# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Hargraves and Stoten* [2010] QSC 188 |
| PARTIES: | **R**<br>v<br>**ADAM JOHN HARGRAVES**<br>(defendant)<br>**DANIEL ARAN STOTEN**<br>(defendant) |
| FILE NO/S: | Indictment 13 of 2010 |
| DIVISION: | Trial |
| PROCEEDING: | Sentence |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 8 June 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 19 March 2010 |
| JUDGE: | Fryberg J |
| ORDERS: | **For Adam John Hargraves:**<br>**1. Impose a sentence of imprisonment of 6½ years, with a non-parole period of 3 years and 9 months.**<br>**2. Declare the period of 93 days between 8 March 2010 and 8 June 2010 imprisonment already served under the sentence.**<br>**3. Direct that the Chief Executive of Corrective Services be advised in writing of the declaration and its details.**<br><br>**For Daniel Aran Stoten:**<br>**1. Impose a sentence of imprisonment of 6½ years, with a non-parole period of 3 years and 9 months.**<br>**2. Declare the period of 93 days between 8 March 2010 and 8 June 2010 imprisonment already served under the sentence.**<br>**3. Direct that the Chief Executive of Corrective Services be advised in writing of the declaration and its details.** |
| CATCHWORDS: | Criminal law – Particular offences – Property offences – Other frauds and impositions – Fraud – Defrauding the Commonwealth – Sentence<br><br>Criminal law – Sentence – Sentencing orders – Non-parole |

period or minimum term – Queensland – Federal offenders – Whether there is a "norm" or desirable range of proportionality between the head sentence and non-parole period

*Corrective Services Act 1988* (Qld), s 9
*Corrective Services Act 2006* (Qld), s 214
*Crimes Act 1914* (Cth), s 16A, s 16E, s 16F, s 17A, s 19A, s 19AA, s 19AB, s 19AL, s 19AM, s 19AN, s 19AQ, s 19AS, s 19AU, s 19AV, s 19AZC
*Criminal Code Act 1995* (Cth), s 135.4
*Evidence Act 1977* (Qld), s 132C
*Income Tax Assessment Act 1936* (Cth), s 226J
*Judiciary Act 1903* (Cth), s 68(1)
*Mutual Assistance in Criminal Matters Act 1987* (Cth), s 43B
*Penalties and Sentences Act 1992* (Qld), s 154, s 159A

*Bryce v Chief Executive Officer of Customs (No 2)* [2010] QSC 125, cited
*Cheung v The Queen* (2001) 209 CLR 1; [2001] HCA 67, cited
*Director of Public Prosecutions v Hamman*, unreported, Court of Appeal, NSW, Nos 60388 and 60457 of 1998, 1 December 1998, cited
*Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370, cited
*Director of Public Prosecutions (Cth) v Goldberg* (2001) 184 ALR 387; [2001] VSCA 107, cited
*Director of Public Prosecutions (Cth) v Rowson* [2007] VSCA 176, cited
*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22, cited
*Leeth v The Commonwealth* (1992) 174 CLR 455; [1992] HCA 29, cited
*Pearce v R* (2005) 216 ALR 690; [2005] WASCA 74, cited
*R v Bedington* [1970] Qd R 353, cited
*R v El-Rashid*, unreported, Court of Criminal Appeal, NSW, No 60682 of 1994, 7 April 1995, cited
*R v Harris* [1961] VR 236, cited
*R v Holdsworth; ex parte Director of Public Prosecutions (Cth)* [1993] QCA 242, cited
*R v Isaacs* (1997) 41 NSWLR 374, cited
*R v Jones; R v Hili* [2010] NSWCCA 108, not followed
*R v Kingswell* (1984) 14 A Crim R 211, cited
*R v Le* [1996] 2 Qd R 516; [1995] QCA 479, cited
*R v Narula* (1985) 22 A Crim R 409, cited
*R v NK* (2008) 191 A Crim R 483; [2008] QCA 403, cited
*R v Peters* [1997] 1 VR 489, cited
*R v Ronen* [2006] NSWCCA 123, cited
*R v Ruha, Ruha & Harris; ex parte Cth DPP* [2010] QCA

010, applied
*R v Schubring; ex parte A-G (Qld)* [2005] 1 Qd R 515; [2004] QCA 418, cited
*R v Schwabegger* [1998] 4 VR 649, compared
*R v Shrestha* (1991) 173 CLR 48; [1991] HCA 26, cited
*R v Sinclair* (1990) 51 A Crim R 418; cited
*R v Suarez-Mejia* [2002] WASCA 187, cited
*R v Thomson* (1975) 11 SASR 217, cited
*R v To & Do; ex parte Director of Public Prosecutions (Cth)* [1998] 2 Qd R 166; [1998] QCA 106, cited
*R v Warby* (1983) 9 A Crim R 340, cited
*Savvas v The Queen* (1995) 183 CLR 1; [1995] HCA 29, cited

COUNSEL: A MacSporran SC with C Toweel for the Crown
M J Byrne QC for the defendant A J Hargraves
J Hunter SC for the defendant D A Stoten

SOLICITORS: Director of Public Prosecutions (Cth) for the Crown
Peter Shields Lawyers for both defendants

[1] **FRYBERG J:** Adam John Hargraves and Daniel Aran Stoten are before me for sentence, each on a count of conspiracy to dishonestly cause a loss to a Commonwealth entity between May 2001 and June 2005. They were convicted upon the verdict of a jury earlier this year. I was provided with written submissions on behalf of the Crown and joint written submissions on behalf of the prisoners, both of which were supplemented by oral submissions and by further written submissions on behalf of the prisoners.

**The circumstances of the offence**

[2] The prisoners were two of the directors and shareholders[1] of Phone Directories Company Pty Ltd ("PDC"), a company whose business was production and distribution of local telephone directories. In 1999 they made an arrangement with a Swiss firm of accountants, Strachans. Under it, money sent to a company controlled by those accountants was fraudulently claimed as tax deductions by PDC. After passing through several foreign entities controlled by Strachans in circumstances rendering it untraceable by Australian authorities, the money (less some agreed deductions) was placed in trust in separate bank accounts, originally in Jersey and subsequently in Switzerland, in proportion to the prisoners' shareholdings in PDC. The prisoners (and their wives) held debit cards for the respective accounts. Using these cards, the prisoners withdrew the money from ATMs, mostly in Australia. They did not declare the money in the accounts or the money withdrawn as income but applied the latter to their own use. With the accountants they took elaborate steps to maintain the secrecy of the arrangement. The scheme continued until mid-2005, when the prisoners' homes and offices were raided by officers of the Australian Crime Commission and the Australian Federal Police.

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1 A third director and shareholder, Glenn Luke Hargraves, was acquitted by the jury.

