IRCSA by s 13 of the LSL Act. The Republic disputed the jurisdiction of the IRCSA to hear and determine both applications. It relied for this purpose on s 12(4) of the Immunities Act.
4. Part 2 of the Immunities Act contains a codification of the circumstances in which a foreign State is immune from the jurisdiction of Australian courts. It commences with s 9 which provides:

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

1. In ss 10‑21, Pt 2 provides for circumstances in which a foreign State will not, or may not, be immune from the jurisdiction of Australian courts. Section 12 concerns employment disputes:

**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.

1. The scheme of s 12(1) is to provide first that a foreign State, as 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. Secondly, the scheme provides for particular circumstances in which the foreign State will continue to be immune. As noted by Nettle and Gordon JJ in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31 at [198], s 12 reflects a legislative expectation that, when a foreign State enters into an employment contract in Australia or which is to be performed in Australia, the interest of Australia in providing a local forum for the resolution of disputes arising from it outweighs the interest of the foreign State in having exclusive jurisdiction.
2. Relevantly for the present appeals, the lifting of the immunity is excluded when the conditions specified in subs (4) are satisfied, namely, that the contract of employment contains an “inconsistent provision” (subpara (a)) and a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision (subpara (b)). Subsection (2) makes explicit that proceedings in which a foreign State, as employer, will not be immune from the jurisdiction of Australian courts include a proceeding concerning “a right or obligation conferred or imposed by a law of Australia on a person as employer or employee”.
3. An Industrial Magistrate in the IRCSA rejected the Republic’s submission that s 12(4) had the effect that the IRCSA was without jurisdiction to hear the Respondents’ claims, holding that neither of their contracts of employment contained an “inconsistent provision” of the kind contemplated by subs (4)(a): *Miotto v Republic of Italy* [2015] SAIRC 33. Subsequently, the Magistrate made orders requiring the Republic to pay to the Respondents amounts in respect of unpaid wages and unpaid long service leave entitlements. He deferred for further evidence and submissions the determination of the Respondents’ claims in respect of superannuation contributions.
4. The Republic’s appeals against the decision of the Industrial Magistrate were heard by a single Judge of the IRCSA (Judge Hannon) and were unsuccessful, although for reasons which were different from those of the Magistrate: *Republic of Italy v Benvenuto* [2016] SAIRC 31. The Judge considered that each of the Respondent’s contracts of employment did contain an “inconsistent provision” for the purposes of subs (4)(a) but found that the requirements of subs (4)(b) were not satisfied.
5. The Republic now appeals to this Court, having been granted extensions of time in which to do so: *Republic of Italy (Ministry of Foreign Affairs and International Cooperation – Adelaide Consulate) v Benvenuto* [2017] FCA 940. In my opinion, each of the appeals should be dismissed. My reasons follow.

## The factual setting

1. The circumstances giving rise to the appeals were not in issue. The Respondents commenced employment at the Italian Consulate in Adelaide on 30 April 1999 and 1 September 1998 respectively. Until April 2002, each was employed pursuant to a series of fixed term contracts written in the Italian language. It was common ground in the proceedings in the IRCSA that those contracts provided for the Respondents’ employment to be governed by “local law”, that is, the law of Australia.
2. On 15 April 2002, each Respondent signed a document written in the Italian language by which he elected for “a full time contract under Italian law”. In November 2002, each Respondent entered into a written contract of employment bearing the heading “Individual Open Ended Work Contract”. Mr Benvenuto’s contract commenced with the following “Introduction”:

According to the regulations of part II title VI, of the D.P.R. (decree of the President of the Republic) of the 05/01/1967, n. 18 and subsequent modifications and additions – In particular the Legislative Decree of the 07/04/2000, n. 103 – not being modified by the further Agreement for the employees as in the Article 1, 4, line 3, of the CCNL (National Workers’ Contract) – Ministry compartment, undersigned on the 22/10/1997 by ARAN and by the Trade Union Departments and Organizations (here denominated “subsequent Agreement) and, more generally by collective bargaining applicable for the employee who has a contract, and further modifications and additions, between the Consulate of Italy in Adelaide and Mr Danilo Benvenuto, Italian Citizen, born in Rome the [omitted], Tax File Number [omitted] (fiscal domicile = Comune Ciampino, in the province of Rome, Lazio region), resident of Australia since the 28/11/1994, the following work contract is stipulated, according to Article 2 of the following Agreement.

