

# THE DOCTRINE OF EXTENDED JOINT CRIMINAL ENTERPRISE: A ‘WRONG TURN’ IN AUSTRALIAN COMMON LAW

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*The common law doctrine of extended joint criminal enterprise was controversially recognised by the High Court in 1995. In contrast to its English equivalent, the doctrine’s relationship with earlier Australian common law has received a sparse amount of attention in the Australian debate over the doctrine. This article seeks to fill this gap. Against a context of hitherto overlooked line of Australian authorities — from the colonial era to today — this article contends that the doctrine of extended joint criminal enterprise emerged from a misreading of prior authorities and rests on an unsound theoretical foundation from which insurmountable difficulties with the doctrine flow. After considering the High Court’s decision in Miller (2016) to retain the doctrine, this article recommends that if the opportunity ever arises to reconsider the doctrine, the High Court should abolish it.*

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## I INTRODUCTION

The Australian history of the common law doctrine of extended joint criminal enterprise (‘EJCE’) is a short one. Its prequel was the High Court case of *Johns v The Queen* in 1980.<sup>1</sup> At issue in the case was what the High Court later described as the doctrine of joint criminal enterprise (‘JCE’).<sup>2</sup> That doctrine stipulated, as it still does today, that if two or more people agree to commit one or more crimes, each will be criminally liable for the commission of all offences that fall within the scope of their agreement.<sup>3</sup> Five years after *Johns*, in 1985, the Privy Council in *Chan Wing-Siu v The Queen* relied on *Johns* to recognise a ‘wider principle’ of JCE.<sup>4</sup> Subsequent English cases took that wider principle to mean the *extended* JCE principle that still stands in Australia today.<sup>5</sup> Under this principle, if one party to a JCE, during the course of the enterprise, ventures beyond the common agreement and commits an offence foreign to that agreement, any party to the agreement who foresaw the *possibility* of commission of that offence and continued to participate in the

<sup>1</sup> (1980) 143 CLR 108 (‘*Johns (High Court)*’).

<sup>2</sup> *McAuliffe v The Queen* (1995) 183 CLR 108, 113.

<sup>3</sup> See, eg, *R v Dowdle* (1900) 26 VLR 637, 639–40; *R v Surridge* (1942) 42 SR (NSW) 278, 282–3; *Blackmore v Linton* [1961] VR 374, 377. For the modern position, see *McAuliffe* (n 2) 113–14.

<sup>4</sup> [1985] 1 AC 168, 175; see also at 176–7.

<sup>5</sup> See, eg, *R v Hyde* [1991] 1 QB 134, 139; *Hui Chi-Ming v The Queen* [1992] 1 AC 34, 51.

enterprise will be criminally liable for that offence.<sup>6</sup> In 1995, the High Court in *McAuliffe* followed this line of English authorities and recognised the principle of EJCE.<sup>7</sup> From that point forth, the principle has formed part of Australian common law, receiving endorsements by the majority of the High Court in *Gillard v The Queen* (2003),<sup>8</sup> *Clayton v The Queen* (2006)<sup>9</sup> and, now, *Miller v The Queen* (2016).<sup>10</sup>

Subsequent judgments<sup>11</sup> and academic commentary<sup>12</sup> considering the doctrine have centred on this catena of cases. This emphasis is well founded; these authorities were pivotal to the development of EJCE as it stands in Australian common law today. A consequence of this focus, though, is the examination of the doctrine through an analytical prism capturing only 30 years of the history of Australian common law. To the extent that High Court judgments and commentary have widened this prism to consider pre-*Johns* antecedents of EJCE, the focus of the discussion is often on earlier English authorities.<sup>13</sup> As the UK Supreme Court recently demonstrated in its landmark decision in *R v Jogee* to eliminate EJCE liability from English common law, those earlier English authorities are critical to the debate over the doctrine, for they starkly illustrate the aberrance of the doctrine in light of the

<sup>6</sup> *Hyde* (n 5) 139.

<sup>7</sup> *McAuliffe* (n 2) 117–18.

<sup>8</sup> (2003) 219 CLR 1, 14 [25] (Gleeson CJ and Callinan J), 35–6 [110]–[112] (Hayne J).

<sup>9</sup> (2006) 81 ALJR 439, 443–4 [14]–[21].

<sup>10</sup> (2016) 259 CLR 380, 387–8 [2] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), 424 [131] (Keane J) (*Miller* (2016)).

<sup>11</sup> The treatment of *Johns* or later cases as the starting point for the analysis of EJCE is evident in *Gillard* (n 8) 35–9 [108]–[124] (Hayne J); *Clayton* (n 9) 443–5 [14]–[29]; *McAuliffe* (n 2) 115–18.

<sup>12</sup> Without directing any criticism towards the following commentary (which considered subjects far broader than the development of EJCE alone), a similar focus on the aforementioned set of cases is also evident in Robert Hayes and FL Feld, ‘Is the Test for Extended Common Purpose Over-Extended?’ (2009) 4(2) *University of New England Law Journal* 17; Luke McNamara, ‘A Judicial Contribution to Over-Criminalisation?: Extended Joint Criminal Enterprise Liability for Murder’ (2014) 38 *Criminal Law Journal* 104; Laura Stockdale, ‘The Tyranny of Small Differences: Culpability Gulf between Subjective and Objective Tests for Extended Joint Criminal Enterprise in Australia’ (2016) 90 *Australian Law Journal* 44, 51–3.

