SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cox, Cuffe and Morrison* [2011] QSC 187
PARTIES:	**R** **v** **STEPHEN BRIAN COX** (first defendant) **JOHN REGINALD CUFFE** (second defendant) **PETER JAMES MORRISON** (third defendant)
FILE NO:	BS 704 of 2009
DIVISION:	Trial
PROCEEDING:	Sentencing
DELIVERED ON:	24 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2011
JUDGE:	Fryberg J

ORDERS:

Stephen Brian Cox

1. Sentenced to imprisonment for nine years and 11 months to commence on 29 September 2011.
2. The non-parole period is fixed for of three years and four months.
3. The court officer to hand him a notice in the form of Annexure A to these reasons.

John Reginald Cuffe

1. Sentenced to imprisonment for six years.
2. The non-parole period is fixed for of three years.
3. Time spent in pre-sentence custody from 6 May 2011 until 24 June 2011, a period of 49 days, will be time already served under the sentence.
4. The Sheriff to cause the Chief Executive (Corrective Services) to be advised in writing of the pre-sentence custody declaration and its details.
5. The court officer to hand him a notice in the form of Annexure B to these reasons.

Peter James Morrison

1. Sentenced to imprisonment for six years.
2. The non-parole period is fixed for of three years.
3. Time spent in pre-sentence custody from 6 May 2011 until 24 June 2011, a period of 49 days, will be time already served

under the sentence.
4. The Sheriff to cause the Chief Executive (Corrective Services) to be advised in writing of the pre-sentence custody declaration and its details.
5. The court officer to hand him a notice in the form of Annexure B to these reasons.

CATCHWORDS:

Criminal law – Particular offences – Property offences – Other frauds and impositions – Fraud – Defrauding the Commonwealth – Sentence

Criminal law – Sentence – Sentencing orders – Non parole period or minimum term – Queensland – Federal offenders

Criminal law – Sentence – Relevant factors – Totality – General principle

Corrective Services Act 2006 (Qld) s 214, s 194
Crimes Act 1914 s 16, s 16A, s 16B, s 16F, s 19AA, s 19AB, s 19AL, s 19AM, s 19AN, s 19AQ, s 19AS s 19AU, s 19AV, s 19AZC, s 29D.

Director of Public Prosecutions v Hamman, unreported, Court of Appeal, NSW, Nos 60388 and 60457 of 1998, 1 December 1998, considered
Director of Public Prosecutions (Cth) v Gregory [2011] VSCA 145, cited
Director of Public Prosecutions (Cth) v Rowson [2007] VSCA 176, considered
Leeth v The Commonwealth [1992] HCA 29 [21]; (1992) 174 CLR 455, considered
Pearce v The Queen [2005] WASCA 74; (2005) 216 ALR 690, considered
Postiglione v R [1997] HCA 26; (1997) 189 CLR 295, cited
R v Alateras [2004] VSCA 214, considered
R v Baunach [1999] QCA 207, cited
R v Cox [2010] QCA 262, considered
R v Hargraves and Stoten [2010] QSC 188, applied
R v Hargraves and Stoten [2010] QCA 328, considered
R v Hart [2006] QCA 39, considered
R v Howson [2001] FCA 114, considered
R v Hussein [2003] VSCA 187; (2003) 8 VR 92, considered
R v Huston No 1488 of 2009, 30/03/2011, considered
R v L [1995] QCA 444; [1996] 2 Qd R 63, cited
R v Peterson [2008] QCA 70, considered
R v Phillips & Woolgrove [2008] QCA 284; (2008) 188 A Crim R 133, considered
R v Rivkin [2004] NSWCCA 7; (2004) 59 NSWLR 284 considered
R v Ronen [2006] NSWCCA 123; (2006) 161 A Crim R 300, considered
R v Shrestha [1991] HCA 26; (1991) 173 CLR 48, cited

Ridley v R [2008] NSWCCA 324; (2008) 192 A Crim R 139, considered

COUNSEL: G Long SC and J Hanna for the Crown
D Shepherd for the 1st defendant
M Johnson for the 2nd defendant
A Nelson for the 3rd defendant

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the Crown
Legal Aid Queensland for the 1st defendant
Legal Aid Queensland for the 2nd defendant
Gilfoyle Solicitors for the 3rd defendant

[1] **FRYBERG J:** Earlier this year the prisoners were convicted by a jury of conspiracy to defraud the Commonwealth. It now falls to me to sentence them.

The circumstances of the offending

[2] It is implicit in the jury's verdict that the prisoners agreed to promote to taxpayers a variety of schemes which purportedly would minimise their income tax. They implemented that agreement, although they played different roles in the implementation, from May 1999 until February 2001. They did so via a company, National Health and Aged Care Pty Ltd ('NHAAC'), of which Cox was the effective owner and sole director and Morrison the office manager. The schemes were promoted at seminars, by brochures and by word of mouth through a number of agents. Those who wished to participate made an application to the company and paid a fee, usually at the rate of $12,000 per $100,000 of "investment". It was estimated that the company received more than $4.25 million for the 1999 and 2000 income tax years from scheme participants. Most of the balance after payment of expenses went to Cox.

[3] It is unnecessary to describe the schemes in detail. On their face they relied on provisions in the income tax legislation which allowed taxpayers to claim deductions for donations to charity, investment in retirement villages and expenditure on employee welfare arrangements. It is unnecessary to consider whether the schemes would have been legitimate if they had been operated lawfully. Had they been operated lawfully, I doubt they would have been viable. But the case was conducted by the Crown on the basis, and the jury must have found, that the schemes were actually fictitious and the documents purporting to evidence the arrangements under them were false and misleading. Putting it crudely, the arrangements which the prisoners promoted to taxpayers simply did not exist and the documents provided were mostly bogus. The accused knew these matters, although it will be necessary to consider their individual positions in more detail later.

[4] The Crown alleged that the schemes were fictitious and the documents misleading in five different respects:

> "(a) There were no lending entities and therefore no loans provided as applied for by the taxpaying participants, so as to enable funds to be applied according to the terms of the arrangements; and/or

(b) There were no genuine life bonds and/or insurance policies issued as security against the loans purportedly advanced by the finance company; and/or

(c) Receipts were issued on behalf of the Caboolture Orthodox Catholic Church College Building Fund which were false and/or misleading as to the donation of sums of money; and/or

(d) Various documents were backdated; and/or

(e) There was no genuine contemplation of investment in any retirement village concept."

The case was left to the jury on the basis that proof of any one of the particulars in paras (a), (d) and (e) would suffice on this aspect of the case. In other words one can draw from the verdict no more than that the jury were satisfied in respect only of one of those particulars. For the purposes of sentencing however, it is material to identify whether all of the particulars were correct. In my judgment they were. No loans were ever made under the scheme; there were never any life bonds or insurance policies to secure loans; receipts issued on behalf of the Caboolture Orthodox Catholic Church College Building Fund were false and misleading; numerous documents were backdated; and there was never any genuine contemplation of investment in any retirement village concept.