*The period of offending*

[3] The prisoners were acquitted by the jury on a separate charge relating to the period from June 1999 to May 2001.[2] At the trial, the prisoners' defence to both charges, virtually their only defence, was that at no time had they acted dishonestly. The Crown submitted that the verdict may be explained on the basis that the jury believed the relevant act of dishonesty was the submission of a false tax return. On the facts, no such return was lodged until after May 2001. Accordingly, the Crown submitted, the jury may have found that there was no dishonesty until after May 2001. If the jury reasoned in that manner, it was not in accordance with the directions given to them. The jury were instructed to ask themselves the questions whether the *intention* was "that … PDC would inflate the deductions in the allowable deductions section of its tax return" and "Did the relevant accused know that the inflating *would be* done dishonestly?" There is no cause to think that the jury reasoned in the manner suggested by the Crown. It must be accepted that in respect of count one, the jury were not satisfied that the Crown had proved dishonesty.

[4] It is implicit in the convictions that the jury were satisfied that the prisoners' participation in the scheme became dishonest at some time between May 2001 and June 2005. For the purposes of sentencing I must determine when that occurred. I may only make a finding which is consistent with the jury's verdict.[3]

[5] The jury were given the following direction on the question of differential verdicts on the two charges:

> "We would expect that for any one accused the verdict would be the same on each count, whether guilty or not guilty, although there is an exception to that. If you were satisfied beyond reasonable doubt that an accused acted dishonestly after about the 14th of February 2004 when the accused heard of Egglishaw being searched, but were not so satisfied for the period before then, then differential verdicts on the two charges would theoretically be possible."

No party sought any other direction in relation to differential verdicts,[4] and no party sought to have the jury questioned as to the basis for its verdict when that verdict was returned.

[6] The Crown submitted that on the evidence there were two possible events which could have produced that result. The first in time occurred in April 2002 when the prisoners received a letter from a fellow director, Mr Smibert, questioning the legitimacy of the arrangement and refusing to participate in it. The second occurred on 14 February 2004 when the prisoners learned that one of the accountants had been detained and searched by police; he was subsequently questioned by the Australian Crime Commission.

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2 The Crown laid two charges in respect of one continuing conspiracy because the law changed in May 2001, when the relevant provision in the *Crimes Act 1914* (Cth) was repealed and the *Criminal Code 1995* (Cth) came into force.

3 *R v Harris* [1961] VR 236, *R v Bedington* [1970] Qd R 353, *R v Isaacs* (1997) 41 NSWLR 374, *Cheung v The Queen* (2001) 209 CLR 1, *R v Schubring; ex parte Attorney-General* [2005] 1 Qd R 515.

4 Counsel for the prisoner Stoten sought a redirection in relation to the direction quoted, but on a basis irrelevant to the issue now under discussion.

[7] The prisoners initially submitted that 14 February 2004 represented "the 'best-case' factual scenario as far as the Crown is concerned". They submitted that dishonesty should be attributed to the accused no earlier than 24 March 2004. That was the date when Stoten met Egglishaw, a principal of Strachans, in Geneva. According to Stoten, he was then instructed thenceforth first, to cease communicating by e-mail and communicate only by telephone; and second, to cease using existing debit cards and to arrange for the use of debit cards in the names of people other than the prisoners and their wives, being persons resident outside Australia. In supplementary written submissions the prisoners submitted that the jury's verdicts could only be a reflection of the direction, which I take to be a submission that only 14 February 2004 could be the relevant date.[5]

[8] The case was long and complex; and the jury appeared diligent and attentive. In my judgment they would at least have considered the question of honesty in terms of the direction. In other words, they would have considered whether the conduct of the accused was dishonest after 14 February 2004. However, in doing so they would have taken into account evidence of events occurring up to the time stated in the direction (including receipt of the Smibert letter). They would not have considered evidence of subsequent events. On the other hand they may have considered the question on the basis initially proposed by the prisoners; the direction referred to the date in the terms of approximation. In doing so they would have taken into account evidence of events occurring up to and including 24 March 2004. In short the jury might, consistently with its verdict, have considered that the onset of dishonesty occurred in April 2002, on or about 14 February 2004 or on or about 24 March 2004. It is impossible to say on what basis the jury made its decision. Each is consistent with the jury's verdict. I hold that it is open to me to decide it on any of the bases already discussed without inconsistency.

[9] The date has some importance in the sentencing process because it affects the magnitude of the fraud the object of the conspiracy.

[10] The Crown submitted that it was unlikely that the jury would have made their finding only on the basis of the (precise) date suggested in the direction because the direction specifically stated that the result was only a theoretical possibility. It also submitted that if this were the basis of the verdicts, the co-accused Glenn Hargraves would also have been convicted. In my judgment neither reason is convincing. "Theoretically" in the context of the direction related to the possibility of differential verdicts; it was not used in the context of distinguishing among the various possible dates for the onset of dishonesty. The acquittal of Glenn Hargraves could have been on any number of bases. I reject these submissions by the Crown.

[11] The earliest of the three possible events was the receipt of the Smibert letter. The letter was sent in relation to a decision which had been made to issue shares in PDC to Mr Smibert. Mr Smibert wrote:

> "You will recall, that upon learning of company monies being sent to Jersey, that I expressed my concern. Admittedly, financial management is not among my talents. Despite the assurances given about the propriety of such an arrangement, I elected not to utilise the 'Jersey' facility personally. This was not a criticism of any of

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5 I have had these submissions marked AA for identification.

> you. When described as 'ignorant' on the subject, I accept that, but nevertheless I question the ethics and legitimacy of such an arrangement.
>
> At the time that the share agreement was established, it was verbally agreed that I would not use the 'Jersey facility' as I elected to pay tax on all my dividend. This week, however, I learned that my declaring the full amount of my dividend to the A.T.O. would jeopardise my fellow share holders standing with the Taxation dept. It is surely your business how and when you pay your tax but I am now left in a regrettable position.
>
> One must ask, if indeed these are legitimate shares, why can't I legitimately declare them without implicating others? And what if I chose one day to sell or bequeath my shares? Would the buyer or beneficiary have to look over his shoulder each time he used an A.T.M. and not be able to bank the money he withdrew? Ignorant as I may be, I cannot feel comfortable about going down that path.
>
> So now what do I do? I feel any security I have had to this point has been misplaced. In fact I feel somewhat devastated as to my future financial status. I am not writing this to be dramatic or sensational and I assure you I have given much thought and prayer to this whole matter. I am also not bitter or angry but I am extremely disappointed about this whole situation. I do not want to loose what I believe I have earned and am entitled to and indeed what I have relied on, but I am prepared to if it comes to it.
>
> If you can see how my financial security can be salvaged by the legitimisation of my 4% shares, I would be most grateful for your comments.
>
> Based on our disparity over the 'Jersey issue' and the fact that will be leaving for three years, I have attached a letter of my resignation as company director."