<sup>13</sup> The majority deviated from this trend but almost exclusively considered only prior English cases in *Miller* (2016) (n 10) 389–92 [6]–[16]. See also reliance on *R v Anderson* [1966] 2 QB 110 in Justice Mark Weinberg, Judicial College of Victoria and Department of Justice, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (Report, August 2012) 70–1 [2.174]–[2.178] (*Simplification of Jury Directions Project*).

common law as a cohesive whole.<sup>14</sup> Thus, from an Australian perspective, the question arises as to whether the same can be said about the significant body of pre-1980 Australian common law that has thus far received little attention.

This article submits that it can. Not only do these overlooked Australian authorities create a more vivid picture of the novelty of EJCE than has hitherto emerged, they contextualise *Johns*. When *Johns* is read in light of what came before — cases from colonial courts through to cases a few years prior — and traced through to *McAuliffe*, the conclusion that arises is that the doctrine of EJCE may fairly be described as the product of erroneous interpretation of prior authorities. This conclusion has wider implications for the doctrine than merely illustrating that the doctrine's precedential foundation is unsound. From that anomalous development, this article will argue, sprang an equally unsound theoretical justification of EJCE in High Court jurisprudence, a theory based on a construct of those individuals liable under the EJCE doctrine as intentional aiders and abettors.<sup>15</sup> After critiquing this theory, and the updated theory propounded by the High Court in *Clayton and Miller*, this article then connects these broader theoretical issues to the more specific arguments that have been levelled against the doctrine. On that basis, this article concludes that the doctrine of EJCE should no longer form part of the common law governing the states without statutorily codified complicity rules, New South Wales and South Australia.

## II THE AUSTRALIAN LAW OF CRIMINAL COMPLICITY BEFORE *JOHNS*

To correctly interpret *Johns* and what followed, it is important to understand the Australian common law of criminal complicity as it stood at the time that the High Court decided *Johns* in 1980. Accordingly, this part of the article is divided into two sections. The first section provides an overview of the Australian common law of accessorial liability and JCE liability as at 1980. The second section then examines whether Australian common law recognised a doctrine of EJCE at any time before this point. In considering this question, this article travels back to the content of the JCE principle in the 19<sup>th</sup>-century common law of the Australian colonies, and charts its development throughout the 20<sup>th</sup> century until *Johns*.

<sup>14</sup> [2017] AC 387, 412–17 [61]–[87].

<sup>15</sup> *McAuliffe* (n 2) 118; *Gillard* (n 8) 14 [25] (Gleeson CJ and Callinan J) 35–6 [110]–[112] (Hayne J); *Miller* (2016) (n 10) 397–8 [33].

### A *The Australian Law of Criminal Complicity before Johns*

By 1980, the common law of accessorial liability divided felony offenders into three categories by reference to their role in the commission of a group crime.<sup>16</sup> A principal in the first degree referred to an individual who, with the requisite intent, committed some or all of the acts comprising the actus reus of an offence.<sup>17</sup> The distinction between a principal in the first and second degree was that the latter did not commit any actus reus element of an offence, but was present while it was committed and aided or abetted in some way.<sup>18</sup> That left the designation of an accessory before the fact, which referred to an individual who, while not present during the offence, counselled or procured its commission.<sup>19</sup> Of course, mere commission of the acts meant by ‘aiding’, ‘abetting’, ‘counselling’ and ‘procuring’ did not found criminal liability. Consistently with the criminal law’s adoption of a subjective approach over the 20<sup>th</sup> century,<sup>20</sup> an accused was only criminally liable if he or she committed these acts with the requisite mens rea. Before *Johns*, the requisite mens rea was unclear.<sup>21</sup> From case to case, it undulated between knowledge of the facts constituting the offence, realisation of the possibility of those facts, and intent to facilitate the commission of the offence.<sup>22</sup> However, shortly after *Johns*, the High Court settled the issue in *Giorgianni v The Queen*. Accessorial liability ‘require[d] intentional participation in a crime by lending assistance or encouragement’<sup>23</sup> and ‘knowledge of the essential facts which constitute the offence.’<sup>24</sup> The consequence of this decision, then, was heightened consonance

<sup>16</sup> By this point, the designation of ‘accessory after the fact’ no longer related to complicity in the offence itself, but rather related to ‘hindering the administration of justice’: Colin Howard, *Criminal Law* (Law Book, 3<sup>rd</sup> ed, 1977) 284. Accordingly, it is not discussed further in this overview.

<sup>17</sup> See, eg, *R v Ferguson* (1916) 17 SR (NSW) 69, 76 (Street J). See also *Blackmore* (n 3) 377; *R v Lowery [No 2]* [1972] VR 560, 561.

<sup>18</sup> Howard (n 16) 268; Peter Brett and Louis Waller, *Criminal Law: Text and Cases* (Butterworths, 4<sup>th</sup> ed, 1978) 443 [7.01]. See also *Blackmore* (n 3) 377; *Lowery [No 2]* (n 17) 561.

<sup>19</sup> Howard (n 16) 268; Brett and Waller (n 18) 444 [7.03].

<sup>20</sup> *Müller* (2016) (n 10) 393 [18], referring to *Woolmington v DPP* [1935] AC 462.

<sup>21</sup> Simon Bronitt, ‘Defending *Giorgianni* — Part One: The Fault Required for Complicity’ (1993) 17 *Criminal Law Journal* 242, 244.

<sup>22</sup> See, eg, the conflicting commentary in Howard (n 16) 273 and Brett and Waller (n 18) 463 [7.18], 466 [7.21]. Cases propounding divergent mens rea elements include: *Canty v Ivers* (1913) 19 Arg LR 403, 405; *R v Russell* [1933] VLR 59, 66 (Cussen ACJ); *Blackmore* (n 3) 377; *Thambiah v The Queen* [1966] AC 37, 46; *R v Harding* [1976] VR 129, 139 (Gowans J).

