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## Principles of Complicity

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The following sections are based on the second author's contribution to *Halsbury's Laws of Australia*, Lexis Nexis – Terminology, Innocent Agent, Establishing Liability, Withdrawal, Procedure and Sentencing.

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#### Introduction

The principles of complicity makes a person liable for an offence which he or she has intentionally assisted another to commit. Accessorial liability arises in several ways. A person who provides assistance before or during the commission of the offence may be liable for the offence itself. A person who participates pursuant to an understanding or agreement may be liable for the offence under the principles of joint criminal enterprise or common purpose. Assistance provided after the commission may make a person liable for the offence of accessory after the fact, or a related offence such as conceal serious offence (s.316 *Crimes Act* (NSW)), or hinder investigation of an offence (s.315 (1) *Crimes Act* (NSW))

#### Terminology

In this paper the offender who commits the actus reus of an offence is referred to as the 'principal offender' and the offence committed as the 'principal offence'. *Osland* (1998) 197 CLR 316; 159 ALR 170 at 188; (CTH) *Criminal Code* s 11.2(5) and (NSW) *Crimes Act* 1900 ss 345, 346, 347, 351. Where more than one person performs the actus reus of the offence, the persons are working together, and together complete the offence, they are each regarded as the principal offender, although individually they may have performed only part of the offence, and may not have been present when the other elements of the offence were completed. *Ferguson* (1916) 17 SR (NSW) 69 at 76; 34 WN (NSW) 46; *Demirian* [1989] VR 97; (1988) 33 A Crim R 441 at 477 The person assisting will be referred to as the accessory. At common law an accessory who is present at the commission of a serious indictable offences is called a 'principal in the second degree'. An accessory who participates in the preliminary stages of the offence, but is not present at the commission of the offence, is called an 'accessory before the fact'. (*Osland* (1998) 197 CLR 316; 159 ALR 170 at 189) In New South Wales this terminology is used in referring to serious indictable offences. ((NSW) *Crimes Act* 1900 ss 345 (principal in the second degree), 346 (accessory before the fact).) Accessories to minor indictable offences are called abettors. ((NSW) *Crimes Act* s 351). In the Commonwealth legislation no particular term is used.((CTH) *Criminal Code* s 11.2)

#### Innocent Agent

A person will still be liable for an offence as a principle offender where they use an innocent agent to commit the offence. (CTH) *Criminal Code* s 11.3; *Cogan* [1976] 1 QB 217; [1975] 2 All ER 1059; [1975] 3 WLR 316; *Matusevich* (1977) 137 CLR 633 at 637-8; *White v Ridley* (1978) 140 CLR 342 at 346-7; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 193; *Pinkstone* (2004) 206 ALR 84; at [8] per Gleeson CJ and Heydon J, at [59]-[66] per McHugh and Gummow JJ, at [102]-[106] per Kirby J. A person may be an innocent agent if they lack the mens rea for the offence or have no criminal responsibility due, for example, to age or insanity. *Cogan* [1976] 1 QB 217; [1975] 2 All ER 1059; [1975] 3 WLR 316 *Matusevich* (1977) 137 CLR 633 at 637; *White v Ridley* (1978) 140 CLR 342 at 346; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 193. In *Pinkstone* (2004) 206 ALR 84; the High Court concluded police officers making controlled delivery were not acting as innocent agents (at [59]-[60] per McHugh and Gummow JJ, at [104]-[106] per Kirby J).

#### Establishing Accessorial Liability

The prosecution must prove the following elements:

1. Commission of the principal offence
2. That the accessory knew all the essential facts or circumstances necessary to show the crime was committed by the principal offender (including the relevant mens rea required of the principal offender)
3. The accessory intentionally assisted or encouraged the principal offender to commit the crime.

### Commission of the Principal Offence

The prosecution must prove, on evidence admissible against the accessory, that the principal offence has been committed. (CTH) *Criminal Code* s 11.2(2)(b), 11.2(7); *Giorgianni* (1985) 156 CLR 473 at 491; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 174 per Gaudron and Gummow JJ. Evidence of the conviction of the principal offender, or admissions made by the principal offender, are not admissible as evidence of the commission of the principal offence against the accessory. *Kirkby* (1998) 105 A Crim R 323; *Mallan v Lee* (1949) 80 CLR 198 at 210; (CTH) *Evidence Act* 1995 s 91; (NSW) *Evidence Act* 1995 s 91 (exclusion of evidence of judgments and convictions)

It is not necessary that anyone be convicted as the principal offender. (CTH) *Criminal Code* s 11.2(5); (NSW) *Crimes Act* 1900 s 346; (NSW) *Criminal Procedure Act* 1986 s 24; *Giorgianni* (1985) 156 CLR 473 at 491; *King* (1986) 161 CLR 423 at 433-4, 435. Where the person charged as the principal offender is acquitted because of insufficient evidence, an accessory may still be convicted if it is proved that the principal offence was committed, and there is no evidentiary inconsistency in the different results. *King* (1985) 17 A Crim R 184 at 189; *King* (1986) 161 CLR 423 at 433-4; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 174 per Gaudron and Gummow JJ, at 187 per McHugh J.

### Assistance

An accessory must provide assistance to the principle offender and must do so intentionally. Neither unintentional encouragement or assistance, *Coney* (1882) 8 QBD 534 at 557; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440 per Roden J. nor intention alone, *Mills* (1985) 17 A Crim R 411 at 440 per Roden J; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [69]. is sufficient for liability as an accessory.

**Actus Reus:** An accessory must aid, abet, counsel or procure the commission of an offence to be liable as an accessory. (CTH) *Criminal Code* s 11.2(1); (NSW) *Crimes Act* 1900 s 351, 351B (in relation to minor indictable and summary offences) For serious indictable offences see *Johns* [1978] 1 NSWLR 282 at 285; *Giorgianni* (1985) 156 CLR 473 at 493. This requires that the accessory was linked in purpose with the principal offender, and by words or conduct did something to bring about, or render more likely, the commission of the principal offence. *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [69]. The assistance may be provided through a third party. *Cooper* (1883) 5 C & P 535; 172 ER 1087 at 1088 (the accessory may make a general request to the third party that the third party find 'someone' to commit the offence: see, for example, *King* (1986) 161 CLR 423 at 434) Mere presence at the commission of an offence is insufficient, *Coney* (1882) 8 QBD 534 at 539, 540 per Cave J, at 552 per Lopes J, at 560 per Hawkins J, at 561 per Huddleston B; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440; *Adam* (1999) 106 A Crim R 510 at [69]-[70]. although presence may be evidence of encouragement or assistance sufficient to make a person an accessory. *Coney* (1882) 8 QBD 534 at 540, 543 per Cave J, at 558, 560 per Hawkins J; 15 Cox CC 46; *Russell* [1933] VLR 59 at 66; [1933] ALR 76 per Cussen ACJ

There is no general liability for a failure to prevent the commission of an offence, *Coney* (1882) 8 QBD 534 at 539 per Cave J, at 557-8 per Hawkins J; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440. although the failure of a person to act where they have a duty to do so may be sufficient for liability as an accessory. *Russell* [1933] VLR 59 at 77, 81-82; *Ex parte Parker; Re Brotherson* [1957] SR (NSW) 326 at 330; (1956) 74 WN (NSW) 463. A person may be liable for a failure to act where he or she is in a position of power or control, is aware that an offence is about to be committed or is being committed, has reasonable opportunity to intervene, and fails to take reasonable steps to prevent the offence being committed: *Smith* (TAS CCA 6.3.1979) at 34 referred to with approval in *Randall* [2004] TASSC 42 (applied to manager of club who permitted office to be used for rape).

