FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v CENTENNIAL FINANCIAL SERVICES PTY LTD & ORS *[2011] FMCA 459*

INDUSTRIAL LAW – Sham contracting – failure to pay wages and accrued annual leave entitlements – accessorial liability – consideration of matters relevant to penalty.

Workplace Relations Act 1996, ss.182, 232, 235, 719, 722, 841, 900, 901, 902, 904

Fair Work Ombudsman v Centennial Financial Services Pty Ltd (2010) 245 FLR 242
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383
Construction, Forestry, Mining & Energy Union v Williams (2009) 262 ALR 417
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
A&L Silvestri Pty Limited v Construction, Forestry, Mining & Energy Union [2008] FCA 466
Trade Practices Commission v CSR Ltd (1991) ATPR 41-076
Finance Sector Union v Commonwealth Bank of Australia (2005) 147 IR 462
CPSU, Community & Public Sector Union v Telstra Corporation Ltd (2001) 108 IR 228

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	CENTENNIAL FINANCIAL SERVICES PTY LTD (ACN 112 859 248)
Second Respondent:	ROLF MERTES
Third Respondent:	CHRISTOPHER CHORAZY
File Number:	SYG 3337 of 2008
Judgment of:	Cameron FM
Hearing date:	14 April 2011

Date of Last Submission:	14 April 2011
Delivered at:	Sydney
Delivered on:	21 June 2011

REPRESENTATION

Counsel for the Applicant:	Mr I. Ahmed
Solicitors for the Applicant:	Norton Rose Australia
Solicitors for the Second Respondent:	Collins Legal

The Third Respondent did not appear

ORDERS

(1) The second respondent pay a penalty of $4,400 for contravening s.182 of the *Workplace Relations Act 1996* in relation to the non-payment of wages to certain employees of the first respondent, namely Andrew Young, Mirantha Perera, Adje da Silveira, David Peisley, Reagan Murphy, Richard Nguyen, Taranath Shetty and Dennis McFarlane

(2) The second respondent pay a penalty of $1,100 for contravening s.901 of the *Workplace Relations Act 1996* in relation to Andrew Young.

(3) The second respondent pay a penalty of $1,100 for contravening s.901 of the *Workplace Relations Act 1996* in relation to Adje da Silveira.

(4) The second respondent pay a penalty of $1,100 for contravening s.901 of the *Workplace Relations Act 1996* in relation to David Peisley.

(5) The second respondent pay a penalty of $1,100 for contravening s.901 of the *Workplace Relations Act 1996* in relation to Dennis McFarlane.

(6) The second respondent pay a penalty of $1,100 for contravening s.902 of the *Workplace Relations Act 1996* in relation to Andrew Young.

(7) The second respondent pay a penalty of $1,100 for contravening s.902 of the *Workplace Relations Act 1996* in relation to Adje da Silveira.

(8) The second respondent pay a penalty of $1,100 for contravening s.902 of the *Workplace Relations Act 1996* in relation to David Peisley.

(9) The second respondent pay a penalty of $1,100 for contravening s.902 of the *Workplace Relations Act 1996* in relation to Dennis McFarlane.

(10) The third respondent pay a penalty of $250 for contravening s.182 of the *Workplace Relations Act 1996* in relation to the non-payment of wages to certain employees of the first respondent for time spent in training, namely Andrew Young, David Peisley, Helen Kioukas, Trish Taylor and Dennis McFarlane.

(11) The third respondent pay a penalty of $1,000 for contravening s.182 of the *Workplace Relations Act 1996* of the WRA in relation to the non-payment of wages to certain employees of the first respondent namely

Andrew Young, Mirantha Perera, Adje da Silveira, David Peisley, Reagan Murphy, Richard Nguyen, Taranath Shetty and Dennis McFarlane.

(12) The third respondent pay a penalty of $500 for contravening s.235 of the *Workplace Relations Act 1996* in relation to the non-payment of accrued annual leave entitlements to certain employees of the first respondent, namely Andrew Young, Mirantha Perera, Adje da Silveira, David Peisley, Reagan Murphy, Richard Nguyen, Taranath Shetty and Dennis McFarlane.

(13) The third respondent pay a penalty of $250 for contravening s.901 of the *Workplace Relations Act 1996* in relation to Andrew Young.

(14) The third respondent pay a penalty of $250 for contravening s.901 of the *Workplace Relations Act 1996* in relation to Adje da Silveira.

(15) The third respondent pay a penalty of $250 for contravening s.901 of the *Workplace Relations Act 1996* in relation to David Peisley.

(16) The third respondent pay a penalty of $250 for contravening s.901 of the *Workplace Relations Act 1996* in relation to Dennis McFarlane.

(17) The third respondent pay a penalty of $250 for contravening s.902 of the *Workplace Relations Act 1996* in relation to Andrew Young.

(18) The third respondent pay a penalty of $250 for contravening s.902 of the *Workplace Relations Act 1996* in relation to Adje da Silveira.

(19) The third respondent pay a penalty of $250 for contravening s.902 of the *Workplace Relations Act 1996* in relation to David Peisley.

(20) The third respondent pay a penalty of $250 for contravening s.902 of the *Workplace Relations Act 1996* in relation to Dennis McFarlane.

(21) The second respondent pay the penalties ordered in orders 1 to 9 by paying

(a) $294.80 to Andrew Young.

(b) $3,268.26 to Mirantha Perera.