1. Mr Benvenuto’s contract then provided (relevantly):

**ART. 1**

**(TYPE OF LABOR RELATIONS AND CONTRACT CHARGES)**

Mr. D. B. is a full time employee.

Mr D. B.’s contract which refers to the nature of his employment and his professional profile is decided by collective bargaining.

The aforementioned is mainly assigned to driver and receptionist duties.

**ART. II**

**(EFFECTIVE DATE AND DURATION OF THE AGREEMENT)**

This agreement is an open ended contract *commencing after the stamp of approval has been affixed on the relevant Ministerial Decree by the Ufficio Centrale del Bilancio.*

By virtue of the option taken by Mr D.B. the previous employment relationship commencing on 01.05.2001 to the day immediately before the commencement date of the current contract, to be verified by appropriate statement, is fully paid out in every lawful regard (if and when required).

This agreement is an open ended contract starting after ratification by the relevant Ministry Department.

**ART. III**

**(WORK PLACE LOCATION**

The location of the employment is at the Consulate of Italy In Adelaide.

**ART. IV**

**(ECONOMIC COMPENSATION)**

Mr D.B. receives an annual salary of AUD$ 45,049. …

**ART. V**

**(SOCIAL SECURITY)**

The National Institute of Social Security (I.N.P.S.) insures the employee in case of disability and provides old age and survivors insurance.

The amount of contribution from the Government and from the insured are proportional to the salary determined annually by the Ministry of Employment and Social Security.

…

**ART. IX**

**(ANNUAL LEAVE)**

The employee is entitled to annual leave as contained in point 3 & 4 of the subsequent Agreement.

**ART. X**

**(SICK LEAVE)**

In the event of absence due to illness payment will be as provided for by Art 7 of the subsequent Agreement.

…

**ART. XII**

**(AUTHORISED PAID LEAVE & SHORT TERM LEAVE)**

The applicable rules for payment in the event of authorized paid leave and authorized short term leave, is as provided by articles 5 and 6 of the subsequent Agreement.

…

**ART. XVI**

**(RESOLUTION OF THE CONTRACT)**

The work relationship is governed by the rules of the existing subsequent Agreement even as far as the causes that give rise to the resolution of the employment relationship.

As far as not expressly provided in the previous paragraph, Art. 166 of D.P.R. 18/67 is applicable.

(Emphasis in the original)

1. Mr Miotto’s contract was expressed in relevantly identical terms save that he was recorded as engaged in “administrative office duties”.
2. In about July 2013, the Republic informed both Respondents that it would close its consulate in Adelaide on 28 February 2014. However, on 17 December 2013, the Republic informed the Respondents that the closure decision had been reversed. By this time, each of the Respondents had accepted an offer of alternative employment and felt committed in that regard. Thus, on 27 December 2013, each gave notice to the Republic of his resignation to take effect 22 days later. These circumstances culminated in the commencement of proceedings by the Respondents in the IRCSA. In particular, there were disputes as to whether the Respondents had been obliged to give 28 days’ notice of termination of employment, or 90 days as required by their respective contracts of employment. These disputes were resolved adversely to the Republic by reason of the finding of the Industrial Magistrate that a modern award made under the FW Act, the Clerks’ Private Sector Award (the Clerks’ Award), applied to the employment of each Respondent. The Clerks’ Award required the Applicants to give 28 days’ notice of termination of their employment.

## The applicability of the Clerks’ Award

1. The Industrial Magistrate reasoned that the Clerks’ Award was applicable because the Republic was, in relation to its employment of the Respondents, an “Australian employer” of the kind to which s 35(1)(f) of the FW Act referred. Namely, it was an employer that:

(f) carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia;

1. No challenge was made to the Magistrate’s conclusion in this respect. However, in my view, s 35(1)(f) did not have any application to the Republic’s activities as an employer of the Respondents. The definition in s 35(1) concerns the term “Australian employer” appearing in ss 33 and 34, which are concerned with the employment of persons on Australian ships in and beyond Australia’s exclusive economic zone.
2. 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.

