

EXTENDED JOINT CRIMINAL ENTERPRISE IN THE WAKE OF *JOGEE* AND *MILLER*

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- 1 Since its inception, the doctrine of extended joint criminal enterprise has been the subject of strong and repeated criticism from academics, law reform bodies and judicial officers. It has been labelled “*an entirely unprincipled departure from principle*”,¹ “*unjust, obscure, disparate and asymmetrical*”,² and has been subject to multiple challenges, both in Australia and the United Kingdom.
- 2 It is convenient to note that while the doctrine of extended joint criminal enterprise (sometimes referred to as ‘extended common purpose’) is of general application in the criminal law, it is most commonly invoked for the purposes of imposing criminal liability for murder on a secondary participant in a joint enterprise.³ This is also the aspect of its application that is most controversial.⁴
- 3 Until recently, the courts in Australia and the United Kingdom adopted a similar approach to the test to be applied to the doctrine, looking to whether the accused had foresight of the *possibility* of the second offence being committed.

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¹ Weinberg JA, ‘Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group’ (Report, Judicial College of Victoria and Department of Justice, August 2012).

² *Clayton v The Queen* [2006] HCA 58; (2006) 231 ALR 500, [114] (Kirby J).

³ *Miller v The Queen* [2016] HCA 30; (2016) 90 ALJR 918, [1].

⁴ Luke McNamara, ‘A Judicial Contribution to Over-Criminalisation Extended Joint Criminal Enterprise Liability for Murder’ (2014) 38 *Criminal Law Journal* 104, 104.

- 4 This changed in early 2016 when in *R v Jogee; Ruddock v The Queen*,⁵ the Supreme Court of the United Kingdom and the Privy Council (the UK Court)⁶ reversed the test for extended joint criminal enterprise, a doctrine which it called “*parasitic liability*”, on the basis that it marked a “*wrong turn*” in the development of the common law and had no place in contemporary legal doctrine.
- 5 Several months later, in *Miller v The Queen*,⁷ the High Court declined to abandon the doctrine, affirming that it should remain part of the common law of Australia.
- 6 Both cases involved, amongst other things a tussle as to whether their decision making ought to be constrained by the principles of *stare decisis*. The outcome was different in each jurisdiction. The different reasons of the two Courts on *stare decisis* are discussed below.
- 7 It will be convenient at the outset to briefly explain what was decided in *Jogee*.
- 8 The UK Court considered the line of common law authority leading to *Chan Wing-Siu v The Queen*,⁸ which established the doctrine of extended joint criminal enterprise in that country, and concluded that the Privy Council in that decision had made an error in developing the doctrine as it did. After closely examining the two authorities relied upon in *Chan Wing-Siu*, the Court found that they failed to provide support for the principle which that case developed.⁹ In fact, it identified several inconsistent authorities that had not been fully considered.¹⁰ It concluded that:

⁵ [2016] 2 WLR 681, [2]–[3], [87].

⁶ The phrase ‘the UK Court’ is used as a convenient characterisation in circumstances where the cases were heard together and there was a single judgment.

⁷ [2016] HCA 30; (2016) 90 ALJR 918.

⁸ [1985] AC 168.

⁹ *R v Jogee* [2016] UKSC 8, [63], [71].

¹⁰ See, eg, *R v Smith (Wesley)* [1963] 1 WLR 1200; *R v Reid* (1976) 62 Cr App R 109.

“... the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments.”¹¹

- 9 The UK Court acknowledged that there is a growing emphasis on subjective tests of criminal guilt and a move away from objective standards.¹² Accepting that this was so, the UK Court characterised the error made by the Privy Council in *Chan Wing-Siu* as “*equat[ing] foresight with intent to assist, as a matter of law*”.¹³ The UK Court concluded that **the correct approach was to treat it as evidence of intent.**

Miller

- 10 The plurality decision in *Miller* is characteristically short (83 paragraphs) and to the point. It is nonetheless a judgment of broad, or perhaps more aptly phrased, deep import, covering and/or raising the following issues:

- The legal test at common law for extended joint criminal enterprise;
- The policy basis for the test;
- The jurisprudential underpinning of criminal liability;
- The principles of *stare decisis*.

- 11 It also deals with the “*unreasonable verdict*” ground, particularly in circumstances where intoxication was in issue.¹⁴ It is sufficient to state in this paper that the Court’s approach reaffirmed the onerous task an appellate court has in determining that ground of appeal.

- 12 The case is important for two other reasons. First, it allowed Gageler J to “*maintain the rage*”. Secondly, it confirmed the correctness of *Clayton v The*

¹¹ *R v Jogee* [2016] UKSC 8, [79].

¹² *Ibid* [73].

¹³ *Ibid* [87].

¹⁴ *Ibid* [77]-[82].

Queen.¹⁵ That case is itself important because it discusses what directions ought to be given to the jury in an extended joint enterprise case. I will come back to this.

