Federal Court of Australia

JMC Pty Limited v Commissioner of Taxation [2022] FCA 750

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| File number: |  |
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| Judgment of: | **WIGNEY J** |
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| Date of judgment: | 29 June 2022 |
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| Catchwords: | **TAXATION –** applicant provides accredited higher education creative industries courses – Mr Harrison engaged by applicant as lecturer – respondent deemed Mr Harrison an employee of applicant under the *Superannuation Guarantee (Administration) Act 1992* (Cth) – applicant issued notices of assessment of superannuation guarantee charges – applicant lodged objection to notices of assessment – respondent disallowed applicant’s objection – applicant appealed respondent’s objection decision under s 14ZZ(1) of the *Taxation Administration Act 1953* (Cth)  **CONTRACTS –** whether Mr Harrison was an “employee” per its ordinary meaning in s 12(1) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) – common law principles inform ordinary meaning of “employee” – issue of whether contract between applicant and Mr Harrison was one of employment or independent contractor – consideration of recent statement of test in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* (2022) 96 ALJR 144; [2022] HCA 2 – consideration of totality of parties’ contractual rights and obligations – parties’ contracts contained in memoranda of agreement and email correspondence – right to sub-contract or assign required applicant’s written consent – not an “unlimited power of delegation” – Mr Harrison remunerated referable to hourly rate for “teaching services” provided – provision of teaching services under the contracts could not reasonably be considered delivery of a “product or result” – balance of the terms of the contracts favoured characterisation as one of employment – Mr Harrison held to be an “employee” on ordinary meaning in s 12(1)  **CONTRACTS –** whether contracts were wholly or principally “for” Mr Harrison’s labour per extended meaning of “employee” in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) – application of *Dental Corporation Pty Ltd v Moffet* (2020) 278 FCR 502; [2020] FCAFC 118 – contracts were at least “principally” for Mr Harrison’s labour – applicant contracted for the benefit of teaching services by Mr Harrison that complied with its accreditation obligations – right to sub-contract or assign work was limited given the need for applicant’s consent and compliance with accreditation obligations – Mr Harrison held to be an “employee” on extended meaning in s 12(3) |
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| Legislation: | *Fair Work Act 2009* (Cth)  *Privacy Act 1988* (Cth)  *Taxation Administration Act 1953* (Cth) ss 14ZZ(1), 14ZZO(b)  *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ss 21(1), 49(1), 58(1)  *Superannuation Guarantee (Administration) Act 1992* (Cth) ss 12(1), 12(3)  *Higher Education Standards Framework (Threshold Standards) 2011* (Cth)  *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) |
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| Cases cited: | *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 145; [2013] FCAFC 3  *ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69; [2006] FCAFC 109  *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54  *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 40  *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337  *Commissioner of State Revenue v Mortgage Force Australia Pty Ltd* [2009] WASCA 24  *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; [2022] HCA 1  *Dental Corporation Pty Ltd v Moffet* (2020) 278 FCR 502; [2020] FCAFC 118  *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40; [2016] FCAFC 79  *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44  *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419  *On-Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82; [2011] FCA 366  *OneSteel Manufacturing Pty Ltd v BlueScope (AIS) Pty Ltd* (2013) 85 NSWLR 1; [2013] NSWCA 27  *Queensland Stations* *Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539  *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179  *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497  *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; [1986] HCA 1  *The Queen v Allan; Ex parte Australian Mutual Provident Society* (1977) 16 SASR 237  *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150  *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392; [2016] HCA 5  *World Book (Australia) Pty Ltd v Commissioner of Taxation* (1992) 27 NSWLR 377  *ZG Operations Australia Pty Ltd v Jamsek* (2022) 96 ALJR 144; [2022] HCA 2 |
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ORDERS

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|  | | NSD 175 of 2020 |
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| BETWEEN: | JMC PTY LIMITED (ACN 003 572 012)  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| order made by: | WIGNEY J |
| DATE OF ORDER: | 29 June 2022 |

THE COURT ORDERS THAT:

1. The applicant’s appeal against the appealable objection decision made by the respondent on 17 January 2020 be dismissed.
2. The applicant pay the respondent’s costs.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. **JMC** Pty Limited provides higher education programmes within the creative industries sector. It has campuses in Sydney, Melbourne and Brisbane. One of the degrees it offered to its students was a Bachelor of Creative Technologies (Audio Engineering and Sound Production). Mr Nichollas **Harrison** is a qualified sound engineer or technician. During the periods from 1 April 2013 to 30 June 2016 and 1 July 2017 to 31 March 2018 (the **relevant periods**), JMC engaged Mr Harrison to provide it with “teaching services”. Those teaching services comprised delivering lectures to JMC’s students at its Melbourne campus and marking student examinations or assignments.
2. The terms and conditions upon which Mr Harrison was engaged to provide teaching services were recorded in writing. The terms and conditions included that JMC would pay Mr Harrison an hourly rate for delivering lectures and marking examinations. Mr Harrison was required to submit invoices to JMC which specified the particulars of the teaching services he had provided. Those invoices were required to be accompanied by time sheets and signed weekly “lesson plans”. The terms and conditions of Mr Harrison’s engagement also gave JMC, through its managing academic officer, a degree of oversight and control over Mr Harrison, including when, how and where he was to provide the services.
3. Mr Harrison provided the services to JMC and submitted invoices throughout the relevant periods. JMC duly paid Mr Harrison in accordance with those invoices. JMC did not, however, make any superannuation contributions in respect of Mr Harrison. That was no doubted because JMC considered that Mr Harrison provided the teaching services to it as an independent contractor, not an employee.
4. The **Commissioner** of Taxation, however, considered otherwise.
5. On 25 March 2019, the Commissioner issued to JMC notices of assessment of superannuation guarantee charges in respect of Mr Harrison’s engagement during the relevant periods. The assessments totalled $17,369.63, including interest and administration components. The assessments were premised on the Commissioner having found that Mr Harrison was JMC’s employee for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**), either because he fell within the “ordinary meaning” of the term “employee” (s 12(1) of the SGA Act), or because he worked under contracts that were “wholly or principally” for his “labour” and therefore fell within the “extended” meaning of employee in s 12(3) of the SGA Act.
6. On 22 May 2019, JMC lodged an objection against the Commissioner’s assessments. On 17 January 2020, the Commissioner disallowed JMC’s objection. JMC appealed to this Court against the Commissioner’s objection decision: s 14ZZ(1) of the *Taxation Administration Act 1953* (Cth) (**TA Act**). JMC claimed that the objection decision should be varied by allowing, in full, its objection against the assessments.
7. The ultimate question for determination in this proceeding is whether JMC discharged its burden of proving that the assessments were excessive or otherwise incorrect: s 14ZZO(b)(i) of the TA Act. The answer to that question hinged on whether JMC was able to demonstrate that Mr Harrison was not its employee for the purposes of the SGA Act. That required JMC to demonstrate that Mr Harrison was not an employee having regard to both the ordinary or common law meaning of “employee” and the extended meaning of “employee” in s 12(3) of the SGA Act. The question whether Mr Harrison was an employee within the extended meaning turned on the question whether Mr Harrison worked under contracts with JMC which were principally for his labour.
8. The question whether Mr Harrison was an employee having regard to common law principles is difficult and somewhat finely balanced. While there were undoubtedly terms in the contracts between Mr Harrison and JMC which tend to suggest that Mr Harrison may have provided teaching services to JMC as an independent contractor, a close analysis of the totality of the legal rights and obligations provided for in the contracts between JMC and Mr Harrison ultimately supports the conclusion that the relationship was one of employer and employee. The question whether Mr Harrison fell within the extended meaning of “employee” in s 12(3) of the SGA Act is perhaps somewhat clearer. There could be little doubt that Mr Harrison worked under a series of contracts with JMC. A close analysis of those contracts reveals that they were principally for Mr Harrison’s labour.
9. In the end result, JMC failed to discharge its burden of proving that Mr Harrison was not its employee during the relevant periods. The balance of these reasons for judgment explains the basis of that finding.

# RELEVANT LAW AND PRINCIPLES

1. It is necessary to first consider the relevant law and principles that must be applied in determining whether Mr Harrison was an employee of JMC.
2. Subsections 12(1) and (3) of the SGA Act provide as follows:

**12 Interpretation: employer, employee**

(1) Subject to this section, in this Act, ***employee*** and ***employer*** have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons.

….

(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

1. As has already been noted, the Commissioner contended that Mr Harrison was an employee of JMC having regard to both the ordinary and the extended meanings of “employee”. It is accordingly necessary to consider the principles applicable to both the ordinary and the extended meaning of “employee”.

## The ordinary meaning of “employee”

1. The ordinary meaning of the terms “employee” and “employer” for the purposes of s 12(1) of the SGA Act is the meaning of those terms at common law.
2. Both JMC and the Commissioner initially proceeded on the basis that the determination of whether one person was employed by another at common law involved a multifactorial assessment of the “totality of the relationship” (*Stevens v* ***Brodribb*** *Sawmilling Co Pty Ltd* (1986) 160 CLR 16; [1986] HCA 1 at 29 (Mason J)) and that the relationship was not to be found merely from the contractual terms, but also from the “system which was operated thereunder” and the “work practices imposed”: ***Hollis*** *v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44 at [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); see also [47]. That was perhaps understandable given the state of the authorities at the time. Numerous Full Court decisions had applied the multifactorial test: see, for example, *ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69; [2006] FCAFC 109 at [19] (Wilcox, Conti and Stone JJ); *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40; [2016] FCAFC 79 at [57] (Pagone and Davies JJ); ***ACE Insurance*** *Ltd v Trifunovski* (2013) 209 FCR 145; [2013] FCAFC 3. Be that as it may, the result was that, when JMC’s application proceeded to trial, a good deal of evidence concerning work practices and how JMC and Mr Harrison conducted themselves during the period that Mr Harrison provided teaching services to JMC was tendered and admitted without objection.
3. After the trial concluded and while judgment was reserved, the High Court granted special leave and subsequently allowed appeals in two cases which raised similar questions to those raised in this case: see *Construction, Forestry, Maritime, Mining and Energy Union v* ***Personnel Contracting*** *Pty Ltd* (2022) 96 ALJR 89; [2022] HCA 1 and *ZG Operations Australia Pty Ltd v* ***Jamsek*** (2022) 96 ALJR 144; [2022] HCA 2. The judgments of the majority of the justices in those two cases moved the goalposts, or, as all but two of the justices (Gageler and Gleeson JJ) would have it, affirmed where the goalposts had always been, or should always have been seen to have been.
4. The fundamental principles established by the judgments of the majority of the justices in *Personnel Contracting* and *Jamsek* may be shortly summarised as follows.
5. First, where the rights and duties of the parties are comprehensively committed to a written contract, the legal rights and obligations established by the contract are decisive of the character of the relationship provided that the validity of the contract has not been challenged as a sham, or that the terms of the contract have not been varied, waived or are subject to an estoppel: *Personnel Contracting* at [43], [44], [47], [59] (Kiefel CJ, Keane and Edelman JJ), [172] (Gordon J, Steward J relevantly agreeing at [203]). The task is to construe and characterise the contract made between the parties at the time it was entered into: *Personnel Contracting* at [174] (Gordon J).
6. Second, in order to ascertain the relevant legal rights and obligations, the contract of employment must be construed in accordance with the established principles of contractual interpretation: *Personnel Contracting* at [60] (Kiefel CJ, Keane and Edelman JJ), [124] (Gageler and Gleeson JJ), [173] (Gordon J). In that respect, regard may be had to the circumstances surrounding the making of the contract, as well as to events and circumstances external to the contract which are objective, known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract: *Personnel Contracting* at [174]-[175] (Gordon J); *Jamsek* at [61] (Kiefel CJ, Keane and Edelman JJ), referring to *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352. The nature of the specific job that the putative employee applied for and the nature and extent of any tools or equipment they have to supply for that job may also be relevant: *Personnel Contracting* at [175] (Gordon J). It is, however, generally not legitimate to use in aid of the construction of a contract anything which the parties said or did after it was made: *Personnel Contracting* at [176] (Gordon J).
7. Third, and flowing from the first two principles, the characterisation of the relationship between the parties is not affected by circumstances, facts or occurrences arising between the parties that have no bearing on their legal rights: *Personnel Contracting* at [44] (Kiefel CJ, Keane and Edelman JJ), [173]-[178] (Gordon J); *Jamsek* at [109] (Gordon and Steward JJ). A “wide-ranging review of the entire history of the parties’ dealings” is neither necessary nor appropriate: *Personnel Contracting* at [59] (Kiefel CJ, Keane and Edelman JJ); see also [185]-[189] (Gordon J). For a “matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties’ contract, and *not simply an aspect of how the parties’ relationship has come to play out in practice* but bearing no necessary connection to the contractual obligations of the parties”: *Personnel Contracting* at [61] (Kiefel CJ, Keane and Edelman JJ) (emphasis added).
8. It follows that the fact that the parties’ subsequent conduct may not have precisely aligned with their contractual rights and obligations, or the fact that a particular contractual right may have never been exercised or utilised, will generally be irrelevant when it comes to characterising the relationship. That is so unless the manner in which the parties conducted themselves after entering into the contract was such as to establish that the contract was a sham, or that the contract had been varied, or that certain rights under the contract were subject to an estoppel.
9. Fourth, the contractual provisions that may be relevant in determining the nature of the relationship include, but are not limited to, those that deal with the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the deduction of income tax, the delegation of work and the right to exercise direction and control: *Personnel Contracting* at [113] (Gageler and Gleeson JJ); [174] (Gordon J), referring to *Brodribb* at 24 (Mason J); see also 36-37 (Wilson and Dawson JJ).
10. In *Brodribb*, Wilson and Dawson JJ said (at 36-37) that the indicia which suggested an employment relationship included “the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like”, whereas those that suggested a contract for services included “work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax”. Their Honours were, however, careful to note (at 37) that “any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant”. It should also be emphasised that the list of possible indicia must now be approached on the basis that the focus is on the parties’ contractual rights and obligations relevant to those matters, at least where the contract is wholly in writing, not on the way in which the work was actually carried out.
11. Fifth, the characterisation of the relationship as one of service or employment involving an employer and employee, as opposed to a relationship involving an independent contractor providing services to a principal, often hinges on two considerations. The first consideration is the extent to which the putative employer has the right to control how, where and when the putative employee performs the work: *Personnel Contracting* at [73]-[74] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); see also *Brodribb* at 24 (Mason J) and 36-37 (Wilson and Dawson JJ). The second is the extent to which the putative employee can be seen to work in his or her own business, as distinct from the business of the putative employer – the so-called “own business/employer’s business” dichotomy: *Personnel Contracting* at [36]-[39] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); cf [180]-[183] (Gordon J). Neither of those considerations are determinative and both involve questions of degree.
12. As for the element of control, “the existence of a right of control by a putative employer over the activities of a putative employee serves to sensitise one to the subservient and dependent nature of the work of an employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services”: *Personnel Contracting* at [73] (Kiefel CJ, Keane and Edelman JJ).
13. As for the “own business/employer’s business” dichotomy, it also “usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee’s work was so subordinate to the employer’s business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise”: *Personnel Contracting* at [39] (Kiefel CJ, Keane and Edelman JJ); cf [180]-[182] (Gordon J). Another way of framing the question, which focusses more directly on the terms of the contract, is whether the person “is *contracted to work in the business or enterprise of* the purported employer”: *Personnel Contracting* at [183] (Gordon J) (emphasis in original). One consequence of answering that question in the negative *may* be that the person is not an employee.
14. Sixth, a “label” which the parties may have chosen to describe their relationship is not determinative of the nature of the relationship and will rarely assist the court in characterising the relationship by reference to the contractual rights and duties of the parties: *Personnel Contracting* at [63]-[66] (Kiefel CJ, Keane and Edelman JJ); [127] (Gageler and Gleeson JJ); [184] (Gordon J). The parties’ “legitimate freedom to agree upon the rights and duties which constitute their relationship” does not “extend to attaching a ‘label’ to describe their relationship which is inconsistent with the rights and duties otherwise set forth” – to permit otherwise would elevate the freedom to “a power to alter the operation of statute law to suit … the interests of the party with the greater bargaining power”: *Personnel Contracting* at [58] (Kiefel CJ, Keane and Edelman JJ).
15. The characterisation of a relationship as being either one of employer and employee, or one involving the engagement of an independent contractor, is ultimately an evaluative judgment that takes into account the totality of the parties’ contractual rights and obligations. The exercise may not necessarily be straightforward because, in some cases at least, the parties’ contractual rights and obligations may point in different directions. The evaluative exercise also should not be approached on the basis that there is some checklist against which ticks and crosses may be placed so as to produce the right answer. Some degree of uncertainty is unavoidable, particularly in the case of many modern-day work or service contracts.