## The decision of the Industrial Magistrate

1. Before the Industrial Magistrate, the Republic submitted that a provision inconsistent with the lifting of the immunity was “necessarily implied” in each contract. It relied on three factors, both individually and in combination:
2. its characterisation of the contract as an Italian law contract;
3. the election of the Respondents in April 2002 for a contract “under Italian law”; and
4. the absence of any reference in the written contracts to s 154 of the Italian Legislative Decree No 173 of 2000 (the 2000 Legislative Decree)*.*
5. The 2000 Legislative Decree concerned the employment of locally engaged employees in the diplomatic missions and consulates of the Republic in foreign countries. Section 154 of the 2000 Legislative Decree provided (relevantly):

Even though this is not specifically regulated under this title, contracts are regulated by local law. It being understood that in accordance with the rules of general and conventional international law, the local court is competent to solve any disputes that may arise from the application of this decree. Diplomatic Missions or, in their absence first class Consular offices, ensure, after consulting the unions, the compatibility of the contract with the local regulations of mandatory nature and ensure in all cases the application of the most favourable regulations for the worker in place of the regulations of this title. The conditions of the contract must be adequate and guarantee all favorable entitlements.

As can be seen, s 154 provided that the local courts would be competent to resolve disputes arising from the application of the decree.

1. The Industrial Magistrate rejected the Republic’s submissions, holding that each of the three factors on which it relied, were “equally consistent with [the Republic] simply assuming Italian source entitlements would not be challenged in Australian courts as they were incorrectly thought to necessarily be superior to Australian entitlements, but with no specific attention given to the issue of immunity from Australian legal proceedings”.

## The decision of the primary Judge

1. The primary Judge held that the term “the inconsistent provision” in subs (4)(a) was not to be narrowly construed and, in particular, was not confined to a single provision which was inconsistent with the lifting of the immunity. Instead, the relevant question was whether the provisions in the contract of employment were “expressly or impliedly inconsistent” with the lifting of the immunity under s 12(1).
2. The Judge regarded a number of matters as indicating inconsistency with the lifting of the immunity (it seems by necessary implication). These were:
3. the elections made by the Respondents in April 2002 and the contracts of employment themselves were in the Italian language (although the Judge said that this was not a significant factor), at [43];
4. the elections in April 2002 were for contracts “under Italian law” (the Judge said that these elections were “arguably collateral contracts”) and had been contemplated by the 2000 Legislative Decree, at [45], [50]‑[51];
5. the content of the contracts and, in particular, the references to presidential and legislative decrees and to a collective bargaining agreement made in Italy, at [46];
6. the fact that, with the exception of the salary, all the benefits and entitlements for which the contracts provided were fixed by reference to Italian instruments or administrative arrangements, at [52].
7. On the basis of these considerations, the Judge concluded that “there are provisions in the 2002 contracts which are inconsistent with the lifting of the immunity of [the Republic] with respect to the proceedings before the Court”, at [52]. His Honour did not identify a particular provision or provisions which were inconsistent for the purposes of s 12(4)(a).
8. However, this conclusion of the primary Judge did not avail the Republic because his Honour found that the requirements of s 12(4)(b) were not satisfied. He noted, at [61], that:

The question is whether there is an Australian law which sets a minimum standard and impliedly and expressly forbids contracting out so as to avoid the operation of, or prohibit or render unlawful the inclusion of, the inconsistent provision in the contract of employment.

His Honour held that s 45 of the FW Act (which proscribes contraventions of a term of a modern award) and the LSL Act (which imposes a minimum standard for long service leave) were laws of this kind. For this reason, his Honour held that the Republic “did not establish” that a law of Australia did not avoid the operation of contractual provisions inconsistent with the claims brought by the Respondents, at [63].

1. By each of its appeals in this Court, the Republic contends that the primary Judge’s conclusion with respect to s 12(4)(b) of the Immunities Act was wrong. By Notices of Contention, each of the Respondents contends that the Judge should in any event have found that the requirements of subs 4(a) were not satisfied.

