Criminal Responsibility [1]

1 Introduction.

The law imposes criminal liability on one person, a secondary party, for an offence committed by another person, a primary party, in certain circumstances. This paper looks at those circumstances as they apply to a New South Wales prosecution.

Those circumstances generally fall into two categories:

a. Joint Liability; and
b. Accessorial Liability.

This paper deals with the following topics:

Joint Liability
Accessorial Liability
Other Important Topics
Sentencing
Commonwealth Criminal Code

2 Joint Liability

2.1 Joint Criminal Enterprise

Liability by way of joint criminal enterprise arises where two or more persons reach an understanding or arrangement amounting to an agreement to commit an offence and an offence is committed pursuant to that agreement.[2] The agreement or understanding need not be express and may be inferred from all the circumstances.[3] There must be an agreement to act together to commit the offence – it is not sufficient that the alleged parties to the offence decide individually to commit the same offence, even if they are aware of what

[1] This paper updates an earlier paper entitled Criminal Responsibility written by Craig Smith SC and Jennifer Wheeler , Researcher, Public Defender's Chambers which in turn updated an earlier paper written in 2007 by Peter Zahra SC, judge of the District Court and Jennifer Wheeler, Researcher, Public Defender's Chambers.
[2] *McAuliffe* (1995) 183 CLR 108 at 114; *Handlen; Paddison* (2011) 245 CLR 282 at [4]; *Huynh v R; Duong v R; Sem v R* (2013) 295 ALR 624 at [3]-[4]; *Likiardopoulos v R* (2012) 247 CLR 265 at [19]; *Miller v R; Smith v R; Presley v Director of Public Prosecutions (SA)* (2016) 334 ALR 1; [2016] HCA 30 at [4].
[3] *McAuliffe* (1995) 183 CLR 108 at 114; *Miller v R; Smith v R; Presley v Director of Public Prosecutions (SA)* (2016) 334 ALR 1; [2016] HCA 30 at [4] per French CJ, Kiefel, Bell, Nettle, Gordon JJ.

the other parties may do.[4] Liability requires proof of agreement and participation in some way in furtherance of the enterprise.[5] Presence of the offender at the time the offence was committed will be sufficient to establish participation.[6] Presence at the time of the offence is not necessary if the offender participated in some other way in the furtherance of the enterprise.[7]

Where one or more of the parties commit the offence agreed upon, acting in accordance with the continuing understanding or agreement, liability for the offence each party to the agreement is primary regardless of the part they played.[8] Each party will be liable as a principal offender and may be convicted although the party actually doing the act constituting the offence is acquitted or convicted of a lesser offence.[9] It also means the party may be held liable for the acts of the principal although it was physically or legally impossible for the accomplice to have committed the act.[10]

These principles extend to parties to the agreement not physically present at the time of the offence,[11] although the existence, nature and scope of the agreement cannot be inferred from the circumstances of the offence itself where the party is not present.[12]

In *Handlen; Paddison*[13] the High Court highlighted the essential difference between liability as an accessory[14] and liability pursuant to joint criminal enterprise. In regard to the first, the Crown must establish that the conduct of the accused in fact facilitated the commission of the offence. As to the latter, the question is whether the accused was party to an agreement to have the offence committed.[15]

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[4] *Taufahema* (2006) 162 A Crim R 152 NSWCCA at [28], [30]; R v *Taufahema* (2007) 228 CLR 232 at [48] per Gummow, Hayne, Heydon and Crennon JJ; [9], [20], [28] per Gleeson CJ and Callinan J.
[5] *Huynh v R; Duong v R; Sem v R* (2013) 295 ALR 624 at [5], [37]; *Dickson* [2017] NSWCCA 78 at [41].
[6] *Osland v R* (1998) 197 CLR 316 at [72]-[73] per McHugh J; *Huynh v R; Duong v R; Sem v R* (2013) 295 ALR 624 at [38]; *Youkhana v R* [2015] NSWCCA 41 at [13]-[15]; *Dickson* [2017] NSWCCA 78 at [45].
[7] *Huynh v R; Duong v R; Sem v R* (2013) 295 ALR 624 at [37]; *Dickson* [2017] NSWCCA 78 at [47].
[8] *McAuliffe* (1995) 183 CLR 108 at 113-114 affirmed in *Gillard* (2003) 219 CLR 1 at [110]; *Huynh v R; Duong v R; Sem v R* (2013) 295 ALR 624 at [5], [37]
[9] *Osland v R* (1998) 197 CLR 316 at [72]-[75] per McHugh J; *Likiardopoulos* (2012) 247 CLR 265 at [19]; *IL* [2017] HCA 27 per Kiefel CJ, Keane and Edelman JJ at [30]; per Gordon J at [145]-[146]. See for example *Sutcliffe* [2014] NSWCCA 208
[10] *IL* [2017] HCA 27 per Kiefel CJ, Keane and Edelman JJ at [36]; per Gageler J at [103]
[11] *Johns* (1980) 143 CLR 108 at 125-6, 130-1; *Sever* [2010] NSWCCA 135 at [146]; *Likiardopoulos v R* (2012) 247 CLR 265 at [21].
[12] *Sever* [2010] NSWCCA 135 at [146]. See for example *Jamal v R* (2012) 223 A Crim R 585 at [18]-[25].
[13] *Handlen; Paddison* (2011) 245 CLR 282 at [42]-[47]
[14] See accessorial liability below
[15] In *Handlen; Paddison* (2011) 245 CLR 282 the trial had been conducted on the erroneous assumption that the accused could be held liable under the doctrine of joint criminal enterprise. At the time of the offence liability as an accessory aiding and abetting, counselling or procuring, was the only basis for convicting the accused under the (CTH) Criminal Code. The High Court allowed the appeal on the basis that a finding by the jury that the accused had been a party to a group exercise did not necessarily mean the jury had been satisfied of the essential elements required for a conviction as an accessory: [47]. See also *IL* [2017] HCA 27 at [34] per Kiefel CJ, Keane and Edelman JJ; *Clayton, Hartwick and Hartwick v The Queen* (2006) 168 A Crim R 174; [2006] HCA

