



Extended Joint Criminal Enterprise – ‘Top-down’ or ‘Bottom-up’ Legal Reasoning?¹

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Remarks of the Hon. Justice Weinberg at the New South Wales Supreme Court Conference, Bowral, New South Wales.

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1 Our law provides that responsibility for a criminal offence extends beyond the person who commits the crime itself. It covers others who, in one way or another, assist that person. In other words, a person who promotes or assists in the commission of a crime is treated as being just as responsible for that crime as the person who actually commits it.

2 The doctrine of criminal complicity is said to have developed, over time, in a ‘rather haphazard and inconsistent fashion’.³ The judge-made principles that govern this area have been criticised by practitioners, commentators, and law reform bodies. Anyone who practises regularly in crime would readily accept that this branch of the law is in serious need of attention.

3 Legislation now governs almost every aspect of the criminal law, whether it be substantive, procedural, the rules of evidence, or sentencing. This makes it all the more fascinating when one of those rare remnants of the criminal law that is still judge-made leads to

¹ In philosophy, the term ‘top-down’ reasoning is normally regarded as synonymous with deductive, as distinct from inductive, reasoning. However, ‘top-down legal reasoning’ has a secondary sense, as identified by Judge Richard Posner, and as further discussed by Keith Mason AC, then President of the New South Wales Court of Appeal in his Sir Maurice Byers Lecture, delivered to the New South Wales Bar Association on 26 February 2004. Top-down legal reasoning proceeds from a broad assumption or theory to a conclusion. Bottom-up legal reasoning, on the other hand, encompasses working within traditional legal constraints, such as case law analysis.

² The views expressed in this paper are, of course, my own. They should not be taken to represent the views of any other member of the Supreme Court of Victoria. I have been greatly assisted in the preparation of this paper by my Associate, Grace Krütsch, and also by the Associate to Justice Paul Coghlan, Max Koh.

³ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co., 4th ed, 2017) 396.



quite fundamental disagreement between the highest courts of the United Kingdom and Australia. That is precisely what has recently occurred in relation to the doctrine of extended joint criminal enterprise, the subject of this paper.⁴

4 Of course, there have been stark differences in the past as to basic criminal law doctrine between those courts. In *Parker v The Queen*,⁵ for example, the High Court took what was, at the time, the remarkable step of refusing to follow a recent decision of the House of Lords in *Director of Public Prosecutions v Smith*.⁶ This was because, in the opinion of the High Court, their Lordships had produced a judgment that was ‘misconceived and wrong’.⁷

5 There are remnants of that same fundamental disagreement as to basic principle in the recent decisions of *R v Jogee*,⁸ and *Miller v The Queen*.⁹ The former is a decision of the Supreme Court of the United Kingdom and of the Privy Council, and the latter of the High Court. Both cases concern what is sometimes described in this country as ‘extended joint criminal enterprise’ (EJCE), and in England as ‘parasitic accessorial liability’ (PAL). On this occasion, however, most commentators say that it is the English who have stated the law correctly, and the High Court whose judgment is ‘misconceived and wrong’.

⁴ The common law of extended joint criminal enterprise only applies in New South Wales and South Australia. It should be noted that the law relating to criminal complicity generally, in the remaining States and Territories is to be found in Code provisions or legislation. See *Criminal Code Act 1995* (Cth) s 11.2; *Criminal Code 2002* (ACT) s 45; *Criminal Code Act* (NT) s 43BG; *Criminal Code Act 1899* (Qld) s 10A; *Criminal Code Act 1924* (Tas) s 4; *Criminal Code Act 1913* (WA) s 8; *Crimes Act 1958* (Vic) ss 323, 324C.

⁵ (1963) 111 CLR 610 (*‘Parker’*).

⁶ [1961] AC 290.

⁷ *Parker* (1963) 111 CLR 610, 611.

⁸ [2017] AC 387.

⁹ (2016) 259 CLR 380.



A brief historical overview of complicity

6 In his classic text on this subject,¹⁰ Professor K J M Smith made the point that the development of the substantive law of criminal complicity is bound up with its ‘tortured procedural history’.¹¹

7 The common law has traditionally distinguished between various modes of complicity, based on the nature of the offence assisted or encouraged. For example, the law identified degrees of participation in relation to felonies. The actual perpetrator was a ‘principal in the first degree’.¹² Those who were present assisting or encouraging were described as ‘principals in the second degree’. Those not physically present, but assisting or encouraging before the commission of the crime, were ‘accessories before the fact’. In relation to misdemeanours, the law described all accessories, irrespective of their role, as principals.

8 These distinctions between modes of complicity are said to have emerged from early judicial efforts to overcome the unsatisfactory consequences of treating accessorial liability as derivative. It appears that from about the 13th century, the common law had developed a strict rule that an accessory to a felony could not be convicted unless there was proof that the actual perpetrator had been convicted and had suffered punishment. That punishment had to be by way of attainder, meaning a sentence of death.

9 From about the 16th century, the courts developed a fiction to the effect that anyone present at the scene aiding and abetting the commission of an offence, was a principal whose liability was not to be viewed, in unqualified terms, as derivative. They thereby overcame some of the difficulties associated with characterising accessorial liability in that way, rather than as

¹⁰ K J M Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press, 1991).

¹¹ *Ibid* 22, cited in Bronitt and McSherry, above n 3, 397.

¹² There could, of course, be joint principals in the first degree. For example, when a number of people, acting jointly, bash a victim to death.



direct or primary.

10 As Simon Bronitt and Bernadette McSherry point out in the most recent edition of their criminal law text,¹³ the distinctions and terminology outlined above are largely of historic interest only. Nevertheless, 'they continue to infect the language of lawyers and judges'.¹⁴ That is so despite the fact that the classification of indictable offences into felonies and misdemeanours no longer applies.

11 As will be seen, the historic need to link the liability of an alleged secondary party to the actual perpetrator of the crime continues to plague the development of coherent principles in this area. That is particularly so with regard to the fault element required for complicity.

Present day common law principles regarding complicity

12 A defendant, 'D', may be criminally liable for the actions of another, 'P':

- (i) where D acts through P, and P is an innocent agent;
- (ii) where D has aided, abetted, counselled or procured P in the commission of the crime;
- (iii) via joint criminal enterprise, sometimes described as 'common purpose' or as 'acting in concert'; or
- (iv) via what is described in this country as EJCE, and in England as PAL.

13 Broadly speaking, the common law in Australia recognises (ii) and (iii) as the two main forms of complicity, while (iv) is seen as a subset, or extension, of (iii).

14 It is necessary to be aware that some of the terminology used for these forms of

¹³ Above n 3.

¹⁴ Ibid 397.



complicity differs between England and Australia. For example, what we in this country would call joint criminal enterprise (or common purpose or acting in concert), and would regard as primary liability,¹⁵ is viewed in England as a form of derivative liability. Similarly, while we distinguish between joint criminal enterprise, and *extended* joint criminal enterprise, some commentators in England use these terms entirely interchangeably.

15 As regards aiders and abettors, according to traditional use, these are persons who are present when the offence is committed. Counsellors and procurers are those who have assisted or encouraged the commission of the offence, but are absent at the time of its commission.

16 The language used in relation to these forms of complicity has been described as archaic. Some modern statutes speak of 'assistance' and 'encouragement', rather than 'aiding, abetting, counselling or procuring'. Other variations are also sometimes used.¹⁶

17 The fault element for this particular form of accessorial liability has never been definitively identified. Some authorities suggest that criminal liability for this type of complicity should be restricted to cases where there is an *intention* to assist or encourage the commission of the actual perpetrator's crime. Other authorities speak of the need to establish the secondary party's knowledge of the 'essential matters' that make up the elements of that crime, as the basis for the requisite finding of intent. Still other authorities have, in the past, taken a somewhat broader view. They recognised that some form of recklessness (perhaps foresight of virtual certainty, or of the probability that the act or consequence would occur), might be sufficient. Others took the view that even a high degree of negligence would suffice.

¹⁵ See, eg, *Osland v The Queen* (1998) 197 CLR 316.

¹⁶ In Victoria, the term now adopted to encompass all of these forms of assistance or encouragement, as well as acting in concert, is 'involved'. See *Crimes Act 1958* (Vic) s 323.



18 In *Giorgianni v The Queen*,¹⁷ the High Court made it clear that aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of the things which go to make up the offence. The majority in *Giorgianni* favoured a requirement of specific intent, such that the secondary party's acts of assistance or encouragement must be intentionally aimed at the commission of the very acts which constitute the actual perpetrator's offence. At the same time, the courts seemed to accept that in order to be liable under this particular limb of complicity, a secondary party must intend that his or her conduct will result in the encouragement or assistance of an offence of the type that is in fact committed.¹⁸

19 This still leaves for consideration what is known as the problem of 'divergence'. English courts have grappled with this difficulty for many years. In *R v Bainbridge*,¹⁹ for example, the accused had supplied oxyacetylene cutting equipment to others who had used it to break into a bank, and steal cash. It was held on appeal that the accused was liable for that eventual crime as he knew, when he supplied the equipment, that it would be used for a break-in and theft. It was not necessary to establish that he knew the time or place where the offence would be committed. In other words, a secondary party charged in England with complicity of this kind needed only to know the general type of crime to be committed, rather than the specific details, in order to be held liable.

20 Leading scholars, including Professor J C Smith, criticised cases such as *Bainbridge* on the basis that they had broadened the fault element necessary for complicity to the point that the entire doctrine posed a risk of over-criminalisation. It is fair to say that the English courts have never managed satisfactorily to resolve the difficulties associated with the fault

¹⁷ (1985) 156 CLR 473 (*'Giorgianni'*).

¹⁸ The Commonwealth jurisdiction rejects this narrow formulation of the fault element for complicity in favour of the broader view that recklessness is sufficient. See *Criminal Code Act 1995* (Cth) s 11.2.

¹⁹ [1960] 1 QB 129 (*'Bainbridge'*).



element for aiding, abetting, counselling or procuring.

21 I turn, then, to the second main form of criminal complicity, described in this country as joint criminal enterprise, common purpose or acting in concert. It can be said, as Professor K J M Smith has done, that it was the derivative nature of aiding, abetting, counselling or procuring that gave rise to the need for a different doctrinal basis under which a participant in a crime could be held liable. This was particularly so, as a participant could be held liable even where the actual perpetrator's conduct was not itself criminal, or subject to criminal proceedings.

22 The common law developed various techniques by which the problems associated with derivative liability could be overcome. As previously indicated, one was the doctrine of 'innocent agency'.²⁰ Another was what we, in Victoria, have come to know as acting in concert, and what in South Australia and New South Wales has been described as joint criminal enterprise and/or common purpose.²¹

23 The conceptual basis upon which the doctrine of joint criminal enterprise rests has not been given adequate attention. For a long time, this resulted in uncertainty as to whether liability under this doctrine was derivative, or direct.²² That controversy was finally resolved by the High Court in *Osland v The Queen*.²³ There, it was held that, unlike aiding and

²⁰ See, eg, the celebrated case of *R v Cogan* [1976] QB 217.

²¹ Recently, in Victoria, there appears to have been a move away from the term 'acting in concert', towards the use of the expression 'joint criminal enterprise', or, what amounts to the same thing, 'common purpose'. In *Hill & Ors v The Queen* [2018] VSCA 190, the Court of Appeal adopted this terminology, in dealing with an assault which resulted in death. The Court considered whether what took place was outside the 'scope of the agreement', the classic test for liability under this doctrine. The notion of 'acting in concert', however, has a long pedigree in Victoria. It was adopted by Smith J in his classic charge to the jury in *R v Lowery and King (No 2)* [1972] VR 560.

²² Another term for 'direct' in this context is 'primary'.

²³ (1998) 197 CLR 316 ('*Osland*').



abetting, liability under acting in concert was direct, and not derivative.²⁴ That allowed Mrs Osland's conviction to be upheld, notwithstanding the ultimate acquittal of her son, who was the actual killer of his step-father.