## The extended meaning of “employee” in s 12(3) of the SGA Act

1. A person is an “employee” within the extended meaning in s 12(3) of the SGA Act if the person “works under a contract that is wholly or principally for the labour of the person”.
2. Three elements must be satisfied before a person could be said to be an “employee” within the extended meaning: *first*, there must be a contract; *second*, the contract must be wholly or principally “for” the labour of the person; and *third*, the person must work under the contract: *Dental Corporation Pty Ltd v* ***Moffet*** (2020) 278 FCR 502; [2020] FCAFC 118 at [82] (Perram and Anderson JJ) and [111], [115] (Wigney J agreeing).
3. The question whether the contract is “for” the labour of the person must be approached from the perspective of the putative employer: *Moffet* at [84]. The question must also be determined by reference to the terms of the contract: *Moffet* at [86]. The question is essentially whether the terms of the contract reveal that the benefit that the putative employer receives from entering into the contract is “wholly or principally” the labour of the putative employee: *Moffet* at [84]-[85]. The word “principally” in this context is essentially synonymous with “substantially” (*Moffet* at [104]) or “predominant[ly]”: *Moffet* at [116].
4. A contract is not wholly or principally for the labour of the putative employee if the contract is a contract for the provision or production of a result and the putative employee is paid for that result: ***Neale*** *v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 425 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ); ***World Book*** *(Australia) Pty Ltd v Commissioner of Taxation* (1992) 27 NSWLR 377 at 385-386 (Sheller JA, with Clarke JA agreeing); *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150 at 155 (Sheller JA, with Beazley JA agreeing).

# THE CONTRACTS BETWEEN JMC AND MR HARRISON

1. It was common ground that the teaching services provided by Mr Harrison at JMC’s Melbourne campus were provided pursuant to a series of contracts, the terms of which had been reduced to writing. The Commissioner did not contend that the contracts were a sham. The focus of the inquiry as to the nature of the relationship between Mr Harrison and JMC is therefore on the rights and obligations under the relevant contracts. In construing the contracts, regard can be had to the circumstances surrounding the making of those contracts, as well as to the objective events and circumstances known to Mr Harrison and JMC at the time they entered into the contracts, at least insofar as they may assist in identifying the purpose or object of the contracts.
2. As adverted to earlier, when JMC’s application proceeded to trial, a good deal of evidence concerning how JMC and Mr Harrison in fact conducted themselves throughout the period that Mr Harrison was providing teaching services to JMC was tendered and admitted without objection. After the judgments in *Personnel Contracting* and *Jamsek* were handed down, JMC and the Commissioner were invited to make further submissions in respect of the significance and potential impact of those decisions on this case.
3. The further submissions of both parties proceeded on the basis that one impact of those decisions was that the Court was effectively required to disregard much of the evidence concerning work practices and the dealings between JMC and Mr Harrison during the period that Mr Harrison was contracted to provide services to JMC. The only evidence of that nature to which regard could be had was evidence of objective, mutually known circumstances at the time of entry into the contracts which might assist in construing the contracts, or evidence which was capable of establishing that the contracts had been varied, or that certain rights under the contracts might be subject to an estoppel.

## Circumstances surrounding the making of the contracts

1. JMC is a company which conducts a business involving the provision of higher education courses of study within the creative industries sector. It has campuses in Sydney, Melbourne and Brisbane.
2. JMC was at all relevant times a higher education provider registered by the Tertiary Education Quality and Standards Agency (**TEQSA**). Courses of study offered by JMC were also accredited by TEQSA. TEQSA was the Commonwealth government’s independent national quality assurance and regulatory agency for higher education.
3. To be registered by TEQSA, a higher education provider was required, among other things, to meet the “Threshold Standards”: s 21(1)(a) of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (**TEQSA Act**). For courses of study to be accredited by TEQSA at the relevant time, TEQSA had to be satisfied, among other things, that the course of study met the standards in the Threshold Standards: s 49(1)(b) of the TEQSA Act. The Threshold Standards during the relevant periods were the Higher Education Standards Framework (Threshold Standards) 2011 (the **2011 Threshold Standards**) and, from 1 January 2017, the Higher Education Standards Framework (Threshold Standards) 2015 (the **2015 Threshold Standards**), both being legislative instruments made under s 58(1) of the TEQSA Act.
4. The Threshold Standards relevantly included standards required to be met by accredited higher education providers (the **Provider Registration Standards**), as well as standards in respect of the courses provided by accredited higher education providers (the **Provider Course Accreditation Standards**).
5. The Provider Registration Standards in the 2011 Threshold Standards included: that the provider had in place effective quality assurance arrangements that encompassed systematic monitoring, review and improvement; that the provider managed human resources to ensure effective performance review and professional development of its personnel; that the qualifications, experience and expertise of the provider’s academic staff are appropriate to the nature, level and mode of delivery of the course of study and attainment of expected student learning outcomes; that the provider’s staff have an understanding of pedagogical and/or adult learning principles relevant to the student cohort being taught; and that the provider’s staff are advised of student and other feedback on the quality of their teaching and have opportunities to improve their teaching.
6. The Provider Course Accreditation Standards in the 2011 Threshold Standards included, in short summary, that the: course design was appropriate; course resourcing and information was adequate; admission criteria were appropriate; teaching and learning were of high quality; assessment was effective and expected student outcomes were achieved; and course monitoring, review, updating and termination were appropriately managed.
7. The 2015 Threshold Standards relevantly included the following standards: that staff with responsibilities for academic oversight and those with teaching and supervisory roles in courses or units of study were equipped for their roles, including having skills in contemporary teaching, learning and assessment principles; that teachers who teach specialised components of a course of study who may not fully meet the standards for knowledge, skills and qualification or experience required for teaching or supervision have their teaching guided and overseen by staff who meet the standard; that comprehensive reviews of courses of study were informed and supported by regular interim monitoring of the quality of teaching and supervision of student progress and overall delivery of units within each course of study; and that academic oversight assured the quality of teaching, including by monitoring and reporting to the corporate governing body on the quality of teaching.
8. The important point to note about both the 2011 and 2015 Threshold Standards is that they effectively required JMC, as a registered higher education provider, to ensure that its academic and teaching staff were appropriately qualified and experienced. JMC could only allow appropriately qualified and experienced individuals to teach its students. Perhaps more significantly, JMC was required to supervise, monitor and review the performance of its academic and teaching staff to ensure that their teaching met the required standard for the accredited courses it provided. JMC could not simply employ or retain teaching staff and leave it up to them to determine when, how and from where they were to teach JMC’s students.
9. JMC engaged individuals to, among other things, teach and assess TEQSA accredited courses. The accredited courses provided by JMC relevantly included a Bachelor of Creative Technologies (Audio Engineering and Sound Production), a Bachelor of Creative Arts (Film and Television) and a Diploma of Audio Engineering and Sound Production. Each of those courses included units of study relating to audio engineering and sound production.
10. Mr Harrison was at all relevant times a qualified sound engineer or technician. His qualifications included holding a Bachelor of Digital Media (Audio Production Major) from SAE Creative Media Institute conferred in 2008 and a Master of Communication from Victoria University in June 2011.
11. From July 2011 to August 2017, JMC and Mr Harrison entered into a series of contracts pursuant to which Mr Harrison agreed to provide “teaching services” to JMC and JMC agreed to pay Mr Harrison sums of money calculated by reference to specified hourly rates for a “lecture” and “marking”. Each of the contracts related to teaching services in respect of specified units of study during a specific period or “trimester”. The terms and conditions of some of the contracts were recorded in documents entitled “Memorandum of Agreement” which identified, in a schedule, the units of study and the trimester in which Mr Harrison was to provide teaching services. Other contracts were entered into by the exchange of emails which specified the units of study and the trimester in which Mr Harrison was to provide teaching services, and otherwise adopted or incorporated the terms and conditions of a specified Memorandum of Agreement between Mr Harrison and JMC. The documentary evidence in respect of some of the contracts was scant or, in some cases, essentially non-existent, though the parties generally proceeded on the basis that the terms and conditions of those contracts were relevantly the same as those contracts where greater documentary evidence was available.
12. The contracts that are of direct relevance to the Commissioner’s assessments the subject of this proceeding are those that were in place during the period from April 2013 to June 2016 and July 2017 to March 2018. It is, however, relevant to have regard to the earlier contracts because they provide potentially important context.

## The first contract – July 2011 to October 2011

1. In July 2011, Mr Harrison applied for a position at JMC which was described as “Audio Engineering Lecturer”. Shortly thereafter, he was engaged by JMC as a lecturer and began teaching classes at JMC’s Melbourne campus.
2. On 28 July 2011, Mr Harrison signed a document entitled “Appendix 142: Induction Checklist for New Lecturers 2011”. In signing the document, Mr Harrison acknowledged that he had received the Lecturer Handbook, and had been “inducted”. He also completed a document entitled “Appendix 83 – Staff Employment Details March 2011”, which included his personal particulars and contact details.
3. There was some indication that Mr Harrison may have also signed a memorandum of agreement in terms relevantly identical to memoranda of agreement that he signed in respect of later periods. The copy of the document which was in evidence, however, was not complete and did not include the signature page or the schedule which described the relevant period to which the memorandum related. If such a document was signed, it may be inferred that it was in the same terms as the Memorandum of Agreement dated 16 October 2012, as set out below.
4. Mr Harrison’s evidence was that he taught “Sound for Film” classes (AUD303) between 28 July 2011 and 18 October 2011.

## The second contract

1. On 14 February 2012, Mr Harrison signed a document entitled “**Lecturer – Position Description** 11/23”. That document described the “objectives” of the position as including to “deliver the Academy’s Higher Education and VET curriculum” and “assess Higher Education and VET students”. It described the basic job function as including “[t]eaching and training” and “[w]riting lesson plans and devising assessments”. It also recorded that the position of lecturer reported to the “Head of Department on academic matters and the Campus Manager on operational matters”.
2. On 16 October 2012, Mr Harrison signed two documents. The first document was another copy of the Lecturer Position – Description. The second was a document entitled “Memorandum of Agreement” (the **first MOA**). It is important to set out the terms of the first MOA in full (emphasis in original).

**MEMORANDUM OF AGREEMENT**

**Parties:**

The Parties to this Agreement are: **JMC Pty Limited (ACN: 003 572 012) of 41 Holt Street, Surry Hills, New South Wales 2010 trading as JMC Academy (the Academy)**

And

**Nick Harrison** (the Services provider) of

[REDACTED ADDRESS] trading as NICHOLLAS HARRISON [registered business name]

**Recitals:**

**1** The Academy is a recognised provider of approved Higher Education programmes.

**2** The services provider has offered to provide teaching services to the Academy in the Unit or Units set out in the Schedule to this Agreement and has represented to the Academy that she/he is able to provide such services to the Academy at the standard required to deliver Higher Education programmes and that she/he is qualified, capable and suitably experienced to do so with the skills required and in a manner necessary to provide learning outcomes consistent with accreditation requirements. In providing such services she/he is permitted to utilize any of their own tools, props, computer software etc that she/he feels will assist them in their teaching services but must do so with the expressed permission of the academy.