(c) $1,766.12 to Adje da Silveira.

(d) $2,010.00 to David Peisley.

(e) $1,526.26 to Reagan Murphy.

(f) $3,268.26 to Richard Nguyen.

(g) $1,027.78 to Taranath Shetty.

(h) $119.26 to Helen Kioukas.

(i) $119.26 to Trish Taylor.

(22) The third respondent pay the penalties ordered in orders 10 to 20 by paying

(a) $82.50 to Andrew Young.

(b) $914.62 to Mirantha Perera.

(c) $494.25 to Adje da Silveira.

(d) $562.50 to David Peisley.

(e) $427.12 to Reagan Murphy.

(f) $914.62 to Richard Nguyen.

(g) $287.63 to Taranath Shetty.

(h) $33.38 to Helen Kioukas.

(i) $33.38 to Trish Taylor.

(23) The second and third respondents pay the amounts listed in orders 21 and 22 by providing to the applicant bank cheques drawn in the relevant amounts in favour of the respective individuals.

(24) The parties have liberty to apply.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3337 of 2008

FAIR WORK OMBUDSMAN
Applicant

And

CENTENNIAL FINANCIAL SERVICES PTY LTD (ACN 112 859 248)
First Respondent

ROLF MERTES
Second Respondent

CHRISTOPHER CHORAZY
Third Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant in these proceedings is the Fair Work Ombudsman ("Ombudsman"). The first respondent ("Centennial") was in the business of providing financial services. The second respondent, Mr Mertes, was Centennial's sole director and shareholder and was responsible for the day to day management and operation of its business. The third respondent, Mr Chorazy, was employed by a company in the Centennial group of companies as Centennial's human resources manager.

2. This is the second stage of these proceedings, the first being concerned with whether the respondents breached ss.182, 232, 235, 900, 901 and 902 of the *Workplace Relations Act 1996* ("WRA") or any of them. On 15 November 2010 I concluded that Centennial had contravened ss.182, 235, 901 and 902 of the WRA. I further concluded that Mr Mertes was involved in Centennial's contraventions of ss.901 and 902 and in its contraventions of s.182 in what was described in the reasons for judgment published that day ("first judgment") as the "Second Period", and was thus treated as having contravened those provisions. Mr Chorazy was found to have been involved in Centennial's contraventions of ss.182, 901 and 902 and in Centennial's contraventions of s.235 in the Second Period and was thus treated as having contravened those provisions: *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* (2010) 245 FLR 242 at 314 [314].

3. This stage of the proceedings is concerned with whether Messrs Mertes and Chorazy should be ordered to pay civil pecuniary penalties by reason of their involvement in Centennial's contraventions of the WRA and, if so, in what amounts.

Background facts

Unpaid accrued annual leave

4. All relevant background facts were set out in the first judgment. However, one matter which was not addressed in that judgment was the quantum of accrued annual leave which should have been paid to certain of the Corporate Associates but was not. The further amended application filed by the Ombudsman on 14 April 2011 now makes it necessary to address that quantification.

5. Section 232 of the WRA relevantly provided:

> ***232 The guarantee***
>
> *(1) For the purposes of this Division, annual leave means leave to which an employee is entitled under this Subdivision.*
>
> *All employees to whom this Division applies*

(2) An employee is entitled to accrue an amount of paid annual leave, for each completed 4 week period of continuous service with an employer, of 1/13 of the number of nominal hours worked by the employee for the employer during that 4 week period. ...

Section 235 of the WRA relevantly provided:

235 Annual leave—payment rules

(1) If an employee takes annual leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of annual leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).

(2) If the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee must be paid a rate for each hour (pro-rated for part hours) of the employee's untaken accrued annual leave that is no less than the rate that, immediately before that time, is the employee's basic periodic rate of pay (expressed as an hourly rate).

6. In the first judgment I found that the Corporate Associates worked for Centennial in the following periods:

Corporate Associate	First Period	Second Period
Andrew Young	12/03/07 – 04/05/07	07/05/07 – 31/05/07
Mirantha Perera	05/02/07 – 04/05/07	07/05/07 – 22/08/07
Adje da Silveira	22/01/07 – 04/05/07	07/05/07 – 29/06/07
David Peisley	12/03/07 – 04/05/07	07/05/07 – 06/07/07
Reagan Murphy	08/02/07 – 04/05/07	07/05/07 – 22/06/07
Richard Nguyen	30/01/07 – 04/05/07	07/05/07 – 22/08/07
Taranath Shetty	22/01/07 – 11/05/07	14/05/07 – 08/06/07
Helen Kioukas	26/03/07 – 16/04/07	
Trish Taylor	12/03/07 – 13/04/07	
Dennis McFarlane	12/03/07 – 03/05/07	

7. I also found that Andrew Young, David Peisley, Trish Taylor and Dennis McFarlane had participated in unpaid training for six hours per

day on 6 to 9 March 2007 inclusive and that Helen Kioukas had done so too on 20 to 23 March 2007 inclusive.

8. In the first judgment I found that Centennial had not accrued or paid out annual leave to which each of Messrs Young, Perera, da Silveira, Peisley, Murphy, Nguyen, Shetty and McFarlane were entitled.

9. As noted in the first judgment, at all relevant times the federal minimum wage applicable to the employment of the Corporate Associates was $13.47 per hour.

