TWO'S NOT COMPANY?

Does the Doctrine of Joint Criminal Enterprise Have Any Place in the Northern Territory?

Overview

1. The purpose of this paper is to question whether the doctrine of Joint Criminal Enterprise (JCE) has any application in the Northern Territory. JCE is a common law doctrine which is given a foothold in Schedule 1 of the *Criminal Code Act 1983* (NT) ("***Criminal Code***") through section 8 of that Code. From the experience of the author it seems that the prevailing view is that section 8 of gives rise to an expanded form of JCE/Common Purpose which applies to most ***Criminal Code*** offences. On closer examination it appears that this is a misinterpretation of the section.

The Power to Charge Multiple Offenders

2. Anybody reading this paper will likely be doing so because they are acting for a defendant in a matter involving co-accused. That is to say, more than one defendant will have been named on the indictment. The power to charge more than one offender in the same indictment is contained in section 308 of Schedule 1 of the *Criminal Code Act 1983* (NT) ("***Criminal Code NT***"):

> **SECTION 308 - CIRCUMSTANCES IN WHICH MORE THAN ONE PERSON MAY BE CHARGED IN THE SAME INDICTMENT**
>
> (1) Any number of persons charged with committing or with counselling or procuring the commission of the same offence, although at different times, or of being accessories after the fact to the same offence, although at different times, and any number of persons charged with receiving, although at different times, any property that has been obtained by means of an indictable offence, or by means of an act that, if it had been done in the Territory, would be an indictable offence and that is an offence under the laws in force in the place where it was done, or any part of any property so obtained, may be charged with substantive offences in the same indictment and may be tried together notwithstanding that the perpetrator or the person who so obtained the property is not included in the same indictment or is not amenable to justice.
>
> (2) Any number of persons charged with committing different or separate offences arising substantially out of the same facts or out of closely related facts so that a substantial part of the facts is relevant to all the charges may be charged in the same indictment and tried together.

The Place of a Common Law Doctrine in a Code Jurisdiction

3. Before getting bogged down in the detail the significance of the ***Criminal Code*** itself needs to be addressed. In interpreting a Code the common law has a limited and specific role to play. It cannot be assumed that Parliament intended to preserve the common law and it is an error to consider how the law previously stood before the Code was introduced.[1]

4. In *R v Barlow* (1997) 188 CLR 1, at 31-33, Kirby J outlined 5 principals to be applied in the construction of a Code (underlining added):

> 1. A code is enacted by an Act of Parliament. Like any other enactment, the imputed will of Parliament must be derived from the language of the enactment, understood in its context and, so far as possible, in order to give effect to its apparent purposes. Courts must give the language of a code, like any legislation, its natural meaning. If that meaning is clear and unambiguous, it must be given effect. The court will only look externally to other sources where the meaning is doubtful either because of the inherent ambiguity of the language used or because the words used have previously acquired a technical or special meaning.
>
> 2. As a species of legislation, a code, such as the Code in question, is subject to a paramount rule. Its meaning is to be ascertained:
>
> > "by interpreting its language without reference to the pre-existing law, although reference may be made to that law where the Code contains provisions of doubtful import or uses language which has acquired a technical meaning: Robinson v Canadian Pacific Railway Co. It is erroneous to approach the Code with the presumption that it was intended to do no more than restate the existing law (Brennan v The King) but when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law (Mamote-Kulang v The Queen) including decisions subsequent to the Code's enactment: Murray v The Queen; Reg v Rau".
>
> Thus the first loyalty is to the code. But in the stated circumstances, regard may be had to the pre-existing common law and to parallel developments in non-code jurisdictions.
>
> 3. At least in matters of basic principle, where there is ambiguity and where alternative constructions of a code appear arguable, this Court has said that it will ordinarily favour the meaning which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions. It will also tend to favour the interpretation which achieves consistency as between such jurisdictions and the expression of general principle in the common law obtaining elsewhere. This principle of interpretation goes beyond the utilisation of decisions on the common law or on

[1] *Bank of England v Vagliano Brothers* [1891] AC 107, at 154.

comparable statutory provisions to afford practical illustrations of particular problems and the approaches adopted in resolving them[91]. It represents a contribution by the Court, where that course is sustained by the language of the code in question, to the achievement of a desirable uniformity in basic principles of the criminal law throughout Australia. Variations in local opinion may result in divergencies in matters of detail in the criminal law. But in matters of general principle, it is highly desirable that unnecessary discrepancies be avoided or, at least, reduced.