**3** Relying on the representations of the Services provider the Academy has accepted the offer by the Services provider to provide teaching services in the Unit or Units set out in the Schedule.

**4** This Memorandum records the terms upon which the Parties are agreed that the Services provider will provide teaching services in the Unit or Units set out in the Schedule to the Academy.

**Terms:**

**1** It is a condition precedent to this Agreement that, prior to first providing to the Academy the teaching services in the Schedule this Agreement (the Schedule), the Services provider provides to the Academy current documentary evidence establishing that there is no impediment to her/him providing teaching or other services to children or young persons by virtue of legislation relating to the protection of children or young persons enacted in the State or States in which he/she is to provide those teaching services.

**2** Subject to the condition precedent in Term1, this Agreement will commence on the date of its execution by the Services provider or upon the date on which the Services provider first provides to the Academy a service in the Schedule, whichever is the earlier.

**3** As soon as practicable after the commencement of this Agreement the Services provider will produce to the Academy such original documents establishing that she/he is qualified, capable and suitably experienced to provide the services in the Schedule as the Academy may require, including the original testamurs of her/his Academic Award, and will provide the Academy with certified copies of same.

**4** The Services provider will personally provide teaching services to the Academy in accordance with the Schedule and will do so in a manner consistent with the representations set out in Recital 2.

**5** The Services provider may sub-contract or assign to another person or corporation the provision to the Academy of the teaching services required of her/him by this Agreement but must do so with the written consent of The Academy’s representative.

**6** If on any occasion listed in the Schedule the Services provider does not provide teaching services to the Academy without reasonable notice, the Academy may, at its absolute discretion, deduct from any monies payable to the Services provider under these Terms any costs reasonably incurred in securing teaching services for the particular occasion.

**7** Subject to these Terms, in consideration for the Services provider providing teaching services to the Academy, the Academy will pay to the Services provider the following sums in respect of teaching services provided to the Academy in accordance with the Schedule:

* A Lecture $60.00 per hr
* A Tutorial $ N/A
* A Demonstration $ N/A
* Marking $30.00 per hr
* Each other scheduled activity ; approved by Academic Manager (refer to unit assessment marix [sic])

Provided that should the Parties agree to the provision of teaching services additional to those in the Schedule, the consideration for the provision of such services will be that provided for in this Term.

**8** Where the Academic officer who is responsible for managing the supplying of teaching service under this Agreement is satisfied that the provision of a particular teaching service in the Schedule by the Services provider has been incomplete or has not adequately dealt with an aspect or aspects of the teaching requirements for the particular service, the Academy may, at its absolute discretion, either require the Services provider to repeat provision of the particular service to the satisfaction of the Academic officer without additional payment or withhold payment from the service provider in relation to the particular teaching service and make such other arrangements for the provision of the particular teaching service as it may deem appropriate, specifically, but not limited to, **the return of marked assessments to administration within 7 working days.**

**9** It is of the essence of the Agreement that at all times when the Services provider is providing teaching services to the Academy she/he will be conversant with and comply with the policies and procedures which the Academy has adopted or may adopt, from time to time, in relation to the Academic operation and governance of the Academy, in particular those relating to the teaching and assessment of the Unit or Units set out in the Schedule. However, the terms of those policies and procedures do not form part of this Agreement.

**10** In relation to the teaching services to which this Agreement relates, the Services provider agrees and acknowledges that her/his relationship with the Academy is that of a contractor and indemnifies the Academy in relation to any and all claims, including expenses reasonably and necessarily incurred in relation to such claims, which may be made in relation to any and all entitlements which accrue to an employee under the Fair Work Act 2009 and/or the Superannuation Guarantee (Administration) Act 1992 and any legislation replacing those Acts.

**11** The Services provider will be responsible for their own Workers Compensation/Income protection policy of which the amount covered is at the absolute discretion of the service provider and therefore indemnifies the Academy in relation to any and all Workers Compensation claims which arise in relation to the Services provider providing teaching services to the Academy.

**12** The Services provider warrants that she/he is conversant with the duties, obligations and responsibilities arising under legislation applying to health and safety in workplaces and indemnifies the Academy in relation to any and all claims, costs and penalties arising from any failure of the Services provider to reasonably discharge such duties, obligations and responsibilities whilst in any workplace of the Academy.

Any intellectual property, including musical compositions and programmes of software, bought [sic] into existence by the Services provider, whether alone or with others, in providing the teaching services in the Schedule will fully and absolutely vest in the Academy. The Academy may make or record images of the services provider and may make visual and/or sound recordings of the Service provider whilst she/he is providing the teaching services in the Schedule. The intellectual property in all such images and recordings is exclusively that of the Academy and may be used by the Academy at its absolute discretion for any lawful purpose.

**13** The Services provider will not, either when providing the teaching services in the Schedule or after completing the provision of those services, divulge to any person or corporation or apply to her/his own use any confidential information concerning the business, financial arrangements, intellectual property or position of the Academy, or any dealings, transactions or affairs of the business of the Academy or of any related entities or of any customers or students of the Academy, except as required by law or as expressly permitted by the Academy. The Services provider warrants that she/he is conversant with the obligations and responsibilities arising under Privacy Act 1988, and will discharge those obligations and responsibilities in relation to the teaching services in the Schedule, particularly in relation to the personal information of the students of the Academy. The Services provider indemnifies the Academy in relation to any and all claims, costs and penalties arising from any failure of the Services provider to discharge such obligations and responsibilities.

**14** In relation to the teaching services which the Services provider will provide to the Academy, the Academy will describe her/him as a being [sic] a Casual Lecturer and the Services provider may describe herself/himself as such.

**15** The following trading arrangements will apply:

* The Services provider will produce the original certificate of registration of a business name to the Academy and supply the Academy with a certified copy of the certificate before submitting any invoices for teaching services in the Schedule ;
* The Services provider will use her/his registered business name when invoicing the Academy for the providing of teaching services to the Academy. All invoices will include the Services provider’s Australian Business Number (ABN). Where an Invoice does not include an ABN, the Academy will withhold 46.5% of the invoiced sum for taxation purposes;
* Invoices by the Services provider will be dated and numbered and will specify the date of service provision and particulars of the teaching services provided by reference to the Schedule. Invoices will be accompanied by time sheets and signed weekly lesson plans;
* Where the teaching serviced [sic] in the Schedule include assessment and the submission of academic results at the end of teaching programme or semester, a final invoice must not be submitted until after the academic results have been submitted and will be accompanied by a signed lesson plan;
* Where the Services provider is registered for Goods and Services Tax (GST) purposes, the Services provider will provide invoices in the form of a Tax Invoice and will specify the amount of GST included in the invoiced sum;
* The Academy will pay invoices by direct electronic funds transfer to an account at an Australian financial institution which the Services provider will nominate to the Academy;
* The Academy will keep the Services provider informed of the identity of the Academic officer who will be responsible for managing the supplying of teaching service under this Agreement;
* The Academy will provide the Services provider with copies of both the *Lecturer Handbook* and the *Student Handbook* produced by the Academy from time to time.

**16** Either the Services provider or the Academy may terminate this Agreement by giving the other the two (2) weeks’ notice of termination in writing to the address set out under **Parties**. Provided that the [sic] upon giving or receiving such notice the Academy may at its absolute discretion make a payment to the Services provider for any occasion in the Schedule falling within the period of notice and forego the provision of teaching services to the Academy during the period of notice. Where the Academy exercises the discretion conferred by this Term the Agreement will terminate on the day on which payment is made.

**17** Notwithstanding the provisions of any other Term, either the Services provider or the Academy may terminate this Agreement by giving the other notice of termination in writing to the address of the respective registered offices if any of the following circumstances arise:

a. a liquidator, provisional liquidator, receiver, receiver and manager or an official manager is appointed to the other;

b. an administrator is appointed to the other pursuant to Part 5.3A of the Corporations Act 2001;

c. the other resolves to wind up or is the subject of an order to wind up; or

d. the other enters into a scheme of arrangement with its creditors or otherwise compromises or compounds with creditors.

Notice given pursuant to this Term will take effect on the day it would be received in the ordinary course of pre paid post.

**18** This Agreement will be governed by the Federal law of the Commonwealth of Australia and any legal or administrative proceedings in relation to the Agreement will be commenced only in a Federal court or tribunal of the Commonwealth

**19** Should any term of this Agreement be found to be unlawful, unenforceable or of no effect, that Term will be severed from the Agreement and the Agreement will continue in accordance with its remaining Terms.

**SCHEDULE**

Teaching services which the Services provider will provide to the Academy through the Nominee

**Unit:** AUDIO202 Audio and Acoustic Design

**Managing Academic Officer:** Robert Care - Head of Audio Engineering & Sound Production

**Occasions:** Trimester 1 – October 2012

**Executed by** JMC Pty Limited on October 2nd 2012, by **Roslyn Tabacco – Campus Manager Melbourne** for **Chief Executive Officer**. In the presence of **Managing Academic Officer**

**Executed by** NICHOLLAS HARRISON [Services provider name]

on 16th October 2012 [date] [signature]

In the presence of **Campus Manager**

[Signature and dated 16-10-12]

1. The terms of this Memorandum of Agreement will be analysed in detail later in these reasons. It suffices at this point to note that the “teaching services” that Mr Harrison (referred to in the Memorandum as the “Services provider”) was to provide to JMC (referred to in the Memorandum as “the Academy”) were identified in the schedule to the Memorandum as relating to the “AUDIO202 Audio and Acoustic Design” unit for “Trimester 1 – October 2012”. It would appear, however, that Trimester 1 in 2012 commenced on 28 February 2012 and ended on 25 May 2012. Mr Harrison’s evidence was that he taught “Audio and Acoustics” classes (AUD202) during that period.

## The third and fourth contract periods

1. Mr Harrison’s evidence was that he taught “Audio and Acoustics” classes (AUD202) during the following periods: Trimester 2 in 2012 (19 June 2012 to 15 September 2012) and Trimester 3 in 2012 (9 October 2012 to 25 January 2013). There was, however, very little documentary evidence concerning the terms upon which Mr Harrison was engaged to provide teaching services during those two Trimesters. There was no direct evidence that memoranda of agreement referring specifically to the provision of teaching services during these two Trimesters were executed by JMC and Mr Harrison. The evidence did, however, tend to support the inference that either memoranda of agreement referring to the provision of teaching services in these Trimesters were executed, or that Mr Harrison otherwise agreed, most likely by email or similar communication, to provide teaching services during those Trimesters on the terms set out in a memorandum of agreement which was relevantly identical to the first MOA. JMC did not contend otherwise. Nor did the Commissioner.

## The fifth contract

1. On 5 March 2013, Mr Harrison signed another version of the Lecturer – Position Description.
2. On 12 April 2013, Mr Harrison signed a Memorandum of Agreement (the **second MOA**) which was in relevantly identical terms to the first MOA, save for that the “occasions” on which the teaching services were to be provided by Mr Harrison was described as being “Start of school February 25 - June 14 2013 (Trimester/Semester)”.
3. The fifth contract is the first contract which is directly relevant to the assessments issued by the Commissioner, the earlier contracts having been entered into and performed prior to the period covered by the assessments.
4. Mr Harrison’s evidence was that he taught “Audio and Acoustics” classes (AUD202) during the period 26 February 2013 to 24 May 2013.

## The sixth to fifteenth contract periods

1. Mr Harrison’s evidence was that he taught various classes (including, at various times, “Audio and Acoustics” (AUD202), “Electronic Music” (AUD206) and “Sound for Film” (AUD305)) at JMC during the following periods: Trimester 2 in 2013 (20 June 2013 to 13 September 2013); Trimester 3 in 2013 (9 October 2013 to 25 January 2014); Trimester 1 in 2014 (25 February 2014 to 23 May 2014); Trimester 2 in 2014; Trimester 3 in 2014 (7 October 2014 to 23 January 2015); Trimester 1 for 2015 (17 February 2015 to 15 May 2015); Trimester 2 for 2015 (9 June 2015 to 28 August 2015); Trimester 3 in 2015 (21 September 2015 to 11 December 2015); and Trimester 1 in 2016 (15 February 2016 to 6 May 2016). Mr Harrison also taught “Sound Recording” (FTV207) in the Film and Television Department at JMC for Trimester 2 in 2015.
2. As was the case in respect of the teaching services provided in Trimesters 2 and 3 in 2012, there was very little documentary evidence concerning the terms upon which Mr Harrison was engaged to provide teaching services in the Trimesters commencing in June 2013 and ending in May 2016. There was no direct evidence that memoranda of agreement which referred specifically to the provision of teaching services in those Trimesters were executed by JMC and Mr Harrison. The evidence, however, again tended to support the inference that Mr Harrison agreed, most likely by email or similar communication, to provide teaching services during those Trimesters on terms set out in a memorandum of agreement relevantly identical to the first MOA or second MOA. That was effectively common ground between the parties.