[5] All of the schemes involved the use of offshore entities. Most of those entities existed, but they had no involvement in the schemes. It seems that Cox became aware of their existence while working for another promoter of tax minimisation schemes, Mr Steven Hart[1] of Hart's Accounting. Documentation purportedly emanating from these entities was manufactured in Brisbane at NHAAC's premises or in a unit occupied by Cox. The documents were designed not only to deceive participants in the schemes but also to deceive the Australian Tax Office ('ATO').

[6] The ATO commenced an audit of NHAAC about the middle of 2000 and contacted many of those who had invested in the schemes. As a result a considerable number of people decided not to claim a deduction in respect of the scheme. In all, 138 of the 410 participants claimed deductions, which, had they been allowed, would have resulted in a tax shortfall of some $3.2 million. Had all of the participants successfully claimed the full amount of deductions purportedly available to them ($44.7 million), the estimated tax shortfall would have been about $16.1 million.

Cox

[7] The role played by Cox is specifically described in ex S1. Essentially he was the controlling mind and driving force of the whole operation. He was the primary salesman for the schemes and recruited others as agents to help market them. He received most of the profit from the promotion of the schemes, although the evidence does not permit a finding of precisely how much that was. He selected the overseas "names" and established the arrangements for the creation of false documentation in Brisbane. I reject the submission on his behalf that his involvement ceased about the middle of 2000. There is clear evidence of his involvement almost until the end of the charge period.

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[1] As to whom see *R v Hart; ex parte Cth DPP* [2006] QCA 39 and *Commonwealth Director of Public Prosecutions v Hart* [2007] QCA 184.

[8] Cox was born in March 1958 and was aged between 40 and 42 years at the time of offending. His criminal history included a group of offences relating to weapons, discovered by chance when search warrants were executed in relation to the present matter in 2002. He was fined in relation to that group in October 2003. A second group of offences was dealt with in the District Court in May 2009. It comprised 11 counts of misappropriation with a circumstance of aggravation committed over approximately 19 months between November 1995 and June 1997. The victims were people who had invested money with a company he promoted. The total amount of which victims were defrauded was $312,500. He was committed for trial in October 2003 but absconded on bail the following month and spent several years living under a pseudonym. He was not found until June 2008. He was convicted of the 11 offences in April 2009 after a 15 day trial and given concurrent sentences, the longest of which was imprisonment for six years. He is still in prison. He has a parole eligibility date of 29 September 2011 and his current full-term release date is 1 May 2015.

[9] If he was ever engaged in legitimate employment, no evidence of it was placed before me. I was not told whether he is presently married, but he has four adult, non-dependent children. He suffers from a medical condition called Menière's disease but that is presently well controlled by medication.

Cuffe

[10] Cuffe played a critical role in relation to the charity donations scheme and was also involved in the retirement village scheme. He indirectly benefited to the extent of about $94,000 for his troubles (indirectly because he has been an undischarged bankrupt since about 2000 and the funds were channelled for his benefit) and inferentially expected more. He had a long association with Cox, from before the commencement of the conspiracy. The false documents which he created were critically important. He was not involved on a day to day basis, but his involvement continued for substantially the whole of the period charged.

[11] Cuffe was born in Cyprus in early 1949 and grew up in Australia in a religious community. The church to which he professes his faith is a splinter group which established itself in Caboolture in about 1967. He was aged between 50 and 51 at the time of the offence. He was convicted in 1999 of being knowingly concerned in the management of a company by a bankrupt. His counsel submitted that he was a naïve and trusting person but rejected the opportunity to call him to give evidence on sentence in support of that proposition, which is inconsistent with his objective conduct. Although he issued or authorised receipts on behalf of his church's building fund, neither the church nor the building fund ever received any money. As already noted, a substantial amount of money was used for his personal benefit. There is no ground for concluding that his conduct was designed to benefit his church. I reject the submission made on his behalf that the bulk of the money was used for the church.

[12] He has a large family to which he was said to be very attentive. The youngest of his children is aged 11 and his family is said to be dependent upon him. A number of references from family members and friends speak of his loving and generous nature and the help which he gives to his community, although they do not display any serious appreciation of the true nature of his offending. Nonetheless, I infer that he is a person of good character, apart from the present offences.

Morrison

[13] Morrison began working for NHAAC about a quarter of the way through 2000. He was not involved in the schemes prior to that time. Whether he was initially aware of the extent of dishonesty which the schemes involved is unclear, but he must have known reasonably soon after commencing work for the company. His period of involvement was therefore a good deal shorter than that of his co-offenders. It was his effort which kept the schemes going, not only for new participants but also for existing ones enlisted before he was employed. None of the schemes could have lasted without his work. Like the other two, his conduct is described in detail in ex S1. I infer he was working in the expectation of a large future reward, while receiving wages for his present involvement. It was submitted on his behalf that he received nothing but modest wages which he was paid for his work. That may be so, but he admitted when interviewed that Cox had made him an offer which he could not refuse, and he gave no evidence on sentence to rebut the inference.

[14] Morrison too had no previous convictions. He was born in September 1961 and was aged between 37 and 39 at the time of the offence. He served in the regular Army from 1985 until 1992, mainly in infantry. He completed Year 12 while in the Army and gained entry to RMC Duntroon. After he graduated, I was told, he served in the "corps of military police". Surprisingly, no documents from his military record were placed before me; I infer that his file contains nothing particularly helpful to him. No references were tendered on his behalf. I am unable to draw any inferences as to his character. He has a relationship with an Indonesian lady who lives part-time in Indonesia and part-time in Australia and I was told that they had intended moving full-time to Indonesia. It was not suggested that she was dependent upon him.

General principles

[15] I reviewed many of the principles applicable to sentencing under the *Crimes Act 1914* in my sentencing reasons in *R v Hargraves and Stoten*[2], and it is unnecessary to repeat here what I there set out. I adopt the same approach. It is convenient to deal with the matters to which I must have regard[3] in turn, omitting those which are presently inapplicable. Subsequently, in respect of Cox, it will be necessary to have regard to the sentences which he is currently serving.[4]

The nature and circumstances of the offence

[16] The nature and circumstances of the offence have been described above.

Other offences committed to be taken into account

[17] No party asked me to take any other offences into account, not least because none of the accused admitted having committed any other offences. However on Cuffe's behalf it was submitted that I should consider in mitigation the possibility that he might fear further prosecution for defrauding participants in the schemes. At this late stage it seems most unlikely that any such prosecution would be considered by the Queensland Director of Public Prosecutions. In addition, I would not be

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2 [2010] QSC 188 at [25] ff. The sentences which I imposed were reduced on appeal, but only because sentencing there proceeded on a different factual basis.

3 *Crimes Act 1914*, s 16A(2)(a).

4 *Ibid*, s 16B(a).

prepared to mitigate the sentence on the basis that the prisoner "might" have such a fear.

Personal circumstances

[18] The personal circumstances of the prisoners have been described above.