## Identifying the kind of inconsistent provision

1. It is evident that the inconsistent provision to which subs (4)(a) and “the provision” to which subs (4)(b) refers are one and the same. Subsection (4)(b) operates with respect to a provision which is inconsistent in the requisite sense. Accordingly, although the Republic’s appeals were directed to the conclusion of the primary Judge concerning s 12(4)(b), it is convenient to commence by addressing the term “an inconsistent provision” in subs (4)(a). In effect, this involves considering first the issues raised by the Respondents’ Notices of Contention.
2. The submissions of both parties on the appeals proceeded on the basis that the term “an inconsistent provision” in subs (4)(a) is a reference to a provision in the contract of employment which is inconsistent with the lifting of the immunity for which s 12(1) provides. The primary Judge had adopted the same approach.
3. The Court invited submissions from the parties as to whether an alternative construction may be appropriate, namely, that the term “an inconsistent provision” in s 12(4)(a) is a reference to a provision in the contract of employment which is inconsistent with a law of Australia conferring or imposing a right or obligation on a person as employer or employee, of the kind to which subs (2)(a) refers. Neither counsel supported such a construction and each submitted that it was inappropriate.
4. Counsel for the Republic contended that the construction on which the parties have proceeded hitherto was the proper construction of s 12(4) having regard to:
5. the fact that the subject matter of subs (4) is the identification of a circumstance in which the lifting of the immunity otherwise effected by s 12(1) is excluded. The natural inference, he submitted, is that the subsection refers to a provision which is inconsistent with the immunity;
6. the potential on the alternative construction for s 12(4) to effect a partial maintenance of the immunity, that is, the continuance of the immunity in relation to some claims and its removal in relation to others. Counsel submitted that, on their proper construction, neither subs (1) nor (4), contemplate that the lifting or continuance of the immunity may be partial.
7. Hence the enquiry, so counsel submitted, should be that of whether there was a provision (or were provisions) in the respective contracts of employment which were inconsistent with the lifting of the immunity for which s 12(1) provided.
8. The Respondents’ submissions concerning the question of construction raised by their Notice of Contention were to the same effect as those of the Republic. Counsel also noted the absence of any express reference in s 12(4) to s 12(2), and submitted that the latter was not an integer which is strictly necessary to the scheme established by s 12. He also submitted that the alternative construction would, in practice, leave s 12(4) with little work to do.
9. In my opinion, each of the alternative constructions is available on the language used in s 12. However, the determination of the proper construction of s 12(4) is assisted by reference to its history.
10. The Immunities Act was enacted in 1985. Before that time, the common law governed the immunity of foreign States from the jurisdiction of Australian courts. The Immunities Act gave effect to the recommendations of the Australian Law Reform Commission (ALRC) in its Report No 24 entitled “Foreign State Immunity” published on 10 October 1984. The ALRC Report included a draft Bill. It is apparent that the terms of the Immunities Act follow closely the terms of the ALRC draft. In these circumstances, as Nettle and Gordon JJ noted in *Firebird Global v Republic of Nauru* at [173], while the ALRC Report cannot displace the clear meaning of the Act, it does provide assistance in ascertaining the legislative context and purpose and the particular mischief which the Immunities Act is seeking to remedy.
11. The ARLC Report gave the following explanation for the provision which is now s 12(4):

[99] ***Saving Clauses, etc.*** The operation of the *whole* provision should be subject to any contrary agreement between the parties. But it is not recommended that freedom of contract should be absolute. Legislatures have recognised the inequality of bargaining power between employer and employee. This inequality is not reduced where the employer is a foreign state. *Where legislation avoids the operation of, or prohibits or renders unlawful the inclusion of, a particular provision ousting the jurisdiction of the courts in a contract of employment*57 *such legislation should apply to contracts made by foreign state employees.*58The ‘contract of employment’ should not be interpreted narrowly. 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 relationship59, including pension rights arising under such a contract.

(Emphasis added)

1. A number of aspects of this explanation are pertinent for present purposes:
2. the recommended legislation should make explicit that the immunity is lifted not only when an employee sues to enforce an entitlement arising under a contract of employment, but also when the proceeding concerns “any rights or duties imposed by law on an employer or employee in respect of the employment relationship”. The evident intention is that s 12 should apply to *all* the relations between the employer and employee in those respective capacities. Effect is given to that recommendation in subs (1) and (2);
3. the parties to the employment agreement should have some ability to agree that the immunity be retained;
4. further, that ability should extend to the whole of s 12, by which I understand the ALRC to be referring, amongst other things, to the rights and obligations arising from the contract of employment itself and to the rights and obligations to which subs (2)(a) refers;
5. however, having regard to the recognised inequality of bargaining power between employers and employees, the freedom of the parties to negate the lifting of the immunity by their contract should not be unqualified; and
6. effect should be given to that intention by providing that, if Australian legislation negates or renders unlawful a contractual provision “ousting the jurisdiction of the courts in a contract of employment”, that legislation should apply to the contracts made by foreign State employees irrespective of their contract.
7. Although the ALRC did not use the term “inconsistent provision” in [99], the statutory provisions to which it referred in its footnote 57 are instructive in determining the kind of inconsistent provision to which s 12(4)(a) refers. They make it apparent that the ALRC did not use the expression “a particular provision ousting the jurisdiction of the courts” to refer to ouster of jurisdiction provisions in the conventionally understood sense. Instead, the ALRC was referring to statutory provisions of the commonplace kind which preclude employers and employees from contracting out of the rights or obligations for which a statute provides.
8. The ALRC’s first references were to s 8 of the *Annual Holidays Act 1944* (NSW) and s 7 of the *Long Service Leave Act 1955* (NSW). These provisions were identical and were as follows:

**Contracting out prohibited**

1. The provisions of this Act shall have effect notwithstanding any stipulation to the contrary whether made before or after the commencement of this Act.
2. No contract or agreement made or entered into either before or after the commencement of this Act shall operate to annul or vary or exclude any of the provisions of this Act.
3. The ALRC’s second references were to ss 146 and 160 in the *Labour and Industry Act 1958* (Vic). Although the ALRC Report purports to reflect the law as at 30 June 1984, these two provisions were repealed on 20 December 1979. I assume that the ALRC refers to these sections as in force before their repeal. Sections 146 and 160 were contained in Divs 3 and 4 respectively of Pt VIII of that Act which provided for the grant of annual holidays and long service leave. As ss 146 and 160 are in substance to the same effect, it is sufficient for present purposes to refer only to s 160:

Save as otherwise expressly provided in this Division the provisions of this Division shall have effect notwithstanding any stipulation to the contrary whether made before or after the commencement of this Act and no contract or agreement made or entered into either before or after the commencement of this Act shall operate to annul or vary or exclude any of the provisions of this Division.

1. Finally, the ALRC referred in contrast to ss 49 and 61 of the *Conciliation and Arbitration Act 1904* (Cth). Section 49 vested power in the former Conciliation and Arbitration Commission to declare, in certain circumstances, that any term of an award should, in a Territory, be a common rule so as to bind all persons in the relevant industry. Section 61 provided for an award of the Conciliation and Arbitration Commission to be binding on specified persons.
2. The provisions in the New South Wales and Victorian legislation to which the ALRC referred did not preclude only the contracting out of the substantive entitlements for which the legislation provided. They also had the effect of precluding contracting out of the provisions by which the conferred entitlements could be enforced.
3. In the case of the Annual Holidays and the Long Service Leave Acts of New South Wales, ss 13 and 12, respectively, provided for applications to enforce the payment of annual holidays, or long service leave, as the case may be, to be made to a court of petty sessions constituted by a stipendiary magistrate or to an industrial magistrate appointed under the *Industrial Arbitration Act 1940* (NSW). In the case of the *Labour and Industry Act 1958* (Vic), ss 149 and 157, respectively, provided for applications for enforcement of leave entitlements to be made to a magistrates’ court. In the case of the Conciliation and Arbitration Act, s 123 provided that an employee entitled to the benefit of an award could sue for the amount of the payment in the former Australian Industrial Court.
4. When this part of the legislative history and context is taken into account, it would be inappropriate to understand the term “an inconsistent provision” as confined to provisions in a contract of employment concerning substantive entitlements. Instead, the term can be understood as referring also to provisions concerning the jurisdiction of courts by which substantive entitlements may be enforced. This counts against the appropriateness of the alternative construction.
5. Another indication to the same effect is that the ALRC recommendation contemplated that the *whole* of s 12 should, subject to the identified limitations, be subject to the contrary agreement of the parties. However, if s 12(4) is understood as referring only to provisions concerning substantive entitlements and obligations imposed by Australian law, the parties would not have the contemplated freedom to contract when their relationship is not affected in a relevant way by an Australian law. Put slightly differently, the preservation of the immunity contemplated by s 12(4) could have no operation in relation to claims arising under the contract of employment which are unaffected by an Australian law.
6. 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.

