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Interpretation of the Criminal Code

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By Justice Howie

A disclaimer: Although I was the Chairperson of the Model Criminal Code Committee for many years, I had absolutely nothing to do with the formulation of Chapter 2 of the Code. Nor did Richard Button or Justice Latham who were also members of the Committee during my Chairmanship. This is not to suggest that Chapter 2 does not work but it is to avoid being the subject of either criticism or praise that is undeserved.

A further disclaimer: I was asked to prepare the paper on the basis that I should assume limited knowledge of the Code yet I understand that some Public Defenders are intimately, if not tediously, familiar with the concepts as a result of a long terrorism trial. Others are very familiar with the principle subject matter of this paper.

1 Generally speaking the *Criminal Code (Cth)* should speak for itself and there is little purpose to be served in looking at the common law or cases decided under the common law or previous legislation for guidance. In *DPP(Cth) v Neamati* [2007] NSWSC 746 I was critical of a magistrate who sought to apply the decision in *He Kaw Teh v The Queen* (1985) 157 CLR 523 in construing s 135.2(1) of the *Code* a section concerned with obtaining a financial advantage in relation to Youth Allowance payments. As I pointed out, the offence was set out in a simple statement of each of the physical elements of the offence and by applying the basic provisions of Chapter 2 the fault elements were obvious. Needless to say the magistrate completely confused herself by erroneously applying statements made about a common law offence on importation. In any event there is a body of law developing in the Supreme Court that explains both the general and specific provisions of the Code.
2 Of course the chief basis for an interpretation of the Commonwealth criminal offences is found in Chapter 2 of the *Code*: General principles of criminal responsibility.

3 It can be reduced to a basic formula:

> O = P (being C, R, or Cir) + F (being I, R, or N) Criminal Code s3.1(1)
> Where O = Offence,
> P= Physical element being: C (conduct) or R (a result of conduct) or Cir (a circumstance in which conduct or a result of conduct occurs) Ibid s 4.1 and
> F= Fault element being: I (intention) or R (recklessness) or N (negligence) Ibid s5.1(1)

4 The important provision of Chapter 2 were summarised by Bell J in *R v Saengsai-Or* [2004] NSWCCA 108; 61 NSWLR 135 as follows:

> [37] The general principles of criminal responsibility in the Criminal Code do not adopt the common law concepts of actus reus and mens rea. Instead the Criminal Code defines criminal responsibility in terms of proof of the physical elements and fault elements of an offence. The physical elements of an offence may be conduct, a result of conduct and a circumstance in which conduct, or a result of conduct, occurs: s 4.1.
>
> [38] Under the Criminal Code the fault elements of an offence may be intention, knowledge, recklessness and negligence: s 5.1 (additional fault elements may be specified for the physical elements of a given offence).
>
> [39] The Criminal Code provides that a person has intention with respect to conduct if he or she means to engage in that conduct: s 5.2(1).
>
> [40] The fault element of knowledge requires proof of actual knowledge; a person has knowledge of a circumstance or a result if he or she is aware that it exists or that it will exist in the ordinary course of events: s 5.3.
>
> [41] Recklessness with respect to a circumstance requires proof that the person is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances that are known to him or her, it is unjustifiable to take the risk: s 5.4(1).
>
> [42] An offence consists of physical and fault elements. Liability for the commission of an offence is dependent upon proof of each physical element of the offence together with proof of the fault element that is applicable to each physical element. An offence may comprise more than one physical element and different fault elements may apply to each physical element: s 3.1 (provision is made for the law creating an offence to specify that there is no fault element for one or more of the physical elements of the offence). In the absence of specification of the fault element (or specification that there is no fault element) for a physical element the Criminal Code makes provision for default fault elements: s 5.6.

> [43] Intention is the default fault element for a physical element that consists only of conduct: s 5.6 (1). Recklessness is the default fault element for a physical element that consists of a circumstance or a result: s 5.6(2).