Loss resulting from the offence

[19] There is no evidence that the Commonwealth suffered any loss as a result of the offences. Indeed, if penalty taxes are taken into account it may even have recovered more money than it would have done had the conspiracy never occurred. What has happened, however, is that over 400 people have collectively paid more than $4.25 million for a service and have received no service in return. At least some of them have been charged penalty tax. There is no suggestion that they have any prospect of receiving a dividend in a winding up of NHAAC. They have, in other words, lost substantial amounts of money. The cause of their loss was the prisoners' conduct constituting the present offences; but for that conduct, the loss would not have occurred. The loss is the direct consequence of the conduct, is proximate to it and there is no policy reason why it should be regarded as too remote a consequence for the purpose of this paragraph. A similar loss was taken into account in *R v Hart*[5]. As the Victorian Court of Appeal has written:

> "The size of the benefits obtained by an offender from the commission of the offence is a relevant sentencing factor even if 'benefit' is not an element of the offence as it may have a significant bearing on the moral culpability of the offender or on the need for deterrence."[6]

I shall take the participants' losses into account in the present case.

Contrition

[20] None of the accused has made any reparation to participants in the schemes, nor is there any evidence of genuine remorse. Cuffe and Morrison continue to deny dishonesty.

Cooperation with law enforcement agencies' investigations

[21] None of the prisoners cooperated with any investigations by law enforcement agencies. Cuffe and Morrison took part in recorded interviews with investigators from the ATO, but made no intended admissions of substance to them. Rather, they sought to exculpate themselves. Cox did not participate in an interview and in 2003 he disappeared under a pseudonym for almost five years.

Other cooperation in the administration of justice

[22] This is not a factor listed in s 16A of the *Crimes Act 1914*, but that list is not exclusive. It is an important factor in sentencing.[7] All three accused deserve significant credit for cooperation in facilitating the trial process. For the most part technical objections were eschewed, and the prisoners acted reasonably to facilitate the smooth running of the trial. They did so under conditions of unusual difficulty,

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5 [2006] QCA 39 [74].

6 *Director of Public Prosecutions (Commonwealth) v Gregory* [2011] VSCA 145 [41].

7 *R v Cameron* [2002] HCA 6; (2002) 209 CLR 339.

given the vast number of documents involved and the fact that a further 12 boxes of documents were disclosed by the prosecution on the eleventh day of the trial.

Personal deterrence

[23] I am satisfied that it is necessary to impose a sentence on Cox which will act as a considerable personal deterrent to future fraudulent conduct by him. On the evidence before me he is a dishonest, untrustworthy rogue. He has not disclosed what happened to the money he received (conduct which might have indicated a lessened risk of reoffending), although some of it was possibly spent on his support while living on the Gold Coast and sailing up and down the coast during the period of his disappearance.

[24] The same need does not appear manifest in relation to Cuffe and Morrison. Any sentence which satisfies the requirement to act as a general deterrent will in my view be sufficient personal deterrent to them.

Adequate punishment

[25] Any sentence which satisfies the requirement to act as a general deterrent will be adequate to punish the prisoners for their conduct. This is not a case where mitigating factors are present to such an extent as to create a risk that the punishment will not be adequate.

Character, antecedents, age, means and physical or mental condition

[26] I have dealt with these factors above. My conclusions are that Cox is not a person of good character and Cuffe (apart from this offence) is. I have not been able to draw any conclusion as to Morrison's character. That probably does not matter a great deal. The cases clearly indicate that in the context of white-collar offences, good character is not as significant a mitigating factor as it is in relation to other offences.[8]

Prospects of rehabilitation

[27] There is little evidence to indicate that any of the prisoners has good prospects for rehabilitation. They continue to deny their guilt. None gave evidence of any plans for the future which might give rise to hope in this respect. It is true that none has committed any further offence since being charged, but that fact carries little weight. Cox has been in custody and having regard to the nature of the offending, it would have been surprising had either of the other two done so.

Effect on family or dependants

[28] There is no evidence that any sentence will have an effect which could properly be taken into account under this heading, although I note the position of Cuffe's youngest child, referred to below.[9]

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8 See the cases cited at [2010] QSC 188 [44] and also *R v Rivkin* [2004] NSWCCA 7; (2004) 59 NSWLR 284 at p 410.

9 Para [36]

General deterrence

[29] It is well settled that general deterrence is a predominant consideration when sentencing for offences of defrauding the revenue.[10] Those who systematically defraud the revenue of large sums of money over a substantial period should be sentenced to substantial terms of imprisonment.[11] In *R v Hart; ex parte Commonwealth Director of Public Prosecutions*, Jerrard JA cited with approval the following passage from the judgment of Davies JA in *R v Baunach*:

> "General deterrence, as this Court has said more than once, is an important factor in cases such as this. Whilst one may doubt the general deterrent effect of sentences of imprisonment in many classes of cases, I think this is one of those in which it is of undoubted importance. It must be made clear to people in positions such as that of the respondent, who are intelligent enough to appreciate it when they are told, that the commission of offences of this kind is likely to result in a substantial term of imprisonment."[12]

The same is true of those who conspire to defraud. None of the prisoners made any submission inconsistent with these propositions.

[30] In similar vein the Victorian Court of Appeal considered the comparative importance of general deterrence:

> "53 In seeking to ensure that proportionate sentences are imposed the courts have consistently emphasised that general deterrence is a particularly significant sentencing consideration in white collar crime and that good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process. In the case of taxation offences general deterrence is also given special emphasis in order to protect the revenue as such crimes are not particularly easy to detect and if undetected may produce great rewards. 'Deterrence looms large' as the present process of self assessment reposes on the taxpayer a heavy duty of honesty. Moreover, general deterrence is likely to have a more profound effect in the case of white collar criminals. White collar criminals are likely to be rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished. Further, white collar criminals are also more likely to be first time offenders who fear the prospect of incarceration."[13]

Delay

[31] Investigation of these offences commenced in April 2001. It did not proceed expeditiously. After 15 months warrants were obtained in respect of certain banking institutions and presumably further evidence was thereby gathered. Search warrants were executed on the prisoners' residences and those of certain other

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

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

12 [1999] QCA 207, quoted at [2006] QCA 39 [76].

13 *Director of Public Prosecutions (Commonwealth) v Gregory* [2011] VSCA 145 [53] (citations omitted).

persons in July 2002 and further documents were seized from Cuffe in November of that year. What happened for the next 2½ years is unexplained. The Commonwealth Director of Public Prosecutions received a brief of evidence from the Australian Federal Police in September 2005, but it was not until over two years later that he consented to the commencement of proceedings for conspiracy to defraud. A warrant for Cox's arrest was then issued and proceedings were commenced in November 2007 against Cuffe and Morrison by way of complaint and summons. Both were released on bail and Morrison was permitted to travel to Indonesia on condition that he supply written travel itineraries to the office of the Commonwealth Director of Public Prosecutions. Cuffe sought and obtained a three month adjournment in February 2008. Cox was arrested in June of that year and after that the matter was set down for committal proceedings in November. Committal proceedings concluded in March 2009 and an indictment was presented in August 2009. The trial was listed for four weeks (the parties' estimates) in June 2010, the first date where four weeks were available, but was delisted in May that year because the time estimate had increased to six weeks. It was relisted for eight weeks to commence in February this year, the earliest available date, and duly proceeded as listed.

