

# **Stealing as a servant or public servant**

ss 378(7) and 378(6) *Criminal Code* or analogous instances of stealing

**Prior to 1 January 2014**

**Transitional Sentencing Provisions:** This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

## Glossary:

imp	imprisonment
susp	suspended
PG	plead guilty
att	attempted
ct	count
TES	total effective sentence
EFP	eligible for parole
CBO	community based order

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
22.	<p><i>Heaney v The State of Western Australia</i></p> <p>[No 2] [2013] WASCA 238</p> <p>Delivered</p>	<p>68 yrs at time sentencing.</p> <p>Convicted after early PG – 25 % discount.</p> <p>No criminal record.</p> <p>Always been in regular employment; started own accounting business at 50 yrs.</p>	<p><u>Indictment</u> Ct 1: Steal as servant. Ct 2: Steal as servant.</p> <p><u>Section 32</u> 4 x Stealing.</p> <p>The appellant was a self-employed taxation accountant and the offences occurred over a period of 10 months.</p> <p><u>Indictment</u> He had been engaged for several years by his brother, the victim, as the taxation accountant for his business. On two separate occasions the victim owed the ATO monies. The victim wrote two cheques payable to the appellant so the appellant could pay the ATO. On both occasions the appellant did not pay the funds to the ATO but used them for his own purposes. Total amount stolen was \$48,333.</p> <p>The offences only come to light several months later when the victim was informed by the ATO that the tax had not been paid.</p> <p><u>Section 32</u> The offences relate to 4 other victims, each of whom had instructed the appellant to prepare their individual tax returns. The victims each verbally agreed with the appellant that their tax refund would be paid into the appellant's bank account. The appellant would then deduct payment for the preparation of the tax return and forward the</p>	<p><u>Indictment</u> Ct 1: 18 mths imp (conc). Ct 2: 18 mths imp.</p> <p><u>Section 32</u> 6 mths imp (conc) each count.</p> <p>TES 2 yrs imp.</p> <p>EFP.</p> <p>Remorse.</p> <p>Committed at a time when under financial stress as a result of having to make greater than expected loan repayments on an investment he had entered into with his son.</p> <p>Sold his home to repay a loan he had obtained to effect restitution; Made belatedly, full restitution; in his brother's case after civil proceedings had been taken to recover it.</p> <p>Appellant's brother likely to have incurred significant fines and penalties imposed by</p>	<p>Dismissed.</p> <p>At [22] While the amount stolen is a relevant factor for sentencing purposes, it is not determinative, or even necessarily the most important consideration.</p>

			balance by electronic funds to the victim's bank account. The appellant did not transfer the balance. Total amount stolen was \$19,000.	ATO. Ceased practicing as an accountant; daughter taken over his financial affairs.	
21.	<i>The State of Western Australia v Chapman</i>  [2012] WASCA 203  Delivered 15/10/2012	<u>Chapman</u> 48 yrs at time sentencing.  Convicted after trial.  No prior criminal record.  Tertiary qualifications; excellent references and employment history.  Married to Johnston but separated at time sentencing; 2 children – 10 yrs and 5 yrs old  Instigator of the offending and recruited Johnston to help him.  Rationalised offending on basis on his belief that he was not being financially acknowledged for the work he did.  <u>Johnston</u> 48 yrs at time sentencing.	Ct 1: Steal as public servant. Ct 2: Steal as public servant. Ct 3: Obtain property by deception (Cth charge). Ct 4: Steal as public servant. Ct 5: Fraud. Ct 6: Fraud. Ct 7: Fraud. Ct 8: Steal as public servant (Chapman only). Ct 9: Steal as public servant (Chapman only). Ct 10: Fraud. Ct 11: Steal as public servant (Chapman only). Ct 12: Fraud. Ct 13: Fraud. Ct 14: Fraud. Ct 15: Steal as public servant.  Total amount stolen \$1,705,328 and 3 paintings	Ct 1: 2 yrs imp (C) 16 mths imp (J). Ct 2: 18 mths imp (C) 12 mths imp (J). Ct 3: 4 yrs imp (C) 32 mths imp (J). Ct 4: 2 yrs imp (C) 16 mths imp (J). Ct 5: 2 yrs imp (C) 16 mths imp (J). Ct 6: 2 yrs imp (C) 16 mths imp (J). Ct 7: 32 mths imp (C) 21 mths imp (J). Ct 8: 12 mths imp (C) Ct 9: 12 mths imp (C) Ct 10: 32 mths imp (C) 21 mths imp (J). Ct 11: 12 mths imp (C) Ct 12: 2 yrs imp (C) 16 mths imp (J). Ct 13: 2 yrs imp (C) 16 mths imp (J). Ct 14: 2 yrs imp (C) 16 mths imp (J). Ct 15: 16 mths imp (C) 12 mths imp (J).	<u>Chapman</u> Allowed.  TES increased to 8 yrs imp.  At [6] <i>“The need for general deterrence scarcely needs be stated. Public servants, especially high ranking ones, are entrusted to act in the community interest and not to use their position to enrich themselves. Money and property dishonestly taken is to the detriment of the community as a whole.”</i>  <u>Johnston</u> Allowed.  TES increased to 4 yrs imp.  At [92]-[113] Discussion

