

In Search of a Model Code Provision for Complicity and Common Purpose in Australia

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Abstract

The purpose of this article is to identify the 'best practice' statutory provision for complicity and common purpose in Australia. The chosen vehicle for analysis is the *Criminal Code 1983* (NT). The Northern Territory Government's decision to incorporate Chapter 2 of the *Criminal Code 1995* (Cth), as Part IIAA of the *Criminal Code 1983* (NT),¹ affords a comparison between the new s 43BG and the old s 8, which contains a subjective focus on foresight and the reversal of the onus of proof. This means that two separate but mutually exclusive provisions operate side by side, depending on whether the particular offence is in Schedule 1 or not.² Such a comparison also provides a timely opportunity to contrast both provisions in the *Criminal Code 1983* (NT) with the equivalent sections in the Griffith Codes. This article is a defence of the original reverse onus of proof provisions for common purpose contained in ss 8 to 10 of the *Criminal Code 1983* (NT), which is justified on public policy grounds as the law is particularly concerned with criminal groups. The contrary

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¹ *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT). The Australian Capital Territory (ACT), like the Northern Territory, has adopted Chapter 2 of the *Criminal Code 1995* (Cth). Section 7 of the *Criminal Code 2002* (ACT) which deals with the application of Chapter 2 states: 'This chapter applies to all offences against this Act and all other offences against territory laws.' However, s 7 is qualified by s 8 'Delayed application of ch 2 to certain offences'. Section 8(1) states: 'Despite section 7, the provisions of this chapter (other than applied provisions) do not apply to pre-2003 offences unless – (a) the offence is omitted and remade (with or without changes); or (b) an Act or subordinate law expressly provides for the provision to apply to the offence.' Section 8(5) provides that 'this section expires on the default application date' which s 10(1) defines as meaning 1 July 2013 or another date as prescribed by regulation.

² Under s 43AA(2) of the *Criminal Code 1983* (NT), s 8 (Offences committed in prosecution of common purpose), s 9 (Mode of execution different from that counselled), and s 12 (Abettors and accessories before the fact) do not apply to Schedule 1 offences, which schedule presently only contains offences against the person, although it should be noted that other offences against the person such as s 181 'Serious harm' and s 186 'Harm' have still to be brought into Schedule 1. Instead, Schedule 1 offences come under Part IIAA. For present purposes, the focus is upon s 11.2 of the *Criminal Code 1995* (Cth) which has become s 43BG of the *Criminal Code 1983* (NT). Thus, for criminal responsibility for complicity and common purpose in relation to murder, a Schedule 1 offence, the relevant provision is now s 43BG in Part IIAA.

arguments, including that such a position is an overreach of criminal liability, are clearly addressed.

I INTRODUCTION

In searching for a model code provision for complicity and common purpose in Australia, there are four main choices: the common law; the Griffith Codes; the *Model Criminal Code*; and the original provisions of the *Criminal Code 1983* (NT). Only the Griffith Codes adopt an objective test, and only the original provisions contained in ss 8 to 10 of the *Criminal Code 1983* (NT) reverse the onus of proof. The *Criminal Code 1983* (NT) has been chosen as the vehicle for this analysis because it is presently in a hybrid transitional state while Chapter 2 of the *Criminal Code 1995* (Cth), the progeny of the *Model Criminal Code*, is progressively applied to all offences. Thus, the original provisions can be directly compared with the treatment of complicity and common purpose in the *Model Criminal Code*.

This article takes the law's concern over criminal groups, whether comprising violent gangs or criminal organisations, as a touchstone for the criterion of a model code provision for complicity and common purpose. Measured against such a touchstone, this article argues for the toughest provisions to deal with criminal groups, which are contained in ss 8 to 10 of the *Criminal Code 1983* (NT) via a subjective focus on foresight and the reversal of the onus of proof. The objective provisions of the Griffith Codes are rejected as outmoded and rooted in the nineteenth century with an underlying fault element of negligence. Both the Griffith Codes and the *Model Criminal Code* fail to adequately address 'recklessness'. On the one hand, the Griffith Codes do not deal with 'recklessness' at all, while on the other hand this article takes the view that the *Model Criminal Code's* provisions are restricted because of its definition of 'recklessness'. Consistent with such an approach, the treatment of withdrawal is considered to be too weak in both the Griffith Codes and the *Model Criminal Code*. As such, stricter common law principles are specifically incorporated in a suggested revision of the provisions, which it is hoped will serve as a template for other Code jurisdictions in Australia.

The law surrounding criminal responsibility and other parties to offences has historically evidenced both complexity and controversy. The terms 'complicity', 'common purpose' and 'acting in concert' have caused the courts and law reform bodies³ some difficulty, and case law in this area of

³ See for example Law Reform Commission of New South Wales, *Complicity*, Consultation Paper No 2 (2008).

the law has also been the subject of extensive academic critique.⁴ As the High Court has acknowledged '[t]hose terms — common purpose, common design, concert, joint criminal enterprise — are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime'.⁵ The reference to 'an additional means' recognises that liability can attach beyond accessory before the fact (aids, abets, counsels or procures) and principal in the second degree (present at the scene and aids or abets). The High Court defined a common purpose as arising 'where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime'.⁶ This need not be express, can be inferred from all the circumstances, and encompasses 'any other crime falling within the scope of the common purpose which is committed in carrying out that purpose'.⁷

The law as stated above is consistent with the High Court's decision in *Johns v The Queen*.⁸ However, in *McAuliffe v The Queen*, the High Court was required 'to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture'.⁹ The High Court followed¹⁰ Lord Lane CJ in *R v Hyde*¹¹ who was in turn enunciating the principle identified by Sir Robin Cooke in *Chan Wing-Siu v The Queen*.¹²

If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in

⁴ C Cato, 'Foresight of Murder and Complicity in Unlawful Joint Enterprises Where Death Results' (1990) 2 *Bond Law Review* 182, where the author argues that the test should be based upon foresight of probable consequences and not possible consequences; S Bronitt, 'Defending *Giorgianni* — Part One: The Fault Required for Complicity' (1993) 17 *Criminal Law Journal* 242 argues for a restrictive fault element for common purpose based on intent in excluding both knowledge and recklessness; S Odgers, 'Criminal Cases in the High Court of Australia: *McAuliffe and McAuliffe*' (1996) 20 *Criminal Law Journal* 43 suggests that the High Court has introduced a new doctrine of 'reckless accessoryship' akin to a new felony murder rule for accessories; S Gray, 'I Didn't Know, I Wasn't There: Common purpose and the Liability of Accessories to Crime' (1999) 23 *Criminal Law Journal* 201 argues for the abolition of the doctrine of common purpose in suggesting that this would simplify the law without altering the balance between the Crown and the defendant.

⁵ *McAuliffe v R* (1995) 183 CLR 108, 113 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

⁶ *Ibid* 114.

⁷ *Ibid*.

⁸ (1980) 143 CLR 108.

⁹ *McAuliffe v R* (1995) 183 CLR 108, 115 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

¹⁰ *Ibid*.

¹¹ (1991) 1 QB 134.

¹² (1985) AC 168, 175.

the course of the venture. As Professor Smith points out,¹³ B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder.¹⁴

In *Gillard v The Queen*,¹⁵ the High Court confirmed the above principle in *McAuliffe*, with Hayne J summing up common purpose as requiring 'consideration of what an accused foresaw, not just what the accused agreed would be done'.¹⁶ Criminal responsibility flows from continued participation 'despite having foreseen the possibility of events turning out as in fact they did'.¹⁷ Three years later, in *Clayton v The Queen*,¹⁸ the High Court declined to reopen its earlier decisions in *McAuliffe* and *Gillard* on the law relating to extended common purpose. Six members of the High Court restated the principle of foresight of the possibility of a murderous assault as follows:

If a party to a joint criminal enterprise [interchangeably referred to as 'acting in concert'] 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.¹⁹

¹³ J C Smith, 'Commentary on *Regina v Wakely*' (1990) *Criminal Law Review* 119, 120–121.

¹⁴ *Regina v Hyde* (1991) 1 QB 134, 139 (Lord Lane CJ).

¹⁵ (2003) 219 CLR 1. Gillard drove a man named Preston, in a van Gillard had stolen, to a car repair workshop where Preston shot dead two men while Gillard waited in the van. Gillard drove Preston away and later destroyed the van. Both Preston and Gillard were convicted of murder. The High Court allowed Gillard's appeal in holding that the trial judge should have allowed a case of manslaughter to go to the jury, on the basis that manslaughter was open if Gillard foresaw that Preston might shoot the two men during a robbery but without foreseeing intent to kill or cause grievous bodily harm. The High Court held that it was not possible to say that despite the trial judge's error there was no miscarriage of justice.

¹⁶ *Ibid* 38. As all Australian States retain a constructive or felony murder rule, if Preston had been charged with felony murder rather than murder, then arguably all Gillard would have needed to foresee would have been the trigger offence of the armed robbery. Gillard's defence was that he believed he was involved in an unarmed robbery. It may be objected that it is unfair to an accessory like Gillard to arrive at a murder conviction via the double reach of the felony murder rule in combination with the extended common purpose rule. However, felony murder remains on the statute books for policy reasons and 'reflects a societal judgment that an intentionally committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not'. D Crump and S W Crump, 'In Defense of the Felony Murder Doctrine' (1985) 8(2) *Harvard Journal of Law and Public Policy* 359, 363.

¹⁷ *Gillard v The Queen* (2003) 219 CLR 1, 38.

¹⁸ (2006) 81 ALJR 439. In *Clayton*, three people were convicted of murder when they armed themselves with metal poles, wooden poles and a carving knife and went to a house where the victim was subjected to a prolonged attack during which he was severely beaten and stabbed numerous times, with one of the stab wounds proving fatal.

¹⁹ *Ibid* 443 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

In 1992, the *Model Criminal Code Officers Committee* (MCCOC) produced its Final Report on *General Principles of Criminal Responsibility*.²⁰ Inter alia, the MCCOC attempted to clarify and reform the law of complicity, but in the end left the fundamentals intact such as retaining the dual distinction between accessory before the fact and common purpose.²¹ However, the MCCOC report, and subsequently the *Criminal Code* (Cth), were silent in terms of ‘acting in concert’ liability and this did not form part of the scheme of complicity liability until the insertion of s 11.2A ‘Joint Commission’ into the *Criminal Code* (Cth) in 2010²² rectified the absence of ‘acting in concert’ to deal with organised crime.²³

The doctrine of ‘acting in concert’ requires the parties to be present, unlike the doctrine of common purpose, although both doctrines may overlap depending on the factual matrix which may then in turn create complex jury directions.²⁴ Arguably, in *Osland v The Queen*,²⁵ the High Court recognised ‘acting in concert’ as a new primary form of joint liability. McHugh J stated that under this category ‘the liability of each person present as a result of the concert is not derivative but primary’ (principal in the first degree) such that ‘each of the persons acting in concert is equally responsible for the acts of the other or others’.²⁶ McHugh J cited *R v Lowery and King (No 2)*,²⁷ *Tangye*,²⁸ and an academic text²⁹ as authority. McHugh J observed that the correct

²⁰ *Model Criminal Code Officers Committee* (MCCOC), *General Principles of Criminal Responsibility*, Final Report (1992).

²¹ Ibid 88–93. The MCCOC had proposed to abolish the common purpose rule in the Discussion Draft but, at 91: ‘[w]ith the abolition of recklessness generally from complicity, it was decided to restore common purpose in a modified form based on the general test of recklessness used in the Code’.