- 13 As part of this introduction, I want to suggest to you that each of the four matters to which I have referred is of seminal importance to you as prosecutors. Your duties as a prosecutor are well known to you.¹⁶ What I would like to emphasise is that you are not required to know the law simply in relation to each charge that you prosecute, you are not mere automatons in that task. You are deeply skilled and knowledgeable and an understanding of the policy and jurisprudential issues in the criminal law only serves to enhance those skills and your knowledge.

***Miller*: The High Court’s formulation of the test of extended joint criminal enterprise**

- 14 In *Miller*, the High Court, for reasons based both on policy and on the principle of *stare decisis*, determined that it was not appropriate to depart from the test of extended joint criminal enterprise that had been stated in *McAuliffe v The Queen*.¹⁷
- 15 There were two statements of critical importance in *McAuliffe*. The first was that criminal liability for a joint criminal enterprise is not confined to the commission of the incidental crime being in the **mutual contemplation** of the parties.¹⁸ Following this, and this is the second point, which is at the heart of the discussion in this paper, the Court stated the test for extended joint criminal enterprise (by reference to the facts in *McAuliffe*) as follows: an accused person is guilty of the incidental crime if the accused:

“... contemplated that the intentional infliction of grievous bodily harm was a **possible incident** of the common criminal enterprise.”¹⁹

¹⁵ [2006] HCA 58; (2008) 231 ALR 500.

¹⁶ Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 r 29.

¹⁷ [2016] HCA 30; (2016) 90 ALJR 918, [43].

¹⁸ *McAuliffe* (1995) 183 CLR 108, 113.

¹⁹ *Ibid* 113.

16 This involves a subjective test as to what was in the contemplation of the accused and a rejection of the objective test, which provided that for the secondary offender to be liable for an incidental crime, the incidental crime must have been "*a probable consequence*" of the joint criminal enterprise.²⁰

17 By reference to a secondary offender's liability for murder, the plurality in *Miller* explained extended joint criminal liability in the following terms:

"... the doctrine holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise".²¹

18 That in a nutshell is what *Miller* confirmed to be the law. However, *Miller* did more than simply confirm *McAuliffe*. As I have indicated, the decision is steeped in questions of policy, principle and raises questions relating to the jurisprudential underpinnings of the criminal law. The decision also traced the origins of the current common law position. What follows is a brief overview of that development and of those other questions.

The development of the doctrine of extended joint criminal enterprise

Johns v The Queen

19 The test for extended joint criminal enterprise is said to have its High Court genesis in *Johns v The Queen*.²² That case involved an **accessory before the fact** to a robbery for murder. Its present relevance is threefold.

20 First, the Court accepted that the doctrine of joint criminal enterprise extended to the case of an accessory before the fact and was not limited to the case of a secondary offender. The plurality accepted that the common law distinguished between the accessory before the fact and the principal in the

²⁰ *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [8]-[10]; *Johns v The Queen* (1980) 143 CLR 108, 131.

²¹ [2016] HCA 30; (2016) 90 ALJR 918, [1].

²² (1980) 143 CLR 108.

second degree but said that this classification was unrelated to the doctrine of common purpose. As their Honours explained.

“... Broadly speaking, the doctrine looks to the scope of the common purpose or design as the gravamen of complicity and criminal liability. There is nothing in this to suggest that the criterion of complicity and liability should differ as between accessory and principal in the second degree. **If they are both parties to the same purpose or design and that purpose or design is the only basis of complicity relied upon against each of them, there is no evident reason why one should be held liable and the other not. In each case liability must depend on the scope of the common purpose.** Did it extend to the commission of the act constituting the offence charged? This is the critical question. It would make nonsense to say that the common purpose included the commission of the act in the case of the principal in the second degree but that the same common purpose did not include the commission of the same act in the case of the accessory before the fact.”²³ (emphasis added)

- 21 Secondly, the Court emphasised that this test was not only justified but required, having regard to the change in the law brought about by the decision in *Woolmington v Director of Public Prosecutions*.²⁴ It noted that decisions and those commentators who had adopted or endorsed the objective “*probable consequences test*” pre-dated *Woolmington*.²⁵
- 22 This last point in itself demonstrates the need to have a deep knowledge and conception of the law. It was Chief Justice Street, and indeed the trial judge in *Johns* who, it would seem, were the architects (or at least early adherents) of the doctrine which is now the accepted law. Chief Justice Street, in his reasoning in the New South Wales Court of Appeal, drew upon the “*fundamental reappraisal*” of English criminal law brought about by *Woolmington* “*such that there has now been introduced ... a subjective element*”.²⁶
- 23 Thirdly, it is important not to be confused by the observation in *Jogee* that *Johns* “*is an entirely orthodox decision*”, by which the UK Court must have

²³ *Ibid* 125–6.

²⁴ [1935] AC 462; [1935] UKHL 1.

²⁵ *McAuliffe* (1980) 143 CLR 108, 121.