## The sixteenth contract

1. On 6 May 2016, Mr Robert **Care**, JMC’s Head of Audio Engineering and Sound Production, sent an email to Mr Harrison which stated as follows:

*I refer to your contract with us dated 2012 and advise that we would like to retain your services for the upcoming Trimester period from 06/06/2016 to 02/09/2016.*

*The schedule of units proposed are;*

*-AUDIO 202*

*-AUDIO 305*

*-AUDIO 405*

*All terms and conditions as per the above contract remain the same. Please advise us by return email before 13/06/2016 of your acceptance of the new schedule of works or of your unavailability to undertake the work proposed. Please also advise if you propose to subcontract the work to another party so we can assess their credentials prior to the trimester starting.*

(Emphasis by underlining added)

1. On 6 May 2016, Mr Harrison replied by email to Mr Care’s email, stating: “Thanks Rob, yes I accept”.
2. It was essentially common ground between the parties that the contract which was entered into as a result of this exchange of emails between Mr Harrison and Mr Care incorporated the terms of the second MOA. The Commissioner contended, however, that the portion of Mr Care’s email which is emphasised in the above extract varied or added to the terms of the contract in a potentially important respect. The same argument was advanced in respect of similar statements made in other emails in which Mr Care offered to retain Mr Harrison’s services for different trimesters on the same terms and conditions. The Commissioner also contended that Mr Care’s emails, considered along with the conduct of the parties, gave rise to a variation by conduct or perhaps an estoppel or waiver. JMC denied that the emails effected any variation to the terms and conditions of the contracts and denied that the emails, or the subsequent conduct of the parties, gave rise to any estoppel or waiver.
3. The Commissioner’s contentions concerning variation, estoppel and waiver will be discussed later. It suffices to note at this point that the general effect of the alleged variation, estoppel or waiver was said to be that, if Mr Harrison intended to sub-contract the teaching services to another party, he had to give JMC notice of that intention prior to the commencement of the trimester in which he was to provide the relevant services. In the Commissioner’s submission, the effect of the variation, estoppel or waiver was to significantly narrow the scope of Mr Harrison’s right to sub-contract.

## The seventeenth contract

1. On 19 May 2016, Mr Peter **George**, JMC’s Head of Film and Television, sent an email to Mr Harrison which stated as follows:

*I refer to your contract with us dated 2013 and advise that we would like to retain your services for the upcoming Trimester period from 6/6/2016 to 9/9/2016.*

**Trimester commences June 6, 2016**

Assessment weeks August 29 - September 9, 2016

**Trimester finishes September 9, 2016**

**Inter Trimester Break September 12 - 16, 2016**

*The schedule of units proposed are:*

**• FTV 207 – Sound Recording**

*(See attached timetable)*

*All terms and conditions as per the above contract remain the same. Please advise us by return email before 27/5/2016 of your acceptance of the new schedule of works or of your unavailability to undertake the work proposed. Please also advise if you propose to subcontract the work to another party so we can assess their credentials prior to the trimester starting.*

(Italics in original – emphasis by underlying added)

1. On 25 May 2016, Mr Harrison replied to Mr George’s email and stated as follows:

Thanks Peter, yes completely good. I’ve got two things on this trimester that would mean rescheduling the classes (week 3 and week 8) – if you’re fine with this I can organise the pickup classes.

1. The reference in Mr George’s email to Mr Harrison’s contract with JMC “dated 2013” would appear to be a reference to the second MOA, or perhaps a similar memorandum of agreement executed during 2013. It was common ground that the contract which was entered into as a result of this exchange of emails incorporated the terms of the second MOA, subject to the Commissioner’s contention, considered in more detail later, that the email added to or varied the terms of the agreement, or gave rise to an estoppel or waiver.

## The eighteenth contract

1. On 8 August 2016, Mr Care sent an email to Mr Harrison which stated as follows:

*I refer to your contract with us dated 2012 and advise that we would like to retain your services for the upcoming Trimester period from 27/09/2016 to 23/12/2016.*

*The schedule of units proposed are;*

*-AUDIO 202*

*-AUDIO 305*

*-AUDIO 405*

*All terms and conditions as per the above contract remain the same. Please advise us by return email before 12/08/2016 of your acceptance of the new schedule of works or of your unavailability to undertake the work proposed. Please also advise if you propose to subcontract the work to another party so we can assess their credentials prior to the trimester starting****.***

(Emphasis by underlining added)

1. On 9 August 2016, Mr Harrison replied to Mr Care’s email in the following terms:

Hi Rob, yes happy to keep teaching of course!

1. The reference in Mr Care’s email to Mr Harrison’s contract with JMC “dated 2012” would appear to be a reference to the first MOA, or perhaps a similar memorandum of agreement executed during 2012. It was common ground that the contract which was entered into as a result of this exchange of emails incorporated the terms of that memorandum of agreement, subject again to the Commissioner’s contentions concerning variation and estoppel.

## The nineteenth contract

1. On 28 February 2017, JMC and Mr Harrison executed a memorandum of agreement (the **third MOA**). That memorandum contained recitals and terms that were relevantly identical to the first and second MOA, save for the following changes.
2. First, the second paragraph of clause 12 was renumbered “13” with corresponding renumbering of the subsequent clauses.
3. Second, the hourly rate for “A Lecture” in clause 7 was $65.00 (as opposed to $60.00).
4. Third, clause 15 (the equivalent of clause 14 in the first and second MOA) provided that “[i]n relation to the teaching services which the Services provider will provide to the Academy, the Academy will describe her/him as being a Contract Lecturer and the Services provider may describe herself/himself as such”. Clause 14 of the first and second MOA provided that Mr Harrison could and would be described as a “Casual Lecturer”.
5. Fourth, the schedule specified the “unit(s)” as being “AUDIO 202 and 305” and the “occasions” as being “Academic Year 2017”.
6. Mr Harrison’s evidence was that he taught “Audio and Acoustics” (AUD202) and “Sound for Film” (AUD305) classes during Trimester 1 in 2017 (13 February 2017 to 5 May 2017).

## The twentieth contract

1. On 3 May 2017, Mr Care sent an email to Mr Harrison which stated as follows:

I refer to your original contract with us dated from Feb 2017 and advise that we would like to retain your services for the upcoming Trimester period from 05.6.2017 (Week 1) to 25.08.2017 (Week 12).

The schedule of units proposed are:

AUDIO 202

AUDIO 305

AUDIO 405

I can advise that your rate of pay for delivering these units will be $65 per hour for classroom instruction, and $30 per hour for marking rate.

All terms and conditions as per the above contract remain the same. Please advise us by return email before 29.05.2017 of your acceptance of the new schedule of work, or of your unavailability to undertake the work proposed. If you don’t get back to us by this time your services may not be able to be retained or confirmed, and any invoices submitted in the new trimester will not be paid. Please also be aware that you must advise if you propose to subcontract the work to another party so we can assess their credentials prior to the trimester starting.

(Emphasis by underlining added)

1. Later that day, Mr Harrison replied by email to Mr Care in the following terms: “yes emailing to accept”.
2. The reference in Mr Care’s email to Mr Harrison’s contract with JMC “from Feb 2017” was clearly a reference to the third MOA. It was again common ground that the contract entered into as a result of this exchange of emails incorporated the terms of that memorandum of agreement, subject, again, to the Commissioner’s contentions concerning variation or estoppel.
3. Mr Harrison’s evidence was that he taught “Audio and Acoustics (AUD202), “Sound for Film” (AUD305) and “Sound Aesthetics” (AUD405) during Trimester 2 in 2017 (5 June 2017 to 25 August 2017).

## The twenty-first contract

1. Mr Harrison’s evidence was that he also taught “Sound Recording” (FTV207) in the Film and Television Department during Trimester 2 in 2017. There was, however, very little documentary evidence concerning the terms upon which Mr Harrison was engaged to provide those teaching services.

## The twenty-second contract

1. On 28 August 2017, Mr Care sent Mr Harrison an email which stated as follows:

I refer to your original contract with us dated from Feb 2017 and advise that we would like to retain your services for the upcoming Trimester period from 25/09/2017 (Week 1).

The schedule of units proposed are:

AUDIO 202

AUDIO 305

AUDIO 405

I can advise that your rate of pay for delivering these units will be $65 per hour for classroom instruction, and $30 per hour for marking rate.

All terms and conditions as per the above contract remain the same. Please advise us by return email before 04/09/2017 of your acceptance of the new schedule of work, or of your unavailability to undertake the work proposed. If you don’t get back to us by this time your services may not be able to be retained or confirmed, and any invoices submitted in the new trimester will not be paid. Please also be aware that you must advise if you propose to subcontract the work to another party so we can assess their credentials prior to the trimester starting.

(Emphasis by underlining added)

1. Later that day, Mr Harrison responded by email to Mr Care’s email in the following terms: “Thanks Rob, confirming my acceptance of the new schedule of work”.
2. The reference in Mr Care’s email to Mr Harrison’s contract with JMC “from Feb 2017” was again clearly a reference to the third MOA.

# ANALYSIS OF THE RELEVANT CONTRACTUAL RIGHTS AND OBLIGATIONS

1. As was made clear in both *Personnel Contracting* and *Jamsek*, the characterisation of the relationship between parties to written contracts of the sort in question in this case must proceed by reference to the respective rights and obligations of the parties under the contracts. While the characterisation exercise should not proceed “as if the court is running down items on a checklist in order to determine a balance of ticks and crosses” (cf *Personnel Contracting* at [34] (Kiefel CJ, Keane and Edelman JJ)), it is nonetheless useful to analyse the contractual rights and obligations by reference to, or having regard to, the indicia that are generally identified in the authorities as being indicative of the nature of the relationship: see *Personnel Contracting* at [61] (Kiefel CJ, Keane and Edelman JJ).
2. As can be seen, the memoranda of agreement included recitals. Recitals generally do not have operative effect in a contract. Rather, they form part of the document as a whole, and therefore provide context for construing the operative aspects of the contract: see *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392; [2016] HCA 5 at [65]-[66] (French CJ, Kiefel, Bell, Keane and Gordon JJ). Recitals often “reveal the background chosen by the parties by way of the identification of relevant context” and “assist in interpretation of operative provisions, though they do not control the latter’s operation when clear and unambiguous”: *OneSteel Manufacturing Pty Ltd v BlueScope (AIS) Pty Ltd* (2013) 85 NSWLR 1; [2013] NSWCA 27 at [63] (Allsop P, with whom Macfarlan and Meagher JJA agreed); see also *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 72-73 (Mason J).
3. As has already been noted, the terms of the first MOA, the second MOA and the third MOA were relevantly identical. In the following analysis of the contractual rights and obligations, reference will generally be made to the clauses as they appear in the first MOA and the three memoranda collectively as the **Memoranda**. No distinction will generally be drawn between the contracts between Mr Harrison and JMC which were wholly recorded in the Memoranda and the contracts which were entered into as a result of email exchanges between Mr Harrison and JMC, other than when referring to the Commissioner’s contentions concerning variation, estoppel and waiver. The twenty-two contracts between JMC and Mr Harrison will be referred to collectively as **the contracts**.

## Contracting parties

1. The nature of the contracting parties may be indicative of the nature of the relationship. The fact that the contracting party which provides or performs the work or service is a corporate entity or a partnership, as opposed to an individual, may indicate that the relationship is not one of employer and employee: *Personnel Contracting* at [174] (Gordon J), citing *Australian Mutual Provident Society v* ***Chaplin*** (1978) 52 ALJR 40 at 410; see also *Hollis* at [68].
2. JMC contracted with Mr Harrison in his capacity as an individual. Mr Harrison was not a member of a partnership, or otherwise associated with any company which carried on any relevant business. Nor did he have any separate business or trading name.
3. The Memoranda identified and defined Mr Harrison as the “Services provider”. That expression is then utilised in most of the clauses in the Memoranda. Each time the expression “Services provider” is used in the Memoranda, it should be understood as referring to Mr Harrison in his personal or individual capacity.
4. JMC relied on the fact that the pro forma parts of the Memoranda completed by Mr Harrison contained a space for the insertion of a trading name and that clause 15 of the Memoranda provided that Mr Harrison, as the “Services provider”, was required to use his “registered business name” when invoicing JMC. Mr Harrison did not, however, specify any trading name. Nor was there any evidence that Mr Harrison had a registered business name or used any such name when invoicing JMC. In any event, even if Mr Harrison had a trading name or registered business name, that does not alter the fact that Mr Harrison was himself the contracting party.
5. JMC also relied on the fact that clause 5 of the Memoranda provided that Mr Harrison could sub-contract or assign to another person or corporation the obligation to provide teaching services to JMC. JMC submitted that it followed from clause 5 that Mr Harrison had the ability to incorporate his own business structure as a means of contracting with JMC. That is not, however, an accurate or appropriate characterisation or construction of clause 5.
6. The effect and operation of clause 5 is addressed in more detail later in these reasons. It suffices at this point to note that any right that Mr Harrison had to sub-contract or assign was subject to him obtaining JMC’s written consent. More importantly, clause 5 must be read and construed in the context of the Memoranda as a whole. A number of the clauses in the Memoranda make it plain that the “Services provider” must be an appropriately qualified individual, and that the teaching services must be personally provided by that individual. The scope for any sub-contract or assignment to a corporation, or to anyone else, was at best very narrow.
7. In any event, the fact that Mr Harrison may have been able to assign or sub-contract the provision of the teaching services, provided he was able to secure JMC’s consent to that course, does not alter the fact that Mr Harrison – not a corporation or partnership – was the contracting party. That tends to militate toward the contracts being contracts *of* service, meaning that Mr Harrison was JMC’s employee, as opposed to contracts *for* services.

## Right of control

1. The “existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of the employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services”: *Personnel Contracting* at [73] (Kiefel CJ, Keane and Edelman JJ). The question is whether, having regard to the terms of the contract, the “engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it”: *Brodribb* at 35 (Wilson and Dawson JJ).
2. There are a number of clauses in the Memoranda which are relevant to a consideration of the extent to which it could be said that JMC had a right of control over Mr Harrison, including the question of how, when and where he was required to provide the relevant teaching services.