5 The most important aspect of Chapter 2 is that certain fault elements are deemed to apply where no fault element is specified for an offence. So for a physical element that consists only of conduct, the default fault element is intention Criminal Code s 5.6(1). For example, an offence of being in possession of a substance is an offence consisting only of conduct (possession is conduct Ibid s 4.1(2) provides that conduct includes a state of affairs; See R v McIvor [2009] NSWCCA264 at [15]) and, therefore, the fault element is intention. The person must mean Ibid s 5.2 defines intention with respect to conduct as to mean to engage in the conduct to possess the substance. Where the physical element of an offence is a circumstance or a result, the default element is recklessness Ibid s 5.6(2). For example, in an offence of inflicting grievous bodily harm the physical element is a result and, therefore, the fault element is recklessness. The person must either have known or intended that grievous bodily harm will result Recklessness includes knowledge and intention Ibid s 5.4(4) or have been aware of a substantial risk that grievous bodily harm would result from his or her conduct and having regard to the circumstances known to him or her, it is unjustifiable to take the risk Ibid s 5.4(2) defines recklessness with respect to a physical element of a result. . Unlike the common law recklessness has an objective element to the risk-taking.

6 In *The Queen v Tang* [2008] HCA 39; (2008) 237 CLR 1 at [47] Gleeson CJ stated that:

> . Knowledge or belief is often relevant to intention. If, for example, it is the existence of a state of affairs that gives an act its criminal character, then proof of knowledge of that state of affairs ordinarily will be the best method of proving that an accused meant to engage in the proscribed conduct.

7 It is important that the relevant fault element is identified by determining what is the physical element for the particular offence R v McIvor op cit at [25]ff. but cf R v Kovacs [2008] QCA 417, so that it can be an error for the judge to instruct the jury on all the fault elements, for example on the different forms of intention.

8 The other important aspect of Chapter 2 is that an offence must make it clear whether the fault element of a physical element of an offence is to be strict or absolute liability. This is because, if no fault element is stated, s 5.6 operates to specify a default fault element. No longer does the court have to interpret parliament's intention as to the applicable fault element. Generally speaking the element of an offence that gives the Commonwealth jurisdiction will have a physical element that is specified to be absolute liability. In the offences of money laundering the amount of money which is being dealt with is an element for which the fault element is absolute liability Ibid s 400.3(4) for example..

9 Of course the principles in Chapter 2 apply to all Commonwealth criminal offences whether they are found in the Code or in some other statute. The insistence of the Code in specifying fault elements or having them apply by default can have surprising results that possibly were not intended by Parliament.

10 In *R v JS* [2007] NSWCCA 272; 175 A Crim R 108 the offence with which the Court was concerned was the intentional destruction of data that might be required in judicial proceedings, an offence contrary to a provision of the *Crimes Act* (Cth). An element of the offence was that the accused knew that the data being destroyed might be required in judicial proceedings. A subsection stated that for the purposes of the section the proceedings were to be Federal judicial proceedings. The fact that the proceedings were in the Federal jurisdiction was what gave the Commonwealth jurisdiction to create the offence. One might have expected to find such a physical element of circumstances to carry with it a fault element of absolute liability. Other provisions in the Act did just this. But not this one.

11 The trial judge held that it was an element of the offence that the proceedings were Federal judicial proceedings and that, as this was a physical element of circumstance and as there was no fault element stated, the default element of recklessness applied. As the Crown could not prove that the accused either knew or was reckless as to the Federal nature of the proceedings the charge must fail. This was despite the fact that under the common law interpretation of the same provision of the *Crimes Act* creating the offence, the Crown would not have had to prove knowledge or recklessness on the part of the accused as to the nature of the proceedings. It had been held that the issue of whether the proceedings were Federal in nature would have been a question of law for the judge to determine. A five Judge Court upheld the trial judge's decision.

12 Spigelman CJ stated:

> 149 The general approach to interpretation of the Code is well established. (See *Bank of England v Vagliano Bros* [1891] AC 107 esp at 144-145; *Brennan v The King* (1936) 55 CLR 253 esp at 263; *Robinson v Canadian Pacific Railway Co* [1892] AC 481 at 481-487; *Vallance v The Queen* (1961) 108 CLR 56 at 74-76; *R v Barlow* (1997) 188 CLR 1 esp at 18-19 and 31-32.) There may be occasions on which it is appropriate to refer to the common law, e.g. where the Code employs a technical legal term or where an interpretation is well established or in the case of patent ambiguity. (See e.g. *Sungravure Pty Ltd v Middle East Airlines Airliban S.A.L.* (1974) 134 CLR 1 at 22; *Stuart v The Queen* (1974) 134 CLR 426 at 437; *Lee v R* [2007] NSWCCA 71 at [19]-[26].)
>
> 150 When interpreting a Code all of the principles of statutory interpretation are applicable. The language used must be construed in its context. The fact that the Code creates criminal offences will often be determinative e.g. to decide that references to reasonable care import a standard of criminal negligence. This may be a specific example of patent ambiguity in a Code, arising when the words are construed, as they must be, in their context in the first instance and not merely after some