		<p>Convicted after trial.</p> <p>Married to Chapman but separated at time sentencing; 2 children – 10 yrs and 5 yrs old.</p> <p>Significant health problems – unresolved psychiatric issues.</p> <p>Well educated; impressive work history; considerable contribution to community as public servant.</p> <p>Willing participant and beneficiary of fraud and theft.</p>	<p>valued at \$61,000. Offending period 8 yrs. No restitution and paintings not recovered.</p> <p>Two respondents embarked on course of joint criminal conduct which saw them steal and defraud money and property in a sophisticated scheme involving false invoices and fake trust accounts.</p> <p>Offending only stopped when it was discovered.</p>	<p><u>Chapman</u> TES 6 yrs imp.</p> <p>EFP.</p> <p>No remorse.</p> <p><u>Johnston</u> TES 32 mths imp.</p> <p>EFP.</p>	<p>of comparable cases.</p> <p>At [119]-[130] Discussion of relevance of effect of sentencing on children.</p>
20.	<p><i>Colwell v the State of Western Australia</i></p> <p>[2012] WASC 196</p> <p>Delivered 8/10/2012</p>	<p>48 yrs at time sentencing.</p> <p>No prior criminal record.</p> <p>Suffers from hereditary spastic paraparesis – disease which affects mobility of lower limbs and causes muscle spasticity and pain; degenerative condition with no cure.</p> <p>Separated from wife of 13</p>	<p>Ct 1: Steal money with direction s 378(9). Ct 2: Steal money with direction s 378(9).</p> <p>Offending very serious. Total amount stolen \$1,040,743.14. Two victims. Total offending period approx 2 ½ yrs.</p> <p><u>Count 1:</u> Appellant employed as an accountant and received money into a trust fund he controlled with a direction to transfer funds to the tax office. Under that direction, appellant received \$50,550.33</p>	<p>Ct 1: 20 mths imp. Ct 2: 30 mths imp.</p> <p>TES 30 mths imp.</p> <p>EFP.</p>	<p>Dismissed.</p> <p>At [21]-[22], [63]-[70] Fact the appellant suffering from debilitating physical condition did not mean that imprisonment was not an appropriate option – prison adequately able to provide appellant with care required.</p>

		yrs; 13 yr old daughter.	<p>between 19 July 2007 and 30 December 2009. Appellant paid no money to the tax office and instead used these funds to supplement his failing investments and make modifications to his home (including the installation of heated pool). Appellant handed himself into police after a new accountant took over the account and discovered the theft. New accountant told the appellant she was going to report it to the tax office. When interviewed by the police in relation to this count, appellant admitted the offending in ct 2.</p> <p><u>Count 2:</u> Appellant was appointed accountant at a company with the responsibilities including the monthly payroll, wages, tax summaries and quarterly business statements. The arrangement between the appellant and the company provided that, on completion of the activity statements, the appellant advise the company the amount owing to the tax office, the State Revenue office and the employees' superannuation funds. The company would then transfer the amounts into the appellant's trust fund so he could then pay the relevant bodies. Between 26 September 2007 and 2 February 2010 21 electronic transfers totalling \$2,499,384.23 were made into the appellant's trust account by the company. In the same period the appellant paid a total of \$1,590,191.42 to the relevant bodies. The remaining \$990,192.81 was used by the appellant for personal investments and home modifications.</p>		
<b>19.</b>	<b><i>Zande v The State of Western Australia</i></b>	45 yrs at time sentencing. Convicted after early PG.	Ct 1: Steal as servant (\$5,000). Ct 2: Steal as servant (\$20,000). Ct 3: Steal as servant (\$34,394).	Ct 1: 12 mths imp. Ct 2: 16 mths imp. Ct 3: 16 mths imp.	Allowed. TES reduced to 2 yrs

	<p><b>[2012] WASCA 100</b></p> <p>Delivered 4/05/2012</p>	<p>No prior criminal record.</p> <p>Married; 3 children.</p> <p>Qualified accountant; excellent employment history.</p> <p>Offending partly related to undiagnosed mental condition.</p>	<p>Ct 4: Steal as servant (\$6,624.25). Ct 5: Steal as servant (27,135). Ct 6: Steal as servant (\$13,780). Ct 7: Steal as servant (\$17,700.42).</p> <p>Offending particularly serious. Total amount stolen \$124,633.67. Offending period approx 13-14 mths. Money repaid in full shortly after appellant disclosed offending (sold shares acquired with stolen money and re-financed mortgage).</p> <p>Appellant employed as financial controller in small family owned and controlled business. Appellant had complete trust of employer and became a trusted friend of the employer and his family. Appellant electronically transferred company money to his own bank accounts to finance his own share acquisitions. Some of the transfers were falsely recorded as superannuation payments. Appellant's employment was terminated and, owing to the circumstances of his termination, it was highly likely the offending would be discovered. The day after his termination, appellant disclosed offending to employer.</p> <p>When interviewed by police, readily admitted wrong-dong and assisted in investigation by identifying unauthorised transactions in spreadsheets.</p>	<p>Ct 4: 12 mths imp. Ct 5: 16 mths imp. Ct 6: 16 mths imp. Ct 7: 16 mths imp.</p> <p>TES 3 yrs 4 mths imp. EFP.</p> <p>Genuine remorse.</p>	<p>imp. EFP.</p> <p>At [33]-[43] Discussion of general sentencing principles for stealing as a servant and comparative cases.</p>
<p><b>18.</b></p>	<p><i>Dimanopoulos v The State of Western Australia</i></p>	<p>70 yrs at time sentencing.</p> <p>Convicted after fast track PG.</p>	<p>175 x Steal as servant. (one on indictment, remainder by s 32 notice)</p> <p>Offending towards high end or range of</p>	<p>TES 2 yrs imp and \$2000 fine.</p> <p>Low risk re-offending;</p>	<p>Dismissed – leave to appeal refused on papers.</p> <p>TES appropriate in</p>