[32] The reasons for judgment of the Court of Appeal in *R v L* recognised that there may be circumstances of delay which operate as a mitigating factor on sentence; but only if some unfairness results to the offender from the delay. The reasons for judgment of the court included this passage:

> "It is difficult to see why lapse of time between commission of an offence and sentence should be a mitigating factor in sentence unless that delay has resulted in some unfairness to the offender. There are two obvious cases in which that will be so and in which, consequently, it has been said that that unfairness should mitigate the sentence which should otherwise be imposed.
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> The first is where there is delay between the date of apprehension of the offender, or first indication to him by some person in authority that he is likely to be prosecuted, and the date of sentence, in consequence of which the offender *may* have had his liberty curtailed or his reputation called in question or, at least, left in a state of uncertainty caused by a failure to prosecute his case more quickly. … The rationale for mitigation in these cases is analogous to that for which, in jurisdictions where a right to a speedy trial is constitutionally or legislatively guaranteed, proceedings may be stayed because of such delay. … .
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> The second is where the time between commission of the offence and sentence is sufficient to enable the Court to see that the offender has become rehabilitated or that the rehabilitation process has made good progress. … .
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> Although the respondent does not come within the second case because of his conduct in 1983 it can now be concluded, for reasons we have mentioned, that he is unlikely to re-offend. We have, however, already mentioned that factor in his favour.
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> The facts here would come within the first case only if the delay from 1983 when the complainant made his complaint to the police and told the respondent he had done so, is likely to have caused the respondent to be left in a state of apprehension until his arrest in mid-1994. It does not appear why in 1983, when the police spoke to the

> respondent about these offences, they did not then charge him with them or how the respondent felt in consequence of their failure to do so. He may, for example, have thought that when, notwithstanding a complaint by the present complainant, they proceeded to charge him only in respect of the 1983 offence, they did not intend to proceed on these much earlier offences … . If that were the case it is difficult to see how he would have suffered any disadvantage by reason of being sentenced in 1995 rather than in 1983. The burden of proving that this delay should be taken into account in mitigation was upon the respondent.
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> There may well be other bases for mitigation arising out of lapse of time between commission of an offence and sentence, involving general notions of fairness."[14]

Excessive delay between the commission of the offence and the time of sentence may be taken into account whether or not it was attributable to any fault on the part of the prosecution.[15]

[33] I am satisfied that the delay between the time of the offence and the time of sentence in the present case was excessive. The nature of the case meant that some delay was inevitable. The use of overseas entities whose very existence was in doubt added to the complexity of the investigation, and assembling and correlating the enormous number of documents was doubtless a time-consuming task. Perhaps it was felt that the cost of a prosecution could not be justified unless Cox was also charged, and he had vanished. The Crown Prosecutor informed the court that the Crown could not explain the delay in charging the prisoners "other than the matter was under consideration rightly or wrongly through that period of time." In the absence of the evidence that the delay was inherent in the nature and circumstances of the case, the finding which I have made is inevitable.

[34] Cox did not suggest that the delay was a consideration which should affect his sentence.

[35] Cuffe submitted that the delay in laying the charge had caused unfairness to him in three ways. First, had he been prosecuted promptly, the trial might have been finished and his sentence served before the development of a significant disability in his youngest child at the age of six. He would then have been available to assist with the child. Second, he has had to live with the risk of prosecution hanging over his head, knowing that it may one day happen. Third, he must now commence his sentence at the age of 61, much older than he would have been if the matter had been prosecuted promptly.

[36] As to the first ground of unfairness, it appears from ex S2 that the disability referred to was a viral illness which the child contracted in 2006. He has been left with brain damage which has caused a learning disability and hearing loss, as well as abnormal fearfulness. His mother states that for this reason education provided by mainstream schooling would not be the best option for his needs. She states that Cuffe works with him every day, reading to him and tutoring him in maths and English. She says the one-to-one attention makes all the difference to how the child views the world and his own abilities.

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14 [1995] QCA 444; [1996] 2 Qd R 63 at pp 66-7.

15 *R v Phillips & Woolgrove* [2008] QCA 284 [56]; (2008) 188 A Crim R 133 at p 147.

[37] There are two difficulties with the submission. First, the Cuffes have chosen homeschooling for all three of their school-aged children. Both of the parents are involved in this process. This makes assessing the position of the youngest child more difficult. No professional evidence has been led in support of the submission. Second, and more importantly, there is no basis for concluding that Cuffe's imprisonment now will have any greater effect on the child than it would have done had he been tried and sentenced more promptly. That being so, a conclusion of unfairness is not open on this ground.

[38] As to the second ground, there is a remarkable lack of evidence. Doubtless Cuffe would have felt some apprehension when he saw his name on the search warrant as a possible conspirator and offender, but as time went by one would expect that apprehension to have diminished. If it did not, one would have expected Cuffe to have given evidence about it; but he chose not to give evidence on sentence. A degree of apprehension is inevitable in all criminal proceedings but delay does not by itself prove the existence of such apprehension as would amount to unfairness.

[39] As to the third ground, there is no reason to suppose that imprisonment at the age of 55 or 56 is significantly easier than imprisonment at the age of 61. There is no unfairness on this ground.

[40] I conclude that no basis has been shown for treating the delay as a mitigatory factor in relation to Cuffe.

[41] Morrison submitted that he knew since early 2001 that he would be charged. That was confirmed when his premises was searched in 2002. He "wore the mental brunt" of this for a number of years. Moreover, during the period from 2002 to 2007 he converted to Islam. He has established a part-time home in Indonesia. He cited the decision of the Full Court of the Federal Court in *R v Howson*.[16] Since being charged and bailed, he has been inconvenienced every time he travels to that country by having to submit an itinerary in advance. An additional impost was that many of the witnesses were unable to remember things. Finally, there may have been other things arising from delay that he was not even aware of.

[42] As to the first of these grounds, Morrison is in much the same position as Cuffe. He chose not to give evidence on sentence and there is no reason to conclude that the delay has in any way oppressed him; certainly not to the point of unfairness.

[43] Several points may be made about the second ground. First, it is not suggested that Morrison would not have converted to Islam had he been dealt with promptly. Second, it is difficult to see how imprisonment of a Muslim convert is unfair when imprisonment of someone who had not undergone such a conversion would not be. It is not suggested that he will be unable to practice his religion in prison. Third, in relation to the submission that he has established a part-time home in Indonesia, there is no evidence of what precisely has happened. The submission may mean no more than that when he is in that country he lives at his partner's house. The facts bear little resemblance to those in *R v Howson*, which in any case was about how an appellate court should exercise its discretion to intervene "in the very particular circumstances of this case".[17]

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16 [2001] FCA 114.

17 *Ibid*, at [5].