[12] Adam Hargraves claimed that before the letter was sent he had discussions with Smibert by telephone and that Smibert's objections were ethical, not legal. He testified that he knew the letter was being sent, but that he did not read it at the time. He implied that he did not receive it. He testified that in his conversations with Smibert, the latter said that he did not have questions with the legitimacy of the structure. In cross-examination he claimed he was not privy to a lot of the discussions with Smibert. He said that Smibert was wrong to describe the money as a dividend.

[13] Stoten testified that in the weeks before the letter he had a number of conversations with Smibert in which the latter said he was uncomfortable with the scheme. Asked if Smibert disclosed the basis for his uncomfortable feeling, he said that there was:

> "... a risk that the loophole could be closed down and so he just generally didn't want to be a part of any sort of, I guess if there had been, you know, a stoush at the ATO or something like that something along those lines it would have concerned him, so."

He said that he thought at the time that Smibert did not understand the structure.

[14] Smibert testified that in April 2002 Stoten told him that he would need to receive his dividends the same way they were receiving theirs (i.e. by cash from ATMs) or it would jeopardise their position with the taxation department. In cross-examination he said that he was told by either or both of the prisoners that everything about the structure was "completely above board". They assured him it was legal. His discussions were with both the prisoners, but primarily with Adam Hargraves. He accepted the legality of the arrangement. It was not put to him that his uncomfortable feeling about the scheme resulted from a desire not to be part of any sort of stoush with the ATO.

[15] Stoten did not deny receiving and reading Smibert's letter. Hargraves attempted to do so, but in my judgment he lied. I am satisfied that he read it at about the time it was written. Consistently with the finding of the jury I accept that until the letter was received neither of them doubted the legality of the scheme. After receiving the letter, neither prisoner took any step to verify this, despite the terms of the letter. If, as Hargraves claimed, Smibert's objections had to that point been solely ethical, it must have come as a shock to see him question the legitimacy of the scheme in writing. They would presumably have been surprised to see him describe the payments as dividends. They would have been surprised at the suggestion that their standing with the tax department would be jeopardised were Smibert to declare the full amount of his dividend. In what, they must have wondered, would they be "implicated"? Smibert was an older man, a man of the church, a friend of Hargraves since his childhood and a fellow director; he was, he told them, somewhat devastated as to his future financial position and extremely disappointed about the situation, to such an extent that the disagreement over the issue was cited as a reason (although not the primary reason) for his resignation as a director.

[16] How would honest men have reacted to such an expression of views by a respected and trusted co-director? In my judgment they would at least have sought confirmation from PDC's accountants, Lee Garvey, that the scheme was legitimate. Lee Garvey were never consulted. True, Smibert lacked expertise in these matters; but in my judgment honest men would not have ignored his letter. Moreover Smibert was clearly distressed. Had they continued to believe that the scheme was legal, they would have referred him to the source of that belief, Feddema, or to Lee Garvey. They did not do so. Their evidence about the relevant events was unreliable. I accept Smibert's evidence that his discussions were primarily with Hargraves and reject the latter's evidence that he was not privy to a lot of the discussions. Smibert did not suggest he had any concern about a stoush with the ATO. I find that Stoten invented that part of his evidence.

[17] I infer from their conduct that upon receipt of the letter, they appreciated the very real possibility that the scheme was illegal, and that they were at least indifferent to that possibility. I am well satisfied that from that point forward their behaviour was dishonest.[6]

[18] There is no suggestion in the evidence that any subsequent event occurred which might have restored their belief in the legality of the scheme.

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6 *Evidence Act 1977* (Qld), s 132C.

*The amount of the putative loss*

[19] PDC lodged four tax returns between 12 April 2002 and 9 June 2005. They were its returns for the 2001, 2002, 2003 and 2004 financial years. The following table shows the amounts overclaimed by PDC in those years, the amount of tax which would have been payable had the overclaims not been made and the loss to the Commonwealth (entity) in respect of company tax:

**CALCULATION OF LOSS OF COMPANY TAX[7]**

| | 2000 | 2001 | 2002 | 2003 | 2004 | TOTAL 2001-4 |
|---|---|---|---|---|---|---|
| **PDC Pty Ltd** | **AUD $** | **AUD $** | **AUD $** | **AUD $** | **AUD $** | **AUD $** |
| Taxable income/losses deducted as returned | -224,851 | 289,519 | 420,194 | -254,456 | 409,896 | |
| Overclaimed deductions for directory listings | 4 14,559 | 911,997 | 1,348,211 | 1,193,452 | 1,358,471 | 4,812,131 |
| Correct taxable income before prior year losses | 189,708 | 1,201,516 | 1,768,405 | 938,996 | 1,768,367 | 5,677,284 |
| Losses correctly brought forward from previous year | -1,405,240 | -1,215,532 | -14,016 | 0 | 0 | |
| Losses correctly carried forward to next year | -1,215,532 | -14,016 | 0 | 0 | 0 | |
| Correct taxable income | 0 | 0 | 1,754,389 | 938,996 | 1,768,367 | 4,461,752 |
| Tax correctly payable 30% | 0 | 0 | 526,317 | 281,699 | 530,510 | 1,338,526 |
| Tax payable from tax return | 0 | 0 | 0 | 0 | 0 | |
| **Loss to Commonwealth** | **0** | **0** | **526,317** | **281,699** | **530,510** | **1,338,526** |

[20] As I understand the submissions, the prisoners contend that, had PDC not overclaimed the deductions, the overclaimed amount would have been paid to the shareholders as franked dividends. They would have paid tax on those dividends at 48.5% but would have received franking credits equivalent to 30% of the dividends. Consequently the shareholders would individually have paid further tax of about

(0.485 – 0.30) * $4,812,131 = $890,244

The total amount of tax which would eventually have been paid had the conspiracy not taken place would therefore have been about $2,228,770. In my judgment that is the amount of the loss referred to in s 135.4(3)(a) of the *Criminal Code 1995* (Cth). I accept the submission for the prisoners that any other methodology would involve double counting.

[21] In calculating the foregoing figures I have ignored the fact that Stoten did not hold shares personally, but through a family trust. The parties seem to have ignored that fact in this context and I take it that it makes no material difference in sentencing terms. I have also included the amount of tax which would have been paid by Glenn Hargraves, as that is part of the loss which would have resulted from the conspiracy by the prisoners. Each is criminally responsible for the whole of the

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7 Source: Exhibit CJST, Table 21.

putative loss, not simply for the amount of benefit which he personally would have received.

[22] The Crown submitted that the amounts in question were larger than the foregoing amounts. I do not understand the source or method of calculation of the figures in para 109 of the Crown's submissions and have not found those figures helpful.