²⁶ *R v Johns* (1978) 1 NSWLR 282, 289.

meant ‘orthodox’ according to the test it had determined to be the law. However, as the plurality in *Miller* pointed out:

“Their Lordships observed there was ample evidence from which the jury could infer that Johns gave his assent to a criminal enterprise which involved the discharge of a firearm should the occasion arise. **Nonetheless, there may be discerned a difference in principle between the parties’ contemplation of the possible commission of the incidental offence and a requirement of proof of conditional intent that the incidental offence be committed.**”²⁷ (emphasis added)

McAuliffe v The Queen

- 24 The facts of *McAuliffe* (which are likely to be familiar to you) provide the archetypal example of the doctrine’s operation.
- 25 After consuming a large amount of alcohol and smoking some marijuana, two brothers, Sean and David McAuliffe, and a friend, Matthew Davis – all in their teens – decided to go to a nearby park to ‘roll’, ‘rob’ or ‘bash’ someone.²⁸ Sean carried a hammer and Matthew carried what was variously described as a ‘baton’ or ‘stick’. Sean and David were experienced in Tae Kwon Do and Matthew was an experienced street fighter. There was no evidence that either Matthew or David knew that Sean carried a hammer and although Sean knew that Matthew carried a stick, there was no evidence that David was aware of this prior to arriving at the park.²⁹
- 26 Upon arriving at the park, the three youths attacked two men, who were standing near a lookout at the top of a cliff. Both men were kicked and beaten with the stick. Matthew chased the deceased onto a footpath near the edge of the cliff, where Sean kicked him in the chest, causing him to fall some 3–5m to a puddle below. The deceased was covered in blood at this point. The youths then left. The next day the deceased’s body was found in the sea at the bottom of the cliff. Matthew pleaded guilty to the murder of the deceased

²⁷ [2016] HCA 30; (2016) 90 ALJR 918, [21].

²⁸ *McAuliffe* (1995) 183 CLR 108 111.

²⁹ *Ibid.*

and was convicted. The question arose as to whether the principles of joint criminal enterprise operated such that the brothers, Sean and David, could also be convicted.

- 27 The Court considered the position of the brothers on the application of an objective test, noting that on that test:

"... liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture".³⁰

- 28 However, drawing on the earlier case of *Johns* and the Privy Council decision in *Chan Wing-Siu*, the Court continued,

"... In accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose."³¹

- 29 The Court explained the practical effect of applying the subjective test as follows:

"... the trial judge was not in error in directing the jury that if the appellants were engaged in a joint criminal enterprise with [Matthew] Davis, a shared common intention – that is, a common purpose – to inflict grievous bodily harm or ***an individual contemplation of the intentional infliction of grievous bodily harm as a possible incident of the venture would be a sufficient intention on the part of either of them for the purpose of murder.***"³² (emphasis added)

- 30 The Court's observations on *Johns* are also helpful in explaining the basis of liability – and therefore what must be proved – in an extended joint criminal enterprise. It pointed out that *Johns* was not concerned with the situation where one party foresees but does not agree to a crime other than that which is planned but nonetheless continued to participate. The Court continued:

³⁰ Ibid 114.

³¹ *McAuliffe* (1995) 183 CLR 108 111, 114.

³² Ibid 118.

"However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose. Of course, in that [former] situation the **prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind.** But there is no other relevant distinction."³³

31 Finally, reference needs to be made to the Court's observations in relation to *Chan Wing-Siu*. In that case, after referring to the principle whereby a secondary party acting in concert with a primary offender is criminally liable for acts done by the primary offender of a type which the secondary party foresees but does not necessarily intend, Sir Robert Cooke continued:

"That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."³⁴

Thus *McAuliffe* made clear that the test for the scope of a criminal enterprise was subjective, looking to whether the accused foresaw the offence in question.³⁵

Clayton

32 The basis of the extended common law principle was further explained in *Clayton*, in the following terms:

"If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious injury to that person, and, despite that foresight, continues to participate in the venture, **the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight.**"³⁶ (emphasis added)

³³ *Ibid* 115.

³⁴ [1985] AC 168, [11].

³⁵ (1995) 183 CLR 108, 113, 118.

³⁶ [2006] HCA 58; (2006) 231 ALR 500, [17].

33 The plurality was clear that "*a participant [who] does not wish or intend that the victim be killed*" may be convicted on the basis of an extended joint criminal enterprise.³⁷

Academic responses to the subjective test

34 This possible outcome of the subjective test is one subject to substantial academic criticism. It has been suggested that the doctrine will apply to an accused when they foresaw the possibility of murder, even where there is evidence that he or she:

"... had an avowed desire that it did **not** occur; even where he/she had expressed this view to the member of the group who was the source of the foreseen risk; and even where he/she extracted a promise that that member would not commit murder."³⁸ (emphasis in original)

35 The legal answer to that criminal conundrum lies in the accused's continued participation in the criminal enterprise.

36 The same response has been suggested academically by Andrew Ashworth, who argues that an accused, by deliberately attacking another's legally protected interests, changes their status in the eyes of the law such that they should be made liable for the consequences of their conduct.³⁹

37 Further explanation is offered by Professor Simester, whose approach was endorsed by the plurality in *Miller*. Simester suggests that in a case involving extended joint criminal enterprise, it is the foundational offence that changes the accused's normative position in the eyes of the law. The accused's:

"... new status has moral significance: [the accused] associates [himself or herself] with the conduct of the other members of the group ..."⁴⁰

³⁷ Ibid [17].