**Mens Rea:** An accessory must have knowledge of the essential facts and circumstances of the principal offence, and with this knowledge provide intentional assistance or encouragement. *Giorgianni* (1985) 156 CLR 473 at 482, 487-8 per Gibbs J, at 494 per Mason J, at 500, 505 per Wilson, Deane, Dawson JJ; *Stokes* (1990) 51 A Crim R 25 at 37-8, 41. The essential facts and circumstances of the principal offence include both the actus reus and the relevant state of mind or intent of the principal offender. *Stokes* (1990) 51 A Crim R 25 at 38; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [105]. It is sufficient for the accessory to have knowledge of the type of offence that is committed, and does not need to have knowledge of all the details of the offence. *Bainbridge* [1960] 1 QB 129; [1959] 3 All ER 200 at 202; [1959] 3 WLR 656 per the court, CCA; *Director of Public Prosecutions (Northern Ireland) v Maxwell* [1978] 3 All ER 1140 at 1147-8 per Lord Hailsham of St Marylebone, at 1150 per Lord Fraser of Tullybelton, at 1150-1 per Lord Scarman, at 1162 per Lowry LCJ; *Glennan* [1970] 2 NSWLR 421 at 426; (1970) 91 WN (NSW) 609 per the court, CCA(NSW); *Cavallaro v Waterfall* (1988) 8 MVR 271 at 278; BC8801179 per Carruthers J, SC(NSW); *Bruce v Williams* (1989) 10 MVR 451; 46 A Crim R 122 at 129-30 per Priestly JA, CA (NSW). The accessory need not be aware of the illegal nature of the conduct which constitutes the offence.

*Giorgianni* (1985) 156 CLR 473 at 500, 506; *McCarthy* (1993) 71 A Crim R 395 at 409; *Buckett* (1995) 79 A Crim R 302 at 309. The accessory does not need to have had knowledge of, nor intend, the consequences of the offence committed. *Giorgianni* (1985) 156 CLR 473 at 495 per Wilson, Deane and Dawson JJ, at 500 per Mason J; *Mills* (1985) 17 A Crim R 411 at 450; *Stokes* (1990) 51 A Crim R 25 at 38, 39. Actual knowledge is required; recklessness or mere suspicion is insufficient. *Giorgianni* (1985) 156 CLR 473 at 483, 486-8 per Gibbs CJ, at 495 per Mason J, at 505, 506 per Wilson, Deane and Dawson JJ; *Stokes* (1990) 51 A Crim R 25 at 42. The requirement of knowledge and intention for the accessory applies where the principal offence is one of strict liability and no intention is required of the principal offender. *Giorgianni* (1985) 156 CLR 473 at 479, 483 per Gibbs CJ, at 494 per Mason J, at 500, 504-5 per Wilson, Deane and Dawson JJ; *Buckett* (1995) 79 A Crim R 302 at 309.

Under the Commonwealth Criminal Code an accessory will be liable if he or she intends their conduct to assist the commission of an offence of the type committed, or intends to assist the commission of an offence and is reckless about the offence actually committed. (CTH) Criminal Code s 11.2(3)

### Common Purpose

Liability by way of the principle of common purpose is established where "a venture is undertaken by more than one person, acting in concert pursuant to a common criminal design". *McAuliffe* (1995) 183 CLR 108 at 113-14. The common purpose arises where two or more persons reach an understanding or arrangement amounting to an agreement to commit an offence. The agreement or understanding need not be express and may be inferred from all the circumstances. There must be an agreement to assist – it is not sufficient for an offender to decide to commit an offence and be aware that others also intend to commit the offence. *Taufahema* [2006] NSW CCA 152 at [28]. The doctrine may also be referred to as joint criminal enterprise. *McAuliffe* (1995) 183 CLR 108 at 113-114. See also *Tangye* (1997) 92 A Crim R 545 at 556-7; *Osland* (1998) 197 CLR 316 and *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30

Where one or more of the parties commit the offence agreed upon, acting in accordance with the continuing understanding or agreement, each party to the agreement is liable for the offence regardless of the part they played. *McAuliffe* (1995) 183 CLR 108 at 113-114 affirmed in *Gillard* (2003) 202 ALR 202; 139 A Crim R 100 at [110].

A party to a common purpose may also be liable where the offence committed is not the offence agreed upon by the parties, but is an offence falling within the scope of the common purpose. *McAuliffe* (1995) 183 CLR 108 at 113-114 The test for an offence being within the scope of the common purpose is a subjective one – the party to the common purpose must have foreseen the offence as a **possible consequence** of the execution of the common purpose. *McAuliffe* (1995) 183 CLR 108 at 114, 115; *Johns* (1980) 143 CLR 108 at 130-1; *Gillard* (2003) 202 ALR 202 at [112]. Where an agreement encompassed the infliction of serious bodily harm it was not necessary for prosecution to show that the accessory foresaw the particular manner harm was to be inflicted, nor the weapon used. *Suteski* (2002) 56 NSWLR 182; 137 A Crim R 371 at [135]-[159] The accessory will only be liable for such offence as he or she foresaw as a possible consequence of the common purpose, and may be convicted of a lesser offence than the principal offender. *Gillard* (2003) 202 ALR 202 (where the principal offender is convicted of murder the accessory may be convicted of manslaughter if he or she foresaw as a possibility that the principal offender would kill, but did not foresee the relevant intent for murder); *Taufahema* [2006] NSW CCA 152 at [35]-[36].

### **Johns (1980) 143 CLR 108**

[per Barwick CJ at p.113]

The learned trial judge's summing up, of which I have quoted relevant parts, did correctly express the common law. The participants in a common design are liable for all acts done by any of them in the execution of the design which can be held fairly to fall within the ambit of the common design. In deciding upon the extent of that ambit, all those contingencies which can be held to have been in the contemplation of the participants, or which in the circumstances ought necessarily to have been in such contemplation, will fall within the scope of the common design.

[per Mason, Murphy and Wilson JJ at p.125-6]

The object of the doctrine is to fix with complicity for the crime committed by the perpetrator those persons who encouraged, aided or assisted him, whether they be accessories or principals. Broadly speaking, the doctrine looks to the scope of the common purpose or design as the gravamen of complicity and criminal liability. There is nothing in this to suggest that the criterion of complicity and liability should differ as between accessory and principal in the second degree. If they are both parties to the same purpose or design and that purpose or design is the only basis of complicity relied upon against each of them, there is no evident reason why one should be held liable and the other not. In each case liability must depend on the scope of the common purpose. Did it extend to

the commission of the act constituting the offence charged? This is the critical question. It would make nonsense to say that the common purpose included the commission of the act in the case of the principal in the second degree but that the same common purpose did not include the commission of the same act in the case of the accessory before the fact. Yet this is precisely what the applicant's submission does say. A telling answer to it is the example given by Street CJ in his judgment in this case, where he speaks of the three men who set out to carry out an armed robbery on a bank, two intending to enter the bank with loaded firearms whilst the third remains outside to drive the getaway car. In the course of the robbery a bank officer is shot and killed. The driver of the getaway car would be held liable as a principal in the second degree for the killing. If, however, the plan had involved the driver and merely dropping the two armed men outside the bank and then driving off, the car driver would be an accessory before the fact. There would, as his Honour says, be no logical or legal justification for distinguishing between the complicity and liability of the driver whether he be a principal in the second degree or an accessory before the fact.

The problem here is one of expressing the degree of connexion between the common purpose and the act constituting the offence charged which is required to involve the accessory and the principal in the second degree in complicity.

[per Mason, Murphy and Wilson JJ at p.130-1]

In our opinion these decisions support the conclusion reached by Street CJ, namely, "that an accessory before the fact bears, as does a principal in the second degree, a 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". Such an act is one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise.

**McAuliffe (1995) 183 CLR 108**

[per the Court at p.113-115]

The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. See *Giorgianni v The Queen* (1985) 156 CLR 473. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission. cf *Lowery and King [No 2]* [1972] VR 560 at 560, per Smith J.

Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. *Mansell and Herbert's Case* (1556) 2 Dyer 128b [73 ER 279]; *Ashton's Case* (1698) 12 Mod 256 [88 ER 1304]; *Radalski* (1899) 24 VLR 687; *Kalinowski* (1930) 31 SR (NSW) 377. See generally Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991), pp 209-214. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose. See *Johns* [1978] 1 NSWLR 282 at 287-290, per Street CJ.

Two questions arose in *Johns (T S) v The Queen* (1980) 143 CLR 108. concerning the doctrine of common purpose. The first was whether the doctrine extended to an accessory before the fact. The Court held that it did and so held that it was not necessary for a party to be present at the scene of



a crime to be acting in pursuit of a common purpose with others who were present. *cf Lowery and King [No 2] [1972] VR 560 at 560-561*, where Smith J appears to have held a contrary view.

The second question was whether the scope of the common purpose was confined to the probable consequences of the joint criminal enterprise or whether it extended to the possible consequences. The Court held that the scope of the common purpose did extend to the possible consequences of the criminal venture, but, accepting that the test was a subjective one, held that the possible consequences which could be taken into account were those which were within the contemplation of the parties to the understanding or arrangement. Thus Mason, Murphy and Wilson JJ, after referring to a number of authorities, said: *Johns (1980) 143 CLR 108 at 130-131*.

*"In our opinion these decisions support the conclusion reached by Street CJ, [in the court below] namely, 'that an accessory before the fact bears, as does a principal in the second degree, a 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'. Such an act is one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise."*

[per the Court at p.117-118]

In *Johns* this Court was concerned with the common purpose of a joint criminal enterprise. In particular, it was concerned with whether the scope of the common purpose extended to possible as well as probable incidents of the venture. The scope of the common purpose is no different from the scope of the understanding or arrangement which constitutes the joint enterprise; they are merely different ways of referring to the same thing. Whatever is comprehended by the understanding or arrangement, expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement. That is why the majority in *Johns* in the passage which we have cited above spoke in terms of an act which was in the contemplation of both the secondary offender and the principal offender. There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind. But there is no other relevant distinction. As Sir Robin Cooke observed, the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties. That is in accordance 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 party to it.

For these reasons, the trial judge was not in error in directing the jury that if the appellants were engaged in a joint criminal enterprise with Davis, a shared common intention - that is, a common purpose - to inflict grievous bodily harm or an individual contemplation of the intentional infliction of grievous bodily harm as a possible incident of the venture would be a sufficient intention on the part of either of them for the purpose of murder.

### ***Osland (1998) 197 CLR 316***

[per McHugh J]

[70] At common law, a person who commits the acts which form the whole or part *Bingley (1821) Russ & Ry 446 [168 ER 890]* (Bingley's part was to impress the date lines and numbers on forged bank notes; other associates were responsible for the printing and signatures); *Ferguson (1916) 17 SR (NSW) 69 at 76* (assisting in making a plate to be used for printing counterfeit notes). of the actus reus of the crime is known as a "principal in the first degree". There can be more than one principal in the first degree. *Erringtons' Case (1838) 2 Lewin 217 [168 ER 1133]*; *Clarke [1959] VR 645*. However, a person may incur criminal liability not only for his or her own acts that constitute the whole or part of the actus reus of a crime but also for the acts of others that do so. The liability may be primary or derivative. In earlier times, when it was alleged that a person should be held criminally liable for the acts of another, it mattered whether the crime was a felony or a misdemeanour. In Victoria, the distinction between felonies and misdemeanours has been abolished. *Crimes Act 1958 (Vict)*, s 322B. There is no longer any need to draw a distinction between the two categories of crime. *Crimes Act 1958 (Vict)*, s 323.

[71] Those who aided the commission of a crime but were not present at the scene of the crime

were regarded as accessories before the fact or principals in the third degree. Their liability was purely derivative and was dependent upon the guilt of the person who had been aided and abetted in committing the crime. *Higgins* (1801) 2 East 5 at 19 [102 ER 269 at 274-275]; See *Lun* (1932) 32 SR (NSW) 363 at 364; *Howell v Doyle* [1952] VLR 128 at 133; *Jackson v Horne* (1965) 114 CLR 82 at 94. Those who were merely present, encouraging *Kupferberg* (1918) 13 Cr App R 166; *Clarkson* [1971] 1 WLR 1402; [1971] 3 All ER 344. but not participating physically, *Coney* (1882) 8 QBD 534; *Wilcox v Jeffery* [1951] 1 All ER 464. or whose acts were not a substantial cause of death, *Mohan v The Queen* [1967] 2 AC 187. were regarded as principals in the second degree. Lanham, "Limitations on Accomplice Liability", *Criminal Law Journal*, vol 6 (1982) 306, at p 313. They could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the principal in the second degree could not be guilty. *Dunn* (1930) 30 SR (NSW) 210 at 213. Their liability was, accordingly, also derivative.

[72] However, there is I say "is" because it may be that this third category is a late development of the common law which owes its impetus to the enactment of the *Accessories and Abettors Act* 1861 (UK) and its counterparts in other jurisdictions, such as s 323 of the *Crimes Act* 1958 (Vict), and the abolition of the distinction between felonies and misdemeanours. a third category where a person was not only present at the scene with the person who committed the acts alleged to constitute the crime but was there by reason of a pre-concert or agreement with that person to commit the crime. *Lowery and King [No 2]* [1972] VR 560. In that category, the liability of each person present as the result of the concert is not derivative but primary. He or she is a principal in the first degree. In that category each of the persons acting in concert *Hurse* (1841) 2 M & Rob 360 at 361 [174 ER 316 at 317], which was a case of misdemeanour, Erskine J directed the jury "that if two persons, having jointly prepared counterfeit coin, plan the uttering, and go on a joint expedition and utter in concert and by previous arrangement the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering." is equally responsible for the acts of the other or others. The general principle was clearly stated in *Lowery and King [No 2]* [1972] VR 560 at 560. by Smith J who directed the jury in the following terms:

*"The law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime."*

...

[75] As a result, a person may be found guilty of murder although he or she did not commit the acts which physically caused the death of the victim and the person who did is found guilty only of manslaughter. *Howe* [1987] AC 417 at 426, 436, 438, 446, 458. In *Howe*, [1987] AC 417. all their Lordships were of the opinion that *Richards*, [1974] QB 776. which had held that the person who did not perform the acts could not be guilty of a more serious charge than the actual perpetrator, was wrongly decided. Lord Mackay said: *Howe* [1987] AC 417 at 458.

"[W]here a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for the other participant."

...

[79] The principle that those who act in concert and are present at the scene are responsible for the acts of the actual perpetrator operates to make a person guilty of the principal crime, even though the actual perpetrator is acquitted completely. Thus, the person who did the act may be legally insane. Yet as long as that person had sufficient mental capacity to enter into the arrangement or common understanding, the other participant present at the scene will be guilty of committing the principal crime if he or she has the relevant mens rea. *Matusevich v The Queen* (1977) 137 CLR 633. In *Matusevich v The Queen*, (1977) 137 CLR 633. this Court decided that, when two persons are said to be acting in concert, the fact that the actual perpetrator is legally insane does not necessarily mean that the conviction of the other, who was present at the scene, should be quashed. If the actual perpetrator has sufficient capacity to enter into the agreement or understanding, the person present at the scene who was acting in concert may be convicted of the offence.