24 Accessorial liability came to be broadened further under the somewhat more flexible doctrine of divergence developed in England in relation to common purpose. This is the doctrine of EJCE, known in England, as I have said, as PAL.²⁵

25 There is debate as to whether this doctrine, howsoever it may be described, represents a special form of accessorial liability, *sui generis*, or whether it is merely an application to group-based scenarios of the ordinary principles of aiding, abetting, counselling or procuring. The weight of authority suggests that the doctrine is conceptually distinct from orthodox principles of criminal complicity. Most commentators would say that the doctrine is of relatively recent origin.

26 The traditional doctrine of common purpose, however described, requires the criminal act of the actual perpetrator to be within the contemplation of the other parties who are said to be complicit in that act. Each of the parties to the arrangement or understanding is said to be guilty of any crime committed that falls *within the scope of the common purpose*. Everything then turns upon what that scope of that common purpose happens to be.

27 A substantial body of authority has developed around the notion of the 'scope' of a common purpose. Originally, the test had a significant objective component. Ultimately, however, the focus came to be what the parties to the common purpose themselves contemplated as falling within the parameters of the joint criminal enterprise.

²⁴ The position in England appears to be that liability under common purpose or joint criminal enterprise is derivative. See, eg, Bronitt and McSherry, above n 3, 427.

²⁵ For ease of reference, I shall use the Australian term, EJCE, for the remainder of this paper.



28 The focus upon the scope of the enterprise as the test for liability under this doctrine altered somewhat with the landmark decision of the Privy Council in *Chan Wing-Siu v The Queen*,²⁶ and the cases that followed. It is necessary to examine how the doctrine of EJCE developed over time in both England and Australia.

The authorities

29 There are six main cases to be considered. They are *Chan Wing-Siu*, *McAuliffe v The Queen*,²⁷ *Clayton v The Queen*,²⁸ *R v Jogee*,²⁹ *Miller v The Queen*,³⁰ and most recently, *IL v The Queen*.³¹

Chan Wing-Siu v The Queen

30 According to most, though not all, commentators, it was *Chan Wing-Siu* that first expanded the ordinary principles of common purpose to encompass EJCE.

31 The facts in *Chan Wing-Siu* were typical of cases that give rise to this form of complicity. Three men, each armed with knives, forced their way into an apartment with the intention of robbing its occupants. An occupant of the apartment died as a result of stab wounds inflicted by one or more of the men. It could not be determined which of the men had inflicted the fatal wounds.

32 Sir Robin Cooke delivered the advice of the Privy Council. He noted that one of the ways in which the prosecution case had been put was that the accused must have

²⁶ [1985] AC 168 (*'Chan Wing-Siu'*).

²⁷ (1995) 183 CLR 108 (*'McAuliffe'*).

²⁸ (2006) 81 ALJR 439 (*'Clayton'*).

²⁹ [2017] AC 387 (*'Jogee'*).

³⁰ (2016) 259 CLR 380 (*'Miller'*).

³¹ (2017) 91 ALJR 764.



contemplated the possible commission of the murder in carrying out the robbery. In that event, liability would depend not just upon the scope of the agreement, but whether the acts done by whoever stabbed the deceased were of a kind which the co-accused foresaw as possible, though not necessarily intended. It was said to be sufficient for criminal liability, by way of complicity, merely to foresee a crime as a possible incident of a common unlawful enterprise. The criminal culpability lay in participating in that criminal enterprise, while possessing that foresight or awareness.

33 One can readily understand why, on the particular facts before the Privy Council, the principle was expressed in that way. When a group of men, all of them armed with knives, carry out a violent robbery, it can scarcely be surprising that the victim is met with force when he resists. Death, or at least really serious injury, seems likely to be within the scope of a planned armed robbery of that kind.

34 Plainly, if the felony murder rule, or any of its modern statutory equivalents, happened to be in existence in the relevant jurisdiction, constructive liability might arise under that doctrine as well.³² However, even without the possibility of conviction under that form of constructive murder, orthodox principles of common purpose would suggest that the result in *Chan Wing-Siu* was justified. The problem with that case lies not so much in its outcome, but in the way that Sir Robin Cooke formulated the relevant statement of principle.

35 It should be noted that *Chan Wing-Siu* was subsequently affirmed by the Privy Council in *Hui Chi-Ming v The Queen*.³³ It was also later affirmed by the House of Lords in *R v Powell*.³⁴

³² See *IL v The Queen* (2017) 91 ALJR 764.

³³ [1992] 1 AC 34.

³⁴ [1999] 1 AC 1.



McAuliffe v The Queen

36 In *McAuliffe*, three youths, two of whom were brothers, went to a park near Bondi Beach. For reasons not explained in the judgment, but which are not difficult to surmise,³⁵ their aim was to attack and beat up a stranger. One went armed with a hammer, and another with a stick. Two of the three offenders were experienced martial arts exponents. They attacked a man who happened to be standing near the top of one of the cliffs, overlooking the beach. Two of the youths kicked him repeatedly and struck him with the stick.

37 The third youth then kicked the man in the chest. This caused him to fall over the edge of the cliff into some shallow water in the rocks, resulting in his death. The youths then ran from the scene. The next day, the man's body was found in the sea below the cliff. One of the youths eventually pleaded guilty to murder. The other two, being the brothers, were convicted after a trial.

38 The trial judge directed the jury, in relation to 'common purpose', that the prosecution had to establish (1) a common intention on the part of all three youths to bash someone; (2) that the act on the part of one of them which caused death, was done with at least the intention of causing grievous bodily harm; and (3) that all three participants either shared the common intention of inflicting grievous bodily harm, *or* contemplated the infliction of such harm by one or other of them as a *possible* incident in the criminal enterprise. Both brothers were convicted of murder.

39 The High Court held that the judge had directed the jury correctly in relation to common purpose. Notably, having dealt in an orthodox fashion with the doctrine of ordinary common purpose, and the liability of each accused for any other crime falling within the scope of the common purpose, the judgment added something new. The High Court held that a party

³⁵ The assault appears to have been what is described as a 'gay bashing'.



would also be guilty of a crime which fell *outside the scope* of the common purpose if (1) that party had *contemplated as a possibility* the commission of that offence by one of the other parties participating in the joint criminal enterprise, and (2) continued to participate in that enterprise with that knowledge.

40 In expressing the law in these terms, the High Court referred to its decision in *Johns v The Queen*,³⁶ as well as the judgment of the New South Wales Court of Criminal Appeal which Johns had appealed against.³⁷ In particular, however, the Court also cited *Chan Wing-Siu* with approval.

41 From that time on, the doctrine of EJCE seems to have taken on a life of its own in this country.

Clayton v The Queen

42 In *Clayton*, Kirby J, in a powerful dissent, expressed strong criticism of EJCE. However, the majority of the High Court declined an invitation to revisit *McAuliffe* with a view to overruling it, and abolishing EJCE.

43 Among Kirby J's specific criticisms of the doctrine was what his Honour considered to be the unreasonable burden that it imposed upon trial judges and juries.³⁸ In addition, he said:

Foresight of what might possibly happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite *intention*. Its adoption as a test for the presence of the mental element necessary to be guilty of

³⁶ *Johns v The Queen* (1980) 143 CLR 108 ('*Johns* (in the High Court)').

³⁷ *R v Johns* [1978] 1 NSWLR 282 ('*Johns* (in the NSWCCA)').

³⁸ Experienced trial judges in Victoria sometimes have to grapple with cases where the prosecution seeks to charge murder on the basis of aiding and abetting, joint criminal enterprise, extended joint criminal enterprise, and statutory constructive murder. There are many permutations involved in these various forms of complicity, and the task of directing a jury on them is one that contains traps for the unwary.



murder, amounts to a seriously unprincipled departure from the basic rule that is now generally reflected in Australian criminal law that liability does not attach to criminal conduct of itself, unless that conduct is accompanied by a relevant criminal intention.³⁹

44 There have been other attempts over the years to persuade the High Court to reconsider *McAuliffe*.⁴⁰ All have been rebuffed. Nonetheless, after judgment in *Jogee* had been delivered in 2016, it was hoped in some circles, that the High Court at last might reflect upon whether EJCE should continue to be part of the common law in Australia. As will be seen, that optimism proved to be misplaced.

R v Jogee

45 As I have said, *Jogee* is a joint judgment of both the Supreme Court of the United Kingdom and of the Privy Council. It involved two quite separate cases; *R v Jogee* and *Ruddock v The Queen*. It reconsidered a number of common law principles dealing with criminal complicity, including EJCE.

46 After *Jogee* had been decided, the English Court of Appeal reflected upon the test that would henceforth apply, in that country, to joint criminal enterprise. In *R v Anwar*,⁴¹ it was noted that prior to *Jogee*, it had been sufficient for criminal liability, based on joint criminal enterprise, that the defendant foresaw that the principal *might* intentionally cause grievous bodily harm, or even kill, if the circumstances arose. The Court of Appeal said that, after *Jogee*, the applicable test now required the prosecution to establish that the defendant *intended* that the principal cause grievous bodily harm, or kill, if the circumstances arose.⁴²

47 The facts giving rise to the two appeals in *Jogee* may be summarised briefly. *Jogee*

³⁹ *Clayton* (2006) 81 ALJR 439, 457–8 [97].

⁴⁰ See, eg, *Gillard v The Queen* (2003) 219 CLR 1.

⁴¹ [2016] 2 Cr App R 23.

⁴² *Ibid* [22].



was convicted of murder. He and a co-offender, Hirsi, had been drinking and using drugs on the night in question. They went to the home of a woman that they knew in the early hours of the morning. Jogee became angry, and the woman told them to leave.

48 It seems that the woman was in a relationship with the deceased. She told Hirsi and Jogee that she was expecting him home shortly. They replied that they were not scared of him and would 'sort him out'. The two men then left. They said, however, that they would return.

49 Hirsi subsequently came back to the house on his own. He was there when the deceased arrived. The woman then phoned Jogee and asked him to take Hirsi away. Shortly after Jogee arrived, there was a confrontation between the two men and the deceased.

50 At that point, Hirsi took a knife from the kitchen. Jogee was nearby, outside, but close to the front door of the house. He shouted encouragement to Hirsi to do 'something' to the deceased. Then Jogee came to the doorway, carrying a bottle that he had previously wielded, when he damaged a car parked outside. Jogee said that he wanted to smash the bottle over the deceased's head. The woman then threatened to call the police. Hirsi grabbed her by the throat. She backed away and went to the kitchen. Hirsi then stabbed the deceased in the chest, killing him. Both Jogee and Hirsi ran away.

51 The trial judge directed the jury that they could find that Jogee realised that Hirsi might use the knife, intending to cause at least serious bodily harm. By doing so, they could find that by Jogee's conduct, he encouraged Hirsi to act with the requisite intent for murder. In giving that direction, the judge considered that this was nothing more than an orthodox direction, entirely in accordance with *Chan Wing-Siu*.

52 In a similar vein, Ruddock was convicted of the murder of a taxi driver. A co-offender pleaded guilty to that murder. The prosecution case was that the killing was committed in the course of a joint criminal enterprise, which was to rob the deceased of his motor vehicle.



53 In his record of interview, Ruddock denied having stabbed the deceased, but rather blamed his co-offender. He agreed, however, that in the course of the robbery he had tied the deceased's hands and feet, in furtherance of the enterprise.

54 The trial judge directed the jury that if they were satisfied that Ruddock was aware that there was a 'real possibility' that his co-offender might stab the deceased with murderous intent, but nonetheless continued with the armed robbery, they could convict Ruddock of murder.

55 In upholding each appeal, their Lordships held that the Privy Council in *Chan Wing-Siu* had taken a 'wrong turn' in equating 'foresight' or 'contemplation' of possible consequences with 'intention'. They emphasised that foresight was simply evidence of intention to assist or encourage the commission of the ultimate crime. It was intention, and nothing less, which was the requisite mental element for liability by way of criminal complicity.