10. Given that s.232 of the WRA provided that annual leave was to accrue in respect of each completed four week period of continuous service, the period in respect of which the Corporate Associates' annual leave accrued does not, in the circumstances of each Corporate Associate, reflect the full period of their employment; it does not take account of so much of their employment as is not comprised in a completed four-week period of service. I thus calculate the relevant Corporate Associates' accrued annual leave entitlements based on the rate of $13.47 per hour as follows:

Corporate Associate	Period of leave accrual (wks)	Hours accrued annual leave	Quantification
Andrew Young	12	35.08	$472.53
Mirantha Perera	28	81.85	$1,102.52
Adje da Silveira	20	58.46	$787.46
David Peisley	16	46.77	$629.99
Reagan Murphy	16	46.77	$629.99
Richard Nguyen	28	81.85	$1,102.52
Taranath Shetty	20	58.46	$787.46
Dennis McFarlane	4	11.69	$157.46
Total			**$5,669.93**

11. The entitlements of Messrs Young, Peisley, and McFarlane take account of the periods of unpaid training which were found in the first judgment to be part of their period of employment. Also, as noted at [221] of the first judgment:

Amounts owing to Mr McFarlane were paid following the Workplace Ombudsman's service of a breach notice on Centennial and an amount of $2,014.57 was paid to Mr Young in similar circumstances. These payments may have related not only to unpaid wages but also to other matters.

The contraventions

12. The second and third respondents' contraventions can be grouped by category. In respect of Mr Mertes they are:

    a) contravention of s.182 in respect of the Second Period;

    b) contravention of s.901; and

    c) contravention of s.902.

13. In relation to Mr Chorazy, the contraventions can be grouped as follows:

    a) contravention of s.182 in respect of unpaid training;

    b) contravention of s.182 in relation to the non-payment of wages to Corporate Associates in the Second Period;

    c) contravention of s.235 in respect of unpaid annual leave;

    d) contravention of s.901 in relation to representations made to employees; and

    e) contravention of s.902 in relation to dismissal of employees.

14. Section 719(2) of the WRA provided that where the same person committed two or more breaches of an "applicable provision" and the breaches arose out of the same course of conduct by that person, the breaches were to constitute a single breach. Although, through its continuing operation by virtue of the *Fair Work (Transitional Provisions & Consequential Amendments) Act 2009,* s.719(2) applies to the contraventions of ss.182 and 235, it did and does not apply to contraventions of ss.901 or 902. Consequently, each proved contravention of ss.901 and 902 may attract a separate penalty.

15. The maximum penalty which can be imposed on the second and third respondents for each proved contravention is $6,600: ss.719 and 904 of the WRA.

Submissions

Applicant

16. The Ombudsman submitted that Mr Mertes was involved in thirteen contraventions of the WRA and that Mr Chorazy was involved in fifteen contraventions. He submitted that the contraventions were not isolated incidents as they occurred over a period of approximately thirteen months and involved numerous employees. He submitted that they were wide ranging and substantial in nature and included failures by the respondents to pay appropriate wages to employees, contraventions of the WRA's sham contracting provisions and failures to pay accrued annual leave. He submitted that the respondents' contraventions of ss.901 and 902, which involved changing the Corporate Associates' status from "employees" to "independent contractors", were of particular concern because they effectively deprived the Corporate Associates of their employment rights under the WRA.

17. The Ombudsman pointed to the senior positions held by Messrs Mertes and Chorazy. He submitted that Mr Mertes, as the controlling mind of Centennial, instigated the conduct that gave rise to the contraventions and that Mr Chorazy was also "centrally involved" in the contravening conduct because, as Centennial's human resources manager, he was responsible for ensuring that the company complied with applicable workplace relations laws. He also submitted that Mr Chorazy had held himself out as having considerable experience in the field. He submitted that, in the circumstances, it was not open to Mr Chorazy to contend that his responsibility for the contraventions was reduced merely because he was following instructions provided by Mr Mertes.

18. The Ombudsman submitted that Centennial's contraventions occurred over a thirteen month period and involved underpayments amounting to $44,069.25 of which $39,153.10 (excluding superannuation) remained outstanding. He submitted that the loss suffered by the

Corporate Associates was significant given that they were only entitled to be paid the federal minimum wage.

19. In considering the appropriate penalties to impose, the Ombudsman submitted that the respondents' financial circumstances were of limited relevance. He further submitted that Mr Mertes, as Centennial's sole shareholder, had obtained a direct financial benefit as a result of Centennial's contraventions. He submitted that any suggestion that Mr Mertes would suffer financial hardship because of the imposition of a pecuniary penalty should not, therefore, be regarded as a matter of significant relevance. With respect to Mr Chorazy, the Ombudsman submitted that even if it were accepted that the imposition of a pecuniary penalty would cause him some financial difficulty, this should not dissuade the Court from imposing a penalty that would otherwise be appropriate in the circumstances.

20. The Ombudsman submitted that the contraventions in which Mr Mertes and Mr Chorazy were involved may not have been wilful but were, nevertheless, deliberate in the sense that they were committed with the knowledge that the Corporate Associates would be deprived of certain of their entitlements. He submitted that, to date, neither Mr Mertes nor Mr Chorazy had expressed any degree of contrition in respect of their contraventions and that most of the underpayments remained outstanding. He also submitted that both Mr Mertes and Mr Chorazy had adopted an unco-operative approach during the Workplace Ombudsman's investigation of Centennial's contraventions.