[44] The remaining three grounds relating to delay have no substance. Having to submit a travel itinerary is trivial. There is no evidence that witnesses' forgetfulness in any way adversely affected Morrison at the trial; quite the contrary. The possibility of there being other types of unfairness is speculative.

[45] Counsel also made the point that Morrison had not reoffended in the intervening period. It is however accepted that for white-collar offences the absence of other offending carries little weight.

[46] I conclude that no basis has been shown for treating the delay as a mitigatory factor in relation to Morrison.

The parties' submissions

[47] The prosecution submitted that Cuffe and Morrison should each be sentenced to imprisonment for a period of between six years and 7½ years, with a non-parole period equal to half of the head sentence. It submitted that Cox should be sentenced to prison for between 7½ and nine years, again with a non-parole period of half the head sentence. It submitted that the sentence should commence on 30 September 2011.

[48] Counsel for Cox submitted that the appropriate range was imprisonment for a period of five to 8½ years and contended in the circumstances for a sentence of imprisonment for six years, with the non-parole period half of that. As I understood the submission it was accepted that the sentence should commence on 30 September 2011.

[49] Counsel for Cuffe submitted that the top of the range for his client was imprisonment for 7½ years, and that the term imposed should be substantially less than that. He described the scheme as bogus and unsophisticated and his client as financially inexperienced and a man well regarded in the community.

[50] Counsel for Morrison submitted that any imprisonment which was imposed should be wholly suspended. He declined to specify any particular range of sentence. He submitted that the purposes of general deterrence should be reflected in the sentence imposed on the principal offender, not the minor accessories. He submitted that some of the witnesses arguably behaved more abhorrently than did Morrison, and they were indemnified by the prosecution.

[51] While the maximum penalty for the offences was imprisonment for 20 years, any penalty imposed should not (at least absent extraordinary factors) exceed the maximum for the substantive offence the subject of conspiracy. In this case, that was 10 years imprisonment.[18]

[52] No party submitted that a sentence other than imprisonment was appropriate in this case.[19] I am satisfied that no other sentence is appropriate in all the circumstances.

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18 *Crimes Act 1914*, s 29D.

19 *Ibid*, s16A(1).

Comparable cases

[53] The Crown provided me with a schedule of comparable cases 27 pages in length. I do not propose to recount the circumstances of all of them. I shall refer to those which seem to me to be of most assistance. Features of particular relevance are:

- whether there was a plea of guilty
- the duration of the offending
- the amount of money at risk
- the benefit to the offender
- whether any losses were recovered
- mitigating factors.

Whether promoters of fraudulent schemes should be sentenced more heavily than individual participants in such schemes was not the subject of submissions to me. I therefore approach the process on the basis that there is no reason to regard the prisoners' behaviour as displaying a greater level of criminality; but equally, no reason to regard it as displaying a lesser level.[20]

[54] Counsel for Cuffe also cited the decision of Mullins J in *R v Huston*[21]. The Commonwealth Director of Public Prosecutions has appealed in that matter and it would not be appropriate for me to discuss it in detail. It suffices to say that I do not think the sentences there imposed would be appropriate in the present case.

[55] Counsel for Morrison cited *R v Hussein*[22] and *R v Alateras*.[23] Both were prosecution appeals, but each was much less serious than the present case; and in the latter, the circumstances were described by Eames JA as unique. I do not think it helpful to refer to them in detail. Counsel also relied on *R v Goldberg*, for this proposition:

> "Each of those three secondary offenders, if I could put it that way, received wholly suspended sentences, your Honour, so that should be seen as within range for the accused Morrison."

The decision does not support that proposition. The only matter before the Victorian Court of Appeal was an application by the principal offender. Neither side appealed the sentences imposed on the other offenders and no approval of the sentences imposed upon them at first instance can be gleaned from the reasons for judgment. Moreover it is impossible to assess their criminality from the information in the reasons. All that appears about them is this: "His three co-offenders became involved at his instigation, performed minor roles under his direction and were all heavily influenced by his dominant position in the family."[24]

Peterson[25]

[56] Peterson was convicted of one count of defrauding the Commonwealth, one count of obtaining a financial advantage by deception, one count of attempting to obtain a financial advantage by deception, and one count of using forged documents. He was sentenced to concurrent terms of seven years imprisonment for each offence

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20 *Director of Public Prosecutions (Commonwealth) v Gregory* [2011] VSCA 145 [42].

21 No 1488 of 2009, 30/03/2011.

22 [2003] VSCA 187; (2003) 8 VR 92.

23 [2004] VSCA 214.

24 [2001] VSCA 107 [54]; (2001) 184 ALR 387 at p 398.

25 [2008] QCA 70.

with a non-parole period of three years and six months. The offences were committed as part of a scheme to obtain refunds of goods and services tax. They took place over a period of 3½ years and the amount involved (including the amount the subject of the attempt) was some $817,000. None of this was recovered. The forged documents were used to deceive an ATO auditor. He was aged 42 at the inception of the scheme and 49 at the time of sentencing. He had a criminal history for offences of dishonesty going back to 1989 and in 1998 served four months of an 18 month sentence for false pretences and making false instruments. He pleaded guilty at committal and was committed for sentence.

[57] Court of Appeal described the sentence as "a just sentence for offending as serious and persistent as this committed by a mature offender with a record of criminal dishonesty" and commented:

> "The applicant's offences were crimes of calculation rather than of passion. In cases such as the present, general deterrence is an important consideration allied to the need to protect the community, and especially its taxpayers, from the depredations of dishonest individuals. Punishment must be such as to make it clear that defrauding the community, even for large amounts of money, is not worthwhile."

Those remarks are apposite in the present case.

Hargraves and Stoten[26]

[58] The applicants were convicted on their second trial (the jury having been unable to agree at the first) of one count of conspiracy to defraud the Commonwealth. The offences were committed to implement a scheme devised by others for their company to make inflated payments for services to an overseas company, claim the payments as tax deductions and launder a large part of the payments back to the applicants in Australia. The Court of Appeal resentenced each of them to five years imprisonment with a non-parole period of 2½ years. The offences took place over a period of about one year and four months and defrauded the Commonwealth of $1.28 million. The tax was eventually paid with interest and penalty tax was also recovered.

[59] The applicants were in their early 30s and had no relevant criminal history. They provided extensive evidence of good character, but demonstrated no remorse. There was no evidence of cooperation in the administration of justice and one applicant had attempted to have evidence destroyed.

Ronen[27]

[60] The applicants were convicted after a lengthy trial of conspiracy to defraud the Commonwealth, and one of them also pleaded guilty to avoiding reporting requirements under the *Financial Transaction Reports Act 1988*. Their companies owned and operated a number of stores. They concealed a substantial proportion of the income from those stores, banking no more than 10% of the cash takings. The balance of those takings, somewhere between $15 million and $17 million, was sent overseas and no tax was paid on it. The offending took place over a period of about 10 years. The effective sentence on each was imprisonment for 8½ years with a

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26 [2010] QCA 328.