56 In the joint judgment of Lord Hughes and Lord Toulson JJSC (with whom Lord Neuberger PSC, Lord Thomas CJ and Baroness Hale DPSC agreed), the following was said:

We respectfully differ from the view of the Australian High Court, supported though it is by some distinguished academic opinion, that there is any occasion for a separate form of secondary liability such as was formulated in the *Chan Wing-Siu* case. As there formulated, and as argued by the Crown in these cases, the suggested foundation is the contribution made by D2 to crime B by continued participation in crime A with foresight of the possibility of crime B. We prefer the view expressed by the Court of Appeal in *Mendez...* and by textbook writers including *Smith and Hogan's Criminal Law...* that there is no reason why ordinary principles of secondary liability should not be of general application.

The rule in *Chan Wing-Siu* is often described as 'joint enterprise liability'. However, the expression 'joint enterprise' is not a legal term of art. As the Court of Appeal observed in *R v A...* it is used in practice in a variety of situations to include both principals and accessories. As applied to the rule in *Chan Wing-Siu*, it unfortunately occasions some public misunderstanding. It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law.

As we have explained, secondary liability does not require the existence of an



agreement between D1 and D2. Where, however, it exists, such agreement is by its nature a form of encouragement and in most cases will also involve acts of assistance. The long-established principle that where parties agree to carry out a criminal venture, each is liable for acts to which they have expressly or impliedly given their assent is an example of the intention to assist which is inherent in the making of the agreement. Similarly, where people come together without agreement, often spontaneously, to commit an offence together, the giving of intentional support by words or deeds, including by supportive presence, is sufficient to attract secondary liability on ordinary principles. We repeat that secondary liability includes cases of agreement between principal and secondary party, but it is not limited to them.⁴³

57 Their Lordships referred to the position regarding EJCE in Australia. They said that, properly understood, neither *Johns* (in the High Court) nor *Miller v The Queen*⁴⁴ (the earlier 1980 High Court decision)⁴⁵ involved more than mere foresight, or the contemplation of death or really serious injury. However, both cases encompassed the accused having entered into an arrangement which, by its very nature, contemplated the possible murder of the particular victims. In that sense, those cases were applications of ordinary joint criminal enterprise, or common purpose. Each had been based upon the scope of the agreed criminal enterprise, rather than reliant upon EJCE.

58 *Jogee* then turned to *McAuliffe*. It noted that that case had brought about the adoption of EJCE in Australia. It had extended the law so that criminal liability, in complicity, would exist irrespective of whether the ‘possible incident’ that was foreseen fell within the scope of the understanding or arrangement. *McAuliffe* therefore, according to their Lordships, represented a new, and quite radical departure from the common law, as it had long stood in Australia.

59 *Jogee* also noted that the judgment in *McAuliffe* had cited only two Australian authorities dealing with joint criminal enterprise. Neither of these two cases had been directly in

⁴³ *Jogee* [2017] AC 387, 415 [76]–[78] (citations omitted).

⁴⁴ *Miller v The Queen* (1980) 55 ALJR 23.

⁴⁵ Not to be confused with the case of *Miller v The Queen* (2016) 259 CLR 380, to which I have previously, and will subsequently, refer.



point so far as EJCE was concerned.

60 The first was *Johns* (in the NSWCCA). In that case, after an extensive analysis of the authorities going back as far as the 17th century, Street CJ had said that secondary liability would extend to acts which were ‘within the contemplation’ of the parties’.⁴⁶ He noted that there had been a shift over the years away from what might be termed a wholly objective approach, to one which focused upon the actual state of mind of the accused. That was a step forward, but it brought with it its own problems.

61 The second was *Johns* (in the High Court), where the majority decision in the New South Wales Court of Criminal Appeal was affirmed.

62 In addition, *Jogee* noted that *McAuliffe* had focused heavily upon Sir Robin Cooke’s formulation of EJCE in *Chan Wing-Siu*. This formulation was that criminal culpability would arise through participation in a joint criminal enterprise with nothing more than ‘foresight’ as to possible consequences. *Jogee* noted that no authority had been cited for Sir Robin Cooke’s formulation.⁴⁷

63 One commentator, Sarah Pitney, has concluded that both *McAuliffe* and *Chan Wing-Siu* suffered from the same ‘paucity of analysis’, so far as the earlier authorities were concerned.⁴⁸ Ms Pitney added that it might also be said, as *Jogee* had concluded, that *Chan Wing-Siu* addressed the policy considerations underlying the extension of liability from what was *intended*, to what was merely *contemplated* (or foreseen) in just one or two sentences, a wholly inadequate basis upon which to change the law so radically.

⁴⁶ *Johns* (in the NSWCCA) [1978] 1 NSWLR 282, 290.

⁴⁷ *Jogee* [2017] AC 387, 406 [38].

⁴⁸ Sarah Pitney, ‘Undoing a ‘wrong turn’: The implications of R v Jogee; Ruddock v The Queen for the doctrine of extended joint criminal enterprise in Australia’ (2016) 40 *Criminal Law Journal* 110, 112.



64 *Jogee* also noted that in *R v Powell*,⁴⁹ in which the House of Lords followed *Chan Wing-Siu*, it had been baldly asserted, in support of EJCE, that the ‘criminal justice system exists to control crime’.⁵⁰ It had also been asserted that the doctrine was required to address the problem of joint criminal enterprises escalating into the commission of more grave offences.

65 *Jogee* concluded that it was policy reasoning of that kind that lay behind cases such as *McAuliffe*. It also noted that legal scholars of high repute had subjected EJCE to strong criticism, almost from the moment that the doctrine first emerged.

66 In a similar vein, as regards recourse to policy, Bronitt and McSherry observe:

The historical development of complicity has been particularly sensitive to public concern over collective criminal activity. Like conspiracy, the imperative of devising ‘catch-all’ forms of criminal liability to deal with groups of individuals who jointly agree to commit offences (but who do not necessarily perpetrate them) underlies the historical evolution of the doctrines of ‘common purpose’ and ‘acting in concert’.⁵¹

Miller v The Queen — the joint judgment

67 The High Court was again given the opportunity to reconsider *McAuliffe* in *Miller v The Queen*.⁵² The case was an appeal from the South Australian Court of Criminal Appeal. Three men, M, S and P, were party to an assault. The deceased was fatally stabbed in the course of the assault, by a fourth man, B. M, S and P were convicted of murder on the basis of EJCE. They appealed to the High Court.

68 The joint judgment (French CJ, Kiefel, Bell, Nettle and Gordon JJ) expressed the doctrine of EJCE as follows:

⁴⁹ [1999] 1 AC 1.

⁵⁰ *Ibid* 15.

⁵¹ Bronitt and McSherry, above n 3, 398–9.

⁵² (2016) 259 CLR 380 (*‘Miller’*).



In this context, the doctrine holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury *might* be occasioned by a co-venturer acting with murderous intention and he or she, with that *awareness*, continues to participate in the agreed criminal enterprise.⁵³

69 At trial, the prosecution case against M, S and P was put on the basis of either ordinary joint criminal enterprise or, in the alternative, EJCE. In relation to EJCE, the jury were directed, in accordance with *McAuliffe*, that each of M, S and P would be guilty of murder if he was party to an agreement to commit an assault, and foresaw the possibility that another party, acting with murderous intent, might kill or inflict really serious bodily harm.

70 Initially, the sole ground of appeal was that the verdicts were unreasonable. This was because of the heavily inebriated state of each of the three applicants, which bore upon whether all or any of them had formed murderous intent.

71 After judgment in *Jogee* was delivered, M, S and P, not surprisingly, sought to amend their grounds of appeal to include a direct attack upon EJCE.

72 The High Court (Gageler J not deciding this point) held that each appeal should be allowed on the basis that the South Australian Court of Criminal Appeal had not properly reviewed the sufficiency of the evidence, as required by *M v The Queen*.⁵⁴

73 However, in a carefully considered joint judgment, their Honours declined to follow *Jogee* in preference to *McAuliffe*. Keane J agreed, in substance, albeit in a separate judgment. Gageler J, however, delivered a strong dissent on this point.

⁵³ *Miller* (2016) 259 CLR 380, 387 (emphasis added)(citations omitted). The authorities cited in support of this formulation of the doctrine included *McAuliffe* (1995) 183 CLR 108, *Gillard v The Queen* (2003) 219 CLR 1, *Clayton* (2006) 81 ALJR 439, and *R v Taufahema* (2007) 228 CLR 232. For the purpose of this paper, I take this formulation of EJCE as the authoritative exposition of that doctrine in Australia. It should be noted that this formulation focuses upon foresight of the possibility of the consequences that might flow from the actions of one of the group, rather than foresight of the possibility of those actions themselves. I shall return to this distinction shortly, when I deal with *IL v The Queen* (2017) 91 ALJR 764.

⁵⁴ (1994) 181 CLR 487.



74 It had been submitted on behalf of M, S and P, that *Chan Wing-Siu*, and the cases which had applied that decision, represented a ‘misstep’ in the English common law. It was said that the reasoning underlying EJCE was unsatisfactory, and that the cases which had followed *Chan Wing-Siu* were in a state of disarray. It was submitted that *McAuliffe* had provided prosecuting authorities with a means of establishing secondary liability for murder which evaded the rigours of having to prove a sufficiently culpable mind for an offence of that gravity, and had therefore led to over-criminalisation.

75 It was further submitted that EJCE exposed an accused to liability for an offence of which they may have strongly disapproved, and which they did not carry out, agree to, authorise, intend, assist, encourage or even acknowledge was likely to transpire. The doctrine could not be reconciled with established tenets of the criminal law that emphasised the importance of the co-existence of mens rea and actus reus. It also sat uncomfortably with contemporary sentencing regimes. Moreover, it was said to be incompatible with the more general principles of accessorial liability that had been developed in *Giorgianni v The Queen*.⁵⁵

76 In addition, it was submitted that EJCE had proved difficult to apply, and had added to the complexity of jury directions, the very point made by Kirby J in *Clayton*. The doctrine had undoubtedly been a recurring source of complaints by trial judges and judges in intermediate appellate courts.

77 Finally, it was argued that the rules of accessorial liability relevant to aiding and abetting, and ordinary joint criminal enterprise, were themselves perfectly adequate to enable secondary participants to be held accountable for having taken part in joint criminal ventures. There was no need for the considerable expansion of criminal liability that had been brought about by EJCE. Mere foresight of the possibility that a co-offender may act with murderous intent should not, as a matter of basic principle, be sufficient to render a participant in such a

⁵⁵ (1985) 156 CLR 473.



venture guilty of murder.

78 On behalf of the Crown, it was submitted that *McAuliffe* should not be revisited. First, it was a unanimous judgment of the High Court which had been delivered after full argument. Secondly, the case had been affirmed by the Court on more than one occasion, and it had been consistently applied by intermediate appellate courts over many years. Thirdly, *Jogee*'s restatement of the law, as it should now be applied in England, was said to be 'confusing and problematic'. Fourthly, any change to this area of the law should come from a systematic review of the law of complicity in its entirety, and should ultimately be a matter for the legislature.

79 The joint judgment largely accepted the submissions put forward on behalf of the Crown. It noted that there were a variety of different expressions used throughout the Australian States and Territories when dealing with various forms of criminal complicity. These included common purpose, common design, and acting in concert, as well as joint criminal enterprise.

80 The joint judgment chose to use the expression joint criminal enterprise, in preference to acting in concert, or any of the other expressions sometimes invoked to deal with this doctrine, on the basis that this was the preferred terminology in South Australia, from where the appeal had come.⁵⁶

81 The joint judgment went on to provide a helpful exposition of the various forms of joint criminal enterprise known to the common law in Australia. Their Honours said:

The law, as stated in *McAuliffe*, is that a joint criminal enterprise comes into being when two or more persons agree to commit a crime. The existence of the agreement need not be express and may be an inference from the parties' conduct. 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,

⁵⁶ It was also the preferred term in New South Wales.



regardless of the part that each has played in the conduct that constitutes the actus reus. 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 (joint criminal enterprise liability). 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. *Moreover, 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).*⁵⁷

82 The joint judgment next explored the vexed history of secondary liability for incidental crimes. It considered the writings of Foster in the early 19th century.⁵⁸ At that time, to the extent that there had to be established an element of fault in order to make good criminal liability in complicity, that element could be satisfied by the application of a purely objective test. In the event that the incidental crime was a 'probable consequence' of that which had been agreed to, a person who had entered into the agreement would be an accessory to the felony, irrespective of his or her own actual state of mind.