21. The Ombudsman submitted that the penalties imposed by the Court should contain an element of specific deterrence. He submitted that there was evidence to suggest that both Mr Mertes and Mr Chorazy were, or would in the future be, responsible for the employment of individuals. He submitted that the imposition of a meaningful penalty was warranted in order to underscore to Mr Mertes and Mr Chorazy the importance of compliance with workplace laws.

22. The Ombudsman also submitted that one of the principal objects of the WRA was the maintenance of an effective safety net and that the contraventions found to have occurred in this case undermined that safety net. In particular, it was submitted, the contraventions removed

the Corporate Associates' rights to basic employee entitlements provided by the WRA.

23. As far as the sham contracting was concerned, the Ombudsman submitted that because the WRA referred to the fact that representations might be made to an individual, the parliament had placed the focus on the number of individuals to whom a representation was made and therefore the effect that it might have on those people. He submitted that the absence from the sham contracting provisions of something like s.719(2) which permitted the aggregation of contraventions was significant on the basis that, had the parliament wanted separate contraventions of ss.901 and 902 to be treated as a single contravention, it could have said so. On that basis, he submitted that Messrs Mertes and Chorazy should be treated as if they had each engaged in four separate contraventions of s.901 and eight separate contraventions of s.902.

24. Nevertheless, and although the respondents did not submit that the representations made to the Corporate Associates should be treated as forming part of the same transaction or course of conduct such that they should be regarded as one activity or one contravention as was discussed in *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at 396 [41]ff, the Ombudsman did concede that if the treatment of related contraventions as being entirely separate from one another would lead to a level of punishment inappropriate to the wrongdoing in question, then the Court can adjust the penalty to be imposed. He referred to *Construction, Forestry, Mining & Energy Union v Williams* (2009) 262 ALR 417 where the Full Court of the Federal Court recognised that sometimes a single act of offending conduct will comprise two or more technically identifiable offences. It was said that concurrent sentences are likely to be just and convenient in such cases where, whatever the number of technically identifiable offences committed, the contravener was truly engaged upon one multi-faceted course of offending conduct.

25. The Ombudsman submitted that although it was open to the Court to consider whether the penalty should be adjusted, the level of wrongfulness which arises from the representations made to four separate people at a particular meeting is greater than the level of wrongfulness which would arise had the representation been made only

to one person. He submitted that the penalties applicable to the contraventions of s.901 and, impliedly, s.902 should be greater than would be the case had there been only one contravention of the WRA.

26. The Ombudsman submitted that, in the circumstances, a mid to high range penalty was appropriate in respect of the contraventions committed by Mr Mertes and that a low to mid range penalty was appropriate in respect of the contraventions committed by Mr Chorazy.

Mr Mertes

27. The second respondent made no submissions.

Mr Chorazy

28. In his submissions filed on 22 February 2011 and 24 March 2011 Mr Chorazy disputed the Court's findings that he had been involved in various contraventions of the WRA. He submitted, essentially, that he had merely been following the instructions of Mr Mertes and had not had any input into the decisions which gave rise to the contraventions. He submitted that his position as the human resources manager was "a mere title" and that he had no authority beyond what was approved by Mr Mertes. He also submitted that the Ombudsman had been selective in choosing who it would "pursue legally" and that there were others, besides Mr Mertes, who had occupied decision-making roles in the company and who were equally responsible for the contraventions committed by Centennial.

29. Mr Chorazy submitted that the negative publicity generated by these proceedings had effectively ruined his career in human resources. He submitted that, despite applying for thousands of positions, he had not been able to secure a permanent role.

30. Mr Chorazy submitted that he was in an extremely poor financial position. He submitted that he had limited assets, little to no cash flow and still relied occasionally on Centrelink for financial assistance. He submitted that he had already been financially penalised as his salary had dropped from approximately $65,000 at Centennial to $25,000-

$28,000. He submitted that there was a real possibility that the imposition of a penalty would lead to his bankruptcy.

Consideration

31. As Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14 at 18-19 [14], in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [24] Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Tracey J adopted those considerations and described them as follows:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*

- *The need for specific and general deterrence.*

However, as Gyles J said in *A&L Silvestri Pty Limited v Construction, Forestry, Mining & Energy Union* [2008] FCA 466 at [6], there are no mandatory statutory criteria.

32. Considerations relevant to this case are:

a) the nature and extent of the conduct which led to the breach;

b) the circumstances in which the conduct took place;

c) the nature and extent of any loss or damage sustained as a result of the breach;

d) whether there has been similar previous conduct by the respondents;

e) whether the breaches are properly distinct or arose out of the one course of conduct

f) the size of the business enterprise involved;

g) the deliberateness of the breaches;

h) whether the first respondent had a culture of compliance;

i) whether the respondents exhibited contrition;

j) whether the respondents have taken corrective action and have co-operated with the enforcement authorities; and

k) the need for specific and general deterrence.

The nature and extent of the conduct which led to the breach

33. Centennial's underpayments of the Corporate Associates' entitlements arose out of its desire to reduce the cost of its payroll. Mr Mertes decided to change the Corporate Associates' arrangements because the company was "bleeding financially". Knowing that to continue to pay the Corporate Associates in accordance with their entitlements as employees would damage Centennial financially, Mr Mertes sought to find a way to have the Corporate Associates work at a lower cost. He

did this by changing the description of the Corporate Associates' employment, but not its substance.