27 [2006] NSWCCA 123; (2006) 161 A Crim R 300.

non-parole period of 5½ years. They had paid the tax and also paid penalty tax of about $7.18 million, although in the absence of evidence of what it meant in real terms to them to make that payment, the Court of Criminal Appeal gave little weight to that factor. They had no prior convictions. The court did not depart from the finding of the sentencing judge that contrition and remorse had been demonstrated by the applicants, but also agreed with him that the offending was "within the worst category given the length of time over which the conspiracy operated, the amount of money defrauded from the Commonwealth and the manner in which the fraud was carried out".[28] Appeals by the applicants and by the Crown were dismissed.

Ridley[29]

[61] After a trial the applicant was sentenced to a total of somewhat under eight years imprisonment on nine counts of defrauding the Commonwealth and three of attempting by deception to dishonestly obtain a financial advantage from the Commonwealth. He dishonestly made false claims for refunds of goods and services tax in 12 business activity statements submitted on behalf of companies controlled by him over a period of five months, conduct described by the Court of Criminal Appeal as brazen. The total amount of tax claimed to be the subject of refund in the 12 charges was $2,858,160. The ATO paid over the claimed refunds for the first nine BASs, totalling $1,746,582, none of which, it seems, was recovered. However, it did not pay over the amounts claimed in the last three BASs, totalling $1,111,578. He had no prior convictions and good prospects of rehabilitation. The court found no error in the weight given by the sentencing judge to considerations of general deterrence and dismissed the appeal.

Hart[30]

[62] Hart was convicted by a jury of nine counts of defrauding the Commonwealth and another count of fraud under the Criminal Code of Queensland. He was sentenced to seven years imprisonment with a non-parole period of two years and nine months. The non-parole period was adjusted downward from half of the head sentence to take into account imprisonment served in respect of an earlier conviction on other charges of which Hart was ultimately acquitted. He was an accountant and tax agent and defrauded the Commonwealth by lodging tax returns for clients containing false claims for deductions. The alleged deductions related to expenditure on so-called employee retention plans. It is unnecessary to describe the scheme in detail; it suffices to say that superficially it bore some resemblance to, and may have been the inspiration for, the employee welfare plans which were promoted by the prisoners. The essence of the fraud lay in the fact that Hart represented to the Commissioner of Taxation that payments for insurance bonds had been made in the relevant year when no such payments had in fact been made. The false claims led to an under-assessment of tax exceeding $750,000. In due course this was recovered from the taxpayers, together with interest, late payment tax and penalty tax. The State count related to the misappropriation of $335,000 paid by the taxpayers and intended to be used for the purposes of the scheme, which Hart in fact used for his accountancy practice when cash flow difficulties arose. Neither that amount nor the penalty tax levied on the clients was recovered. Hart's application for leave to appeal against sentence was refused.

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28 *Ibid*, at p 316 [65].

29 [2008] NSWCCA 324; (2008) 192 A Crim R 139.

30 [2006] QCA 39.

Gregory[31]

[63] The respondent, a solicitor, was convicted after a two week trial of conspiracy to dishonestly cause a risk of loss to a Commonwealth entity. He was acquitted of two counts of defrauding the Commonwealth which apparently related to an earlier period. He was sentenced to imprisonment for two years and ordered to be released on recognizance of $5,000 after 12 months. He conspired with one taxpayer (Wheatley) and two persons overseas for the taxpayer falsely to claim a deduction of $400,000. As a result Wheatley evaded $194,000 in tax for the relevant year. The respondent used his position as a solicitor in the relevant offending conduct and received a commission of $22,000. He paid a pecuniary penalty of nearly $27,500 but showed no contrition for his conduct. On appeal by the Commonwealth Director of Public Prosecutions the Court of Appeal held that the sentence imposed at first instance fell well short of meeting the relevant considerations, describing it as "egregiously disproportionate".[32] It held that a head sentence in the range of four to six years imprisonment with a requirement to serve between three and four years would have been appropriate.[33] It urged caution in relation to earlier (semble Victorian) judgments in this area:

> "54 In many if not most cases, imprisonment will be the only sentencing option for serious tax fraud in the absence of powerful mitigating circumstances. A sophisticated degree of planning accompanied by a lack of contrition should ordinarily lead to a more severe sentence of imprisonment. But despite the recognised importance of general deterrence, tax fraud has not always been as severely enforced as other forms of criminality. Over a decade ago this court, constituted by Winneke P, Brooking and Callaway JJA observed in R v Nguyen and Phan that the seriousness of the offence of defrauding the Commonwealth of income tax 'has not always been sufficiently reflected in the sentence passed'."[34]

Pearce[35]

[64] The three appellants (Tieleman, Pearce and Wharton) were sentenced to imprisonment for five years subject to an order for release on recognizance after serving 18 months. They had been convicted after an eight week trial of conspiring with two other men (Wahby and Aistrope) to defraud the Commonwealth. The complex arrangement was described by Malcolm CJ:

> "10 The scheme in its final form involved the sale of franchises to investors for a total of $39,500 of which $29,500 was lent to investors by the company associated with Wharton. In the marketing of the scheme, it was represented as one which would result in a tax rebate to investors of up to $18,810 in the year of investment, of which the franchisee would pay $10,000 to the franchisor which, added to the proceeds of the loan, would pay for the franchise.

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31 [2011] VSCA 145.

32 *Ibid* at [59].

33 The court dismissed the appeal because of the position adopted by the prosecution at first instance, delay, and the fact that the respondent had already been released.

34 Citations omitted.

35 [2005] WASCA 74; (2005) 216 ALR 690.

> 11 A part of the scheme as marketed was an arrangement for an investor on payment of an initial amount of $675 by way of an indemnity fee and an annual payment of $150 to limit his or her liability to repay the $29,500 loan. Further, the investor was to provide authorisation to the company associated with Wharton to pay the loan moneys to the franchisor. The intended effect of the first set of arrangements was to make the loan a non-recourse arrangement, which would appear to the taxation authorities to be a recourse arrangement, an appearance which was crucial to the tax rebate sought; while the effect of the payment authorisations was intended to create an appearance of payments where none were to be made.
>
> 12 In the event, a total of 1160 franchises were sold. Had the scheme worked as the five participants had intended, taxation rebates totalling approximately $20 million would have become available, which would have produced a total benefit to those promoting the scheme about $14 million and a net benefit to Aistrope and Wahby of approximately $6 million. In the event, the franchisor was selected for a taxation audit, and after refunds in an initial amount of $1,589,540 had been paid, further refunds were stopped."

[65] The conspiracy was apparently inspired by Aistrope and Wahby, who pleaded guilty and were not involved in this appeal. Tieleman and Pearce were chartered accountants. The sentencing judge found that Wharton had deceived them, that he had wilfully misrepresented to them the financial standing of his companies and that without their knowledge, he had orchestrated two elaborate round robins in respect of the loan arrangements. He described Wharton as a financial rogue and the Court of Appeal accepted that his conduct was more serious than that of his co-offenders. They submitted on appeal that the sentences imposed on them were manifestly excessive having regard to their previous good character, the catastrophic effect of conviction upon their business and future occupations and the acknowledged the lack of any need for personal deterrence.

