


# Decision impact statement

## JMC Pty Ltd v Commissioner of Taxation

<b>Court citation/s:</b>	[2023] FCAFC 76 (Full Federal Court) [2023] HCASL155 (Special leave application) [2022] FCA 750 (Federal Court)
<b>Venue/s:</b>	Full Federal Court of Australia High Court of Australia (Special leave application) Federal Court of Australia
<b>Venue reference no/s:</b>	NSD 562 of 2022 (Full Federal Court) S69/2023 (Special leave application) NSD 175 of 2020 (Federal Court)
<b>Judge/s:</b>	Bromwich, Thawley, Hespe JJ (Full Federal Court) Edelman and Steward JJ (High Court) Wigney J (Federal Court)
<b>Judgment date:</b>	23 May 2023 (Full Federal Court) 12 October 2023 (Special leave application) 29 June 2022 (Federal Court)
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Unfavourable to the Commissioner

## Impacted advice

 The ATO is reviewing the impact of this decision on related advice and guidance products.

- [Taxation Ruling TR 2013/1](#) *Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties*
- [Superannuation Guarantee Ruling SGR 2005/1](#) *Superannuation guarantee: who is an employee*
- [Superannuation Guarantee Ruling SGR 2005/2](#) *Superannuation guarantee: work arranged by intermediaries*
- [Superannuation Guarantee Ruling SGR 2009/1](#) *Superannuation guarantee: payments made to sportspersons*
- [ATO Interpretive Decision ATO ID 2014/28](#) *Superannuation Guarantee Status of the Worker: Pizza delivery drivers as employees*

## Summary

This Decision impact statement outlines the ATO's response to this case, which concerned whether a contract lecturer of a higher education provider was engaged

as an employee or an independent contractor pursuant to the common law meaning of the term 'employee' under subsection 12(1) of the *Superannuation Guarantee (Administration) Act* 1992 (SGAA) or alternatively, was an employee under the extended meaning of the word contained in subsection 12(3) of the SGAA. Under subsection 12(3) of the SGAA, an individual is an employee of an engaging entity where they work under a contract that is wholly or principally for their labour.

All legislative references in this Decision impact statement are to the SGAA, unless otherwise indicated.

All judgment paragraph references in this Decision impact statement are to the judgment of *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76, unless otherwise indicated.

## Brief summary of facts

JMC Pty Ltd (JMC) is the provider of higher education programs.

For the periods 1 April 2013 to 30 June 2016 and 1 July 2017 to 31 March 2018 (collectively, the Relevant Period) JMC engaged Mr Nicholas Harrison, a qualified sound technician, to provide teaching services by way of delivering lectures and marking student exams and assignments in courses for a Bachelor of Creative Technology (Audio Engineering and Sound Production).

The terms and conditions upon which Mr Harrison was engaged to provide teaching services were recorded in writing contained within numerous contracts executed during the Relevant Period. The terms and conditions of each contract included that:

- Mr Harrison was obliged to provide JMC with documentary evidence establishing that there was no legislative impediment to him providing the teaching services to children or young persons.
- Mr Harrison would provide JMC with original documents which established that he was qualified, capable and suitably experienced to provide the teaching services.
- JMC would pay Mr Harrison an hourly rate for delivering lectures and marking.
- 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. Mr Harrison was also required to provide his Australian business number.
- Any intellectual property brought into existence by Mr Harrison while providing the teaching services vested in JMC.
- Mr Harrison would carry out the teaching services personally.
- Mr Harrison could subcontract or assign the teaching services he was engaged to provide to another but only with JMC's written consent.

JMC was, throughout the Relevant Period, registered with the Tertiary Education Quality and Standards Agency. Courses of study offered by JMC were also accredited by the Tertiary Education Quality and Standards Agency.

JMC paid Mr Harrison for the work he performed during the Relevant Period without withholding and remitting superannuation contributions, upon the basis that he was an independent contractor.

On 25 March 2019, the Commissioner issued to JMC notices of assessment for superannuation guarantee charges for the Relevant Period, premised on Mr Harrison being an employee, either within:

- subsection 12(1), which takes on the common law meaning of employee in accordance with general law principles, or
- the extended definition of employee contained in subsection 12(3), which deems as an employee a person who works under a contract that is wholly or principally for the labour of the person.