²² *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth). Section 11.2A ‘Joint Commission’ deals with parties who enter into an agreement (which may consist of a non-verbal understanding) to commit an offence, and covers offences committed in accordance with the agreement (of the same type) and in the course of carrying out the agreement (a person is reckless about the commission of the joint offence that another party in fact commits in the course of carrying out the agreement).

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6967 (Robert McClelland, Attorney-General).

²⁴ Justice Geoff Eames, ‘Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?’ (2007) 29 *Australian Bar Review* 161. See also *R v Taufahema* (2007) 228 CLR 232. The facts were that four men on parole went for a ride together in a stolen car each armed with a loaded stolen revolver. The car was speeding and was pursued by a highway patrol car but collided with an obstacle. All four men leapt from the car and one of them (not Taufahema) shot at the windscreen of the patrol car killing the policeman inside. The trial highlighted the complexity of administering a criminal trial and of explaining the law of complicity.

²⁵ (1998) 197 CLR 316.

²⁶ *Osland v The Queen* (1998) 197 CLR 316, 342.

²⁷ [1972] VR 560, 560 (Smith J).

²⁸ (1997) 92 A Crim R 545, 556–557 (Hunt CJ at CL).

²⁹ P Brett, P L Waller and C R Williams, *Criminal Law* (Butterworths, 1997) 465.

principle 'is that they are all equally liable for the acts that constitute the actus reus of the crime'³⁰ and is accurately stated by Brett, Waller and Williams as follows:³¹

[E]ven if only one participant performed the acts constituting the crime, each will be guilty *as principals in the first degree* if the acts were performed in the presence of all and pursuant to a preconceived plan. In this case, the parties are said to be acting in concert.³²

Osland was decided in 1998, yet it took a further 12 years and the increasing prominence of organised crime to prompt the insertion of s 11.2A Joint Commission into the *Criminal Code* (Cth) in 2010. Certainly, the recognition by the High Court of 'acting in concert' complicated the existing law dealing with complicity and common purpose. A further complication emerges when it is understood that cases like *Giorgianni v R*³³ are in conflict with 'a line of cases'³⁴ which on true analysis, impose secondary liability on the basis of something like recklessness'.³⁵ In light of the various forms of derivative and primary liability constituted by criminal complicity, this article seeks to identify the most appropriate statutory provision to cover criminal complicity.

II THE ORIGINAL STATE OF THE LAW OF COMPLICITY AND COMMON PURPOSE IN THE NORTHERN TERRITORY

A Common Purpose

Part 1 of the *Criminal Code* (NT) is entitled 'Introductory Matters' and Division 2 is captioned 'Presumptions' which includes s 8 dealing with the presumption for offences committed in prosecution of common purpose. For common purpose, s 8 contains a rebuttable presumption that each of the parties aided or procured the perpetrator to commit the offence unless he or she could prove on the balance of probabilities lack of foresight that the commission of the offence was a possible

³⁰ *Osland v The Queen* (1998) 197 CLR 316, 343.

³¹ Brett, Waller and Williams, above n 29.

³² *Osland v The Queen* (1998) 197 CLR 316, 343 (emphasis in original).

³³ (1985) 156 CLR 473. This case concerned a truck with defective brakes which was involved in a fatal accident when the brakes failed. The owner of the truck, Giorgianni, was not present at the time of the accident. The High Court held that, on a charge of culpable driving, Giorgianni could be held liable only if he knew that the driver was going to commit an offence and he intended to assist. Recklessness was insufficient and knowledge meant actual knowledge.

³⁴ *Johns v The Queen* (1980) 143 CLR 108; *Miller v The Queen* (1980) 32 ALR 321; *McAuliffe and McAuliffe v R* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1.

³⁵ D Lanham, B Bartal, R Evans and D Wood, *Criminal Laws in Australia* (Federation Press, 2006) 500. 'The language is that of common purpose but in reality it is foresight rather than purpose which is being punished' citing Gray, 'I Don't Know, I Wasn't There' above n 4, 201.

consequence.³⁶ Once the Crown is able to prove beyond reasonable doubt the common intention to prosecute an unlawful purpose, a reversal of the onus of proof operates under a subjective test of foresight.

8 Offences committed in prosecution of common purpose

(1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed by one or some of them, the other or each of the others is *presumed* to have aided or procured the perpetrator or perpetrators of the offence to commit the offence *unless he proves he did not foresee the commission of that offence was a possible consequence* of prosecuting that unlawful purpose. (Emphasis added.)

(2) Two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another when they agree to engage in or concur in engaging in any conduct that, if engaged in, would involve them or some or one of them in the commission of an offence or a tort.

Thus, for example, under s 8 above the ‘accessories in *McAuliffe*³⁷’ would need to prove that they did not foresee murder as a possible consequence of their plan to “roll” or “bash” someone.³⁸ This is a subjective test of foresight. There is a legal onus of proof being placed on the accused on the balance of probabilities, not a mere evidential onus as a reasonable possibility.

Similarly, Gillard would have to have proved that he did not foresee Preston’s intent to kill or cause grievous bodily harm as a possible consequence during an armed robbery, when both men were disguised and Gillard made a telephone call to establish the key victim was at the workshop. Again, Clayton would have to have proved that he did not foresee murder as a possible consequence during a prolonged attack, in which he was a participant, when the victim was stabbed numerous times. Finally, Taufahema would need to prove that he did not foresee murder as a possible consequence, when four armed men on parole carrying unlicensed firearms in a stolen car travelling at excessive speed were

³⁶ Similar rebuttable presumptions are contained in s 9 ‘Mode of execution different from that counselled’ and s 10 ‘Death or serious harm caused in the course of violence of 2 or more persons’. Section 9 is similar in form to s 9 of the Griffith Codes. Section 10, which has no counterpart in the Griffith Codes, is constructed to avoid each defendant being acquitted because of the Crown’s inability to prove which defendant actually struck the final fatal blow. However, unlike ss 8 and 9, s 10 does apply to Schedule 1 offences. Section 10 is not included in s 43AA(2) which contains a list of provisions of Part 1 which do not apply in relation to Schedule 1 offences, such as s 43AA(2)(f) excluding s 8 and s 43AA(2)(g) excluding s 9. The non-inclusion of s 10 to Schedule 1 offences would appear to be necessary given that sub-s (7) of 11.2 ‘Complicity and common purpose’ of the *Criminal Code* 1995 (Cth) does not appear in s 43BG of the *Criminal Code* 1983 (NT).

³⁷ (1995) 183 CLR 108.

³⁸ S Gray, *Criminal Laws: Northern Territory* (Federation Press, 2004) 158–159.

chased by a police patrol car and caught when the stolen car hit a gutter and stopped.

The uniqueness of s 8 above needs to be emphasised. Arguably, s 8 represents a halfway house between the purely objective approaches to fault liability for common purpose in the Griffith Codes of Queensland and Western Australia, and the subjective approaches of common law jurisdictions such as New South Wales represented by the line of High Court cases since *McAuliffe*. Lanham et al argue that '[t]he Northern Territory provision is close to the common law in basing liability on foresight of possibility but it extends the common purpose to torts and inverts the burden of proof'.³⁹ It is unfortunate that the New South Wales Law Reform Commission appears to have overlooked s 8 *Criminal Code* (NT) in summarising the reform options available.⁴⁰

Bronitt and McSherry also state that common purpose in s 8(1) 'follows the common law approach'⁴¹ which the learned authors describe as 'a distinct form of extended secondary liability',⁴² where accessorial liability is imposed for offences that either fall within the scope of the original criminal agreement or fall outside that scope but are foreseen as a possible consequence.⁴³ Thus, the doctrine of common purpose applies to two different situations.⁴⁴ However, as Clough and Mulhern note, s 8(1) differs from the common law because 'the onus of proving lack of foresight is on the accused'⁴⁵ which follows from the wording of the onus of proof expressed in s 8(1).

What is the rationale for a reversal of the onus of proof and what justification is there for the State placing a legal burden of proof on the defendant? The lurking spectre of *Woolmington v DPP*⁴⁶ and the lustre of the famous golden thread speech of Viscount Sankey inevitably appears whenever the onus of proof is raised. In this context, it should be recalled that Viscount Sankey qualified 'one golden thread' as 'subject also to any statutory exception'.⁴⁷

³⁹ Lanham et al, above n 35, 502.

⁴⁰ Law Reform Commission of New South Wales, above n 3, [6.13].

⁴¹ S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook, 2nd revised ed, 2005) 380.

⁴² Ibid.

⁴³ For extended common purpose the requisite degree of contemplation is 'an act contemplated as a possible incident of the originally planned venture': *R v Johns* [1978] 1 NSWLR 282, 290 (Street CJ), affirmed in *Johns v R* (1980) 143 CLR 108, 130–131 (Mason, Murphy and Wilson JJ).

⁴⁴ *Osland v R* (1998) 197 CLR 316, 327 (Gaudron and Gummow JJ).

⁴⁵ J Clough and C Mulhern, *Criminal Law* (LexisNexis Butterworths, 2nd ed, 2004) [11.64].

⁴⁶ *Woolmington v DPP* [1935] AC 462.

⁴⁷ Ibid 481.

However, as has been pointed out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*,⁴⁸ the Senate Scrutiny of Bills Committee ‘usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged’.⁴⁹ Significantly, for the purposes of this article, whilst the matter being within the defendant’s knowledge has not been considered sufficient justification, the Senate Committee ‘is most inclined to support reversal where the defence consists of pointing to the defendant’s state of belief’.⁵⁰ Given that foresight is at the heart of extended common purpose, the Committee’s view appears to be promising.

Nevertheless, there are problems using reverse onus provisions in jurisdictions with human rights legislation such as Victoria,⁵¹ as the recent case of *R v Momcilovic*⁵² amply demonstrates. Prohibited drugs were found in the applicant’s apartment. Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) imposed on a defendant the legal burden of disproving possession on the balance of probabilities. However, under s 25(1) of the Victorian *Charter of Human Rights*, ‘a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law’. The Victorian Court of Appeal held that ‘s 5 cannot be interpreted consistently with s 25(1) of the *Charter*, although this does not affect the validity of s 5’.⁵³ The Court of Appeal issued a declaration of inconsistent interpretation under s 36(2) of the *Charter*, and the matter is now under review by the Victorian Government.

Notwithstanding the Senate Scrutiny of Bills Committee and human rights legislation, the case for a reverse onus of proof for common purpose rests on public policy grounds. The Law Commission of England and Wales in its 2007 report *Participating in Crime*⁵⁴ gave its reasons for retaining the doctrine of extended common purpose under the ‘*Chan Wing-Sui* principle’,⁵⁵ which have been usefully summarised by the New South Wales Law Reform Commission in its own 2008 report.⁵⁶ This article contends that some of the reasons, which are rooted in public

⁴⁸ Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, Australian Government (December 2007).

⁴⁹ *Ibid* 30.

⁵⁰ *Ibid* 31.

⁵¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic). See also the *Human Rights Act 2004* (ACT).

⁵² [2010] VSCA 50 (17 March 2010) (Maxwell P, Ashley and Neave JJA).

⁵³ *Ibid* [154].

⁵⁴ Law Commission of England and Wales, *Participating in Crime*, Law Commission Report No 305 (2007) [3.140], [3.141], [3.142], [3.146], [3.147].

⁵⁵ *Chan Wing-Siu v The Queen* (1985) AC 168.

⁵⁶ Law Reform Commission of New South Wales, above n 3, [6.11].

policy, are equally valid in support of the reverse onus of proof for common purpose.