[66] Steytler JA (for the court) described the sentence imposed on them as "entirely appropriate".[36] He did not use the same description in relation to the sentence imposed on Wharton. Wharton had received the same sentence as the others because his wife was dying from an incurable disease, at a very advanced stage such that there was a very real prospect that she might die while he was in prison. His Honour expressed no view on what would have been an appropriate sentence but for this fact. In the absence of a prosecution appeal he did not consider whether mitigation for this reason was appropriate. He simply held that the ground was not made out.

Assessing the sentences

[67] I take into account all of the foregoing considerations, although I do not attempt to summarise all of them in the following paragraphs.

[68] Cox was undoubtedly the ringleader of the conspiracy. His culpability was greater than that of the others by a considerable margin. He gained the most benefit from

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36 *Ibid*, at [343].

the scheme. Any sentence imposed on him must give weight to the need for personal deterrence as well as for general deterrence. It must be adequate to express the community's denunciation of his conduct and to deter others from similar conduct. It must also be mitigated to reflect his significant cooperation during the trial.

[69] Cox merits imprisonment for eight years for this offence alone.

[70] Cuffe and Morrison played different roles in the implementation of the conspiracy. Cuffe played a critical role in facilitating the charity scheme. His conduct was dishonest and fraudulent, and nonetheless so because its target was the Commonwealth. His involvement in the retirement village scheme appears to have been part of a deliberate attempt by Cox to deceive investigators from the Australian Tax Office and he received a substantial amount of money for it. His professed Christianity (he wore clerical garb every day of the trial) rings hollow and hypocritical. It cannot mitigate his sentence, although his community work can and does do so. So does his cooperation during the trial.

[71] Morrison was not involved in the conspiracy for as long as Cuffe, but he was intimately concerned with implementing all of the schemes. His counsel described his conduct as stupid. So it was; but it was also dishonest and fraudulent. He continued to seek money from participants in the schemes after he became aware of their fraudulent nature. His expectations of reward were largely unfulfilled; he received little or no benefit apart from his wages. He too is entitled to credit for his cooperation during the trial.

[72] Although their roles and conduct were different, in my judgment Cuffe and Morrison should receive the same sentence. Each will be sentenced to imprisonment for six years.

Non-parole period[37]

[73] The purpose of parole is rehabilitation of the offender:

> "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. 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."[38]

That does not suggest that any substantial period of parole is required for these prisoners, particularly Cox. However two factors have ultimately led me to conclude that for Cuffe and Morrison the part of the periods of imprisonment during which they are not to be released on parole should be fixed at half the term imposed. The first is the fact that they will serve their sentences in Queensland, where the vast majority of those with whom they will be imprisoned will be released on parole not later than half way through their sentences. In *Leeth v The Commonwealth*, Mason, Dawson and McHugh JJ wrote:

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37 *Crimes Act 1914*, s 19AB(1).

38 *R v Shrestha* [1991] HCA 26 [20]; (1991) 173 CLR 48 at p 63 per Brennan and McHugh JJ.

> "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."[39]

The second is the fact that this was the course proposed in the submission of the learned Crown Prosecutor.

[74] The position of Cox requires additional consideration.

Totality

[75] Cox is already serving a period of imprisonment of six years imposed on 1 May 2009. He had in fact been in custody from 28 June 2008 but the 10 months presentence custody could not be declared under s 159A of the *Penalties and Sentences Act 1992* because it was not solely in respect of the relevant offending. The learned District Court judge took that time into account in relation to both the head sentence and the parole eligibility date (29 September 2011). The head sentence of six years, which the judge said reflected the overall criminality, was thus equivalent to a sentence of six years and 10 months. The parole eligibility date was three years and three months in that period. No reason was given for fixing that date at a point earlier than halfway through the sentence. The discrepancy was not noticed in the Court of Appeal.[40]

[76] I assume without deciding that the period up to 29 September is part of a non-parole period within the meaning of s 19(1)(b) of the *Crimes Act 1914*.[41] On that basis, that section requires the term I am to impose to commence not later than that date. But for that provision I would have ordered that the new imprisonment commence at the expiry of the full term of the current imprisonment, subject to issues of totality, because the offending was separate in time, place and victim; and I would have fixed a non-parole period equal to half of that total. Applying the section, the sentence should be partially cumulative and should commence on that date. Nonetheless, the totality principle still applies to it.

[77] "The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved."[42]

[78] Some idea of the criminality of the offending for which Cox is currently imprisoned can be gained from the sentencing remarks of Martin DCJ:

> "Your offending extended over a period from November 1995 to May 1997. You were not, at the relevant time, a director of Australian Fund & Property Managers Pty Ltd. However, I am satisfied to the required standard that you had a substantial interest in the company and that you were the driving force in the company.
> …

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39 [1992] HCA 29 [21]; (1992) 174 CLR 455 at p 466.

40 *R v Cox* [2010] QCA 262 [8].

41 See the definition of non-parole period in s 16 of the *Crimes Act 1914* and compare s 194 of the *Corrective Services Act 2006*, which provides for exceptional circumstances parole.

42 McHugh J in *Postiglione v R* [1997] HCA 26; (1997) 189 CLR 295 at p 304.

> 10 of the 11 counts involved the dishonest application of money to the use of the company. I am satisfied to the required standard that such money was used to pay the company's expenses, which included cash payments to you.
>
> Count 11 involves the dishonest application of money to your own use. You directly, and in the case concerning count 5, indirectly, induced complainants to pay over money for investment in enterprises. You never invested those funds.
>
> I am satisfied to the required standard that on occasions you concealed your offending by creating or causing to be created statements purporting to show complainants that the funds had been duly invested and that the investments were attracting substantial returns. I am also satisfied that on occasions you concealed your offending by orally informing complainants that the funds had been duly invested and were attracting substantial returns.
>
> Your misconduct was brazen and protracted. Clearly, some of the complainants could ill afford the loss which they sustained. The complainants in count 10 are a very good example of that.
>
> Those complainants ended up having to sell their unencumbered apartment and move into rental accommodation because of your offending. Mrs Londis, formerly Mrs Cunial, had to take on full-time work, having previously worked two days a week to augment the pension for her and her husband, who is now deceased. Your conduct in respect of Mr and Mrs Cunial was particularly callous and exploitative.
>
> The total amount involved in your offending is $312,500. The total amount of loss to complainants is $295,050. There has been delay in this matter. …
>
> You absconded on bail as early as November 2003. A bench warrant for your arrest issued. You were finally arrested on 28 June 2008. You have not cooperated in the administration of justice but rather you have thwarted it for some years. You have shown absolutely no remorse.
>
> …
>
> There has been nothing advanced by you which would suggest that your offending resulted from other than greed. You have no relevant criminal history whatsoever. You are now 51 years of age. Given the protracted and cynical nature of your offending, personal as well as general deterrence are important considerations in the determination of penalty in this case."