It will be an error to leave a case to the jury on the basis of joint criminal enterprise where there is no evidence to establish the existence of such an enterprise.[16]

2.2 Extended Joint Criminal Enterprise (Common Purpose)

A party to a joint criminal enterprise may also be liable where the offence committed is not the offence agreed upon by the parties, but is an offence falling within 'the scope of the common purpose'.[17] This may be referred to as extended joint criminal enterprise or common purpose. The test for an offence being with the scope of the common purpose is a subjective one – the party to the joint criminal enterprise must have foreseen the offence as a possible consequence of the execution of the joint criminal enterprise.[18] Where an agreement encompassed the infliction of serious bodily harm it is not necessary for the prosecution to show that the accessory foresaw the particular manner in which harm was inflicted, the type of weapon used,[19] nor even that a weapon be used.[20] The accessory will only be liable for such offence as he or she foresaw as a possible consequence of the joint criminal enterprise, and may be convicted of a lesser offence than the principal offender.[21]

In *Clayton, Hartwick and Hartwick v The Queen*[22] the High Court was asked to reformulate the test for extended joint criminal enterprise set down in ***McAuliffe*** and ***Gillard***. It was argued that under the principle of extended joint criminal enterprise a person may be guilty of murder if he or she foresaw the ***possibility*** of a murderous assault by the principal offender, although the principal offender must have intended or foreseen the ***probability*** that an assault would be murderous. Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ declined to reconsider the law in this area, and dismissed the appeal. They affirmed the principles as set out in ***McAuliffe*** and ***Gillard***:

> [17] A person who does not intend the death of the victim, but does intend to do really serious injury to the victim, will be guilty of murder if the victim dies. If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in

58 at [20] per per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ (a person may be liable under both)

[16] *Wood* [2012] NSWCCA 21 at [660]-[672]; *Sever* [2010] NSWCCA 135 at [147].

[17] *McAuliffe* (1995) 183 CLR 108 at 113-114

[18] *McAuliffe* (1995) 183 CLR 108 at 114, 115; *Johns* (1980) 143 CLR 108 at 130-1; *Gillard* (2003) 219 CLR 1 at [112]; *Miller v R; Smith v R; Presley v Director of Public Prosecutions (SA)* (2016) 334 ALR 1; [2016] HCA 30 at [2], [23] per French CJ, Kiefel, Bell, Nettle, Gordon JJ. Possibility does not include a fanciful possibility or circumstances where an offence occurs fleetingly to a party to the agreement but is genuinely dismissed as a negligible risk: *Miller v R; Smith v R; Presley v Director of Public Prosecutions (SA)* at [43]-[44].

[19] *Suteski* (2002) 56 NSWLR 182; 137 A Crim R 371 at [135]-[159]

[20] *Hawi* (No.25) [2011] NSWSC 1671 per RA Hulme J

[21] *Gillard* (2003) 319 CLR 1; *Taufahema* (2006) 162 A Crim R 152 at [35]-[36]; *Nguyen* (2010) 242 CLR 491 at [49]-[50]. See also *Al; SB and Al* [2011] NSWCCA 95 at [30]-[36]; *Nguyen* (2013) 298 ALR 649 at [23].

[22] (2006) 168 A Crim R 174; [2006] HCA 58

> the continued participation in the joint enterprise with the necessary foresight *McAuliffe v The Queen* (1995) 183 CLR 108 at 118; *Gillard v The Queen* (2003) 219 CLR 1 at [112]. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend *that* result, yet be guilty of the crime of murder.

Kirby J dissenting, referred to the current law on extended joint criminal enterprise as "unjust, overbroad and anomalous."[23]

The High Court was again asked to reconsider the principles of extended joint criminal enterprise in relation to murder in *Miller; Smith; Presley* (2016) 259 CLR 380 after the House of Lords ruled the English courts had taken a 'wrong turn'. In *R v Jogee* [2016] UKSC 8 the House of Lords determined that a secondary party could only be liable if he or she intended to assist the commission of the offence and foresight of the possibility that the offence would be committed was simply evidence of that intention. The High Court declined to follow in that approach and affirmed both *Clayton* and *McAulliffe*.[24] In a dissenting judgment Gageler J held that the doctrine of extended joint criminal enterprise was anomalous and unjust and had created a problem of over-criminalisation.[25]

In *Taufahema*[26] the Court of Criminal Appeal emphasised the requirement that in an extended joint criminal enterprise (common purpose) murder the accessory must have foreseen the possibility that the principal offender would act with intent to kill or inflict grievous bodily harm.[27] In the case for one of the co-offenders the Court affirmed the requirement that the common purpose must relate to the commission of an offence.[28]

2.3 Directions to the Jury

It is essential that judges carefully direct juries as to the nature of the Crown case and the basis for alleged liability of the accused[29]. Hunt CJ at CL suggested the following directions in *Tangye*[30]

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

[23] *Clayton, Hartwick and Hartwick v The Queen* (2006) 168 A Crim R 174; [2006] HCA 58 at [98]
[24] *Miller; Smith; Presley* [2016] HCA 30 at [6]-[45] per French CJ, Kiefel, Bell and Gordon JJ
[25] *Ibid* at [128]-[129]
[26] [2007] NSWCCA 33 at [27]-[33]
[27] See also *Nguyen* [2007] 180 A Crim R 267 at [91]-[117].
[28] *Taufahema* (2006) 162 A Crim R 152 at [16]-[27] (in this case the proposed common purpose of evading arrest did not constitute an offence)
[29] *Tangye* (1997) 92 A Crim R 545 at 556
[30] Ibid at 556, approved in *Chishimba* [2010] NSWCCA 228 at [29].

> (1) The law is that, where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise. The Crown must establish both the existence of that joint criminal enterprise and the participation in it by the accused.
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> (2) A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.
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> (3) A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime.
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> (4) If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.[31]

It is equally essential that a trial judge detail the relationship between the general principles and the evidence of the case to assist the jury in understanding the way the case is put against the respective accused.[32]

The Crown should not rely upon a case of extended joint criminal enterprise where the crime committed is the crime the Crown alleges the accused agreed to commit,[33] or where liability for the offence can be established by the ordinary principles of principal and accessory.[34]

Hunt CJ at CL said in ***Tangye***[35]

> The Crown needs to rely upon a straightforward joint criminal enterprise only where -- as in the present case -- it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making that point for years, and it is a pity that in many trials no heed is taken of what has been said.