	<p><b>[2011] WASCA 62</b></p> <p>Delivered 25/02/2011</p>	<p>No prior criminal record.</p> <p>Married 46 yrs at time sentencing; husband and children supportive.</p> <p>Poor health – diabetes; hypertension; chronic back pain which would make serving sentence more difficult.</p> <p>History depression and anxiety – partly causative of offending but of little mitigation as appellant knew behaviour wrong.</p>	<p>seriousness.</p> <p>Total amount stolen \$290,711.58.</p> <p>Offending period approx 6 yrs 9 mths (1999-2006).</p> <p>At time sentencing all money stolen had been repaid by appellant (appellant and husband sold home and accessed his superannuation).</p> <p>Appellant employed as book-keeper for small family run business. Appellant commenced employment in 1994 and was regarded as highly trusted employee. Thefts would occur two to three times per month and appellant would make false entries in business records to cover up her thefts.</p> <p>Appellant retired in 2006 and her replacement found discrepancies in financial records which lead to an audit being conducted and the appellant's offending was discovered. Appellant stole money to financially assist her daughters and their families as well as herself.</p> <p>Appellant's conduct had significant adverse financial impact on victims – brothers who ran business could not work out why it was struggling financially and had to make financial sacrifices to keep business afloat. Both victims suffered great stress and left business after 30 yrs as result significant adverse health problems as result of offending.</p>	<p>lack victim empathy (accepted in sentencing as being related to fact victims pursuing appellant in civil action); minimised offending; little insight into own behaviour.</p>	<p>circumstances and not open to suspend.</p> <p>At [19] Serious offence as involves abuse of position of trust – significant weight given to general deterrence.</p> <p>At [19] Ordinary disposition of sentence is one of immediate imprisonment particularly where total amount stolen substantial and involves multiple offences.</p>
17.	<p><b>McNamara v The State of Western Australia</b></p> <p><b>[2010] WASCA</b></p>	<p>35 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>No prior criminal record.</p>	<p>180 x Steal as servant.</p> <p>Serious instance of offending.</p> <p>Total amount stolen \$56, 136.</p> <p>Offending period approx 1 yr 8 mths.</p>	<p>12 mths imp each ct.</p> <p>TES 2 yrs imp.</p> <p>EFP.</p>	<p>Dismissed.</p> <p>At [17] Sentence at low end of range and offending too serious for</p>

	<p><b>193</b></p> <p>Delivered 8/10/2010</p>	<p>Married; 3 dependent children (18, 12 and 10 yrs); loving and caring mother; offending impact family emotionally and financially.</p>	<p>Individual amounts stolen ranged from \$20 to \$1590:  19 cts involved amounts \$100 or less.  141 cts involved amounts \$101-499.  18 cts involved amounts \$500-1,000.  2 cts involved \$1,000 or more.</p> <p>Appellant employed as manager of business which sold hair products. Appellant responsible for banking the cash received from daily sales. On 180 separate occasions, appellant stole portion of cash prior to banking it. Appellant was in a senior position of trust and offending occurred over prolonged period at regular intervals – significant abuse of that position of trust.</p> <p>Offending discovered after appellant’s employment ended when a reconciliation of cash takings which had been banked was done.</p>		<p>suspension of term to be open.</p>
<p><b>16.</b></p>	<p><b><i>Reynolds v The State of Western Australia</i></b></p> <p><b>[2010] WASCA 60</b></p> <p>Delivered 7/04/2010</p>	<p>38-39 yrs at time offending.</p> <p>Convicted after fast track PG – co-operated with police.</p> <p>No prior criminal record.</p> <p>Left school in yr 10; mother died when appellant 8 yrs; father died when appellant 16 yrs; single; no assets of own; resided with brother.</p>	<p>4 x Steal as servant.</p> <p>Total amount stolen \$35,000.  Offending period approx 9 mths.  No restitution made at time sentencing.</p> <p>Appellant was carer for 76 yr old man – employed for approx 18 mths prior to first instance offending. Appellant’s duties extended to cleaning, laundry and organising meals not to assisting victim with banking or paying bills – appellant illicitly gained access to victim’s money and car.  On two occasions, appellant filled out a cheque of the victim’s in the amount of \$5,000 in her name</p>	<p>12 mths each ct.</p> <p>TES 2 yrs imp.</p>	<p>Dismissed.</p>

		<p>Attempted suicide and developed eating disorder following death of father.</p>	<p>and deposited the cheques in her own bank account (cts 1 &amp; 2). Over a period of 4 mths appellant withdrew \$19,000 (amounts between \$300-1,000) from the victim's bank account from automatic teller machines (ct 3). Appellant also sold victim's car and kept the \$6,000 from the sale for herself (ct 4).</p> <p>Offending discovered by victim's niece (held power of attorney over victim's affairs).</p> <p>Appellant's conduct aggravated by victim's vulnerability, financial and otherwise, health and age – gross abuse of trust.</p>		
15.	<p><b><i>Brennan v The State of Western Australia</i></b></p> <p><b>[2010] WASCA 19</b></p> <p>Delivered 15/02/2010</p>	<p>41 yrs at time sentencing.</p> <p>Convicted after early PG.</p> <p>Financial problems began in 2001 (legal partnership dissolved due to death of partner and began solo practice).</p> <p>Separated from; did not have physical custody of children; good references.</p> <p>During period offending brother died and wife seriously ill – added to financial stress.</p>	<p>70 x Stealing. 1 x Attempt to gain benefit by deceit.</p> <p>Total amount stolen almost \$900,000. Offending period approx 5 yrs 9 mths (Aug 2001-May 2007). Victim's cheque book never recovered.</p> <p>Individual amounts stolen range from \$1,000-125,000:</p> <p>23 cts involved amounts less than \$5,000. 21 cts involved amounts \$5,000-\$9,999. 18 cts involved amounts \$10,000-24,999. 6 cts involved amounts \$25,000-49,999. 1 ct involved amount \$50,000-99,999. 1 ct involved amount over \$100,000. Gain benefit by deceit involved amount \$73,790.</p> <p>Appellant was solicitor and victim was Polish immigrant who became appellant's client following</p>	<p>Sentence range 2-3 ½ yrs imp.</p> <p>TES 7 yrs 6 mths imp.</p> <p>EFP after 5 yrs 6 mths imp.</p> <p>Depth of remorse questionable.</p> <p>Judgement contains schedule with indiv amounts stolen and sentence on each amount.</p>	<p>Dismissed.</p> <p>Individual sentences not challenged only TES.</p>