Specifically, any joint criminal venture 'has the potential to escalate and involve the commission of more serious offences'.⁵⁷ Furthermore, a participant with foresight of a range of possible offences 'should not be able to pick and choose which of these offences to be liable for, simply on the basis of his or her attitude towards their occurrence'.⁵⁸ Then, there is always the opportunity for one of the participants to 'withdraw from the criminal venture by negating the effect of the original agreement'⁵⁹ before the commission of the offence.

Legislative support for a reversal of the onus of proof for incitement offences can be found in s 50 of the *Serious Crime Act 2007* (UK). Part 2 of the *Serious Crime Act* (which came into force on 1 October 2008) replaced the common law inchoate offence of incitement with three new offences dealing with encouraging or assisting the commission of an offence (ss 44 to 46). Section 50 'Defence of acting reasonably' sets out that it will be a defence to the offences in Part 2 if the person proves (reverse onus) that he or she acted reasonably in the circumstances he or she was aware of or reasonably believed existed. Section 50(3) sets out factors (not exhaustive) to be considered by the court in determining whether an act was reasonable in the circumstances, such as the seriousness of the anticipated offence, and any purpose or authority for or by which the person claims to have been acting.

It is acknowledged that casting the net of criminal liability for extended common purpose too wide may compromise the legitimacy of the criminal law in cases which implicate defendants for some of the most serious offences. Kirby J is a prominent critic of the current test of extended common liability in homicide cases, describing the test as the 'overreach of criminal liability'.⁶⁰ However, for homicide, given that the prosecution is rarely in a position to contest the version of events given by the defendant(s), as often the only other witness has been killed by the defendant(s), this is a strong justification for reversing the onus of proof under extended common purpose. It is true that the prosecution has the ability to present evidence to contest the defendant's version of events, but this has to be tempered by judicial directions to the jury to decide the case on the facts most favourable to the defendant. Such an argument in support of a reverse onus was endorsed by the Queensland Law Reform Commission in relation to the partial defence of provocation, and recently

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ *Clayton v The Queen* (2006) 81 ALJR 439, 461.

enacted by the Queensland Parliament.⁶¹ Furthermore, in a 1997 study it was found that 40 per cent of all homicides were perpetrated by more than one offender.⁶²

Applying a public confidence test in the legitimacy of the criminal law to the quartet of cases that went to the High Court previously discussed in this article, namely, *McAuliffe*, *Gillard*, *Clayton*, and *Taufahema*, given the facts in each case the only question is whether they should all have been convicted of murder (as opposed to one of the four being convicted of manslaughter).⁶³ A reverse onus of proof would not only have made four murder convictions more likely, but also would have lessened the scope for appeals. Arguably, this is in keeping with public expectations when more than one person is knowingly involved in a violent crime.

By contrast to a subjective test with a rebuttable presumption in s 8(1) *Criminal Code* (NT), under the Griffith Codes which 'depart from the common law slightly',⁶⁴ the test is objective as to whether the offence was a probable consequence of the common intention to prosecute an unlawful purpose. Section 8 of the *Criminal Code* 1913 (WA) has been singled out below because unlike either its 'sister' Code in Queensland⁶⁵ or the *Criminal Code* (NT) it contains a specific section on withdrawal. It is apparent that s 8(2) (set out below) has three elements: (i) withdrawal;

⁶¹ Queensland Law Reform Commission, 'A Review of the Excuse of Accident and the Defence of Provocation', Report No 64 (2008) [20.225], which recommendation has now become subsection (7) of s 304 of the *Criminal Code* 1899 (Qld) which states: 'On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only', following the successful passage of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

⁶² C Carcach, 'Youth as Victims and Offenders of Homicide' (Trends and Issues in Crime and Justice, No 73, *Australian Institute of Criminology*, 1997) 4.

⁶³ Motekiai Taufahema at retrial pleaded guilty to manslaughter and was sentenced to 11 years imprisonment with eligibility for parole after 7 years. See *R v Taufahema* [2007] NSWSC 959 (31 August 2007) (Grove J). Gillard at retrial was found unfit to stand trial by reason of mental impairment. Under s 269MB *Criminal Law Consolidation Act* 1935 (SA), Nyland J found the objective facts of two murders proved and made a supervision order with a mandatory limiting term fixed of life. See *R v Gillard* [2008] SASC 38 (22 February 2008) (Nyland J).

⁶⁴ Bronitt and McSherry, above n 41, 380. The authors suggest that the Griffith Codes 'continue to apply the nineteenth century approach to fault, adopting an objective test in assessing whether the crime committed by the principal offender was a probable consequence of carrying out the common purpose'. As Goode has pointed out, 'the Griffith Codes did not, and do not, deal with the (for them) entirely novel idea of recklessness'. M R Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 159. Indeed, as Fairall has observed, '[i]n Queensland and Western Australia, courts have interpreted the Griffith Codes in such a way that negligence is the underlying fault standard'. P Fairall, *Review of Aspects of the Criminal Code of the Northern Territory Report*, Department of Justice (NT) (March 2004) 41, citing as authority *R v Taiters* (1996) 87 A Crim R 507, 512.

⁶⁵ See s 8 *Criminal Code* 1899 (Qld). See also s 4 *Criminal Code* 1924 (Tas) which adopts the objective test.

(ii) communication of the withdrawal to each person involved; and (iii) the taking of reasonable steps to prevent the commission of the offence. A fuller discussion of withdrawal is undertaken during a later examination of s 43BG(5) which also adopts the 'taking reasonable steps' approach as the test for withdrawal.

8. Offences committed in prosecution of common purpose

(1) When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a *probable consequence* of the prosecution of such purpose, each of them is deemed to have committed the offence.

(2) A person is not deemed under subsection (1) to have committed the offence if, before the commission of the offence, the person

- (a) *withdrew* from the prosecution of the unlawful purpose;
- (b) by words or conduct, communicated the *withdrawal* to each other person with whom the common intention to prosecute the unlawful purpose was formed; and
- (c) having so *withdrawn*, took all reasonable steps to prevent the commission of the offence.

(Emphasis added.)

As Kenny points out the probable consequence test in s 8(1) of the *Criminal Code 1913* (WA) 'imports a remoteness test into the provision ... because of the objective nature of the test'.⁶⁶ As Gibbs J observed in *Stuart* the question is 'not whether the accused was aware that its commission was a probable consequence'⁶⁷ but rather the test for probable consequence is 'that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act'.⁶⁸

Recent High Court authority on the meaning of 'probable consequence' is contained in *Darkan v the Queen*⁶⁹ where the majority (comprising Gleeson CJ, Gummow, Heydon and Crennan JJ) found that the trial judge had 'failed to steer a course between saying that a probable consequence

⁶⁶ R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (Butterworths, 2008) 9.37.

⁶⁷ (1974) 134 CLR 426, 442.

⁶⁸ *Ibid.*

⁶⁹ (2006) 227 CLR 373. Darkan and two other men had been recruited by the victim's former partner to give the victim 'a touch up' and to 'fix him up'. None of the men knew the victim. The victim was hit with a pickaxe handle and kicked repeatedly, with one of the men wearing steel-capped boots. The victim was crying for help. His body was found the next day with severe bruising, a broken jaw and facial lacerations. The cause of death was aspiration of blood due to severe facial trauma. One of the men gave evidence for the prosecution in return for receiving a reduced sentence.

was one which was more likely to occur than not ... and saying that a probable consequence was a real or substantial possibility or chance'.⁷⁰ In seeking to clarify the law, the majority held that the expression 'probable consequence' means that 'the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible'.⁷¹ In framing a correct jury direction under s 8 the majority concluded that the commission of the offence 'had to be not merely possible, but probable in the sense that it could well have happened in the prosecution of the unlawful purpose'.⁷²

Darkan was solely concerned with the interpretation of the two words 'probable consequence'. The appellants argued that the trial judge should have said nothing about the meaning of a 'probable consequence',⁷³ relying on a statement by Sir Samuel Griffith that '[a] Code ought, if possible, to be so framed as to require no definitions of terms in common use in ordinary speech or writing'.⁷⁴ The majority rejected this view stating that the meaning of a 'probable consequence' is 'not relatively simple, but differs with context',⁷⁵ and that judges should not be precluded from answering juror questions about the meaning of such expressions.⁷⁶

The test of 'probable consequence' was further considered by the High Court in *R v Keenan*.⁷⁷ Keenan, in company with three other men, had confronted the victim, Coffey, who allegedly had failed to pass on \$7,000 collected for Keenan. One of the men, Booth, was carrying a small baseball bat. Another of the men, Spizzirri, allegedly produced a sawn-off gun and shot Coffey several times in the spine leaving him a paraplegic. There was no evidence that using a gun had been discussed beforehand. Keenan was convicted of doing grievous bodily harm with intent and appealed.

The Court of Appeal acquitted Keenan holding that a jury, properly instructed, could not have excluded the inference that Spizzirri was acting independently of the common planned intention to the attack on Coffey. The Crown appealed to the High Court which unanimously allowed the appeal. The High Court held s 8 of the *Criminal Code* (Qld) required the jury to consider firstly, what the common purpose was, and, then,

⁷⁰ Ibid 396–397.

⁷¹ Ibid 398.

⁷² Ibid.

⁷³ Ibid 393.

⁷⁴ Sir Samuel Griffith, 'An Explanatory Letter to the Honourable the Attorney-General', *Draft of a Code of Criminal Law prepared for the Government of Queensland*, (1897) viii.

⁷⁵ *Darkan v The Queen* (2006) 227 CLR 373, 395.

⁷⁶ Ibid 394–395.

⁷⁷ *R v Keenan* (2009) 236 CLR 397.

secondly, 'whether the shooting was an offence of such a nature that its commission was a probable consequence of carrying out that purpose'.⁷⁸

Hayne J held that the Court of Appeal had misdirected itself by treating absence of evidence that Keenan knew that a gun had been taken to the scene as determinative, because focus on the weapon used was an incomplete description of the common purpose, which was alleged to be inflicting serious harm on the victim, Coffey. The second question posed by s 8, was the offence committed of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose, 'can be answered in the affirmative even if the possibility that the conduct actually committed would occur was not shown to have been adverted to by any participant in the common intention'.⁷⁹

Hayne J pointed out that the formation of the common purpose 'may not have been accompanied by any consideration, let alone detailed consideration, of what was to be done, how it was to be done, and who was to do what to bring about the intended purpose', and cited Gibbs J in *Stuart v The Queen*⁸⁰ in support. The test to be applied under s 8 was identified by Kiefel J as referring to 'the probable consequences of the common plan, not what the parties might have foreseen'.⁸¹ Thus, it matters not under such an objective test that the parties did not consider the possibility that the type of offence actually committed would be committed, or be aware that it was a probable consequence.

Lanham et al state that s 8(1) departs 'more radically from the current common law by making the indirect party liable for an offence committed by the direct party if that offence is an objectively probable consequence of the common unlawful purpose'.⁸² For this reason, the New South Wales Law Reform Commission suggests (and the author respectfully agrees) that this test 'is arguably harder to establish by a prosecution than

⁷⁸ Public Information Officer, High Court of Australia, Judgment Summary: *R v Francis Robert Keenan* (2 February 2009).

⁷⁹ *R v Keenan* (2009) 236 CLR 397, 424 (Hayne J).

⁸⁰ (1974) 134 CLR 426, 442 (Gibbs J): 'in fact the nature of the offence [may be] such that its commission was a probable consequence of the prosecution of the common unlawful purpose'.