## Identifying any inconsistent provisions

1. An initial question is whether the inconsistent provision to which s 12(4)(a) refers must be express or whether it may be implied. The primary Judge did not address that question directly but, on my understanding, proceeded on the basis that s 12(4) refers to a provision in a contract which is express. His Honour then considered whether express provisions in the two contracts were “expressly or impliedly” inconsistent with the lifting of the immunity under s 12(1).
2. Some textual considerations seem to suggest that subss (4)(a) and (b) refer to express provisions. First, the expression “implied term” is commonly used to identify those parts of a contract which exist by implication. The term “implied provision” is seldom used and its usage in this context does not seem apt.
3. Secondly, the reference in subs (4)(a) to a provision which is “included” in a contract of employment, and the cognate expression in subs(4)(b), seem more apt as a reference to an express provision.
4. On the other hand, it is common place for contracts of employment to contain implied terms and it is not readily apparent that the legislature would have wished to provide in subs (4) only for express contractual provisions.
5. The Republic’s submission that the inconsistency could arise by implication from express provisions rested, in large part, on the contrast between the language used in ss 11 and 12 of the Immunities Act.
6. Section 11(1) provides that a foreign State is not immune in a proceeding insofar as the proceeding concerns a commercial transaction. Subsection (2) provides that subs (1) does not apply if, amongst other things, all parties to the proceeding are foreign States or are the Commonwealth and one or more foreign States and “have otherwise agreed in writing”. Counsel submitted that the different terminology used in s 11(2) and s 12(4) was an indication that the Parliament intended by the latter to provide that the negation of the lifting of the immunity may be other than express because, if the Parliament had intended that an inconsistency for the purposes of subs (4)(a) be express, it could easily have used the same verbiage used in s 11(2).
7. In my opinion, this is not a persuasive consideration. The freedom of the identified contracting parties in s 11(2) to agree that the immunity be retained is unqualified. The freedom of contract contemplated by s 12(4), is, in contrast, qualified having regard to the recognised inequality of bargaining power of employers and employees. That is an obviously available explanation for the difference in terminology. Further, the phrase “any inconsistent provision” is also used in s 17 of the Immunities Act. That section removes the immunity of a foreign State from the jurisdiction of Australian courts in relation to litigation arising from an agreement to submit a dispute to arbitration to which the foreign State is a party. In that context, the term “any inconsistent provision” seems more apt as a reference to an express provision in the agreement, although it is not necessary for present purposes to express a concluded view about that.
8. Counsel for the Republic also referred to s 4 of the *State Immunity Act 1978* (UK). Section 4(1) of that Act provides that a State is not immune in respect of proceedings relating to a contract of employment made between the State and an individual when the contract is made in the United Kingdom or the work is to be wholly or partly performed in the United Kingdom. Subsection (2) provides for an exception when “the parties to the contract have otherwise agreed in writing”.
9. In my opinion, the contrast between s 12(4) and its UK counterpart is not presently of assistance. The two provisions have a different legislative history and, in any event, s 4(4) of the UK Act provides that subs (2)(c) does not operate to retain the immunity of the foreign State when the law of the UK requires the proceedings to be brought before a court of the UK.
10. The determination of the present appeals does not necessitate a concluded view on the question of whether an inconsistent provision may be implied as well as express because the Republic did not rely on any implied term, let alone attempt to demonstrate how such a term had been implied into either of the Respondents’ contracts of employment. Instead, its submission was that the express terms of the respective contracts were impliedly inconsistent with the lifting of the immunity, this being the same approach as had been taken by the primary Judge.
11. The matters on which the Republic relied for the inconsistency were the same matters on which the primary Judge had relied, set out earlier in these reasons.
12. Like the primary Judge, I do not regard the fact that the elections made by the Respondents in April 2002 and their respective contracts of employment were in the Italian language to be a significant factor. One could not infer that the parties had agreed that Australian courts should not have jurisdiction over any disputes which may arise merely because they expressed their contract in their native language.
13. The second matter was that the Respondents had elected for contracts “under Italian law”. The elections were relevantly identical. Each was addressed to the Italian Consulate in Adelaide. The substantive part of the election was follows (in Mr Benvenuto’s case):

The undersigned [DB], born in Rome on the [omitted], Italian citizen, under the first work contract dated 13.05.2000, seen clause 3, 1, of the law n. 442 of the 21 December 2001, asks to elect for a full time contract under Italian law.