[31] See, generally, *McAuliffe* (1995) 183 CLR 108 at 113-116
[32] *Georgiou & Harrison* [2001] NSWCCA 464 at [19]
[33] *Stokes and Difford* (1990) 51 A Crim R 25 per Hunt J at p.36; *May* (2012) 215 A Crim R 527, NSWCCA at [249]-[250], [260].
[34] *Clough* (1992) 64 A Crim R 451 at 453, 456 per Hunt CJ at CL.
[35] (1997) 92 A Crim R 545 at 556

3 Accessorial Liability

In general terms it is easier to think about accessorial liability by relating it to the timing of the offence[36]. Liability might be as a result of things that occur:

a. Before the offence;
b. During it; or
c. After it.

A person who provides assistance before or during the commission of the offence may be liable for the offence itself as an accessory. Assistance provided after the commission of the offence may make a person an accessory after the fact or liable for a related offence such as conceal serious offence or hinder investigation of an offence.[37]

Liability for an accessory is derivative and dependent upon the guilt of the principal offender.[38]

3.1 Establishing Accessorial Liability

To establish the liability of a person as an accessory (principals in the second or third degree) the prosecution must prove all of the following elements:

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

3.2 Commission of the principal offence

The prosecution must prove, by evidence admissible against the accessory, that the principal offence has been committed.[39] Evidence of the conviction of the principal offender,

[36] In *Osland v R* (1998) 197 CLR 316 at [70]-[72] McHugh J sets out different terminology used for participants in an offence. The person who commits the actus reus of an offence is the 'principal in the first degree'. A person who is present at the offence pursuant to a pre-concert or agreement is a 'principal in the first degree'. An accessory who aided but was not present at the commission of the offence is an 'accessory before the fact' or a 'principal in the third degree'. A person who is present and encouraging the principal in the first degree, but not present pursuant to a joint criminal enterprise, is referred to as a 'principal in the second degree'. A person who provides assistance after the offence is an 'accessory after the fact'

[37] Sections 315 & 316 *Crimes Act* (NSW).

[38] *Osland v R* (1998) 197 CLR 316 at [71] per McHugh J; *IL* [2017] HCA 27 per Kiefel CJ, Keane and Edelman JJ at [30]

or admissions made by the principal offender, are not admissible as evidence of the commission of the principal offence against the accessory (unless admitted by consent).[40]

It is not necessary that anyone be convicted as the principal offender.[41] Where the person charged as the principal offender is acquitted because of insufficient evidence, an accessory may still be convicted if it is proved by evidence admissible against the accessory, that the principal offence was committed, and there is no evidentiary inconsistency in the different results.[42]

3.3 Assistance

An accessory must provide intentional assistance to the principal offender. Neither unintentional encouragement or assistance,[43] nor intention alone,[44] is sufficient for liability as an accessory.

3.4 Actus Reus

An accessory must aid, abet, counsel or procure the commission of an offence to be liable as an accessory.[45] This requires that the accessory was linked in purpose with the principal offender, and by words or conduct did something to bring about, or render more likely, the commission of the principal offence.[46] The assistance may be provided through a third party.[47] Mere presence at the commission of an offence is insufficient,[48] although presence

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[39] *Giorgianni* (1985) 156 CLR 473 at 491; *Osland* (1998) 197 CLR 316; 159 ALR 170 at 174 per Gaudron and Gummow JJ.

[40] *Kirkby* (1998) 105 A Crim R 323; *Mallan v Lee* (1949) 80 CLR 198 at 210; (CTH) *Evidence Act* 1995 s 91; (NSW) *Evidence Act* 1995 ss 83 (exclusion, subject to consent, of third party admissions) & 91 (exclusion of evidence of judgments and convictions).

[41] (NSW) *Crimes Act* 1900 s 346; (NSW) *Criminal Procedure Act* 1986 s 24; *Giorgianni* (1985) 156 CLR 473 at 491; *King* (1986) 161 CLR 423 at 433-4, 435.

[42] *King* (1985) 17 A Crim R 184 at 189; *King* (1986) 161 CLR 423 at 433-4; *Osland* (1998) 197 CLR 316 at [14] per Gaudron and Gummow JJ, at 187 per McHugh J. See also *Likiardopoulos* (2012) 247 CLR 265 at [24]-[39] per Gummow, Hayne, Crennan, Kiefel and Bell J: no inconsistency in verdicts, unfairness or abuse of process where prosecution accepts a plea of guilty to manslaughter by the principal offender and the accessory is convicted of murder provided there is sufficient evidence admissible against the accessory that the principal offender committed murder.

[43] *Coney* (1882) 8 QBD 534 at 557; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440 per Roden J.

[44] *Mills* (1985) 17 A Crim R 411 at 440 per Roden J; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [69].

[45] (NSW) *Crimes Act* 1900 s 351, 351B (in relation to minor indictable and summary offences) For serious indictable offences see *Johns* [1978] 1 NSWLR 282 at 285; *Giorgianni* (1985) 156 CLR 473 at 493; *Handlen; Paddison* (2011) 245 CLR 282 at [6], [46]-[47] (distinguishing liability as an accessory to liability through joint criminal enterprise).

[46] *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [69].