In the Court of Appeal the President noted that he showed no remorse or insight into his conduct and wrote, "His offending warranted a condign deterrent sentence." Chesterman JA noted that Cox had absconded on bail and that in conducting his defence he attempted to transfer responsibility for his frauds to two employees. The application for leave to appeal was refused.

[79] I must therefore ask myself whether a total period of imprisonment from about the end of June 2008 to about the end of September 2019[43], a period of 11 years and

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[43] The full time release date were I to impose a sentence of eight years imprisonment.

three months, with release on parole on 29 September 2015[44] (a period served of seven years and three months) is a just and appropriate measure of the total criminality of all of his offending. In my judgment it is not. The additional criminality involved in the current offence merits a total sentence increased from the current period of six years and 10 months by more than four years and five months. Such an increase would be substantially less than the head sentences imposed on Cuffe and Morrison. It would completely fail to reflect the sentencing objectives and factors to which I have earlier referred. It would create the appearance of a discount for quantity of offending.[45]

[80] Its shortness is due to its early commencement date, brought about by the technical requirements of s 19(1)(b) of the *Crimes Act 1914*, aggravated by the apparent mistake in the calculation of the current parole eligibility date. Those requirements are the product of the federal system.

[81] Nothing in the *Crimes Act 1914* manifests an intention relevantly to change the operation of the totality principle. In *R v KM* Miles AJ, with whom Santow JA and James J agreed, wrote:

> "55 Nevertheless, whilst it is sometimes difficult, if not artificial, to assess the criminality of an offence in isolation when it is only one of what are, in law, separate offences but inextricably part of the same conduct, the exercise must be undertaken. It may be that in undertaking that exercise, and being anxious to avoid double punishment, a judge may just overlook the need for the sentences as a whole to reflect the seriousness of the offender's conduct as a whole. In particular, whilst the totality principle is familiar enough and applied commonly enough in favour of an offender in order to avoid an excessive or crushing punishment, it is not to be disregarded for the converse purpose of assessing whether the overall effect of the sentences is sufficient having regard to the usual principles of deterrence, rehabilitation and denunciation.
>
> 56 In particular, when there is a series of offences, some committed on one victim, others committed on another victim, there is a special need to ensure that concurrency of sentence does not gloss over that feature … ."[46]

In my judgment that passage applies in the present case.

[82] Were full accumulation of the sentences possible in the present case Cox would be required to serve a total period of 14 years and 10 months In my judgment that would be too much. It would not be proportionate to the total criminality he has exhibited. That criminality merits a total period of imprisonment somewhat over 13 years – say 13 years and three months, which would result in a full-time release date of 28 September 2021. That would be an increase above the current effective head sentence (six years and 10 months terminating on 1 May 2015) of six years and five months. It could be achieved by imposing a head sentence for the current offence of 10 years, commencing on 29 September 2011. Such a sentence would deprive Cox

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44 The half-way point in an eight year sentence.

45 Compare *R v MAK* [2006] NSWCCA 381 [18]; (2006) 167 A Crim R 159; *R v Knight* [2005] NSWCCA 253 [112]; (2005) 155 A Crim R 252; *R v Cramp* [2010] SASC 51 [61]; (2010) 106 SASR 304, citing *R v Bruce and Hollick* [1998] SASC 6831; (1998) 71 SASR 536 at 541.

46 [2004] NSWCCA 65.

of the certainty of release on parole at the expiration of the non-parole period.[47] To avoid that consequence while retaining the utility of the sentence, a head sentence of nine years and 11 months would be required. That is the sentence which I propose to impose.

[83] That requires further consideration of the non-parole period. That period must be fixed in relation to the federal sentence only, not in relation to the combined state and federal sentences. The halfway point in the total period of imprisonment occurs on about 28 January 2015. That is a period of three years and four months into the federal sentence, which is less than halfway, but it is nonetheless appropriate in all the circumstances.

[84] It remains an open question whether the totality principle requires additional consideration of the question whether the sentence is "crushing".[48] In case it be necessary, I find that the proposed sentence is not crushing. Cox's prospects of rehabilitation are not good, but such as they are, they are not likely to be snuffed out by the proposed sentence. He will be a little under 57 years of age when he must be released on parole, so his prospects of a useful life thereafter will not have been eliminated.

Sentences

[85] I sentence Stephen Brian Cox to imprisonment for nine years and 11 months. I direct that the sentence commence on 29 September 2011. I fix a non-parole period of three years and four months in respect of that sentence. I direct that the court officer hand him a notice in the form of Annexure A to these reasons.

[86] I sentence John Reginald Cuffe to imprisonment for six years. I fix a non-parole period of three years in respect of that sentence. I state that the prisoner was held in presentence custody from 6 May 2011 until 24 June 2011, a period of 49 days, and I declare that time to be imprisonment already served under the sentence. I direct that the Sheriff cause the Chief Executive (Corrective Services) to be advised in writing of that declaration and its details. I direct that the court officer hand him a notice in the form of Annexure B to these reasons.

[87] I sentence Peter James Morrison to imprisonment for six years. I fix a non-parole period of three years in respect of that sentence. I state that the prisoner was held in presentence custody from 6 May 2011 until 24 June 2011, a period of 49 days, and I declare that time to be imprisonment already served under the sentence. I direct that the Sheriff cause the Chief Executive (Corrective Services) to be advised in writing of that declaration and its details. I direct that the court officer hand him a notice in the form of Annexure B to these reasons.

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

48 *R v Schmidt* [2011] QCA 133.

Annexure A to
Reasons for Sentence

STEPHEN BRIAN COX
EXPLANATION OF SENTENCE

Service of your sentence will entail a period of imprisonment of 3 years and 4 months or slightly less, commencing on 29 September 2011.[1] Unless you are then serving a sentence under a State or Territory law[2], the Attorney-General must at the end of that period order your release from prison on parole provided you accept the parole conditions.[3] You will complete the service of your sentence in the community.[4] 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.[5] 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,[6] 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.[7] The order will be a sufficient authority for your release if and only if you indicate your acceptance of its conditions in writing on the order or a copy of it.[8] 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.[9]

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.[10] 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[11] and you will become liable to serve in prison the period unserved as at the date of revocation.[12] If the order is revoked by the Attorney-General, you will be liable to arrest without warrant[13] 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.[14] 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.[15]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Annexure B to
Reasons for Sentence

JOHN REGINALD CUFFE AND PETER JAMES MORRISON
EXPLANATION OF SENTENCE

Service of your sentence will entail a period of imprisonment of 3 years or slightly less, commencing in effect on 9 May 2011.[1] Unless you are then serving a sentence under a State or Territory law[2], the Attorney-General must at the end of that period order your release from prison on parole provided you accept the parole conditions.[3] You will complete the service of your sentence in the community.[4] 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.[5] 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,[6] 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.[7] The order will be a sufficient authority for your release if and only if you indicate your acceptance of its conditions in writing on the order or a copy of it.[8] 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.[9]

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.[10] 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[11] and you will become liable to serve in prison the period unserved as at the date of revocation.[12] If the order is revoked by the Attorney-General, you will be liable to arrest without warrant[13] 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.[14] 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.[15]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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