### Supervision and monitoring of how the services were to be provided

1. Recitals 1 and 2 in the Memoranda directly or indirectly advert to the fact that JMC was a TEQSA registered provider of higher education programmes that provided TEQSA accredited courses of study. Recital 1 states that JMC is a “recognised provider of approved Higher Education programmes” and recital 2 notes that Mr Harrison had represented that he was able to provide teaching services at the “standard required” and was qualified, capable and suitably experienced to provide learning outcomes “consistent with accreditation requirements”. Those recitals must be read and understood in the context of the relevant TEQSA system of registration and accreditation which required, among other things, that JMC have in place effective arrangements relating to performance review, quality assurance and the systematic monitoring and review of academic and teaching staff. The TEQSA requirements may be taken to be objective facts known to both JMC and Mr Harrison at the time they entered into the contracts.
2. Given the requirements imposed upon JMC by the TEQSA system of registration and accreditation, it is perhaps not surprising that a number of clauses in the Memoranda effectively gave JMC the right to supervise and monitor the teaching services provided by Mr Harrison under the contracts, including how they were to be provided.
3. Clause 15 provided (as set out in the seventh dot point) that JMC would keep Mr Harrison informed of the identity of the “Academic officer” who would be “responsible for managing the supplying of teaching service[s]” under the agreement. The schedule to the Memoranda identified Mr Harrison’s “managing academic officer” as being Mr Care, who was Head of Audio Engineering and Sound Production at JMC. It should also be noted in this context that the Lecturer – Position Description documents signed by Mr Harrison stated that Mr Harrison was to report to the “Head of Department” in respect of “academic matters”.
4. Clause 4 of the Memoranda provided that Mr Harrison was required to “personally” provide the teaching services “in a manner consistent with the representations set out in Recital 2”. As just noted, those representations included that Mr Harrison could and would provide the teaching services at the “standard required” and in a manner necessary to produce learning outcomes “consistent with accreditation requirements”.
5. Clause 8 of the Memoranda provided, in effect, that if Mr Care (as Mr Harrison’s managing academic officer) was satisfied that Mr Harrison’s provision of a “particular teaching service” was “incomplete” or did not “adequately” deal with an aspect of the “teaching requirements”, JMC had the power either to require Mr Harrison to “repeat provision of” the particular service to Mr Care’s satisfaction “without additional payment”, or “withhold payment” from Mr Harrison and “make such other arrangements for the provision of the particular teaching service as it may deem appropriate”. The general effect of clause 8 was that JMC, through the managing academic officer, had the right to monitor and supervise the provision of teaching services by Mr Harrison and, if not satisfied that the services had been adequately provided to the requisite standard, had the contractual power to either require Mr Harrison to provide the services again, without further payment, or withhold payment in respect of the services rendered.
6. Clause 9 of the Memoranda provided that it was the “essence” of the agreement that Mr Harrison at all times be “conversant with and comply with the policies and procedures which [JMC] has adopted or may adopt, from time to time … in particular those relating to teaching and assessment of the Unit or Units set out in the Schedule”. JMC therefore had the right to put in place policies and procedures in relation to the teaching and assessment of the units in which Mr Harrison was to provide teaching services, and Mr Harrison was contractually obliged to comply with those policies and procedures, including those put in place after the contract was entered into.
7. Other clauses in the Memoranda provided somewhat less direct, though nevertheless significant, means by which JMC could effectively supervise, monitor and control Mr Harrison’s provision of the teaching services he contracted to provide.
8. Clause 15 of the Memoranda provided (as set out in the third dot point) that the invoices that Mr Harrison was required to submit would, among other things, provide particulars of the teaching services provided and would be “accompanied by time sheets and signed weekly lesson plans”. The nature and content of the lesson plans was an objective fact or circumstance which may be taken to have been known to JMC and Mr Harrison at the time they entered into the contracts during the relevant period. JMC provided Mr Harrison with lesson plans in respect of the courses that Mr Harrison was required to teach. The lesson plans were lengthy and detailed documents which specified the content of the relevant unit of the course of study, as well as the teaching methods and suggested delivery of the unit content relevant to each class or lesson. The teacher who delivered the lesson was required to sign the lesson plan and declare that “the information is a true and accurate record of the course content I delivered this lesson”.
9. The contractual requirement for Mr Harrison to attach signed lesson plans to his invoices was a means by which JMC could effectively direct Mr Harrison as to how he should deliver his lectures or lessons. It also provided a means by which JMC could closely monitor and supervise Mr Harrison’s delivery of the lectures, including the content and the particular way they were delivered.
10. JMC submitted that recital 2, clause 4 and the schedule to the Memoranda simply obliged Mr Harrison to teach the content of the accredited course identified in the schedule to a particular standard. They did not, in JMC’s submission, direct how the lectures were to be delivered by Mr Harrison. JMC also submitted that the requirement in clause 15 to sign and provide lessons plans when invoicing JMC for the teaching services served purely an administrative function, and that the lesson plans themselves were merely suggestive of what was to be covered in each lecture.
11. Those submissions, however, were based on an overly narrow and confined reading of recital 2, clause 4 and the requirement in clause 15 to provide signed lesson plans. JMC’s construction of those provisions in the Memoranda largely ignored the TEQSA registration and course accreditation requirements, which were reflected, at least implicitly, in recital 2. It also completely ignored the terms of clause 8, and downplayed the significance of the lesson plans, which were detailed and highly prescriptive.
12. It cannot, in all the circumstances, be accepted that the requirement stipulated in clause 15 that Mr Harrison attach signed lesson plans to his invoices was a mere administrative requirement. The lesson plans included an outline of the “content topics”, “teaching resources” and “lesson outcomes” relevant to the particular lesson in question. They also included a lengthy section on “suggested class delivery” which addressed how the content topics should be addressed and provided related “in-class activities”. Mr Harrison, like the other lecturers, was required to sign a declaration that the lesson plan was a “true and accurate record of the course content I delivered this lesson”. Mr Harrison had no right to be paid if he did not comply with the requirement to submit the signed lesson plans with his invoices. The evident purpose of the requirement was to give JMC a means by which to ensure that Mr Harrison was delivering lectures in such a way so as to ensure JMC met its TEQSA registration and course accreditation obligations.
13. There is, in any event, a very fine and blurry line between the right to control and direct the content and standard of each lecture given by Mr Harrison and the right to control how Mr Harrison was to deliver the teaching services he was contracted to provide. While Mr Harrison may well have been free to employ his own unique teaching style when delivering the lectures, he was nonetheless effectively contractually required to provide the lectures in accordance with the highly prescriptive terms of the lesson plans. JMC also had the contractual right, conferred in particular by clause 8 of the Memoranda, to monitor and supervise Mr Harrison to ensure that he delivered the lectures in that way. The managing academic officer who was responsible for managing Mr Harrison’s provision of teaching services had the right to effectively sanction Mr Harrison if he was satisfied that the teaching services provided by Mr Harrison were incomplete or had not adequately dealt with an aspect of the teaching requirements. That contractual right gave the managing academic officer, and, in turn, JMC, a significant degree of control over how Mr Harrison was to provide the relevant teaching services.
14. The combined operation of recitals 1 and 2 and clauses 4, 8, 9 and 15 of the Memoranda gave JMC a considerable degree of control over Mr Harrison and his provision of the teaching services he had agreed to provide, including control in relation to how those services were to be provided. They reveal the subservient and dependent nature of the work that Mr Harrison was to provide under the terms of the contracts.

### Control over when and where the services were to be provided

1. JMC effectively directed and controlled when, how and where Mr Harrison was required to perform the relevant teaching services.
2. The unit or units in which Mr Harrison would deliver lectures and mark assessments, and the particular trimester in which Mr Harrison was to provide those services, were stipulated in the Memoranda, or otherwise in the emails that JMC sent to Mr Harrison offering to retain his services. In some cases, the timetable of classes for the relevant units for the trimester in question was annexed. While some of the emails suggested that there may have been some scope for Mr Harrison to rearrange some of the classes specified in the timetable, even those minor rearrangements of the timetable required JMC’s approval. More significantly, Mr Harrison did not have the contractual right to vary the timetables.
3. Once the contract in respect of a particular trimester was entered into, Mr Harrison was contractually obliged to provide the relevant teaching services, including giving lectures at the timetabled times. Indeed, he was subject to potential financial penalty if he did not do so. Clause 6 of the Memoranda provided that if Mr Harrison failed to provide the specified teaching services to JMC without reasonable notice, JMC could “at its absolute discretion, deduct from any monies payable to [Mr Harrison] under [the terms of the Memoranda] any costs reasonably incurred in securing teaching services for the particular occasion”.
4. Clause 4 of the Memoranda required Mr Harrison to “personally provide” the specified teaching services to JMC. It was at least implicit in the terms of the Memoranda that Mr Harrison would provide those services – principally lectures – at the relevant JMC campus. JMC did not contend otherwise. In Mr Harrison’s case, that campus was the one in Melbourne. Mr Harrison certainly did not have the contractual right to provide lectures anywhere other than at JMC’s campus.
5. It is true, as JMC submitted, that the Memoranda did not stipulate when, how or where Mr Harrison was to *prepare* for the lectures he gave. That said, while it might be accepted that Mr Harrison would generally be expected to do at least some preparation for his lectures, the Memoranda did not expressly require him to do so. Indeed, the Memoranda made no mention of preparation. The teaching services for which Mr Harrison was to be remunerated were expressly identified in clause 7 as being, in effect, delivering lectures and marking in the units identified in the schedule to the Memoranda.
6. JMC also relied on the fact that the Memoranda did not specify when, how or where Mr Harrison was to provide the marking services he contracted to provide. It is, however, at least implicit from the terms of the Memoranda that marking was only a small component of the teaching services that Mr Harrison was contracted to provide. The major component was lecturing or teaching. Indeed, the Memoranda barely refers to marking, other than specifying in clause 7 the hourly rate that JMC would pay Mr Harrison in respect of marking, which was half the hourly rate that JMC paid for the provision of a lecture. In contrast, Mr Harrison was described as a “Casual Lecturer” (clause 14) and was required to provide signed weekly lesson plans with his invoices (clause 15, as set out in the fourth dot point).