> ambiguity is discerned in the words of the specific offence. (*CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408; *Project Blue Sky* supra at [69].)
>
> ……..
>
> 152 No provision of the Code states that a physical element which is a question of law for the judge cannot have attached to it a fault element which the jury must decide. The Code makes no direct distinction between questions of law and questions of fact. It does, however, make express provision for decoupling a specific physical element, relevantly a question of law, from any fault element. This can be done by either providing that no fault element applies to that physical element (under s3.1(2)) or by specifying that strict or absolute liability applies to the offence (under s6.1 or s6.2). Neither was done here.

13 It did not matter in this case that amendments were made to the *Crimes Act (Cth)* to apply the principles of the *Code* with the expressed intention of preserving the law as it was before the *Code* was enacted. There was an oversight in that the element that the proceedings were Federal judicial proceedings should have been made an element of absolute liability. It is worth noting what the Chief Justice said about the second reading speech that introduced the amendments of the Crimes Act to bring it in to line with the Code.

> 141 The Appellant submitted that the 2001 legislation, which applied the *Criminal Code* to the relevant *Crimes Act* provisions did not intend to alter the operation of s39 from its prior operation at common law. The Appellant relied on express statements by the Minister in the Second Reading Speech and in the Explanatory Memorandum, asserting that no change was intended. Such assertions are rarely useful and often have been rejected in the course of interpretation by the courts.
>
> 142 The task of the courts is to interpret the words used by the Parliament. It is not to divine the intent of the Parliament. (See *State v Zuma* (1995) (4) BCLR 401 at 402; (1995) 2 SA 642; *Matadean v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *Pinder v The Queen* [2003] 1 AC 620.) The distinction between interpretation and divination is an important one. The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say. (See *R v Bolton ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne & Frew v Australian Airlines Limited* (1995) 185 CLR 410 at 459; *Wik People v Queensland* (1996) 187 CLR 1 at 168-169; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Limited* (2003) 218 CLR 1 at [10].) At times that will require the court to refuse to implement an express statement as to what the Parliamentary intention is. (As in *R v Bolton ex parte Beane* supra.)
>
> 143 Statements of the character that the drafter of the legislation did not intend to change the prior operation of the law are rarely, if ever, useful, let alone entitled to significant weight. Such an assertion makes two assumptions. First, that the author knows completely and precisely how the previous provision has been and will be applied. Secondly, that the author has stated the new provision with indisputable comprehensibility. Each assumption reflects a conceit to which drafters of texts are prone when appraising their own work. Each assumption is rarely, let alone generally, applicable.

14 One of the important aspects of the case was that the Court rejected the submission that there were categories of fault elements that arose by implication and were not specified in the provisions of the Code. The Chief Justice stated:

> 126 In its submissions to this Court the Appellant sought to draw a distinction between different kinds of elements of an offence. It invoked a distinction between "substantive" and "definitional" characteristics of a physical element of an offence, suggested by the author of a text on the Code. (See Stephen Odgers *Principles of Federal Criminal Law,* Law Book Co, Sydney, (2007) at p22 par 4.1.390.) It also invoked a similar distinction, drawn by the author of another text, between "facts" and "statutory references or designations". (See Attorney-General's Department *The Commonwealth Criminal Code: A Guide for Practitioners,* Canberra, March 2002, p119.)
>
> 127 I do not think it is open, when construing a Code, to decide that there are elements of an offence that are merely "definitional" or "referential" in such manner as to permit the words used in the formulation of the offence to be set aside. The very breadth of the definition of "physical element", encompassing as it does anything capable of answering the description of a "circumstance", indicates that all of the words of a statutory offence to which the *Criminal Code* applies must be given force and effect.
>
> 128 Accordingly, in the present case the characterisation of the proceedings as 'federal' must be accepted to be either a component part of the single circumstance of judicial proceeding or a separate circumstance. In either event, the issue has to be determined as to whether or not the fault element of knowledge expressed in s39 applies to that circumstance.
>
> 129 A Commonwealth offence to which the *Criminal Code* applies must, by reason of the nature of the Code, be approached on the basis that it comprehensively states each of the elements of a criminal offence. That is the central purpose of adopting a Code. The *Criminal Code* assumes that it is apparent on the face of the offence, as interpreted in the light of the *Criminal Code,* precisely what are the physical elements of an offence and to precisely which of those physical elements a fault element, if any, attaches and what that fault element is.