[47] *Cooper* (1883) 5 C & P 535; 172 ER 1087 at 1088 (the accessory may make a general request to the third party that the third party find 'someone' to commit the offence: see, for example, *King* (1986) 161 CLR 423 at 434)

[48] *Coney* (1882) 8 QBD 534 at 539, 540 per Cave J, at 552 per Lopes J, at 560 per Hawkins J, at 561 per Huddleston B; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440; *Adam* (1999) 106 A Crim R 510 at [69]-[70].

may be evidence of encouragement or assistance sufficient to make a person an accessory.[49]

The assistance must be provided before or during the commission of the principal offence of which the accused is charged with assisting.[50]

There is no general liability for a failure to prevent the commission of an offence,[51] although the failure of a person to act where they have a duty to do so may be sufficient for liability as an accessory.[52]

In *Chishimba*[53] the court reviewed the cases on this topic and concluded:

> [148] These authorities indicate that proof of "encouragement" of the commission of a crime ordinarily requires proof that the accused took some active steps to indicate to the perpetrator his or her approval of the perpetrator's conduct, such that the accused and the perpetrator may be regarded as being linked in purpose. Expressions, gestures and other actions, as well as words, will qualify as active steps if they are intended to communicate approval to the perpetrator of the perpetrator's actions. Mere presence when a crime is committed will not generally however so qualify unless the circumstances are exceptional, such as they were in *Russell* where the moral duty of a father to intervene to save his wife and children and exercise control over the situation gave to the father's presence and inaction "the quality of participation" in the wife's criminal acts.

3.5 Mens Rea

An accessory must have knowledge of the essential facts and circumstances of the principal offence, and with this knowledge provide intentional assistance or encouragement.[54] The essential facts and circumstances of the principal offence include both the actus reus and the relevant state of mind or intent of the principal offender (but do not extend to the consequences of the principal offender's act).[55] It is sufficient for the accessory to have knowledge of the type of offence that is committed, and does not need to have knowledge of

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[49] *Coney* (1882) 8 QBD 534 at 540, 543 per Cave J, at 558, 560 per Hawkins J; 15 Cox CC 46; *Russell* [1933] VLR 59 at 66; [1933] ALR 76 per Cussen ACJ

[50] See *Nolan* (2012) 224 A Crim R 1: although the accused intended to assist in the importation of prohibited drugs the importation had ceased at the time of the involvement of the accused because the drugs had been substituted for an inert substance.

[51] *Coney* (1882) 8 QBD 534 at 539 per Cave J, at 557-8 per Hawkins J; 15 Cox CC 46; *Mills* (1985) 17 A Crim R 411 at 440.

[52] *Russell* [1933] VLR 59 at 77, 81-82; *Ex parte Parker; Re Brotherson* [1957] SR (NSW) 326 at 330; (1956) 74 WN (NSW) 463. A person may be liable for a failure to act where he or she is in a position of power or control, is aware that an offence is about to be committed or is being committed, has reasonable opportunity to intervene, and fails to take reasonable steps to prevent the offence being committed: *Smith* (TAS CCA 6.3.1979) at 34 referred to with approval in *Randall* [2004] TASSC 42 (applied to manager of club who permitted office to be used for rape).

[53] [2010] NSW CCA 228 at [137]-[148]

[54] *Giorgianni* (1985) 156 CLR 473 at 482, 487-8 per Gibbs J, at 494 per Mason J, at 500, 505 per Wilson, Deane, Dawson JJ; *Stokes* (1990) 51 A Crim R 25 at 37-8, 41; *Likiardopoulos* (2012) 247 CLR 265 at [20]

[55] *Stokes* (1990) 51 A Crim R 25 at 38; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30 at [105].

all the details of the offence.[56] The accessory need not be aware of the illegal nature of the conduct which constitutes the offence.[57] The accessory does not need to have had knowledge of, nor intend, the consequences of the offence committed.[58] Actual knowledge is required; recklessness or mere suspicion is insufficient.[59] The requirement of knowledge and intention for the accessory applies where the principal offence is one of strict liability and no intention is required of the principal offender.[60]

4 Other Important Topics

4.1 Withdrawal

A person will not be liable for an offence if he or she withdrew his or her involvement prior to the offence being committed.[61] The accessory must make a timely and unequivocal[62] communication, by words or conduct,[63] to all other parties of the intention to withdraw,[64] and must take all reasonable steps to prevent the commission of the offence.[65] A withdrawal is only timely if it can be effective and is not made too late to prevent the offence being committed.[66] Where there is evidence of withdrawal the onus is on the prosecution to prove beyond reasonable doubt there was no withdrawal.[67]

[56] *Bainbridge* [1960] 1 QB 129; [1959] 3 All ER 200 at 202; [1959] 3 WLR 656 per the court, CCA; *Director of Public Prosecutions (Northern Ireland) v Maxwell* [1978] 3 All ER 1140 at 1147-8 per Lord Hailsham of St Marylebone, at 1150 per Lord Fraser of Tullybelton, at 1150-1 per Lord Scarman, at 1162 per Lowry LCJ; *Glennan* [1970] 2 NSWR 421 at 426; (1970) 91 WN (NSW) 609 per the court, CCA(NSW); *Cavallaro v Waterfall* (1988) 8 MVR 271 at 278; BC8801179 per Carruthers J, SC(NSW); *Bruce v Williams* (1989) 10 MVR 451; 46 A Crim R 122 at 129-30 per Priestly JA, CA(NSW).
[57] *Giorgianni* (1985) 156 CLR 473 at 500, 506; *McCarthy* (1993) 71 A Crim R 395 at 409; *Buckett* (1995) 79 A Crim R 302 at 309
[58] *Giorgianni* (1985) 156 CLR 473 at 495 per Wilson, Deane and Dawson JJ, at 500 per Mason J; *Mills* (1985) 17 A Crim R 411 at 450; *Stokes* (1990) 51 A Crim R 25 at 38, 39
[59] *Giorgianni* (1985) 156 CLR 473 at 483, 486-8 per Gibbs CJ, at 495 per Mason J, at 505, 506 per Wilson, Deane and Dawson JJ; *Stokes* (1990) 51 A Crim R 25 at 42
[60] *Giorgianni* (1985) 156 CLR 473 at 479, 483 per Gibbs CJ, at 494 per Mason J, at 500, 504-5 per Wilson, Deane and Dawson JJ; *Buckett* (1995) 79 A Crim R 302 at 309; *Sexton* (2008) 181 A Crim R 507 at [22]
[61] (CTH) *Criminal Code* s 11.2(4)(a); *White v Ridley* (1978) 140 CLR 342; *Tietie* (1988) 34 A Crim R 438
[62] A countermand which is vague, ambiguous or perfunctory is insufficient: *White v Ridley* (1978) 140 CLR 342 at 351.
[63] *White v Ridley* (1978) 140 CLR 342 at 351
[64] *White v Ridley* (1978) 140 CLR 342 at 348-351; *Tietie* (1988) 34 A Crim R 438 at 447
[65] (CTH) *Criminal Code* s 11.2(4)(b); *White v Ridley* (1978) 140 CLR 342 at 351 *Tietie* (1988) 34 A Crim R 438 at 447 CCA(NSW); *Tierney* [2016] NSWCCA 144. See also *Truong* NSWCCA 22.6.1998 (if the accessory honestly believes that the offence will not take place he or she does not have to take any further steps to prevent its commission) and *Miller v Miller* (2011) 242 CLR 446 at [104] (no reasonable steps available.)
[66] *White v Ridley* (1978) 140 CLR 342 at 351
[67] *White v Ridley* (1978) 140 CLR 342 at 348