34. The period during which Centennial committed the contraventions which have been proved commenced in January 2007 and concluded in August 2007. However, in respect of the First Period, Centennial's contravention concerns its failure to accrue, and subsequently pay, annual leave entitlements, a contravention in which neither Messrs Mertes nor Chorazy have been found to have been involved. Nevertheless, Mr Chorazy was aware that Corporate Associates were not being paid for their training prior to the commencement of the First Period. Further, both Messrs Mertes and Chorazy were involved in Centennial's contraventions arising out of the purported transition of the Corporate Associates from employment to contracting which commenced with the meeting on 23 April 2007 and persisted through the failure to pay wages and annual leave entitlements. The evidence permits a conclusion that, had the Ombudsman not intervened, Centennial would have continued to act in breach of its obligations under ss.182 and 235 of the WRA.

35. The breaches in the Second Period were the products of Centennial's contraventions of ss.901 and 902. As submitted by the Ombudsman, this had a significant effect on the Corporate Associates' working conditions in so far as it deprived them of their rights to employment protections including superannuation, insurance, protection from unfair dismissal and their employment entitlements under the WRA.

The circumstances in which the conduct took place

36. Centennial's failure to pay wages in respect of the Corporate Associates' training periods demonstrated its failure to appreciate the nature of its relationship with those individuals. Mr Chorazy, who has been found to have been involved in these particular contraventions, did not explain why he and Centennial believed that persons undergoing training for the purposes of their employment, and were thus working and giving up their time for reasons associated with their employment, should not have been paid for that time.

37. A similar ignorance pervaded Centennial's sham contracting breaches which arose out of a change in the parties' relationships purported to be substantive but which was, in fact, no more than cosmetic. Moreover, this conduct was motivated by nothing more than a desire to obtain for Centennial a more favourable financial outcome than would have been achieved if the Corporate Associates had remained on the terms upon which they had been employed at the commencement of their engagements. It was not suggested that Centennial had sought advice concerning whether its proposal was lawful.

38. I am willing to accept that Mr Chorazy was overborne by Mr Mertes and exercised no independent judgment in those actions which have led to the finding that he was involved in Centennial's sham contracting and related breaches. Nevertheless, as human resources manager, he should have been aware of, and at least attempted to give advice on, Centennial's obligations under the WRA.

39. Even so, Mr Mertes must bear principal responsibility for Centennial's contraventions. He was the sole shareholder and director and responsible for the day to day management and operation of its business. Consequently, not only did he have ultimate managerial responsibility for Centennial's actions and procure its breaches of ss.901 and 902, as Centennial's sole shareholder he was also to be the principal beneficiary of any advantage which Centennial gained from its failure to pay its employees their full wages and entitlements.

The nature and extent of any loss or damage sustained as a result of the breach

40. In the first judgment I found that Centennial failed to pay the Corporate Associates $33,863.59 in wages which they were entitled to receive. In these reasons, I have found that Centennial failed to pay annual leave entitlements totalling $5,669.93. Together, these figures amount to $39,533.52. While some of the amounts owed to the Corporate Associates were quite small, others were significantly larger, for instance Messrs Perera and Nguyen who were both not paid $9,087.54. Given that the employees in this case were only entitled to be paid the federal minimum wage these are not insignificant amounts and, in relation to the Second Period, the amounts unpaid represented the

Corporate Associates' entire statutory entitlements to wages and accrued annual leave entitlements.

Whether there has been similar previous conduct by the respondents

41. The Ombudsman did not submit that any of the respondents had been engaged in similar conduct in the past.

Whether the breaches are properly distinct or arose out of the one course of conduct

42. In the first judgment I found that Centennial had failed to pay certain of its Corporate Associates the wages to which they were entitled. In that judgment, those wages were summarised in the following table at [220]:

Corporate Associate	Training	Second Period	Total
Andrew Young	323.28	1,945.07	2,268.35
Mirantha Perera		7,985.02	7,985.02
Adje da Silveira		4,094.88	4,094.88
David Peisley	323.28	4,606.74	4,930.02
Reagan Murphy		3,583.02	3,583.02
Richard Nguyen		7,985.02	7,985.02
Taranath Shetty		2,047.44	2,047.44
Helen Kioukas	323.28		323.28
Trish Taylor	323.28		323.28
Dennis McFarlane	323.28		323.28
Grand total			33,863.59

43. The wages appearing in the first column of figures set out above relate to the period when Messrs Young, Peisley and McFarlane and Ms Kioukas and Ms Taylor underwent training before they started performing the role of Corporate Associate. The failure to pay these wages arose out of a decision or an approach taken by Centennial that the period of training did not amount to part of those Corporate Associates' employment. As such, it can be understood to be a single

course of conduct. Similarly, the breaches of s.182 in relation to the Second Period all arose out of Centennial's mischaracterisation of its relationship with its Corporate Associates as being one of contracting rather than of employment and thus should be considered to be a single course of conduct. However, these courses of conduct were separate and distinct both as to the bases of the actions and as to the period in which they occurred. Therefore, they should be treated as separate breaches and attract separate penalties.

44. Because I found in the first judgment that Mr Chorazy had been involved in Centennial's contraventions of s.182 in relation to the training period and the Second Period, I find that he should be taken to have committed two contraventions of that section. I previously found that Mr Mertes was only involved in Centennial's contraventions in the Second Period and, as a consequence, I find he should be taken to have been involved in one contravention of the section.