### Who provided the services – the right to sub-contract or assign

1. JMC placed considerable reliance on clause 5 of the Memoranda which, as already noted, provided that Mr Harrison “may sub-contract or assign to another person or corporation the provision to [JMC] of the teaching services required of [Mr Harrison] … but must do so with the written consent of [JMC’s] representative”.
2. There could be no doubt that if clause 5 gave Mr Harrison an unlimited, unrestricted or unilateral power to delegate the contracted teaching services to someone else, that would be a powerful indication that he was an independent contractor, not an employee of JMC: see *Brodribb* at 26 (Mason J); *Chaplin* at 391 (Lord Fraser of Tullybelton); *ACE Insurance* at [25] (Buchanan J, with whom Lander and Robertson JJ agreed). In contrast, a “limited or occasional” power of delegation may not be inconsistent with an employment relationship: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515 (McKenna J), cited with approval in ***On-Call*** *Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82; [2011] FCA 366 at [283] (Bromberg J).
3. When clause 5 of the Memoranda is read in context, it is tolerably clear that Mr Harrison’s right to sub-contract or assign the provision of his teaching services in clause 5 of the contract was far from unlimited. Indeed, its scope and potential operation was very limited. Critically, Mr Harrison could only sub-contract or assign the services if he obtained the written consent of JMC’s representative. He could not unilaterally decide to sub-contract or assign the services.
4. A number of the recitals and operative clauses of the Memoranda make it abundantly clear that the default or expected position was that Mr Harrison would himself personally provide the teaching services which he had been retained to provide. Recitals 2 and 3 make it clear that JMC had retained Mr Harrison to provide the relevant teaching services on the basis of representations made by him concerning his own qualifications, experience, skills and capacity to provide the teaching services in accordance with JMC’s TEQSA registration and course accreditation obligations. Clause 1 obliged Mr Harrison to provide JMC with documentary evidence establishing that there was no legislative impediment to him providing the teaching services to children or young persons. Clause 3 obliged Mr Harrison to provide JMC with “original documents” which established that he was “qualified, capable and suitably experienced to provide the services”. Clause 4 expressly provided that Mr Harrison was required to “personally” provide the teaching services to JMC “in a manner consistent with the representations set out in Recital 2”. While, strictly speaking, Mr Harrison could, with JMC’s written consent, sub-contract or assign to a corporation, ultimately there had to be an individual who would personally deliver the lectures and mark the assessments. A corporation cannot deliver a lecture other than through an individual officer, servant or agent.
5. It is abundantly clear from those recitals and operative clauses that Mr Harrison could or would only be permitted to sub-contract or assign the services to another person or corporation if the person who was to personally provide the sub-contracted or assigned teaching services was not prevented by legislation from providing those services to children and young persons, and that the person had the requisite qualifications, experience, skills and capacity to provide the relevant teaching services in accordance with JMC’s TEQSA registration and course accreditation obligations. Mr Harrison, or the person who was to personally provide the sub-contracted or assigned teaching services, would also have to be able to provide JMC with original documents that demonstrated that to be the case. JMC was able to, and would in all the circumstances effectively be required to, refuse to consent to any proposed sub-contract or assignment if Mr Harrison, or the person who was to personally provide the sub-contracted or assigned teaching services, was unable to demonstrate that they had the necessary qualifications, skills, experience and capacity to meet JMC’s TEQSA registration and accreditation obligations.
6. That effective precondition to any sub-contracting or assignment of the teaching services was effectively confirmed by the terms of the emails that JMC sent to Mr Harrison when it offered to retain his services during the trimesters that were not specifically covered by the terms of the Memoranda. Those emails invariably contained a request, or demand, by JMC that Mr Harrison tell JMC if he proposed to sub-contract the services to another so that JMC was able to assess the “credentials” of that person prior to the commencement of the relevant trimester.
7. The Commissioner contended that the effect of the relevant email exchanges between JMC and Mr Harrison was to vary, or add an additional term to, the contracts in relation to Mr Harrison’s ability to sub-contract or assign the provision of the teaching services otherwise required of him. The general effect of the alleged variation or additional term was that, if Mr Harrison wanted to sub-contract or assign the teaching services to another person, he was required to give JMC notice of his intention to sub-contract or assign prior to the commencement of the relevant trimester. The Commissioner also contended, in the alternative, that the effect of the relevant email exchanges was such that Mr Harrison would have been estopped from seeking to sub-contract or assign the teaching services to another person, or would have been regarded as having waived the right to sub-contract or assign the teaching services, if he had not given JMC notice of his intention to do so prior to the commencement of the relevant trimester.
8. In the Commissioner’s submission, the evidence adduced at trial supported his contention that the contracts had been added to or varied, or that he was effectively estopped or otherwise prevented from sub-contracting or assigning the teaching services if he had not given JMC notice of his intention to sub-contract or assign prior to the commencement of the trimester. The evidence relied on by the Commissioner in that regard established, in summary, that Mr Harrison had never sought to sub-contract or assign the teaching of a unit pursuant to clause 5 of the Memoranda. It necessarily followed that JMC had never consented to any sub-contracting or assignment by Mr Harrison. There were only a few disparate occasions where a substitute lecturer had filled in for Mr Harrison. That generally occurred when Mr Harrison was unable to work on a day that he would otherwise have been required to deliver a lecture. On all but one of those occasions, JMC arranged for and paid the substitute lecturer directly. Those isolated substitutions did not, in all the circumstances, constitute sub-contracting or assignment under clause 5. The Commissioner also relied on evidence in relation to JMC’s general practices and experience in relation to substitution of casual or sessional lecturers other than Mr Harrison.
9. It is at best doubtful that the evidence relied on by the Commissioner was capable of supporting his argument concerning the variation of his contracts with JMC insofar as the operation of clause 5 of the Memoranda was concerned. It is even more doubtful that the evidence supported the Commissioner’s estoppel and waiver arguments. The evidence really only established that Mr Harrison had never sought JMC’s consent to him sub-contracting or assigning the teaching services he had otherwise been contracted to personally provide.
10. It is not at all surprising that Mr Harrison never sought to sub-contract or assign the teaching services he had contracted to provide. It is not readily apparent why, having agreed to personally provide the teaching services to JMC, Mr Harrison would want to sub-contract or assign the provision of those services to someone else. Why would Mr Harrison bother agreeing to provide the services to JMC, only to seek to sub-contract or assign those services to someone else, particularly in circumstances where there was at least a risk that Mr Harrison might be exposed to some liability if the person to whom the services were sub-contracted or assigned subsequently failed to provide, or failed to adequately provide, the services that Mr Harrison had agreed to provide to JMC? The likelihood of Mr Harrison actually seeking to sub-contract or assign the teaching services was made all the more remote by the fact that he was required to secure JMC’s written consent to the sub-contracting or assignment, and the fact that, in order to secure that consent, Mr Harrison would almost certainly have been required to satisfy JMC that the person to whom the services were to be sub-contracted or assigned had the necessary qualifications, skills, experience and capacity to meet JMC’s TEQSA registration and accreditation obligations.
11. Did the terms of the emails themselves have the effect of adding to or varying the contractual terms otherwise contained in the Memoranda? JMC submitted that the emails were incapable of supporting a variation of the terms of the Memoranda for a number of reasons, including: first, that some of the emails only requested, rather than required, Mr Harrison to notify JMC prior to the trimester commencing; second, that the language of the emails was not contractual in nature and generally did not suggest any intention to vary the terms of the Memoranda; and third, that there was no indication that Mr Care and Mr George, who sent the relevant emails to Mr Harrison, had JMC’s authority to vary the terms of the Memoranda.
12. While there is perhaps some force in JMC’s submissions concerning the emails, there is equally some merit in the Commissioner’s contention that the relevant emails added to or varied the terms of the relevant contracts. While expressed in fairly informal terms, the emails were clearly intended to be contractual in nature. The Memoranda themselves only applied to the teaching services in the specific units and trimesters identified in the schedules to the Memoranda. The emails were necessarily contractual in nature insofar as they gave rise to new contracts which applied to different units in different trimesters, albeit contracts which otherwise incorporated the terms and conditions in the Memoranda. In those circumstances there is no real reason to doubt that the emails in their entirety were intended to record the terms of the new contracts, including the effective requirement that Mr Harrison notify JMC prior to the commencement of the trimester if he proposed to sub-contract or assign the teaching services. Whether that amounted to a variation of clause 5 of the Memoranda, or an additional term, is of no real moment. Either way, the effect was that, if Mr Harrison wanted to exercise the right to sub-contract or assign, he was contractually required to give JMC notice of that intention prior to the commencement of the relevant trimester. Mr Harrison’s replies to the emails amounted to an acceptance of that variation to, or additional term in, the contracts.
13. Even if the emails did not constitute or effect a variation, or impose an additional term to those contained in the Memoranda, it remains the case that the scope and operation of clause 5 was limited. The critical limitation was that Mr Harrison was unable to sub-contract or assign the teaching services unless he obtained the written consent of JMC. JMC effectively had an unfettered power or discretion to refuse to consent to Mr Harrison sub-contracting or assigning the teaching services. It may perhaps be accepted that JMC was required to exercise that power or discretion in good faith. Even if that be so, there could be little or no doubt that it would have been contractually open to JMC to refuse to consent to any proposal to sub-contract or assign if Mr Harrison did not give notice of his intention to do so prior to the commencement of the trimester, particularly given the terms of the relevant emails. Equally, JMC could no doubt refuse consent if it did not accept that the person to whom Mr Harrison proposed to sub-contract or assign the services to did not have the appropriate qualifications, experience, skills and capacity to provide the relevant teaching services in accordance with JMC’s TEQSA registration and course accreditation obligations. Indeed, JMC could refuse consent simply because it wanted, in good faith, to have Mr Harrison perform the services himself.
14. In those circumstances, JMC effectively retained the unfettered right to control who provided the relevant teaching services under the contract. If JMC wanted Mr Harrison to provide those services, as he had agreed to do, it could insist on him doing so. Mr Harrison had no right to unilaterally decide to sub-contract or assign the services.
15. It is, in those circumstances, unnecessary to specifically address the Commissioner’s arguments concerning estoppel and waiver. It suffices to note that it is difficult to imagine how any issue of estoppel or waiver could ever arise. That is because it would, in any event, be open to JMC to refuse to consent to Mr Harrison sub-contracting or assigning the teaching services if he did not give JMC notice of that intention prior to the commencement of the relevant trimester. In those circumstances, JMC would never have occasion, or the need to, rely on any alleged estoppel or waiver to prevent Mr Harrison from sub-contracting or assigning.
16. JMC contended that Mr Harrison’s right to sub-contract or assign the teaching services he had otherwise contracted to provide to JMC was a powerful, indeed almost conclusive, indication that Mr Harrison was an independent contractor, not an employee. JMC relied, in support of that contention, on the statement by Wilson and Dawson JJ in *Brodribb* (at 38) that “[a]n unlimited power of delegation of this kind was viewed as being almost conclusive against the contract being a contract of service” in *Chaplin* (at 391). In JMC’s submission, the reference by Wilson and Dawson JJ to an “unlimited power of delegation” was a reference to the power to delegate the entirety of the work, not a reference to whether or not the power was limited in some other way, such as by a requirement to obtain the putative employer’s consent. It followed, so JMC submitted, that Mr Harrison’s right to sub-contract or assign was “unlimited”, in the requisite or relevant sense, because he was able to sub-contract or assign the entirety of the teaching services he had contracted to provide.
17. That submission cannot be accepted for a number of reasons.
18. First, in *Brodribb*, the contractor, Mr Gray, did not need to obtain the principal’s consent before delegating to his son some of the work he had been contracted to provide. The reference by Wilson and Dawson JJ to an “unlimited power of delegation of this kind” would therefore appear to be a reference to a power of delegation which was not limited by any requirement to obtain the consent of the principal or putative employer.
19. Second, it may be accepted that when Lord Fraser referred (at 391) to the “power of unlimited delegation” in *Chaplin*, he was referring to the fact that the agent in question in that case could, at least according to his Lordship, delegate “the whole performance of his work to one or more sub-agents”. There is, however, no reference in the judgment of Lord Fraser to the question of whether or not the agent was required to obtain the principal’s consent before appointing sub-agents. It would appear from the judgment under appeal in *Chaplin*, the judgment of the Full Court of the South Australian Supreme Court in *The Queen v Allan; Ex parte Australian Mutual Provident Society* (1977) 16 SASR 237, that the agreement in issue in fact provided that the agent “should” obtain the principal’s approval should he “wish” to appoint a sub-agent. That provision in the agreement, however, was not adverted to by Lord Fraser and does not feature at all in his Lordship’s reasoning. It cannot, in those circumstances, be said that *Chaplin* is binding, or even persuasive, authority for the proposition that a delegation clause which requires the consent of the other party to the contract nevertheless confers an unlimited power to delegate.
20. Third, the facts and circumstances of *Chaplin* are, in any event, relevantly distinguishable from the facts and circumstances of this case. A requirement for an agent to seek the principal’s approval of the appointment of a particular sub-agent is somewhat distinguishable from a requirement that a putative employee obtain the written consent of his putative employer to any sub-contracting or assignment of the services to be provided under the contract.
21. Fourth, it is, with respect, rather nonsensical to suggest that a power to delegate which is conditional on obtaining the written consent of the putative employer is relevantly “unlimited”.
22. Clause 5 of the Memoranda cannot, in all the circumstances, reasonably or accurately be characterised as giving Mr Harrison an “unlimited power” to sub-contract or assign. Mr Harrison was required to obtain JMC’s written consent in respect of any sub-contract or assignment and JMC effectively had an unfettered discretion to refuse to grant its consent. He could not unilaterally decide to sub-contract or assign the services to somebody else: cf *ACE Insurance* at [25] (Buchanan J, with whom Lander and Robertson JJ agreed). Mr Harrison also had a very narrow window of opportunity to seek and obtain JMC’s consent. The effect of the email exchanges that gave rise to many of the contracts was that Mr Harrison was required to seek JMC’s consent before the commencement of the trimester in question. Mr Harrison’s ability to obtain JMC’s written consent was also relevantly constrained by other contractual provisions the effect of which was that the range of people to whom the services could be sub-contracted or assigned was limited. At the very least, he effectively could only sub-contract or assign the services if the person who was to personally provide the sub-contracted or assigned teaching services had the requisite qualifications, experience, skills and capacity to provide the teaching services in accordance with JMC’s TEQSA registration and course accreditation obligations.
23. It may be accepted that the existence of the limited right to sub-contract or assign the teaching services, with JMC’s consent, as provided in clause 5 of the Memoranda is a contractual right which to some extent militates against characterising the relationship as one of employer and employee. It cannot, however, be said that the presence of that clause is “almost conclusive”, let alone determinative, that the relationship was not one of employer and employee. It is but one of the contractual rights and obligations which must be considered in determining the nature of the legal relationship established by the contracts.

### Conclusions in relation to control

1. JMC had significant contractual rights to supervise and control Mr Harrison in respect of his delivery of teaching services under the relevant contracts. JMC had the right to dictate when and where Mr Harrison was to deliver lectures. Once Mr Harrison entered into a contract in respect of a particular trimester, he was obliged to deliver lectures at JMC’s campus on the days and at the times determined by JMC. The delivery of lectures was the most significant component of the teaching services provided by Mr Harrison.
2. Perhaps more significantly, JMC also had significant rights of supervision and control in respect of how Mr Harrison was to deliver lectures, including not only the content of the lectures, but also, at least to a certain extent, the way he delivered the lectures. JMC had the effective right to sanction, or even penalise, Mr Harrison if his managing academic officer was satisfied that his delivery of the relevant teaching services was incomplete, or that he had not adequately dealt with an aspect or aspects of the teaching requirements. Those features of the rights and obligations under the contracts significantly militate toward the characterisation of the relationship as one of employer and employee. They reveal the subservient and dependent nature of the work that Mr Harrison was to provide under the terms of the contracts
3. The only qualification in respect of JMC’s control was Mr Harrison’s right under the contracts to sub-contract or assign the delivery of the teaching services. When read in the context of the contracts as a whole, however, Mr Harrison’s right to sub-contract or assign was relatively limited and very narrow in scope, particularly having regard to JMC’s effectively unfettered right to refuse to give its consent to any sub-contracting or assignment. It was, as a matter of construction, a relatively hollow or empty right which in reality was unlikely to ever be exercised or exercisable. The limited contractual right that Mr Harrison had to sub-contract or assign nevertheless weighs to some extent toward characterising the relationship as one in which Mr Harrison was an independent contractor.