<sup>23</sup> (1985) 156 CLR 473, 506.

<sup>24</sup> *Ibid* 503.

between complicity principles and the remainder of criminal law in terms of the typical mens rea precondition to criminal liability.

The doctrine of common purpose accompanied this set of principles. With the possible exception of the presence requirement,<sup>25</sup> the following statement captures the doctrine's content by 1980:

[I]f two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them, in accordance with their understanding or arrangement, all the things that are necessary to constitute the crime, they are all equally guilty of that crime regardless of what part each played in its commission.<sup>26</sup>

Whether in English common law this doctrine arose independently from the preceding set of principles is unclear.<sup>27</sup> Irrespective of its historical origin, though, the rule was enlivened by a subset of the conduct that triggered accessorial liability generally after *Giorgianni*. That is, the doctrine attributed criminal liability to those who subjectively harboured the same intention as other individuals to commit a crime (the mens rea)<sup>28</sup> and expressly or impliedly communicated agreement to work with others to give effect to that intention (the actus reus).<sup>29</sup> This proposition was recognised judicially in many Australian decisions, which applied the doctrine in its wider context of accessorial liability without treating it as a free-standing ground for complicity liability.<sup>30</sup> The only difference in result arising from application of the common purpose rule was the nature of liability incurred. Because the rule did not distinguish between primary and secondary offenders, all accused caught by the rule were fixed with direct responsibility for the relevant offence (as if they themselves had committed the crime), instead of being fixed with

<sup>25</sup> The High Court in *Johns* regarded this presence requirement as contrary to previous authority and held that an accessory before the fact (eg someone not present at the crime) could be criminally responsible under the common purpose rule: *Johns* (High Court) (n 1) 129–31 (Mason, Murphy and Wilson JJ).

<sup>26</sup> *Lowery* [No 2] (n 17) 560.

<sup>27</sup> KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, 1991) 209.

<sup>28</sup> See, eg, *Dowdle* (n 3) 639–40; *Surridge* (n 3) 282–3; *R v Lovett* [1972] VR 413, 421.

<sup>29</sup> See, eg, *Dowdle* (n 3) 639–40; *Surridge* (n 3) 282–3.

<sup>30</sup> See, eg, *R v Douglas*, as reported in 'Norfolk Island: Supreme Court', *The Sydney Gazette and New South Wales Advertiser* (New South Wales, 13 September 1834) 1 ('Douglas'); *Surridge* (n 3) 282; *Blackmore* (n 3) 377; *Lowery* [No 2] (n 17) 561–2.

the derivative responsibility inherited by aiders, abettors, counsellors and procurers from complicity in another's crime.<sup>31</sup>

### B *EJCE* before Johns?

From this framework of complicity principles arises the important question of whether Australian common law recognised *EJCE* liability at any time before *Johns*. To answer that question, this section begins with the 19<sup>th</sup> century common law governing the Australian colonies.

#### 1 *The 19<sup>th</sup> Century*

The closest analogue to *EJCE* in the common law during this period was the precursor of the modern common purpose rule. The position was best summarised by Dowling CJ in *R v Young*, who directed the jury that 'all the persons who are present and engaged in an unlawful act are equally guilty of any felony that may be committed in the pursuance of their common design although they may not be aware that it will be committed.'<sup>32</sup> On the face of the rule, it is unclear whether the rule was objective or subjective; the phrase 'in the pursuance of their common design' could refer to acts actually subjectively agreed upon between the parties, or acts that merely had an objective connection to a shared goal. Not assisting resolution of this point was that the 19<sup>th</sup>-century English law on common purpose (from which this rule derived) was confusingly split into two strands: one imposing a non-uniform mens rea prerequisite to criminal liability,<sup>33</sup> and one extending criminal liability to objectively probable consequences of pursuing an unlawful purpose.<sup>34</sup> However, based on the absence of references to mens rea and occasional references to probable consequences in contemporaneous colonial cases,<sup>35</sup> it is

<sup>31</sup> Howard (n 16) 269–70.

<sup>32</sup> As reported in 'Law Intelligence: Supreme Court — Criminal Side', *Sydney Herald* (Sydney, 19 August 1839) 2. Because of the way these colonial era cases come down to us, they often do not have page or paragraph numbers in the conventional sense.

<sup>33</sup> KJM Smith (n 27) 211, citing: *R v Hodgson* (1730) 1 Leach 5; 168 ER 105; *R v White* (1806) Russ & RY 99; 168 ER 704; *R v Collison* (1831) 4 Car & P 564; 172 ER 827; *R v Franz* (1861) 2 F & F 579; 175 ER 1195.

<sup>34</sup> KJM Smith (n 27) 211, citing: *R v Edmeads* (1828) 3 Car & P 389; 172 ER 469; *R v Cooper* (1846) 8 QB 533. See also KJM Smith (n 27) 211–12, discussing Samuel Prentice, *A Treatise on Crimes and Misdemeanors* by Sir WM Oldnall Russell, KNT (Stevens & Sons, 5<sup>th</sup> ed, 1877) vol 1, 164.

<sup>35</sup> *R v Douglas*, as reported in 'Norfolk Island', *The Sydney Gazette and New South Wales Advertiser* (New South Wales, 27 September 1834) 1.

reasonably clear that it was the latter test that was implied when colonial courts referred to additional crimes committed ‘in pursuance of a common design’.<sup>36</sup> This proposition is borne out by the test’s application.<sup>37</sup> For example, in *Tinkabed*, Tinkabed (‘T’) was sentenced to six years of hard labour for the act of striking the victim with a club (a crime actually committed by another during a larceny in which T participated) without any evidence that T’s intention extended to clubbing the victim.<sup>38</sup> Accordingly, in terms of the objective common purpose rule’s extension of liability to individuals for crimes they did not intend, this doctrine might be said to be similar to the subjective EJCE concept that arose later.

