**Extending Criminal Liability**

Criminality can be extended in two main ways:

1. Criminal law can extend liability to members of a group, each of whom take part in the commission of an offence (‘**complicity law’**)
2. Association of itself can be the basis for criminality under various common law and statutory rules

**11.2 Complicity**

“Complicity” is not of itself an offence. It is a set of rules that can be invoked to extend criminal liability to persons other than the actual offender in three circumstances:

1. Joint criminal enterprise – where two or more persons agree to commit a crime and one or all of the participants carry out the necessary conduct elements
2. Extended joint criminal enterprise – where, during the course of a joint criminal enterprise, one member of the group commits an additional crime, the other members of the group may also be liable for that additional crime
3. Accessorial liability – Where a person ‘aids, abets, counsels or procures’ the commission of a crime by another person. This can be divided into further categories:
   1. Principal in the first degree - where a person provides assistance or encouragement at the scene
   2. Accessory before the fact – where a person is not present at the scene but has earlier provided assistance or encouragement

**11.2.2 Joint criminal enterprise**

*Osland* (1998) 159 ALR 170

**Facts**

Heather Osland and her son, David Albion were charged with murder. The Crown case was that they had both reached an agreement to murder Frank Osland. The plan was implemented when Heather Osland mixed a sedative into her husband’s dinner and Albion bashed him to death with a metal pipe. Osland was convicted but Albion was acquitted. Osland appealed arguing that, since the Crown case was that she and Albion were jointly responsible for the murder of the victim, her conviction was inconsistent with the jury’s failure to convict Albion.

**Holding**

There was ‘no flaw in reasoning’ and the conviction can be upheld

**Reasons**

* (McHugh J) There are two broad types of liability:
  + Derivative liability – this occurs when the accused aids in the commission of a crime without being present at the crime
  + Principal in the first degree:
    - This can occur when the accused commits the act which form the whole or part of the actus reus
    - However, this can also occur where the accused is present at the scene and agrees with another to commit the crime. In this case the accused will be responsible for the actus reus (so if the actual perpetrator has a defence such as insanity, this will not assist the accused).
* The instant case involves being present at the scene and acting in concert. Therefore, the jury were entitled to convict Mrs Osland whilst failing to reach agreement in respect of David Albion, whose criminal responsibility was independent of his mother’s.
* (Gaudron and Gummow JJ, dissent) The prosecution could not negative self-defence and provocation for Albion. Therefore there was no basis for the jury to determine that he was acting as part of an arrangement with his mother and no basis on which to convict Osland.

*Osland* confirms that the liability of a participant in a joint criminal enterprise is not derivative – it is primary. This is a key point of distinction between the rules relating to joint criminal enterprise and the rules relating to accessorial liability. If the case against Osland had been constructed on the basis of accessorial liability, the jury’s failure to convict Albion would have rendered it impossible to convict Osland.

**The presence requirement**

Joint criminal enterprise requires presence at the scene (notwithstanding, per Gaudron and Gummow JJ in *Osland*, that this may be anomalous in principle) whereas accessorial liability does not. This has been qualified, distinguished or ignored in other cases:

1. Presence does not have to be continuous (*Franklin*)
2. In *Sutseski*, there was an implicit interpretation that presence at the time of the agreement would suffice, contradicting the holding in *Osland* that presence at the time of the commission of the offence was required
3. In *Prochilo*, it was held that presence at the scene of drug supply was one way of proving participation in joint criminal enterprise but that participation could be proved by telephone intercept tapes and listening device tapes

**Proving agreement**

In the case of conspiracy, the agreement to commit a crime or other unlawful act is itself the crime. In the case on joint criminal enterprise, the agreement extends liability to all parties to the agreement, irrespective of which of them complete the conduct elements of the offence. The agreement threshold may be lower for a joint criminal enterprise, in that it could include ‘an unspoken understanding or arrangement amounting to an agreement’ (*Tangye* affirmed in *Kanaan*)

However there still needs to be ‘mutuality of assistance’ as opposed to a mere ‘common intention’ (*Taufahema*). In *Chishimba*, three men were convicted of sexually assaulting a drunk 15 year old girl who had passed out on a bed. Macfarlane JA ruled that the fact that the appellants were present in the bedroom when sexual intercourse took place did not, of itself, amount to encouragement for the purpose of establishing a joint criminal enterprise. Encouragement of sexual intercourse with the complainant was not proved beyond reasonable doubt and the conviction was quashed.