⁸¹ *R v Keenan* (2009) 236 CLR 397, 434.

⁸² Lanham et al, above n 35, 502–503, citing inter alia *Stuart v The Queen* (1974) 134 CLR 426 and *R v Hind and Harwood* (1995) 80 A Crim R 105. The learned authors observe at 503 that: 'Probability is to be determined not by the abstract definition of the wrong which makes up the unlawful purpose but by the circumstances in which the wrong is committed ... Probability by itself is not enough. The ultimate crime must be committed in prosecution of the common purpose.' Thus, in *R v Phillips* [1967] Qd R 237, the common purpose was to assault the victim and the direct party committed robbery, therefore the robbery did not occur in the prosecution of the common purpose and consequently liability was not made out. In *Phillips*, external factors were considered in determining the scope of the common intention, with the court taking the perplexing view that robbery would not ordinarily occur in the common prosecution of an assault.

the “possibility” test⁸³ at common law.⁸⁴ The rationale for supporting extended common purpose (or ‘reckless accessoryship’)⁸⁵ rather than limiting fault to intention based on knowledge has, with respect, been well expressed by Hayne J in *Gillard v The Queen*:

If liability is confined to offences for the commission of which the accused has previously agreed, an accused person will not be guilty of any form of homicide in a case where, despite foresight of the possibility of violence by a co-offender, the accused has not agreed to its use. That result is unacceptable. That is why the common law principles have developed as they have.⁸⁶

In summarising the above authority on the meaning of the words ‘probable consequence’ in s 8 of *Criminal Code* (Qld), extension of criminal responsibility is confined to only such offences as are objectively the probable consequence of the common intention. Thus, foresight of the offence is immaterial; rather, the meaning of probability varies with the context and is to be contrasted with possibility. The focus in *Darkan* was on a meaning of a probability of less than 50–50 but must be probable as distinct from possible, which was refined in *Keenan* to refer to the probable consequences of the common plan as opposed to what the parties might have foreseen.

The question then arises, in the search for the most appropriate statutory provision for common purpose, whether an objective test of ‘probability’ based on the ordinary person test as per s 8(1) *Criminal Code* (WA) is to be preferred to a subjective test⁸⁷ that the defendant did not foresee the commission of the offence as a possible consequence as per s 8(1) *Criminal Code* (NT). It is here contended that the intention of the wording of s 8(1) *Criminal Code* (NT), by specifying the reversal of proof against a possible consequence, was to raise the bar above the

⁸³ Law Reform Commission of New South Wales, above n 3, [6.13]. The Commission took this view because the probability test ‘makes the secondary participant liable for the offence committed by the primary participant if that offence is an objectively probable consequence of the common unlawful purpose’ citing Lanham et al, above n 82.

⁸⁴ Interestingly, while at the original trial Keenan was convicted, Booth, who was carrying a small baseball bat, was found not guilty. The jury could not reach a verdict on Spizzirri, who was retried and found not guilty. See above n 78.

⁸⁵ See Odgers, ‘Criminal Cases in the High Court of Australia: *McAuliffe and McAuliffe*’, above n 4.

⁸⁶ *Gillard v The Queen* (2003) 219 CLR 1, 38.

⁸⁷ Bronitt and McSherry, above n 41, 380, note that the Gibbs Committee regarded the objective test in s 8(1) *Criminal Code* (WA) as ‘outmoded and recommended the adoption of the current common law approach’ citing Attorney General’s Department (Cth), Review Committee of Commonwealth Criminal Law, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) 205–206. The authors further observed that the MCCOC, *General Principles of Criminal Responsibility*, Final Report (1992) 89, ‘similarly recommended a subjective rather than objective approach’.

common law (which is in turn above the objective test in the Griffith Codes) for defendants seeking to avoid being caught under common purpose. It follows that if a legislature determines for policy reasons in the face of gang violence and organised crime to cast a wide net for common purpose (effectively a double bar jump over the objective test), then the use of 'possible' instead of 'probable' and the placing of a legal burden on the defendant on the balance of probabilities is the more effective option.

B Complicity

From its earliest days our criminal law has recognised that a person may be convicted of committing a crime that was in fact committed by someone else.⁸⁸

As with the amended *Criminal Code* (Cth) following the insertion of s 11.2A, Part 1 of the *Criminal Code* (NT) has two distinct sections dealing with common purpose (s 8) and parties to offences (s 12 dealing with abettors and accessories before the fact). Accessorial liability arises where there is no agreement (as opposed to joint criminal enterprise) to commit a crime among participants.⁸⁹ As previously mentioned, s 8 operates such that once the Crown is able to prove beyond reasonable doubt the common intention to prosecute an unlawful purpose, the defendant faces a rebuttable presumption that he or she did not subjectively foresee the offence committed. Section 12 below overlaps⁹⁰ with s 8 but as opposed to a rebuttable presumption, adopts a deeming provision whereby aiders, counsellors or procurers to the offence are deemed to have taken part. Thus, for example, once the Crown proves a person's involvement in the offence under s 12(1)(a) below, which deals with a person aiding another in committing the offence, that person may be charged with actually committing the offence as this subsection 'applies where the accessory is physically present during the commission of the offence'.⁹¹

Clearly, the prosecution would favour charging a person under s 8 because of the reverse onus of proof as opposed to utilising s 12. Herein is to be found a major limitation of s 43BG in the new Part IIAA, in that

⁸⁸ J Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 *Law Quarterly Review* 453. The law of complicity has been stated to be suffering from 'fundamental doctrinal obscurity': A Ashworth, 'General Principles of Criminal Law' in D Feldman (ed), *English Public Law* (Oxford University Press, 2004) [24.58].

⁸⁹ A Simester and R Sullivan, *Criminal Law: Theory and Doctrine* (Hart, 2003) 221.

⁹⁰ The doctrine of complicity has three categories: joint criminal enterprise, extended common purpose and accessorial liability. In practice there is considerable overlap between them. See D Brown, D Farrier, S Egger, L McNamara and A Steel, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (Federation Press, 4th ed, 2006) [11.4.1].

⁹¹ Gray, above n 38, 153.

combining complicity and common purpose in the one section limits the reach of the common purpose provision, and also acts to restrict statutory flexibility in terms of the deployment of rebuttable presumptions through the use of separate sections. The critical point here is that the scope of criminal responsibility of an accessory which falls to be decided under s 12 is extended through the operation of sections 8, 9 and 10 *Criminal Code* (NT).⁹²

Division 3 Parties to Offences

12 Abettors and accessories before the fact

(1) When an offence is committed, the following persons also are deemed to have taken part in committing the offence and may be charged with actually committing it:

- (a) every person who aids another in committing the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another to commit the offence; and
- (c) every person who counsels or procures another to commit the offence.

(2) A person who counsels or procures another to commit an offence may be charged with committing the offence or counselling or procuring its commission.

(3) A finding of guilt of counselling or procuring the commission of an offence entails the same consequences in all respects as a finding of guilt of committing the offence.

Section 12 above has its origins in s 7 *Criminal Code* (Qld) which is entitled 'Principal offenders' and also employs deeming provisions for accessories. Section 12 is solely focused on complicity and leaves common purpose to be covered by s 8, which follows the approach taken by the Griffith Codes, and differs from the *Criminal Code* (Cth) which combines complicity and common purpose into the one section, s 11.2.

The structure of s 12, following the Griffith Codes,⁹³ separates aiding from counsels and procures which reflects the traditional distinction of aiders being present during the commission of the offence, and counsellors and procurers being absent.⁹⁴ There is no reference to abettors which is only a marginal gain. Section 12(1)(b) 'covers a person who

⁹² Kenny, above n 66, 181, for the same observation in relation to ss 7, 8 and 9 of the Griffith Codes.

⁹³ Ibid. Under s 7 of the Griffith Codes the categories of liability reflect those at common law. 'Para (a) describes a principal in the first degree [person who does the act], paras (b) and (c) describe a principal in the second degree [person who does an act to aid anyone to commit the offence or aids anyone in committing the offence] and para (d) describes an accessory before the fact [counsels or procures].'

⁹⁴ *Thambiah* [1966] AC 37.

supplies materials or information for use in committing an offence⁹⁵ which includes the getaway driver or the lookout. However, as will be discussed in the next section, there is a single concept underlying the phrase ‘aids, abets, counsels or procures’ and s 12 is in need of modernisation.

Clearly, s 12 *Criminal Code* (NT) and s 7 of the Griffith Codes follow the categories of liability at common law, and need to be seen in the context of the respective other sections discussed earlier which extend the criminal responsibility of an accessory. It is here contended that ss 8, 9, 10 and 12 of the *Criminal Code* (NT) are to be preferred to ss 7, 8 and 9 of the Griffith Codes. As Clough and Mulhern observe under the objective test ‘it does not matter that the accused did not foresee the commission of the principal offence, so long as it was a probable consequence of the unlawful purpose’.⁹⁶ However, such objectivity is qualified by a determination of probability from the position of the defendant. As Jacobs J observed in *Stuart v The Queen*⁹⁷ ‘[t]he probable consequence is the consequence which would have been apparent to an ordinary reasonable man in the position of the applicant, that is to say, in his state of knowledge’. As the High Court has stated, it is foresight not knowledge or agreement that is the touchstone of extended common purpose.⁹⁸

Kirby J is critical of the current test pointing out on the authority of *Crabbe v The Queen*⁹⁹ that ‘[i]f a principal offender were to kill the victim, foreseeing only the possibility (rather than the probability) that his or her actions would cause death or grievous bodily harm, that person would not be guilty of murder’.¹⁰⁰ Kirby J goes on to observe that given a secondary offender could be found guilty on the basis of foresight of a possibility of murder, such an outcome is anomalous and lacks symmetry.¹⁰¹

This argument is met by a public policy justification well expressed by Simester and Sullivan. ‘The law has a particular hostility to criminal groups ... they present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address ...

⁹⁵ Gray, above n 38, 155.

⁹⁶ Clough and Mulhern, above n 45, 11.68.

⁹⁷ (1974) 134 CLR 426, 454 (emphasis added).

⁹⁸ *Clayton v The Queen* (2006) 81 ALJR 439, 443 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *Gillard v The Queen* (2003) 219 CLR 1, 38 (Hayne J). To add to the confusion on this point under s 8 *Criminal Code* (WA), Starke J in *Brennan v The Queen* (1936) 55 CLR 253, 260–261 held that a probable consequence is ‘that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the particular act’. (Emphasis added).

⁹⁹ (1985) 156 CLR 464, 469–470.

¹⁰⁰ *Clayton v The Queen* (2006) 81 ALJR 439, 458.

¹⁰¹ *Ibid.*

concerted wrong doing imports additional and special reasons why the law must intervene'.¹⁰² Similar sentiments were expressed by Lord Hutton in *R v Powell*¹⁰³ where his Lordship supported the public policy argument based on deterrence:

I recognise that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs ... In my opinion there are practical considerations of weight and importance related to considerations of public policy which justify the principle ... and which prevail over considerations of strict logic.¹⁰⁴

The *Criminal Code* (NT) was drafted some 80 years after the Griffith Codes, and the language and structure of the later Code is better suited to the present day and the rise of organised crime.¹⁰⁵ More particularly, the use of a subjective rather than objective test for common purpose under s 8, the use of rebuttable presumptions under sections 8, 9 and 10, and the addition of s 10 dealing with violence perpetrated by two or more persons, all combine to give the younger code a cutting edge to deal with gang related crime.¹⁰⁶

Kirby J, who dissented in *Clayton*, recognised that the objective test of a probable consequence contained in s 8 of the *Criminal Code* 1899 (Qld) was 'frozen in time'.¹⁰⁷ However, he argued that in re-expressing extended common purpose liability, the simplest approach would be for the High Court 'to replace the foresight required of the secondary offender under the present law [possible] by foresight of an outcome that was regarded as probable'.¹⁰⁸ By contrast, this article, in company with

¹⁰² Simester and Sullivan, above n 89, 226.

