

JOINT CRIMINAL ENTERPRISE¹

1. Crimes are often committed by more than one person, in various combinations of connection with one another and the offending. But it is essential that just limits are placed on functional and coherent theories of liability for those who have not physically committed the crime charged². In *Darkan v The Queen* (2006) 227 CLR 373 Gleeson CJ, Gummow, Heydon and Crennan JJ said at 397 [76]:

‘ Further, whatever the common law in the late 19th century was in relation to the problem dealt with by s 8 of the Code, it is clear that now at common law an accessory is liable if the principal offender's crime is "foreseen as a possible incident of the common unlawful enterprise": *Chan Wing-Siu v The Queen* [1985] AC 168 at 175. Although the law has long recognised accessorial liability, it has also long attempted to lay down limits to the accessorial liability of a person who shared a common purpose with a wrongdoer, or who instigated a wrongdoer to commit a crime. The alleged accessory is not to be liable for everything a principal offender did, either vicariously or absolutely. Over time the law has employed different techniques for placing accessorial liability within just limits while continuing to give it substantial room for operation. The common law protects against excessively wide liability by demanding actual foresight, albeit of a possibility.’

2. The High Court in *Darkan* was dealing with s 8 of the *Criminal Code (Qld)* which, like the other Code states, creates liability in ways different from the common law. In NSW and South Australia state offences continue to be governed by the common law. Victoria has legislatively abolished the common law of complicity and in its place imposed liability on persons "involved in the commission of an offence". The Commonwealth *Criminal Code* addresses related issues in ss 11.2 (complicity and common purpose), 11.3 (commission by proxy) and 11.2A (joint commission) and are not further discussed in this paper.
3. Complicity in crime may be established by intentionally encouraging or assisting another's crime. Although accessories (before the fact or alternatively at the fact / principals in the second degree) are prosecuted as principals (see *Crimes Act 1900* (NSW) ss 345, 346, 351, 351B), their liability is derivative and the prosecution need to

¹ This is an updated version of a talk given in March 2017

² Lord Bingham in *R v Rahman* [2009] 1 AC 129 said at 145 ‘Any coherent criminal law must develop a theory of accessory liability which will embrace those whose responsibility merits conviction and punishment even though they are not the primary offenders.’

prove that the crime has been committed by the alleged principal. This does not mean the principal needs to have been convicted of the crime.³

4. Joint criminal enterprise liability offers a different and often complementary way of describing complicity in crime. There are pursuant to this doctrine really three layers of liability for those who mutually embark on a criminal enterprise:⁴
 - (i) If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty regardless of the part that each has played in the conduct that constitutes the actus reus.⁵ An accused can be shown to be guilty of a crime on this basis although the Crown cannot show what the person has actually done himself or herself. The Crown needs to prove agreement and participation in furthering the agreement. Presence at the commission of the offence may be sufficient to demonstrate participation, but it is not essential.⁶ This first principle is reasonably uncontentious. This first most basic aspect of joint criminal enterprise requires no contemplation of the individual acts to be done to perform the crime agreed upon. This is the concept of joint criminal enterprise in its simplest form.
 - (ii) Each party is also guilty of any other crime (the ‘incidental crime’) committed by a co-venturer that is within the scope of the agreement.⁷ An incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement.’ This is the principle applied in *Johns (T.S.) v R* (1980) 143 CLR 108 (*‘Johns’*).
 - (iii) A party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence (‘extended joint criminal enterprise liability’). This is the

³ See discussion in *Likiardopoulos v The Queen* [2012] HCA 37; (2012) 247 CLR 265

⁴ Apparent from the caselaw generally but recently made clear in paragraph 4 of the plurality judgment in *Miller v The Queen* [2016] HCA 30; 334 ALR 1 (*‘Miller’*)

⁵ See also *McAuliffe v The Queen* (1995) 183 CLR 108 at 114, *Gillard* at 35 [110] (Hayne J), *Huynh v The Queen* [2013] HCA 6; (2013) 295 ALR 624 at [37]; and as described by the Privy Council in *Brown v The State (Trinidad & Tobago)* [2003] UKPC 10 at [8] and [13], as the ‘plain vanilla version’ (as quoted by Kirby J in *Keenan v The Queen* (2009) 236 CLR 397 (dissenting as to the orders made) at [3] and Lord Bingham in *Rahman* at 145).