4. In giving meaning to a particular phrase or word in a code, it is important to read it in the context of the code taken as a whole. This is especially so in a case such as the present because the word "offence", which is in question in s 8 of the Code, is inherently ambiguous. It is given a particular definition in s 2 of the Code. For example, the word appears, undefined, in s 80 of the Constitution.

5. If the interpretation be available, it is clearly desirable in principle that it should be open to a jury to return a verdict which reflects the measure of the criminality of the accused as established by the evidence. Although the law abounds in fictions and although legislation (including the Code) can sometimes require results which, in particular circumstances, may seem unjust or unreasonable, where there is a choice, a court will ordinarily construe penal legislation to permit a reflection of the relative involvement of the accused in the crime. This approach avoids presenting the law in a bad light. That will occur if the result of a statutory fiction is that an accused person, with minor and distinguishable involvement in a crime, is unjustly assimilated to the principal or escapes altogether because the jury could not tolerate the prospect of that result.

5. Thus the interpretation of a Code can be summarised as follows:

Step 1 – look to the terms of the Code itself without reference to how the law previously stood. In examining the meaning of a phrase or word, its use in the Code as a whole can be considered;

Step 2 – if legal terminology is employed in the Code without definition of those terms, you can look to their common law definitions;

Step 3 – resolve ambiguities in a manner which favours consistency in the application of the law across other Code jurisdictions and the common law generally;

Step 4 – where available on the above steps, apply an interpretation which avoids legal fictions or the potential to cast the law into a bad light.

Two Standards in the Code

6. The **Criminal Code** contains two Parts relating to criminal responsibility, either of which can apply depending on the offence charged. The relevant parts are *Part II – Criminal Responsibility*, and *Part IIAA - Criminal responsibility for Schedule 1 offences and declared*

offences. In any matter the practitioner with carriage should be aware of which provisions apply for each offence.

Joint Criminal Enterprise (JCE)

7. The Common Law

The foundational authority on the modern JCE doctrine is the decision of the High Court in *McAuliffe v The Queen.*[2] Brennan CJ, Deane, Dawson, Toohey, and Gummow JJ, heard the case and delivered a unanimous judgment which defined common purpose and distinguished it from accessorial liability (underlining added):

> The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those 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. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises 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. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.
>
> Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused

[2] [1995] HCA 37.

person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.[3]

8. The second paragraph of the above quote outlines what is commonly referred to as 'extended joint criminal enterprise'. Following a departure from the doctrine by the UK Supreme Court and the Privy Council[4], in 2016 the Australian High Court re-examined and reaffirmed that extended JCE still has a place in Australian law[5]. Under the common law, and consistent with the presumption of innocence, it is for the prosecution to prove that the accused had the relevant foresight:

> …the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind.[6]

The Criminal Code NT provisions

9. **Part I – Division 2 - Presumptions**

> **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.
>
> (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.

10. **Part IIAA – Division 4 – Extensions of Criminal Responsibility**

Section 8 does not apply to Part IIAA offences.[7] Section 43BG covers Common Purpose for Part IIAA.

> **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.

[3] Ibid at [12] – [13].
[4] *R v Jogee; Ruddock v The Queen* [2016] 2 WLR 681.
[5] *Miller v The Queen* [2016] HCA 30.
[6] *McAuliffe v R* [1995] HCA 37, at [19].
[7] *Criminal Code Act 1983* (NT) s 43AA(2)(f).

(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:

(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.

So What Is the Law in The Northern Territory?

11. It is most convenient to deal with s 43BG first. The application of this section will be far less controversial and, given that consistency within the Code is a consideration of interpretation, it is also a useful comparator while discussing section 8.

12. The language of section 43BG is clear and unambiguous. It does not import criminal liability for persons acting in a JCE or common purpose. Instead the language refers only to aiding, abetting, counselling to procuring the commission of the offence. These are separate concepts in law with independent definitions. The Code requires that the accused's conduct actually did aid, abet, counsel or procure the offence committed[8]. It also sets out the applicable *mens rea.*[9]

13. This reading was confirmed by Hiley J in *McKay v Bryant and Rhodes v Bryant* [2017] NTSC 88 (***McKay***) at [57]:

[8] Section 43BG(2)(a).
[9] Section 43BG(3).