¹⁰³ [1999] 1 AC 1.

¹⁰⁴ *R v Powell* [1999] 1 AC 1, 25.

¹⁰⁵ Even before the Griffith Codes, writers like Sir Arthur Conan Doyle were inventing fictional criminal masterminds like Professor James Moriarty described by Sherlock Holmes as the 'Napoleon of Crime'.

¹⁰⁶ Bronitt and McSherry, above n 41. Both the Gibbs Committee and the MCCOC recommended the subjective approach. The Gibbs Committee 'recommended the adoption of the subjective test of foresight of possibility' – see above n 35, 503.

¹⁰⁷ *Clayton v The Queen* (2006) 81 ALJR 439, 457.

¹⁰⁸ *Ibid* 463. Kirby J's preferred position, at 463–464, was that 'the judge would explain the need for the jury to be sure that the secondary offender either *wanted* the principal offender to act as he or she did, with the intention which he or she had, or knew that it was virtually certain that the principal offender would do so', citing J Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 *Law Quarterly Review* 453, 465 (emphasis in original). This paper rejects such a position on public policy grounds as it represents the

the Gibbs Committee and the MCCOC, contends for the subjective test of foresight of possibility.

The use of a subjective rather than an objective test sets the *Criminal Code* (NT) and the *Criminal Code* (Cth) apart from the Griffith Codes. This then leads, first, onto a comparison with s 11.2 *Criminal Code* (Cth) now incorporated into Part IIAA as s 43BG of the *Criminal Code* (NT), which Kirby J exemplified as '[w]ithin Australia, piecemeal reforms by way of limited statutory enactments have been achieved'.¹⁰⁹ Then second to whether the Northern Territory should follow the Commonwealth's example and insert a new s 43BGA to mirror s 11.2A 'Joint Commission'.

III THE NEW STATE OF THE LAW OF COMPLICITY AND COMMON PURPOSE IN THE NORTHERN TERRITORY

A Complicity and Common Purpose

By contrast with the dual ss 8 and 12 in the *Criminal Code* 1983 (NT) dealt with in the previous section, s 11.2 of the *Criminal Code* 1995 (Cth), which for 15 years stood alone and which has become s 43BG of the *Criminal Code* 1983 (NT),¹¹⁰ combines complicity with common purpose into the one section. Interestingly, s 11.2 has remained unaltered notwithstanding the insertion of s 11.2A Joint Commission and the two sections are presumably either to work in tandem or to overlap. Under s 11.2A(1), joint commission applies when a person and a least one other person enter into an agreement to commit an offence, and either an offence is committed in accordance with that agreement or an offence is committed in the course of carrying out the agreement. As Lanham et al

greatest degree of difficulty for the Crown to prove secondary liability in extended common purpose crimes, and is consistent with the view of the majority of the High Court in *Clayton v The Queen*.

¹⁰⁹ *Clayton v The Queen* (2006) 81 ALJR 439, 462.

¹¹⁰ Section 43BG of the *Criminal Code* 1983 (NT) does not include s 11.2(7) of the *Criminal Code* 1995 (Cth). Section 11.2(7) states: 'If the trier of fact is satisfied beyond reasonable doubt that a person either: (a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or (b) is guilty of that offence because of the operation of subsection (1), but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.' The absence of s 11.2(7) in s 43BG may partly explain why s 10 of the *Criminal Code* 1983 (NT), which covers death or serious harm caused in the course of violence of 2 or more persons, and is constructed to avoid each defendant being acquitted because of the Crown's inability to prove which defendant actually struck the final fatal blow, is not on the list of provisions of Part 1 in s 43AA(2) which do not apply in relation to Schedule 1 offences. However, the rebuttable presumption contained in s 10 has no reverse onus of proof counterpart in s 11.2(7) which permits a guilty verdict even if the trier of fact is unable to determine whether guilt was because of the operation of sub-s (1) or not. Subsection (1) states: 'A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.'

point out, these ‘Codes’¹¹¹ limit the common purpose rule to cases where the wrong agreed upon is an offence and the indirect party is reckless about the offence actually committed by the direct party’.¹¹²

The use of the words ‘is taken to have committed’ in s 43BG(1) below replicate the deeming language of s 12(1) of the *Criminal Code* 1983 (NT), subject to proof of either of the fault elements (intention or reckless) in 43BG(3) and proof of the absence of withdrawal (‘terminated involvement’ and ‘took all reasonable steps to prevent the commission of the offence’) under s 43BG(5). However, while the common law in England allows an accomplice to be convicted of a more serious offence than the principal offender,¹¹³ ‘the Code [both Cth and NT] appears to preclude that possibility’¹¹⁴ as by virtue of s 43BG(1) below ‘the accomplice is guilty of the same offence as the principal’.¹¹⁵ Nevertheless, as Bronitt and McSherry point out while s 43BG(2)(b) ‘states that offences by another person must have been committed, there is no need for proof of conviction’¹¹⁶ as per s 43BG(6). Thus, instead of being treated as an extension of criminal responsibility like inchoate offences, ‘accessorial liability is a *mode of participation* in the perpetrator’s offence’ (original emphasis).¹¹⁷

Subdivision 4 External factors

43BG Complicity and common purpose

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

(2) For the person to be guilty:

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

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

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

¹¹¹ *Criminal Code* 1995 (Cth) s 11.2(3)(b); *Criminal Code* 1983 (NT) s 43BG(3)(b). See also *Criminal Code* 2002 (ACT) s 45(2)(b)(ii).

¹¹² Lanham et al, above n 35, 503. It should be noted that the Lanham text (2006) pre-dates s 11.2A Joint Commission of the *Criminal Code* (Cth).

¹¹³ *Howe* [1987] 2 WLR 568 [HL] overruling *Richards* [1974] QB 776.

¹¹⁴ I Leader-Elliott for the Commonwealth Attorney-General’s Department, *The Commonwealth Criminal Code – A Guide for Practitioners* (2002) 249 (‘Guide for Practitioners’).

¹¹⁵ *Ibid.* ‘Section 11.2(1) [s 43BG(1) in the *Criminal Code* 1983 (NT)]: An accomplice in “an offence [committed] by another person is taken to have committed *that* offence” (italics for emphasis).’

¹¹⁶ Bronitt and McSherry, above n 41, 343.

¹¹⁷ *Ibid.*

- (a) the person's conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
 - (b) the person's conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (4) Subsection (3) has effect subject to subsection (7).
- (5) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
- (a) terminated his or her involvement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (6) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (7) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

In *R v Kaldor*,¹¹⁸ a case involving the procurement of prohibited imports, Howie J in interpreting s 11.2 *Criminal Code* (Cth) stated that the 'provision, in its terms, does not create an offence but merely states a way in which a person may commit an offence'¹¹⁹ and that the section 'does no more than extend criminal liability for an offence contained in the Code'.¹²⁰ Thus, a person is 'made criminally responsible for the offence committed by the principal offender'¹²¹ and the provision operates as an extension of principal offences.¹²² Therefore, any prosecution of the 'accomplice' requires both proof that the offence was committed by the principal offender and proof of all the elements of the provision.

Hayne J in *Gillard v The Queen* explained the operation of the crucial fault elements contained in s 11.2(3) of the *Criminal Code* (Cth) and highlighted the centrality of foresight of a possibility to recklessness as follows:

Section 11.2(3) of the *Criminal Code* (Cth) provides that a person is taken to have committed an offence committed by another if he or she aids,

¹¹⁸ [2004] NSWCCA 425 2004/1832 (29 November 2004) (Dunford, Adams and Howie JJ).

¹¹⁹ *Ibid* [77].

¹²⁰ *Ibid* [79].

¹²¹ S Odgers, *Principles of Federal Criminal Law* (Thomson Reuters, 2007) 133.

¹²² See note to s 11.6 *Criminal Code* (Cth).

abets, counsels or procures the commission of that offence and intended either that his or her conduct would aid, abet, counsel or procure the commission of *that* offence, or that 'his or her conduct would aid, abet, counsel or procure the commission of *an* offence and have been reckless about the commission of the offence (including its fault elements) that the other person *in fact* committed' (emphasis added). The South Australian law reform proposals to which reference has been made¹²³ also provided for liability in cases where what was done went beyond what was agreed by reference to the concept of recklessness. In this context, foresight of the relevant possibility is central to the notion of recklessness.¹²⁴

The *Guide for Practitioners* states that in regards to the conduct element of complicity, the *Criminal Code* (Cth) and the common law 'employ a common conceptual vocabulary and case law in common law jurisdictions has continuing relevance when the conduct element of complicity under the *Code* is in issue'.¹²⁵ Sub-sections 43BG(1) and (2) list four alternative physical elements: aids, abets, counsels or procures. Historically, to aid or to abet has referred to those physically present at the time the offence was committed, whilst to counsel or to procure has referred to persons who were absent.¹²⁶ In *Giorgianni v The Queen*, Mason J having discussed this traditional distinction concluded that 'in substance, however, there appears to be no distinction between a principal in the second degree and an accessory before the fact beyond the question of presence'.¹²⁷

Sub-section 43BG(2)(a) *Criminal Code* (NT) requires that the conduct of the accomplice 'in fact' aided et al, which has been taken to mean 'manifest ... assent to actions in a manner promotes their performance'.¹²⁸ The *Guide for Practitioners* states that it follows from a requirement for manifest assent that 'counsel and abetment cannot amount to complicity unless the principal offender was aware of the defendant's attempts to promote the criminal activities of the principal'.¹²⁹ This is to be contrasted with criminal liability being incurred

¹²³ In *Gillard v The Queen* (2003) 219 CLR 1, 21 (in footnote 67) Kirby J cited and referred to the South Australian law reform proposals as follows: 'South Australia, Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, 4th Report (1977), 300-309. The Committee proposed a redefinition of the common law doctrine by reference to the principle of recklessness. It recommended that an accomplice should be liable for a collateral offence if a substantial risk had been adverted to. The report was written before *Johns* (1980) and *McAuliffe* (1995). It has not been implemented.'

¹²⁴ *Gillard v The Queen* (2003) 219 CLR 1, 38.

¹²⁵ Leader-Elliott, above n 114, 249.

¹²⁶ *Ferguson v Weaving* [1951] 1 KB 814, 818-819.

¹²⁷ *Giorgianni v The Queen* (1985) 156 CLR 473, 493.

¹²⁸ B Fisse, *Howard's Criminal Law* (Thomson Legal and Regulatory, 1990) 326.