*Payments to the Australian Tax Office*

[23] In fact the Australian Tax Office has not attempted to assess the participants on any such basis. It has assessed them on the basis of what actually occurred. It has assessed tax payable in respect of the years 2001-2004 at about $3,536,156. It also assessed penalty tax and interest. The total assessed was about $8,884,410. That amount included about $861,460 paid by Adam Hargraves and $183,061 paid by Stoten as penalty tax. Legal challenges to these assessments are pending, but in January 2010 they were paid in full either by PDC, Glenn Hargraves and the prisoners respectively or by the Official Trustee in Bankruptcy pursuant to an order under the *Proceeds of Crime Act 2002* (Cth).

[24] I accept the submission on behalf of the prisoners that it is relevant to take these penalty payments into account in assessing the sentence to be imposed.

**Sentencing principles**

[25] A non-exclusive list of matters to which the court must have regard when passing sentence is set out in s 16A of the *Crimes Act 1914* (Cth). Not all are relevant in the present case. The court must impose a sentence of the severity appropriate in all the circumstances of the case[8] and must not pass a sentence of imprisonment unless satisfied that no other sentence is appropriate in those circumstances.[9]

[26] *Conspiracy*. The Crown submitted and the prisoners accepted that sentences for conspiracies are usually imposed by reference to what was actually done in the transaction of the conspiracy.[10] In the present case the prisoners implemented the conspiracy over a period of more than three years. Hargraves benefited from it throughout the relevant period to a much greater extent than Stoten. Stoten was responsible for the running of the scheme after Hargraves became less active in the affairs of PDC in 2000.

[27] *Imprisonment*. Both prisoners accepted the inevitability of a term of actual imprisonment. No other sentence would be appropriate because of the magnitude of the potential loss to the Commonwealth, the duration of the offending, the sophistication of the offending conduct and the need for general deterrence.

**Hargraves**

[28] Hargraves was born on 29 May 1971. He was therefore aged between 31 and 34 years at the time of the offence. He is currently married. His wife is pregnant with

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8 *Crimes Act 1914* (Cth), s 16A(1).

9 *Crimes Act 1914* (Cth), s 17A(1).

10 *R v Warby* (1983) 9 A Crim R 340, *R v Kingswell* (1984) 14 A Crim R 211, *R v Narula* (1985) 22 A Crim R 409; but see *Savvas v The Queen* (1995) 183 CLR 1 at pp 5 – 6.

their first child and he has two children aged 12 and 10 from a previous marriage to whose support he contributes both financially and as a father. He has some old and irrelevant convictions for offences of disorder and resisting arrest and a substantial traffic offence history. Of most relevance is an offence in May 2008 of driving while his licence was suspended and while affected by alcohol. His attitude to the traffic laws may be inferred from the number plate on his Porsche: "IM LATE".[11]

[29] He has shown no sign of remorse for his conduct. There is little evidence of cooperation in the administration of justice. He made no admissions to police and continued to deny his offending in the witness box. He did not require all aspects of the case to be formally proved, thereby shortening the length of the trial and saving costs for both sides. His evidence was evasive and argumentative and when he was cornered, he lied. He cannot be given credit for offering to cooperate in the prosecution of other persons involved; at least one such prosecution is pending.

[30] I have been provided with a number of references which speak highly of him, many of which have been written or co-signed by employees of the corporate successor of PDC. Writers have referred to his generosity, loyalty and kindness to friends and family. He has been a generous contributor to charities, but as his counsel accepted, that fell to be modified in the light of the fact that his ability to be generous was at taxpayers' expense.[12] He is a hard worker and built the business of PDC from scratch.

**Stoten**

[31] Stoten was born on 27 November 1971. He was therefore aged between 30 and 33 years at the time of his offending. He is married with three children aged 11, 9 and 5. He has no previous convictions. He is admitted as a solicitor. He is close to his family and is badly missed by them. He is active in the life of his church and has donated large sums of money to it. He has contributed generously to charities.

[32] He too has shown no sign of remorse for his conduct. He took part in a short interview with police during the raid on his home but did not provide helpful information. On the contrary, he told significant lies. Following the raid on his home he procured staff at PDC to destroy evidence. He continued to deny his offending in the witness box. He did not require all aspects of the case to be formally proved, thereby shortening the length of the trial and saving costs for both sides. Significant parts of his evidence were untruthful. He cannot be given credit for offering to cooperate in the prosecution of other persons involved.

[33] A number of references which speak highly of him have been provided to me; a number have been written or co-signed by employees of the company. They speak of his openness and generosity and his loyalty and unselfishness. He is evidently a highly respected managing director of the company. He has been financially generous to employees, friends and family.

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11 Exhibit SEN5.

12 T1-54, l20.

**Other factors affecting sentence**

[34] *General approach*. The Crown submitted that I should approach the sentence on the basis that the prisoners knowingly agreed and entered into a complex and sophisticated scheme to dishonestly evade tax and personally enrich themselves. I reject that submission. I accept the submission on behalf of the prisoners that to adopt such an approach would be to ignore the verdict of the jury on the first charge. I shall sentence on the basis that the prisoners entered into an elaborate scheme, but did so initially without dishonesty. They did not devise the scheme to defraud the Commonwealth. I have referred to the onset of dishonesty above. That said, the prisoners persisted in dishonest conduct for more than three years until they were caught.

[35] *Families*. Imprisonment will have significant adverse consequences for their families, a matter which I must take into account.[13] However it is difficult to see that the consequences differ in any major way from those which occur to the families of every offender sentenced to jail. I note also the publicity which attended the prisoners' conviction and that the effect which it must have had on their families. It must however be remembered that the prisoners' wives held debit cards and can hardly have been unaware of the nature of the arrangements, particularly after the cards were reissued in the names of foreign nationals. Kerry Hargraves certainly, and Gry Stenson (Hargraves' second wife) and Kate Stoten probably, used the cards. As Kate Stoten put it in a telephone conversation with her husband recorded the day before she was interviewed by the ACC, "Like I mean, if they say to me have I seen it, yes I've seen the credit card, and I mean it's in someone else's fricken name, I mean how fraudulent is that?" The consequences to the prisoners' families are not matters which can carry much weight in this case.[14]

[36] *Personal deterrence*. Personal deterrence is an important factor in sentencing for offences of the present type. However in this case, there is no evidence to suggest that a heavy sentence is needed for this purpose. Neither has previously been imprisoned; it is likely both will be profoundly affected by any period of imprisonment. Hargraves' display of contempt with his number plate I treat as flashiness and braggadocio. Whatever might be the position were I sentencing him for a traffic offence, I am not satisfied that a lengthy period of imprisonment for the present offence would add to the level of personal deterrence.