It is important to note that, unlike in the case of joint criminal enterprise, an agreement and commonality of purpose are not elements of the analysis under section 43BG. The analysis rather involves consideration of the evidence, as to whether it sufficiently establishes that the appellants, by their words or conduct did in fact aid, abet, counsel or procure the damaging of the cars by Jones-Garling.

14. ***McKay*** is the only appellate decision in the NT which considers the application of s 43BG in significant detail. It was a matter in which three boys formed the common intention to steal from cars. In doing so a number of car windows were smashed and each was charged with an offence against s 241 (Damage to Property) correlating to each damaged window, as well as a host of other offences governed by section 8. Section 241 comes under s 43BG. The evidence was that all but one of the windows had been smashed by the third co-offender named Jones Garling, and not by either of the appellants. Hiley J quashed the convictions for the s 241 offences. He determined (footnotes omitted):

> [71] Also relevant are the following observations by the High Court in *Handlen v The Queen* at [6]:
>
> > The words "aids", "abets", "counsels" and "procures" are not defined in the Code. They have a long history in the law of complicity and are to be understood as having their established legal meaning. Each is used to convey the concept of conduct that brings about or makes more likely the commission of an offence.
>
> [72] I do consider that there was evidence sufficient for the Local Court to be satisfied beyond reasonable doubt that the appellants intended that their conduct would aid, abet and or procure the criminal damage caused by Jones-Garling. That they had such an intention flows from a number of the surrounding circumstances. These include their joint decision to "do a job", namely to steal from motor vehicles in the car park, disguising themselves, crossing the road, "scoping the place out", entering the car park at a time early in the morning when no one else would be likely to be nearby and stealing things from vehicles after Jones-Garling had broken the windows. I consider that s 43BG(3) was satisfied.
>
> [73] The real question however is whether s 43BG(2) was satisfied beyond reasonable doubt.
>
> [74] Most of the facts relied upon by the respondent, and listed in [66] above, only go to support the inference concerning the appellants' intent, for the purposes of s 43BG(3). There was no evidence that Jones-Garling was encouraged to continue damaging cars after or by the appellants taking items from inside cars that had been damaged (cf [66](e) above) or that the first appellant permitted the bat with a spark plug on the end to be taken from his apartment or even knew about the bat (cf [67]).
>
> [75] There was no evidence that directly implicated a particular appellant in any particular offending. Whilst it is likely that both of the appellants were involved in the trespassing and stealing, and one of them was responsible for damaging the Subaru that belonged to Jones-Garling's cousin, the only evidence of either of them having anything to do with the criminal damage was the mere fact that they were there at the time.

> [76] In some cases the mere presence of an accused when a co-accused is committing an offence may be sufficient encouragement and assisting for that offence to be committed and thus fall within the scope of aiding or abetting. Obvious and common examples would be; where a single victim is being assaulted by the primary offender, or where the sole function of the accused is to provide warning to others in his gang who are committing a crime such as a robbery.
>
> [77] The situation is not so clear in a case such as the present, where the crime of criminal damage could have been performed without any assistance or encouragement from anyone else.
>
> [78] With the exception of the Subaru, all of the criminal damage was done by Jones-Garling without any assistance from anyone else. I consider that there is a real doubt as to whether any of the conduct of either of the appellants "in fact aided, abetted, counselled or procured" the damaging of the cars by Jones-Garling. I do not consider that the Local Court could have been satisfied beyond reasonable doubt that the requirement in s 43BG(2)(a) was met.
>
> [79] I uphold this ground of appeal.

15. In light of this authority, and the clear effect of the provision itself, there really cannot be any doubt that the doctrine of JCE has no place in extending criminal liability to Part IIAA offences. Practitioners should be aware of this and look at whether there is sufficient evidence to prove beyond reasonable doubt the required *actus reus* and *mens rea* with reference to subsections (2) and (3) of s 43BG.