⁶ See analysis in *Dickson v R* [2017] NSWCCA 78, relating to a series of aggravated break and enter and theft charges involving multiple offenders.

⁷ See also *McAuliffe* at 114, *Clayton v The Queen* (2006) 231 ALR 500 (*‘Clayton’*) at 504 [17]

extended principle applied in *McAuliffe v The Queen* (1995) 183 CLR 108 ('*McAuliffe*') at 115-8, affirmed in *Miller v The Queen* [2016] HCA 30; (2016) 259 CLR 380; (2016) 334 ALR 1; (2016) 90 ALJR 918; (2016) 251 A Crim R 105 ('*Miller*').

5. Although the High Court in *Miller* described the second (or the first and second) as 'joint criminal enterprise liability', the second has not usually been described this way in NSW. The case emanated from South Australia, and it was South Australian terminology that was adopted. Although the distinction between the second and third is conceptually important, and was the subject of the decisions in *R v Jogee*; *Ruddock v The Queen* ('*Jogee*') [2016] 2 WLR 681 and *Miller*; in practical terms the distinction between the second and third on the one hand, and the first on the other, is much wider. Very often the second and third are referred to as though the same. The second and third were both generally before *Miller* referred to in NSW as 'common purpose', 'extended joint criminal enterprise' or 'extended common purpose' liability. Sometimes they were distinguished as 'traditional' joint enterprise or common purpose and 'extended'. The particular issue in *Miller* of distinguishing between those cases where the contemplated incidental crime is within or without the agreement does not detract from the fact that usually these are treated as though the same.⁸ In fact the judgment really depends on the suggested similarity between them; and in so far as there has been criticism of the judgment and of *McAuliffe* before it, it has to a large extent been directed towards the suggested failure to keep the two distinct, or to recognise that foresight does not always constitute authorisation or assent so as to provide the requisite intention for the relevant crime.

⁸ The lack of distinction in *Clayton* is referred to below. In *R v Taufahema* (2007) 228 CLR 232 complicity for incidental crime contemplated as within the scope of the agreement as discussed in the early part of *McAuliffe* (at 113-4) was said by Gleeson CJ and Callinan J to be sometimes described as 'extended common purpose', and was so described by their Honours: 237-8 [6]-[8]. In the NSW Law Reform Commission *Complicity* (Report 129) (December 2010) both forms of complicity for foreseen crime are described in chapter 4 as extended joint criminal enterprise. In the Victorian report of Weinberg JA, the Judicial College of Victoria and the Victorian Department of Justice, *Simplification of Jury Directions Project: A report to the Jury Directions Advisory Group* (Weinberg Report), 2012, both the concept in *Johns* and that in *McAuliffe* are addressed under the heading of 'Extended common purpose': page 70 ff. A similar grouping is apparent *Nguyen v The Queen* (2013) 298 ALR 649.

6. The current NSW Bench Book entry for complicity by joint criminal enterprise confirms that usually the directions on (ii) and (iii) above would be best merged because the distinction may be confusing to a jury:

‘ Whether the crime committed is foreseen as a possible incident in carrying out the joint criminal enterprise, .. or foreseen as a possible consequence of the commission of the joint criminal enterprise ... is not so significant a distinction as to require separate directions to meet those particular factual situations. The accused is criminally responsible for the commission of the further offence, if he or she foresees the possibility of it being committed during the course of carrying out the joint criminal enterprise no matter what the reasons is for that foresight.’⁹