15 A strict interpretation of the provisions of the Code has resulted in another change of the law that it is doubtful that Parliament intended. A strict interpretation of the word “imports” in the Code meant that it did not include activity taking place after the goods had landed in Australia, despite the fact that for offences under the *Customs Act* “importation” had applied to any activity intended to deliver or distribute the goods once they had been imported See for example R v Sukkar [2005] NSWCCA 54. In *Campbell v R* [2008] NSWCCA 214 it was held that the words of the relevant provisions in the *Code*, in contrast with the words of the provisions in the *Customs Act*, suggested a precise rather than expansive use of the word “imports”.

16 The Crown relied upon the arrival of the drugs imported at the accused’s premises and alleged that the fault element of intending to import the drugs was in existence at the time the packages containing the drugs were opened. In upholding the appeal and restricting the term “imports” the Chief Justice referred to earlier decisions and stated:

> 101 The authorities on the word "importation", on which the respondent primarily relied in the present proceedings, are of little assistance for the purpose of interpreting the word "imports" in s 307.11(1)(a) of the Code. This is particularly so because the immediate context of s 233B(1)(d) incorporates the expansive concept of "knowingly concerned" (see *Lam* 46 A Crim R at 405; *R v Cheung* (1997) 97 A Crim R 283 esp at 288-292).
>
> 102 Indeed, although the judgments do contain references to the meaning of "importation" as something that occurs over a period before and after an act referred to by the word "import", it appears to me that the word "importation" may have received that expansive interpretation because of its immediate textual context. The expansive intention of the formulation "aids, abets, counsels, or procures, or is in any way knowingly concerned in" gives the word "importation" a colour it may not receive in a different context.

17 The Chief Justice went on to consider the word “imports” in the context of the *Code*. His Honour referred to the decision of the Model Criminal Code Committee (MCCOC) to restrict accessorial liability on a much more limited basis than existed under the *Customs Act*. He then stated:

> 124 There is one aspect of the immediate textual context which is of some assistance. The respective provisions of Div 307 of Pt 9.1 of the Code, including relevantly s 307.11, each use the formula that a person commits an offence if "the person imports *or exports* a substance". This formulation appears to equate the concept of "imports" with "exports". It focuses attention on crossing the national border, rather than upon arrival at a destination. The concept of exporting is clearly not concerned with arrival at a foreign destination in any manner. This is a textual indicator which tends to support the appellant's case that what the legislature has rendered criminal is the act of arrival in Australia, without regard to subsequent deployment.

18 He concluded:

> 128 In my opinion, the purpose of the Act requires the border controlled drugs and precursors "to arrive in Australia from abroad" and to be delivered at a point which, in the words of Isaacs J in *Wilson v Chambers*, would "result in the goods remaining in Australia". That occurred when the goods were picked up by the appellant's agent or, at the latest, when the container arrived at her premises and *before* it was unpacked.

19 Weinberg AJA said this about the interpretation of the Code:

> 141 In searching for the meaning to be imputed to the term 'imports' in s 307.11 of the Code, it may be useful to have regard to the provisions which governed the importation of narcotic drugs before that section came into effect. In doing so, however, it must be remembered that what is being interpreted is a code and not an Act of Parliament. This means that special rules of interpretation are applicable. The language of the Code should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. See *Bank of England v Vagliano Brothers* [1891] AC 107; *Brennan v The King* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ; and *Vallance v The Queen* (1961) 108 CLR 56 at 74-6 per Windeyer J.

20 His Honour thought that it was of significance that there was no longer any concept of “being knowingly concerned in the importation” in the Code. He stated:

> 176 The authorities upon which the Crown relied, in support of its submission that the word 'import' has the extended meaning for which it contended, are all cases that were decided under the rubric of 'knowingly concerned'. That phrase was always attached to the term 'importation'.
>
> 177 The Code now shifts from the noun 'importation' to the verb 'imports'. A change of that kind can have consequences. They may be unintended. To be 'knowingly concerned' in an importation is to be involved in an activity that is necessarily ambulatory. To import, or to aid and abet an importer, is to engage in a more finite activity, which is part of a broader process properly characterised as the process of importation.