			<p>a deterioration in victim's physical and mental health. Victim had never married, had few relatives in Australia and lived alone on his farm in primitive conditions.</p> <p>In 2000, victim executed enduring power of attorney giving appellant control of his affairs. While managing victim's affairs, appellant regularly stole money from victim's accounts. The victim died on 13 Feb 2006 and no will was found. The appellant did not notify financial institutions and continued to operate now deceased victim's accounts and steal money (10 cts steal as servant and gain benefit by fraud occurred after victim's death - \$767,245 stolen while victim alive and \$129,542 stolen after victim's death). Gain benefit by fraud entailed appellant selling shares owned by deceased victim with intent keeping profits – supervising solicitor had been appointed by that stage and the appellant was not able to receive the funds. Shares were sold as all other readily accessible funds had been exhausted by the appellant's thefts.</p> <p>A complaint was made about the appellant's handling of the victim's estate and offending discovered. Appellant also struck off roll of legal practitioners. Complaint was made by victim's nieces after they contacted the appellant and told him that they had been advised by the victim that he had left his estate to them in his will. The appellant undertook to search for the will and contact the nieces. Appellant did not advise them of true value of estate, nor reveal his thefts, nor did he contact them in relation to the search for the will or the disbursement of the estate.</p>		
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			Appellant used the money to pay off his credit cards, personal loans and other debts, pay his children's school fees, catering for private functions, home improvements and holidays.		
<i>Transitional provisions repealed (14/01/2009)</i>					
14.	<p><i>Smallbone v The State of Western Australia</i></p> <p><b>[2008] WASCA 167; (2008) 187 A Crim R 57</b></p> <p>Delivered 18/08/2008</p>	<p>50 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>No prior criminal record.</p> <p>No significant history dishonesty.</p> <p>Previously struck off roll of legal practitioners – not related to offending.</p> <p>Depression – not causative and no evidence suffering at time offending.</p>	<p>Cts 1-11: Stealing. Ct 12: Fraud. Cts 13 &amp; 14: Steal funds held under direction. Ct 15: Forgery.</p> <p>Total amount stolen \$63,163. Offending period approx 2 yrs. Full restitution of money stolen.</p> <p>Although not charged stealing as servant, noted at [147] that sentences for steal as servant are appropriate to use for comparative purpose in this instance.</p> <p><u>Cts 1-11:</u> Appellant and wife ran debt collecting business. Appellant authorised collect money on behalf clients and withdraw from that expenses, fees and commission. Appellant required to pay balance to client within 45 days of receipt. Appellant drew cheques from trust account on numerous occasions to cover personal debts. Total amount stolen \$27,500.</p> <p><u>Ct 12:</u> Appellant and wife owned land in Claremont over which there was an unregistered mortgage with a</p>	<p>TES 3 yrs imp.</p> <p>EFP.</p> <p>Sentence range for Cts 1-11 was 8-24 mths imp.</p> <p>Ct 12: 2 yrs imp.</p>	Dismissed.

			<p>caveat. Appellant removed caveat by forging mortgagee's common seal and used land to as security (secured by mortgage) on loan of \$25,000.</p> <p><u>Cts 13 &amp; 14:</u> Appellant received two cheques (\$34,000 and \$1,633) under direction that be used for particular purpose or be paid to a third party. Appellant fraudulently endorsed both cheques so they were payable to himself and deposited them in his bank account.</p> <p><u>Ct 15:</u> Appellant fraudulently endorsed cheque to himself in the amount of \$15,000. The cheque was stopped before the money was deposited in his account.</p> <p>Multiple victims, breach of trust, temporary loss by one victim of security (land in Claremont).</p>	<p>Ct 13: 2 yrs imp. Ct 14: 8 mths imp.</p> <p>Ct 15: 12 mths imp.</p>	
<p><b>13.</b></p>	<p><b><i>The State of Western Australia v Bianco</i></b></p> <p><b>[2007] WASCA 197</b></p> <p>Delivered 28/09/2007</p>	<p>32 yrs at time sentencing.</p> <p>Convicted after PG.</p> <p>Single; supportive parents.</p> <p>Employed by company upon graduation from university - \$63,000 salary and fuel card.</p> <p>Offending motivated by gambling addiction.</p>	<p>297 x Steal as servant.</p> <p>Total amount stolen \$924,937.16. Offending period approx 6 yrs. \$724 restitution made at time sentencing – evidence before court that restitution in amount of \$336,000 would be paid as result of respondent's bankruptcy proceedings.</p> <p>109 cts involved amounts under \$1,000. 59 cts involved amounts \$1,000-2,000. 57 cts involved amounts \$2,000-5,000. 55 cts involved amounts \$5,000-7,500. 13 cts involved amounts \$7,500-10,000. 4 cts involved amounts over \$10,000.</p> <p>Respondent employed as company accountant for a</p>	<p>TES 2 yrs 6 mths imp.</p> <p>EFP.</p> <p>Remorseful; took full responsibility for offending; ashamed.</p> <p>6 mths imp each ct. 8 mths imp each ct. 10 mths imp each ct. 12 mths imp each ct. 12 mths imp each ct. 12 mths imp each ct.</p>	<p>Allowed.</p> <p>TES increased to 3 yrs 6 mths imp.</p> <p>At [2] Noted if not for double jeopardy considerations attached to State appeals, a higher substituted sentence would have been imposed.</p> <p>At [2]-[3] Notes devastating effect such offending has on small businesses and highlights importance of small</p>