45. The failure to pay out annual leave entitlements accrued during the Second Period also arose out of the characterisation of the parties' relationships as one of contracting and not employment. Consequently, it was a single course of conduct by Centennial with the result that Mr Chorazy was involved in and is taken to have committed one contravention of s.235.

46. As to the contraventions of s.901, in the first judgment I found that Centennial contravened s.901 in respect of the contract which, at the meeting on 23 April 2007, it offered to enter into with Messrs Peisley, McFarlane, Young, da Silveira and Mr Guilmar Perez. Although it was admitted, by means of the notice to admit facts, that Mr Perez was present at the meeting on 23 April 2007, in his submissions on penalty the Ombudsman has conceded that he had made no allegation in his further amended statement of claim that Centennial contravened s.901 in relation to Mr Perez. He conceded that no penalty can be imposed in relation to whatever representations were made to Mr Perez in the 23 April 2007 meeting. Nevertheless, I do find that a penalty may properly be imposed for the contravention of s.901 in relation to the representations made to Messrs Peisley, McFarlane, Young and da Silveira.

47. In *CFMEU v Williams*, their Honours recognised that there will be instances where the interrelationship of multiple offences is so intimate that those offences can only be said to arise from a single course of conduct and that in such an instance injustice can only be avoided by imposing concurrent terms, otherwise the offender would be punished more than once for the same criminality. The Court also referred to the importance of proportionality in the context of sentencing for interrelated offences and found in that case that the appellant's conduct was to be treated as one act of contravening conduct even though, strictly, it resulted in a finding that there had been two statutory contraventions. In that case, it was held that it was appropriate to take the single course of conduct into account by imposing separate fines for the two offences which, when aggregated, would represent a single penalty appropriate to punish the single course of conduct concerned.

48. I find that Centennial committed four contraventions of s.901. I consequently find that Messrs Mertes and Chorazy are each taken to have committed four contraventions of that section. However, it must be acknowledged that the contraventions occurred at one meeting at which Centennial, through Messrs Mertes and Chorazy, spoke to the Corporate Associates about the sales consultant agreement, and that the meeting arose out of the one decision, procured by Mr Mertes, that the Corporate Associates were to become contractors. Consequently, it is appropriate to impose separate penalties for these four contraventions but to do so on the basis that they represented a single course of conduct, with the result that the penalties to be imposed for each individual contravention will represent a quarter of the figure which would represent the penalty appropriate to punish the one course of conduct.

49. In relation to Centennial's contraventions of s.902, the Ombudsman alleged in his further amended statement of claim:

> *On or around 23 April 2007 for each of Andrew Young, Dennis McFarlane, Mirantha Perea* [sic], *Adje de Silveira, David Peisley, Reagan Murphy, Richard Nguyen and Taranath Shetty the First Respondent breached section 902 of the WR Act by dismissing them or threatening to dismiss them for the sole or dominant purposes of engaging them as independent contractors.*

However, of the individuals identified in that allegation, only four were contended in the notice to admit facts to have been present at the 23 April 2007 meeting, namely, Messrs Peisley, McFarlane, Young and da Silveira. The notice to admit facts did not invite admissions that Messrs Perera, Murphy, Nguyen or Shetty were at the meeting in question and the first judgment proceeded on the basis that the respondents' admissions were not as broad as the allegations made: cf. first judgment at [267]. Although the Ombudsman submitted in this stage of the proceedings that Centennial contravened s.902 on eight occasions, this does not reflect his earlier submissions recorded at [281] of the first judgment. As a result of the way the case proceeded in its first stage, the consideration set out in the first judgment at [290]-[299] reached the conclusion, albeit implied, that the contravention of s.902 related only to those Corporate Associates found to have been present at the 23 April 2007 meeting. I find that Centennial committed four contraventions of s.902 and that, as a consequence, Messrs Mertes and Chorazy are each taken to have committed four contraventions of that section.

50. For the reasons given in relation to s.901, I find that these contraventions represented a single course of conduct. They will be penalised in the same way as the contraventions of s.901.

The size of the business enterprise involved

51. The magnitude of Centennial's operation is not absolutely clear but it does appear from the evidence that it was an organisation of some size, with a number of individuals employed in managerial positions. I conclude that it was well able to afford proper advice and to have ensured that its employment practices complied with the law. Indeed, it was sufficiently large to employ a human resources manager, in the form of Mr Chorazy. The fact that the latter appears to have focused his energies on the recruitment of staff and day to day matters of administration, rather than on issues of compliance, is a deficiency which has not been properly explained.

The deliberateness of the breaches

52. It has not been demonstrated that either Mr Mertes or Mr Chorazy knew that Centennial's actions, either in respect of the training period or the Second Period, amounted to contraventions of the WRA. Nevertheless, they understood and intended the financial outcomes produced by the actions in which they have been found to have been involved. Even if the fact that the actions contravened the WRA was inadvertent, the actions themselves were not.

Whether the first respondent had a culture of compliance

53. No evidence was adduced to suggest that Centennial had any compliance program in relation to its employment obligations or that it actively sought to ensure that its employment practices complied with the law other than, initially, making enquiries as to the award relevant to the employment of the Corporate Associates in the First Period.