7. The Bench Book suggests that the term ‘additional crime’ should be used in directions to juries rather than ‘incidental crime’.
8. The first basis of complicity is the one that will most often arise in Local Court hearings and District Court trials. Liability for contemplated additional offences has particular significance in murder trials, although it is not at all limited to that charge and will from time to time arise in other offences.
9. With joint criminal enterprise in its most basic form, it will sometimes be the same evidence that supports the proposition that a person is a party to a joint enterprise, and his or her participation in it. An example may be the fact that premises owned by the accused are used to manufacture drugs. This could be a piece of evidence supporting the proposition that he or she was party to an agreement to manufacture drugs, and would also demonstrate participation. This should not obscure the fact that the two propositions do need to be proved.
10. Where a person is a party to a joint criminal enterprise to commit a crime, all acts done to commit it are attributed to him or her, whether s/he did them or not, to establish liability for that agreed upon offence. This is pursuant to joint criminal enterprise in its most basic form. The accused has what is normally described as direct liability for that crime, co-extensively with any co-offenders, and is liable as a principal. In a case where it matters (as in a situation like *Osland v The Queen* (1998) 197 CLR 316 (‘Osland’)) it can be said that the accused is responsible for the acts done by others, not their crime.

⁹ Judicial Commission NSW *Criminal Trial Bench Book* electronic version 2-740

11. In *IL v The Queen* [2017] HCA 27; (2017) 345 AR 375; (2017) 91 ALJR 764 ('IL') Bell and Nettle JJ at [65] held that in a joint criminal enterprise the only acts committed by one participant that are attributed to another participant are those that comprise the actus reus of a crime. Kiefel CJ, Keane and Edelman JJ did not agree. Gageler J at [106] expressly agreed with the plurality judgment, and Gordon J's judgment also did not restrict the effect of *Osland* for liability only to acts which are the actus reus of a crime.
12. No concept of determining the scope of the enterprise or the contemplation of the accused of the acts done to commit it is relevant in relation to joint criminal enterprise in its most basic form. If the accused has agreed to the elements the prosecution has no need to prove any consideration on the part of the accused of methodology, particular weapon to be used or detail beyond the elements. Sentencing judges work out actual disparity between roles.
13. A common direction given by trial judges relates to the multiple participants in a bank robbery, or an offence of breaking, entering and stealing. The current Bench Book entry recommends use of a crime no more serious than the charge the subject of the trial, and gives the following demonstration regarding a break and enter:

' You make take the following as an example of the operation of the law relating to joint criminal enterprise. Suppose that three people are driving in the same vehicle and they see a house with a lot of newspapers at the gate. One says to the others, "Let's check out this place". The car pulls up, two of them get out and one of them stays in the car behind the steering wheel with the engine running, while the other two go to the front door. One of the two persons breaks the glass panel on the outside of the door, places a hand through the panel, unlatching the door and opening it. The other goes inside and collects some valuables and comes out. Meanwhile, the one who opened the door has returned to the vehicle without entering the house. The question arises whether the three of them have by their acts and intentions committed the offence of breaking into the house and stealing objects from it.

Only one of them broke into the house (being the person who broke the glass panel and put a hand inside to open the door). Only one of them entered the house and stole something (that is the one who removed the valuables from the house) and the third person did neither of those things. But the law provides that, if a jury were satisfied that by their actions (rather than merely by their words) all three had reached an understanding or arrangement which amounted to an agreement between them to commit the crime of break, enter and steal from a house, each of the three is criminally

responsible for the acts of the others. On this example all three could be found guilty of breaking, entering and stealing from the house regardless of what each actually did.’¹⁰

14. The following formulation by Hunt CJ at CL (with the concurrence of McInerney and Sully JJ) in *Tangye v R* (1997) 92 A Crim R 545 at 556 – 557 (*‘Tangye’*) sets out the directions that should be given to a jury where a “straightforward joint criminal enterprise” is alleged. It was approved of by McHugh J in *Osland* at [73]¹¹:

“(1) The law is that, where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise. The Crown must establish both the existence of that joint criminal enterprise and the participation in it by the accused.

(2) A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.

(3) A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime.

(4) If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission” (at 556 – 557).

15. Presence throughout the commission of the crime is not essential: see *Likiardopoulos* and *Dickson*.
16. Hunt CJ at CL explained in *Tangye* that the terminology applicable to ‘common purpose’ (level ii of those referred to above at paragraph [4]) should not be used where joint criminal enterprise in its basic form (level i) is involved. Such terms should be

¹⁰ Judicial Commission NSW *Criminal Trial Bench Book* electronic version 2-750.