[85] In cases where the person who performed the act the subject of the arrangement or understanding escapes liability, it is often said that that person has been the "innocent agent" of the

other participant or participants. But that description merely records the result that the person who performed those acts is not criminally liable. It is more accurate to describe the person, who escapes liability in a concert case where the other person is convicted, as a non-responsible **This was the term used in argument by Mr Weinberg QC who appeared for the Crown in this Court.** agent. No doubt there are cases where the person who does the harm-causing act is innocent in a moral sense. For example, the accused may have induced a child of tender years to do the act which constitutes the actus reus of the crime, cf *Manley (1844) 1 Cox CC 104*. or imported drugs via an airline carrier *White v Ridley (1978) 140 CLR 342*. [142]. In that case, the agent is innocent of any wrong doing and the accused is regarded as a principal in the first degree. The acts of the innocent person are attributed to the accused who is guilty of the crime because the latter has the necessary mens rea. The fact that the innocent agent is not guilty of the crime is of no relevance.

#### Taufahema [2006] NSW CCA 152, 8.5.2006

[28] At the outset, Mr Game SC for the appellant submitted (I think rightly) that the appellant could not be convicted if the Crown proved no more that he intended to run away from the police officer and was aware that the other passengers in the car intended to do the same, even if he adverted to the possibility that someone might shoot at the officer. It was essential that the jury be satisfied beyond reasonable doubt not only that each had decided to evade the officer and that each was aware that the others would also evade the officer, but that each would assist the others in doing so and that the appellant realised that a gun might be used in the attempt and there was a real risk that the officer might be shot or suffer grievous bodily harm. It is this mutuality of assistance that creates the essential commonality of purpose and makes them members of a joint enterprise as distinct from each taking part in his own individual enterprise of attempting to avoid arrest.

...

[30] With unfeigned respect for the learned trial judge it does not seem to me that this direction sufficiently conveyed to the jury the essential point that it was not enough that each of them decided that he would escape as distinct from an agreement that each would assist the others to escape. With respect, it seems to me that the phrase "an agreement or understanding that all four of them would jointly evade lawful apprehension" would not be sufficient to convey to the jury the vital distinction. If the appellant simply intended to run away, he could not be criminally responsible for the death of Senior Constable McEnallay merely because he realised that the other occupants of the vehicle intended to escape and that one of the other offenders, in the course of that offender's escape, might use a weapon against the officer.

#### Common Purpose and Murder

In the recent case of *Clayton, Hartwick and Hartwick v The Queen* [58] 13.12.2006 the High Court was asked to reconsider and reformulate the test for extended joint criminal enterprise set down in *McAuliffe and Gillard* (2003) 219 CLR 1. It was argued that under the principle of extended joint criminal enterprise an accused is guilty if he or she foresaw the **possibility** of a murderous assault whereas the principal offender must have intended or foreseen the **probability** that an assault would be murderous.

In dismissing the appeal Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ:

[15] First, contrary to the applicants' central submission, it is not demonstrated that the application of the principles stated in those cases has led to any miscarriage of justice in this case or, more generally, has occasioned injustice in the application of the law of homicide.

[17] A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder.

[18] Secondly, the applicants could point to no other court of final appeal accepting the proposition

that the applicants put at the forefront of their submission, namely, that the doctrine of extended common purpose should be abolished or modified by replacing foresight of the possibility of a murderous assault with foresight of the probability of such an assault. Other common law countries continue to apply generally similar principles to those stated in *McAuliffe* and *Gillard*.

[19] Thirdly, if there are to be changes in this area of the law (and we are not to be taken as suggesting that there should be) there could be no change undertaken to the law of extended common purpose without examining whether what was being either sought or achieved was in truth some alteration to the law of homicide depending upon distinguishing between cases in which the accused acts with an intention to kill and cases in which the accused intends to do really serious injury or is reckless as to the possibility of death or really serious injury[7]. That is a task for legislatures and law reform commissions. It is not a step that can or should be taken in the development of the common law.

In his dissent Kirby J referred to the current law on extended joint criminal enterprise as "unjust, overbroad and anomalous." [Clayton, Hartwick and Hartwick v The Queen](#) [58] 13.12.2006 at [98]

[100] If a principal offender were to kill the victim, foreseeing only the possibility (rather than the probability) that his or her actions would cause death or grievous bodily harm, that person would not be guilty of murder. *cf Crabbe* (1985) 156 CLR 464 at 469-470. Yet a secondary offender with a common purpose could, on the current law, be found guilty of murder of the same victim on the basis of extended common purpose liability if the jury were convinced that he or she had foreseen the possibility that one of the group of offenders might, with intent, cause grievous bodily harm and if, in the result, one of the group does indeed kill the victim with the intention to cause such grievous bodily harm. *McAuliffe* (1995) 183 CLR 108 at 118.

[101] On the face of things, the secondary offender's moral blameworthiness in such a case is significantly less than that of the principal offender. Yet (particularly in separate trials *cf Osland v The Queen* (1998) 197 CLR 316 at 368-370 [155], [157]) it is quite possible, on current legal doctrine, that the secondary offender might be convicted of murder whilst the principal offender is acquitted, or convicted of a lesser offence. *Somewhat analogous and disparate outcomes arose in the case of Mr Bentley. See Bentley (Deceased)* [2001] 1 Cr App R 307.

[102] There is a further anomaly and lack of symmetry upon which the applicants relied. In *Giorgianni*, (1985) 156 CLR 473. *The tension between Giorgianni and McAuliffe has been noted. See Simester, "The Mental Element in Complicity"*, (2006) 122 *Law Quarterly Review* 578 at 596. this Court expressed the mens rea required for other forms of complicity at common law, in the case of an accused charged as an aider, abettor, counsellor or procurer of the offence in question, in terms firmly anchored in a requirement of proof of: (1985) 156 CLR 473 at 506 per Wilson, Deane and Dawson JJ. See also at 481-482, 487-488 per Gibbs CJ, 500, 504-505 per Wilson, Deane and Dawson JJ.

*"intentional participation ... by lending assistance or encouragement. ... The necessary intent is absent if the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence."*

[103] Adherence to the present requirements of liability for an extended common purpose is difficult, or impossible, to reconcile with this approach to criminal liability.

[108] To hold an accused liable for murder merely on the foresight of a possibility is fundamentally unjust. It may not be truly a fictitious or "constructive liability". *Powell* [1999] 1 AC 1 at 13. But it countenances what is "undoubtedly a lesser form of mens rea". *Powell* [1999] 1 AC 1 at 14. It is a form that is an exception to the normal requirements of criminal liability. *Gillard* (2003) 219 CLR 1 at 18-19 [46]-[47], 28-29 [78], 30 [84]; *Powell* [1999] 1 AC 1 at 11 per Lord Mustill. And it introduces a serious disharmony in the law, particularly as that law affects the liability of secondary offenders to conviction for murder upon this basis.

As an alternative Kirby J proposed the following formulation.

[125] ... In the place of telling the jury, relevantly, that they might convict a secondary offender for a crime actually committed by another in the course of a common enterprise if it was proved that that offender participated or continued to participate in the enterprise aware that it was possible that another participant might commit murder, the judge would explain the need for the jury to be sure that the secondary offender either wanted the principal offender to act as he or she did, with the intention which he or she had, or knew that it was virtually certain that the principal offender would do so.



**Taufahema [2007] NSW CCA 33, 16.2.2007**

In the most recent case of *Taufahema*, the Court of Criminal Appeal emphasised the requirement that in joint enterprise murder, the accessory must have foreseen the possibility that the principal offender acted with intent to kill or inflict grievous bodily harm.

[27] The appellant submitted that his Honour's written direction failed to correctly identify the elements necessary for joint enterprise murder. The problem, acknowledged by the Crown in this appeal, is that the direction did not state that the appellant must have contemplated that it was possible that (the co-accused) would have deliberately pulled the trigger of the gun intending to cause death or grievous bodily harm.

...

[30] In my opinion the appellant's submission must be accepted. The offence of murder relevantly required in (the co-accused) an intention to kill or inflict grievous bodily harm on the policeman: (the offence was not advanced on the basis of reckless indifference (s 18(1)(a) *Crimes Act 1900*)).