4.2 In Company

The element of being 'in company' for the purpose of an offence requires an express or implied agreement between the offenders to commit the offence – it is insufficient to be present and co-incidentally seeking the same end.[68]

The offenders must be physically present and proximate enough 'either to embolden or reassure the offender in committing the crime, or to intimidate the victim into submission.' [69] The victim of the offence does not need to be aware of the presence of another offender or offenders.[70]

4.3 Constructive Murder

Under s.18(1) *Crimes Act* murder is committed where the act causing death is done or omitted

> in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

To establish a constructive murder the Crown must establish:

- an offence was committed or attempted to be committed;
- the offence being one punishable by 25 years imprisonment or life;
- during or immediately after an the commission or attempted commission of the offence;[71]
- the victim was killed;
- by a voluntary act of the offender.[72]

No intent in relation to the killing is required on the part of the offender.

The relationship between constructive murder and joint criminal enterprise has been recently considered by the High Court in *IL*.[73] Both the majority and dissenting judgements agreed that under s.18 where the act of the accomplice causes death and the act is done in an

[68] *Button & Griffen* (2002) 54 NSWLR 455; (2002) 129 A Crim R 342 at [120]; *Markou* [2012] NSWCCA 64 at [28], [33]; *FP* [2012] NSWCCA 182 at [126].
[69] *Button & Griffen* (2002) 54 NSWLR 455; (2002) 129 A Crim R 342 at [120], [125]; *Leoni* [1999] NSWCCA 14 at [20]; *FP* [2012] NSWCCA 182 at [126]; *Batcheldor and Walsh* [2014] NSWCCA 252 at [83]-[92]
[70] *Button & Griffen* (2002) 54 NSWLR 455; (2002) 129 A Crim R 342 at [120]; *Leoni* [1999] NSWCCA 14 at [20]
[71] As to the connection between the foundational offence and the murder see *Munro* (1981) 4 A Crim R 67 at 69-70; *Spathis; Patsalis* [2001] NSWCCA 476 at [313]. As to whether the murder was committed 'immediately after the offence' see *Hudd* [2013] NSWCCA 57.
[72] *Ryan* (1966-1967) 121 CLR 205 p.213. 216-7.
[73] *IL* [2017] HCA 27.

attempt to, during or immediately after commission of the foundational offence, any party to the agreement to commit that foundational offence will be liable for constructive murder.[74]: Gordon J concluded constructive murder was is harsh in its application.[75]

In *Sharah*[76] Carruthers J set out what is required to establish liability as an accessory to constructive murder.

> As to felony-murder (upon the assumption that the foundational crime was the offence under s98) it was incumbent upon the Crown to prove beyond reasonable doubt:
>
> > (i) that there was a common purpose between the appellant and Attard in company to rob John whilst Attard was, to the knowledge of the appellant, armed with an offensive weapon, namely, a sawn-off double-barrelled shotgun;
> >
> > (ii) that during the course of the armed robbery Attard wounded John and during the course of such armed robbery with wounding or immediately thereafter, Attard discharged the gun causing the death of Nick;
> >
> > (iii) that the discharge of the gun by Attard during or immediately after the armed robbery with wounding of John, was a contingency which the appellant had in mind, whether or not the gun was fired intentionally and whether or not in furtherance of the common unlawful purpose.

The question of whether *Sharah* (1992) 30 NSWLR 292 at 297 requires an additional, unnecessary element of foresight as to the possibility of the act causing death was questioned by Hidden J in *Batcheldor*.[77] The issue was referred to in three of the judgements in *IL* but not decided. Bell and Nettle JJ referred to but declined to consider the issue,[78] Gageler J concluded *Sharah* was correctly decided,[79] and Gordon J specifically rejected the need for additional foresight or contemplation on the part of the accomplice.[80] at [166]

Sharah is instructive because it contrasts liability as an accessory to constructive murder with liability under common purpose murder[81]. To establish common purpose murder the Crown must prove the principal offender killed with an intent to kill or inflict grievous bodily harm, and that the accessory contemplated the principal offender might act with such an

[74] *IL* [2017] HCA 27 per Kiefel CJ, Keane and Edelman JJ at [27]-[28]; Bell and Nettle JJ [60]; Gageler J at [101] and Gordon J at [151]-[153]. (In this case the appeal was allowed on the unrelated basis that self-killing could not constitute an offence of murder or manslaughter)
[75] *IL* [2017] HCA 27 at [143]
[76] (1992) 30 NSWLR 292 at 297
[77] [2014] NSWCCA 252 at [79]-[80]; see also at [129]-[132] per RA Hulme J. In this case the conviction was quashed because the trial judge failed to direct the jury in relation to the foresight required by the appellant for the foundational offence of specially aggravated kidnapping. See also *IL* [2016] NSWCCA 51 at [36]-[37] per Simpson JA
[78] *IL* [2017] HCA 27 at [89]
[79] *IL* [2017] HCA 27 at [102]
[80] *IL* [2017] HCA 27 at [166]
[81] (1992) 30 NSWLR 292 at p.297

intent. No foresight of intention (to kill or do grievous bodily harm) is required on the part of an accessory to constructive murder.