Whether the respondents exhibited contrition

54. Neither Mr Mertes nor Mr Chorazy adduced any evidence of contrition or made submissions suggesting contrition. Indeed, Mr Mertes made no submissions at all at the penalty stage of these proceedings. While Mr Chorazy appears genuinely to regret his time at Centennial and the consequences which this has had for his career, he has not expressed any acceptance of responsibility for the events in question.

Whether the respondents have taken corrective action and have co-operated with the enforcement authorities

55. Mr McFarlane was paid what he was owed and $2,014.57 was paid to Mr Young. Nevertheless, significant amounts remain outstanding to Corporate Associates, which demonstrates a lack of substantive corrective action on the part of Centennial. However, in making this observation, it must also be noted that Centennial went into liquidation.

56. During the course of the Ombudsman's inquiries, Centennial, and in particular Mr Chorazy, did provide some assistance and provided documents. Nevertheless, it remained necessary for the Ombudsman to

issue final notices and to commence these proceedings. Once these proceedings were commenced, Mr Mertes failed to engage with them in any meaningful way, exemplified by the fact that much of the Ombudsman's case against him was proved by an unanswered notice to admit facts. Mr Chorazy did address the notice to admit facts and admitted much of what it contained. To that extent, he co-operated with the Ombudsman.

The need for specific and general deterrence

57. As has already been noted, neither Messrs Mertes nor Chorazy evinced any contrition for their conduct. The evidence adduced by Mr Chorazy indicates that it is unlikely that he will be in a position to commit similar breaches in the future but there is no evidence upon which to draw a similar conclusion in relation to Mr Mertes. An element for specific deterrence will be included in the penalties to be imposed on Messrs Mertes and Chorazy although it will be larger in the case of Mr Mertes than it will be in the case of Mr Chorazy.

58. Further, in order to discourage repetition of these contraventions by Mr Mertes, Mr Chorazy or by others who might be tempted to contravene the WRA's successor, the *Fair Work Act 2009*, such penalties as are imposed should be imposed at a meaningful level: *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 per French J at 52,152; *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462 at 475 [41]. In this regard, the law's disapproval of the conduct in question should be marked and a penalty serve as a warning to others not to engage in similar conduct: *CPSU, Community & Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 228 at 231 [9].

59. Finally, although it was indicated at the hearing that Mr Mertes was in effect a bankrupt, no evidence was adduced on this issue. As to Mr Chorazy, I am willing to accept that the events at Centennial have had a chilling effect on his career in human resources and that he has seen a significant decline in his income which would tend to increase the impact on him of any financial penalties imposed in these proceedings.

Penalties

60. By reason of his involvement in Centennial's breaches of the WRA, I find that Mr Mertes committed:

a) one contravention of s.182 of the WRA;

b) four contraventions of s.901 of the WRA; and

c) four contraventions of s.902 of the WRA.

61. In relation to Mr Chorazy, by reason of his involvement in Centennial's breaches of the WRA, I find that he committed:

a) two contraventions of s.182 of the WRA;

b) one contravention of s.235 of the WRA;

c) four contraventions of s.901 of the WRA; and

d) four contraventions of s.902 of the WRA.

62. I have taken into account the matters considered above and, in the circumstances, I consider the appropriate penalties in this matter to be:

a) as to Mr Mertes:

i) $4,400 for the contravention of s.182 of the WRA in relation to the non-payment of wages to the Corporate Associates in the Second Period;

ii) $1,100 for the contravention of s.901 in relation to Mr Young;

iii) $1,100 for the contravention of s.901 in relation to Mr da Silveira;

iv) $1,100 for the contravention of s.901 in relation to Mr Peisley;

v) $1,100 for the contravention of s.901 in relation to Mr McFarlane;

vi) $1,100 for the contravention of s.902 in relation to Mr Young;

vii) $1,100 for the contravention of s.902 in relation to Mr da Silveira;

viii) $1,100 for the contravention of s.902 in relation to Mr Peisley; and

ix) $1,100 for the contravention of s.902 in relation to Mr McFarlane;

b) in respect of Mr Chorazy:

i) $250 for the contravention of s.182 of the WRA in respect of unpaid training;

ii) $1,000 for the contravention of s.182 of the WRA in relation to the non-payment of wages to the Corporate Associates in the Second Period;

iii) $500 for the contravention of s.235;

iv) $250 for the contravention of s.901 in relation to Mr Young;

v) $250 for the contravention of s.901 in relation to Mr da Silveira;

vi) $250 for the contravention of s.901 in relation to Mr Peisley;

vii) $250 for the contravention of s.901 in relation to Mr McFarlane;

viii) $250 for the contravention of s.902 in relation to Mr Young;

ix) $250 for the contravention of s.902 in relation to Mr da Silveira;

x) $250 for the contravention of s.902 in relation to Mr Peisley; and

xi) $250 for the contravention of s.902 in relation to Mr McFarlane.

63. In respect of the Mr Mertes, the total penalty is therefore $13,200 and in respect of the Mr Chorazy the total penalty is $3,750. I am satisfied that these are just and appropriate amounts as aggregate figures.