83 As the joint judgment noted, Stephen, in his *Digest of the Criminal Law*,⁵⁹ stated the principles concerning liability for offences committed that diverged from the agreed criminal enterprise, in terms similar to those adopted by Foster. In other words, Stephen's formulation embodied an objective test of fault, that could not survive 20th century developments to the common law.

84 Not surprisingly, and having regard to Stephen's eminence and influence upon the codification of the criminal law, that same objective test came to be adopted by the Code

⁵⁷ *Miller* (2016) 259 CLR 380, 388 (emphasis added) (citations omitted). Again, it can be seen that this formulation is directed towards foresight of the consequences to the victim of the incidental crime, and not foresight of the possibility of the commission of the actus reus that gives rise to those consequences.

⁵⁸ Sir Michael Foster, *Discourses on Crown Law* (3rd ed, 1809).

⁵⁹ Sir James Fitzjames Stephen, *A Digest of the Criminal Law* (MacMillan & Co, 1877), cited in *Miller* (2016) 259 CLR 380, 391.



States. It continues to apply in Queensland and Western Australia.⁶⁰

85 The Court in *Miller* noted that English decisions regarding joint criminal enterprise, going back to the 19th century, were not easy to reconcile. The joint judgment, sensibly, I would respectfully suggest, put them largely to one side.

86 Their Honours' starting point, so far as the modern history of secondary liability and the doctrine of EJCE was concerned, was the 1978 decision of *Johns* (in the NSWCCA).

87 In that case, as the joint judgment noted, Johns was a party to an agreement, along with two other men, W and D, to rob a man named Morriss, who was believed to be a receiver of stolen jewellery. It was Johns' role to drive his co-offenders to the scene of the planned robbery, to wait outside whilst it was being carried out and then to collect the proceeds. Johns knew that W always carried a pistol. He also knew that W was quick-tempered. As it happened, there was a struggle and W shot and killed Morriss. W died before he could be tried, but Johns and D were both convicted of murder.

88 Johns appealed against his conviction. Street CJ recognised that the objective test, propounded by Foster in the 19th century, no longer had any application. The question of Johns' guilt was to be resolved by reference to his state of mind, and that alone.

89 In assessing whether Johns' state of mind was culpable, so far as secondary liability for murder was concerned, Street CJ posed the question whether Johns had contemplated the murder of Morriss as a possible incident of the originally planned robbery. In other words, according to his Honour, the test was subjective, but it was pitched at the level of *contemplation*, rather than *intention*. Subsequently, when *Johns* went to the High Court, Street CJ's formulation of the law was affirmed.⁶¹

⁶⁰ *Criminal Code Act 1899* (Qld) s 10A; *Criminal Code Act 1913* (WA) s 8.

⁶¹ *Johns* (in the High Court) (1980) 143 CLR 108, 130–1.



90 The joint judgment in *Miller* noted that *Jogee* itself had not taken issue with *Johns*. Indeed, their Lordships had described the reasoning in that case as ‘entirely orthodox’.⁶² However, in their Lordships’ view, *Johns* was not a case of EJCE at all. Rather, it was an application of joint criminal enterprise, or common purpose, in its traditional form. It was said in *Jogee* that W’s act was within the scope of the agreed criminal enterprise, because it was within the parties’ joint contemplation that it might occur. It was also foreseen as a possible incident of the execution of the joint criminal enterprise. There was ample evidence from which the jury could infer that Johns had given his assent to an unlawful enterprise which he fully understood might involve the discharge of a firearm, should the occasion call for it.

91 The joint judgment noted that *Jogee* had held that the law stated in *Chan Wing-Siu*, and the decisions following that case, had extended the reach of criminal liability too far. *Jogee* had said that that conclusion was supported by the views of a number of distinguished commentators. The joint judgment characterised *Jogee*’s conclusion that there was no occasion for EJCE, and that the proper counterpart to Foster’s objective ‘probable consequence’ test was one of intention, as ‘conclusions about the policy the law should pursue’, rather than an analysis of correct principle.⁶³

92 The joint judgment further noted that the conclusion reached in *Jogee* reflected their Lordships’ preference for the view of the authors of the 14th edition of *Smith and Hogan’s Criminal Law*,⁶⁴ that EJCE does not come within the principles of accessorial liability. This was a proposition that the joint judgment would not accept.

93 The joint judgment went on to observe that the relationship between joint criminal

⁶² *Jogee* [2017] AC 387, 412 [67].

⁶³ *Miller* (2016) 259 CLR 380, 397 [32].

⁶⁴ David Ormerod and Karl Laird, *Smith and Hogan’s Criminal Law* (Oxford University Press, 14th ed, 2015). I shall have more to say about the opinions of these authors on this subject later in this paper.



enterprise and EJCE on the one hand, and general concepts of complicity on the other, was 'contested'.⁶⁵ Their Honours referred to the conclusion of the majority in *Clayton*, to the effect that the wrong lies in the mutual embarkation on a crime with the awareness that the incidental crime *may* be committed in executing the agreement.

94 The joint judgment then turned to the specific submission that *McAuliffe* should be overruled. It noted that *McAuliffe* had built upon principles enunciated in *Johns*. It emphasised that neither side had sought to challenge the correctness of that case. Their Honours said:

In cases in which the participants in a joint criminal enterprise acknowledge that an incidental crime is a possible consequence of carrying out their agreement, the commission of the offence is within the scope of the agreement and the parties must be taken to have authorised or assented to its commission even if it is their preference that it be avoided. It is the authorisation or assent which is said to justify the imputation of the acts of the principal to all the participants in the agreement. The wrong turning in the law enunciated in *McAuliffe*, in the appellants' submission, was the discarding of the concepts of mutuality, authorisation and assent.

The reason for *McAuliffe's* rejection of the mutuality of foresight of the commission of the incidental offence as the criterion of liability is well illustrated by the example given by Professor J C Smith in his commentary on *R v Wakely*: A knows that P is carrying a weapon which he will use to kill or cause grievous bodily harm if it is necessary in carrying out the agreed enterprise and A says to P 'I do not agree to your using that weapon' but nevertheless A continues to participate in the enterprise. As Professor J C Smith observed, A's words deny tacit assent to the use of the weapon. Moreover, adopting the *Jogee* analysis, A can hardly be said to have conditionally intended the use of the weapon. It is not self-evident, however, that the policy of the law should be against the imposition of liability for murder in such a case. Certainly A's moral culpability is not less than that of the secondary party in a case such as *Johns*.⁶⁶

95 The joint judgment then continued as follows:

The principles applied to the re-opening of decisions of this Court need not be recited. *McAuliffe* was a unanimous decision. It has since been affirmed on a number of occasions. Many prosecutions have been conducted on the law

⁶⁵ *Miller* (2016) 259 CLR 380, 397 [33]. They referred to the divergent views of Professor J C Smith, on the one hand, and Professor Andrew Simester on the other, which I shall return to shortly.

⁶⁶ *Miller* (2016) 259 CLR 380, 399 [37]-[38] (citations omitted).



stated in it in the Australian common law jurisdictions. *Jogee* held that the effect of ‘putting the law right’ will not be to invalidate convictions arrived at over many years by faithfully applying the law laid down in *Chan Wing-Siu*, as leave to appeal out of time would only be granted where the applicant can demonstrate substantial injustice. The position in Australian law in this respect cannot be regarded as settled and it cannot be said that to depart from the law as it has been consistently stated and applied would not occasion inconvenience. Of course, were the law stated in *McAuliffe* to have led to injustice, any disruption occasioned by departing from it would not provide a good reason not to do so. However, here, as in *Clayton*, the submissions are in abstract form and do not identify decided cases in which it can be seen that extended joint criminal enterprise liability has occasioned injustice.⁶⁷

96 Finally, their Honours reiterated why, in their view, the invitation to reconsider *McAuliffe* should be declined. They said:

In the decade since *Clayton* was decided, the Parliament of Victoria has amended the *Crimes Act 1958* (Vic), abolishing the common law of complicity and in its place imposing liability on persons ‘involved in the commission of an offence’. The New South Wales Law Reform Commission undertook a review of the law of complicity. The Commission proposed retention of extended joint criminal enterprise liability along the lines adopted in the *Criminal Code* (Cth) with a further modification in the case of liability for homicide. In such cases the Commission recommended that the secondary party’s foresight be of the probability of the commission of the offence. The Parliament of New South Wales has to date not chosen to act on the Commission’s recommendations. The Parliament of South Australia has also not chosen to reform the law as stated in *McAuliffe*.

In light of this history, it is not appropriate for this Court to now decide to abandon extended joint criminal enterprise liability and require, in the case of joint criminal enterprise liability, proof of intention in line with *Jogee*. For the same reasons, it is not appropriate to depart from *McAuliffe* by substituting a requirement of foresight of the probability of the commission of the incidental offence. As *Johns* explains, the difficulty with such a requirement is that it ‘stakes everything on the probability or improbability of an act, admittedly contemplated, occurring’. This is not to accept the submission that since ‘anything is possible’, the secondary party may bear liability for a crime contemplated by him or her as no more than a fanciful possibility.⁶⁸

⁶⁷ Ibid 399–400 [39] (citations omitted).

⁶⁸ Ibid 401–2 [42] – [43] (citations omitted).



Miller v The Queen — Keane J's judgment

97 Justice Keane, in a separate judgment, agreed that *McAuliffe* should not be reconsidered. His Honour said:

The position established in Australian law ... does not deny or diminish the importance of the overarching concern that criminal responsibility should reflect the moral culpability of the individual offender. Rather, the Australian position recognises that deliberate participation in a joint criminal enterprise which carries a foreseen risk of an incidental crime itself has an important bearing upon the individual moral culpability of each participant for the incidental crime. The implications of deliberate participation in a criminal enterprise for the moral culpability of each individual participant are ignored if one adopts an analysis of criminal responsibility which starts from an assumption that the person who commits the actus reus of the incidental offence is the principal offender and all others complicit in that offence are to be regarded as having accessorial responsibility only. The moral culpability of a participant in a crime will not always be revealed by an analysis which assumes that the participant has merely aided or abetted the commission of the actus reus by the principal offender.

In particular, where two or more persons agree to commit a crime together knowing that its execution includes the risk of the commission of another crime in the course of its execution, there is no obvious reason, in terms of individual moral culpability, why the person who commits the actus reus should bear primary criminal responsibility, as between himself or herself and the other participants to the joint criminal enterprise, for the incidental crime. Because of the fact of the agreement to carry out jointly the criminal enterprise, the person who commits the actus reus of the incidental crime is necessarily acting as the instrument of the other participants to deal with the foreseen exigencies of carrying their enterprise into effect.⁶⁹

Miller v The Queen — Gageler J's dissent

98 As previously indicated, Gageler J delivered a strong dissent. His Honour commenced by noting that the common law imposes criminal liability on one person, the secondary party, for an offence committed by another, the primary party, where the secondary party intentionally assists or encourages the commission of the offence by the primary party. He described this as 'accessorial liability', and noted that the requisite fault element was one of

⁶⁹ Ibid 426-7 [137]-[138] (citations omitted).



actual intent.

99 In addition, the common law imposed criminal liability on the secondary party where the primary party committed the offence as part of a criminal enterprise to which the secondary party was a participant. His Honour observed that this was typically referred to as joint criminal enterprise liability. He concluded that the fault element for this form of liability was also one of intent.