[37] *Rehabilitation*. The prospect of rehabilitation is related to the question of personal deterrence. Both prisoners have been hard-working, productive members of the community with unblemished records if one disregards Hargraves' offending while affected by alcohol and his driving record. It is difficult to assess prospects of rehabilitation so soon after their refusal to recognise their guilt; but I see no reason to think that the prospect of rehabilitation is other than good.

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13 *Crimes Act 1914* (Cth), s 16A(2)(p).

14 *R v Sinclair* (1990) 51 A Crim R 418; *R v Le* [1996] 2 Qd R 516 at p 522; *R v Peters* [1997] 1 VR 489.

*General deterrence*

[38] One of the most important factors affecting sentence in this case is the need to impose a sentence which will deter others from similar conduct.[15] This factor takes on added importance in connection with offences which are particularly difficult to detect. The present is such a case. The prisoners caused PDC to send money to a London bank account owned by a company incorporated in the British Virgin Islands, purportedly for the provision of electronic services. The money was then laundered in a way which ordinarily would have been completely opaque to the Australian Taxation Office and in places (Jersey and Switzerland) beyond its jurisdiction to investigate. Much of it was repatriated anonymously in cash by the use of debit cards in machines which required no signature. Hargraves investigated investing some of it in Europe and he may have made investments. The scheme was discovered only by chance, through the carelessness of Egglishaw in bringing to Australia a computer containing detailed information about the scheme. These features place the case in a class above ordinary tax fraud. It is necessary to deter such conduct "by the imposition of penalties that those minded to defraud governmental departments will find an unacceptable risk".[16]

[39] Even apart from that aspect of the matter, general deterrence is a vital consideration in sentencing for tax fraud offences. The reason for this was explained by the New South Wales Court of Criminal Appeal:

> "General deterrence is a predominate consideration when sentencing for offences of defrauding the revenue.
>
> Appeal Courts have discussed and emphasised the seriousness of frauds committed to the detriment of the public revenue. Inevitably, the Australian system of tax collection depends upon the honesty of taxpayers and, in particular, upon their fully declaring in each year of income what their gross income is. In a free society, such as Australia, the tax collector cannot check that every taxpayer has done so. The effect of dishonesty and non-disclosure of income increases the burden on all other taxpayers and particularly those who have truly disclosed their gross income. This demonstrates the serious nature of the offences charged against the respondent and the importance when punishing such offences to put in the forefront of the principles to be applied that of general deterrence."[17]

[40] A similar point has been made by the Victorian Court of Appeal:

> "[24]It is well recognised that those who systematically defraud the public revenue of large sums of money over a substantial period should be sentenced to substantial terms of imprisonment. The regime established for the collection of goods and services tax is basically dependent on the honesty of those participating in it. In cases such as this, considerations of general deterrence

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15 It is a relevant factor despite its absence from s 16A(2): *R v To; ex parte Director of Public Prosecutions* [1998] 2 Qd R 166; *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at p 377.

16 *R v Holdsworth; ex parte Director of Public Prosecutions (Cth)* [1993] QCA 242 at p 7.

17 *Director of Public Prosecutions v Hamman*, unreported, Court of Appeal, NSW, Nos 60388 and 60457 of 1998, 1 December 1998.

> are given particular emphasis, and indeed prominence, in the sentencing process. The courts have a significant responsibility to protect the integrity of the revenue system, by imposing punishments, for deliberate and sustained fraud, which are likely to deter others who may be otherwise tempted to indulge in the type of conduct committed by the respondent."[18]

[41] *References*. Honesty has particular significance in the present case. Many of the references, including that from a Bishop of Stoten's church, the Church of Jesus Christ of the Latter-Day Saints, have referred to the integrity or honesty of the prisoner about whom they were written. I regret that I cannot in this respect give these references the weight they might otherwise deserve. The trial was fought on the issue of honesty and the prisoners were convicted by the jury. On any view, they were dishonest. Moreover they lied about their conduct on oath in an attempt to protect themselves. It must, I think, be assumed that the writers were unaware of these facts. (It would be unfair to them to assume that they did not think it dishonest to cheat on tax.) The true position is well expressed in the following passage which has the approval of both the Victorian[19] and Western Australian[20] Courts of Appeal:

> "Tax evasion is not a game, or a victimless crime. It is a form of corruption and is, therefore, insidious. In the face of brazen tax evasion, honest citizens begin to doubt their own values and are tempted to do what they see others do with apparent impunity. At the very least, they are left with a legitimate sense of grievance, which is itself divisive. Tax evasion is not simply a matter of failing to pay one's debt to government. It is theft, and tax evaders are thieves."[21]

[42] *Penalties*. I have referred above to the large amounts of money assessed by and paid to the ATO in respect of the years covered by the scheme.[22] To the extent that this money is comprised of tax properly payable and interest for late payment, I disregard it. The payments cannot in the circumstances of this case be regarded as evidence of contrition. Nor is it possible to regard such payments as a form of punishment. It is otherwise in respect of penalty tax.[23] That tax is imposed where a taxpayer has a tax shortfall caused by his or her intentional disregard of the tax legislation.[24] In the circumstances of the case the conduct giving rise to the penalty is much the same as the conduct founding the convictions. It is true that the assessment has been challenged; but I think I must proceed on the basis that the challenge will fail. It is also true that there are some differences between the figures used by the Australian Tax Office in the assessment of tax and those proved in this case. That is because under the mutual assistance treaties, material obtained by the ACC from overseas countries can be used only for the prosecution and may not be

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18 *Director of Public Prosecutions (Cth) v Rowson* [2007] VSCA 176 (citations omitted).

19 *Director of Public Prosecutions (Cth) v Goldberg* (2001) 184 ALR 387.

20 *Pearce v R* (2005) 216 ALR 690.

21 *Ibid*, at p 763.

22 Paragraph [23].

23 *R v Ronen* [2006] NSWCCA 123.

24 *Income Tax Assessment Act 1936* (Cth), s 226J.

made available to the ATO.[25] The differences are not significant. I take the tax penalties into account.

[43] *Delay*. It is not contended by the prisoners that delay is a factor of any great significance.[26] In my judgment there has been no significant delay at all.