[31] In *Sharah* (1992) 30 NSWLR 292 Carruthers J with whom Gleeson CJ and Smart J agreed said of common purpose murder:

*"It is well-established that there are two classes of common purpose murder. The first class is where the Crown proves that the accused was present and that the deceased was killed in accordance with an understanding or arrangement to which the accused was a party and that that understanding or arrangement included the intent charged, that is, either to kill or to cause grievous bodily harm. The second class of case is where the accused lends himself to a criminal enterprise knowing that a potentially lethal weapon was being carried by one of his companions and in the event that it is in fact used by one of his partners with an intent sufficient for murder, then the accused too will be guilty of that offence of murder if the Crown establishes beyond reasonable doubt that the accused contemplated that in the carrying out of the common unlawful purpose, one of his partners might use a lethal weapon with the intention of at least causing serious bodily harm. In the recent case of Hui Chi-ming v The Queen [1992] 1 AC 34 (a case to which, I regret to say, this Court was not referred by either party) the Privy Council were concerned with a case of the second class. The present case is also within the second class."*

[32] See also the discussion in *McAuliffe v The Queen* (1995) 18 3 CLR 108 at 114-117.

[33] The present case was advanced by the Crown as falling into the "second class" for which, as Carruthers J emphasised, an essential element is that the accompanying person understood that the killer might use a lethal weapon "with the intention of at least causing serious injury."

**When is it Appropriate to Base a Case on Common Purpose?*****Stokes and Difford* (1990) 51 A Crim R 25**

[per Hunt J at p.36]

It is (at the very least) unnecessary for a case based on common purpose to be put to the jury where the crime in fact committed is the very crime for the purpose of which both or all accused are alleged to have combined. To do so is simply to add an additional and an unnecessary element to what must be proved by the Crown in any event. A common purpose case does not relieve the Crown from the need to prove that each of the accused was himself guilty of the crime for the purpose of which they are all alleged to have combined - either as the principal offender or as having aided and abetted that principal offender. Apart from making some evidence admissible against all of the accused which would otherwise have been admissible against only one of them (in accordance with *Tripodi* and *Ahern*), that additional and unnecessary element which must be proved by the Crown is also both inappropriate (unless the crime actually committed was only incidental to the one originally planned) and undesirable (because of the confusion which it is very likely to produce).

***Clough* (1992) 64 A Crim R 451**

The Crown alleged that the appellant and another bound a security guard. The security guard was found badly injured and his pistol missing. He later died of injuries to his head which were consistent with a number of applications to the head by a blunt instrument consistent with the pistol.

[per Hunt CJ at CL at p.453]

The Crown case on the face of it was a simple one. It was open to the jury to conclude from the evidence that:

- (1) both the appellant and Sellers were involved in the assault upon the victim;
- (2) one or other of them had the victim's pistol and had used it in order to inflict the blow or blows about his head which led directly to his death; and
- (3) in such a joint assault, the one who was not using the pistol must have been aware that the other was using it but nevertheless continued to assist or to encourage him by continuing himself to beat the victim with his fists or hands until he had fallen to the ground.

In those circumstances, it did not matter which of the two men was using the pistol to hit the victim, and it was unnecessary for the Crown to establish which one it was. The accused was guilty of murder if the Crown also proved either:

- (4) that both men had an intention at least to inflict grievous bodily harm, or
- (5) (a) that the one who used the pistol (whichever he may be) had such an intention, and
  - (b) that the other man was aware:
    - (i) not only that the man with the pistol was using it to hit the victim about his head, but also
    - (ii) that he was doing so with such an intention to inflict grievous bodily harm, and
  - (c) that, with that knowledge, he intentionally assisted or encouraged the man using the pistol by continuing himself to beat the victim with his fists or hands until he had fallen to the ground.

The authorities for those propositions are *Mohan* [1967] 2 AC 187 at 195 and *Giorgianni* (1985) 156 CLR 473 at 487-488, 494, 500, 504-505, 506-507; 16 A Crim R 163 at 173-174, 178, 182-183, 185-186, 187-188: see also *Yorke v Lucas* (1985) 158 CLR 661 at 667. Those authorities were discussed by this Court in *Stokes and Difford* (1990) 51 A Crim R 25 at 35-39. As it was said in that case (at 35), the ratio in *Mohan* (in which the Crown was unable to establish which of the two accused had inflicted the fatal blow) does not depend upon the fact that each of the accused in that particular case was physically attacking the victim. It would equally be applicable where the finding of aiding and abetting is available from other conduct.

[at p.456]

(T)he Crown case was considerably (and unnecessarily) complicated by the introduction of the concept of common purpose. This was a classic case of principal offender and accessory, even though (let it be assumed) the Crown was unable to identify which of the two men had the pistol and had inflicted the fatal blow or blows. *Mohan's* case makes it clear that proof of a pre-arranged plan is unnecessary. Crown Prosecutors should *not* rely upon common purpose unless it is necessary to do so. This Court has said so on many occasions: see, eg, *Stokes and Difford* (at 35-37). Common purpose is usually necessary only where the accused against whom such a case is sought to be made was not an accessory (that is, present and assisting) at the time when the crime in question is committed and where the crime committed was merely incidental to that which had been the prime object of the common criminal venture.

### **Identifying Case to Jury**

#### ***Tangye* (1997) 92 A Crim R 545**

[per Hunt CJ at CL at p.556]

The obligation of the Crown Prosecutor in opening the Crown case is not merely to outline the facts which the Crown proposes to establish in evidence. It is also to indicate, in conceptual terms, the nature of the Crown case. This is to assist both the trial judge and counsel for the accused, more so than the jury. It is essential that any doubt about the nature of the Crown case, conceptually, be removed at that early stage. If it is not done at that stage, or if there had been some change in its nature since the case was opened, it is vital that it be identified with some precision, in the absence of the jury, before counsel commence their final addresses. It becomes very difficult for the judge sensibly to make alterations to directions already given once it is learnt that the issues are different to those which had been assumed to exist.

The summing up in the present case has suffered substantially from the judge's failure to ascertain what the Crown case was in relation to the first count until after the original directions had been given. I will refer presently to the problems which arose. Before doing so, it will be seen from the passages quoted that the judge has referred - apparently interchangeably - to a joint criminal enterprise and to the so-called doctrine of common purpose which extends the concept of a joint criminal enterprise. Where - as here - no such extended concept was relied upon, it was both unnecessary and confusing to refer to it.

The Crown needs to rely upon a straightforward joint criminal enterprise only where - as in the present case - it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making that point for years. [See, for example: Stokes \(1990\) 51 ACrimR 25 at 35-37; Clough \(1992\) 28 NSWLR 396 at 400; 64 ACrimR 451 at 455.](#) and it is a pity that in many trials no heed is taken of what has been said.

So far as a straightforward joint criminal enterprise is concerned, the jury should be directed along these lines:

(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. [See, generally, McAuliffe \(1995\) 183 CLR 108 at 113-116; 79 ACrimR 229 at 233-236.](#) [14]

It is advisable to give an example of facts right away from the facts of the particular case after the definition in the second of those directions in order to assist the jury's understanding of what is meant. The bank robbery example is usually suitable where there has been some degree of planning involved in the joint criminal enterprise. It is not of much assistance where, as here, the evidence is fairly silent as to how the agreement was reached. Particularly is that so where - contrary to the way in which the present case appears to have been left to the jury - the agreement by the appellant to participate in the joint criminal enterprise appears to have been (at most) coincidental with joining his friends in the fight. A better example of such a spontaneous type of joint criminal enterprise, based upon that given in *Lowery (No 2)* [1972] VR 560 at 560-561. is one where the crime involved is that of break enter and steal:

*"Three men are driving and they see a house with a lot of newspapers and milk bottles at*

*the gate. One says to the others 'Let's go and have a look at this one'. The car pulls up, two of the men get out and one of them stays in the car behind the driving wheel with the engine running, while the other two go to the front door. One of them breaks the glass panel on the outside of the door, puts his hand through and unlatches the door and throws it open. The third man goes inside and collects the valuables and comes out, while the man who opened the door goes back to the car and never enters the house at all.*

*Only one of the men broke into the house, the man who broke the glass panel and put his hand inside, and only one of them entered the house and stole something, the one who picked up the valuables, and one of them did neither of those three things. But the law provides that, if the jury is satisfied by their actions (rather than merely by their words) that all three men had reached an understanding or arrangement which amounted to an agreement between them to commit the crime of break enter and steal, each of the three is criminally responsible for the acts of the others. All three are guilty of break enter and steal."*

It should only be after the directions of law have been given that the judge should refer to the facts of the particular case upon which the Crown relies, and that the application of the law to those facts should be explained.