100 Justice Gageler went on to say that, in practice at least, accessorial liability and joint criminal enterprise liability (as his Honour understood and explained these terms), overlapped to some degree. Common to both was the mental element of intention. In order to be liable, a secondary party had to *intend* the commission of the offence by the primary party. Intend, in that sense, meant 'desire'.⁷⁰

101 His Honour noted that, at one time, the notion of intention was treated as having to be objectively ascertained.⁷¹ It was said that a person was taken to intend the probable consequences of what they did, or of that to which they agreed. It was not until the middle of the 20th century that the common law moved decisively away from objective liability to a subjective form of moral culpability.⁷²

102 His Honour observed that there was never any particular difficulty with the situation where the party who did not carry out the primary crime, nonetheless intended that it be committed, albeit perhaps only on a contingent basis. In Gageler J's example, A, B and C had set out to rob a bank, and C was allotted the task of driving the getaway car. A would be guilty

⁷⁰ Putting to one side, for the moment, the notion of 'oblique intent', meaning foresight of the 'virtual certainty' that the consequence or consequences will occur.

⁷¹ Of course, in the 19th century, an accused would not give evidence in his own defence. The question of intent had to be determined by the process of drawing inferences from established facts.

⁷² Presumably, his Honour had in mind cases such as *DPP v Smith* [1961] AC 290, and the High Court's rejection of the reasoning in that case in *Parker v The Queen* (1963) 111 CLR 610.



of murder if he shot the deceased intending to kill or cause really serious injury.⁷³ B, who was present in the bank with A, would also be guilty of murder if he intended that A shoot to kill or cause really serious injury, if necessary, in order to effect an escape. The same would apply to C.

103 Justice Gageler then posed a more difficult question. What if shooting to kill or cause grievous bodily harm had never been any part of the plan? The gunman had simply gone too far. The gun was not meant to be loaded, and its use was designed only to frighten. His Honour observed:

The common law's traditional answer has been that the bagman and driver cannot be liable for a criminal act of the gunman that they never intended to occur.⁷⁴

104 He then went on to say:

The common law has of late given a different answer. The bagman and driver need not have intended that the gunman would shoot to kill or cause grievous harm as a possible means of carrying out the plan to rob the bank. It is enough for them to be liable for murder that they foresaw the possibility that the gunman would take it upon himself to shoot to kill or cause grievous harm and that they participated in the plan to rob the bank with that foresight.⁷⁵

105 Justice Gageler then commented that the shift from requiring intention and foresight in combination, as a basis for imposing criminal liability on a secondary party, to one where foresight alone would be sufficient, could be traced back to *Chan Wing-Siu*. According to his Honour, it was Sir Robin Cooke who, in that case, equated contemplation with authorisation, such that participating in a venture with foresight of a possibility suddenly became equivalent to intention.

⁷³ I put to one side, for present purposes, the so-called 'felony murder', or 'constructive murder' rule.

⁷⁴ *Miller* (2016) 259 CLR 380, 413 [90] (citations omitted).

⁷⁵ *Ibid* 413 [91].



106 His Honour said that it was Professor J C Smith who, in 1990, identified the fallacy in the reasoning in *Chan Wing-Siu*. The learned author had pointed out that contemplation was not the same as authorisation. He also wrote that the doctrine espoused by the Privy Council was problematic at the level of principle. In addition, he considered that the *Chan Wing-Siu* doctrine might reasonably be viewed as too harsh. It could therefore be criticised at the level of policy.

107 Finally, Gageler J turned his attention to EJCE. He subjected the reasoning underlying that doctrine to withering criticism. He said:

The awkwardness of the resultant common law doctrine, by which a member of a group setting out to commit one offence would become liable for a different offence committed by another member of the group if he or she foresees the possibility of that other member committing that different offence, was reflected in the labels the new doctrine came to be given. Professor Smith called it '*parasitic* accessory liability' and noted that it had 'a savour of '*constructive* crime'. In Australia, it became known as '*extended* common purpose' or '*extended* joint criminal enterprise liability'.⁷⁶

108 His Honour continued:

Prosecution reliance on extended joint criminal enterprise liability in Australia has been noted to have been a source of difficulty for judges, to have added to the complexity of jury directions, and to have contributed to the number of appeals. But the problem has not been ignored by legislatures and law reform bodies in Australia. The common law of secondary liability has not for some time applied to offences under Commonwealth or Territory law and the entirety of the common law of secondary liability has recently been abolished by legislation in Victoria in the implementation of recommendations of Weinberg JA, the Judicial College of Victoria and the Victorian Department of Justice. Extensive legislative reform of the common law of secondary liability has been recommended by the New South Wales Law Reform Commission.

...

This Court ... cannot be said to have failed carefully to consider the doctrine until now. Of particular significance is that in 2006 the Court entertained a full argued attempt to reopen *McAuliffe* in the course of refusing applications for special leave to appeal in *Clayton v The Queen*. For reasons then elaborately given, the attempt to reopen *McAuliffe* was rejected by a majority of six to

⁷⁶ Ibid 416 [100] (emphasis in original) (citations omitted).



one. Reasons for refusing applications for special leave to appeal are not binding as precedents. The indication of views of current members of the Court contained in reasons for refusing applications for special leave to appeal can nevertheless have a significant effect on legal practice. The *Clayton* refusal had just that effect.

In 2007, Kirby J, who had been the sole dissident in *Clayton*, said that '[w]hatever doubts or hesitations existed earlier concerning the common law of Australia in this respect, the decision in *Clayton* has to be taken as settling the matter, at least for the present'. Since then, the Court has reapplied *McAuliffe*, declining an express invitation in 2012 'to establish a more principled and unified approach to when a person should be criminally responsible for the acts of another'.

If the common law of Australia is now to be returned to the path it was on before *McAuliffe*, the only justification could be that the return is compelled by principle. Consideration of principle must examine the reason for following *Chan Wing-Siu* and *R v Hyde* stated by all five members of the Court more than twenty years ago in *McAuliffe*. Consideration of principle must also grapple with the reasons for not reopening *McAuliffe* given by six members of the Court nearly ten years ago in *Clayton*. One of the reasons given in *Clayton* for not reopening *McAuliffe* was that other countries continued to apply a similar doctrine. That reason has been overtaken by *Jogee* and *Ruddock*. Other reasons have not.

Just one reason was stated in *McAuliffe* for following *Chan Wing-Siu* and *R v Hyde*. That reason, as has already been noted, was that to hold a secondary party liable for a crime committed by a primary party on the basis of the secondary party's participation in a joint criminal enterprise with foresight of that crime accorded with the general principle of the criminal law that a person who intentionally assists in or encourages the commission of a crime may be convicted of that crime.

McAuliffe's identification of the applicable general principle of the criminal law is undoubtedly correct: a person who intentionally assists in or encourages the commission of a crime may be convicted as a party to that crime. The principle explains accessorial liability and (if there is a difference) joint criminal enterprise liability.

The problem is that the general principle does not explain why a secondary party should be liable for a crime committed by a primary party which the secondary party neither intentionally assisted nor encouraged. In short, the principle does not explain *McAuliffe*'s extension of criminal liability beyond accessorial liability or joint criminal enterprise liability.

Of the numerous criticisms of the extension of criminal liability ushered in by *Chan Wing-Siu* and *R v Hyde* which are to be found in *Jogee* and *Ruddock* and in the formidable dissent of Kirby J in *Clayton*, two predominate. The first is that making a party liable for a crime which that party foresaw but did not intend disconnects criminal liability from moral culpability. The second is that making the criminal liability of the secondary party turn on foresight when the criminal liability of a principal party turns on intention creates an anomaly.



To my mind, those two criticisms are unanswerable. The first is fundamental, and the second is related to the first. The anomaly demonstrates incoherence in the imposition of criminal liability. The incoherence in turn highlights the disconnection between criminal liability and moral culpability.

The common law has developed ordinarily to insist that justice requires that a primary party become criminally liable only by acting with intention, albeit that in the case of murder the requisite intention is not confined to an intention that the victim be killed but can be an intention that the victim suffer very serious injury, and albeit that in a case of manslaughter special considerations apply. Exceptions to the principle that intention is an element of an offence at common law have been few, and the overall trend of the case law has been for the exceptions to become fewer.

The imposition of liability in the category of case sometimes described as murder by recklessness is not an exception, at least in any presently meaningful sense. To the contrary, contrasting liability of a secondary party for extended joint criminal enterprise murder with liability of a primary party for reckless murder illustrates both the incoherence and the disconnection.

According to the narrow view of murder by recklessness, which has prevailed in Australia, the concept of recklessness is confined to engaging in an act expecting its probable result to be death or grievous harm. Acting with that expectation has been seen to be acting with a state of mind 'comparable' to acting with an intention to kill or to do grievous harm in that acting with that expectation is 'just as blameworthy'. But even on the wide view of murder by recklessness, now rejected, the concept of recklessness was understood to involve more than mere foresight of a possible result: it required foresight to be coupled with willingness to run the risk of the result occurring so as to amount to indifference to a foreseen result.

Underlying the Australian common law's preference for the narrow view over the wide view of murder by recklessness has been acknowledgment of a basic distinction in terms of moral culpability between acting with an intention or an equivalent expectation and acting with mere foresight. Acknowledgment of that basic distinction in terms of moral culpability has in turn been seen to be reflected in the common law distinction between murder and manslaughter. Gibbs J explained in *La Fontaine v The Queen*:

There is a great difference between the state of mind of an accused who is prepared to risk the consequences of death or grievous bodily harm that he foresees as probable and that of an accused who does no more than take the chance that death or serious injury may ensue although it seems an unlikely consequence. The act of the former is much more worthy of blame than that of the latter. To treat knowledge of a possibility as having the same consequences as knowledge of a probability would be to adopt a stringent test which would seem to obliterate almost totally the distinction between murder and manslaughter.

Consistently with accepting higher moral culpability to attach to acting with intention and lower moral culpability to attach to acting with mere foresight,



Gibbs A-CJ spelt out the gradations of criminal responsibility of participants in a joint criminal enterprise resulting in death in *Markby v The Queen*:

When two persons embark on a common unlawful design, the liability of one for acts done by the other depends on whether what was done was within the scope of the common design. Thus if two men go out to rob another, with the common design of using whatever force is necessary to achieve their object, even if that involves the killing of, or the infliction of grievous bodily harm on, the victim, both will be guilty of murder if the victim is killed ... If, however, two men attack another without any intention to cause death or grievous bodily harm, and during the course of the attack one man forms an intention to kill the victim, and strikes the fatal blow with that intention, he may be convicted of murder while the other participant in the plan may be convicted of manslaughter ... The reason why the principal assailant is guilty of murder and the other participant only of manslaughter in such a case is that the former had an actual intention to kill whereas the latter never intended that death or grievous bodily harm be caused to the victim, and if there had not been a departure from the common purpose the death of the victim would have rendered the two participants guilty of manslaughter only. In some cases the inactive participant in the common design may escape liability either for murder or manslaughter. If the principal assailant has gone completely beyond the scope of the common design, and for example 'has used a weapon and acted in a way which no party to that common design could suspect', the inactive participant is not guilty of either murder or manslaughter.

Those very clear gradations of criminal responsibility of participants in a joint criminal enterprise resulting in death have been blurred by the choice made in *McAuliffe*. The gradations should in my view have been maintained.

To hold a secondary party liable for a crime committed by a primary party which the secondary party foresaw but did not intend does not measure up against the informing principle of the common law 'that there should be a close correlation between moral culpability and legal responsibility'. In the language of King CJ, who stood against the introduction of the doctrine of extended joint criminal enterprise into the common law of Australia during the period after *Chan Wing-Siu* and before *McAuliffe*, the doctrine results in 'the unjust conviction of persons of crimes of which they could not be said, in any true sense, to be guilty'.

The fundamental problem that the doctrine fails to align criminal liability with moral culpability was not, to my mind, answered by the majority in *Clayton* in the suggestion that 'criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight' or in the observation that a primary party as well as a secondary party can be liable for murder without intending that a victim be killed. Neither the suggestion nor the observation explains how it is consistent with justice and principle that a secondary party is criminally liable for acting merely with foresight of the possibility of the primary party acting with intent.