**Withdrawal from a joint criminal enterprise**

A withdrawal from a criminal enterprise requires ‘timely communication’ and the taking of reasonable steps to prevent the commission of the crime (*White v Ridley*). What is required to break the chain of causation and responsibility will depend upon the circumstances of each case. If, after communicating their withdrawal to the other participants, the accused honestly believes that they will not go ahead with the crime, no further ‘preventative steps’ will be required (*Truong*).

**11.2.3 Extended joint criminal enterprise**

Extended joint criminal enterprise is relevant when a participant commits another crime beyond that which was originally contemplated.

*McAuliffe and McAuliffe* (1995) 130 ALR 26

**Facts**

Sean McAuliffe, David McAuliffe and Matthew Davis armed themselves and went to a park near Bondi Beach to ‘roll’ or ‘rob’ or ‘bash’ someone. When the three youths arrived, they saw two men, who were the deceased and Mr Sullivan. They assaulted all three men and eventually, Sean McAuliffe kicked the deceased in the chest, causing him to fall from the footpath into a puddle on the rocks below. The defendants argued that the intention of the McAuliffe brothers was to assault but not cause grievous bodily harm and therefore, they were not guilty of murder

**Holding**

The trial judge was correct – the contemplation of the intentional infliction of grievous bodily harm as a possible incident of the venture would be a sufficient intention to establish murder

**Reasons**

* (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ) The appellants contended that the doctrine of common purpose required that the intentional infliction of grievous bodily harm be part of the common purpose before one party can be liable for murder arising out of the act of another
* In other words, the appellant contends that:
  + where the harm is not part of the common purpose; but
  + might only be incidentally caused as part of the joint criminal enterprise

then the appellant’s realisation of the possibility of intentional infliction of grievous bodily harm is not sufficient to render him liable for a murder committed by the other party.

* The doctrine of common purpose means that each of the parties to an arrangement is guilty of any another crime falling within the scope of the common purpose
* The scope of the common purpose extends to the probable *and the possible* consequences of the joint criminal enterprise

The extremely violent and unprovoked nature of the group attack by McAuliffe, McAuliffe and Davis, including its escalation beyond what was said to be the original plan to ‘rob or roll someone’ is illustrative of the sort of behaviour at which the extended joint criminal enterprise doctrine would appear to be directed.

**Individual foresight, not ‘common’ agreement**

Following McAuliffe, the distinction between additional crimes within the joint criminal enterprise and additional crimes outside the joint criminal enterprise is effectively redundant. The test is now the same whether the additional crime is regarded as inside or outside the joint criminal enterprise: foresight of a possibility that a crime would be committed. There is no longer any need for the prosecution to prove that the additional crime was in any respect jointly or commonly foreseen (notwithstanding that the crime is labelled extended *joint* criminal enterprise).

**The relationship between joint criminal enterprise and extended joint criminal enterprise**

In *Tangye*, Hunt CJ criticised prosecutors and stated that the Crown only needed to rely upon extended joint criminal enterprise where the offence charged is not the same as the enterprise agreed. However, in *Jacobs and Mehajer*, the defendants planned a robbery but it is unclear whether and to what extent they planned to harm persons found on site. Because of this, Wood CJ said that there was no reason why the prosecution could not simultaneously run arguments based on joint criminal enterprise and extended joint criminal enterprise.