21 The South Australian Court of Appeal in the very recent decision of *R v Toe* [2010] SASC 39 applied *Campbell*.

22 One result of this decision is that the Commonwealth are now using State offences to charge persons who would once have been dealt with under the Commonwealth importation offences, or, are relying upon Commonwealth offences that are similar to State offences. An example of the problems this causes can be seen in the sentencing appeal of *Shen v R* [2009] NSWCCA 251 where a person involved in the distribution of imported drugs received disproportionate sentences to the importer. He was also charged with a State offence and a Commonwealth offence arising from similar activity in two different importations. The problem in using charges under different jurisdictions arise because Commonwealth offences deal with drug purity where as NSW is concerned with admixtures, there are no standard non-parole periods for Commonwealth offences and Commonwealth non-parole periods are generally lower because there is no requirement to find special circumstances. The problem was exacerbated in *Shen* because the importer was sentenced in Queensland and that jurisdiction takes a different view of *Pearce*. Despite there being two completely separate importations the importer received concurrent sentences!

23 However there may be occasions where it is necessary to look outside the Code in order to construct its provisions. So where the *Code* used the common law concept of "conspiracy" it was held to be valid to consider the provisions of the *Code* in light of the common law. So in *Ansari v R* [2007] NSWCCA 204; 70 NSWLR 89 the common law was considered in determining whether it was possible under the *Code* to have an offence of conspiracy in relation to an offence for which the fault element was recklessness. One of the problems for prosecutions under the *Code* is the absence of a concept of joint criminal enterprise There is currently legislation before the Federal Parliament to overcome this problem.. The result is that the Commonwealth have been using the offence of conspiracy in cases where there was clearly a joint criminal enterprise.

24 In *Ansari* the Commonwealth wanted to charge three brothers with being in a conspiracy to launder drug money. Two of the brothers were operating a business in Sydney but the third brother was in Europe. The allegation was that the third brother was sending persons to the Sydney business to have drug money laundered. However, in order to be able to prosecute the third brother the Commonwealth charged the three brothers with conspiring to deal with money where there was a risk that the money would become an instrument of crime and where the three were "reckless as to whether there was a risk that the money would become an instrument of crime". It was the last allegation that led to trouble.

25 It was clear that the two Sydney brothers knew of the risk that the money would become an instrument of crime, because the Crown was alleging that they were in fact laundering the money. There was nothing reckless about their states of mind. But the Crown could not prove knowledge on the part of the third brother. The issue that arose was whether the offence as charged was unknown to law because it asserted a conspiracy to do an act with a reckless state of mind. The Crown was not alleging that the accused were reckless in forming the conspiracy but the offence that they intentionally agreed would be committed was one to be performed with a reckless state of mind.

26 The Court of Criminal Appeal applied common law principles in determining the issue, principally relying upon the decisions of the High Court in *Giorgianni v The Queen* (1985) 156 CLR 473 and the House of Lords in *Churchill v Walton* [1967] 1 All ER 497. In effect by reference to the final report of MCCOC, the Court was able to discern an intention that, although Parliament intended to limit the scope of common law conspiracy, it had limited it in the specific ways set out in s 11.5 of the Act and not otherwise. By relying upon common law principles the Court held that there was nothing wrong with a charge that alleged an intentional conspiracy to commit an offence recklessly but the issue was in the proof of the offence. In particular the Court relied upon the common law principle of accessorial liability, to the effect that for an accessory to be liable in respect of an offence of strict liability, the accessory, unlike the principal offender, had to know of all the facts that made the acts of the principal criminal.

27 Giorgianni concerned the owner of a truck that was driven dangerously causing the death of a number of persons on the road. The Crown allegation was in effect that because the truck had faulty breaks the driver lost control of the vehicle going down Mount Ousley. The driver was convicted of culpable driving, an offence of strict liability, even though he was not aware that the breaks were faulty. The driver was prosecuted for the same offence but as an accessory before the fact. The High Court held that Op cit at 506:

> For the purposes of many offences it may be true to say that if an act is done with foresight of its probable consequences, there is sufficient intent in law even if such intent may more properly be described as a form of recklessness. There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another. And we think the offences of aiding and abetting and counselling and procuring are others. Those offences require intentional participation in a crime by lending assistance or encouragement. They do not, of course, require knowledge of the law and it is necessary to distinguish between knowledge of or belief in the existence of facts which constitute a criminal offence and knowledge or belief that those facts are made a criminal offence under the law. The necessary intent is absent if the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence. He need not recognize the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it. It is not sufficient if his knowledge or belief extends only to the possibility or even probability that the acts which he is assisting or encouraging are such, whether he realizes it or not, as to constitute the factual ingredients of a crime. If that were sufficient, a person might be guilty of aiding, abetting, counselling or procuring the commission of an offence which formed no part of his design. Intent is required and it is an intent which must be based upon knowledge or belief of the necessary facts.