Section 8

16. In ***McKay*** Hiley J briefly refers to section 8 although its full effect was not something he was required to determine on the appeal. He adopts the widely held view in the NT that the section gives rise to the doctrine of JCE for Part II matters. In doing so he simply states that "Section 8 of the Criminal Code is a particular formulation of the common law doctrine of "acting in concert" or "joint criminal enterprise" as expressed in *McAuliffe v The Queen*".[10] I have not found any other detailed appellate consideration of the application of section 8.

17. All that needs to be noted at this stage is that if this reading is correct then there are two massive differences between the common law and the provisions of s 8 of the ***Criminal Code.*** Both of these differences involve a significant expansion of the doctrine in a manner which erodes fundamental protections and rights held by the accused**:**

    i. Firstly, under section 8 the unlawful purpose can include agreement to engage in conduct that would give rise to civil liability only, it does not have to involve the commission of a crime. The section makes clear that conduct giving rise to tortious liability is sufficient to amount to an 'unlawful purpose'.

[10] *McKay v Bryant and Rhodes v Bryant* [2017] NTSC 88, at [42].

ii. Secondly, section 8 shifts the onus onto the accused to prove that they did not foresee that the offence charged could be committed in execution of that common purpose. In many cases overcoming this presumption would require the accused to give evidence regarding their state of mind at the relevant times, opening them to cross-examination on all aspects of the prosecution case.

The Alternate (and Correct) Reading

18. The first thing to note about section 8 is where it appears in the ***Criminal Code***. Rather than be included in Part 1, Division 3 – "Parties to Offences", it is contained in Part 1, Division 2 – "Presumptions". It is a well established principle of statutory interpretation that the headings of parts and divisions in which sections appear operate as a guide to their interpretation.[11] Moreover section 55(1) of the *Interpretation Act 1978* (NT) expressly provides that a heading to a Chapter, Part, Division or Subdivision of an act forms part of that act. Any reading of section 8 which claims that it does anything other than create a statutory presumption would be incongruous with the Division in which the Legislature saw fit to place the section.

19. It is not surprising then, that on any ordinary reading of section 8, its effect is only to create a presumption which applies to other Parts of the Code. Subsection (8)(1) can be broken down into three components:

    i. The precondition for the presumption:

        "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…"

    This sets out the precondition for the applicability of the section. The phrase "common intention to prosecute an unlawful purpose" is defined in subsection (2).

    ii. The presumption created when the precondition is present (underlining added):

        …the other or each of the others is <u>presumed to have aided or procured</u> the perpetrator or perpetrators of the offence to commit the offence…

    Here the section creates a presumption which applies to the doctrines of aiding or procuring. Section 12 of the ***Criminal Code*** is the section which creates criminal responsibility for aiding or procuring.

    iii. The exception to the presumption:

        …unless he proves he did not foresee the commission of that offence was a possible consequence of prosecuting that unlawful purpose.

    The final part provides for an exception to the presumption. If the accused can demonstrate that they did not have the relevant foresight then the presumption will

[11] See for example the High Court's analysis in *Tabcorp Holdings Limited v Victoria* [2016] HCA 4.

not apply. This is the most likely aspect of this argument to be attacked, the counter argument and why it is wrong will be set out below.

Cool, what does that mean?

20. The effect of this is that section 8 does not in and of itself create criminal liability. This is the only available reading which ensures internal consistency within the terms of the code. If the precondition is met and the exception does not apply then there is a presumption that the accused aided or procured the principal offender in relation to the offence. Section 12 of the ***Criminal Code*** sets out aiding and procuring as a basis for criminal responsibility. When section 8 is satisfied a presumption is created which applies to section 12. The section appears in Part 3 – "Parties to Offences" and reads:

> **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.

21. Where a presumption exists it can be rebutted by evidence. In the words of the Australian Law Reform Commission:

> A presumption of law operates so that when a fact—the 'basic fact'—is proved, it must, in the absence of further evidence, lead to a conclusion that another fact—the 'presumed fact'—exists. In other words, a presumption that a fact exists will arise on proof of a basic fact. The presumption will then operate unless rebutted by evidence to the contrary[12]

22. Presumptions against the accused do not place a heavy burden on them, but it does shift the onus onto them to satisfy the court that the relevant state of affairs does not apply.[13] Where the evidence shows, on balance, that the accused did not aid or procure the commission of the offence, the section 8 presumption would be rebutted.

---

[12] Australian Law Reform Commission, 2014 Issues Paper 3, *The Presumption of Continuity,* para 78.