³⁸ McNamara, above n 4, 110.

³⁹ Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 *New Criminal Law Review* 232, 233.

⁴⁰ A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, 3rd ed, 2007) 229.

- 38 Krebs suggests that “[a]t first sight, this is an attractive rationale”,⁴¹ as it accounts for the accused’s liability by linking it to his or her “**previous intentional, wrongful and culpable commitment to criminal activity**”.⁴² However, she doubts the validity of this approach. She argues that where the further offence is of the same ‘family’ as the earlier offence, for example, the fact scenario in *McAuliffe* where the foundational offence also involved violence to the individual, this makes sense. However, as a justification it appears to lose some strength when applied to offences which are less clearly related, such as robbery and murder.⁴³
- 39 Krebs suggests that this rationale becomes weaker still when compared with the manner in which the law would treat an individual acting alone.⁴⁴ An individual who commits one offence, say robbery, and goes on to commit another, say murder, must still have the requisite mental element for that second offence, despite the fact they have deliberately attacked another’s legally protected interests, potentially shifting their normative position in the eyes of the law.

The policy basis for the common law test

- 40 The plurality in *Miller*, as well as Gageler J (in dissent) and Keane J in a separate judgment, dealt with the policy basis for the test for extended joint criminal enterprise.
- 41 I propose for the purposes of this paper to examine principally the reasons of Keane J, who gave particular attention to the questions of policy, although it is fair to say that his Honour’s views did not differ from those of the plurality.
- 42 The plurality noted that there were competing policy considerations at play in determining the test for extended joint criminal liability. The first was based on treating the relationship of joint criminal enterprise, including extended joint

⁴¹ Beatrice Krebs, ‘Joint Criminal Enterprise’ (2010) 73 *Modern Law Review* 578, 598.

⁴² *Ibid* 598.

⁴³ *Ibid* 595.

⁴⁴ *Ibid* 600.

criminal enterprise, as an aspect of general concepts of complicity. This approach reflected that of Professor K J M Smith in *A Modern Treatise on the Law of Criminal Complicity*.⁴⁵ The alternative view was that joint criminal enterprise is a *sui generis* form of secondary participation in a crime and not merely a sub-species of accessorial liability, being the view taken by Professor Simester.⁴⁶ The latter approach had been adopted in *Clayton*.

- 43 Keane J in explaining this *sui generis* form of liability, stated that where there is an agreement to carry out jointly a criminal enterprise:

“... the person who commits the actus reus of the incidental crime is necessarily acting as the instrument of the other participants to deal with the foreseen exigencies of carrying their enterprise into effect.”⁴⁷

- 44 On his Honour’s analysis, the members of the joint criminal enterprise, by reason of their respective commitments to the enterprise became “*partners in crime*”.⁴⁸

- 45 Interestingly, his Honour used the language of authorisation, stating:

“... each participant also necessarily authorises those acts which he or she foresees as possible incidents of carrying out the enterprise in which he or she has agreed, and continues, to participate.”⁴⁹

- 46 This was language that was explained away by the Court in *McAuliffe*. Nonetheless, it is clear that Keane J considered that the theoretical underpinning of culpability for extended joint criminal enterprise was as a *sui generis* form of secondary participation in crime. This was to be contrasted, as his Honour pointed out, with the decision in *Jogee*, which was based

⁴⁵ K J M Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, 1991) 209.

⁴⁶ A P Simester, “The Mental Element in Complicity” (2006) 122 *Law Quarterly Review* 578; Simester and Sullivan, above n 32, 228.

⁴⁷ *Miller* [2016] HCA 30; (2016) 90 ALJR 918 [138].

⁴⁸ *Ibid* [139].

⁴⁹ *Ibid* [139].

squarely on the view that cases of complicity in a crime must be analysed as a subset of accessorial liability.⁵⁰

47 Gageler J rejected the prosecution argument that there was a gap in the criminal law and that this was the policy reason for the test of foresight of possible consequences. The argument advanced by the prosecution in this regard was that there was social science research demonstrating that individuals behave differently in groups, taking more risks, feeling pressure to conform and feeling less personal responsibility.⁵¹

48 This was recognised in the English case of *R v Powell*, where Lord Steyn suggested that:

“... Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed.”⁵²

49 This also reflects what Simester observes to be a broader concern regarding the potential for criminality within a group. They suggest that:

“The law has a particular hostility to criminal groups ... Criminal associations are dangerous. They present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address.”⁵³

50 However, according to Gageler J there is no “gap” in the law which made the doctrine necessary to address a social problem of escalating gang violence. As his Honour analysed the doctrine, the “gap” in the law suggested by the prosecution was:

⁵⁰ Ibid, [139]; *R v Jogee*; *Ruddock v The Queen* [2016] UKSC 8, [78].