[44] *Good character*. The prisoners' good character, generosity and charity are factors in their favour. However their weight is limited by two factors: the fact that the offence is a white collar crime and the need for general deterrence. As to the former, in *R v El-Rashid* Gleeson CJ observed, "[People with a criminal history] do not usually find themselves with the opportunity to commit [white collar] offences."[27] As to the latter, in *R v Thompson*, Bray CJ said:

> "I realise to the full that the appellant is a man of good character and worthy of respect, that he is not, in the ordinary sense of the word, a criminal, that he had no intention of harming anyone, and that imprisonment will be to him a great hardship and a great indignity. He does not stand in need of reformation all rehabilitation. But … there are offences where the deterrent principle must take priority and where sentences of imprisonment may properly be imposed, even on first offenders of good character, to mark the disapproval by the law of the conduct in question and in the hope that other people will be deterred from like behaviour."[28]

[45] *Remorse*. Although both prisoners have expressed regret at their involvement in the scheme, neither has shown any sign of genuine remorse. Their persistent attitude is that they have done nothing wrong. They made no attempt to desist from the scheme, nor did they attempt voluntarily to lodge amended tax returns to correct the position in respect of earlier years until after the raids in June 2005. On the contrary, they adopted the system of using debit cards in the names of foreign nationals and communicating with Strachans only by telephone, not by e-mail. They are exercising their rights to contest the assessments, including the penalty tax assessed.

[46] *Operation Wickenby*. The prosecution submitted that it is important to note that this matter is part of Operation Wickenby. It referred to the overall objectives of the project of which that operation is part, to the concerns of the ATO about arrangements relating to tax havens and transactions with tax havens and to statistics from the Organisation for Economic Co-operation and Development. The prisoners submitted that the fact that this matter arose out of Operation Wickenby is irrelevant. In my judgment ordinary sentencing principles are sufficient to deal with this case. There is no evidence before me to suggest that the prevalence of offences of this type has changed; and in any event, general deterrence is already a factor of major importance in my consideration. I accept the defence submission.

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25 *Mutual Assistance in Criminal Matters Act* 1987 (Cth), s 43B.

26 Compare *R v Schwabegger* [1998] 4 VR 649.

27 Unreported, Court of Criminal Appeal, NSW, No 60682 of 1994, 7 April 1995.

28 (1975) 11 SASR 217 at p 222.

[47] *Maximum penalty*. The maximum penalty for the offence is imprisonment for 10 years.[29]

*Comparable cases*

[48] That brings me to the question of comparable cases. The Crown referred to the following cases as comparable:

QLD: *R v Peterson* [2008] QCA 70
*R v Chen, Hsiao, Ngo & Truong*, Supreme Court, QLD, Douglas J, 28 August 2009

NSW: *R v Walters* [2002] NSWCCA 291
*R v O'Driscoll* [2003] NSWCCA 281
*R v Ronen & Ors* (2006) 161 A Crim R 300
*El-Charr v R* [2007] NSWCCA 16
*R v Ridley* [2008] NSWCCA 324

VIC: *R v Wheatley* [2007] VCC 718
*R v Ambrosy*, County Court, VIC, McInerney J, 22 February 2008

WA: *Ramanah v R* [2006] WASCA 112

[49] Counsel for the prisoners submitted that none of those cases was truly comparable, although they commented on four of them. They cited four other cases as comparable and since I reserved my decision the solicitors for the prisoners have forwarded two more cases. The cases are:

*DPP (Cth) v Goldberg* (2001) 184 ALR 387
*Pearce v R* (2005) 216 ALR 690
*R v Hart* [2006] QCA 39
*R v Wall* [2000] QCA 297
*R v Gregory* [2010] VSC 121
*R v Thomson*, unreported, Supreme Court, WA, INS 172 of 2009, 13 May 2010.

[50] The prisoners submitted:

> "The unique circumstances of this case mean that there will be few, if any decisions that are 'sufficiently like' it. 'Comparable' cases will be of little assistance in determining not only the appropriate level of sentence, but also the proper relationship between the head sentence and the actual custodial term."

I accept that submission. It was based particularly on the circumstance that none of the cases referred to by the prosecution involved a scheme that was honestly embarked upon. The same is true of the cases referred to by the prisoners. In my judgment that is an important point of distinction between the present case and those cited; but it is not the only one. The circumstances of the cases cited are widely variable and none, it seems to me, provides a "shining star" to guide the sentences in this case.

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29 *Criminal Code Act 1995* (Cth), s 135.4(3).

[51] For this reason I do not think it necessary to set out the circumstances of them all at length. I have read them all and they influence me in the sense that, by way of general background, they inform the exercise of the sentencing discretion. I see no benefit in comparing their details with those of the present case; the differences are numerous and obvious.

[52] *Parity*. Although no party has suggested it, I have considered whether different sentences should be imposed on the two prisoners. Hargraves stood to gain far more from the scheme than did state; but Stoten had much more to do with the implementation of the scheme in the period after their participation in it became dishonest. Stoten as a solicitor probably has more to lose; but as such he was in a better position to make an informed judgment about the scheme. There are other differences between them; but in the end I see no sufficient basis for different sentences.

[53] *Hard labour*. Imprisonment for a Commonwealth offence may generally be imposed with or without hard labour.[30] Neither party addressed this question in submissions. Given the nature of the offending, it might be thought just that the prisoners be sentenced with hard labour. However hard labour has been abolished in Queensland, where their sentences will be served.[31] Ordering it might create administrative difficulties disproportionate to the value of the sentence; or might be impractical. In the absence of submissions I am not prepared to make such an order.

*Non-parole period*

[54] By s 19AB(1) of the *Crimes Act* a court which imposes a federal sentence exceeding three years must either fix a non-parole period in respect of that sentence or make a recognisance release order. All parties in the present case submitted that I should fix a non-parole period in respect of the sentences to be imposed.

[55] In *R v Suarez-Mejia*, the Western Australian Court of Appeal wrote:

> "The nature of a non-parole period was described by Barwick CJ, Menzies, Stephen and Mason JJ in *Power v The Queen* (1974) 131 CLR 623 at 629 as being:
>
> > ' ... to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.'
>
> As was further observed by Brennan and McHugh JJ in *R v Shrestha* (1991) 173 CLR 48 at 63, after canvassing a number of authorities:
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> > 'It is clear that, although a minimum term is a benefit for the offender, it is a benefit which the offender may be allowed only for the purpose of his rehabilitation and it must not be shortened beyond the lower limit of what might be reasonably regarded as a condign punishment.

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30 *Crimes Act 1914* (Cth), s 18.

31 *Corrective Services Act 1988* (Qld), s 9.