The similarity is not deep, however. That is because the 19<sup>th</sup>-century common purpose rule fastened upon the equivalence between objective probability and subjective intention often embraced by the criminal law (and other areas of law) during this period. This equivalence was well instanced in English law from the 19<sup>th</sup> century and beyond.<sup>39</sup> For example, Lord Coleridge CJ, in affirming the conviction of an accused found guilty of intentionally causing grievous bodily harm by putting out the lights in a theatre and barring the exit, stated:

The prisoner must be taken to have intended the natural consequences of that which he did. He acted ‘unlawfully and maliciously’, not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured.<sup>40</sup>

Critically, however, this proposition was also well established in Australian colonial law.<sup>41</sup> As Stawell CJ of the Victorian Supreme Court said in 1876,

<sup>36</sup> *R v Tinkabed*, as reported in ‘Brisbane Circuit Court’, *The Moreton Bay Courier* (Brisbane, 20 November 1852) 4 (at ‘Tuesday, November 16’) (*‘Tinkabed’*).

<sup>37</sup> See, eg, *ibid*; *Douglas* (n 30) 1; *R v Mayne*, as reported in ‘Law Intelligence: Supreme Court — Criminal Side’, *Sydney Herald* (Sydney, 17 May 1839) 2; *R v Shea*, as reported in ‘Law Intelligence: Supreme Court — Criminal Side’, *Sydney Herald* (Sydney, 25 February 1841) 2; *R v Mogar* (1850) 1 Legge 655, 655–6.

<sup>38</sup> *Tinkabed* (n 36) 4.

<sup>39</sup> See the explanation in *O (A Child) v Rhodes* [2016] AC 219, 243 [43]–[45], 247 [61]–[62] (Baroness Hale DPSC and Lord Toulson JSC).

<sup>40</sup> *R v Martin* (1881) 8 QBD 54, 58.

<sup>41</sup> See, eg, *R v Ryan* (1853) 1 Legge 797, 798; *Randell v South Australian Insurance Co* (1868) 2 SALR 172. For a relaxed application of the principle, see *Re Jeanneret; Ex parte MacMaster* (1893) 14 NSW Bky C & P 68, 69–70.



[i]t is a well-known rule of law, applicable in all cases, whether civil or criminal, that a person must be considered as intending to do that which is the necessary consequence of his act.<sup>42</sup>

In its context, then, the similarity between the 19<sup>th</sup>-century common purpose rule and modern EJCE is more accurately characterised as a significant difference. Assuming an equivalence between probability and intention, a rule that fixes A with liability for the objectively probable consequences of a common purpose merely fixes A with liability for what A intended. Of course, the equivalence is a tenuous premise from which to proceed. But the important point for present purposes is that the purported basis for the Australian colonial conception of the common purpose rule lay in an individual's intention to commit a crime.<sup>43</sup> For that reason, the pre-20<sup>th</sup>-century common law's wide net of secondary liability resembles EJCE liability in only the most superficial sense.

## 2 *The 20<sup>th</sup> Century*

Once the common purpose rule operated by reference to individuals' subjective mens rea, the Australian authorities on the common law of complicity began overwhelmingly pointing in one direction: individuals were only criminally liable for crimes that they assented to and intended. An early iteration of such decisions was *R v Dowdle*, which helpfully summarised the contemporary position.<sup>44</sup> Directing the jury on the common purpose rule with hypothetical examples, Williams J said:

Supposing at the time of the robbery, when the man was making some resistance to one of their number, the others shouted out, 'Stouch him', or 'Throw him to the ground', and thereupon one man, in accordance with the request of the others, 'stouched' the man in the eye, or threw him down, so as to cause death, they would all be guilty of murder, because that one man would be doing that act of violence with the assent and consent of the others.<sup>45</sup>

<sup>42</sup> *Hasker v Moorhead* (1876) 2 VLR 160, 166.

<sup>43</sup> *Miller* (2016) (n 10) 412 [87] (Gageler J), citing: *Woolmington* (n 20) 474–5 (Viscount Sankey LC) (in relation to the intention of a primary offender); *R v Johns* [1978] 1 NSWLR 282, 288–90 (Street CJ) ('*Johns (NSWCCA)*'); *Johns (High Court)* (n 1) 120–1 (Stephen J), 131 (Mason, Murphy and Wilson JJ) (in relation to the intention of a secondary offender).

<sup>44</sup> *Dowdle* (n 3).

<sup>45</sup> *Ibid* 639–40.

Remarking that ‘if the law went beyond that it would shock common-sense’,<sup>46</sup> Williams J continued:

[S]upposing that these five men had arranged to rob this man of his money, that, when he got to the gate leading into the first yard, they proceeded to rob him, and in his drunken state did rob him, and that then one of them, of his own motion, without the knowledge and consent of the others, or without previous arrangement on their part, gave him a violent shove into the first yard through the gate, causing him to fall and lose his life, the other four in those circumstances would not be guilty of murder.<sup>47</sup>