The prosecution seeks to provide the missing explanation. The prosecution asserts that the imposition of criminal liability on a participant in a joint criminal enterprise for acting with foresight of the commission of a more serious crime is necessary to prevent a 'gap' in the law. To support the existence of and need to fill that gap, the prosecution invokes the policy justification that the doctrine is necessary to address the important social problem of escalating gang violence. The prosecution points in support of that policy justification to social science research said to show that individuals behave differently when they are in groups – they take more risks, feel pressure to conform to the majority, and feel less personal responsibility.

What the prosecution seeks to characterise as a gap in the law is nothing more or less than the difference between the limit of secondary criminal liability as traditionally understood and the limit of secondary criminal liability as extended following *Chan Wing-Siu*. There is in truth no gap to be filled. Absent the extension of secondary criminal liability, there would be no hole in the legal fabric which would need to be mended. There would be an absence of secondary criminal liability in circumstances now covered solely by the extension. There would be an alignment of criminal liability with moral culpability.

What the prosecution advances as the policy justification for the extension is a highly contestable normative judgment about the appropriate legal response to a particular social problem. The policy justification was once proffered in the House of Lords, but is now rejected by the Supreme Court of the United Kingdom and the Privy Council.

Courts must of course make normative judgments in the course of adapting the common law to meet contemporary social conditions. But courts must be extremely cautious about refashioning common law principles to expand criminal liability. Escalating gang violence is hardly a new social phenomenon. Whether some, and if so what, modification of common law principles of secondary criminal liability is needed to address that particular social problem in a contemporary setting is appropriately a question for legislative consideration. Significantly, no law reform body considering the problem has seen fit to recommend that the appropriate response is to impose secondary criminal liability by reference only to foresight.

Whether the social science literature to which the prosecution points provides an empirical basis for drawing any general conclusion about gang behaviour has been questioned academically and was not scrutinised in argument. The literature does nothing to dispel the concern expressed by Kirby J in *Clayton* that the extension of secondary criminal liability to individuals unable to extricate themselves from a group as violence gets out of hand operates to catch potentially weak and vulnerable secondary offenders, fixing them with 'very serious criminal liability because they were in the wrong place at the wrong time in the wrong company'.

The majority in *Clayton* gave as another reason for refusing to reopen *McAuliffe* that it would be inappropriate to reconsider the doctrine of extended joint criminal enterprise without reconsidering other aspects of common law criminal responsibility including the whole of the law with respect to secondary



liability for crime. I cannot agree. Adoption of the doctrine was a discrete judicial development. The doctrine is capable of discrete judicial reversal. Whatever room there may be for debate as to their jurisprudential foundation, and however much they might yet be improved by reconsideration and re-expression, the common law principles of secondary liability apart from the doctrine of extended joint criminal enterprise would remain unaffected by its excision. The distinction between murder and manslaughter in a case of joint criminal enterprise would re-emerge with clarity.

One further consideration, not mentioned in *Clayton* and not now raised by the prosecution, must be addressed. It is the systemic consideration of stability. To declare the common law in a case such as this is to declare the common law for the past as well as the future. To reopen and overrule *McAuliffe* would be to hold that the doctrine *McAuliffe* introduced has never been part of the common law of Australia. The overruling of *McAuliffe* would not of itself alter the legal rights of persons whose criminal liability has already merged in conviction. The overruling would nevertheless create a legitimate sense of injustice in persons who have been convicted on the assumption that the doctrine of extended joint criminal enterprise formed part of the common law of Australia and raise the real prospect of many of them seeking to have their convictions overturned by invoking such avenues of legal redress as may remain available to them. The overruling would also raise the prospect of criticism of a court system which could proceed on an erroneous view of the common law for more than twenty years.

Troubling as that consideration is, it cannot be decisive. The doctrine of extended joint criminal enterprise is neither deeply entrenched nor widely enmeshed within our legal system. The problem the doctrine has created is one of over-criminalisation. To excise it would do more to strengthen the common law than to weaken it. Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it is better that this Court be 'ultimately right' than that it be "persistently wrong".

The doctrine of extended joint criminal enterprise is anomalous and unjust. The occasion for its reconsideration having been squarely presented, I cannot countenance its perpetuation. Dissenting from the view of the majority, I would reopen and overrule *McAuliffe*.⁷⁷

109 I have quoted at great length from Gageler J's judgment. I make no apology for having done so. In my respectful opinion, it is a fine piece of legal writing, and his Honour's views warrant the closest attention. The judgment presents a considered and rigorous analysis of an area traditionally bedevilled by conceptual confusion, and terminological uncertainty.

⁷⁷ Ibid 417–24 [103], [106] – [129] (citations omitted).



IL v The Queen

110 The decision of the High Court in *IL v the Queen*⁷⁸ had nothing to do with EJCE. Rather, it was about ordinary common purpose or joint criminal enterprise. Nonetheless, there are significant passages in the judgment that bear upon both *Miller* and EJCE.

111 The facts in *IL v The Queen* were as follows. A fire broke out in the appellant's residence, as a consequence of which a man died. Police found a large quantity of methylamphetamine on the premises. The evidence indicated that the property was being used for the purpose of refining that drug.

112 The appellant was charged with one count of manufacturing a large commercial quantity of a prohibited drug and, significantly, one count of murder. The trial judge directed the jury to acquit on the charge of murder, and also on the alternative of manslaughter. The New South Wales Court of Criminal Appeal overturned that decision, and ordered a new trial. The High Court, by majority, re-instated the trial judge's decision.

113 The background facts were that the lighting of the gas ring burner had sparked a fire, causing the co-offender's death. The Crown could not exclude the possibility that it was the co-offender who had lit the fire. The appellant was charged with constructive murder on the basis of s 18(1)(a) of the *Crimes Act 1900 (NSW)*, that being the statutory form of what used to be the felony murder rule.⁷⁹

114 It was submitted on behalf of the Crown that the appellant was liable for all acts committed in the course of carrying out the joint criminal enterprise of manufacturing methylamphetamine. That was an offence that was punishable by life imprisonment, and

⁷⁸ (2017) 91 ALJR 764 (*IL v The Queen*).

⁷⁹ Section 18(1)(a) is in the following terms: Murder shall be taken to have been committed where the act of the accused...causing the death charged, was done...during...the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.



therefore fell within s 18(1)(a). It was common ground that the usual rules of attribution in criminal law, namely joint enterprise liability, applied to s 18(1)(a).

115 The plurality (Kiefel CJ, Keane and Edelman JJ), held that s 18(1) could not be engaged by an act of the deceased in lighting the ring burner. That was because the section was not applicable to the situation where a person killed himself or herself in the course of committing a crime punishable by imprisonment for life or for 25 years.

116 Their Honours went on to say that where two or more persons act pursuant to an understanding or arrangement that they will commit a crime, and the doctrine of joint enterprise liability applies, it is an *act* done by one participant in the course of effecting a common purpose which was incidental to that purpose that can be attributed to the other, and not the liability.⁸⁰ Their Honours did not deal with EJCE, that doctrine being inapplicable given the way that the case had been conducted.

117 Justices Bell and Nettle joined in the decision to allow the appeal. Their analysis differed somewhat from that of the plurality. They held that it was not open under s 18(1) to attribute criminal liability to one participant in a joint criminal enterprise for an act committed by another, unless the act in question was part of the *actus reus* of a crime. That was not so in the instant case. Accordingly, they held that the ordinary common law doctrine of joint criminal enterprise, if properly applied, was determinative of the appeal.

118 Justices Gageler and Gordon dissented, albeit, it seems, with some reluctance. They were of the view that this was a case of constructive murder under s 18(1)(a). The requisite mental state for that form of murder was nothing more than an intention to commit the

⁸⁰ Their Honours went on to say, following *Osland*, that the liability of each participant in a joint criminal enterprise for acts committed in the course of that enterprise was direct, or primary, and not derivative. They made it clear that joint criminal enterprise differed, in that respect, from counselling or procuring, or aiding and abetting, where, on the authorities, liability was derivative.



foundational offence. In that sense, if it happened to be the deceased who had lit the ring burner, and thereby brought about his own death, that would be deemed to be the act of the appellant, sufficient to render her guilty of murder.

119 What is particularly interesting about *IL v The Queen*, is the analysis of the various forms of criminal complicity undertaken by Bell and Nettle JJ.⁸¹ Having outlined the common law doctrine of joint criminal enterprise liability, or common purpose, or concert, their Honours went on to discuss its further dimensions.

120 They spoke firstly of an extension of liability to any other crime committed by a party to an arrangement in the course of carrying out that arrangement, if that crime was ‘within the scope of the understanding or arrangement’.⁸² This was classic *Johns* jurisprudence.

121 Their Honours went on to say:

There is then also a third dimension of joint criminal enterprise liability — usually called ‘extended common purpose’ or ‘extended concert’— which was considered by this Court in *McAuliffe* and more recently in *Miller v R*, which extends to crimes that, although not within the scope of the understanding or arrangement, are foreseen as possibly being committed in the course of carrying out the understanding or arrangement, and are then committed by one of the participants when carrying out the understanding or arrangement. The doctrine of extended common purpose is not in issue in this appeal and, for present purposes, need not be considered further. **Nonetheless, it should be observed that the doctrine of common purpose and the doctrine of extended common purpose are at one in attributing criminal liability to one participant for a *crime* committed by another participant in the course of carrying out their joint criminal enterprise.**⁸³

122 In other words, the plurality treated attribution, in the context of ordinary joint criminal enterprise, as being based upon *acts* rather than liability. Justices Bell and Nettle apparently regarded attribution, in that context, and with regard to EJCE, as being the attribution of liability

⁸¹ *IL v The Queen* (2017) 91 ALJR 764, 781 [63].

⁸² *Ibid.*

⁸³ *Ibid* (emphasis added) (citations omitted).



rather than of the act giving rise to such liability.

123 Justice Gageler did not proffer a view on this aspect of EJCE. Nor did he express a concluded view as to whether criminal responsibility under EJCE should be considered primary, or derivative. His Honour said:

For completeness, I note that *Osland* concerned only the doctrine of joint criminal enterprise and not the doctrine of extended joint criminal enterprise recently affirmed by majority in *Miller*. This case too concerns only joint criminal enterprise. Whether criminal responsibility attributed by operation of the doctrine of extended joint criminal enterprise is primary or derivative and how, if at all, the doctrine of extended joint criminal enterprise might intersect with constructive murder are questions which do not now arise for consideration.⁸⁴

124 The dicta in *IL v The Queen* regarding EJCE leave aspects of that doctrine uncertain. No doubt, we shall hear more on this subject in the future.

Jogee versus Miller — where to from here?

125 Legal scholars are notoriously unable to agree on almost any subject. It is significant, therefore, that almost all of the legal commentary regarding EJCE leans heavily in favour of *Jogee*, and against *Miller*.

126 There is really only one academic of high repute whose work can be said to be wholly supportive of the doctrine. Professor Andrew Simester has expressed strong criticism of *Jogee*.⁸⁵ He has attacked the reasoning in that case on a number of bases. For example, he argues that *Jogee* was wrong to treat EJCE as having originated from the observations of Sir Robin Cooke in *Chang Wing-Siu*. He claims that the doctrine can be traced back at least as far as the early 19th century. He has set out, in considerable detail, the cases which he argues brought the doctrine into existence.

⁸⁴ Ibid 791 [107] (citations omitted).

⁸⁵ See Andrew Simester, 'Accessory liability and common unlawful purposes' (2017) 133 *Law Quarterly Review* 73.



127 For my part, even if Professor Simester’s arguments were made good, I doubt that it undercuts the validity of the reasoning in *Jogee*. The criminal law has moved on so much since the 19th century, that these older authorities seldom shed much light on contemporary issues regarding matters of basic principle.

128 At the same time, a similar point can be made against those who extol the virtues of *Jogee*, and are critical of *Miller*. They make much the same criticism of *Miller* as Professor Simester does of *Jogee*, save that they castigate the authors of the joint judgment in *Miller* for their failure to have regard to a series of cases, this time going back as far as the 17th century. That criticism is of no greater weight in their hands, than it is in the hands of Professor Simester.