JMC objected to the notices of assessment but the Commissioner disallowed the objection. JMC appealed that decision to the Federal Court.<sup>1</sup>

On 29 June 2022, Wigney J, at first instance, handed down a favourable decision for the Commissioner, dismissing the appeal and finding that Mr Harrison was an employee of JMC under both subsection 12(1) (that is, within the common law meaning of the word) and the extended definition as contained in subsection 12(3).<sup>2</sup>

JMC appealed Wigney J's decision to the Full Federal Court.<sup>3</sup>

## Issues decided by the Full Federal Court and High Court

### Full Federal Court

The Full Federal Court considered the same 2 issues as the Federal Court, that is:

- Was Mr Harrison an employee of JMC during the Relevant Period pursuant to subsection 12(1)? (Subsection 12(1) issue)
- Alternatively, was Mr Harrison an employee of JMC during the Relevant Period pursuant to subsection 12(3)? (Subsection 12(3) issue)

The Full Federal Court constituted by Bromwich, Thawley and Hespe JJ, in a unanimous decision, allowed the appeal, overturning the decision of Wigney J. The Full Federal Court found that Mr Harrison was an independent contractor and not an employee of JMC under either subsection 12(1) or subsection 12(3) for the Relevant Period.<sup>4</sup>

### Subsection 12(1) issue

Consistent with the High Court's decision in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, the Full Federal Court held that it is the contractual terms of the arrangement (and not the performance of them) which were relevant to a determination of the nature of the relationship between the parties.<sup>5</sup> Taking such an approach the Full Federal Court found, among other things, the following:

- The existence of a right which allows a worker to delegate, subcontract or assign their work to another, qualified<sup>6</sup> or otherwise, is

<sup>1</sup> *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750.

<sup>2</sup> *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 at [200].

<sup>3</sup> *JMC Pty Limited v Commissioner of Taxation* [2023] FCAFC 76.

<sup>4</sup> At [7] and [105–107].

<sup>5</sup> At [64] and [90].

<sup>6</sup> An example of a qualified right of delegation, subcontracting or assignment of work is such a right which requires the consent of the engaging entity to be exercised (at [79]).

generally to be viewed as inherently inconsistent with an employee relationship.<sup>7</sup>

- Where a worker has an entirely unfettered right to delegate, subcontract or assign their work to others, in the absence of countervailing considerations (for example, where the right is a sham or is legally incapable of exercise), the existence of this right will be 'almost conclusive' against the worker being an employee.<sup>8</sup> Where the right is fettered<sup>9</sup>, the degree of inconsistency between it and the other terms of the contractual relationship between the parties will reveal the degree to which the fettered right to delegate, subcontract or assign tends against a finding of employment.<sup>10</sup>
- It is the existence of the right to delegate, subcontract, or assign the work that is important, not whether it is likely to be or has been in fact exercised. The Court observed that the question of whether a right is likely to be exercised in the future or is a hollow or empty right would be relevant to an argument about sham. However, in the absence of an argument about sham, it is necessary to consider the contractual terms.<sup>11</sup> The right bestowed upon Mr Harrison to subcontract or assign the performance of his teaching services, subject to JMC's written consent, was a real and substantial right which was inconsistent with an employment relationship between him and JMC.<sup>12</sup>
- The evidence did not support a finding that JMC had a sufficient contractual right to control the work of Mr Harrison, to indicate their relationship was one of employment.<sup>13</sup>
- The mode of Mr Harrison's remuneration, being payment of an hourly rate, while not pointing strongly either way inclined towards an independent contractor relationship.<sup>14</sup>
- The manner in which Mr Harrison charged for his services, including the provision of an Australian business number and invoices was not consistent with an employment relationship.<sup>15</sup>
- The fact that intellectual property brought into existence by Mr Harrison vested in JMC, was neutral or perhaps slightly favoured an independent contracting relationship.<sup>16</sup>
- Contractual terms concerning the trading relationship of the parties, that is, taxation, insurance, sick leave, holiday pay, and the requirements relating to invoicing, were operative contractual provisions regulating the parties' rights, duties and obligations. They were not considered determinative in characterising the nature of the relationship between the parties.<sup>17</sup>

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<sup>7</sup> At [74–76].

<sup>8</sup> At [74–75].