## Mode and manner of remuneration

1. Clause 7 of the Memoranda provided that JMC would pay Mr Harrison a fixed hourly rate for the provision of teaching services: $60 per hour for a lecture (raised to $65 per hour from February 2017) and $30 per hour for marking.
2. JMC contended that, while clause 7 expressly provided for payment at an hourly rate, in fact the terms of Mr Harrison’s remuneration was that he was to be paid a fixed sum to produce particular results or products, irrespective of how long it took Mr Harrison to supply those results or products. The results or products were said to be delivered lectures and marked assessments. JMC relied, in support of that contention, on the fact that the teaching services were defined in the schedules to the Memoranda, and in the emails, by reference to lectures and marking in respect of particular units of study. JMC also asserted that it was “common knowledge” that production of a lecture requires “significant preparation” and that time might also need to be expended in providing student support. It followed, in JMC’s submission, that there was a “lack of correlation between the hours actually expended and the fee expressed by reference to the duration of the actual face to face lecture”. JMC similarly asserted that it was “common knowledge” that payment for marking “would be made on a specified, allocated amount of time per exam” and that there was therefore a “lack of correlation between the time actually taken to mark an exam and the amount paid”.
3. JMC’s contentions concerning the lack of correlation between the hours worked by Mr Harrison and the amount he was to be paid have no foothold in the terms of the contracts between JMC and Mr Harrison. Indeed, they are contrary to the terms of the contracts.
4. The contracts expressly provide that Mr Harrison was to be paid an hourly rate for the delivery of lectures and marking. He was to be paid that hourly rate for the time he spent delivering lectures and marking irrespective of the outcome or product of his labours. The managing academic officer responsible for managing Mr Harrison’s delivery of the lectures and marking could (by virtue of clause 8 of the Memoranda) withhold payment, or require Mr Harrison to repeat the provision of the lectures or marking, in certain defined circumstances; namely, if he was satisfied that Mr Harrison’s provision of those services was incomplete, or did not meet the “teaching requirements”. Clause 8, properly construed, however, was a means by which JMC could manage and control Mr Harrison’s provision of the services in question. It was not a provision which served to identify or define a product or result to be provided by Mr Harrison. JMC’s assertions concerning the matters of “common knowledge” that were said to support the alleged lack of correlation between the time expended and the amount paid have no sound evidentiary basis and are incapable of displacing the express terms of the contracts concerning Mr Harrison’s remuneration.
5. As for the delivery of lectures, no provision of the contract obliged Mr Harrison to prepare for the delivery of his lectures. Even if it could be inferred that there was a common expectation that Mr Harrison would generally have to spend some time preparing for lectures, or that he would provide additional student support, it does not follow that there was a lack of correlation between the hours expended by Mr Harrison in delivering a lecture and the remuneration he was entitled to receive from JMC, expressed as it was at $60 (or $65 from February 2017) per hour. Indeed, the better view is that the hourly fee for the delivery of a lecture had built into it a component representing the anticipated or average preparation time for a lecture and student support. That is apparent from the fact that the hourly rate for lectures was $60 (and subsequently $65), whereas the hourly rate for marking was $30. This is not a case where it could be concluded that the fixing of the reward bore little or no connection to the time actually spent or anticipated: cf *On-Call* at [282] (Bromberg J).
6. As for the marking of assessments or examinations, the terms of the contracts provide no support whatsoever for JMC’s contention that Mr Harrison was to be paid on the basis of a specified or allocated amount of time per assessment or examination, irrespective of the time actually taken by him to perform that task. Nor did the evidence at trial support that proposition. The contract simply provided that Mr Harrison was to be paid an hourly rate for the time he expended in marking assessments.
7. It is also not otherwise accurate or apposite to construe or characterise the contract as involving remuneration for the production of a product or result, being delivered lectures and marked assessments, as opposed to remuneration at an hourly rate for the provision of work or labour. As Bromberg J pointed out in *On-Call* (at [277]), the distinction between a contract for labour and a contract for the product of labour can sometimes be illusory. Ordinarily, however, a contract for the product of labour involves a mode or manner of remuneration which bears little or no reference to the time spent in producing the product: for example, an amount calculated by reference to the amount of timber delivered (*Brodribb*) or the number of cattle delivered (*Queensland Stations* *Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539). This is not such a case. The mode or manner by which Mr Harrison was to be remunerated was clearly expressed by reference to the time that Mr Harrison was engaged in delivering lectures and marking, not by reference to any readily identifiable or quantifiable product or result. The contract did not provide that Mr Harrison was to be paid a fixed amount per completed lecture, or per marked assessment.
8. It is not just the specification of an hourly rate in clause 7 of the Memoranda which makes it plain that Mr Harrison was to be remunerated by reference to the time he spent providing his labour to JMC. When the Memoranda and, where applicable, the emails are read as a whole, it is readily apparent that Mr Harrison was not contracted to produce results or products in the form of delivered lectures and marked assessments. Rather, he was engaged by JMC to provide his labour, in the form of the specified “teaching services”, for which he would be remunerated at an hourly rate. The teaching services in question involved both delivering lectures and marking papers or examinations in the units described in the schedule (or the relevant email, as the case may be) during the period described in the schedule (or email). That is apparent from recitals 2, 3 and 4 of the Memoranda, which refer to Mr Harrison providing “teaching services in the Unit or Units set out in the Schedule”. The recitals do not state that Mr Harrison was to produce a result or product, in the form of delivered or completed lectures, or marked assessments, in the specified units.
9. A number of the operative clauses in the Memoranda also make it plain that Mr Harrison was contracted to provide services – delivering lectures and marking papers – at an hourly rate, as opposed to being contracted to produce a product or result. Clause 4 obliges Mr Harrison to “personally” provide the relevant teaching services. As already noted, clause 7 identifies the relevant teaching services as being lecturing and marking for which Mr Harrison was to be remunerated by JMC at an hourly rate. To be paid, Mr Harrison was required to provide, along with his invoices, timesheets and completed, signed lesson plans. What was the point of requiring Mr Harrison to provide timesheets if he was only contracted to produce a result or product? None of the recitals or operative clauses are expressed in terms of Mr Harrison being remunerated for the production of an identified or readily identifiable product or result.
10. It should finally be noted that there is equally no basis for construing the contracts as providing that Mr Harrison was to be remunerated for producing a result or product in the form of the completed unit or units of study specified in the Memoranda or emails, as the case may be. The contracts provide that Mr Harrison was to be remunerated periodically through the relevant trimesters in accordance with his invoices. Mr Harrison’s invoices were required to be accompanied, relevantly, by his timesheets.
11. Mr Harrison was contracted to provide labour, in the form of teaching services, to JMC for which he was remunerated at an hourly rate. He was not contracted to produce a result or product. This consideration, and the mode by which Mr Harrison was to be remunerated under the contracts, militates towards characterising the relationship as one in which Mr Harrison was JMC’s employee, as opposed to an independent contractor.

## Provision and maintenance of equipment

1. An individual who is contractually obliged to use or provide his or her own equipment, tools or other assets, or to meet his or her own expenses, in delivering the relevant services or performing the relevant work, is more likely to be considered to be an independent contractor: see *Brodribb* at 24-25 (Mason J) and 38 (Wilson and Dawson JJ); *Personnel Contracting* at [175] (Gordon J); *Jamsek* at [70] (Kiefel CJ, Keane and Edelman JJ) and [87]-[88] (Gageler and Gleeson JJ). Questions of scale may, however, be important. Bicycle couriers were found to be employees in *Hollis* despite the fact that they provided their own bicycles. The conventional view, however, is that an individual who owns and is required to use expensive equipment for the purposes of performing the contract is likely to be an independent contractor: *Jamsek* at [88] (Gageler and Gleeson JJ); *Hollis* at [71] (McHugh J).
2. Mr Harrison was not contractually obliged to use *any* of his own equipment in providing the teachings services under the contracts. He was permitted to utilise his “own tools, props, computer software etc” if he felt that might assist him in providing the teaching services. Even then, he could only use his own equipment with the “expressed permission” of JMC: recital 2 in the Memoranda. The effective default position was that Mr Harrison would utilise JMC’s equipment in the delivery of the teaching services.
3. The evidence established that it was known to both JMC and Mr Harrison at the time they entered into all the contracts during the relevant period that JMC would effectively provide all the necessary infrastructure and equipment to enable Mr Harrison to deliver the teaching services in accordance with the contracts. The infrastructure and equipment provided by JMC was extensive. It included the classrooms at JMC’s campus where Mr Harrison delivered his lectures, whiteboards, audio equipment for teaching audio-related subjects (including mixing consoles, speakers and microphones), computers and a photocopier for general teaching tasks (including marking), and access to wireless internet.
4. The fact that JMC made its infrastructure and equipment available was an objective fact known to the parties at the time of entry into the contract which assists in identifying the purpose of the contract. It tends to indicate that the purpose of the contract was to have Mr Harrison provide his labour in service of JMC’s business. It therefore militates in favour of there being a relationship between JMC and Mr Harrison of employer and employee.

## Intellectual property and confidentiality

1. The second paragraph of clause 12 of the Memoranda provides that “[a]ny intellectual property … bought [sic] into existence by [Mr Harrison] … in providing the teaching services in the Schedule will fully and absolutely vest in [JMC]”. It also permits JMC to make visual and sound recordings of Mr Harrison while he is providing teaching services, and provides that the intellectual property in those recordings vests in JMC. JMC also has the right to use those recordings for any lawful purpose at its “absolute discretion”.
2. The fact that any intellectual property, including the intellectual property in any recordings, brought into existence by either Mr Harrison or JMC while Mr Harrison was providing teaching services is indicative of Mr Harrison’s relative subservience. It also points to Mr Harrison serving in JMC’s business, as opposed to him providing services to JMC as an independent contractor. If Mr Harrison was an independent contractor, it would be surprising if he did not have the right to retain the intellectual property in any recordings or images he created in the course of providing the teaching services. The fact that JMC had the right to make, retain and use any recordings that were made of Mr Harrison’s lessons, even after Mr Harrison has ceased to provide services to JMC, also demonstrates the extent of JMC’s control in respect of Mr Harrison’s services and indicates that he served in JMC’s business. One would generally expect that, if Mr Harrison was conducting his own business as an independent contractor providing teaching services, he would retain the intellectual property in any recordings made in the course of him providing those services.
3. Clause 13 of the Memoranda is a fairly standard confidentiality clause. The only point to note about it is that it is essentially unilateral in the sense that it only protects JMC. It prohibits Mr Harrison from divulging or applying to his own use any confidential information concerning the “business, financial arrangements, intellectual property or position” of JMC, or “any dealings, transactions or affairs of the business” of JMC. JMC is not prevented or prohibited from using or disseminating any confidential information concerning Mr Harrison. That again tends to suggest that Mr Harrison was engaged to provide services in or for the purposes of JMC’s business.

## Termination

1. Clause 16 of the Memoranda provides that both JMC and Mr Harrison were able to terminate the contracts upon giving two weeks’ written notice. JMC submitted that termination upon such relatively short notice pointed towards an independent contractor relationship. The Commissioner submitted to the contrary, pointing out that, in *Personnel Contracting*, the individual in question, Mr McCourt, was held to be an employee in circumstances where he had the right to notify his employer that he was no longer available for the supply of labour on four hours’ notice. Gordon J indicated (at [196]) that the fact that Mr McCourt could give such short notice “may be indicative of a relationship of casual employment”. The Commissioner also noted that in *Commissioner of State Revenue v* ***Mortgage Force*** *Australia Pty Ltd* [2009] WASCA 24, Buss JA (with whom Steytler P and La Miere AJA agreed) reasoned (at [104]) that a clause in a deed of appointment permitting the putative employer to terminate the deed on two weeks’ written notice, absent any breach or failure to observe the provisions of the deed by the putative employee, “conferred [upon the putative employer] a capacity to control” the putative employee and its activities.
2. Ultimately, not a great deal may hinge on the contractual right to terminate on two weeks’ notice. It does not point particularly strongly in either direction, though if anything it again tends to reveal Mr Harrison’s relative subservience.

## “Labels” and description

1. Clause 10 of the Memoranda provides that Mr Harrison “agrees and acknowledges” that his relationship with JMC is that of “contractor” and that he indemnifies JMC “in relation to any and all claims … which may be made in relation to any and all entitlements which may accrue to an employee” under the ***Fair Work Act*** *2009* (Cth) and the SGA Act and “any legislation replacing those Acts”.
2. Little, if any, weight is to be given to Mr Harrison’s agreement and acknowledgment as to the status of his relationship with JMC. It is, at best, no more than an expression of opinion by the parties – though, in reality, really only an expression of opinion by JMC, the party with the greater bargaining power and the party that drafted the Memoranda – about the legal character of the relationship. A “label” chosen by the parties to describe their relationship, or an expression of their opinion about the legal character of their relationship, is not “determinative of, or even relevant to, that characterisation”: *Personnel Contracting* at [63] (Kiefel CJ, Keane and Edelman JJ); see also [184] (Gordon J). That is because the determination of the character of a relationship between two parties constituted by the rights and obligations by which they are to be bound is a matter for the court: *Personnel Contracting* at [64] (Kiefel CJ, Keane and Edelman JJ). The “parties cannot deem the relationship between themselves to be something it is not” (*Hollis* at [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ)), or to put the matter in somewhat more colourful terms, the “parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck”: *Personnel Contracting* at [127] (Gageler and Gleeson JJ), citing *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184.
3. This is not one of those rare cases where the “descriptive language chosen by the parties can shed light on the objective understanding of the operative provisions of their contract”: cf *Personnel Contracting* at [66] (Kiefel CJ, Keane and Edelman JJ). The “contractor” label, which was agreed to and acknowledged by Mr Harrison in clause 10 of the Memoranda, sheds little, if any, light on the objective understanding of the operative clauses of the Memoranda, other than those clauses which directly reflect the application of that label. There is accordingly “no occasion to have recourse to the label chosen by the parties”: cf *Personnel Contracting* at [79] (Kiefel CJ, Keane and Edelman JJ).

## Taxation, insurance, sick leave and holiday pay

1. There are a few provisions in the Memoranda that reflect the fact that the parties – though, in reality, JMC – chose to describe Mr Harrison as a “contractor”.
2. Clause 15 (as set out in the second dot point) provides that Mr Harrison was to use his “registered business name” when invoicing JMC and that all invoices would include Mr Harrison’s Australian Business Number (ABN). Mr Harrison did not, however, have or use a registered business name, and did not have an ABN.
3. Clause 15 (as set out in the fifth dot point) provides that “[w]here the Services provider is registered for Goods and Services Tax (GST) purposes, the Services provider will provide invoices in the form of a Tax Invoice and will specify the amount of GST included in the invoiced sum”. This clause did not apply to Mr Harrison as he was not registered for GST purposes. The invoices provided by Mr Harrison were not in the form of a tax invoice.
4. Clause 11 of the Memoranda provides that Mr Harrison was responsible for his own workers compensation and income protection insurance, and that Mr Harrison indemnified JMC in relation to any workers compensation claims which might arise as a result of his provision of teaching services.
5. Those provisions – clause 11 and clause 15 (namely, the second and fifth dot points) – are simply reflective of JMC’s view that Mr Harrison was a contractor. They are therefore in the same category as clause 10, which ascribes that label to the relationship. They are accordingly deserving of little, if any, independent weight and are certainly not decisive or conclusive: cf *ACE Insurance* at [37], [122] and [130] (Buchanan J, with whom Lander and Robertson JJ agreed).
6. The same can be said about the fact that the Memoranda makes no provision for the payment to Mr Harrison of sick leave, holiday pay or superannuation.