4.4 Innocent Agent

A person may be liable for an offence as a principle offender where they use an innocent agent to commit the offence.[82] A person may be an innocent agent if they lack the mens rea for the offence or have no criminal responsibility due, for example, to age or insanity.[83]

4.5 Procedure

Although an accessory may be prosecuted as a principal offender,[84] the indictment should indicate the basis for liability is accessorial, or this should be made clear early in the trial, to prevent unfairness to the defence.[85]

Where a prosecutor is unable to establish who, of the parties involved, committed the actus reus of an offence, an offender may be convicted of the offence provided the prosecutor can prove they were *either* the principal offender *or* an accessory.[86] The prosecution may not need to specify the basis for the liability contended.[87]

4.6 Admissibility of previous representations by A in furtherance of a common purpose with B.

Once there is reasonable evidence of the existence and participation of an accused in an unlawful agreement or common purpose, the words and actions of other parties to the agreement are admissible as evidence against the accused providing the words and actions are in furtherance of the common purpose.[88]

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[82] *Cogan* [1976] 1 QB 217; [1975] 2 All ER 1059; [1975] 3 WLR 316; *Matusevich* (1977) 137 CLR 633 at 637-8; *White v Ridley* (1978) 140 CLR 342 at 346-7; *Osland* (1998) 197 CLR 316 at [85] per McHugh J; *Pinkstone* (2004) 206 ALR 84; at [8] per Gleeson CJ and Heydon J, at [59]-[66] per McHugh and Gummow JJ, at [102]-[106] per Kirby J.

[83] *Cogan* [1976] 1 QB 217; [1975] 2 All ER 1059; [1975] 3 WLR 316 *Matusevich* (1977) 137 CLR 633 at 637; *White v Ridley* (1978) 140 CLR 342 at 346; *Osland* (1998) 197 CLR 316 at [85] per McHugh J. In *Pinkstone* (2004) 206 ALR 84; the High Court concluded police officers making a controlled delivery were not acting as innocent agents (at [59]-[60] per McHugh and Gummow JJ, at [104]-[106] per Kirby J).

[84] (CTH) *Criminal Code* s 11.2(1), 11.2(7); (NSW) *Crimes Act* 1900 ss 346, 351, 351B

[85] *Giorgianni* (1985) 156 CLR 473 at 497; *King* (1985) 17 A Crim R 184; *King* (1986) 161 CLR 423 at 425 per Murphy J, at 436-7 per Dawson J; *Buckett* (1995) 79 A Crim R 302 at 305.

[86] *Mohan* [1967] 2 AC 187; [1967] 2 All ER 58; *Phan* (2001) 53 NSWLR 480; 123 A Crim R 30; at [65] per Wood CJ at CL and [90] per Smart AJ.

[87] *Serratore* (1999) 48 NSWLR 101 per Greg James J at [154]-[225].

[88] *Tripodi* (1961) 104 CLR 1 at 6-7; *Ahern* (1988) 165 CLR 87 at 100; *Masters* (1992) 26 NSWLR 450 at 461; 59 A Crim R 445; *Chan Kam Wah*, NSWCCA, 13.4.1995 at p.5; *Velardi* NSWCCA, 24.5.1996.

The application of this rule was recently affirmed in *Handlen; Paddison*[89]:

> [4] At common law, two or more persons may be jointly criminally responsible for the commission of an offence which, tacitly or otherwise, they have agreed to commit and which is committed while the agreement is on foot.[90] As McHugh J explained in *Osland*, the criminal responsibility of each participant in such an enterprise is direct, each being equally responsible for the acts constituting the actus reus of the crime.[91] Commonly, proof of the offence and the accused's participation in the joint enterprise is facilitated by the evidentiary rule sometimes inaccurately described as "the co-conspirator's rule".[92] The rule is not confined to the prosecution of conspiracy offences. It applies in the prosecution of substantive offences in which it is alleged that two or more persons acted in preconcert to commit an offence.[93] The acts and declarations of all the participants to the joint criminal enterprise are admissible to prove the offence and the accused's participation in its commission.[94] The agreement or preconcert implies that each participant has authority to act in furtherance of the common purpose on behalf of all of the other participants.[95]

Such evidence can only be used where there is reasonable evidence of the existence of the preconcert and the involvement of the accused as a participant. This requirement was explained in *Tripodi*:[96]

> When the case for the prosecution is that in the commission of the crime a number of men acted in preconcert, reasonable evidence of the preconcert must be adduced before evidence of acts or words of one of the parties in furtherance of the common purpose which constitutes or forms an element of the crime becomes admissible against the other or others, that is to say of course, unless some other ground for admitting the evidence exists in the given case….From the nature of the case it can seldom happen that anything said by one which is no more than a narrative statement or account of some event that has already taken place, that is to say, some statement which would be receivable in evidence against the man who made it as an admission and not otherwise, can become admissible under this principle against his companions in the common enterprise. Usually the question of admissibility will relate to directions, instructions or arrangements or to utterances accompanying acts.

See also *Ahern*[97]:

> In our view, the test adopted in *Tripodi* is the appropriate one. Where an accused is charged with conspiracy, evidence in the form of acts done or words uttered outside his presence by a person alleged to be a co-conspirator will only be admissible to prove the participation of the accused in the conspiracy where it is established that there was a combination of the type alleged, that the acts were done or the

[89] (2011) 245 CLR 282
[90] *Lowery and King (No 2)* [1972] VR 560; Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 349.
[91] (1998) 197 CLR 316 at 343 [73]; [1998] HCA 75
[92] Gillies, *The Law of Criminal Complicity*, (1980) at 259–266.
[93] *Tripodi* (1961) 104 CLR 1 at 6–7. See also *Cross on Evidence*, 8th Aust ed (2010) at [33565].
[94] The admission of the evidence is subject to reasonable evidence being adduced of the pre-concert: *Ahern* (1988) 165 CLR 87 at 99; [1988] HCA 39. See also *Tripodi* (1961) 104 CLR 1 at 7.
[95] *Tripodi* (1961) 104 CLR 1 at 7; *Ahern* (1988) 165 CLR 87 at 94–95.
[96] (1961)104 CLR 1 at 6-7.
[97] (1988) 165 CLR 87 at 100

> words uttered by a participant in furtherance of its common purpose and there is reasonable evidence, apart from the acts or words, that the accused was also a participant. The words "reasonable evidence" have provided a standard which has been applied without difficulty in this country for some years, at least in cases where preconcert has been the basis upon which evidence has been led in cases other than conspiracy, and there is no reason to suppose that if it has provided an appropriate test in those cases, it will not do so where conspiracy is charged. If there is any difference between "reasonable evidence" and "a prima facie case", which in this context we very much doubt, then the words "reasonable evidence" are to be preferred providing, as they do, a test of admissibility for which no more precise expression is needed. The aim in limiting the use which might be made of a co-conspirator's acts or declarations is to exclude such evidence when its admission might operate unfairly against an accused. For this purpose, the element of discretion implicit in the term "reasonable evidence" is desirable.