This distinction was widely observed in many subsequent cases. For instance, in *R v Kalinowski*, Kalinowski (‘K’) appealed his conviction of maliciously inflicting grievous bodily harm (actually committed by Timbury (‘T’) during a robbery to which K was party) on the basis that the jury was not directed to consider whether the crime fell within T and K’s common purpose.<sup>48</sup> The Supreme Court of New South Wales agreed and quashed the conviction, holding that it was necessary for the jury to find before it convicted K that ‘the infliction of grievous bodily harm with intent to do grievous bodily harm’ formed part of the common design.<sup>49</sup> A number of later Victorian authorities reached the same conclusion.<sup>50</sup> For example, the decision of the Full Court of the Supreme Court of Victoria in *R v Lovett* records a direction by the trial judge to the jury in respect of one of the co-accused in a murder trial:

Was it the common intention in this design to kill Pearce? If you are satisfied on the whole of the evidence beyond reasonable doubt that it was, then it would be open to you to find Lovett guilty of murder. If you believe the common intention existed to do Pearce serious bodily injury, again it would be open to you to find Lovett guilty. On the other hand, if you find that the common intention in such circumstances was merely to do injury, then you would find Lovett guilty of manslaughter.<sup>51</sup>

<sup>46</sup> Ibid 640.

<sup>47</sup> Ibid.

<sup>48</sup> *R v Kalinowski* (1930) 31 SR (NSW) 377.

<sup>49</sup> Ibid 380; see also at 382. See also *R v Dunn* (1930) 30 SR (NSW) 210, 212 (Street CJ), 214 (Ferguson J); *Surridge* (n 3) 282; *R v McConnell* [1977] 1 NSWLR 714, 714 (Street CJ), 721 (Taylor CJ at CL), 723 (Begg J).

<sup>50</sup> See, eg, *Blackmore* (n 3) 377; *Lovett* (n 28) 421; *R v Lowery* [No 3] [1972] VR 939, 950.

<sup>51</sup> *Lovett* (n 28) 421.

In determining whether the verdicts of the co-accused were consistent with the charge, the Full Court did not question the correctness of the direction and proceeded on the basis that it was correct.<sup>52</sup> Most significantly for present purposes, the High Court before 1980 had also arrived at a conception of secondary liability that went no further than a person's intention. In *Markby v The Queen*, the Court considered the issue in some depth, and concluded that '[w]hen two persons embark on a common unlawful design, the liability of one for acts done by the other depends on whether what was done was within the scope of the common design'.<sup>53</sup> The combined effect of these authorities, therefore, was to mark the outer limit of a person's criminal liability with that person's intention and assent. Consequently, by the time the High Court considered *Johns*, the modern-day concept of EJCE was resoundingly discordant with developed principle and, in some cases, had been expressly rejected.

### III THE (VERY) MODERN HISTORY OF EJCE LIABILITY

Against that background of the Australian common law of criminal complicity, this part of the article will begin with *Johns* and trace its application in subsequent Australian and English authorities. The reason for doing so is that the first Australian decision to officially recognise the EJCE doctrine, the High Court case of *McAuliffe*, was based on these authorities, which were in turn based on *Johns*. It is therefore valuable to inquire whether the decision in each case is justified by the previous authority on which it relies.

#### A Johns

*Johns* concerned a botched robbery.<sup>54</sup> Johns' ('J') role in the crime began with driving Watson ('W') to the victim's house so that W could rob the victim. According to the plan, J was to wait outside the victim's house, and assist W after the robbery with loading the property into the car and hiding the property at a construction site so that W could later collect it. W told J beforehand that he 'wouldn't stand for any nonsense'.<sup>55</sup> When W arrived at the victim's residence, the victim resisted, and W killed him and fled. At trial, W and J were convicted of murder. Before the New South Wales Court of

<sup>52</sup> Ibid 421–2.

<sup>53</sup> (1978) 140 CLR 108, 112 (Gibbs ACJ). See also *Varley v The Queen* (1976) 12 ALR 347, 353.

<sup>54</sup> These facts are taken from *Johns (High Court)* (n 1) 110–11 (Barwick CJ), 123–4 (Mason, Murphy and Wilson JJ).

<sup>55</sup> Ibid 111.

Criminal Appeal, J contended that the trial judge erred in directing the jury that the murder need only be a ‘possibility’ or ‘contingency’ of the common purpose for J to be guilty of murder.<sup>56</sup> The Court of Criminal Appeal dismissed the appeal. Specifically, Street CJ stated the law as follows:

[A]n accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention — an act contemplated as a possible incident of the originally planned particular venture.<sup>57</sup>

The High Court also dismissed J’s appeal, approving Street CJ’s statement.<sup>58</sup>

Some commentators view this statement of principle as an early instantiation of EJCE, or a departure from prior authority on secondary liability.<sup>59</sup> For example, Laura Stockdale argues that *Johns* ‘established a subjective test for EJCE in Australian common law jurisdictions.’<sup>60</sup> This article respectfully submits, however, that *Johns* is simply a case about common purpose. Both Street CJ and the High Court were clear that the murder under consideration was one *within* J and W’s common purpose.<sup>61</sup> Mason, Murphy and Wilson JJ, for example, wrote:

In the present case there was ample evidence from which the jury could infer that the applicant gave his assent to a criminal enterprise which involved the use ... of a loaded gun, in the event that [the victim] resisted or sought to summon assistance. ... The jury could therefore conclude that the common purpose involved resorting to violence of this kind, should the occasion

<sup>56</sup> *Johns* (NSWCCA) (n 43) 296; see also at 265 (Begg J).

<sup>57</sup> *Ibid* 290 (Street CJ).

<sup>58</sup> *Johns* (High Court) (n 1) 122 (Stephen J), 130–1 (Mason, Murphy and Wilson JJ).