[13] See for example the approach of the NTSC to the presumption against bail as outlined in *Suttie v The Queen* [2013] NTSC 37, [32] – [34].

23. In summary, section 8 in no way incorporates an expanded doctrine of JCE into the NT Criminal Code. Where it is satisfied its only effect is to create a rebuttable presumption relating to aiding or procuring. If Parliament had intended otherwise, they simply would have inserted the words "to be criminally responsible" in place of "to have aided or procured" in section 8.

Why the counter arguments are wrong

24. This argument goes against the ingrained understanding of section 8 and will likely be initially met with scepticism from the Bench and even more so by the Prosecution.

25. There are two counter arguments I can anticipate:

    a) An ordinary reading of section 8 is that the presumption can only be rebutted if the accused demonstrates a lack of the relevant foresight, making this whole argument academic and putting us back into the realm of the expanded JCE;
    b) If my argument is correct then the language in section 308, which enables a number of people charged with committing the same offence would 'have no work to do'.

26. The second argument is easiest to deal with. Both sections 12 and 43BG provide other mechanisms through which multiple persons can be charged with the same offence.

27. The first counter argument requires a more nuanced response. Initially I would point out that the 'presumption only' reading is the clearer one. This is so for a number of reasons:

    i. The expanded JCE argument requires a presumption to be construed so that it can only be rebutted with evidence of a particular subject matter, notwithstanding the fact that the evidence capable of rebutting the presumption would be far more varied. It is counterintuitive to suggest that a presumption regarding whether a person aids or procures an offence could only be rebutted through evidence of that person's foresight, and not through, for example, evidence proving that the person did not in fact aid or procure the offending. This would be especially so when the precondition for this presumption need not involve any common purpose to engage in criminal behaviour, in section 8 a tort will suffice. It is not difficult to imagine situations where this would produce absurd results.

    ii. This would offend the principle of legality.[14] It requires reading constraints into the law which are not clearly stated and abrogate the fundamental rights of the accused. This reading means that a court is required to go no further than section 8 to conclude whether a person is guilty of aiding or procuring an offence. Such an interpretation creates a presumption of guilt which can arise from non-criminal actions and puts a constraint on the evidence that a person can use to rebut that presumption. This result is not open in the absence of clear parliamentary intent.

[14] See for example *Coco v The Queen* (1994) 179 CLR 427.

28. Nevertheless, lets assume for a moment that both interpretations are found to be equally available, rendering the operation of section 8 ambiguous. The next question to be asked is what would Kirby J do? If we apply his guide to interpretation of a Code from *R v Barlow* there is a clear winner between the arguments:

Question 1 - Which reading achieves greater consistency between the meaning of terms in the Code?

29. The expansive JCE interpretation says that section 8 creates a basis for criminal liability which is independent from, but uses the same terms as, other sections of the Code. In my interpretation section 8, when satisfied, creates a presumption which applies to aiding and procuring within their meanings set out in section 12. This is also consistent with the Parts in which they are located. Under this interpretation the principles of criminal responsibility are also far more consistent with Part IIAA offences.

Question 2 - Are there undefined terms of craft for which we need to resort to the common law in order to resolve this ambiguity?

30. There are no terms within section 8 requiring further definition in order to resolve this dispute.

Question 3 - Which interpretation achieves greater consistency with other code jurisdictions and the common law generally?

31. The reciprocal sections of the other Australian Criminal Codes are set out at the end of this paper. Suffice to say, none of those Jurisdictions employ a definition of JCE which creates a presumption of guilt, potentially arising from tortious conduct only, rebuttable by limited means. Interestingly both the ACT and Commonwealth Codes originally only had sections in similar terms to s43BG. The doctrine of JCE was later introduced by amendment.

32. As explored at paragraph 17 of this paper, the expansive interpretation of section 8 also introduces Draconian requirements into JCE which are found nowhere in the common law.

Question 4 - which interpretation avoids legal fictions or the potential to cast the law into a bad light

33. The widely held view produces an absurd outcome. Depending on the charge JCE is either not available at all (s 43BG) or alternatively involves an onerous test which goes beyond any code Jurisdiction or the common law (s 8). For defendants, victims, and the community the outcomes will differ wildly depending on whether the offence falls within Part II or Part IIAA. If this is not a legal fiction, it is hard to imagine what is.