1. These elections were made some seven months before the Respondents entered into their respective contracts of employment, and do not form part of those contracts. The primary Judge said that they were arguably collateral contracts, that is, contracts collateral to the respective contracts of employment. Counsel made a like submission but did not develop it. It is not easy to see how, on conventional understandings of the concept of a collateral contract, that the elections had any contractual effect. Instead, they seem to have been in the nature of a unilateral act by each Respondent of a non‑promissory kind. In my view, the elections cannot be regarded as provisions “included in the contract of employment” with the consequence that questions of their inconsistency do not arise.
2. Understandably, the submissions of counsel turned more on the content of the contracts, their references to Italian presidential and legislative decrees and the circumstance that, with the exception of the salary, all the benefits and entitlements for which the contracts provided were fixed by reference to Italian instruments or administrative arrangements. Counsel submitted that those circumstances gave rise to an inconsistency by implication having regard to the fact that the contracts of employment provided for rights and obligations which were different from those for which Australian law provides and that they did so by reference to the rights and obligations contained in Italian instruments. Counsel referred, by way of example, to Arts IX and XVI in the respective contracts. Those articles in Mr Benvenuto’s contract are set out earlier in these reasons. Article IX provided that Mr Benvenuto was entitled to annual leave “as contained in point 3 & 4 of the subsequent Agreement”. Article XVI provided that the termination of the contract was governed by the rules of the existing “subsequent Agreement” and, to the extent to which that was incomplete, by Art 166 of D.P.R. 18/67. The “subsequent Agreement” was identified in the introduction to the contact of employment as an agreement made by the Agency for the Representation and Negotiation of work contracts for employees in the Public Sector, on the one hand, and by the Unions and Trade Union Departments and Organisations, on the other.
3. The Respondents’ contracts of employment undoubtedly provided for rights and obligations having their origins in Italian law and Italian instruments. That circumstance may make it convenient (and perhaps more convenient) for disputes arising under the contracts to be heard in Italian courts. I am unable to agree, however, that it indicates, by implication, an agreement by the parties that such disputes should not be determined in Australian courts. The distinction between the jurisdiction of a court, on the one hand, and the law to be applied in the exercise of that jurisdiction, on the other, is well known. There is no reason to suppose that the IRCSA could not, on proper evidence, determine the parties’ entitlements by reference to the law of Italy, if that was applicable. To the extent to which the parties’ rights and entitlements under Italian law and instruments are superior to the minimum entitlements required by Australian law, they may, subject to proper proof of the Italian law, be enforced in an Australian court. To the extent that they are inferior, they may not be enforceable. But in either situation, the Australian courts have jurisdiction.
4. The Republic did not contend that there were features of the rights and entitlements for which the respective contracts provided which were linked inherently to the jurisdiction of Italian courts, in the sense that their very existence or quantification depended upon a judicial determination which only an Italian court could make. Nor, conversely, did the Republic contend that there was some feature of the rights and entitlements for which the contract provided which would be incapable of determination by an Australian court.
5. I conclude that the Republic did not establish that the contracts of employment of the Respondents contained an inconsistent provision of the requisite kind, and that the Industrial Magistrate’s decision on that question was correct. It follows that I would uphold the Respondents’ Notices of Contention concerning the application of subs (4)(a), although not for the same reasons as advanced by them.

## The subs (4)(b) limb

1. Strictly speaking, that conclusion makes it unnecessary to consider the application of s 12(4)(b).
2. However, if the contracts did contain inconsistent provisions as contended by the Republic, I would hold that s 12(4)(b) is applicable. In particular, s 545(3) of the FW Act would have the effect of avoiding the operation of a provision purporting to preclude an employee enforcing an amount due under the Clerks’ Award in the IRCSA. It provides:

*Eligible State or Territory courts*

(3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:

(a) the employer was required to pay the amount under this Act or a fair work instrument; and

(b) the employer has contravened a civil remedy provision by failing to pay the amount.

1. 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 the operation of that provision in relation to claims under the FW Act and under the Clerks’ Award.
2. Likewise, the express grant of jurisdiction to the former IRCSA by s 13 of the LSL Act would have the effect of avoiding the operation of any provision in the contracts of employment purporting to exclude the jurisdiction of that Court in relation to the Respondents’ long service leave entitlements. It is not necessary to elaborate that conclusion, or to consider the jurisdiction of Australian courts with respect to the Respondents’ claims to superannuation contributions because the Republic did not contend that there could be a lifting of the immunity in respect of some claims but not in respect of others.

## Conclusion

1. For these reasons, I would uphold the respective Notices of Contention and would dismiss each of the appeals.

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| I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 24 April 2018