⁵¹ *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [121] citing Paul F Cromwell et al, ‘Group Effects on Decision-Making by Burglars’ (1991) 69 *Psychological Reports* 579; Ben Marshall, Barry Webb, Nick Tilley, *Rationalisation of Current Research on Guns, Gangs and Other Weapons: Phase 1* (Report, 2005); Law Commission (UK), *Participating in Crime*, Law Com No 35 (2007), 88–9 [3.144]–[3.145].

⁵² [1997] 4 All ER 545, 551.

⁵³ A P Simester, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 4th ed, 2010) 244. See also Krebs, above n 41, 601

“... nothing more or less than the difference between the limit of secondary criminal liability as traditionally understood and the limit of secondary criminal liability as extended.”⁵⁴

51 His Honour warned that “*Courts must be extremely cautious about refashioning common law principles to expand criminal liability*”.⁵⁵ His Honour further pointed out that escalating gang violence was hardly a new social phenomenon. If that problem needed to be addressed within the criminal law, that was a question for legislative consideration.⁵⁶

Jurisprudential underpinning of liability in the case of extended joint criminal enterprise

52 Gageler J and Keane J also had regard to the moral culpability that underpinned criminal responsibility, but in doing so reached different conclusions.

53 Gageler J was of the opinion that making a party liable for a crime that the party foresaw but did not intend “*disconnects criminal liability from moral culpability*”.⁵⁷ He also considered that making the criminal liability of the secondary party turn on foresight when the criminal liability of the principal turned on intention, created an anomaly.⁵⁸ He described the first of these considerations as “*fundamental*” and the second as being related to the first.⁵⁹ In his Honour’s view, the anomaly demonstrated “*incoherence in the imposition of criminal liability*”.⁶⁰ That incoherence highlighted, for his Honour, “*the disconnection between criminal liability and moral culpability*”.⁶¹ He emphasised that the “*the informing principle of the common law*” was that

⁵⁴ *Miller* [2016] HCA 30; (2016) 90 ALJR 918 [122].

⁵⁵ *Ibid* [124].

⁵⁶ *Ibid* [124].

⁵⁷ *Ibid* [111].

⁵⁸ *Ibid* [111].

⁵⁹ *Ibid* [112].

⁶⁰ *Ibid* [112].

⁶¹ *Ibid* [112].

there should be such correlation.⁶² His Honour considered that these two problems were “*unanswerable*”.⁶³

54 Gageler J did not accept the analysis in *Clayton* that criminal responsibility lay in the “*continued participation in the joint enterprise with the necessary foresight*”.⁶⁴ His Honour could not see that this was:

“... consistent with justice and principle that a secondary party is criminally liable for acting merely with foresight of the possibility of the primary party acting with intent.”⁶⁵

55 Keane J, however, considered that there was little reason why those who organised crime should be regarded as less morally culpable for the risks of carrying it out, which were foreseen, than those who were deployed to deal with the risks and committed the incidental crime.⁶⁶

Stare decisis

56 *Stare decisis* describes a principle “*whereby a superior court considers itself bound by its previous decisions*”.⁶⁷ It is to be distinguished from the doctrine of precedent:

“... whereby a court is bound by the decision of the court at the apex of the hierarchy to which the lower court belongs, or if there is no decision of that court, to the decision of the next court within that hierarchy.”⁶⁸

57 The principle of *stare decisis* is said to promote consistency, continuity, coherence and predictability.⁶⁹ For this reason, it has been described as “*the cornerstone of the common law judicial system*”.⁷⁰ However, the principle is not absolute and modern jurisprudence recognises that courts should not be

⁶² Ibid [119]; *Wilson v The Queen* (1992) 174 CLR 313, 334.

⁶³ *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [112].

⁶⁴ Ibid [120].

⁶⁵ Ibid [120].

⁶⁶ Ibid [141].

⁶⁷ M J Beazley, P T Vout and S E Fitzgerald, *Appeals and Appellate Courts in Australia and New Zealand* (LexisNexis, 2014) 28.

⁶⁸ Ibid 28.

⁶⁹ Ibid 29.

⁷⁰ A F Mason, ‘The Use and Abuse of Precedent’ (1988) 4 *Australian Law Review* 93.

bound by the past “*where a change in the law is recognised to be desirable, or indeed, necessary*”.⁷¹

58 The High Court recognises a distinction between constitutional cases and those concerning common law principles in applying the principle. Given the High Court’s position within the Australian constitutional framework and its ultimate responsibility for the correct interpretation of the Constitution, it has not applied the doctrine as rigorously with respect to constitutional authorities.⁷² In this context, the Court’s fidelity is to the text of the Constitution, and not earlier authority.⁷³

59 As I have already indicated, questions of *stare decisis* arose in both the UK Court in *Jogee* and in the High Court in *Miller*.