129 Thus, it is said by some critics of *Miller* that *Chan Wing-Siu*, *McAuliffe* and *Clayton*, were all based on an ‘incomplete, and in some respects, erroneous reading of the previous case law’.⁸⁶ Once again, and without commenting upon the strict correctness of that historical analysis, I am tempted to say, ‘so what?’.

130 Surely, we have moved beyond worrying about what was said about the law of criminal complicity some hundreds of years ago, at a time when criminal trials were conducted, a dozen or so a day before the same judge, and with no opportunity for appeal. An ultimate appellate court, charged with the task of declaring the common law for the future, should not be unduly concerned about what may have been said about criminal complicity at the time of the Bloody Assizes.

131 Other commentators have been trenchant in their criticisms of *Miller*, but for better reasons. Shortly after judgment in *Jogee* was delivered, Stephen Odgers SC, wrote in support

⁸⁶ *Jogee* [2017] AC 387, 415 [79] cited in Sarah Pitney, above n 48, 111. *McAuliffe* is also said to display a ‘paucity of analysis’. The author goes on to say that the High Court in that case failed to examine earlier authorities, going back to the 17th century, with appropriate rigour.



of that decision, and against *McAuliffe*.⁸⁷ He referred to his earlier criticisms of *McAuliffe*, which he had described as 'one of the most regressive of the High Court's judgments in the field of substantive criminal law'.⁸⁸ He went on to say that there was no evidence that possible liability under EJCE would dissuade a potential offender from participation in a joint criminal enterprise. Moreover, even if such evidence did exist, the doctrine was inconsistent with modern principles of criminal liability.

132 Odgers went on to say that it would be only a start, even if the High Court were to follow *Jogee*. He noted that the Code jurisdictions still adopt an objective test for liability, and nothing short of legislation could rectify that situation in those States. The *Criminal Code Act 1995* (Cth) and the amendments to the *Crimes Act 1958* (Vic), both adopted a mid-way, or compromise, position using recklessness (foresight of probability) as the basis for the mental state for EJCE, but they too were unsatisfactory in that regard. According to Odgers, nothing short of intentional encouragement or assistance, with full knowledge of what was to occur, should be sufficient as the basis for liability for murder.

133 After *Miller* was decided, Odgers revisited his attack upon EJCE.⁸⁹ He spoke in glowing terms of Gageler J's dissent, and criticised the majority for having refused to reconsider the doctrine. He argued that the fact that both the Commonwealth and Victoria had legislated to abolish EJCE, and replaced that doctrine with their own forms of EJCE liability, was no basis for the High Court's refusal to reconsider *McAuliffe*. The High Court had created EJCE, with all of its unsatisfactory aspects. There was no reason, in his view, why the High Court should not clean up the mess it had created.

⁸⁷ Stephen Odgers, 'The High Court, the common law and conceptions of justice' (2016) 40 *Criminal Law Journal* 243.

⁸⁸ Stephen Odgers, 'Criminal Cases in the High Court of Australia: *McAuliffe* and *McAuliffe*' (1996) 20 *Criminal Law Journal* 43, 44, cited in Stephen Odgers, 'McAuliffe revisited again' (2016) 40 *Criminal Law Journal* 55, 56.

⁸⁹ Above n 87.



134 In addition, Odgers attacked the majority in *Miller* for having used the failure of the applicants in that case to identify any specific instances in which EJCE had occasioned actual injustice as a basis for declining to revisit the doctrine. As he pointed out, given the inscrutability of jury verdicts, the joint judgment in that regard set a hurdle that, almost by definition, could not be overcome. Odgers argued that if a doctrine makes no sense, and is inherently unjust, it should not be necessary for its critics to point to actual injustice in order to persuade the High Court to reconsider the law on that point.

135 Critics who hold similar views to those of Odgers argue that even *Jogee* goes too far in allowing a secondary party to be convicted of murder, in circumstances where the requisite mental state for that offence cannot be established as against that party.

136 It is instructive to consider the comprehensive submissions filed on behalf of the applicants in *Jogee*. It was said that EJCE had created 'serious doctrinal and practical difficulties' in England. The extended form of criminal liability created by *Chan Wing-Siu* required acceptance of the notion that to foresee a non-negligible risk of another committing a crime was tantamount to authorising that risk. Worse still, should the risk eventuate without the secondary party having done anything in particular to facilitate it, that secondary party could be liable in full for what then occurs.

137 At the nub of those written submissions was the following statement:

Traditionally, to be liable for the principal's offence, the secondary party needed to contribute in some minor way to the principal's crime, knowing of the principal's purpose to commit that crime or one like it and intending to aid or encourage him. Now, a secondary party need only contribute in some minor way, intending his or her own act, while foreseeing that the principal might commit that crime or one like it. In practice, the narrative presented for accessories is that they were 'in it together' and insufficient effort is put into distinguishing between relative contributions and fault.⁹⁰

⁹⁰ Ameen Jogee, 'Submissions on foundations of liability for secondary parties on behalf of Ameen Jogee', Submission in *R v Jogee*, 1 June 2015 [8].



138 Other critics of EJCE argue that nowhere else in the criminal law is mere foresight of a possibility sufficient to suggest that the consequences have been willingly run, or that enough fault has been shown to equate the risk taker with the person who brings the risk about. In no other area would foresight be equated with authorisation, consent, or willing association.

139 In the face of such strong criticism levelled at EJCE, it is appropriate to inject a note of balance. While it can be said that English law, with regard to the mental state for murder, focuses almost exclusively upon the actual intent with which the fatal act was carried out,⁹¹ the common law in this country has, for many years, been quite different.

140 In Australia, an accused will be guilty of murder if they brought about the death of the deceased, knowing that their act would probably cause death or grievous bodily harm.⁹² In that regard, the High Court has made it clear that it is not enough that the accused does the act bringing about death knowing that it is possible, but not likely, that death or really serious injury might result.⁹³ This is, of course, a wider definition of the mens rea for murder than that which applies in England.

141 Even that qualification, setting as a minimum a need for foresight of probability, may require further consideration. For example, in *R v Faure*,⁹⁴ a case concerning a killing in the

⁹¹ See *R v Woollin* [1999] 1 AC 82 (*Woollin*), where Lord Steyn made it clear that the position previously taken in *Hyam v DPP* [1975] AC 55 to the effect that foresight of a high probability of grievous bodily harm would be sufficient for murder no longer represented the law in England. Rather, a jury may find that a result was intended, though it was not the actor's purpose to cause it, when that result was a 'virtually certain' consequence of his act, and the actor knew that this was so. See also *R v Nedrick* (1986) 83 Cr App R 267. This mental state is sometimes described in England as 'oblique intention'.

⁹² See *La Fontaine v The Queen* (1976) 136 CLR 62.

⁹³ *R v Crabbe* (1985) 156 CLR 464. I note, however, that in *Boughey v The Queen* (1986) 161 CLR 10, in the context of a provision of the *Criminal Code Act 1924* (Tas), which spoke of the offender knowing that his unlawful act was 'likely to cause death' in the circumstances of the case, the word 'likely' conveyed a notion of substantial, real and not remote chance. That was so regardless of whether or not that chance was more or less than 50 per cent. On the other hand, 'likely' was a stronger term than 'possible', and that should be made clear to the jury.

⁹⁴ [1999] 2 VR 537. This approach conforms with that put forward in relation to this issue by



course of playing a form of Russian roulette, the Victorian Court of Appeal held that merely because it had been determined by the High Court that murder required knowledge of the probability of death or grievous bodily harm, that test was not to be approached in a purely quantitative sense. Juries were not to be directed in terms of an ‘odds on’ chance, but rather in more pragmatic terms. The use of a weapon in such circumstances was said to represent an ‘indifference to human life’ of a kind which warranted a finding of moral culpability for murder, even where, mathematically, such an outcome was less than a fifty per cent chance.

142 Professor David Ormerod QC, currently Law Commissioner for England and Wales, and Professor of Criminal Justice at University College London, is generally acknowledged to be one of the leading scholars working in the field of criminal law. Together with his colleague, Karl Laird, of the University of Oxford, they are the current authors of *Smith and Hogan’s Criminal Law*,⁹⁵ undoubtedly the leading text in England on this subject. Their Chapter on the principles governing secondary liability represents the most sophisticated, and compelling, analysis of that topic.⁹⁶

143 In something of an understatement, the authors describe the law on the subject of joint criminal enterprise, at least as it stood prior to *Jogee*, as ‘unsatisfactorily complex’. They add that it displayed ‘many of the characteristic weaknesses of common law’, by having been allowed to develop in a pragmatic and unprincipled way.⁹⁷

144 The authors also speak of the mental state requirements for accessorial liability as being unduly complex. They note that, at least in relation to what we would describe as the basic forms of accessorial liability (aiding, abetting, counselling or procuring), the law required

Professor David Lanham in his article, ‘Murder, Recklessness and Grievous Bodily Harm’ [1978] 2 *Criminal Law Journal* 255.

⁹⁵ David Ormerod and Karl Laird, *Smith and Hogan’s Criminal Law* (Oxford University Press, 14th ed, 2015).

⁹⁶ *Ibid* ch 8.

⁹⁷ *Ibid* 205.



an intention to assist or encourage, as well as proof of knowledge on the part of the alleged accessory of the essential elements of the principal's offence. That, of course, remains the position today, even after *Jogee*.

145 Prior to *Jogee*, in relation to what we would call traditional joint criminal enterprise, and not EJCE, the prosecution had to prove that the party said to be complicit was aware that one or more of his co-offenders might commit a different offence from that which had been agreed, but was still prepared to continue in the unlawful enterprise. Liability would then depend on whether what was done by the co-offender was, broadly speaking, 'within the scope of the agreement'. That test for joint criminal enterprise appears to have been left untouched by *Jogee*.

146 Writing after judgment in *Jogee* had been delivered, Professor Ormerod and Mr Laird commented favourably upon it, but with some reservations.⁹⁸ They noted, for example, that their Lordships had left several important questions unanswered. In particular, *Jogee* had failed to set out, with precision, what degree of foresight would be required before a jury could be satisfied that an accused, said to be complicit in a murder, possessed the requisite intent for that offence.

147 The authors provided a telling example of some of the difficulties that had arisen under EJCE in England in the past.⁹⁹ If two accused act jointly in throwing their victim off a bridge and into a river where he drowns, neither can be convicted of murder unless it is established that he or she appreciated that death or really serious harm was a 'virtually certain' consequence of their actions.

148 If, however, rather than being joint principals, one is the principal and the other is the

⁹⁸ David Ormerod and Karl Laird, '*Jogee*: Not the End of a Legal Saga but the Start of One?' [2016] 8 *Criminal Law Review* 539.

⁹⁹ The authors referred specifically to *R v Matthews* [2003] 2 Cr App R 30.



secondary party, under the law as it stood pre-*Jogee*, it would be easier to convict the secondary party of murder than the principal. That would be so even though their respective states of mind were exactly the same. The principal would have been acquitted unless he appreciated that death or serious harm was ‘a virtually certain consequence’, but the secondary party could have been convicted if he merely foresaw death or serious harm as a possible outcome of what the principal was doing. The position was even more difficult if it could not be established which of the two was the principal, and which was the secondary party.¹⁰⁰

149 As between *Jogee* and *Miller*, it is hardly surprising that the authors strongly favour the English approach.

150 Another English commentator, Catarina Sjölin,¹⁰¹ has described EJCE as a ‘pernicious theory’.¹⁰² She argues that the doctrine can only be supported on policy grounds. She claims that the doctrine is not one of ancient pedigree, and describes it as an ‘erroneous tangent’. She contends that, pre-*Jogee*, it resulted in a low level of mental fault, equivalent to nothing more than ‘suspicion’, rendering a person whose moral culpability falls well short of that required for murder, guilty of that crime. In her view, EJCE reflected little more than a revival of constructive liability for murder, a doctrine which was thought to have disappeared in England after the abolition of the felony murder rule.