¹¹ Noting at [74] that “[i]n accordance with the New South Wales practice, the Court referred to ‘carrying out a criminal enterprise’ rather than acting in concert. The principles, however, are the same.’

reserved for cases where the Crown needs to use the extended concept because the offence charged is not the same as the foundational enterprise. Joint criminal enterprise in its basic form is not concerned with contemplated acts or the scope of the agreement.

17. This form of liability is distinct from accessorial liability as discussed for example in *Giorgianni v R* (1984 – 1985) 156 CLR 473, although there are strong connections and similarities. Gibbs CJ at 480, adopting the words of Cussen ACJ in *R v Russell* at 67, referred to the need for a person charged as a secondary party to the commission of a criminal act as an accessory to be in some way ‘linked in purpose with the person actually committing the crime’. Mason J adopted the same passage (493). Wilson, Deane and Dawson JJ said that “[a]iding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence” (505). The Crown often pursues its case on alternative bases of liability: direct agreement, accessorial liability and / or extension for foreseen incidental crime. In many instances the agreement based and accessorial forms of complicity will be indistinguishable.¹²
18. Historically the responsibility of those who set out to commit crime together, for the acts of others, was based on reasonably objective standards. This was continued in the provisions of the Criminal Codes of Queensland, Western Australia and Tasmania regarding liability for offences committed by co-accused which differ from the offence set out to commit: see discussion in *Keenan v The Queen* (2009) 236 CLR 397. The judgments in *Jogee* and *Miller* set out detail of the nature of the tests for complicity in the centuries prior to the crucial decisions in the last decades of the 20th century, with which the courts were concerned.
19. There has been a long development of attempt to closer match moral culpability and legal liability. In *Ryan v The Queen* (1967) 121 CLR 205 Windeyer J at 238 quoted Sir Owen Dixon’s 1935 article ‘*The Development of the Law of Homicide*’ regarding the movement over eight centuries from an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act.¹³ Part of that development, especially subsequent to *Woolmington v Director of*

¹² See judgment of Gageler J in *Miller* at [85], Hamill J in *R v Qaumi & Qaumi* (No 12) [2017] NSWSC 134 at [10], [13].

¹³ Australian Law Journal, vol 9, sup. P. 64.

Public Prosecutions [1935] AC 462, was to examine the subjective mental state of the accused in connection with offending physically carried out by co-offenders. The 1980 High Court decision of *Johns* was an appeal from the decision of the NSW Court of Criminal Appeal in *R v Johns* [1978] 1 NSWLR 282. Street CJ at CL referred to this move to a subjective test, and specifically referred to *Woolmington*. His Honour's statement that the secondary party bears criminal liability:

“ ..for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention – an act contemplated as a possible incident of the originally planned particular venture.”

was endorsed in the joint reasons of Mason, Murphy and Wilson JJ in *Johns* (High Court).

20. In *Johns* the appellant was convicted of murder and assault with intent to rob. He was an accessory before the fact: his role was to drive the principal offender Watson to a rendezvous with a third man, Dodge. The appellant was to wait while the other two robbed a known receiver of stolen jewellery. The appellant was to afterwards take possession of the proceeds and hide them. Johns knew Watson was carrying a pistol, had a short temper, and was told by Watson that he would not stand for any nonsense if he met obstacle during the robbery. The victim resisted and Watson shot him dead. The case was prosecuted as one of either intentional murder or constructive murder, with Johns (the accessory before the fact) and Dodge (the principal in the second degree) made culpable for the homicide by virtue of the principle referred to in this case as 'common purpose'. The judge directed the jury that Johns and Dodge would be guilty if the act constituting the offence committed was within the contemplation of the parties as an act done in the course of the venture on which they had embarked.
21. The High Court rejected the argument that this principle applied only to Dodge, the principal in the second degree (not an accessory before the fact) and the other argument that Johns must have foreseen the fatal discharge as a probable consequence of the way in which the crime was to be committed, rather than a possible one. The majority judgment was given by Mason, Murphy and Wilson JJ. Their Honours said (at 131-2):

‘ *In the present case there was ample evidence from which the jury could infer that the applicant gave his assent to a criminal enterprise which involved the use, that is the*

discharge, of a loaded gun, in the event that Morriss resisted or sought to summon assistance. We need not recapitulate the evidence to which we have already referred. The jury could therefore conclude that the common purpose involved resorting to violence of this kind, should the occasion arise, and that the violence contemplated amounted to grievous bodily harm or homicide.'