**What must the secondary participant have foreseen as a possibility**

In the case of murder, the prosecution must establish that the accused foresaw both the conduct (actus reus) and the fault (mens rea) element (see, eg, *Barlow*). In *Gillard*, it was held that if the accused foresaw the possibility of shooting without foreseeing the intent, then he would be guilty of manslaughter, not murder. In *Nguyen* [2010] HCA 38, the prosecution case was that Nguyen was guilty of murder based on: joint criminal enterprise, extended joint criminal enterprise or accessorial liability. The High Court held that the trial judge had erred in failing to leave the alternative verdict of manslaughter to the jury.

It is likely that for crimes other than murder, if a lesser alternative is available then there is also an option to convict on that lesser alternative (see, eg, *King* [2004] NSWCCA 20). It seems that the accused must see only the extent of the harm, not the method by which harm is caused (*Keenan*). In England, the courts have taken the position that the type of weapon does matter (see, eg, *Bentley*) although Mantell LJ (in *O’Flaherty* [2004] EWCA Crim 526) said this should be a matter of evidence and not a principle of law.

**Must there be a foundational crime?**

The primary policy rationale for the rules relating to extended joint criminal enterprise is that individuals should refrain from engaging in joint criminal enterprises (crime X) where there is a risk that one of the participants will engage in another more serious crime (crime Y). The rule from *Miller* was that no foundational crime was required. However, this is no longer good law.

In *Taufahema*, the accused was one of a group of men detected by police travelling at excessive spend in a stolen car. One of the occupants (Sione Penisini) fired five gunshots into the windscreen of the police car. Constable McEnallay was struck and later died. Motekiai Taufahema was charged with murder and the Crown sought to rely on extended joint criminal enterprise. At trial, the prosecution argued that it was only necessary for an agreement to evade arrest and that Taufahema foresaw the possibility of murder. The jury returned a guilty verdict. On appeal, the NSW Court of Criminal Appeal held that the trial decision was not open as a matter of law because evading apprehension by a police officer is not of itself a crime.

The Crown appealed to the High Court and the majority (Gummow, Hayne, Heydon and Crennan JJ) were in no doubt that the trial had been ‘a flawed one’ because of errors summing up and because of the lack of a ‘foundational crime’. Interestingly, the majority held that if, hypothetically, at the second trial, the prosecution had advanced its case in terms of armed robbery, then a retrial would be warranted. The minority held that the prosecution should not be able to advance a different case at the eleventh hour.

Although the foundational crime does not have to be defined with absolute specificity, the judge and jury must know enough to determine:

1. whether it is criminal; and
2. whether the additional crime was within the scope of the common purpose

**Criticisms of the doctrine of extended joint criminal enterprise**

The most common criticism of the doctrine is that it is inconsistent with the fundamental principle of criminal responsibility because an individual can be convicted of an offence without committing the actus reus or possessing the mens rea, so long as they foresaw the possibility of its commission. It has been called ‘a serious disharmony in the law’ (per Kirby J in *Clayton*). This is because a principal offender could kill a victim and be not guilty of murder for foreseeing only the possibility (rather than probability) of death or grievous bodily harm. Yet the secondary offender, also foreseeing only a possibility, could be found guilty of murder based on the doctrine of extended joint criminal enterprise.

In *Powell*, Lord Hutton argued that the common law is based not solely on logic but also practical concerns, specifically the protection of the public against criminals operating in gangs. Lord Steyn further argued that it would be nearly impossible for the prosecution to prove that the secondary offender had the necessary intention for murder

In *Clayton*, Kirby J argued that confusion resulted where the prosecution advanced alternate cases of: acting in concert, aiding and betting, and extended joint criminal enterprise. For the first two at least intention to cause serious injury had to be proved. However, for the third proof of intention was unnecessary. The majority argued that ‘factual intersection…of two different sets of principles does not deny their separate utility’.