151 Professor Denis Baker, another eminent English legal scholar, also used strong language when referring to EJCE.¹⁰³ He described the doctrine as ‘normatively vacuous’. He added that it was simply a manifestation of the old doctrine of constructive crime. However, it

¹⁰⁰ Above n 98, 546.

¹⁰¹ Catarina Sjölin was Junior Counsel for Ameen Jogee in the Supreme Court of the United Kingdom.

¹⁰² Catarina Sjölin, ‘Killing the parasite’ (2016) 25 *Nottingham Law Journal* 129, 137.

¹⁰³ Dennis Baker, ‘Unlawfulness’s doctrinal and normative irrelevance to complicity liability: a reply to Simester’ [2017] 81 *Journal of Criminal Law* 393.



was worse than that because the doctrine extended beyond homicide, and into other branches of the criminal law that had been thought to be immune from such an approach. As with other commentators, Professor Baker described the law of criminal complicity, in England, as a 'complete mess'.¹⁰⁴

Analysis

152 Even *Jogee's* most ardent supporters accept that their Lordships' judgment should not be regarded as the last word on the subject of EJCE. They also accept that the reasoning in *Jogee* is by no means immune from criticism.

153 For example, there is surely substance in Professor Ormerod and Mr Laird's point regarding their Lordships' failure to have stated clearly what they meant by expressions such as '*intention to assist or encourage*', or '*foresight that [the principal] may commit crime*', as '*evidence, or powerful evidence of intent*', or '*foresight of what might happen*'. These expressions are all, as the authors argue, far from self-explanatory. In an area already largely bereft of clarity, they are likely to give rise to problems in the future.

154 As previously indicated, it seems to me to be hardly fair for Professor Simester to criticise *Jogee* for a supposed failure to consider adequately a body of case law, much of which is archaic. *Jogee* itself refers to a series of cases going back as far as 1831.¹⁰⁵ It then tracks a number of 19th century cases dealing with secondary liability for murder,¹⁰⁶ and finally deals with the cases leading up to *Chan Wing-Siu*.¹⁰⁷

155 There are, however, other difficulties with *Jogee*. For one thing, it quite

¹⁰⁴ Ibid 395.

¹⁰⁵ *R v Collison* (1831) 4 Car & P 565.

¹⁰⁶ *R v Macklin* (1838) 2 Lewin 225; *R v Luck* (1862) 3 F & F 483; *R v Turner* (1864) 4 F & F 339; *R v Skeet* (1866) 4 F & F 931.

¹⁰⁷ *R v Spraggett* [1960] Crim LR 840; *R v Smith (Wesley)* [1963] 1 WLR 1200; *R v Betty* (1964) 48 Cr App R 6; *R v Anderson* (1966) 50 Cr App R 216; *R v Reid* (1976) 62 Cr App R 109.



understandably focused upon the principles of joint criminal enterprise that are particularly applicable to murder. It did not address the application of EJCE to other, lesser offences.¹⁰⁸

156 Professor Baker makes the point that the doctrine is said to be of general application. Yet a moment's reflection will illustrate just how difficult it can be to apply EJCE to offences other than murder.

157 In *Smith and Hogan's Criminal Law*, it is suggested that liability under EJCE in England is wholly derivative, rather than primary or direct.¹⁰⁹ In other words, such liability can arise only where it can be shown that the primary offender has committed the offence to which the secondary party is said to be complicit.

158 Problematically, this analysis seems to be at odds with the very notion that one of the problems with EJCE was that it allowed for the secondary party to be convicted of a more serious offence than the primary offender. That was based merely on the secondary party's foresight of the possibility that the primary offender might bring about the consequence foreseen.

159 Depending upon the characterisation of EJCE as either derivative or primary, that particular difficulty may not apply in Australia. If EJCE were to be treated on the same basis as traditional joint criminal enterprise, liability under that doctrine would be primary, and not derivative. So much was established in *Osland*. It would follow that there would be no logical difficulty, as distinct from a problem of principle, with a secondary party facing greater liability than the primary offender, based merely on foresight of possibility.

160 When one attempts to apply EJCE to offences other than murder, difficulties soon become apparent. Assume that two offenders agree that they will jointly assault a particular

¹⁰⁸ Nor, for that matter, did *Miller* (2016) 259 CLR 380.

¹⁰⁹ Ormerod and Laird, above n 95, 259.



victim. The scope of their agreement is, however, specifically and expressly limited. Each understands, and agrees, that the victim is in no way to be seriously harmed. The aim is to intimidate him, or, at worse, cause him only moderate injury.

161 In the course of the assault, the victim unexpectedly resists. One of the offenders loses self-control. He pushes the victim to the ground, and then kicks him repeatedly to the head. The victim sustains grave and ongoing injuries, clearly amounting to grievous bodily harm.

162 The prosecution, perhaps benevolently, charges the primary offender with recklessly causing grievous bodily harm,¹¹⁰ rather than causing grievous bodily harm with intent.¹¹¹ That offender either pleads guilty, or is convicted after a trial.

163 As far as the secondary party is concerned, however, EJCE, if invoked, may enable him to be convicted of the more serious offence of causing grievous bodily harm with intent. All that the prosecution would have to prove, as against that secondary party, is that he foresaw the possibility that his co-accused might go beyond the scope of their agreement, and might go so far as to intentionally inflict grievous bodily harm.

164 This would produce a similar paradox to that which could occur, should the primary offender, on a charge of murder, be convicted instead of manslaughter.¹¹² The co-offender, who is merely present pursuant to an agreement to commit an assault, short of really serious injury, can be convicted of murder on the basis merely of foresight of possibility.

165 The problem is equally real if EJCE is invoked against a secondary party who is charged, on the basis of complicity, with an offence in which recklessness (meaning foresight of

¹¹⁰ *Crimes Act 1900* (NSW) s 35(2).

¹¹¹ *Ibid* s 33(1).

¹¹² This would be on the basis that he lacked murderous intent.



probability) happens to be the requisite mental element. The doctrine would require the jury to be directed, in the case of the party said to be complicit under EJCE, that they would have to be satisfied that he foresaw the *possibility* that the primary offender would himself foresee the *probability* that his actions would bring about the relevant consequence.

166 It need hardly be said that a jury directed in these terms, involving proof of ‘double foresight’, would regard any such direction as incomprehensible.

167 In addition, there seems little justification, in principle, for the prosecution to be allowed a significant forensic advantage by electing to characterise the secondary party’s liability as EJCE, rather than the more traditional aiding and abetting, or common purpose. The facts to be established are, after all, the same. The legal consequences, however, may be vastly different.

168 Next, consider a case where two co-offenders agree to rent a property for the purpose of hydroponically growing a cannabis crop. One is in charge of renting the property, but is to have no other involvement. The second oversees the rest of the operation.

169 Assume that there is no firm agreement between them as to precisely how many plants are to be grown. Self-evidently, however, given the nature of the operation, it is a substantial number. When police raid the property, they discover some 280 mature cannabis plants under cultivation. The person who is actually growing the crop cannot be convicted of cultivation of a commercial quantity of cannabis unless the prosecution can prove that he knew that more than 250 plants were being grown.¹¹³

170 The other party (whose role in the criminal enterprise was limited to arranging for the rental of the property), can, however, be convicted of cultivating a commercial quantity. All that

¹¹³ That number being the threshold of a commercial quantity. See *Drug Misuse and Trafficking Act 1985* (NSW) s 23(2)(a); sch 1.



is required is proof that he foresaw the *possibility* that his co-offender might, in fact, intentionally grow more than 250 plants. In other words, the burden resting upon the Crown so far as the actual grower is concerned, is heavier than that which must be met in relation to the party merely said to be complicit. This seems a somewhat paradoxical result.

171 It can be argued that the problems seemingly posed by these examples, and others like them, are purely theoretical, rather than real. That might be to underestimate the potential for injustice created by the use of EJCE in cases involving joint offenders.

172 The policy underlying EJCE is, of course, understandable. When applied in relation to those who are major players in a joint criminal enterprise, that policy has a certain logic and cogency. On the other hand, it has the potential to result in injustice by over-criminalising those who are, in truth, relatively minor participants in a lesser criminal enterprise.

173 There is a tension between two distinct normative principles, each of which can be seen to have its own justification. If one starts with the proposition that those engaged in a joint criminal enterprise take the risk that their co-offenders will divert from the agreed plan, and possibly commit different and (generally) more serious offences, the policy underlying EJCE becomes readily justifiable. The law is deliberately cast in such a way as to be harsh, in order to achieve a greater deterrent effect. Although in any given case the consequence may seem unjust, there is a certain logic to it.

174 If, on the other hand, one starts with the proposition that it is a fundamental precept of the criminal law that every serious crime requires proof, not just of the actus reus, but also of the mens rea that is specifically applicable to that particular crime, it will clearly be apparent that EJCE represents a serious departure from basic principle. It is as great a departure from such principle as is constructive murder, which itself is a doctrine that is difficult to justify.

175 Recent legislative attempts in Victoria to recast EJCE in the form of foresight of the



probability as to consequence represent an improvement to the doctrine in its present form, but are not necessarily the complete answer. I am told, for example, by colleagues in the Trial Division of the Supreme Court, that since the *Crimes Act 1958* (Vic) was amended to codify the law of criminal complicity in that State, the result has been a revival of the use of constructive murder (often termed ‘s 3A murder’, or ‘statutory murder’).¹¹⁴ Previously, prosecutors, having been able to rely on EJCE, had not thought it necessary to invoke that form of murder, which had in fact become almost obsolete.

176 To many commentators, the High Court’s decision in *Miller* represents a significant departure from basic principle. For what it is worth, I share their view.

177 The title to this paper speaks of ‘top-down’ and ‘bottom-up’ legal reasoning. As Keith Mason observed, in his perceptive presentation on this subject, the term top-down reasoning is generally regarded in legal discourse as a term of abuse. I understand why that is so. I wonder, however, whether that criticism can fairly be levelled at an ultimate appellate court, which, after all, has the responsibility of both declaring and developing the common law.

178 I find it particularly interesting that, reduced to its basics, *Jogee* accuses the High Court, through *McAuliffe*, of having produced a policy judgment, inconsistent with fundamental principle. Their Lordships therefore attack the High Court for having embraced EJCE through a form of top-down reasoning. Yet *Miller*, in response, counters by rejecting *Jogee*, in part at

¹¹⁴ *Crimes Act 1958* (Vic) s 3A. That section is in the following terms:

3A Unintentional killing in the course or furtherance of a crime of violence

- (1) A person who unintentionally causes the death of another person by an act of violence done in the course or furtherance of a crime the necessary elements of which include violence for which a person upon first conviction may, under or by virtue of any enactment, be sentenced to level 1 imprisonment (life) or to imprisonment for a term of 10 years or more shall be liable to be convicted of murder as though he had killed that person intentionally.
- (2) The rule of law known as the felony-murder rule (whereby a person who unintentionally causes the death of another by an act of violence done in the course or furtherance of a felony of violence is liable to be convicted of murder as though he had killed that person intentionally) is hereby abrogated.



least, on the basis that it is a policy judgment, unduly influenced by the views of certain legal scholars, and itself an example of the grievous sin of top-down reasoning.

179 I would respectfully suggest that in an area of judge-made law, such as this, there is nothing wrong with an ultimate appellate court adopting just a little bit of top-down reasoning. There is no reason why sound principle and sound policy cannot both be accommodated.

180 If as appears likely, the High Court is not presently minded to reconsider *McAuliffe*, there is undoubtedly a case for the legislature in both New South Wales and South Australia to do so. It goes without saying that the position in the Code States is even less satisfactory, and surely requires urgent attention.

181 Indeed, the legislature could go further. In 2010, the New South Wales Law Reform Commission produced a thorough and compelling report recommending reform across the board in relation to criminal complicity.¹¹⁵ A useful starting point might be to go back to that report, and re-visit its recommendations.

182 One thing is clear. The present law of criminal complicity is in a state of some disorder, if not disarray. The problem is straightforward to diagnose. The solution is less apparent.

¹¹⁵ New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010).