60 In *Jogee*, the UK Court considered whether the existing doctrine should be reversed, particularly in light of the fact that it had been reaffirmed by the Privy Council and the House of Lords several times.⁷⁴ In *Powell*, members of the House of Lords acknowledged that extended joint criminal enterprise created an anomalous liability threshold but nevertheless found that it should be retained due to policy considerations, namely, its ability to address the risks posed by groups.⁷⁵

61 It should also be noted that in 2006, the United Kingdom Law Commission rejected a proposal to abolish it, once again citing policy considerations.⁷⁶

62 In *Jogee*, however, the UK Court considered a number of factors, including the fact that it had undertaken “*a much fuller analysis than on previous occasions*”, that the law could not be said to be well established and working

⁷¹ Beazley, Vout and Fitzgerald, above n 67, 29 citing *Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180, [92].

⁷² See *Australian Agricultural Company v Federated Engine-Drivers & Fireman’s Association of Australasia* (1913) 17 CLR 261.

⁷³ See *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968) 117 CLR 390, 396.

⁷⁴ [2016] 2 WLR 681, [79].

⁷⁵ [1997] 4 All ER 545, 551 (Lord Steyn), 559 (Lord Hutton).

⁷⁶ Law Commission (UK), *Inchoate Liability for Assisting and Encouraging Crime*, Law Com No 300 (2006), Cmnd 6878.

satisfactorily, and the importance of correcting an error of principle in this area.⁷⁷ In determining that it was appropriate for the Court, as opposed to the legislature, to reverse the doctrine, the Court pointed to the fact that the doctrine was a common law creation, making it “*proper for the courts to correct the error*”.⁷⁸

63 In *Miller*, the issue was explicitly framed in terms of whether extended joint criminal enterprise should be retained in Australia in light of the UK Court’s decision.⁷⁹

64 The plurality considered the approach in *Jogee* and traced the history of the doctrine and the emergence of its current form, noting in particular the reliance of the UK Court on the latest edition of *Smith and Hogan’s Criminal Law*. The plurality acknowledged that the conclusion reached in *Jogee* “*is in line with the views of a number of distinguished commentators*”⁸⁰ and noted that the UK Court’s determination involved a conclusion “*about the policy that the law should pursue*”.⁸¹

65 The plurality in *Miller* relied upon the following reasons in determining not to depart from *McAuliffe*: *McAuliffe* was a unanimous decision, affirmed on a number of occasions, the Court having rejected similar applications in *Gillard* and *Clayton*;⁸² it had not been demonstrated that the application of the test from *McAuliffe* had made trials unduly complicated;⁸³ the test should not be modified or abandoned without there being an examination of the law generally in respect of secondary liability for crime⁸⁴ and without there being an examination of whether the common law of murder should be modified to

⁷⁷ [2016] 2 WLR 681, [80]–[81].

⁷⁸ *Ibid* [85].

⁷⁹ [2016] HCA 30; (2016) 90 ALJR 918, [2].

⁸⁰ *Ibid* [32].

⁸¹ *Ibid* [32].

⁸² See *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [40].

⁸³ See *Gillard v The Queen* [2003] HCA 64; (2003) 219 CLR 1; *Clayton v The Queen* [2006] HCA 58; (2006) 231 ALR 500; *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [39].

⁸⁴ See *Clayton* [2006] HCA 58; (2006) 231 ALR 500, [20]; *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [40].

distinguish between killing with intent to kill and killing with intent to cause very serious injury.⁸⁵

66 These last two points had been the subject of particular comment in *Clayton*.⁸⁶

67 In *Miller*, the plurality observed that rules regarding accessorial liability would need to be examined to consider whether extended joint criminal enterprise has separate utility and the potential impacts of its abolition or modification in light of this.⁸⁷

68 As to the second of the two points, the plurality stated that changes in this area should not be made without considering the issue whether:

“... what was either sought or being achieved was in truth some alteration to the law of homicide depending upon distinguishing between cases in which the accused acts with an intention to kill and cases in which the accused intends to do really serious injury or is reckless as to the possibility of death or really serious injury”.⁸⁸

69 The plurality held that both these questions were not within the remit of the common law and should be left to the legislature to resolve.⁸⁹

70 By contrast with the position taken in *Jogee*, in which the UK Court had held that the effect of “*putting the law right*” would not be to invalidate convictions based on extended joint criminal enterprise, the plurality pointed out that the position in this respect in Australia is less certain.⁹⁰ Accordingly, overturning *McAuliffe* could have significant consequences, not only in terms of future prosecutions but also past convictions.

71 This last observation is a reflection of what the High Court had said in *Kentwell v The Queen* where the plurality observed that “[t]he review of an old

⁸⁵ *Clayton* [2006] HCA 58; (2006) 231 ALR 500, [19]; *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [40].