22. Although the endorsed reasons in the judgment of Street CJ at CL refer to 'acts', the principle of common purpose considered in *Johns* is where an *incidental crime* is contemplated and agreed with. Although part of the judgment of Barwick CJ referred to foresight of acts¹⁴, it immediately followed the finding that the trial judge's directions (that the parties must have had in mind in carrying out their armed robbery offence the contingency that 'the firearm might be discharged and kill somebody' and 'the possibility of the lethal use of the firearm') reflected the common law. The other judgments all specifically refer to whether the commission of another crime has been contemplated.¹⁵ The criminal responsibility under discussion was not that relating to the original crime the prime object of the criminal venture, but another crime committed during it.¹⁶
23. Subsequent authority has made clear, over and again, that it is an incidental crime that needs to be contemplated.¹⁷ A more difficult issue arises, when the crime is murder, as to whether a result needs to have been foreseen. The focus in the United Kingdom on foresight of acts, and the requirement for commission of the act in a 'not fundamentally different manner' than foreseen, gave rise to a convoluted body of case law which has not really been endorsed in NSW.¹⁸ The law is settled that for intentional murder, the intent to kill or cause grievous bodily harm needs to have been contemplated; but the Australian decisions are inconsistent as to whether the act is to be contemplated or the result (although this has normally not been the issue under consideration).¹⁹ The

¹⁴ *Johns* at 113 (Barwick CJ)

¹⁵ Stephen J at 118, Mason, Murphy and Wilson JJ at 124

¹⁶ *Johns* at 118 per Stephen J

¹⁷ Culminating most recently in *Miller* at [4], [10], [21], [37], [43] (plurality), [132], [135], [137], [141], 143 (Keane J).

¹⁸ See AP Simester and G R Sullivan *Criminal Law: Theory and Doctrine*, 3rd ed, Hart, Oxford, 2007 pages 223-227, Ormerod and Laird as above at 247-253, UK Law Ref Report *Participating in Crime* Law Com No 305 (2007) at 2.81 – 2.96 (pages 44-47), *R v Jogee* [2016] UKSC 8; 2 WLR 681[58]-[59], [98]; *Mahana Makarini Edmonds v The Queen* [2011] NZSC 159 where 'knowledge of the weapon' cases from England and Wales are contrasted with the position in New Zealand, Australia and Canada: [28]-[29], [41]-[43]

¹⁹ *Johns* 111-2; *McAuliffe* 112, 113, 119; *Clayton v R* (2006) 231 ALR 500 at 503 [11], 504 [17], 506-7 [26], [28] (majority), 514 [61], 528 [115] (Kirby J). The majority also described it differently at 503 [11], 504 [17], 506

majority in *Miller* at [1] referred to the content of such ‘crime’ as ‘death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention’. The precise content of the ‘crime’ foreseen was not the subject of the appeal, although the intermediate appellate court had dismissed a ground contending foresight of the result was necessary. An argument advanced on behalf of the appellant in *IL* that foresight of the crime of murder requires foresight of death (done with specific intent where intentional murder is alleged, or causation during the course of committing a sufficiently serious crime for constructive murder) was not considered.

24. In *Chan Wing-Siu* [1984] 3 All ER 877, [1985] AC 168 it was held by the Privy Council that if two people set out to commit an offence (crime A), and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person (D2) is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did. D2’s foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, whether or not he intended it.
25. *Chan Wing-Siu* was followed by the High Court of Australia in 1995 in *McAuliffe*, which was in turn followed in *Gillard v R* (2003) 219 CLR 1 (*‘Gillard’*) and *Clayton v R, Hartwick v R* [2006] HCA 58, (2006) 231 ALR 500 (*‘Clayton’*).
26. In *McAuliffe* direction was given to a jury that the accused whose case it was considering could be found guilty of murder if (during the course of the enterprise to bash a person or persons in a park) he ‘.. contemplated that the intentional infliction of grievous bodily harm was a possible incident of the common criminal enterprise...’.²⁰ The issue was whether this unilateral contemplation (without agreement) was sufficient, or whether for joint criminal enterprise (‘common purpose’) liability the prosecution was required to prove a shared contemplation, with express or tacit agreement, that grievous bodily harm might intentionally be inflicted as a possible incident of the agreement to assault.²¹ The court held that the former was sufficient.