> Moreover, the release of an offender for the purposes of rehabilitation through conditional freedom is not to be seen solely as a mercy to the offender but also, and essentially, as a benefit to the public.'
>
> While the question of a non-parole period has come to be considered in the leading authorities in the contexts of different parole legislation, the underlying principles appear to remain uniform. It follows from the nature of a non-parole period and its objectives that all matters relevant to the exercise of the sentencing discretion are again to be taken into account, although they may carry a different weight because of the different question being considered at the stage of fixing the non-parole period. For the purposes of sentence in this case regard is required to be had to such of the matters listed in s 16A of the *Crimes Act 1914 (Cth)* as are relevant and known to the Court."[32]

[56] A similar approach is taken in Queensland:

> "[45] Sections 16A(1) and (2) make it plain that all of the circumstances, including the matters in the non-inclusive list in s 16A(2), must be taken into account in making recognizance release orders just as they must be taken into account in imposing a sentence of imprisonment. In particular, it is relevant to note in these appeals that the necessary deterrent and punitive effects of sentences for serious tax fraud must be reflected both in the head sentence and also in any provision for earlier release from custody.
>
> [46] But it does not follow that the same weight should be afforded to each matter in imposing the sentence of imprisonment and in making a recognizance release order. The differences between the function of the sentence of imprisonment and that of a recognizance release order must be taken into account in assigning weight to the relevant factors. Making due allowances for the relatively slight differences identified above between non-parole periods for sentences longer than three years but less than ten years on the one hand, and release on recognizance for such sentences or for sentences of three years or less on the other hand, the principles applicable in the former case are also generally applicable to recognizance release orders. Those principles were summarised by Buss JA, with extensive reference to authority, in *Bertilone v The Queen*: provisions for early release confer a benefit upon the offender but such provisions are made in the interests of the community; the non-parole period is the minimum period of imprisonment that justice requires the offender to serve; it mitigates the offender's punishment in favour of rehabilitation through conditional freedom after imprisonment for the minimum period; and relevant factors to be taken into account in determining the length of the non-parole period include the

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[32] [2002] WASCA 187 at [48]. Although Brennan and McHugh JJ were dissenting in *R v Shrestha*, there seems to have been no disagreement about the passage quoted.

> length of the head sentence and its position in the permissible range, the seriousness of the offence and the prospects of rehabilitation, and the need to ensure that the sentence reflects the criminality involved and does not lose the important significant effect of general deterrence."[33]

[57] The question whether in sentencing federal offenders or certain classes of federal offenders there is a "norm" or desirable range of proportionality between the non-parole period and the head sentence was addressed at length in the decision of the Court of Appeal in *R v Ruha*. That was a topic upon which the decided cases in this court showed some disagreement and inconsistency. The appellant, the Director of Public Prosecutions, submitted that the correct approach to fixing non-parole periods and pre-release periods under recognisance release orders for all Commonwealth offences was to fix a period expiring after the offender has served 60%-66% of the sentence, and that a period outside that range would require most unusual factors to justify it. The court undertook "to re-examine the statutory sentencing scheme in the *Crimes Act* and the relevant sentencing principles concerning recognizance release orders."[34] After considering cases from a wide variety of jurisdictions, the court held in its joint judgment (citation omitted):

> "[47] Accordingly, and because the relevant factors and the relative differences in the weight to be afforded to each factor in the different aspects of the overall sentencing process may differ according to infinitely variable circumstances, there can be no 'mechanistic or formulaic' approach which requires sentencing judges to ensure that the proportion which the pre-release period bears to the sentence of imprisonment must or must usually fall within a range which is substantially narrower than the whole period of the imprisonment, which is the range the statute expressly contemplates for recognizance release orders. The proportions commonly encountered in the decided cases should themselves be the results of application of conventional sentencing principles to the particular circumstances of each case: the appellant's argument inverts that proper approach by requiring that the sentence in a particular case be substantially dictated by a pre-determined range unless there are unusual factors."

[58] Doubtless influenced by that decision, the Crown did not contend in either its written or its oral submissions that I should fix a non-parole period in the 60%-66% of the head sentence range. However while my decision was reserved, the Director of Public Prosecutions sent to me the decision of the Court of Criminal Appeal of New South Wales in *R v Jones; R v Hili*.[35] In that case, Rothman J, with whom McClellan CJ at CL and Howie J agreed, considered such a submission. His Honour referred to a number of the Queensland cases and quoted from *Ruha* at length, including the passages set out above. He then wrote:

> "39 In my view, the Queensland Court of Appeal have, with great respect, accurately recounted the principles applied by this

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33 *R v Ruha, Ruha & Harris; ex parte Cth DPP* [2010] QCA 10 (citations omitted).

34 *Ibid*, para [31].

35 [2010] NSWCCA 108.

> Court, namely, that the 'norm' for a period of mandatory imprisonment under the Commonwealth legislation is between 60 and 66%, which figure will be affected by special circumstances applicable to a particular offender. On any analysis, there is no basis upon which this Court ought to depart from its approach to non-parole periods.
>
> 40 Ultimately, whatever 'norm' is utilised, the task of the sentencing court is to fix and impose a sentence that appropriately fulfils the goals of punishment, deterrence (general and specific), retribution and reform. It is difficult to imagine, in circumstances where, pursuant to s 17A of the Act, a sentencing judge has come to the conclusion that a sentence of imprisonment is appropriate (and therefore that no other sentence is appropriate), that a mandatory term of imprisonment of less than 60% would be warranted, other than in special circumstances. For any serious offence, any lesser mandatory period of imprisonment would not seem properly to reflect the criminality of the conduct, except in special circumstances."

[59] The High Court has written:

> "Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong."[36]

Presumably that is why the Crown has provided the judgment in *R v Jones* to me. I accept that there is nothing special or exceptional in the present case.

[60] With respect, it is not altogether clear what Rothman J meant in the paragraphs quoted. In both he has referred to a "norm". The conventional meaning of that word is "a model or a pattern; a type, a standard" or "a value used as a reference standard for purposes of comparison".[37] It seems unlikely his Honour was using the word in that sense. Were he doing so, he would hardly have said that *Ruha* accurately recounted the principles applied by the Court of Criminal Appeal in New South Wales. An alternative meaning of "norm" in another source[38] is "mean or average" and that sense fits the context and usage by his Honour. The difference is important.

[61] Nonetheless a difficulty remains with the last sentence of the passage quoted. It applies a value judgment to serious offences in the absence of special circumstances. With great respect, it seems to me that to postulate a level of 60% or above as a desirable or standard proportion to be applied except in special circumstances is inconsistent with what was held by the Court of Appeal in *Ruha*. It is one thing to observe statistical patterns in proportionality between non-parole periods and head sentences and to use an average so observed as a factor in synthesising a sentence. Even there great care is necessary, for departures from the

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36 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at pp 151 – 2 (citation omitted).

37 *The Oxford English Dictionary*.

38 *The Macquarie Dictionary*.

average may be frequent and wide ranging. It is quite another thing for an appellate court to prescribe a range of proportionality outside which a sentence for serious offending can be proper only in special circumstances. That is the very thing which *Ruha* proscribes.

[62] Moreover it cannot be said that there is a uniform national average proportion for non-parole periods across all offences. Adsett and Pedley have convincingly demonstrated that the proportion is variable, depending on the offence and the jurisdiction.[39] If regard is to be had to precise averages, it should be on the basis of empirical research, not on the basis of impressionist diktats by appellate courts.