Payment of penalties

64. At the penalty hearing on 14 April 2011 the Ombudsman was granted leave to file a further amended application. In that further amended application he revised the prayer for relief which had appeared in earlier versions of that document and which had sought an order that such penalties as the Court might impose be paid to the Commonwealth. In place of that prayer, in the further amended application the Ombudsman sought an order in the following terms:

> *... that the pecuniary penalties in order 1 above be paid in accordance with either (a) or (b) below:*
>
> *(a) If the total amount of the pecuniary penalties is less than the total liabilities plus interest set out in Schedule A to this application, the pecuniary penalties be payable to the persons identified in Schedule A to this application in proportion to the total liabilities plus interest for each of those persons as set out in Schedule A; or*
>
> *(b) If the total amount of the pecuniary penalties is greater than the total liabilities plus interest set out in Schedule A to this application:*
>
> *(i) the pecuniary penalties be payable to the persons identified in Schedule A to this application up to the total liabilities plus interest for each of those persons as set out in Schedule A; and*
>
> *(ii) the difference between the amount of the pecuniary penalties and the total liabilities plus interest as set out in Schedule A be payable to the Commonwealth of Australia.*

65. Section 841 of the WRA provided:

> ***841 Application of penalty***

A court that imposes a pecuniary penalty under this Act (other than a penalty for an offence) may order that the penalty, or a part of the penalty, be paid:

(a) to the Commonwealth; or

(b) to a particular organisation or person.

66. The Ombudsman submitted that in the absence of an order under s.841(b) it was unlikely that the Corporate Associates in question would receive any redress for Centennial's failure to provide them with their entitlements under the WRA. I accept this submission in light of the contents of the affidavit of Mathew William Roy Phillips sworn 12 April 2011 where he deposes to conversations and correspondence with Centennial's liquidator and his staff and to the advice he received that there were no funds available to pay employee claims. He also deposed to advice he received from a review officer at the Employee Entitlements Branch of the Department of Education, Employment and Workplace Relations to the effect that none of the Corporate Associates mentioned in the above tables had lodged claims for payment under the Commonwealth Government's General Employee Entitlements and Redundancy Scheme.

67. The Ombudsman submitted that in the circumstances it was appropriate that an order be made under s.841(b) directing that any pecuniary penalties which Mr Mertes or Mr Chorazy might be ordered to pay be paid to the employees affected by their conduct. The Ombudsman indicated at the penalty hearing that he was prepared to receive the amounts and distribute them to the employees in order to facilitate the administration of those payments.

68. In the further amended application, the applicant calculated the total amount of interest owing to the Corporate Associates, presumably as at the date of the penalty hearing, to be $13,251. Since then, additional interest has accrued and, in any event, my calculations of the Corporate Associates' annual leave entitlements differ from those of the Ombudsman. Based on the interest rate applicable in the New South Wales Supreme Court, I calculate that were the Court in a position to order Centennial to pay interest on those Corporate Associates' outstanding entitlements pursuant to s.722 of the WRA, each of the individuals listed below would be entitled, as at the date of the

publication of these reasons, to the amounts appearing against his or her name:

CORPORATE ASSOCIATE	ANNUAL LEAVE	WAGES (training + Second Period)	TOTAL (annual leave + wages)	INTEREST ON TOTAL	GRAND TOTALS
Andrew Young	472.53	253.78	726.31	385.21	1,111.52
Mirantha Perera	1,102.52	7,985.02	9,087.54	3,263.21	12,350.75
Adje da Silveira	787.46	4,094.88	4,882.34	1,793.15	6,675.49
David Peisley	629.99	4,930.02	5,560.01	2,037.30	7,597.31
Reagan Murphy	629.99	3,583.02	4,213.01	1,551.97	5,764.98
Richard Nguyen	1,102.52	7,985.02	9,087.54	3,263.21	12,350.75
Taranath Shetty	787.46	2,047.44	2,834.90	1,047.25	3,882.15
Helen Kioukas	0	323.28	323.28	125.76	449.04
Trish Taylor	0	323.28	323.28	127.04	450.32
TOTALS	5,512.47	31,525.74	37,038.21	13,594.1	**50,632.31**

69. I am satisfied that it is appropriate that the penalties which Messrs Mertes and Chorazy are to pay be paid to Centennial's former Corporate Associates. As the penalties will not cover the outstanding entitlements of the Corporate Associates the amounts which Messrs Mertes and Chorazy will be ordered to pay will be divided amongst the Corporate Associates according to the proportion which the amount each one of them is owed bears to the total amount owed, namely:

CORPORATE ASSOCIATE	TOTAL OUT-STANDING	PER CENTAGE OF TOTAL	AMOUNTS TO BE PAID BY MR MERTES	AMOUNTS TO BE PAID BY MR CHORAZY
Andrew Young	1,111.52	2.20	294.80	82.50
Mirantha Perera	12,350.75	24.39	3,268.26	914.62
Adje da Silveira	6,675.49	13.18	1,766.12	494.25
David Peisley	7,597.31	15.00	2,010.00	562.50
Reagan Murphy	5,764.98	11.39	1,526.26	427.12
Richard Nguyen	12,350.75	24.39	3,268.26	914.62
Taranath Shetty	3,882.15	7.67	1,027.78	287.63
Helen Kioukas	449.04	0.89	119.26	33.38

Trish Taylor	450.32	0.89	119.26	33.38
TOTALS	**50,632.31**	**100**	**13,400.00**	**3750.00**

70. Messrs Mertes and Chorazy will be ordered to draw bank cheques in those amounts and provide them to the Ombudsman for distribution to the individuals concerned.

71. Finally, in the event that there is some difficulty in the working out of the orders, the parties will have liberty to apply.

I certify that the preceding seventy-one (71) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 21 June 2011