See also *Vester Fernando & Anor* [1999] NSW CCA 66; *Helene* [1999] NSW CCA 203.

### **Commonwealth Criminal Code**

Under the Commonwealth Criminal Code a person will be guilty of the principal offence if he or she intentionally assisted the commission of an offence and was reckless as to what offence was actually committed. (CTH) [Criminal Code s 11.2\(3\)\(b\)](#)

### **Common Purpose: Evidence Otherwise Only Admissible Against One May be Admissible Against all Accused.**

#### ***Dixon and Smith (1992) 62 A Crim R 465***

[per Wood J at p.471]

As was pointed out in *Stokes and Difford* (1990) 51 ACrimR 25, it is unnecessary to put a case based on common purpose to the jury when the crime in fact committed is the very crime for the purpose of which all accused are alleged to have combined. Unless a case based upon common purpose is necessary because the crime in fact committed was only within the contemplation of the accused as a possible incident of the execution of the planned enterprise, or because it makes some evidence admissible against all of the accused which would otherwise have been admissible only against one of them, it is not only unnecessary, but also undesirable to do so.

There seems to have been some degree of confusion between these notions because at the end of the summing up, counsel for Mr Dixon sought a further direction to the effect that, in order for an accused to be made liable under the doctrine of "common purpose", where he had refrained from any actual assault, he had to be present encouraging, aiding or assisting the actual perpetrator. This of course was more appropriate to a case where there was no preconcert established: *Lowery and King (No 2)* [1972] VR 560. Over the objection of the Crown Prosecutor, a redirection was given in these terms. The net effect was to compound the problems caused by the fact of a joint trial, and the failure to keep the cases concerning the two accused clearly distinct.

I am of the view that there was in the result, a real risk that the trial miscarried, and that the conviction of Smith, on the count of manslaughter, should be quashed and a new trial ordered.

### **Admissibility of evidence of previous representation made by A in furtherance of a common purpose with B.**

Once there is reasonable evidence of the participation of an accused in an unlawful purpose the words as well as actions of the co-accused are admissible as evidence against the accused providing the words and actions are in furtherance of the common purpose.

*Evidence Act 1995 s.87*

87 (1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

...

(c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

The ALRC [ALRC Evidence \(Interim\), 1985, 26, Vol 1, para 755](#). noted that a previous representation by A, allegedly acting in furtherance of a common purpose by B, will not be hearsay where it is relevant as a verbal act to establish the existence of the common purpose.

Evidence of statements made by an alleged conspirator A and tendered as evidence of acts done pursuant to the alleged conspiracy will continue to be admissible against alleged conspirator B. The evidence is not tendered for a hearsay purpose and is not caught by the hearsay proposal. Such evidence raises a problem of conditional or provisional relevance - the relevance of the act of A to the case against B will depend upon a prima facie finding that there was a common purpose between A and B. This issue is covered by the proposal on provisional relevance and can be handled in practice as at present.

See also s.60 – Exception to the hearsay rule: evidence relevant for a non-hearsay purpose.

See also *Lee v the Queen* (1998) 195 CLR 594

[40] It is then clear that s 60 was intended to work a considerable change to the common law. But there is no basis, whether in the considerations which we have mentioned as having influenced the Commission or otherwise, for concluding that s 60 was intended to provide a gateway for the proof of any form of hearsay, however remote. As has been indicated earlier in these reasons, that that was not intended is made plain by the terms of s 59 to which s 60 is an exception.

See also *Tripodi* (1961) 104 CLR 1; *Ahern* (1988) 165 CLR 87; *Chan Kam Wah*, NSW CCA, 13.4.1995 at p.5; *Velardi* NSW CCA, 24.5.1996.

### Withdrawal

A person will not be liable for an offence if he or she withdrew his or her involvement prior to the offence being committed. (CTH) [Criminal Code s 11.2\(4\)\(a\)](#); [White v Ridley \(1978\) 140 CLR 342](#); [Tietie \(1988\) 34 A Crim R 438](#) The accessory must make a timely and unequivocal A countermand which is vague, ambiguous or perfunctory is insufficient: [White v Ridley \(1978\) 140 CLR 342 at 351](#). communication, by words or conduct, [White v Ridley \(1978\) 140 CLR 342 at 351](#) to all other parties of the intention to withdraw, [White v Ridley \(1978\) 140 CLR 342 at 348-351](#); [Tietie \(1988\) 34 A Crim R 438 at 447](#) and must take all reasonable steps to prevent the commission of the offence. (CTH) [Criminal Code s 11.2\(4\)\(b\)](#); [White v Ridley \(1978\) 140 CLR 342 at 351](#) [Tietie \(1988\) 34 A Crim R 438 at 447](#)CCA(NSW); [Truong NSW CCA 22.6.1998](#): if the accessory honestly believes that the offence will not take place he or she does not have to take any further steps to prevent its commission. A withdrawal is only timely if it can be effective and is not made too late to prevent the offence being committed. [White v Ridley \(1978\) 140 CLR 342 at 351](#) Where there is evidence of withdrawal the onus is on the prosecution to prove beyond reasonable doubt there was no withdrawal. [White v Ridley \(1978\) 140 CLR 342 at 348](#)

### Procedure

Although an accessory may be prosecuted as a principal offender, (CTH) [Criminal Code s 11.2\(1\), 11.2\(7\)](#); (NSW) [Crimes Act 1900 ss 346, 351, 351B](#) the indictment should indicate the basis for liability is accessorial, or this should be made clear early in the trial, to prevent unfairness to the defence. [Giorgianni \(1985\) 156 CLR 473 at 497](#); [King \(1985\) 17 A Crim R 184](#); [King \(1986\) 161 CLR 423 at 425](#) per Murphy J, at 436-7 per Dawson J; [Buckett \(1995\) 79 A Crim R 302 at 305](#).



Where a prosecutor is unable to establish who, of the parties involved, committed the actus reus of an offence, an offender may be convicted of the offence provided the prosecutor can prove they were *either* the principal offender *or* an accessory. [Mohan \[1967\] 2 AC 187; \[1967\] 2 All ER 58; Phan \(2001\) 53 NSWLR 480; 123 A Crim R 30; at \[65\] per Wood CJ at CL and \[90\] per Smart AJ](#). The prosecution does not need to specify the basis for the liability contended. [Serratore \(1999\) 48 NSWLR 101 per Greg James J at \[154\]-\[225\]](#).

## Directions

Directions to jury in trials involving principles of joint criminal enterprise must detail the relationship between the general principles and the evidence of the case. [Georgiou & Harrison \[2001\] NSW CCA 464, 21.11.2001 at \[19\]](#)

## Punishment

An accessory is liable to the same punishment as a principal offender (CTH) [Criminal Code s 11.2\(1\); \(NSW\) Crimes Act 1900 ss 345, 346, 351, 351B\(2\)\(1\)](#), although the actual role played by an offender will be relevant to the assessment of the appropriate sentence. [Johns \(1980\) 143 CLR 108 at 117; Osland \(1998\) 197 CLR 316; 159 ALR 170 at 238](#). Although an accessory would usually expect a lesser sentence than the principal offender this will depend upon the circumstances of the case, and in some circumstances the culpability of the aider and abettor may be equal to or greater than the principal offender. [GAS \(2004\) 206 ALR 116 at \[22\]-\[23\]](#).