34. The presumption only approach still creates an onerous presumption on the accused, but that presumption operates on principles of criminal responsibility also applicable under Part IIAA. The law is far more consistent under this approach.

Contact Details

Clancy Dane

Territory Criminal Lawyers

cdane@territorycriminallawyers.com

0455 484 103

JCE in Other Code Jurisdictions

Commonwealth

11.2 Complicity and common purpose

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

(2) For the person to be guilty:

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

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

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

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

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

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

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

(a) terminated his or her involvement; and

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

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

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

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

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

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

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

11.2A Joint commission

Joint commission

(1) If:

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

(b) either:

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

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

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

Offence committed in accordance with the agreement

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

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

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

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

Offence committed in the course of carrying out the agreement

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

Intention to commit an offence

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

Agreement may be non-verbal etc.

(5) The agreement:

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

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

Termination of involvement etc.

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

(a) terminated his or her involvement; and

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

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

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

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

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

Special liability provisions apply

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

Western Australia

***Criminal Code Compilation Act 1913* (WA)**

8. Offence 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; and

(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.

The ACT

CRIMINAL CODE 2002 - SECT 45

Complicity and common purpose

(1) A person is taken to have committed an offence if the person aids, abets, counsels, procures, or is knowingly concerned in or a party to, the commission of the offence by someone else.

(2) However, the person commits the offence because of this section only if—

(a) either—

(i) the person's conduct in fact aids, abets, counsels, or procures the commission of the offence by the other person; or

(ii) as a result of the person's conduct, the person in fact is knowingly concerned in or a party to the commission of the offence by the other person; and

(b) when carrying out the conduct, the person either—

(i) intends the conduct to aid, abet, counsel, procure, or result in the person being knowingly concerned in or a party to, the commission of any offence (including its fault elements) of the type committed by the other person; or

(ii) intends the conduct to aid, abet, counsel, procure, or result in the person being knowingly concerned in or a party to, the commission of an offence by the other person and is reckless about the commission of the offence (including its fault elements) in fact committed by the other person.

(3) To remove any doubt, the person is taken to have committed the offence only if the other person commits the offence.

(4) Despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of the offence.

(5) A person must not be found guilty of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of an offence if, before the offence was committed, the person—

(a) ended the person's 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, procuring, or being knowingly concerned in or a party to, the commission of an offence even if the person who committed the offence is not prosecuted or found guilty.

(7) To remove any doubt, if a person is taken to have committed an offence because of this section, the offence is punishable as if, apart from the operation of this section, the person had committed the offence.

(8) If the trier of fact is satisfied beyond reasonable doubt that a defendant committed an offence because of this section or otherwise than because of this section but cannot decide which, the trier of fact may nevertheless find the defendant guilty of the offence.

Criminal Code 2002 **(ACT) - Section 45A**

Joint commission

(1) A person is taken to have committed an offence if—

(a) the person and at least 1 other person enter into an agreement to commit an offence; and

(b) either—

(i) an offence is committed in accordance with the agreement; or

(ii) an offence is committed in the course of carrying out the agreement.

(2) For subsection (1) (b) (i), an offence is committed in accordance with an agreement if—

(a) the conduct of 1 or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to; and

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

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

(3) For subsection (1) (b) (ii), an offence is committed in the course of carrying out an agreement if a person is reckless about the commission of an offence (the joint offence) that another person in fact commits in the course of carrying out the agreement.

(4) A person commits an offence because of this section only if the person and at least 1 other party to the agreement intend that an offence will be committed under the agreement.

(5) An agreement—

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

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

(6) A person must not be found guilty of an offence because of this section if, before the conduct making up any of the physical elements of the joint offence concerned was engaged in, the person—

(a) ended the person's involvement; and

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

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

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

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

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

(9) To remove any doubt, if a person is taken to have committed an offence because of this section, the offence is punishable as if, apart from the operation of this section, the person had committed the offence.

Queensland

Criminal Code 1899 (QLD) - Section 8

Offences committed in prosecution of common purpose

8 OFFENCES COMMITTED IN PROSECUTION OF COMMON PURPOSE

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.

Tasmania

Criminal Code Act 1924 (TAS)

4. Crimes committed in prosecution of common purpose

Where 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 a crime 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 crime.