			<p>small family run business. Respondent transferred money from company accounts into accounts held in his name, a former girlfriend's name and account of Burswood Nominees. Respondent able to hide offending through his knowledge of the company accounting systems.</p> <p>Offending discovered when an accounts assistant noticed some anomalies in the general ledger. Assistant brought anomalies to respondent's attention and was told by respondent not to mention it and that he would personally investigate the matter. Assistant noticed further anomalies and reported the matter to one of the company directors. Respondent subsequently made some admissions to a director and his employment was terminated and inquiry begun.</p> <p>Offending caused substantial financial and emotional impact and resulted in lost business and growth opportunities.</p>		<p>businesses to the community and economy as well as their vulnerability to this type offending.</p> <p>At [31]-[33] Noted that following are relevant factors in sentencing:</p> <ul style="list-style-type: none"> <li>• Degree of trust</li> <li>• Period of offending</li> <li>• Use money was put to</li> <li>• Effect on victim</li> <li>• Impact offences on public confidence</li> <li>• Effect on fellow employees</li> <li>• Effect on offender</li> <li>• Personal circumstances of offender</li> <li>• Matters of mitigation</li> </ul> <p>NB: double jeopardy applied to State appeals.</p>
12.	<i>Collins v The State of Western Australia</i>	<p>48 yrs at time sentencing.</p> <p>Convicted after PG at earliest opportunity – co-</p>	<p>75 x Steal as servant.</p> <p>Total amount stolen \$56,507.</p> <p>Offending period approx 10 ½ mths (Oct 1999-Sept</p>	<p>15 mths imp each ct.</p> <p>TES 2 yrs 6 mths imp.</p>	<p>Allowed.</p> <p>TES reduced to 1 yr 8 mths imp.</p>

	<p><b>[2007] WASCA 108</b></p> <p>Delivered 24/05/2007</p>	<p>operated with police.</p> <p>No relevant prior criminal record.</p> <p>On anti-depressants at time offending.</p> <p>Suffered heart attack 4 mths prior to sentencing.</p> <p>Born in Scotland; abandoned by mother and raised in institute until brought to Australia by father aged 19 yrs.</p>	<p>2000).</p> <p>Offending toward lower end of scale of seriousness.</p> <p>Appellant employed as a strata manager at real estate agency. Appellant drew and signed 75 unauthorised cheques from a trust account held in his employer's name and deposited them in a joint account he held with his partner.</p> <p>Appellant resigned from employment in Sept 2000 and offending discovered in mid 2004. When appellant interviewed by police in July 2004 he made several admissions – including that he used the funds for personal expenditure including holidays to Bali. Appellant claimed employer failed to pay him bonuses he was entitled to and that he stole the money to “even the ledger” – admitted he knew actions were wrong.</p> <p>Thefts occurred over extended period at regular intervals and used for lifestyle purposes.</p>	<p>EFP.</p>	<p>EFP.</p> <p>At [18] Where amount stolen substantial and where instances of multiple theft ordinary disposition is term immediate imp.</p> <p>At [22] Error to rely on guideline judgements from other jurisdictions where different sentencing principles and considerations apply.</p> <p>At [29]-[37] Miller AJA dissenting gives brief summary of comparative cases.</p>
<p><b>11.</b></p>	<p><b><i>Wilkie v The State of Western Australia</i></b></p> <p><b>[2005] WASCA 156</b></p> <p>Delivered 12/08/2005</p>	<p>48 yrs at time sentencing.</p> <p>Convicted after fast track PG.</p> <p>No prior criminal record.</p>	<p>102 x Steal as servant.</p> <p>Total amount stolen \$1,652,768.17.</p> <p>Offending period approx 7 yrs 9 mths (July 1993-May 2001).</p> <p>No restitution - \$118,314.18 recovered by CSBP after court action costing \$276,000 instigated. \$1,537,054.47 not recovered and likely to remain that way as appellant filed for bankruptcy. Individual amounts stolen range from \$744.01-68,804.98.</p> <p>Ct 1 involved amount of \$152,927.23. Cts 8, 13, 36, 43, 47 &amp; 59 involved amounts</p>	<p>TES 5 yrs imp.</p> <p>No remorse.</p> <p>Ct 1: 3 yrs imp. Cts 2-54 &amp; 56-102: 1 yr</p>	<p>Dismissed.</p>

			<p>between \$57,000-65,000. Ct 55 involved amount of \$68,804.98</p> <p>Appellant manager of shipping services business which was an operating division of CSBP. Appellant had high level autonomy and worked with limited supervision. Appellant's position carried high degree of trust and recognition within CSBP. Appellant opened unauthorised bank account in name of CSBP with himself as sole signatory.</p> <p>General Manager advised appellant in Sept 2003 that irregularities were being investigated and appellant suspended pending further investigations. Appellant denied knowledge of offending and was indignant about the inference that he was involved in the irregularities. Following investigation, appellant asked to explain a number of irregular transactions. Appellant denied involvement in irregular transactions and did not disclose existence of unauthorised bank account. Forensic accountant was then employed, at considerable expense, to collect evidence.</p>	<p>imp each. Ct 55: 2 yrs imp.</p>	
10.	<p><i>Hladin v The State of Western Australia</i></p> <p>[2005] WASCA 50; (2005) 156 A Crim R 176</p> <p>Delivered 18/03/2005</p>	<p>40 or 41 yrs at time sentencing.</p> <p>Convicted after late PG – no assistance given to police.</p> <p>No prior criminal record.</p>	<p><u>Indictment 632 of 2002:</u> 50 x Fraud.</p> <p>Total amount defrauded unclear. Offending period approx 12 mths. No restitution nor any genuine prospect of restitution.</p> <p><u>Cts 1 and 4-12:</u> Appellant, in each instance, wrote a cheque as payment for loans which had been fraudulently</p>	<p>TES 6 yrs imp (both indictments).</p> <p>3 yrs imp each ct.</p>	<p>Allowed.</p> <p>2 yrs imp substituted on each ct on both indictments.</p> <p>TES reduced to 4 yrs imp.</p> <p>EFP.</p> <p>At [30]-[32] Unable on</p>