¹²⁹ Leader-Elliott, above n 114, 251.

where an accomplice aids the principal notwithstanding the principal being unaware of such assistance.¹³⁰

The better view is contained in the passage of the judgment of Cussen ACJ in *R v Russell*¹³¹ where His Honour was discussing the compendious phrase ‘aids, abets, counsels or procures’, and was of the opinion that these words were all ‘instances of one general idea, that the person charged ... is by his conduct doing something to bring about, or rendering more likely, such commission’.¹³² Mason J adopted this observation as ‘descriptive of a single concept’¹³³ and Cussen ACJ’s formulation was more recently adapted to require that the accomplice ‘was by his or her words or conduct doing something to bring about, or rendering more likely, through encouragement or assistance, its commission’.¹³⁴

The author respectfully agrees with Odgers that a similar approach should be taken in s 43BG *Criminal Code* (NT) (s 11.2 *Criminal Code* (Cth)) that the words ‘aids, abets, counsels or procures ... should be considered as a compendious phrase descriptive of a single concept’.¹³⁵ Adopting Cussen ACJ’s objective test for conduct of ‘render more likely’, Odgers contends that even if the increased likelihood might be small, or there is no causal impact,¹³⁶ or the principal is unaware¹³⁷ of the existence of the accomplice, ‘nonetheless, encouragement or assistance will be sufficient’.¹³⁸ It is contended that such definitional clarification should be included in the provision as notes to s 43BG(1) and (2) and s 11(2)(1) and (2) as below.

43BG Complicity

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

¹³⁰ Ibid citing Fisse, above n 128, 326.

¹³¹ [1933] VLR 59.

¹³² *R v Russell* [1933] VLR 59, 67.

¹³³ *Giorgianni v The Queen* (1985) 156 CLR 473, 493.

¹³⁴ *R v Phan* (2001) 123 A Crim R 30 [69] (Wood CJ at CL).

¹³⁵ Odgers, *Principles of Federal Criminal Law*, above n 121, 137.

¹³⁶ See also Leader-Elliott, above n 114, 251. ‘Conduct will amount to aiding, abetting or counsel though it cannot be said to have caused the commission of the principal offence. To procure an offence, however, is to cause or bring it about.’ (Emphasis in original) Odgers, *Principles of Federal Criminal Law*, see above n 121, 138, takes issue with the exception of ‘to procure’ contending that the phrase ‘aid, abet, counsel or procure’ is better viewed ‘as descriptive of a single concept, which does not require a causal link between the conduct of the accomplice and the commission of the offence by PO [principal offender]’.

¹³⁷ The use of the words ‘in fact’ in s 43BG(2)(a) distinguishes actual encouragement from token encouragement as per *Larkins v Police* [1987] 2 NZLR 282, 288–290. Actual assistance of which the principal is unaware will fall within the ‘in fact’ requirement whereas actual encouragement unknown to the principal will not.

¹³⁸ Odgers, *Principles of Federal Criminal Law*, above n 121, 137.

Note: aids, abets, counsels or procures is to be treated as a single compendious concept which does not require a causal link between the conduct of the person who aids et al and the conduct of another person who commits the offence.

(2) For the person to be guilty:

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

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

Note: For the purposes of this section, a person's conduct is to be determined objectively as to whether the person rendered more likely the commission of the offence by the other person.

As the *Guide for Practitioners* makes clear 'since accomplice liability is derivative rather than direct, the prosecution must prove commission of the offence by the other person'.¹³⁹ Whilst the physical and fault elements must be proved under ss 43BG(2) and (3), the prosecution or conviction of the principal offender is not a prerequisite for the conviction of the accomplice under s 43BG(6). Furthermore, as s 43BG(1) uses the phrase 'taken to have committed' it is unnecessary to separately identify a party's role as either principal or accomplice. Neither does the provision 'draw a distinction between accomplices who are present at the scene of the commission of the offence and accomplices who are not'.¹⁴⁰ Thus, if the Crown can prove the elements of s 43BG (s 11.2), the exact role a party played or whether or not present at the time is irrelevant to securing a conviction as an accomplice. This in turn gives the section some robustness although only for derivative liability. However, as will be discussed later, it is a different story for primary liability.

The *Guide for Practitioners* makes it quite clear that 'the common law doctrine of 'acting in concert' has no counterpart in the *Code* (Cth)',¹⁴¹ going on to state that the essence of the doctrine is that 'liability is taken to be direct rather than derivative',¹⁴² such that all the participants in a joint enterprise 'are taken to be principal offenders'.¹⁴³ It follows from the derivative nature of accomplice liability under s 43 BG (s 11.2) that, as acting in concert is a form of direct criminal liability, joint criminal enterprise 'is incompatible with the structure of the *Code* and has no place in Commonwealth jurisprudence'.¹⁴⁴ Such a statement no longer holds true following the insertion of s 11.2A Joint Commission.

¹³⁹ Leader-Elliott, above 114, 251.

¹⁴⁰ Odgers, *Principles of Federal Criminal Law*, above n 121, 138.

¹⁴¹ Leader-Elliott, above n 114, 261.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid* 263.

When s 11.2 was the sole section dealing with complicity and common purpose it stood in sharp contrast to s 8(1) *Criminal Code* (NT), and goes to the heart of the difference between s 8(1) and s 43BG (s 11.2). The latter section combines complicity and common purpose whilst the former covers common purpose only and is supplemented by s 12 above which covers abettors and accessories before the fact (complicity). The absence of a concept of joint criminal enterprise under the original *Criminal Code* (Cth) resulted in the Commonwealth using the offence of conspiracy (s 11.5) in cases where a joint criminal enterprise clearly existed.¹⁴⁵

In this context, it is interesting that as Bronitt and McSherry point out the MCCOC 'favoured a separate provision, distinct from aiding and abetting relating to common purpose'.¹⁴⁶ However, by this the MCCOC meant s 11.2(3)(b) as opposed to s 11.2(3)(a) which covers complicity, and not a separate section as per the other Codes. The learned authors suggest that s 11.2 *Criminal Code* (Cth) 'envisaged that common purpose would be viewed, consistent with the approach in England, as merely one way of aiding and abetting an offence'.¹⁴⁷ The authors also observe that since s 11.2(3)(b) *Criminal Code* (Cth), which is equivalent to s 43BG(3)(b) *Criminal Code* (NT), 'departs from *Giorgianni*'¹⁴⁸ by allowing recklessness as an alternative fault standard, it was considered unnecessary to articulate expressly a distinct fault element for common purpose'.¹⁴⁹

Sub-sections 11.2(3)(a) and (b) were considered in *R v Choi (Pong Su) (No 12)*¹⁵⁰ in the context of whether the fault element of recklessness applied to both sub-sections. Kellam J held that recklessness only applied to s 11.2(3)(b) dealing with common purpose, in contradistinction to s 11.2(3)(a) dealing with complicity for which the fault element was intention.¹⁵¹ To find otherwise would render redundant the specification of 'recklessness' in s 11.2(3)(b).¹⁵² In *R v Choi*, Kellam J was concerned only with s 11.2(3)(a) and concluded that the Crown must prove:

¹⁴⁵ See Justice Howie, 'Interpretation of the Criminal Code (Cth)' (Paper Presented at Public Defenders Criminal Law Conference, Sydney, 27 and 28 March 2010) [23].

¹⁴⁶ Bronitt and McSherry, above n 41, 380, citing the Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Final Report (1992), 88.

¹⁴⁷ Bronitt and McSherry, above n 41, 380.

¹⁴⁸ *Giorgianni v The Queen* (1985) 156 CLR 473, 505 (Wilson, Dawson and Deane JJ): 'Aiding, abetting, counselling or procuring the commission of an offence requires the intentional assistance or encouragement of the doing of those things which go to make up the offence.'

¹⁴⁹ Bronitt and McSherry, above n 41, 380.

¹⁵⁰ [2005] VSC 32 (21 February 2005).

¹⁵¹ *R v Choi (Pong Su) (No 12)* [2005] VSC 32 (21 February 2005) [44].

¹⁵² *Ibid* [45].

(a) That the conduct of each or any of the accused persons in fact aided, abetted, counselled or procured the commission of the offence which was committed by the other person (s 11.2(2)(a)).

(b) That the offence which was so aided, et cetera, was committed by the other person.

(c) That the accused person intended that his conduct would aid, abet, counsel or procure the commission of *any offence* (including its fault elements) *of the type* the other person committed (s 11.2(3)(a)). In this case the type of offence is the offence of importing prohibited imports to which s.233B(1)(b) of the *Customs Act* applies.¹⁵³

In *Ansari v The Queen*,¹⁵⁴ Howie J (with whom Simpson and Hislop JJ agreed), in the leading judgment for the Court of Criminal Appeal, approved Kellam J's above interpretation of s 11.2 of the *Criminal Code* (Cth).

These provisions accord with the Common Law principles as to aiding and abetting. Because the accused must have intended to assist the commission of the offence by the principal, the accused must have known of all the facts that would make the conduct that he was assisting a criminal offence. Recklessness as to the existence of facts is not sufficient: *R v Choi (Pong Su)* (Ruling No 12) [2005] VSC 32. This reading of s 11.2 is both consistent with the Common Law and would be consistent with the approach to conspiracy under the *Code* that I favour.¹⁵⁵

Howie J's reference above to conspiracy reflected the facts in *Ansari* and the interpretation of s 11.5(2)(b) of the *Criminal Code* (Cth) that the accused and at least one other person 'have intended that an offence would be committed pursuant to the agreement'. In *R v LK*,¹⁵⁶ the High Court held that a person cannot be found guilty of conspiracy under s 11.5 of the *Criminal Code* (Cth) unless the fault element of knowledge can be proven. Thus, being reckless as to the fact that the money was proceeds of crime was insufficient.

It was incumbent on the prosecution to prove that LK and RK intentionally entered an agreement to commit the offence that it averred was the subject of the conspiracy. This required proof that each meant to enter into an agreement to commit that offence (s 5(2)(1)). As a matter of ordinary English it may be thought that a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence.¹⁵⁷

¹⁵³ Ibid [49] (original emphasis).

¹⁵⁴ *A Ansari v R, H Ansari v R* [2007] NSWCCA 204 (14 August 2007).

¹⁵⁵ Ibid [80].

¹⁵⁶ *R v LK; R v RK* [2010] HCA 17 (26 May 2010).

¹⁵⁷ Ibid [117].

Whilst intention is too restrictive for complicity and the broader fault base of recklessness for common purpose is an improvement,¹⁵⁸ there remains the issue of whether a single section¹⁵⁹ purportedly covering both complicity and common purpose, is the most appropriate statutory approach to participation in crime.

It is significant that the MCCOC 'had echoed concerns about the width of the existing common purpose rule',¹⁶⁰ originally supporting the argument that it would be unjust to allow recklessness for complicity and to allow common purpose. The MCCOC explained its reasoning that 'with the abolition of recklessness generally from complicity [a reference to intention as the fault element in s 43BG(3)(a)], it was decided to restore common purpose in a modified form based on the general test of recklessness'¹⁶¹ used in the *Code*'.¹⁶² It is significant that this definition of recklessness moves beyond mere awareness of possibility, instead requiring that the awareness of risk must be substantial and unjustifiable. This outcome dilutes the common law position. The limitations of this 'modified form' of common purpose are magnified by the absence of overlapping sections, at least until the arrival of s 11.2A. This section was enacted to enable the attribution of criminal responsibility in divisible offences and to supplement complicity based on aiding et al, by criminal liability based on an agreement to commit an offence, such as those to be found in both the original *Criminal Code* (NT) and the Griffith Codes.