[63] I am not prepared to apply the dictum "For any serious offence, any lesser mandatory period of imprisonment [than 60%] would not seem properly to reflect the criminality of the conduct, except in special circumstances".[40] There are three reasons for this. First, I am bound by *Ruha* in accordance with the doctrine of precedent and I do not understand the rule in *Say-Dee*[41] to create an exception to that. Second, in my judgment the dictum is not correct. I hesitate to call it "plainly wrong" as there seems little that is plain in this area of the law, but I doubt if that makes any difference. Third, there is the fact that the prisoners will serve their sentence in Queensland. Of those with whom they will be imprisoned, only serious violent offenders and a minute number of federal offenders will be eligible for parole later than half way through their sentences. In *Leeth v The Commonwealth*, Mason, Dawson and McHugh JJ wrote:

> "It is notorious that the application of different regimes to prisoners serving their sentences in the same prison, particularly in relation to the date of release, is productive of conflict and unrest and is inimical to good prison administration."[42]

That cannot be called a special circumstance, but it does differentiate the case from those where imprisonment will be served in New South Wales. In that state, statute prescribes a ratio of no less than 75% for state offenders in the absence of special circumstances.[43]

*Pre-sentence custody*

[64] The prisoners were taken into custody on the day they were convicted, 8 March 2010. Consequently, until today they have been in custody for 93 days. The Crown submitted (without contradiction from the prisoners) that it would be appropriate for the Court to make a direction pursuant to s 159A of the *Penalties and Sentences Act 1992* (Qld). That submission is consistent with what has been done previously in this court.[44] However it did not indicate the basis upon which s 159A applied. Obviously, that section cannot apply of its own force to a federal offence. It seems to have been assumed that the section is caught up by s 16E(2) of the *Crimes Act*;

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39 Adsett D and Pedley M, *Variations in Federal Sentencing*, paper delivered to the National Judicial College of Australia Sentencing Conference, 6 & 7 February 2010, at p 7.

40 *R v Jones; R v Hili* [2010] NSWCCA 108 at para [40].

41 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

42 (1992) 174 CLR 455 at p 466.

43 *R v Jones; R v Hili* at para [32]; and see generally *Bryce v Chief Executive Officer of Customs (No 2)* [2010] QSC 125 at para [112].

44 *R v NK* [2008] QCA 403.

but that assumption is questionable. Section 159A provides neither for the reduction of the period that the prisoner has been in custody for the offence, nor for the commencement of the sentence on the day on which he or she was taken into custody. Instead, it provides for a period of credit ("imprisonment already served") under the sentence, which with irrelevant exceptions commences on the day the court imposes the imprisonment.[45] It requires a substantial straining of language to bring such a regime within the terms of s 16E(1)(a) and an almost impossible straining of language to bring it within the terms of s 16E(1)(b). A stronger argument is that s 159A is caught up by s 68(1) of the *Judiciary Act 1903* (Cth); but that argument must meet the counter argument that s 16E of the *Crimes Act*, enacted in 1990, covers the field as regards pre-sentence custody.

[65] As none of these issues were argued, I shall follow the course adopted in other cases and assume that s 159A applies.

*Sentences*

[66] Adam Hargraves is sentenced to imprisonment for 6½ years. Daniel Stoten is sentenced to imprisonment for 6½ years. For each I fix a non-parole period of 3 years 9 months. In each case I state that the prisoner was held in pre-sentence custody between 8 March 2010 and today, a period of 93 days. I declare that time imprisonment already served under the sentence I direct that the Chief Executive (Corrective Services) be advised in writing of the declaration and its details.

*Explanation to the prisoners.*

[67] The following explanation is to be provided to each of the prisoners in writing.

[68] Service of your sentence will entail a period of imprisonment of 3 years and 9 months or slightly less.[46] The Attorney-General must at the end of that period order your release from prison on parole, regardless of your behaviour in the meantime, provided you accept the parole conditions.[47] Unless you are then serving a sentence under a State or Territory law, you will be released pursuant to that order.[48] You will complete the service of your sentence in the community.[49] The parole order will be subject to the condition that you must, during the parole period, be of good behaviour and not violate any law and may be subject to other conditions imposed by the Attorney-General.[50] If the Attorney-General proposes that you be subject to supervision for any part of the parole period, the order will specify the day on which the supervision period ends,[51] and in that case the order will be subject to a condition that you must during the supervision period be subject to the supervision of a parole officer or other person specified in the order, and must obey all reasonable directions of that officer or other person.[52] The order will be a sufficient authority for your release if and only if you indicate your acceptance of its

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45 *Penalties and Sentences Act 1992* (Qld), s 154(1)(a).

46 *Crimes Act 1914* (Cth), s 19AL(1).

47 *Crimes Act 1914* (Cth), s 19AL(5).

48 *Crimes Act 1914* (Cth), s 19AM.

49 *Crimes Act 1914* (Cth), s 16F(1)(a).

50 *Crimes Act 1914* (Cth), s 19AN(1)(a), (c).

51 *Crimes Act 1914* (Cth), s 19AL(4)(b).

52 *Crimes Act 1914* (Cth), s 19AN(1)(b).

conditions in writing on the order or a copy of it.[53] The Attorney-General may at any time before the end of the parole period vary or revoke a condition of the order or impose additional conditions in it.[54]

[69] The order may be revoked by the Attorney-General at any time before the end of the parole period if you fail to comply with a condition of the order or there are reasonable grounds for suspecting that you have failed to comply.[55] If you are sentenced to imprisonment for more than three months for an offence committed during the parole period, the parole order will be taken to have been revoked upon the imposition of the sentence[56] and you will become liable to serve in prison the period unserved as at the date of revocation.[57] If the order is revoked by the Attorney-General, you will be liable to arrest without warrant[58] and if it is revoked because you are sentenced to imprisonment of three months or more, the sentencing court will issue a warrant for your detention.[59] If the parole period ends without the order being revoked, you will be taken to have served the part of the sentence that remained to be served at the beginning of the parole period and to have been discharged from imprisonment.[60]

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53 *Crimes Act 1914* (Cth), s 19AL(5).

54 *Crimes Act 1914* (Cth), s 19AN(2).

55 *Crimes Act 1914* (Cth), s 19AU(1).

56 *Crimes Act 1914* (Cth), s 19AQ(1).

57 *Crimes Act 1914* (Cth), s 19AQ(5), s 19AA(2); *Corrective Services Act 2006* (Qld), s 214.

58 *Crimes Act 1914* (Cth), s 19AV(1).

59 *Crimes Act 1914* (Cth), s 19AS.

60 *Crimes Act 1914* (Cth), s 19AZC(1)(b).