<sup>9</sup> For example, the right to delegate, subcontract or assign is limited in scope. That is, the worker can only delegate, subcontract or assign a discrete task (at [76]).

<sup>10</sup> At [74] and [76].

<sup>11</sup> At [83].

<sup>12</sup> At [89].

<sup>13</sup> At [92–98].

<sup>14</sup> At [104].

<sup>15</sup> At [104].

<sup>16</sup> At [104].

<sup>17</sup> At [49].

The Full Federal Court decided that, taken as a whole, the contracts did not provide the sort of controls over how, when or where Mr Harrison was required to deliver the lectures such as to amount to indicia that he was an employee rather than an independent contractor.<sup>18</sup>

### **Subsection 12(3) issue**

The Full Federal Court held that<sup>19</sup>:

- Subsection 12(3) requires attention to the rights under the contract not to the actual performance of the contract.
- The right to subcontract or assign the work provided in the contracts indicated that the contracts were not wholly or principally *for* the labour of Mr Harrison, as he could perform the contracts personally; but equally he could have subcontracted or assigned his work under the contracts to another.
- The contracts were for the provision of teaching services and not principally for the labour of Mr Harrison.

### **The High Court**

On 20 June 2023, the Commissioner filed an application for special leave to appeal the decision of the Full Federal Court only in respect of the conclusion reached in regard to subsection 12(3).

On 12 October 2023, the High Court dismissed the Commissioner's special leave application on the basis that the application did not identify any reason to doubt the correctness of the decision of the Full Federal Court.<sup>20</sup>

## **ATO view of decision**

The ATO has set out its view on the ordinary meaning of the term 'employee' in Taxation Ruling TR 2023/4 *Income tax: pay as you go withholding - who is an employee?* which references the Full Federal Court decision. The Ruling aids in understanding the meaning of an 'employee' for the purposes of subsection 12(1).

The existence of a contractual right within a contract that allows a worker to delegate, subcontract or assign their work to another, whether subject to the consent of an engaging entity or not, will result in the contract not being either wholly or principally for the labour of the worker. Where this occurs, the worker will not fall within the extended definition of 'employee' under subsection 12(3). This position is subject to the contractual right not being challenged as being a sham, having been varied by the parties or unenforceable.

There may be circumstances where the contractual terms of the arrangement do not make it clear whether the worker does have a contractual right to delegate, subcontract or assign their work to another. In these circumstances, the ATO will form its position as to the application of subsection 12(3) based on the available evidence of the contractual arrangement.

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<sup>18</sup> At [105].

<sup>19</sup> At [106].

<sup>20</sup> See *Commissioner of Taxation v JMC Pty Ltd ACN 003 572 012* [2023] HCASL 155 at [1].

## Implications for impacted advice or guidance

TR 2023/4, published on 6 December 2023, references the findings of the Full Federal Court in respect of subsection 12(1). The following other relevant guidance will be reviewed and updated as necessary in accordance with the Full Federal Court decision:

- TR 2013/1 *Income tax: the identification of 'employer' for the purposes of the short-term visit exception under the Income from Employment Article, or its equivalent, of Australia's tax treaties*
- SGR 2005/1 *Superannuation guarantee: who is an employee?*
- SGR 2009/1 *Superannuation guarantee: payments made to sportspersons*
- SGR 2005/2 *Superannuation guarantee: work arranged by intermediaries, and*
- ATO ID 2014/28 *Superannuation Guarantee Status of the Worker: Pizza delivery drivers as employees.*

## Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Forward your comments to the contact officer.

**Date issued:** 15 May 2024

**Contact officer details have been removed as the comments period has expired.**

**Legislative references**

SGAA 12(1)

SGAA 12(3)

**Case references**

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1; 275 CLR 165; 398 ALR 404; 96 ALJR 89; 312 IR 1

JMC Pty Ltd v Commissioner of Taxation [2023] FCAFC 76; 297 FCR 600; 2023 ATC 20-861; 116 ATR 309; 325 IR 159; 325 IR 159

JMC Pty Ltd v Commissioner of Taxation ACN 003 572 012 [2023] HCASL 155; 2023 ATC 20-861

**Relevant rulings**

TR 2013/1; TR 2023/4; PCG 2023/2; SGR 2005//1; SGR 2005/2; SGR 2009/1

**Other references**

ATO ID 2014/28

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**ATO references**

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