One can only agree with Odgers who has said that 'the use of the term 'common purpose' in this context is unhelpful and potentially misleading'.¹⁶³ The implication is that there is a shared purpose between the principal offender and the accomplice when no such requirement exists. There are four elements for an offence to be committed under s 43BG(3)(b): (i) the accomplice aided et al, in fact, the commission of the offence by the principal; (ii) that offence was committed by the principal;

¹⁵⁸ The contrary view taken by the High Court in *Giorgianni* in rejecting recklessness and insisting on actual knowledge and by supporters such as Bronitt, 'Defending *Giorgianni* – Part One', above n 4, 242 is now effectively redundant. As Bronitt himself has acknowledged in his own article: '*Giorgianni* has had few supporters in Australia. Described as unsound both in principle and policy, the decision has prompted calls for its reversal by statute' (243, citing Fisse, above n 128, 336). In a line of cases post *McAuliffe*, the High Court has adopted recklessness in the form of foresight of a possibility as the touchstone of accessorial liability which finds expression in s 11.2 *Criminal Code* (Cth).

¹⁵⁹ Albeit now supplemented by s 11.2A 'Joint Commission' to remedy the deficiency that joint criminal enterprise was incompatible with the structure of the *Criminal Code* (Cth) as originally conceived by the MCCOC.

¹⁶⁰ MCCOC, above n 20, 91.

¹⁶¹ For example, under s 43AK(1): 'a person is reckless in relation to a result if (a) the person is aware of a substantial risk that the result will happen; and (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.'

¹⁶² MCCOC, above n 20, 91.

¹⁶³ Odgers, *Principles of Federal Criminal Law*, above n 121, 145.

(iii) the accomplice intended his or her conduct would aid et al the commission of an offence; and (iv) the accomplice was reckless about the commission of the offence that the principal committed.¹⁶⁴

The limitations of s 43BG(3)(b) are well illustrated by the infamous case of *Osland v The Queen*.¹⁶⁵ In that case, Heather Osland and her son David Albion jointly planned and executed the murder of Frank Osland, although David Albion actually bashed in his stepfather's head with an iron pipe after his mother had sedated him and held him down. Heather Osland was convicted of murder while David Albion was acquitted. The Crown ran a case of straightforward joint criminal enterprise and therefore Heather's liability was primary and not derivative. According to the *Guide for Practitioners* joint criminal enterprise is incompatible with the structure of the *Criminal Code* (Cth) and so such an approach would not be available under s 43BG(3)(b). If the Crown had run the case as one of principal and accessory, which appears to be the only option under s 43BG(3)(b), then Heather's liability would have been derivative. It follows that with David's acquittal 'no principal offence had been committed'¹⁶⁶ and therefore Heather could not be liable as an accessory'.¹⁶⁷

Understandably, the correctness of this argument may be questioned given the presence of s 43BG(6) above which allows a person to be found guilty as an accessory 'even if the principal offender has not been prosecuted or has been found not guilty'. However, the Crown must prove that the offence was committed by someone, as s 43BG(2)(b) requires 'the offence must have been committed by the other person'. By contrast, if Heather Osland had been tried under s 8 of the *Criminal Code* 1983 (NT), she would have faced a rebuttable presumption of having aided or procured the perpetrator(s) to commit the offence unless she was able to prove on the balance of probabilities she did not foresee the commission of that offence as a possible consequence.

It is here contended that such an outcome under s 43BG(3)(b), if Heather Osland had been tried as an accessory rather than as a joint perpetrator, is unsatisfactory and requires more than the amendment of the insertion of 'Joint Commission' under 11.2A. At common law, joint criminal

¹⁶⁴ Ibid.

¹⁶⁵ (1998) 197 CLR 316.

¹⁶⁶ See s 43BG(2)(b) which states that 'the offence must have been committed by the other person'.

¹⁶⁷ Clough and Mulhern, above n 45, 11.61, citing *Osland v R* (1998) 197 CLR 316, 324 (Gaudron and Gummow JJ). 'An accessory cannot be convicted unless the jury is satisfied that the principal offence was committed (*Surujpaul v The Queen* [1958] WLR 1050, 1053). Thus, if two people are tried together as principal and accessory, and the evidence as to the commission of the crime is the same against both, acquittal of the person charged as principal is inconsistent with the conviction of the other.'

enterprise (or acting in concert) applies where both parties share a common plan and are present during the commission of the offence, and are either assisting or encouraging one another. Criminal liability for both parties is primary and is based on some direct 'causal' link between the parties. By contrast, under extended common purpose liability is secondary, where members of the group may or may not be present during the commission of the crime, and the crime was neither agreed nor authorised, but merely foreseen. There is no direct causal connection (as opposed to joint criminal enterprise) which is the key distinction between primary and derivative or secondary liability. The matter is complicated where acting in concert (joint commission) can arise on the same facts as common purpose (as to the foundational crime), although the basis for extended liability is derivative not primary.

It would appear that s 11.2A 'Joint Commission' avoids, or is silent on, the above common law requirements of the presence of the joint offenders at the commission of the offence, assisting or encouraging each other at the time of the offence, and a direct 'causal' link between the parties, notwithstanding the use of 'joint offence' in s 11.2A which is not defined. As has been discussed, under the *Criminal Code* (Cth), 'common purpose' extends the liability of an accomplice by virtue of s 11.2(3)(b), such that an accomplice is guilty of an unplanned offence committed by a principal where the accomplice was 'reckless about the commission of the offence'. An identical approach is taken in s 11.2A(3), which purports to extend the liability of a joint offender A for an unplanned offence committed by joint offender B, if joint offender A 'is reckless about the commission of an offence (the joint offence)'. But, if the common law rules for joint commission do not apply to s 11.2A, how then can criminal responsibility be described as primary and how does it differ from the derivative responsibility of common purpose?

The Law Commission for England and Wales, recognising the difficulties flowing from derivative liability, recommended the introduction of new inchoate offences dealing with intending to encourage or assist in the commission of an offence (or believing that the offence will be committed), whether or not the principal offence was committed.¹⁶⁸ Thus, the Law Commission's approach was to develop non-derivative offences. These recommendations were adopted in part in the *Serious Crime Act 2007* (UK), referred to earlier in the discussion on the reverse onus of proof.

Ormerod and Fortson have suggested Part 2 of the Act involves a 'fundamental shift to looking at the harm threatened instead of the harm

¹⁶⁸ Law Reform Commission for England and Wales, *Inchoate Liability for Assisting and Encouraging Crime*, Law Commission Report No 300 (2006), 8 and 49. See also Bronitt and McSherry, above n 41, 421.

caused'.¹⁶⁹ As to the effect of Part 2, Bronitt and McSherry state that the provisions 'confer a wide discretion on prosecutors who no longer have to prove which offence the defendant has committed if it can be proven that the defendant "must have committed the inchoate offence or the anticipated offence"'.¹⁷⁰ The learned authors go on to suggest that 'the enactment of non-derivative statutory offences does not resolve the conceptual strains clearly apparent in the present framework of complicity'.¹⁷¹ Be that as it may, the derivative foundations of liability are too entrenched to be abandoned. This article contends that 'the conceptual strains' are minimised under ss 8 to 10 of the *Criminal Code* (NT).

The introduction of s 11.2A to the *Criminal Code* (Cth) was 'targeted at offenders who commit crimes in organised groups, and hence the relevance to serious and organised crime ... and targets members of organised groups who divide criminal activity between them'.¹⁷² As Biddington noted the introduction of s 11.2A 'has largely gone unnoticed ... and will put the common law principle of joint criminal enterprise into the legislative framework'.¹⁷³ This statement would appear to be arguable as there is nothing in s 11.2A that requires the parties to be present during the commission of the offence, which is the essence of primary liability for joint commission.

Another significant difficulty with s 11.2A is that it mirrors the form of its sister section 11.2 in that recklessness is the fault element in s 11.2A(3) for an offence committed in the course of carrying out the agreement. Recklessness is the default fault element for a physical element that consists of a circumstance or a result,¹⁷⁴ and is the fault element that underpins the *Criminal Code* (Cth). As mentioned above, it is contended that the *Criminal Code* (Cth)'s definition of recklessness that the awareness of the risk must be substantial and unjustifiable, rather than the common law's mere awareness of a possibility, does not sufficiently meet the mischief presented by complicity, common purpose and joint commission. Fundamentally, s 11.2A has the hallmark of a shoehorned section to deal with a glaring omission, which overlooked the opportunity to take common purpose out of s 11.2(3), given there is no rational basis for the separation of s 11.2(3)(b) and s 11.2A on the grounds of a distinction between secondary and primary liability.

¹⁶⁹ D Ormerod and R Fortson, 'Serious Crime Act 2007: The Part 2 Offences' (2009) *Criminal Law Review* 389, 393.

¹⁷⁰ Bronitt and McSherry, above n 41, 422, quoting from *Serious Crime Act 2007* (UK) s 56(1)(a).

¹⁷¹ Bronitt and McSherry, above n 41, 433.

¹⁷² Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6967 (Robert McClelland, Attorney-General).

¹⁷³ M Biddington, Parliament of Australia, Bills Digest, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, no 31 (16 September 2009) 21.

¹⁷⁴ See s 5.6(2) *Criminal Code* (Cth).

The introduction of s 11.2A is a minimum provision as it fills an obvious deficiency in the original s 11.2. The definition of agreement in s 11.2(5), which encompasses a non-verbal understanding, is to be applauded as it imports *McAuliffe*.¹⁷⁵ However, s 11.2A(2) provides that an offence is committed in accordance with the agreement only where the offence actually committed is an offence of the same type as the offence in the original agreement. This article contends that such a limitation is unnecessarily restrictive. The simplicity and reach of s 8(2) *Criminal Code* (NT) is plain from the definition of common intention as 'to prosecute an unlawful purpose in conjunction with one another when they agree to engage in or concur in engaging in *any conduct* that, if engaged in would involve them or some or one of them in the commission of *an offence*' (emphasis added).

The most appropriate statutory approach to deal with the limitations of s 43BG (s 11.2) is to rename s 43BG to cover complicity only by removing s 43BG(3)(b) completely, and therefore to deal with common purpose separately in the manner adopted by the existing ss 8, 9 and 10 of Part I *Criminal Code* (NT). The test of recklessness in s 43BG(3)(b) sits between the probability test in the Griffith Codes and the possibility test in the *Criminal Code* (NT) as recklessness combines the subjective intent of the secondary participant and the objective situation.¹⁷⁶ It is contended that the rebuttable presumptions in sections 8 to 10 *Criminal Code* (NT) are superior to a parallel offence of joint commission in s 11.2A.

The Law Reform Commission of New South Wales usefully ranked the available tests of liability for secondary participants under extended common purpose 'in order of the degree of difficulty for a prosecution to establish secondary liability'.¹⁷⁷ The tests identified are: intention to commit homicide; intention to cause really serious bodily harm coupled with an awareness of the risk of homicide; virtual certainty to commit homicide; probability of homicide (Queensland, Tasmania and Western Australia); recklessness as to homicide (Commonwealth, Australian Capital Territory, and Northern Territory); and possibility of homicide (common law jurisdictions of New South Wales, Victoria and South Australia).

The argument being made here is that the tests of intention (the top step on the staircase of fault liability) and virtual certainty (which effectively requires the recklessness to be so extreme as to virtually merge into intention) above are too lenient towards secondary participants under

¹⁷⁵ *McAuliffe and McAuliffe v The Queen* (1995) 183 CLR 108.

¹⁷⁶ Law Reform Commission of New South Wales, above n 3, 6.13. See also s 43 AK(1) above n 161, 'recklessness' involves an awareness of a substantial risk by the secondary participant and a lack of justification in taking that risk.