		<p>obtained. On each occasion the appellant knew there were no funds in the account to cover the cheque and that the cheque would be dishonoured – the last two cheques were written after the account from which they were to be drawn was closed. The appellant used this as a method of deferring payment of the debt owed.</p> <p><u>Cts 13-50:</u> Appellant obtained short term loans on fraudulent premises from two companies. Appellant then solicited cheques from each company which were paid to the other company and represented by the appellant as returns on the initial loans. Total amount loaned by both companies was \$384,050.</p> <p><u>Cts 2 &amp; 3:</u> Appellant wrote cheques to be drawn from an account he knew was closed in repayment of loans he had received.</p> <p><u>Indictment 1579 of 2002:</u> 2 x Stealing. 1 x Fraud.</p> <p>Appellant offered to sell a BMW on behalf of victim (widow of appellant's friend). BMW was sold by appellant for \$46,000. Victim did not receive any funds from the sale – appellant directed purchaser to put full amount towards a debt he owed purchaser.</p> <p>Appellant also offered to arrange repairs to a Rolls Royce owned by the same victim. Instead of arranging repairs, the appellant sold the car for \$21,000. The purchaser deposited funds into an account as directed by the appellant. The victim did not receive any money from the sale of the car and,</p>	<p>3 yrs imp each ct.</p> <p>3 yrs imp each ct.</p> <p>3 yrs imp each ct. 3 yrs imp each ct.</p>	<p>facts to determine exact amount lost by 3 victims – sentencing judge sentenced on basis total amount 'invested' lost but that was not the case.</p> <p>At [37]-[43] Discussion of comparable sentences for fraud and steal as servant.</p>
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			at the time of the appeal, had not been able to secure the car's return.		
9.	<p><i>Nelmes v The State of Western Australia</i></p> <p>[2004] WASCA 191</p> <p>Delivered 12/08/2004</p>	<p>38 yrs at time sentencing.</p> <p>Convicted after fast track PG – co-operated with police.</p> <p>Serious gambling addiction – taken some steps to address.</p> <p>Married; children; well respected in community.</p>	<p>Cts 1-6: Steal as servant. Cts 7-27: x Fraud.</p> <p>Serious offending – breach of trust and premeditated – towards middle to upper range seriousness.</p> <p>Total amount stole/defrauded \$309,671.44. Offending period approx 3 yrs (Oct 2000 – Nov 2003). Restitution \$5,000 (employment termination entitlements).</p> <p>Appellant employed as financial services administrator. Created a system which allowed him to fraudulently alter cheques and direct the funds in to his personal accounts. Appellant also created fictitious company and falsely invoiced his employer for services provided by that fake company.</p> <p>Offending discovered following inquiries about an account were made of the appellant. Appellant disclosed offending and later fully co-operated with police.</p>	<p>Cts 1-27: 4 yrs 8 mths imp each ct.</p> <p>TES 4 yrs 8 mths imp. EFP after 2 yrs 4 mths.</p> <p>Significant remorse.</p>	<p>Allowed – no regard to PG or remorse and starting point too high.</p> <p>TES reduced to 4 yrs imp.</p> <p><u>Sentences on appeal:</u> Cts 1-6: 32 mths imp each ct. Cts 7-27: 16 mths imp each ct.</p> <p>At [16] Offending repeated on many occasions and that is appropriately reflected by a degree of accumulation in the sentences.</p>
8.	<p><i>R v Faithfull</i></p> <p>[2004] WASCA 39</p> <p>Delivered 16/03/2004</p>	<p>No prior criminal record.</p> <p>Severe gambling addiction; depressive disorder.</p>	<p>Ct 1: Steal as servant. Ct 2: Steal as servant.</p> <p>Total amount stolen \$18,995,212.95. Offending period approx 5 yrs 4 mths (April 1998-Aug 2003).</p>	<p>Ct 1: 5 yrs imp. Ct 2: 3 yrs imp.</p> <p>TES 5 yrs imp.</p>	<p>Dismissed.</p> <p>Sentences incorrectly structured by sentencing judge but TES imposed appropriate - Court of Appeal would have</p>

			<p>Ct 1 involved amount of \$18,152,153.85. Ct 2 involved amount of \$843,509.10. Bank not in a position to trace individual thefts and to do so would have greatly delayed sentencing – both counts occurred over same offending period.</p> <p>Respondent was manager of Karratha bank branch at time offending. Respondent transferred sums of money from bank's matured investments account into his own accounts. In order to cover up the theft, respondent transferred funds from the foreign currency suspense account into the matured investments account. Account funds stolen from was subject to audit by the respondent and the area manager.</p> <p>All money stolen was used to fund gambling addiction.</p> <p>Offending discovered when respondent voluntarily informed the bank of his behaviour – assisted bank investigate individual transactions and attempting to recover funds.</p>		<p>ordered a degree of accumulation in the sentencing but would have imposed lower terms on each ct.</p>
7.	<p><i>Smith v The Queen</i></p> <p>[2003] WASCA 235</p> <p>Delivered 12/09/2003</p>	<p>36 yrs at time sentencing.</p> <p>Convicted after PG.</p> <p>No prior criminal record.</p> <p>Six months pregnant at time sentencing – child born in prison at time appeal and appellant EFP when child 7 mths old;</p>	<p>22 x Steal as servant.</p> <p>Total amount stolen \$667,750. Offending period approx 16 mths (Nov 1999 – March 2001). Restitution of \$217,216 made at time PG (\$440,534 outstanding). Appellant bank manager on Christmas island. Local companies and people incorporated two companies for the purpose of boosting charter flights between Christmas Island and Asia – appellant made</p>	<p>2 ½ yrs imp each ct.</p> <p>TES 2 ½ yrs imp.</p> <p>EFP.</p> <p>Unlikely to re-offend; remorse.</p>	<p>Dismissed.</p> <p>Only failure to suspend term challenged on appeal.</p> <p>At [27] General deterrence primary consideration where stealing deliberate, systematic and planned.</p> <p>At [41] Each sentence of</p>