## Indemnities

1. Several clauses in the Memoranda provide that Mr Harrison indemnified JMC in respect of any potential liability it might incur, including: any liability that may arise under the Fair Work Act or SGA Act should it be found that Mr Harrison was not in fact a “contractor” (clause 10); any workers compensation liability (clause 11); any liability which might arise from any failure on the part of Mr Harrison to reasonably discharge duties, obligations and responsibilities under legislation applying to health and safety in workplaces (clause 12); and any liability that may arise from any failure on the part of Mr Harrison to discharge obligations and responsibilities under the *Privacy Act 1988* (Cth) (clause 13).
2. In *Mortgage Force*, Buss JA (with whom Steytler P and La Miere AJA agreed) reasoned (at [104]) that the indemnities in that case, which were of a similar nature to those contained in the present Memoranda, suggested an employment relationship because they essentially gave the putative employer the capacity to control the putative employee and its activities. The same reasoning applies in this case.

## Own business or JMC’s business?

1. JMC submitted that the terms of the contracts suggested that, in supplying the teaching services, Mr Harrison was conducting his own business. It relied, in support of that submission, on: clause 5, which provided for sub-contracting and assignment; clause 6, which gave JMC certain rights if Mr Harrison did not perform the services when required; and those parts of clause 15 which contemplated the payment of GST and the provision by Mr Harrison of an ABN. JMC also submitted that Mr Harrison was not relevantly integrated into JMC’s business. Its submission in that respect relied primarily on the fact that the contracts did not require Mr Harrison to do certain things, such as wear a name badge or a uniform, or attend external workshops or seminars. Some reliance also appeared to be placed on evidence which could fairly be characterised as evidence about how the relationship played out in practice, such as the fact that Mr Harrison was not provided with a staff email address or an allocated desk in the staff room.
2. On balance, however, the terms and conditions of the contracts between JMC and Mr Harrison suggest that Mr Harrison was engaged to work as part of JMC’s business and was effectively integrated into that business. They do not suggest that Mr Harrison provided the teaching services to JMC while, or in the course of, conducting his own business.
3. At the time each of the contracts during the relevant periods were entered into, both JMC and Mr Harrison knew that Mr Harrison was held out by JMC on its website and promotional material as being one of JMC’s lecturers. At the very commencement of his engagement with JMC, Mr Harrison signed documents that described his position as “lecturer” and noted that he had been “inducted”. JMC had the right, under clause 14 of the first MOA and second MOA, to “describe” Mr Harrison as a “Casual Lecturer”. Mr Harrison was essentially presented as an emanation of JMC’s business: cf *Hollis* at [50] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).
4. JMC’s main business was the delivery of accredited higher education programmes to students. JMC carried out that business by engaging or retaining the services of teachers or lecturers like Mr Harrison. The main component of the teaching services provided by Mr Harrison was the delivery of lectures to JMC’s students at JMC’s campus in respect of JMC’s accredited courses. Lecturers like Mr Harrison were integral to, and for the most part integrated or incorporated into, JMC’s business.
5. Mr Harrison’s provision of those teaching services under the contracts was also in most respects subservient to, and dependent on, JMC’s business. It was, for the most part, JMC that determined when, where and how Mr Harrison was to provide the teaching services. JMC was required to monitor and review the standard and quality of Mr Harrison’s performance so as to ensure, among other things, that it met the terms of its TEQSA registration and the accreditation obligations of its courses. As described in detail earlier, JMC had the right, under the terms of the contracts, to control, direct and supervise Mr Harrison’s delivery of the relevant teaching services, and, in particular, the delivery of lectures. Mr Harrison was required to deliver lectures at JMC’s campus in accordance with JMC’s course timetables, in accordance with JMC’s detailed lesson plans and in compliance with JMC’s policies and procedures. JMC had a managing academic officer who was responsible, under the terms of the contracts, for managing Mr Harrison’s supply of teaching services. Mr Harrison effectively reported to the managing academic officer. The managing academic officer had the power and discretion to withhold payment, or to require Mr Harrison to repeat the provision of a particular service, if the officer was satisfied that Mr Harrison’s delivery of that service was incomplete or had not adequately dealt with an aspect of JMC’s teaching requirements.
6. Those provisions of the Memoranda indicated that Mr Harrison’s work was integral to JMC’s business and that Mr Harrison was essentially integrated or inducted into JMC’s business. He was, for all intents and purposes, a lecturer who, along with other lecturers, was essential and integral to the conduct of JMC’s business of delivering accredited higher education courses to students. When the terms of the contracts are considered as a whole, very little, if anything, turns on the fact that the contracts did not require Mr Harrison to wear a name badge or uniform. The evidence that Mr Harrison was not given a staff email address or a dedicated desk in the staff room is deserving of even less weight.
7. There was, in contrast, little, if anything, in the terms of the Memoranda to suggest that, in providing teaching services to JMC, Mr Harrison was carrying on his own business, save perhaps for the “label” employed in clause 10 of the Memoranda and Mr Harrison’s limited right under clause 5 to sub-contract or assign the teaching services. As has already been discussed at length, the label employed in the contracts is deserving of little weight and the right to sub-contract or assign was limited and constrained. Most significantly, it was subject to JMC’s control given it could, at its absolute discretion, withhold its consent to any proposed sub-contract or assignment. When read in the context of the Memoranda as a whole, the right to sub-contract or assign was somewhat of a chimera that was highly unlikely to ever be exercisable or exercised.

# AN EMPLOYEE WITHIN THE ORDINARY MEANING?

1. The question whether Mr Harrison was JMC’s employee, within the common law meaning of that term, is not entirely straightforward. On balance, however, for the reasons effectively already given, the totality of the legal rights and obligations provided for in the contracts between JMC and Mr Harrison indicate that the relationship between JMC and Mr Harrison was that of employer and employee, as opposed to principal and independent contractor. Mr Harrison was, for all intents and purposes, employed by JMC as a lecturer to provide lectures to JMC’s students and mark their papers.
2. The most significant consideration which militates towards characterising the contracts and relationship as one of employment is the right that JMC had under the contracts to effectively control when, where and how Mr Harrison was to provide the teaching services. Mr Harrison was subservient to JMC and the teaching services he provided under the contracts were subservient to and dependent on JMC’s business. Other terms of the contracts also suggested an employment relationship: Mr Harrison was remunerated at a fixed hourly rate; he was not required to provide any of his own equipment, tools or other assets in providing the services; he effectively ceded to JMC any intellectual property rights in any material arising from his teaching services; he was required to provide certain indemnities to JMC; and his engagement could be terminated on relatively short notice without cause.
3. The totality of the legal rights and obligations provided for in the contracts reveal that Mr Harrison was engaged or retained to work in JMC’s business of providing accredited higher education programmes to its students. The rights and obligations were such that it could be fairly said that Mr Harrison’s work under the contracts was so subordinate to JMC’s business that it could be seen to have been performed as an employee of that business, rather than as part of an independent business or enterprise.
4. The only real pause for thought is that Mr Harrison had a contractual right to sub-contract or assign the teaching services. However, properly construed in the context of the contracts as a whole, that contractual right was limited, narrow in scope and was in reality a chimera which was unlikely to be ever exercisable or exercised. In particular, Mr Harrison could not unilaterally exercise the right because it was subject to JMC’s effectively unfettered discretion to refuse to consent to any sub-contract or assignment. The notion that Mr Harrison could sub-contract or assign the provision of teaching services was also entirely at odds with the balance of the contracts, which plainly envisaged that Mr Harrison would personally provide the services in accordance with the representations referred to in the recitals to the Memoranda.
5. In all the circumstances, the limited right to sub-contract or assign is not capable of outweighing all the other considerations which weigh in favour of the characterisation of the contracts as one of employment and the relationship as one of employer and employee.

# AN EMPLOYEE WITHIN THE EXTENDED MEANING?

1. Despite the finding that Mr Harrison was an employee within the ordinary meaning of that term, it is necessary and desirable to also consider whether he fell within the extended meaning in s 12(3) of the SGA Act. That is particularly so given the possibility that, should JMC appeal, the Full Court might characterise the contract or relationship as not involving one of employment at common law.
2. Fortunately, the question posed by s 12(3) of the SGA Act is somewhat more straightforward.
3. As was noted earlier by reference to *Moffet*, the extended meaning of “employee” in s 12(3) of the SGA Act has effectively three elements: *first*, there is a contract; *second*, the contract is wholly or principally for the labour of the person; and *third*, the person must work under the contract.
4. The first and third elements of the extended meaning are plainly satisfied in the circumstances of this case. There was a series of contracts between JMC and Mr Harrison, and Mr Harrison relevantly worked under those contracts. The word “work” in s 12(3) of the SGA Act bears its ordinary meaning, which the *Macquarie Dictionary* (online edition) defines as “to do work, or labour; exert oneself”. There could be no doubt that, in providing the teaching services in accordance with his contracts with JMC, Mr Harrison worked, laboured or exerted himself.
5. The only real issue is whether the second element is met.
6. As discussed earlier, the question of whether the contract is “for” the labour of the person must be approached from the perspective of the putative employer and determined by reference to the terms of the contract. The question is essentially whether the terms of the contract reveal that the benefit the putative employer receives from entering into the contract is wholly or principally the labour of the putative employee.
7. JMC advanced two reasons why the contracts between it and Mr Harrison were not wholly or principally for the labour of Mr Harrison.
8. The first reason was said to be that the contracts, properly construed, were contracts pursuant to which Mr Harrison was to be paid for producing a result: the result being delivered lectures and marked assessments. In JMC’s submission, the contracts were not contracts pursuant to which Mr Harrison was paid an hourly rate for his labour.
9. The second reason was said to be that Mr Harrison had a right to sub-contract or assign the teaching services. It followed, in JMC’s submission, that the contracts were not wholly or principally for Mr Harrison’s own labour.
10. It may be accepted that if the contracts, properly construed, were contracts for the provision or production of a result or product by Mr Harrison, they could not be said to be contracts wholly or principally for the labour of Mr Harrison: *Neale* at 425 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ); *World Book* at 385-386 (Sheller JA, with Clarke JA agreeing). For the reasons given in detail earlier, however, the contracts, properly construed, were not contracts for the production of a result or product. Rather, they were contracts pursuant to which Mr Harrison was paid an hourly rate for the time he spent providing services, those services comprising delivering lectures and marking assessments. Mr Harrison was, for all intents and purposes, paid for his labour in delivering lectures and marking assessments.
11. For the reasons given earlier, there is no basis for JMC’s contention that there was no correlation between the hours expended by Mr Harrison in delivering those services and the hourly fee that he was to be paid. Nor can the contracts be sensibly construed as providing that Mr Harrison was to be paid for producing delivered lectures, or marked assessments, or a completed unit of study. That would make a nonsense of the repeated references throughout the Memoranda to the provision of “services”. Nowhere in the Memoranda is Mr Harrison’s contractual obligation described as being to produce an identified or identifiable product or result. It would also make a nonsense of the clauses which provided that Mr Harrison was to be paid an hourly rate and was required to produce, along with his invoices, completed timesheets. If Mr Harrison was paid for producing a result, it might be expected that clause 7 of the Memoranda would have provided that Mr Harrison be paid a fixed amount once he completed the delivery of a particular lecture or series of lectures, or completed the marking of a particular assessment or set of assessments, or completed the delivery of a particular unit of study. That was not how the contracts were expressed.
12. It may also be accepted that, if Mr Harrison had an unlimited or unilateral right to sub-contract or assign the teaching services, it could not be concluded that the contracts were wholly or principally for his labour: *Neale* at 425. As discussed at length earlier, however, Mr Harrison’s right to sub-contract (per clause 5) was by no means unlimited or unilateral. It could only be exercised with the written consent of JMC. JMC effectively had an unfettered discretion to refuse to give its consent. It could not, therefore, be said that Mr Harrison was “free to do the work himself or to employ other persons to carry it out”: cf *Neale* at 425. Construed in the context of the contracts as a whole, the right to sub-contract or assign was narrow and confined and, having regard to the terms of the contracts as a whole, unlikely to ever be exercisable or exercised. The terms of the Memoranda, save for clause 5, plainly envisaged that Mr Harrison would personally provide the teaching services in accordance with the representations in the recitals. This was effectively conceded by JMC in the course of its submissions when it accepted that the “default position” was that Mr Harrison would personally deliver the lectures and mark the assessments.
13. The existence of the limited right to sub-contract or assign the teaching services might perhaps suggest that the contracts were not “wholly” for the labour of Mr Harrison, though even that would be a stretch. It does not, however, preclude a finding that the contracts were “principally” for the labour of Mr Harrison.
14. Properly construed, the contracts were principally for the labour of Mr Harrison. The substantial or predominant purpose of the contracts, objectively apparent from their terms, was that Mr Harrison would personally provide his labour in order to provide the teaching services in accordance with his representations referred to in the recitals to the Memoranda. The benefit that JMC obtained from the contracts was principally, if not wholly, Mr Harrison’s labour in providing the teaching services, in return for which JMC paid Mr Harrison an amount of money calculated by reference to the time that Mr Harrison was engaged providing that labour. Mr Harrison was not contractually obliged to provide any equipment or tools in providing the teaching services. Nor could it be said that the services provided by Mr Harrison to JMC under the contracts involved any material component referable to the use by Mr Harrison of his own equipment.

# CONCLUSION AND DISPOSITION

1. The Commissioner’s assessments under appeal were premised on the finding that Mr Harrison was JMC’s employee for the purposes of the SGA Act, either within the “ordinary meaning” of the term “employee” (s 12(1) of the SGA Act), or because he worked under contracts that were “wholly or principally” for his “labour”: s 12(3) of the SGA Act. JMC’s challenge to the assessments hinged on it demonstrating that Mr Harrison was not its employee, either at common law or on the basis of the extended meaning of “employee” in s 12(3) of the SGA Act. JMC failed to demonstrate that Mr Harrison was not its employee in either of those respects. It has accordingly failed to discharge its burden of proving that the assessments were excessive, or otherwise incorrect.
2. JMC’s application must accordingly be dismissed with costs.

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| I certify that the preceding two hundred and one (201) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 29 June 2022