[20]; *Gillard v The Queen* (2003) 219 CLR 1at 11 [19] and 14 [25]; *R v Nguyen* (2010) 242 CLR 491 at 501 [37], 502 [42]; *R v Taufahema* (2007) 228 CLR 232 at 238 [8], 252 [46].

²⁰ *McAuliffe* 113

²¹ *McAuliffe* 113

27. *McAuliffe* did not overrule *Johns* but considered a situation that had not been required to be considered in *Johns*, and in effect extended or superseded it ('built on' it, the plurality in *Miller* said). Like *Johns*, the issue was the complicity of the accused for a crime that was not the very crime agreed upon, but another contemplated as possibly arising from the commission of the originally agreed upon crime. But the difference with *McAuliffe* was unilateral foresight: the Court in *Johns* did not need to consider the situation in which the commission of an offence which lay outside the scope of the common purpose was nevertheless foreseen as a possibility in the carrying out of the enterprise by a party who continued to participate in the venture with that knowledge, (but not agreeing).²² The High Court held that the secondary offender is as much a party to the incidental crime as he is when the incidental crime falls within the common purpose: the difference is only that the prosecution cannot rely on the common purpose to prove that state of mind.²³
28. *McAuliffe* represents the starting point in Australian common law of squarely basing culpability for the additional crime in the participation in the joint criminal enterprise with the necessary foresight – whether this is unilateral or shared, and agreed to or not. When *McAuliffe* was decided this was said to accord with the general principle of the criminal law that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a part to it (see Gageler J's criticism of this proposition in *Miller*, discussed below).²⁴ *McAuliffe* was applied in *Gillard* in 2003, and the relationship of liability for foreseen crime was linked still with the idea of intentional assistance.²⁵
29. The cases which followed cemented a shift to culpability being based in taking the risk of the incidental crime being committed, rather than the scope of the agreement and intention to assist in the incidental crime. In *Clayton* (2006) an application to reconsider *McAuliffe* was refused by six members of the High Court. The majority at 505 [20] described what they called 'extended common purpose liability'²⁶ as jurisprudentially different from secondary liability as an aider or abettor, being grounded in common

²² *McAuliffe* 115, 117

²³ *McAuliffe* 117-8

²⁴ *McAuliffe* 118

²⁵ *Gillard* at 13-15 [25] (Gleeson CJ and Callinan J), 36 [112] (Hayne J)

²⁶ This was used to cover foresight of the intentional infliction of death or really serious injury: 503 [11], 514 [61] – there was no further distinction between foresight as within or outside the scope of the agreement.

embarkation on the foundational crime, rather than in contribution to another's crime. Kirby J provided a strong dissenting judgment, referring in particular to the disparity between the mental element of principal and secondary participant, and between an aider or abettor and that required by the rule of extended common purpose.

30. Meanwhile the House of Lords in *R v Powell, R v English* [1997] 4 All ER 545 at 563; [1999] 1 AC 1 at 27 held in answer to a question certified by the Court of Appeal that 'it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm'. The policy considerations behind such extension of liability were discussed. There was a specific distinction in English's case regarding whether the crime was committed in a fundamentally different manner from that contemplated that need not be discussed further here.
31. Lord Hutton recognised the strict difference between contemplation that in the course of common enterprise another party may use a gun or knife, and tacitly agreeing to such use of such a weapon, but acknowledged the authority creating liability for such contemplation even without tacit agreement. He also acknowledged the potential unfairness because simply foreseeing death or really serious harm is not sufficient mens rea for the principal to be guilty of murder, whereas this basis of complicity makes it sufficient in a secondary party. Important practical considerations of public policy were said to outweigh such anomaly. In a concurring judgment Lord Steyn also recognised these policy considerations, warranting foresight as a sufficient basis for the liability of accessories despite not being synonymous with intent.
32. Interestingly Lord Hutton described *McAuliffe* as authority for subjective contemplation as the test for determining whether a crime falls within the scope of a joint enterprise²⁷, and endorsed the test of foresight as a simpler and more practicable test for juries than one requiring determination of whether an action was within the scope of the joint venture.²⁸
33. In 2016 in *Jogee* the Supreme Court of the United Kingdom and the Privy Council concluded on review of authority that there was no doubt that the Privy Council laid