¹⁷⁷ Law Reform Commission of New South Wales, above n 3, 6.13.

extended common purpose. The objective probability test is rejected as outmoded, and recklessness is considered too weak because the definition of recklessness straddles the probability and possibility tests. The preferred test out of the Commission's list above, because it presents the least degree of difficulty to the Crown, is the common law test of possibility of homicide as per *McAuliffe, Gillard and Clayton*, which is based 'on the subjective state of mind of the secondary participant and whether he or she thought that the additional crime was "possible" in the circumstances as he or she knew them'.¹⁷⁸

However, whilst the Commission mentioned s 43BG of the *Criminal Code* (NT), it overlooked sections 8 to 10 of the *Criminal Code* (NT). Given the reverse onus of proof in sections 8 to 10, on the above ranking of the available tests for secondary liability, these original sections would be at the bottom of the degree of difficulty for the prosecution to establish secondary liability. In other words, ss 8 to 10 rank below the common law test of the possibility of homicide. This article contends that given the public policy perspective that underpins the reverse onus of proof in the face of the rise of organised crime and the prevalence of gang violence, such a ranking qualifies ss 8 to 10 as the model code provisions for common purpose and joint enterprise. The superadded burden on the defence is specifically designed to be asymmetrical and to tilt the scales in favour of the Crown¹⁷⁹ because of the need to effectively protect 'the public against criminals operating in gangs'¹⁸⁰ and the pack mentality.¹⁸¹

B Withdrawal

In an earlier part of this article dealing with s 8(2) *Criminal Code* (WA) it was stated that a fuller discussion of withdrawal would be undertaken during a later examination of s 43BG(5) *Criminal Code* (NT) which, like s 8(2) *Criminal Code* (WA), also adopts the taking reasonable steps approach as the test for withdrawal. In discussing s 11.2(4), the equivalent section in the *Criminal Code* (Cth), Bronitt and McSherry observe that 'the defence leaves open how termination must occur, particularly in relation to the other parties, and what are reasonable steps to prevent the commission of the offence'.¹⁸² The unsatisfactory implication is that in the absence of definitions or clarification, a judge

¹⁷⁸ Ibid.

¹⁷⁹ Cf *Clayton v The Queen* (2006) 81 ALJR 439, 457–458 (Kirby J).

¹⁸⁰ *R v Powell* [1999] 1 AC 1, 25 (Lord Hutton).

¹⁸¹ See, for example, a newspaper piece on street violence by J Silvester, 'Pack Mentality', *The Age* (Melbourne) 17 July 2009.

¹⁸² Bronitt and McSherry, above n 41, 357.

will perforce have to rely on the common law or judicial interpretation of s 8(2) *Criminal Code* (WA).¹⁸³

It seems clear that the onus of disproving termination and lack of taking all reasonable steps to withdraw rests with the prosecution but that an evidential onus¹⁸⁴ needs to be satisfied by the defendant.¹⁸⁵ There is authority for the proposition that the accessory's withdrawal must be communicated to the principal offender¹⁸⁶ and s 8(2)(b) *Criminal Code* (WA) goes further in requiring communication with 'each other person' who was part of the common intention. The well known passage from the judgment of Sloan JA in *R v Whitehouse*¹⁸⁷ is apposite where His Honour defines 'timely communication' as serving 'unequivocal notice' that the other party proceeds without further aid and assistance from the person who is withdrawing.

On the question of taking reasonable steps, there is a conflict between the interpretation that it is sufficient to have taken reasonable steps to undo previous participation, or whether a more stringent interpretation is required 'that the accused eliminate his or her conduct as a cause of the ultimate offence'.¹⁸⁸ In Queensland, where the *Criminal Code* makes no provision for timely withdrawal, the courts have applied the former test¹⁸⁹ which is mirrored in s 8(2)(c) *Criminal Code* (WA).¹⁹⁰

Viewed from a public policy perspective, a decision as to which of the above two interpretations is to be preferred depends on the rationale for the defence.¹⁹¹ Is the basis of the defence the provision of an 'escape route' for a potential accessory to successfully extricate himself or herself from the criminal enterprise, which serves the dual function of raising the probability of withdrawal and lessening the risk of the principal offence occurring? Or is the essence of the defence that withdrawal is *prima facie* evidence of lack of fault?

The former rationale or crime prevention argument would run along the lines that in organised crime groups, alerting the police, without

¹⁸³ See *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell) where it was stated that resort may be had to the previous state of the law where a provision is of doubtful import or had previously acquired a technical meaning.

¹⁸⁴ An evidential onus is defined as 'a reasonable possibility' under s 43BT *Criminal Code* (NT).

¹⁸⁵ *R v Menitti* [1985] 1 Qd R 520, 530 (Thomas J).

¹⁸⁶ *White v Ridley* (1978) 140 CLR 342, 350–351 (Gibbs J).

¹⁸⁷ (1941) 1 WWR 112, 115–116.

¹⁸⁸ Kenny, above n 66, [9.56].

¹⁸⁹ *White v Ridley* (1978) 140 CLR 342, 350 (Gibbs J); *R v Menitti* [1985] 1 Qd R 520, 530 (Thomas J).

¹⁹⁰ See *Seiffert and Stupar* (1999) 104 A Crim R 238, 254–259; *Willis* (2001) 25 WAR 217, 243.

¹⁹¹ K J M Smith, 'Withdrawal in Complicity: A Restatement of Principles' (2001) *Criminal Law Review* 769.

communicating with the group, may be the only reasonable method for a member to withdraw safely. Thus, taking reasonable steps would not necessarily comply with the common law test of giving unequivocal notice of complete withdrawal to the principal offender(s). The latter rationale requires the effective neutralisation of 'the assistance or encouragement offered to the perpetrator before the commission of the offence [which] means that the accessory's conduct had no causative influence on the subsequent criminal conduct of the principal offender'.¹⁹²

The meaning of reasonable steps was discussed by Hammond J in *R v Pink*:

[T]he withdrawal may only be effected by taking all reasonable steps to undo the effect of the party's previous actions.¹⁹³ As with any test of 'reasonableness', it is impossible to divorce that consideration from the facts of a given case. The accused's actions may have been so overt and influential that positive steps must be taken by him to intercede, and prevent the crime occurring.¹⁹⁴

In light of withdrawal being decided on the facts of any given case, it is here contended that for consistency the appropriate basis for the rationale underpinning of the defence of withdrawal is evidence that the fault element was not fulfilled, and that the accessory had no causative role in the subsequent offence. There is no apparent reason in principle not to prefer the application of the stricter common law tests (unequivocal notice of withdrawal to the principal offenders), and that any evidence of ineffective withdrawal should go to mitigation in sentencing.¹⁹⁵

However, it is recognised that such a strict test, whilst meeting the public policy objective of undoing criminal fault by requiring timely unequivocal notice of withdrawal, would also, at the same time, leave little scope for the operation of the other public policy objective of encouraging people involved to reveal a future criminal act in sufficient time for the authorities to take the necessary action to prevent a major crime. The latter public policy of crime prevention has merit. Adopting such a modified common law approach, s 43BG(5) *Criminal Code* (NT) and both s 11.2(4) and s 11.2A(6) *Criminal Code* (Cth) should be rewritten as follows:

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

¹⁹² Bronitt and McSherry, above n 41, 355.

¹⁹³ *R v Menniti* [1985] 1 Qd R 520.

¹⁹⁴ [2001] 2 NZLR 860 [22].

¹⁹⁵ *R v Lew*; *R v Ng* [2003] NSWSC 781 70238/02 (20 August 2003) (Adams J).

- (a) countermanded his or her involvement by a timely communication of the intention to abandon the commission of the offence to each other person with whom the common intention to commit the offence was formed in terms that serve unequivocal notice to each other person that all aid and assistance is withdrawn unless there is cogent evidence that such communication of withdrawal would result in death or serious harm; and
- (b) took all reasonable steps to eliminate his or her conduct as a cause of the commission of the offence, which, depending on the circumstances, may involve taking steps to prevent the commission of the offence by warning the victim or the police.¹⁹⁶

Note: For the purpose of this section, taking 'all reasonable steps' includes revealing a future criminal act in sufficient time for the police to take preventative action.

Thus, to avoid the strictures of the common law, there would need to be both cogent evidence that withdrawal would expose the person to the likelihood of suffering death or serious harm, and the taking of all reasonable steps to either warn the victim or revealing the future criminal act in sufficient time for the police to take preventative action.

Although conceptually the issue of withdrawal is different from the issues surrounding complicity and common purpose, it has been dealt with here for two reasons. First, withdrawal is a significant matter and has been specifically covered in ss 8(2) *Criminal Code* 1902 (WA), s 11.2(4) *Criminal Code* 1995 (Cth), and s 43BG(5) *Criminal Code* 1983 (NT). Secondly, there needs to be consistency between the respective subsections. Hence, as the public policy justification for adopting a subjective test and a reversal of the onus of proof for complicity and common purpose is a particular hostility to gang violence and organised crime, so too does the public policy weighting for withdrawal lean towards the stringent common law test of unequivocal timely withdrawal subject to the provisos above relating to resulting harm and time for preventative action.

IV CONCLUSION

As the title indicates, this article has sought to arrive at a model code provision for complicity and common purpose in Australia. It has been contended that the subjective approach and rebuttable presumptions contained in ss 8, 9, 10 and 12 of the original *Criminal Code* 1983 (NT) are preferable to the objective approach adopted by the Griffith Codes of Queensland and Western Australia in the equivalent ss 7, 8, and 9. It has

¹⁹⁶ See *Becerra and Cooper* (1976) 62 Cr App R 212.

been further contended that s 11.2 *Criminal Code 1995* (Cth) was less than satisfactory because by combining complicity and common purpose into the one section, the reach of common purpose was unnecessarily restricted. Even with the belated insertion of s 11.2A 'Joint Commission', the *Criminal Code* (Cth) provisions remain restricted because of the definition of 'recklessness'. In addition, the treatment of withdrawal is considered to be too weak and that stricter common law principles should be specifically incorporated as per the revised s 43BG(5) above, whilst still allowing some scope for an 'escape route'.

The revised s 43BG and s 11(2) should be renamed 'Complicity' by removing s 43BG(3)(b) from the *Criminal Code 1983* (NT) and s 11.2(3)(b) from the *Criminal Code 1995* (Cth). This argument had merit when s 11.2 stood alone but has been strengthened, at least for the *Criminal Code 1995* (Cth), with the arrival of s 11.2A. It has been argued that the better approach for the *Criminal Code 1983* (NT) is to deal with common purpose separately in the manner adopted by the existing sections 8, 9 and 10 of Part I *Criminal Code* (NT) rather than import s 11.2A. These sections should be entitled presumptions and inserted into Part IAA as s 43BGA (1), (2) and (3). As detailed earlier in this article, there should also be notes appended to s 43BG(1) and (2) clarifying the meaning of the phrase 'aids, abets, counsels or procures' and the adoption of an objective test for a person's conduct of 'render more likely' the commission of the offence by the other person.

In this search for a model code provision for complicity and common purpose, it is to be hoped that the suggested redrafted provisions, which are justified on public policy grounds and designed to present the lowest degree of difficulty to the Crown to establish secondary liability, may also prove to be helpful as a template for other Code jurisdictions in Australia. It is contended that these provisions will go some way to addressing the need to assist judges to more clearly explain the law of complicity to juries in place of the present 'potentially confusing' state of secondary liability.¹⁹⁷

¹⁹⁷ *Gillard v The Queen* (2003) 219 CLR 1, 20 (Kirby J); *Clayton v The Queen* (2006) 81 ALJR 439, 460 (Kirby J). See also Gray, 'I Didn't Know, I Wasn't There', above n 4, 210; Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29 *Australian Bar Review* 161.

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