The common law rule has been codified in the Commonwealth and New South Wales Evidence Acts by section 87(1)(c)[98] which reads:

> **87 Admissions made with authority**
>
> (1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:
>
> > (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

5 Sentencing

A starting point is the relevant maximum penalty for the individual offender.

Generally an accessory is liable to the same punishment as a principal offender[99] absent specific provisions to the contrary.

Similarly, offenders acting pursuant to a joint criminal enterprise (simple or extended) will be sentenced for the full range of acts committed pursuant to that enterprise.

An accessory after the fact to a serious indictable offence is liable to a maximum penalty of 5 years imprisonment unless otherwise stated.[100] An accessory after the fact to murder is

[98] *Macraild* NSWCCA 18.12.1997
[99] (NSW) *Crimes Act* 1900 ss 345, 346, 351, 351B(2)
[100] (NSW) *Crimes Act* 1900 s 350

liable to a maximum penalty of 25 years[101] and an accessory after the fact to armed robbery, robbery in company or kidnapping, is liable to a maximum penalty of 14 years.[102]

There must be a close examination and comparison of factors including:

d. What the form of liability says about the requisite knowledge of the offender (joint or extended criminal enterprise);
e. Relevant roles;
f. The extent of planning as between offenders;
g. The participation in the relevant physical acts; and
h. Any benefits obtained.

The actual role played by an offender will be relevant to the assessment of the appropriate sentence.[103] Although an accessory would usually expect a lesser sentence than the principal offender this will depend upon the circumstances of the case, and in some circumstances the culpability of the aider and abettor may be equal to or greater than the principal offender.[104]

6 Commonwealth Criminal Code

Accessorial liability is provided for in the Commonwealth Criminal Code at s.11.2 and 11.3.

11.2 Complicity and common purpose

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

[101] (NSW) *Crimes Act* 1900 s 349(1)
[102] (NSW) *Crimes Act* 1900 s 349(2)
[103] *Johns* (1980) 143 CLR 108 at 117; *Osland v R* (1998) 197 CLR 316 at [220]; *GAS* (2004) 217 CLR 198 at [23]; *KR* [2012] NSWCCA 32 at [19]-[22]; *Moore* [2016] NSWCCA 300 at [60] (acts of assistance or encouragement central to assessment of culpability); *Burrows* [2017] NSWCCA 45 at [36]-[40] (parties to joint criminal enterprise sentenced for full range of acts done but may receive same punishment as if did acts personally).
[104] *GAS* (2004) 217 CLR 198 at [22]-[23].

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:

(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or

(b) is guilty of that offence because of the operation of subsection (1);

but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

11.3 Commission by proxy

A person who:

(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and

(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

Despite the use of the title 'common purpose' for section 11.2, the section did not refer to liability under the principle of joint criminal enterprise but was effectively limited to the equivalent of accessories before the fact and aiders and abetters. The section does not distinguish between the two and there is no requirement for physical presence at the commission of the offence (see *Handlen and Paddison* [105]at [6]).

Section 11.2A was inserted into the Code by the *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth), commencing 20 February 2010.

[105] (2011) 245 CLR 282

11.2A Joint commission

Joint commission

(1) If:

(a) a person and at least one other party enter into an agreement to commit an offence; and

(b) either:

(i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or

(ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));

the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

Offence committed in accordance with the agreement

(2) An offence is committed in accordance with the agreement if:

(a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to; and

(b) to the extent that a physical element of the joint offence consists of a result of conduct—that result arises from the conduct engaged in; and

(c) to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

Offence committed in the course of carrying out the agreement

(3) An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the joint offence) that another party in fact commits in the course of carrying out the agreement.

Intention to commit an offence

(4) For a person to be guilty of an offence because of the operation of this section, the person and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

Agreement may be non-verbal etc.

(5) The agreement:

(a) may consist of a non-verbal understanding; and

(b) may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in.

Termination of involvement etc.

(6) A person cannot be found guilty of an offence because of the operation of this section if, before the conduct constituting any of the physical elements of the joint offence concerned was engaged in, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent that conduct from being engaged in.

Person may be found guilty even if another party not prosecuted etc.

(7) A person may be found guilty of an offence because of the operation of this section even if:

(a) another party to the agreement has not been prosecuted or has not been found guilty; or

(b) the person was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.

Special liability provisions apply

(8) Any special liability provisions that apply to the joint offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of this section.

The section imposes liability on a party to an agreement in the following circumstances:

(1) the offence is committed by another party to the agreement, and the offence is either the offence agreed upon, or the same type of offence agreed upon.[106]
(2) the offence is committed by another party to the agreement, and the offence is different to that agreed upon but was committed in the course of carrying out the agreement, and the person charged was reckless to the commission of the offence.[107]

In many ways, these Code provisions largely replicate the common law.

- A person held liable under these provisions is punished as a principal offender;[108]
- A principal offence must have been committed;[109]
- A person can be convicted although neither the principal offender, nor other party to the agreement, has been prosecuted or found guilty;[110]
- A person may be convicted of an offence although it cannot be established whether they acted as the principal offender or an accessory;[111]

[106] (CTH) *Criminal Code* s 11.2A(1)(b)(i), (2)
[107] (CTH) *Criminal Code* s 11.2A(1)(b)(ii), (3).
[108] (CTH) *Criminal Code* s 11.2(1), s 11.2A(1). See *McAuliffe* (1995) 183 CLR 108 at 113-114 affirmed in *Gillard* (2003) 319 CLR 1 at [110], and 11 – 5 Sentencing (above).
[109] (CTH) *Criminal Code* s 11.2(2)(b); s 11.2A(1)(b). See 3.2 Commission of Principal Offence (above).
[110] (CTH) *Criminal Code* s 11.2(5), s 11.2A(7)(a). See 3.2 Commission of Principal Offence (above).
[111] (CTH) *Criminal Code* s 11.2(7). See 4.5 Procedure (above).