⁸⁶ *Clayton* [2006] HCA 58; (2006) 231 ALR 500, [19]–[20].

⁸⁷ *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [20].

⁸⁸ *Ibid* [19].

⁸⁹ *Ibid* [19]–[20].

⁹⁰ *Ibid* [39].

conviction may raise consideration of the capacity to hold a new trial that is fair to both sides”.⁹¹ Witnesses may no longer be available, evidence may be lost or destroyed and requiring the victim to give evidence again may cause “*acute stress*”.⁹² The Court, however, left open the question of whether an application to extend the time in which to challenge a conviction should be permitted in circumstances where “*a misconception as to the law has been removed by later authoritative decision*”.⁹³

72 The plurality in *Miller* also considered it relevant that the New South Wales and South Australian legislatures had declined to reform the law, in the face of recommendations to the contrary from their law reform commissions.⁹⁴

73 Following the case of *R v Taufahema* in 2007, the New South Wales Law Reform Commission undertook a review of the principles guiding complicity at common law.⁹⁵ Whilst it concluded that the doctrine of extended joint criminal enterprise is complex and lacks a clear policy justification, it accepted that it “*has a proper role to play as part of the law of complicity*”.⁹⁶ Accordingly, it recommended the introduction of a “*fair, acceptable and workable*” statutory provision.⁹⁷ With respect to charges of murder, it recommended that the doctrine be modified to require that the accused foresaw the **probability** of death resulting from an act done with intent to kill or cause grievous bodily harm in the course of the joint criminal enterprise.⁹⁸

74 The New South Wales Parliament’s failure to respond to these recommendations can be contrasted with the position in Victoria, where in

⁹¹ [2014] HCA 37; (2014) 252 CLR 601, [29].

⁹² *Ibid* [29].

⁹³ *Ibid* [29].

⁹⁴ *Ibid* [42].

⁹⁵ New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 1.

⁹⁶ *Ibid* 128.

⁹⁷ *Ibid* 128.

⁹⁸ *Ibid* 129, rec 4.3(8)(a).

2014 the Parliament amended the *Crimes Act 1958* (Vic) to abolish common law rules of complicity.⁹⁹

75 Interestingly in *Jogee*, the UK Court considered that as extended joint criminal enterprise was a common law doctrine which “*had been unduly widened by the courts it [was] proper for the courts to correct the error*”.¹⁰⁰ This was notwithstanding the fact that the Law Commission had, in 2006, rejected any change to the law.¹⁰¹

76 Gageler J was of a different view to the plurality.¹⁰² His Honour observed that given the High Court’s repeated affirmation of the principle, if *McAuliffe* were to be overturned to return the law to the position it was prior “*the only justification could be that the return is compelled by principle*”.¹⁰³ He further noted that:

“The overruling of *McAuliffe* would not of itself alter the legal rights of persons whose criminal liability has already merged in conviction. The overruling would nevertheless create a legitimate sense of injustice in persons who have been convicted on the assumption that the doctrine of extended joint criminal enterprise formed part of the common law of Australia ...”¹⁰⁴

77 Although his Honour acknowledged the distinction between the application of *stare decisis* in constitutional cases and those, such as this, which concern the common law, he suggested that:

“ ... Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it is better that this Court be ‘ultimately right’ than that it be ‘persistently wrong’ ”.¹⁰⁵

78 Further, his Honour did not consider the doctrine of extended joint criminal enterprise to be deeply entrenched or widely enmeshed in the Australian

⁹⁹ See *Crimes Act 1958* (Vic) ss 323–4.

¹⁰⁰ *Jogee* [1985] AC 168, [85]

¹⁰¹ Law Commission (UK), *Inchoate Liability for Assisting and Encouraging Crime*, above n 76, 19.

¹⁰² *Miller* [2016] HCA 30; (2016) 90 ALJR 918, [128].

¹⁰³ *Ibid* [107].

¹⁰⁴ *Ibid* [127].

¹⁰⁵ *Ibid* [128].

common law.¹⁰⁶ In his view the underlying problem was one of “*over-criminalisation*”.¹⁰⁷ As a result, he considered that to excise it would do more to strengthen the common law than weaken it.

Proof of extended joint criminal liability

79 Against this background, the prosecutor is undoubtedly going to ask: what needs to be proved to establish a case of extended joint criminal enterprise?

80 The answer is to be found in the High Court’s statement to which I referred at the outset:

“... the doctrine holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise”.¹⁰⁸

81 The statement raises the question of the degree of specificity required in identifying (in a murder or aggravated assault case) what must be foreseen as a possible consequence of what was contemplated.

82 In *R v Keenan*, Kiefel J (as her Honour then was), Hayne, Heydon and Crennan JJ agreeing, explained that:

“Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible.”¹⁰⁹

83 As her Honour explained, the means intended to commit the crime may allow an inference to be drawn as to the level of harm intended. For example, in a given case, it could be inferred that that the common purpose was a purpose to inflict serious bodily harm. Her Honour’s remarks were made in the context of a code offence (in Queensland) where the test was whether the accused

¹⁰⁶ Ibid [128].