²⁷ *Powell* 21C

²⁸ *Powell* 31C

down a new principle in *Chan Wing-Siu* when it held that if two people set out to commit an offence (crime A), and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he foresaw it as a possibility, but did not necessarily intend it.²⁹ But the Court was found in doing so to have taken a ‘wrong turn’: [82], [87]. The cases on which the Privy Council had purported to place reliance in *Chan Wing-Siu* were said not to support this development, but were rather based on tacit agreement or conditional assent (like *Johns*). The Privy Council was found to have elided foresight with authorisation (which are not the same), when it said that the principle ‘turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied’: [65].

34. It was found that the continued participation in crime A with foresight of crime B may provide evidence of authorisation or intent to assist with crime B, but this is not conclusively so as a matter of law: [66], [73], [82], [87]. Intention was found to be the proper subjective counterpart to Foster’s objective test (whether ‘the events, although possibly falling out beyond his original intention, were in the ordinary course of things the probable consequence of what B did under the influence, and at the instigation of A’), not foresight. The principle outlined above in the judgment of the High Court in *Johns* was described as an orthodox approach in line with prior authority: [44], [67]. The impugned doctrine was called ‘parasitic accessory liability’, a phrase used by Professor JC Smith in an article in 1997.³⁰ Important to the decision was the anomaly of the secondary participant having a lesser mental state than the principal: [84]. The Court disagreed with the Australian position (in *Clayton*) that there is warrant for a separate form of secondary liability: [76]. It remains the case post *Jogee* that those acting pursuant to a criminal agreement are liable for acts to which they have expressly or impliedly given assent, and where assisting in an accessorial way can give intentional support by supportive presence: [78]. A continuing role for conditional intention as a basis for liability (accused hopes that it will not be necessary to use the guns in the bank robbery but accepts that if the need arises they may be used with intent to cause at least grievous bodily harm) was endorsed: [92]. It was said that one way of

²⁹ Lord Hughes and Lord Toulson JJSC, with whom Lord Neuberger PSC, Lord Thomas CJ and Lady Hale DPSC agreed at [62].

³⁰ JC Smith, ‘Criminal Liability of Accessories: Law and Law Reform’, (1997) 113 *Law Quarterly Review* 463 at 455.

considering whether this is proved is to ask the jury ‘whether they are sure that D1’s act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.’: [93]. Evidence of foresight may sometimes support the inference of such conditional intent: [94].

35. In *Miller* the appellants were granted leave to argue, following *Jogee*, that *McAuliffe* should be re-opened and overruled or confined. The majority considered the history and basis of the doctrine of extended joint criminal enterprise liability, and held that the common law in Australia should remain as stated in *McAuliffe*. The appeals were nonetheless allowed as the intermediate appellate court had not properly reviewed the sufficiency of the evidence to sustain the convictions (particularly given the alcohol consumption), and the proceedings were remitted to the SA Court of Criminal Appeal for determination of whether the verdicts were unreasonable / unsupported by the evidence.
36. The plurality judgment (French CJ, Kiefel, Bell, Nettle and Gordon JJ) adopted the description in *Clayton* of liability flowing from mutual embarkation on crime with awareness that the incidental crime may be committed in executing the agreement. The distinction of this from accessorial liability (grounded in contribution to a principal’s crime) was suggested as explanation for ‘at least some of the anomalies that are suggested to arise from allowing foresight of the possible commission of the incidental offence by a co-venturer as a sufficient mental element of liability.’: [34]. Central to the decision (plurality judgment and that of Keane J) was the fact that liability will not flow unless the crime of murder has been foreseen as a possibility.
37. Their Honours narrowed in effect the division sought to be drawn by the appellants between *Johns* and *McAuliffe*. For example at [10] it was said:

‘ *The paradigm case of joint criminal enterprise liability is where the parties agree to commit a robbery and, in the course of carrying out their plan, one of them kills the intended victim with the requisite intention for murder. Applying the principles of joint criminal enterprise liability explained in Johns v The Queen, the secondary party is equally liable if the parties foresaw murder as a possible incident of carrying out the agreed plan. It can be seen that the rejection of foresight as a sufficient mental element would affect the foundation of joint criminal enterprise liability generally in Australian law. Jogee addresses the paradigm case of joint criminal enterprise liability by the adoption of the concept of "conditional intent": the parties may have hoped to*

carry out their planned robbery without violence but the prosecution must establish it was their intention, in the event the need arose, that a party would administer violence with the intent for murder.’ (footnotes omitted)

38. Referring to the description in *Jogee of Johns* as an ‘entirely orthodox decision’, their Honours stated ‘Nonetheless, there may be discerned a difference in principle between the parties’ contemplation of the possible commission of the incidental offence and a requirement of proof of conditional intent that the incidental offence be committed.’ at [21]. In the context of the judgment as a whole, their Honours seem to be indicating that whereas there may be cases where the prosecution seek to firmly place the contemplation as an aspect of actual agreement, this does not need to be the case for liability to flow. Ultimately the High Court prefers the ongoing role of contemplation of the possible commission of the incidental offence as itself sufficient basis for complicity in it, rather than confining it to an evidentiary matter which may support actual agreement / intent to assist in the commission of the offence. Justification of the principle in *Johns* should not be confined to its references to agreement; it is relevantly aligned with *McAuliffe* and foresight operates as its own warrant for complicity.
39. In a separate judgment joining with the orders of the plurality, and in the reasons for upholding the ground regarding the reasonableness of the verdict, Keane J set out further reasons as to why the common law of Australia should not be altered by rejecting the doctrine known as extended joint criminal enterprise. Of importance to his Honour was the equivalent moral culpability of those who mutually embark on crime, where there is a foreseen risk of another crime occurring: [137] – [141]. There is a shared responsibility as principals for the mutual embarkation in crime with foreseen risks, and the one who commits the actus reus (the instrument to deal with the foreseen exigencies, the one deployed to deal with the risks, the consort who actually does the dirty work) is not to be treated as a principal and the others merely secondary, or an accessory, to his crime. Keane J was the only member of the Court deciding the complex issue of whether liability is direct or derivative where imposed for a crime foreseen but not the primary agreed crime; his Honour finding that it is not derivative.
40. Gageler J dissented, finding that liability should be based on intention. His Honour noted the statement in *McAuliffe* itself on alliance with intention to assist, but found that the extended principle articulated in *McAuliffe* is not explained on that purported basis:

[108] – [110]. His Honour found unanswerable two of the criticisms outlined in Kirby J’s dissenting judgment in *Clayton*; namely disconnection of criminal liability from moral culpability, and the disparity of intent between the principal and secondary party: [111]-[120], [129].

41. I will end with a discussion of the High Court decision in *IL* (see paragraph 11), which involved an appeal from the decision of the NSW Court of Criminal Appeal in *R v IL* [2016] NSWCCA 51, a successful Crown appeal from Hamill J’s determination to direct a jury to acquit in *R v IL (No 2)* [2014] NSWSC 1710. Apart from the authorities already referred to in this paper, the following cases will be discussed in relation to the decision of *IL*: *R v Sarah* (1992) 30 NSWLR 292, *R v Surridge* (1942) 42 SR (NSW), *R & G v R* (1995) 63 SASR 417; 79 A Crim R 191, *Garve v The Queen* [1995] HCA Trans 282 (Garve was the ‘G’ in *R & G v R*), *Batchelder v The Queen* [2014] NSWCCA 252; 249 A Crim R 461, *Rich v The Queen* [2014] VSCA 126; 43 VR 558; 312 ALR 429; 286 FLR 251 at [256]–[60], [283] – [92], and *Arulthilakan v The Queen* [2003] HCA 74; 203 ALR 259, *R v CLD* [2015] NSWCCA 114.

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