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## Guide to Accessorial Liability in New South Wales

by Colin Scouler and Richard Button

### Introduction

Law as at May 2001

Reformatted 29 March 2004

1. This guide does not deal with attempt, conspiracy, incitement, or the offence of concealing a serious offence. [The first three topics are governed by the common law in New South Wales, but see also Part 8A of the Crimes Act 1900 \(NSW\). The offence mentioned is contained in section 316 of the Crimes Act.](#)
2. In this guide we use the terms "mental element" and "physical element" rather than "mens rea" and "actus reus".
3. Although there are statutory provisions that deal with the topic of accessorial liability, [See Part 9 of the Crimes Act, section 100 of the Justices Act 1902 \(NSW\), and section 5 of the Crimes Act 1914 \(C'th\)](#), the source of the substantive law is the common law. [The latest High Court case on the topic is Osland. The discussion by McHugh J at paragraphs 69 to 95 inclusive represents the law in New South Wales. The latest NSW CCA cases on the topic are Chai and Kane. With regard to Commonwealth offences, see section 4 of the Crimes Act 1914.](#) The statutory provisions have been held to be merely declaratory and procedural. [Giorgianni at pages 480 and 490.](#)
4. This guide seeks to distil those common law principles into a concise and accessible format to which practitioners are readily able to refer. [We have sought to state the law as at May 2001.](#)
5. The principles of accessorial liability discussed in this guide apply to both State and Commonwealth offences committed in New South Wales. However, note that it seems that accessorial liability with regard to Commonwealth offences will soon be governed by the Commonwealth Criminal Code. [See the Criminal Code Act 1995 \(C'th\) \(Act No. 12 of 1995\).](#)
6. There are two bases upon which accessorial liability can be founded. The first we call "the classic formulation". The second is "joint criminal enterprise". The latter operates **in addition to** the former. [See McAuliffe at page 114, quoted in Osland at paragraph 24 and Chai at paragraph 10.](#)

### The Classic Formulation

7. There are two ways to be liable for a crime. [The crime of treason is in a special category. There are no degrees of involvement in this offence, presumably due to its seriousness. All who involve themselves in it are guilty as principal in the first degrees.](#) The first is as a principal in the first degree. The other is as a secondary party. [Chai at paragraph 9.](#)
8. **The principal in the first degree is the person who actually commits the crime.**
9. **Example:** a person who walks into a bank waving a gun, and who demands and receives money, is guilty of

armed robbery as a principal in the first degree.

10. Aspects of being a principal in the first degree will be discussed in more detail later.

11. There are three kinds of secondary parties: principal in the second degree, accessory before the fact, and accessory after the fact.

**12. A principal in the second degree is a person present at the commission of the crime who encourages or assists in its commission.**

**13. Example:** the getaway driver at the scene of the armed robbery is guilty of that offence as principal in the second degree, even though he or she personally was not armed and did not rob anyone.

**14. Comment:** the liability of the principal in the second degree is derivative. In other words, the prosecution must prove the commission of the offence by the principal in the first degree in order to prove the offence of the principal in the second degree. [Osland at paragraph 14](#). That does not mean, of course, that the principal in the first degree must be convicted for the principal in the second degree to be proven guilty. It means that the prosecution must prove, in the proceedings against the principal in the second degree, the commission of the crime by the principal in the first degree.

**15. An accessory before the fact is a person, not present at the crime, who encourages or assists the commission of the crime.**

**16. Example:** a person who gives the principal in the first degree a gun in the knowledge that it will be used to commit an armed robbery is guilty of being an accessory before the fact to armed robbery if the principal in the first degree proceeds to commit that crime.

**17. Comment:** the liability of the accessory before the fact is derivative. In other words, the prosecution must prove the commission of the offence by the principal in the first degree in order to prove the offence of the accessory before the fact.

**18. An accessory after the fact is a person who assists the principal in the first degree to avoid detection, apprehension or conviction after the offence has been committed.**

**19. Example:** a person who knows that an armed robbery has been committed and buries the money in order to hide it for the principal in the first degree is guilty of being an accessory after the fact to armed robbery.

**20. Comment:** the liability of the accessory after the fact is derivative, in the sense that the prosecution must prove the commission of the offence by the principal in the first degree in order to prove the offence of the accessory after the fact.

21. However, strictly speaking, the accessory after the fact is not a true accessory. He or she commits another, separate offence after the completion of the principal offence by the principal in the first degree.

22. Aspects of these three kinds of accessorial liability will be discussed in more detail later.

## JOINT CRIMINAL ENTERPRISE

23. There are two kinds of joint criminal enterprise: straightforward and extended. [Chai at paragraph 11](#).

**24. Straightforward joint criminal enterprise** may be relied upon by the prosecution when:

§ the accused

§ reaches an understanding or arrangement amounting to an agreement

§ between the accused and another or others

§ that **they** (the accused and the other or others) will commit a crime [Chai at paragraph 10, quoting McAuliffe](#).

§ the accused is present when the crime is committed [Osland at paragraphs 27, 72, 79, 80, and 93](#). Note that

[Gaudron J and Gummow J suggest that, on the McAuliffe principles, perhaps even presence is not required.](#); **AND**

§ the accused possesses the mental element for the crime (this really restates the agreement element above).

25. The accused will be guilty as a principal in the first degree. His or her liability is primary, not derivative. [Osland at paragraph 72](#). Therefore, the prosecution need not prove, as against the accused, the commission of the crime by the person who carried out the physical elements of the offence. [Osland at paragraphs 27 and 93](#). Indeed, whether or not that person is guilty of a crime at all is irrelevant. [Because of, for example, the physical actor being not guilty on the grounds of mental illness: see Osland at paragraph 75, and the example given immediately below](#). It is the act, not the crime, of the physical actor that is attributed to the accused.

**26. Example:** The accused, who is aged eighteen years, and his younger brother agree to commit a break, enter and steal. They travel to a house together. The accused is present while the brother breaks in and steals a DVD player. The accused does nothing to assist or encourage (other than, of course, being present and entering into the agreement). The brother is aged less than ten years and so is irrebuttably presumed to be not guilty. The accused is nevertheless not only guilty of break, enter and steal, but also guilty as a principal in the first degree.

**27. Comment:** note that this concept has the potential, in certain situations, to convert a "classic" principal in the second degree into a principal in the first degree. [Quite a bit of the discussion in the judgments in Osland is about whether the appellant was a principal in the first degree or a principal in the second degree](#).

28. It has been said that a straightforward joint criminal enterprise should be alleged by the prosecution when the crime agreed to is the crime that is committed, but the prosecution cannot establish who is the principal in the first degree. [Tangye at page 556, quoted in Chai at paragraph 11](#).

29. Extended joint criminal enterprise [Also sometimes known as "common purpose"](#). We have adopted the nomenclature used in [Chai](#). may be relied upon as follows:

§ a person is liable for any other crime

§ falling within the scope of the common purpose

§ which is committed in carrying out that purpose. [McAuliffe quoted in Chai at paragraph 10](#).

30. It has been said that an extended joint criminal enterprise should be alleged when the offence charged is not the enterprise agreed. [Tangye at page 556](#).

**31. Question:** what is meant by "within the scope of the common purpose"?

**Answer:** the test was, in the past, objective. However, now it is subjective:

§ the scope of the common purpose is to be determined by

§ what was contemplated

§ by the parties sharing that purpose. [McAuliffe, quoting Johns in the CCA, quoted in Chai at paragraph 10.](#)

32. In another words:

§ did the accused

§ contemplate the act

§ as a possible incident

§ in the commission of the crime

§ to which he or she had agreed? [Johns in the HCA at pages 130-131.](#)

**33. Example:** the accused and his girlfriend agree to do an unarmed robbery. They confront the victim and assault him with their fists. In the course of the attack, the girlfriend produces a knife and threatens the victim with it.