¹⁰⁷ Ibid [128].

¹⁰⁸ Ibid [1].

¹⁰⁹ [2009] HCA 1; (2009) 236 CLR 397, [121].

foresaw that the incidental crime was the probable consequence of the common purpose. However, it seems her Honour’s observation would be equally applicable to the common law test.

84 There is a question at the practical level as to what would be sufficient proof of the level of harm intended. One obvious example and a common practice is for the prosecution to prove the accused’s knowledge of the weapon to be used by the principal offender or that the principal offender was carrying a certain type of weapon which was in fact used.

85 In England, the prosecution was originally required to establish awareness of the *type* of weapon.¹¹⁰ However, over the last decade this requirement has become more flexible, taking the form of an inquiry into whether the method was “*fundamentally different*” to what had been foreseen as a possibility by the accused.¹¹¹ These decisions of course pre-dated the different test in *Jogee*.

Undue complexity

86 There is one final matter to which reference should be made. It is often suggested that extended joint criminal enterprise is unnecessarily “*technical and complex*”, creating issues for trial judges in instructing juries, and juries in reaching their verdict.¹¹² The NSW Law Reform Commission has observed that in this area, juries can:

“... be required to consider a ‘cascading’ list of possible verdicts ranging from guilty of murder, manslaughter, malicious wounding, possession of a weapon and so on to not guilty”.¹¹³

87 In his dissent in *Clayton*, Kirby J focused on the difficulties associated with requiring trial judges to “*explain the differential notions of secondary liability to*

¹¹⁰ McNamara, above n 4, 107.

¹¹¹ *R v Bentley* [2001] 1 Cr App R 307; *R v O’Flaherty* [2004] 2 Cr App R 314; *R v Rahman* [2009] AC 129; *R v Mendez* [2011] QB 876.

¹¹² NSWLRC, above n 95, 104.

¹¹³ *Ibid* 105.

a jury”.¹¹⁴ As evidence of these difficulties, he cited the fact that in that particular case, the judge took three days to instruct the jury, following a 46 day trial, and provided them with detailed written directions.¹¹⁵ The NSW Law Reform Commission observed, in 2010, that the difficulties associated in explaining the law to juries result in “*a significant number of appeals*”.¹¹⁶

88 This complexity was and is unnecessary. In *Clayton*, the trial judge had given the jury written directions which followed the way in which the prosecution had put its case. These were supplemented by what were described by the plurality as “*extensive oral directions*”.¹¹⁷ The directions required the jury to assume that each of the arguments advanced by the prosecution should be considered separately. In turn, this required a separate statement of each of the elements necessary to establish each argument, namely joint criminal enterprise, extended joint criminal enterprise and aiding and abetting. This was further complicated by the question of whether the accused acted in self-defence.¹¹⁸

89 The plurality noted, however, that “[*t*he real issues in the case which the jury had to decide were issues of fact”.¹¹⁹ They went on to explain that:

“ ... It was for the trial judge to determine what those real issues were and to instruct the jury about only so much of the law as must guide them to a decision on those issues. It may have been possible to instruct the jury in a way that avoided repetition of what, in the end, were relatively few issues for their consideration.”¹²⁰

90 Ensuring that the jury properly understands not only the manner in which the doctrine operates but also the distinction between it and any other alternative charges has significant consequences. In *Clayton*, Kirby J considered the relationship between murder established through extended joint criminal

¹¹⁴ [2006] HCA 38; (2006) 231 ALR 500, [114] (Kirby J).

¹¹⁵ *Ibid* [115].

¹¹⁶ NSWLRC, above n 95, 104.

¹¹⁷ *Clayton* [2006] HCA 58; (2006) 231 ALR 500, [22].

¹¹⁸ *Ibid* [22].

¹¹⁹ *Ibid* [24].

¹²⁰ *Ibid* [24].

enterprise and manslaughter, suggesting that a question arises as to whether the doctrine “leaves adequate room for the offence of manslaughter ... in terms that are realistic so that judges can explain the distinction and so that jurors can understand it”.¹²¹ Ensuring a clear distinction between the offences of manslaughter and murder is seen as significant due not only to the moral opprobrium attached to the label of murder but the differential sentences which may be imposed.¹²²

Conclusion

91 By way of conclusion, the following remarks of Keane J in *Miller* are worthy of repetition:

“To say that those who joined together to organise the commission of a crime, in circumstances which involve the acceptance of the risk of the commission of an incidental crime in the course of carrying out their enterprise are less morally culpable for the incidental crime than their consort who actually does the dirty work, is to appeal to a sense of morality which would commend itself only to the criminal elite.”¹²³

¹²¹ Ibid, [80] (Kirby J).

¹²² Ibid [87]. See also *Crimes Act 1900* (NSW) s 18(1).

¹²³ [2016] HCA 30; (2016) 90 ALJR 198, [141].