<sup>59</sup> See, eg, Sarah Pitney, ‘Undoing a “Wrong Turn”: The Implications of R v Jogee; Ruddock v The Queen for the Doctrine of Extended Joint Criminal Enterprise in Australia’ (2016) 40 *Criminal Law Journal* 110, 112; Stockdale (n 12) 51; Justice MJ Beazley, ‘Extended Joint Criminal Enterprise in the Wake of *Jogee* and *Miller*’ (Speech, Office of the Director of Public Prosecutions, 7 March 2017) 5–6 [19]–[22] <[www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Beazley\\_20170307.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Beazley_20170307.pdf)>, archived at <<https://perma.cc/9UFB-KJUL>>.

<sup>60</sup> Stockdale (n 12) 51.

<sup>61</sup> *Johns* (NSWCCA) (n 43) 289–90; *Johns* (High Court) (n 1) 118 (Stephen J), 131–2 (Mason, Murphy and Wilson JJ).

arise, and that the violence contemplated amounted to grievous bodily harm or homicide.<sup>62</sup>

The consequence of a crime falling within the common purpose of J and W, as was recognised throughout both decisions, is that both intended the commission of the crime and communicated their assent to its commission.<sup>63</sup> The fact that J and W's intent to commit a crime was conditioned on an unlikely event speaks to their desire, rather than the different concept of their intention.<sup>64</sup> That is, J and W may have hoped that the victim did not resist so that W could avoid killing him, but that hope is irrelevant to the fact that they decided to bring about the victim's death if he resisted.<sup>65</sup> On that basis, Stephen Odgers and Stanley Yeo are entirely correct when they summarise *Johns* by saying:

*Johns* ... is not authority for the proposition that A is criminally liable for the conduct of B, if A foresaw that B may commit the relevant act but did not agree that B should do that. Rather, it is authority for the proposition that A will be liable for an act committed by B during the commission of an agreed criminal venture, if A foresaw the possibility that the act would be committed *and* assented to its commission.<sup>66</sup>

For that reason, *Johns* is properly characterised as having nothing to say about criminal acts that fall outside the shared criminal intent of the parties.

### B Miller (1980)

Precisely the same conclusion applies to the later High Court case of *Miller* (1980).<sup>67</sup> As the Court puts it, '[t]he facts of the case were of an extraordinary character'.<sup>68</sup> Miller ('M') habitually drove Worrell ('W') around to 'pick up' women for consensual sexual intercourse with W. When W successfully found

<sup>62</sup> *Johns* (High Court) (n 1) 131–2.

<sup>63</sup> *Johns* (NSWCCA) (n 43) 290 (Street CJ); *Johns* (High Court) (n 1) 118 (Stephen J), 125–6, 131 (Mason, Murphy and Wilson JJ).

<sup>64</sup> See AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 4<sup>th</sup> ed, 2010) 129, 139; David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (Oxford University Press, 14<sup>th</sup> ed, 2015) 127.

<sup>65</sup> See *R v Mohan* [1976] 1 QB 1, 11; Simester et al (n 64) 129. See also the example in *Johns* (High Court) (n 1) 131 (Mason, Murphy and Wilson JJ).

<sup>66</sup> Stephen J Odgers and Stanley MH Yeo, 'McAuliffe Revisited' (2004) 28 *Criminal Law Journal* 5, 6 (emphasis in original).

<sup>67</sup> *Miller v The Queen* (1980) 32 ALR 321 ('Miller (1980)').

<sup>68</sup> *Ibid* 322. These facts appear at 322–3.

a woman, M drove to a secluded area, parked the car and walked away. About two months into this arrangement, M came back to the car to discover that W had killed the woman he picked up. M assisted W with disposing of his victim's body, and continued their arrangement of driving around to pick up women. Sometimes, W had sex with a woman and the woman walked away unscathed; other times, M would come back to see that W had killed his sexual partner. At trial, M was found guilty of six of the murders committed by W, and acquitted of the first murder. M's argument before the High Court was that the trial judge erred in directing the jury that he could 'be convicted of murder if it was within his contemplation that the girl picked up *might* be murdered'.<sup>69</sup>

The High Court denied special leave. The basis for doing so was entirely consistent with prior authority. The Court reasoned that after W killed his first victim, M knew that W might kill any woman he met throughout their arrangement, and W knew that M was aware of this contingency.<sup>70</sup> According to the Court,

[b]ecause of these additional elements the jury might conclude that the purpose common to them both on these subsequent expeditions had altered. Because of their knowledge of one another's state of mind a new factor would be present in the recurring common purpose of the pair: when [M] would leave [W] and a girl together, he would no longer be leaving them merely so that they might have sexual intercourse but also so that, if the mood took him, [W] might, in [M]'s absence, murder the girl.<sup>71</sup>

The Court then explicitly referred to the principle that assent need not be communicated expressly, and held that the trial judge fully directed the jury on all of the relevant principles.<sup>72</sup> The Court's decision is therefore simply summarised by saying that initially M and W had no common purpose to commit a crime at all; but after W killed his first victim, M and W tacitly agreed that M would drive W to pick up women and possibly kill them if he so wished. Such reasoning constitutes a straightforward application of the common purpose doctrine.

<sup>69</sup> Ibid 324 (emphasis added).