		husband supportive.	<p>director of both companies and her husband held shares in one. Appellant not remunerated for role of director and was responsible for management of one company's financial affairs. Appellant opened a bank account at the branch she worked at for that company. Appellant attempted unsuccessfully attempted to obtain an overdraft for that bank account. Appellant then began to falsify bank documents in order to steal bank money for the use of the company. Appellant used her knowledge of bank policy and procedure to hide the thefts.</p> <p>Offending was discovered when company made large payment and questions were asked as to where company obtained those funds from.</p> <p>Appellant gained no personal advantage/benefit from thefts.</p>		<p>imp was at lowest end of the range that could have been imposed and sentencing principles could have commended an element of accumulation in the terms.</p> <p>At [42] Given fundamental importance placed by criminal justice system on the discretion afforded sentencing judges, it cannot be demonstrated in this case that the discretion miscarried in failing to suspend the term.</p>
<b>Transitional Provisions enacted (31/08/2003)</b>					
<b>6.</b>	<b>R v Black</b>  <b>[2002] WASCA 26</b>  Delivered 18/02/2002	<p>32 yrs at time sentencing.</p> <p>Convicted after fast track PG.</p> <p>No prior criminal record.</p> <p>Offending motivated by gambling addiction. Married; 2 children (6 &amp; 4 yrs old).</p>	<p>4 x Steal as servant. 4 x Falsify record.</p> <p>Total amount stolen \$2.9 million (\$2,198,461.60 not recovered). Offending period 7 ½ yrs. No restitution nor any likely to be made.</p> <p>Appellant employed in senior position in bank hierarchy (at time offending discovered appellant was a district manager). Appellant engaged in sophisticated scheme to steal money and used his knowledge of bank procedures to avoid detection.</p>	<p>4 yrs imp each ct. 2 yrs imp each ct.</p> <p>TES 6 yrs imp. Equivalent to 4 yrs imp after implementation of transitional provisions.</p> <p>EFP.</p> <p>Remorse; insight; acceptance of</p>	<p>Dismissed.</p> <p>NB: Double jeopardy applied to State appeals – key factor in appeal as court found sentences were lenient.</p>

			<p>Appellant also lied to and involved other staff members, unaware of appellant's thefts, in his criminal conduct.</p> <p>Co-operated with employer and enabled procedures to be designed to prevent future thefts in this manner.</p>	responsibility.	
5.	<p><b><i>Pain v Forbes</i></b></p> <p><b>[2000] WASCA 260</b></p> <p>Delivered 15/09/2000</p>	<p>55 yrs at time sentencing.</p> <p>Convicted after early PG.</p> <p>No prior criminal record.</p> <p>Abusive marriage broke down as result offending.</p>	<p>36 x Steal as servant.</p> <p>Total amount stolen approx \$129,000. Offending period approx 3 yrs (Nov 1996-Oct 1999).</p> <p>Arrangements for full restitution plus interest made (at sentencing restitution \$65,000).</p> <p>Individual amounts stolen ranged from \$1,000-\$23,000.</p> <p>Appellant altered her pay cheques on repeated occasions after they had been signed by her employer.</p>	<p>Cts 1-21: 1 yrs imp each ct.</p> <p>Cts 22-36: 2 yrs imp each ct.</p> <p>TES 3 yrs imp. Equivalent to 2 yrs imp after implementation of transitional provisions.</p> <p>EFP.</p> <p>Shame; remorse.</p>	<p>Offender's appeal allowed.</p> <p>TES reduced to 2 yrs imp.</p> <p><u>Sentences on appeal:</u> Cts 22-36 1 yr imp each ct.</p> <p>EFP.</p> <p>Original sentencing court did not have full details of restitution prior to sentencing.</p>
4.	<p><b><i>R v Ottobriano</i></b></p> <p><b>[1999] WASCA 207</b></p> <p>Delivered 14/07/1999</p>	<p><u>Stellitano</u> Convicted after trial.</p> <p>Sister of Ottobriano; sister of one company director; wife of another company director.</p> <p>3 children (4, 6 &amp; 8 yrs old).</p>	<p><u>Stellitano</u> 84 x Stealing.</p> <p>Total amount stolen approx \$284,500. Offending period approx 4 yrs (20 Feb 1991-6 Jan 1995).</p> <p>Stole money directly from her own family company that she was working for.</p> <p>At time appeal heard (14/07/99), due to be released on parole on 24/09/99.</p>	<p>12 mths imp each ct.</p> <p>TES 2 yrs imp.</p> <p>EFP.</p>	<p>Dismissed by majority.</p> <p>At [6] Considerable evidence as to personal antecedents both respondents – of little consequence given 'long period during which, by a process of dishonesty and active deliberate misrepresentation, Mrs Stellitano and Mrs</p>