34. Clearly, the girlfriend is guilty of armed robbery as a principal in the first degree. As for the accused, if he did not contemplate the possibility of his girlfriend presenting the knife, then he is not guilty of armed robbery. If he did, he is guilty of armed robbery.

**35. Comment:** the accused need not desire or intend the act contemplated as being a possibility. He may indeed have tried to dissuade the girlfriend from bringing a knife. But so long as the prosecution can establish beyond reasonable doubt that he contemplated the presentation of the knife as a possible incident of the unarmed robbery, the accused will be guilty of armed robbery.

**36. Question:** what **exactly** must the accused contemplate as a possibility in order to be guilty of the extended offence? Certainly, the accused must contemplate the performance of the **act** as being possible. But what about the **consequences** of that act? Must the accused contemplate the possibility of them as well? One would think not, in accordance with what has been said about the classic formulation of the liability of a principal in the second degree (see paragraph 46 below). Furthermore, must the accused contemplate as a possibility the **mental element** of the principal in the first degree with regard to the extended crime? [Note the different terminology \("act" cf "crime"\) in paragraphs 29 and 32 above.](#) Or is contemplation of the possibility of the act, without regard to the state of mind of the actor, sufficient?

**37. Answer:** although it is by no means absolutely clear, we think that the position is as follows:

§ the accused must foresee the possibility of the act; AND

§ the accused must foresee the possibility of the requisite mental element of the principal in the first degree; BUT

§ The accused NEED NOT foresee the possibility of the consequence of the act. [Sharah at pages 297E and 298A, and Kane at paragraphs 54 and 58. But compare McAuliffe at page 118 paragraph 2, which seems to suggest that foresight of the possibility of consequences \(here, grievous bodily harm\) is necessary as well.](#)

**38. Question:** with what degree of particularity must the principal in the second degree foresee the act of the principal in the first degree?

**39. Example:** the principal in the second degree and the principal in the first degree agree to do a home invasion. The principal in the second degree foresees the possibility that the principal in the first degree may use his fists with intent to do grievous bodily harm. In fact, the principal in the first degree uses a knife with intent to do grievous bodily harm. The victim is stabbed and dies. Is the principal in the second degree guilty of murder?

40.

**Answer:** we think not. It seems that the act contemplated as a possibility by the principal in the second degree and the act carried out in reality by the principal in the first degree must be of the same "kind" or "type". [See Johns \(HCA\) at page 131 paragraph 1: "the common purpose involved resorting to violence of this kind" and McAuliffe \(discussing Chan Wing-Siu v the Queen \[1985\] AC 168\) at page 116 paragraph 1: "liable for acts done by the primary offender of a type which the secondary party foresees". See also the discussion of this aspect of Johns in Fisse at pages 343 and 344.](#) Again, we accept that the position is far from clearly settled.

### Aspects of Principal in the First Degree

41. A person who commits the whole or part of the physical elements of the offence will be a principal in the first degree. There may be more than one principal in the first degree. [Osland at paragraph 70.](#)

**42. Example:** two persons enter a bank. One waves a gun around and threatens people. The other takes the money. Both are guilty as principals in the first degree, even though neither one of them personally committed the whole offence.

43. A person is a principal in the first degree pursuant to the classic formulation so long as his or her act "substantially contributes" to the relevant result. [This is really just an application of the test of causation propounded in Royall v the Queen \(1991\) 172 CLR 378.](#)

**44. Example:** a person who holds the victim down while another person bashes the victim to death is a principal in the first degree of the crime of murder, not a principal in the second degree.

45. As noted above, pursuant to straightforward joint criminal enterprise, a person may be a principal in the first degree without any physical act on his or her part.

### Aspects of Principal in the Second Degree

**The classic formulation:**

46. The prosecution must establish: [Difford at page 37](#).

§ the commission of the crime by the principal in the first degree

§ the accused was present

§ the accused knew all of the essential elements necessary for the prosecution to succeed against the principal in the first degree (including any mental element of the principal in the first degree) EXCEPT consequences; eg grievous bodily harm, death, etc.

§ (Or, to put this dot point another way: the accused must know of all of the physical and mental elements of the crime of the principal in the first degree, except consequences); **AND**

§ the accused, with that knowledge, intentionally assisted or encouraged the principal in the first degree to commit the crime.

47. In this context, "present" means that the principal in the second degree is near enough to be readily able to come to the aid of the principal in the first degree if the need arises. [See Gillies at page 161](#).

48. The intention that must be proved against the principal in the second degree is to assist and encourage the principal in the first degree.

49. Recklessness is not sufficient for either aspect of the mental element of the principal in the second degree. It must be knowledge (of the elements of the offence of the principal in the first degree, except consequences) and intention (to assist or encourage).

**50. Comment:** in some ways the liability of the principal in the second degree is strictly circumscribed, in that he or she must know of all of the elements (except consequences) of the crime of the principal in the first degree.

Furthermore, the assistance or encouragement must be nothing less than intentional.

51. However, in another way, the liability of the principal in the second degree is very broad, in that he or she need have no mental element at all with regard to the consequences of the crime of the principal in the first degree.

**Statutory complications**

52. Section 345 of the *Crimes Act* should be noted. It makes principals in the second degree liable to the same punishment as principals in the first degree with regard to serious indictable offences.

53. Section 351 of the *Crimes Act* is to similar effect with regard to minor indictable offences.

54. Section 100 of the *Justices Act* is to similar effect with regard to offences "made punishable on summary conviction". Presumably this applies to summary offences and to indictable offences dealt with summarily pursuant to the *Criminal Procedure Act 1986* (NSW).

55. Note that although sections 345 and 351 of the *Crimes Act* use different terminology, they are merely dealing with two kinds of indictable offences. Furthermore, even though the third section applies to both indictable and summary offences, it is "buried" in the *Justices Act*. The historical reasons for this state of affairs, and a suggestion for law reform, is discussed below.

**Aspects of Accessory before the Fact**

56. There is no difference in the liability between a principal in the second degree and an accessory before the fact. [Difford at page 38](#). The mental elements are the same. In particular, like the principal in the second degree, the accessory before the fact need have no mental element with regard to consequences. [Ibid](#).

57. The difference between a principal in the second degree and an accessory before the fact is that the former is present at the crime and the latter is not.

58. Note that straightforward joint criminal enterprise cannot apply to an accessory before the fact in order to make him or her liable as a principal in the first degree, because of the requirement of presence within that doctrine. [See footnote 13 above](#). However, extended joint criminal enterprise can indeed apply to make a person liable as an accessory before the fact to the "extended" offence. [The accused in the seminal case was an accessory before the fact, not a principal in the second degree: Johns](#).

59. Sections 346 and 351 of the *Crimes Act* and section 100 of the *Justices Act* should be noted.

**Aspects of Accessory after the Fact**

60. The mental elements of an accessory after the fact are that, with knowledge of the commission of the crime, he or she intends to assist the principal in the first degree to avoid detection, apprehension or conviction.

61. Note that, with regard to State offences, one can only be an accessory after the fact to a serious indictable offence. [See section 347 of the Crimes Act](#). A serious indictable offence is defined [Crimes Act section 4](#), as being an indictable offence that carries a maximum penalty of imprisonment for five years or more. There is no offence of being an accessory after the fact to a summary offence, or an indictable offence that carries less than five years.

62. There are statutory provisions that detail the various maximum penalties for being an accessory after the fact to various offences. [Sections 348, 349 and 350 of the Crimes Act](#).

63. One can be an accessory after the fact to any Commonwealth offence. The maximum penalty is imprisonment for two years. [Section 6 of the Crimes Act 1914 \(C'th\)](#).