<sup>70</sup> Ibid 326.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

C Chan Wing-Siu and Its Contemporaneous Interpretation

Both *Johns* and *Miller* (1980) formed the foundation of the Privy Council's reasoning in *Chan Wing-Siu*,<sup>73</sup> the case now regarded as the first to recognise the EJCE doctrine (or 'parasitic accessorial liability' ('PAL'), as it is known in England).<sup>74</sup> The need to refer to these decisions flowed from the Privy Council approaching the case on the premise that the appellants' convictions for murder and wounding with intent to cause grievous bodily harm could only be supported by 'the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend'.<sup>75</sup> According to Sir Robin Cooke (who delivered the Privy Council's judgment),

[t]hat there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.<sup>76</sup>

Noting that the matter had not yet been addressed in significant detail in England,<sup>77</sup> Sir Robin turned to *Johns* and *Miller* (1980). He contended that both of these cases were authorities for the proposition that 'an act contemplated as a possible incident of the originally planned particular venture'<sup>78</sup> is 'within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise'.<sup>79</sup> After discussing these cases' application in a New Zealand Court of Appeal case and the Hong Kong Court of Appeal below,<sup>80</sup> Sir Robin concluded by rejecting the appellants' argument that a co-offender must foresee an incidental crime as more probable than not in order to be criminally liable for it.<sup>81</sup>

<sup>73</sup> *Chan Wing-Siu* (n 4).

<sup>74</sup> See, eg, *Jogee* (n 14) 414 [74] (Lord Hughes and Lord Toulson JJSC).

<sup>75</sup> *Chan Wing-Siu* (n 4) 175.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid* 176.

<sup>78</sup> *Ibid*, quoting *Johns* (NSWCCA) (n 43) 290 (Street CJ).

<sup>79</sup> *Chan Wing-Siu* (n 4) 176, discussing *Johns* (High Court) (n 1) 131 (Mason, Murphy and Wilson JJ).

<sup>80</sup> See *Chan Wing-Siu* (n 4) 176–7, discussing: *R v Gush* [1980] 2 NZLR 92; *Chan Wing-Siu v The Queen* [1982] HKLR 280.

<sup>81</sup> *Chan Wing-Siu* (n 4) 177.

It is not clear whether the ‘incidental crime’ forming the subject of their Lordships’ conclusion was a crime outside the scope of a common purpose. This ambiguity arises from the judgment’s use of ‘contemplation’ and ‘authorisation.’<sup>82</sup> In the second half of the judgment, Sir Robin referred to ‘contemplation’ in the sense it was used in *Johns and Miller* (1980): as referring to the scope of the parties’ express or tacit *agreement*.<sup>83</sup> But *Johns*’ and *Miller* (1980)’s discussions of ‘contemplation’ are used to support the first half of the Privy Council’s analysis of the ‘wider’ principle in which a secondary offender is liable for a primary offender’s crime ‘which the former foresees but does not necessarily intend.’<sup>84</sup> In this section of the judgment, ‘contemplation’ thus connotes mere awareness, instead of the intention *and* assent on which the common purpose principle espoused in *Johns and Miller* (1980) relies. Whether *Chan Wing-Siu* is taken as authority for an independent EJCE principle founded on mere foresight (without agreement) accordingly depends on the constructional weight assigned to each half of the reasoning.

Testament to the ambiguity of *Chan Wing-Siu* on this point is the bifurcation of viewpoints it engendered when it was initially considered. In Australia, a clear majority of authorities in the five years after *Chan Wing-Siu* maintained that the case simply repeated the principles in *Johns* without changing the law.<sup>85</sup> Most notably, a majority of the High Court in *Mills* proceeded on this assumption in a brief statement of reasons denying special leave.<sup>86</sup> But this view was not universal. The South Australian Court of Criminal Appeal, for example, split on this very point in 1988.<sup>87</sup> King CJ said (in apparent agreement with Mohr J):

I do not take the Privy Council in *Chan Wing-Siu* ... or the High Court in *Mills* ... to be abandoning the established principles upon which the criminal liability of participants in a joint enterprise for crimes actually perpetrated by other participants, is based. ... One must not lose sight of the fundamental ground of liability which is the implied authorisation of what is contemplated as part of, or incidental to the implementation of, the common purpose.<sup>88</sup>

<sup>82</sup> JC Smith, ‘Mens Rea’ [1990] *Criminal Law Review* 119, 121.

<sup>83</sup> *Chan Wing-Siu* (n 4) 176.

<sup>84</sup> *Ibid* 175.

<sup>85</sup> *Mills v The Queen* (1986) 68 ALR 455, 455; *Browne v The Queen* (1987) 30 A Crim R 278, 306; *R v Woolley* (1989) 42 A Crim R 418, 438.

<sup>86</sup> *Mills* (n 85) 455.

<sup>87</sup> *R v Britten* (1988) 49 SASR 47, 50 (Mohr J), 53–4 (King CJ), 60 (Millhouse J).

<sup>88</sup> *Ibid* 53–4 (King CJ); see also at 50 (Mohr J).



But Millhouse J took a different view:

I find it puzzling that the majority in the High Court endorse without qualification *Johns*' case when it seems to me to be in some respects contrary to *Chan Wing-Siu*. ... [O]n the other hand, the majority cited with approval the passage from *Chan Wing-Siu* crucial in this appeal. I have come to the conclusion, with respect, that this must have been deliberate and conscious and that we should follow the Privy Council decision ...<sup>89</sup>

The same difference of opinion was also evident in the English authorities that initially considered *Chan Wing-Siu*. As was the case in Australia, most English authorities came out in favour of the proposition that *Chan Wing-Siu* had not displaced the intention requirement embodied in the *Johns* and *Miller* (1980) decisions.<sup>90</sup> For example, the Court of Appeal in *R v Barr* held with respect to this issue

that where it is appropriate to direct a jury upon foreseeability of consequence, the jury must be told that evidence of such foreseeability does no more than assist the jury to determine whether a defendant had at the requisite time an intention either to kill or to do serious harm to the victim.<sup>91</sup>

Occasionally, though, decisions sailed much closer to the wind in terms of conflating these concepts. The Court of Appeal in *R v Ward*, for instance, held that the trial judge correctly articulated the position embraced by *Chan Wing-Siu* with the direction that a party to a JCE could be liable for another party's murder that was foreign to the agreement, so long as the former party 'contemplated and foresaw' that the murder was 'a possible part of the planned joint enterprise'.<sup>92</sup> Accordingly, while most English and Australian authorities between 1985 and 1990 coalesced around the proposition that *Chan Wing-Siu* had not extended the law of JCE, some construed it as establishing a form of JCE liability based on mere foresight.