		<p><u>Ottobrino</u> Convicted after trial.</p> <p>Sister of Stellitano; sister of one company director.</p> <p>2 children (6 &amp; 11 yrs old).</p>	<p><u>Ottobrino</u> 51 x Stealing.</p> <p>Total amount stolen approx \$194,500. Offending period approx 3 yrs 9 mths (April 1991-Jan 1995).</p> <p>Not employee of company money stolen from. Employed by a bank and assisted banking money stolen by Stellitano – money went, directly or indirectly, to families of both respondents.</p> <p>At time appeal heard (14/07/99), due to be released on parole within 14 days.</p>	<p>6 mths imp one ct; 12 mths imp remaining cts.</p> <p>TES 18 mths imp. Equivalent to 12 mths imp after implementation of transitional provisions.</p> <p>EFP.</p> <p>No remorse shown by either respondent until sentencing phase – maintained innocence during long trial.</p>	<p><i>Ottobrino stole money from the persons whom trusted them and relied upon them.</i> Ipp J dissenting.</p> <p>At [7]-[8] Fact respondents had young children of little weight – respondents had ‘four years of constant offending in which to reflect on what a prison sentence would do to their children. Nevertheless, they persisted in their criminal conduct. In these circumstances, I regard with scepticism the attempt made by them to have their prison sentences reduced because of concern about their children’s welfare.’ Ipp J dissenting.</p>
3.	<p><b><i>Bessel v The Queen</i></b></p> <p><b>Supreme Court Library No 98019</b></p> <p>Delivered 20/04/1998</p>	<p>28 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>No prior criminal record.</p> <p>Married; good references; been in full time employment since leaving school at 16 yrs old.</p>	<p>30 x Steal as servant.</p> <p>Total amount stolen approx \$12,000. Offending period approx 18 mths (Aug 1994 – 19 Jan 1996).</p> <p>Individual amounts stolen ranged from \$100-1,500. Appellant employed as book-keeper by self-employed earthmoving contractor in Margaret River. Appellant given power to sign cheques on victim’s behalf. Appellant wrote out unauthorised</p>	<p>TES 2 yrs imp. Equivalent to 16 mths imp after implementation of transitional provisions.</p> <p>EFP.</p>	<p>Dismissed.</p> <p>Appeal did not challenge TES or individual terms but failure to suspend term.</p> <p>At p 6 ‘A conclusion by a sentencing Judge that a specific sentencing option is appropriate carries the necessary inference of</p>

			<p>cheques for cash and deposited them into her accounts. Appellant also withdrew money directly from the cash and stole it, as well as fraudulently writing cheques for wages, holiday pay and back pay.</p> <p>Appellant working approx 5-7 hrs a week for victim at time offending and was also working in a pharmacy and running her own business.</p> <p>Offending discovered when victim attempted to use his bankcard on a trip to Perth and found that he could not. Victim then made enquiries, discovered discrepancies and asked appellant for an explanation. Appellant could not provide satisfactory explanation.</p> <p>\$12,000 substantial amount of money to victim.</p> <p>Offending motivated by appellant's own financial difficulties.</p>		<p><i>satisfaction that all other terms are inappropriate. That the sentencing Judge does not express in positive terms that conclusion cannot lead to an inference that he failed to give proper consideration to the appropriateness of the sentencing options not exercised by him.'</i></p> <p>At p 8 Amount stolen cannot be considered 'small' given that it represented a significant amount of money to the victim.</p> <p>At p 8 Well recognised that it is often good character and reputation of offender which enables them to be placed in the position of trust which allows them to commit the offences.</p>
2.	<p><b><i>The Queen v Jeffree</i></b></p> <p><b>Supreme Court Library No 980150</b></p> <p>Delivered</p>	<p>28 yrs at time offending. 30 yrs at time sentencing.</p> <p>Convicted after PG. Prior criminal record – offences of similar nature committed 10 yrs earlier and involving 33 individual</p>	<p>48 x Steal as servant.</p> <p>Total amount stolen \$30, 200. Offending period approx 18 mths. Restitution at sentencing \$18,370.</p> <p>Individual amounts stolen ranged from \$100-1,900.</p>	<p>24 mth CBO.</p> <p>Compensation order for amount outstanding made.</p> <p>Remorse.</p>	<p>Dismissed.</p> <p>At p 15 Welfare of children relevant in sentencing but circumstances of children must be exceptional to truly impact on sentencing</p>

	13/02/1998	<p>amounts below \$100 each (received probation).</p> <p>Single mother of 5 yr old child.</p> <p>Offending coincided with marital and financial problems.</p>	<p>Offending not sophisticated – no impact on public or public confidence.</p> <p>Respondent employed as part-time accounts clerk/bookkeeper. Respondent altered pay cheques (received at end of each day) after they had been signed by employer. Respondent also altered cheque butt by falsifying amount and recipient so it appeared money was paid to someone else.</p> <p>When offending discovered, respondent admitted thefts to employer when asked about the discrepancies. Respondent unable to explain motivation for offending – no drug or gambling problems. Respondent’s employment terminated and repayment plan put in place (including interest) – respondent found alternate employment to enable her to make repayments as agreed.</p>		<p>and not likely to be a factor on which suspension of sentence turns (quoting <i>Burns</i> (1994) 71 A Crim R 450).</p> <p>At p 16 In all circumstances, immed imp not justified. Court would have imposed suspended term imp rather than a CBO but not in context of State appeal.</p> <p>NB: Double jeopardy applied to State appeals.</p>
1.	<p><i>The Queen v Wilkinson</i></p> <p><b>Supreme Court Library No 960035; (1996) 85 A Crim R 353</b></p> <p>Delivered 25/01/1996</p>	<p>36 yrs at time offending.</p> <p>Convicted after late PG – 3 wks prior to trial.</p> <p>Prior criminal record – steal as servant at 22 yrs (5 yrs imp imposed); fraud (cheques drawn on insufficient funds).</p> <p>Separated from wife; child aged 20 yrs.</p> <p>Offending period coincided with marital and financial</p>	<p>15 x Steal as servant. 3 x Make false entry with intent to defraud.</p> <p>Total amount stolen \$118,450. Restitution at sentencing \$94,019 (made from sale of assets respondent purchased with stolen money).</p> <p>Respondent employed as General Manager – responsible for running business in general and for accounting. Respondent stole money through use unauthorised cheques drawn from company accounts. Offending commenced almost immediately on commencement of employment.</p>	<p>Sentence range 6 mths – 12 mths imp.</p> <p>TES 2 yrs imp. Equivalent to 16 mths imp after implementation of transitional provisions.</p> <p>EFP.</p>	<p>Allowed – misapplication of totality principle resulted in manifestly inadequate sentence not reflective of overall criminality of offending.</p> <p>TES increased to 6 yrs imp.</p> <p>EFP.</p> <p>Sentence range on appeal 6 mths – 2 yrs imp.</p>

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