28 It was held in *Ansari* that as the Crown ultimately relied upon that part of recklessness that included actual knowledge, the two accused who were convicted, the brothers in Sydney, did know all the facts that made the conduct they were conspiring to commit criminal. Therefore, there was nothing wrong with the offence charged or the manner in which it was proved. During the course of the judgment it was pointed out that two persons could agree that a third person would bring drugs into Australia even though the actual importer might only be reckless as to presence of the drugs in the container being imported. The importer might be acquitted but the conspirators could be convicted.

29 In the course of determining *Ansari* the question arose as to what were the elements of the offence of conspiracy under the

Code. Section 11.5 provides:

> **11.5 Conspiracy**
> (1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.
> Note: Penalty units are defined in section 4AA of the *Crimes Act 1914*.
>
> (2) For the person to be guilty:
> (a) the person must have entered into an agreement with one or more other persons; and
> (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
> (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.
>
> (2A) Subsection (2) has effect subject to subsection (7A).
>
> (3) A person may be found guilty of conspiracy to commit an offence even if:
> (a) committing the offence is impossible; or
> (b) the only other party to the agreement is a body corporate; or
> (c) each other party to the agreement is at least one of the following:
> (i) a person who is not criminally responsible;
> (ii) a person for whose benefit or protection the offence exists; or
> (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.
>
> (4) A person cannot be found guilty of conspiracy to commit an offence if:
> (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
> (b) he or she is a person for whose benefit or protection the offence exists.
>
> (5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
> (a) withdrew from the agreement; and
> (b) took all reasonable steps to prevent the commission of the offence.
>
> (6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.
>
> (7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
>
> (7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.
>
> (8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

30 I held that the elements of the offence were contained in 11.5(1) and stated:

> [63] In my opinion there is only one physical element in the offence as stated in s 11.5(1). The physical element is encompassed in the words “conspires to commit an offence”. It is impossible to comprehend two people forming an agreement unless the subject matter of the agreement is known. A composite element of an offence has been recognised in offences to which the Code applies: see Lee v R [2007] NSWCCA 71 at [7]. The subject matter of the prohibited agreement under s 11.5(1) is an intention to commit an offence of the kind described in the section. Therefore s 11.5(1) contains a single physical element of conduct being to enter into the proscribed agreement. There is no fault element stated in s 11.5(1), therefore, applying s 5.6(1), the default fault element for a physical element of conduct is intention. Applying the definition of “intention” in s 5.2(1) of the Code, the person must mean to enter into such an agreement.

31 However this begs the question as to what characterisation is to be given to the provisions in subsections (2), (3), (4) and (5) and why are they proceeded by different words such as “For the person to be guilty” in (2) but “A person cannot be found guilty of conspiracy to commit an offence if” in (4). If they are physical elements, what are the fault elements? I stated:

> [57] A question arose at the hearing of the appeal as to the characterisation of the provisions of s 11.5(2). It is unnecessary for the resolution of the present appeal to determine whether, as counsel suggested, they are elements of the offence of conspiracy. They were treated as such by Jacobson J in United States of America v Griffiths [2004] FCA 879. That decision was upheld in Griffiths v

> United States of America [2005] FCAFC 34. In neither decision was any consideration given to how the provisions of Ch 2 of the Code would operate on the provisions of subs 2. For example, if these are elements of the offence, is each of the matters set out in that subsection a physical element of conduct, result or circumstance and what would be the relevant fault element applying? However these are matters that need not be further addressed here.

32 As it happens when the High Court was considering a special leave application in a decision that considered *Ansari* but distinguished it, this passage attracted the attention of Bell J. Even though the issue was not addressed in the subsequent decision and was not relied upon by the applicant for special leave, who happened to be the Crown, it was of sufficient interest to attract a grant of special leave.