- Provision is made for withdrawal from an offence or agreement where the person withdrawing has taken reasonable steps to prevent the commission of the offence;[112]
- Provision is made for the use of an innocent agent (commission by proxy);[113]
- In relation to accessories, the person must have intentionally assisted the principal offender.[114]

Where liability lies under section 11.2A[115]:

- The person must have entered into an agreement;[116]
- The agreement must be to intentionally commit an offence;[117]
- An agreement may include a non-verbal understanding, and may be entered into at the time the offence was committed;[118]
- A person can be convicted under the principles of joint commission although they were not present at the time of the offence.[119]

The main differences from the common law appear to be in relation to the required foresight and a need for preventative withdrawal.

Under s11.2A(3) a party will be liable for any offence committed under an agreement if they are reckless about the commission of the offence. Under the Code definition a person is reckless if he or she is aware of a substantial risk that the offence would be committed, and having regard to the circumstances known to that person, it was unjustifiable to take that risk as to the commission of the offence.[120] The question of whether any such risk is unjustifiable is one of fact for the jury (Code, s 5.4(3)). This is slightly different to the common law test which requires foresight as to the possibility of the commission of the offence.[121] Similar considerations apply in relation to accessories before and at the fact under s.11.2. Liability can arise where there was an intention to aid, abet, counsel or procure an offence of the type committed, or some other offence whilst reckless (in the sense above) as to the commission of the actual offence.

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[112] (CTH) *Criminal Code* s 11.2(4), s 11.2A(6). See 4.1 Withdrawal (above).
[113] (CTH) *Criminal Code* s 11.3. See 4.4 Innocent Agent (above)
[114] (CTH) *Criminal Code* s 11.2(2)(a), (3). See 3.3 Assistance (above).
[115] In *Masri* (2015) 255 A Crim R 1, NSWCCA at [1] Simpson J states 'essentially, s 11.2A is the Commonwealth statutory adoption of the common law doctrine of joint criminal enterprise'.
[116] (CTH) *Criminal Code* s 11.2A(1)(a). See *Taufahema* (2006) 162 A Crim R 152 at [28], [30].
[117] (CTH) *Criminal Code* s 11.2A(4). See *McAuliffe* (1995) 183 CLR 108 at 114
[118] (CTH) *Criminal Code* s 11.2A(5). See *McAuliffe* (1995) 183 CLR 108 at 114
[119] (CTH) *Criminal Code* s 11.2A(7(b). See *Johns* (1980) 143 CLR 108 at 125-6, 130-1.
[120] (CTH) *Criminal Code* s 5.4
[121] See *McAuliffe* (1995) 183 CLR 108 at 114, 115; *Johns* (1980) 143 CLR 108 at 130-1; *Gillard* (2003) 219 CLR 1 at [112].

It is also interesting to note some of the examples given in the Explanatory Memorandum to the bill inserting section 11.2A, that illustrate the possible breadth of the liability.

The phrase "offence of the same type as the offence agreed to" in s.11.2A(2)(a) means liability can apply

> where people agree to commit a specific drug offence, but the quantity of the drugs, or the type of drug varies from the offence agreed to. For example, if two people agree to import 1 kilogram of cocaine (marketable quantity), and instead import 1.5 kilograms of heroin (commercial quantity), this definition is broad enough to capture the offence of importing 1.5 kilograms of heroin, because it is an offence of the same type as the offence agreed to.

Section 11.2A(2)(a) also allows for the offence to be made up on 'the conduct of two or more parties', allowing the prosecution to aggregate the criminal conduct of parties to the agreement.

> This enables the prosecution to target groups who divide criminal activity between them. For example, the prosecution would be able to charge two offenders with robbery by aggregating their conduct where one offender makes a threat and the other offender appropriates the Commonwealth property (section 132.2 of the Criminal Code).
>
> Further, the ability aggregate the conduct of the parties to the agreement means that it is not necessary for the prosecution to specify which party to the agreement engaged particular conduct. This is helpful in situations where it is not possible to determine with precision the role of each party to the agreement.
>
> The ability to aggregate the conduct of parties to the agreement also enables the prosecution to charge more serious offences. … For example, the prosecution would be able to charge three defendants with importing a commercial quantity of heroin (1.5 kilograms of heroin) by aggregating the conduct of each offender where they import 500 grams each. The offence of importing a commercial quantity of heroin carries a penalty of life imprisonment or 7,500 penalty units (section 307.1 Criminal Code). Without aggregation, each party to the agreement to import 1500 grams of heroin could only be charged with importing a marketable quantity, attracting a maximum penalty of 25 years imprisonment.

These changes have been most recently considered in *Handlen; Paddison*[122]:

> [5] In 1995, the Parliament codified all of the general principles of criminal responsibility applying to offences against the laws of the Commonwealth. The legislative history is discussed in *LK*.[123] The general principles are found in Ch 2 of the Code. The statement of them is exhaustive.[124] The Code has been amended since the date of the appellants' trial by the insertion of s 11.2A, providing for criminal responsibility in circumstances involving the joint commission of a substantive offence.[125]

[122] (2011) 245 CLR 282
[123] [2010] HCA 17; (2010) 241 CLR 177 at 203-206 [51]-[57] per French CJ, 220-224 [99]-[107] per Gummow, Hayne, Crennan, Kiefel and Bell JJ
[124] *Code*, s 2.1
[125] *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth).

Conclusion

The identification of how the Crown puts the case against an accused is fundamentally important to the conduct of a fair trial. That process should be concluded before a case starts – not during it.

It is essential that judges carefully direct juries as to the nature of the Crown case and the basis for alleged liability of the accused.

This in turn requires counsel to understand and apply the relevant principles of complicity to the case at hand.

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Public Defenders Chambers
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