33 The approach in *Ansari* was approved in *R v RK and LK* [2008] NSWCCA 338*,* the decision that was the subject of the special leave application. As to the approach to interpreting the *Code*, the Chief Justice stated:

> [44] The general approach to interpretation of a Code is well established. As Windeyer J put it in Vallance v R (1961) 108 CLR 56 at 75:
>
> > The Code is to be read without any preconception that any particular provision has or has not altered the law.
>
> [45] Nevertheless, there are circumstances in which the interpretation of a Code which, like any other statute, must involve reference to the full context of the specific provision that falls to be interpreted. This extends to the legal history of the particular provision and of the terminology in which it has been expressed.
>
> [46] In Stuart v R (1974) 134 CLR 426 at 437, Gibbs J rejected the proposition that "it is never necessary to resort to the common law for the purpose of aiding in the construction of a Code" and added:
>
> > it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground.
>
> (See also Bank of England v Vagliano Brothers [1891] AC 107 at 145; R v Barlow [1997] HCA 18 ; (1997) 188 CLR 1 at 19; and Sungravure Pty Ltd v Middle East Airlines Airliban SAL (1975) 134 CLR 1 at 22.)
>
> [47] In my opinion, the references to "conspiracy" in the Code are of a technical legal character for purposes of the application of these principles. The terminology which the drafters of the code used were words and phrases which had well established legal meanings. Generally, the legal meanings did not differ from dictionary meanings. As Windeyer J put it in Vallance at 75:
>
> > Law may define the forbidden conduct more fully and more precisely than in common speech is ordinarily necessary; but it does not define it differently.
>
> [48] His Honour went on to give an example:
>
> > [The Code] does not define 'maim', but that word is used in it. In ordinary speech it means a crippling injury, such as the loss of a limb. The meaning is the same for law, but the specific test by which early law distinguished [maim] from lesser injuries was by asking whether the harm would make a man less able for fighting. The test produced some strange decisions. That is an illustration of the meaning of a word in the Code being fixed by the common law.
>
> [49] In my opinion, the references to "conspiracy" in the Code were also intended by the drafters of the Code to be "fixed by the common law", subject to any express statutory modification (cf R v Wyles; Ex parte Attorney-General (Qld) [1977] Qd R 169 at 177–82). The authors of the offence creating provision in s 11.5(1) adopted the terminology of the pre-existing Commonwealth offence in s 86 of the Crimes Act. That section was itself clearly derived from the common law and was not subject to the special rules for interpreting a code.

34 However *Ansari* was distinguished on the basis that the Crown could not contend, as it did in *Ansari*, that the conspirators knew that the money was the proceeds of crime but only that they were reckless to that fact. The Court held that I those circumstances the charge was doomed to fail and the trial Judge was right to direct an acquittal.

35 It is curious that in *RK and LK* all the parties agreed that *Ansari* was correct, it was only the application of the decision that was in dispute. However in the High Court the Crown argued that *Ansari* was wrong as it was unnecessary for the parties to the conspiracy to known all the facts that made the conduct they were agreeing to undertake a criminal offence. As I understand it, the argument was that conspirators could agree to undertake conduct not caring about the facts. Mr Game SC who appeared for the Crown submitted

> There are many people who agree to commit crimes in which they have an agreement, but they do not know or believe that the circumstance exists per se, but they have in their contemplation a circumstance where, if it exists and whether or not they know it they will do it. Whether or not they know that fact they will do the thing See for example [2009] HCA Trans 310 (1 December

2009) at .

That is that *RK and LK* agreed to deal with the money regardless of the fact that it might be the proceeds of crime. There was an intentional agreement to undertake conduct not caring whether or not it was criminal.

36 The Crown did submit that I was correct in holding that the elements of the offence were contained in s 11.5(1). There was a suggestion for some members of the Court, in particular French CJ, that the other subsections of s 11.5 "provide content to the elements of the offence in s 11.5(1)".

37 The respondents in the High Court relied heavily upon s 11.5(2)(b) as being an element of the offence of conspiracy so that each of the conspirators must have intended that an offence be committed.

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Commonwealth Criminal Code

Addendum

By Justice Howie

Importation

The Code now contains the following definition of the word "import" in s 300.2 section in order to overcome the decision in *Campbell* referred to in the paper:

import , in relation to a substance, means import the substance into Australia and includes:

(a) bring the substance into Australia; and

(b) deal with the substance in connection with its importation.

Criminal complicity

The Code has been amended by the *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 to incorporate the notion of joint criminal enterprise by the addition of the following sections:

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