<sup>89</sup> Ibid 60. See also, arguably, *Mills* (n 85) 456 (Deane J).

<sup>90</sup> See, eg, *R v Barr* (1989) 88 Cr App R 362, 369; *R v Slack* [1989] 1 QB 775, 781-2; *R v Wakely* (Court of Appeal Criminal Division, Lord Lane CJ, Leonard and Rose JJ, 25 September 1989) 5-6.

<sup>91</sup> *Barr* (n 90) 369.

<sup>92</sup> (1986) 85 Cr App R 71, 76; see also at 77.

*D Professor Smith's Case Comment and Its Reception*

It was not until 1990 that *Chan Wing-Siu* was characterised as the case founding the EJCE/PAL rule. The cause of that shift was a short case comment on *Chan Wing-Siu* and the English authorities interpreting it. In the comment, Professor Smith pointed out the difficulty in Sir Robin's statement that contemplation was 'the same idea in other words' as authorisation.<sup>93</sup> As he put it, '[o]ne may contemplate that something will be done by another without authorising him to do it'.<sup>94</sup> But considering this aspect of *Chan Wing-Siu*, Professor Smith concluded 'that contemplation or foresight is enough' for a person to be liable for a crime outside the common purpose that is committed by another co-offender.<sup>95</sup> He proceeded to illustrate the moral culpability of a person satisfying this rule with an example, and stated that a secondary offender who continues to participate in a criminal enterprise with foresight that another may commit an additional crime lends himself or herself to the enterprise.<sup>96</sup> The secondary offender therefore gives 'assistance and encouragement to [the primary offender] in carrying out an enterprise which he knows may involve murder'.<sup>97</sup> Accordingly, Professor Smith concluded that the secondary offender's conduct in these circumstances was sufficiently blameworthy to warrant a murder conviction and, according to *Chan Wing-Siu*, was legally sufficient.<sup>98</sup>

It is important to be attuned to the significance of Professor Smith's adoption of this interpretation of *Chan Wing-Siu*. Their Lordships in *Chan Wing-Siu* based their endorsement of the 'wider principle' of criminal liability for acts foreseen but not intended on *Johns* and subsequent Australian, Hong Kong and New Zealand cases applying *Johns*. But as previously explained, *Johns* only concerned acts within a common purpose. Thus, if *Chan Wing-Siu* is interpreted as imposing liability for foreseen acts outside a common purpose, *Johns* does not support it. However, that is precisely how Professor Smith interpreted it. Of course, this may well be justified from the perspective of an English commentator attempting to discern the true effect of a high English authority. But this interpretation unfastened *Chan Wing-Siu* from the authority on which it was based. As a result, from Professor Smith's article

<sup>93</sup> JC Smith (n 82) 120; see also at 121.

<sup>94</sup> *Ibid* 121.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid*.

forth, the only authority for *Chan Wing-Siu*'s purported principle was very little other than *Chan Wing-Siu* itself.

Despite the difficulties associated with Professor Smith's construction, the English Court of Appeal adopted it in the first case to unambiguously recognise a separate EJCE/PAL rule, *Hyde*.<sup>99</sup> In *Hyde*, the Court expressly rejected its previous decisions interpreting *Chan Wing-Siu*, because of Professor Smith's article.<sup>100</sup> Disavowing its previous holding that mere foresight of the possibility of another's crime was insufficient for a party to a common purpose to be liable for that crime, the Court said:

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 the course of the venture. As Professor Smith points out, 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.<sup>101</sup>

And when the occasion to consider *Chan Wing-Siu* and *Hyde* arose before the Privy Council, the Privy Council also endorsed Professor Smith's interpretation and held that the Court of Appeal accurately captured the law as stated in *Chan Wing-Siu*.<sup>102</sup> Thus, by the time that the status of the 'wider principle' in *Chan Wing-Siu* came before the Australian High Court in *McAuliffe* in 1995, Professor Smith's interpretation of *Chan Wing-Siu* had become the official one, bearing the imprimatur of both the English Court of Appeal and the Privy Council.

### E Recognition in Australia

The High Court case of *McAuliffe* concerned an appeal by David McAuliffe ('DM') and Sean McAuliffe ('SM') against their murder convictions, which had arisen from DM and Matthew Davis ('D') beating the deceased near a cliff, and SM kicking the deceased and leaving him in a puddle on the side of the cliff.<sup>103</sup> The case was heard in New South Wales and was therefore gov-

<sup>99</sup> *Hyde* (n 5) 139.

<sup>100</sup> *Ibid* 138–9.

<sup>101</sup> *Ibid* 139.

<sup>102</sup> *Hui Chi-Ming* (n 5) 51.

<sup>103</sup> *McAuliffe* (n 2) 110–11.

erned by the common law of criminal complicity. Since DM and SM challenged the trial judge's direction that they were guilty of murder if they individually foresaw the intentional infliction of grievous bodily harm as a possible incident of a common criminal enterprise,<sup>104</sup> the question of whether EJCE should be officially recognised by Australian common law fell squarely for decision. The High Court was therefore required to review prior authorities to determine whether the doctrine did or should form part of Australian common law.

In the course of reviewing those authorities, the High Court unanimously made two significant corrections to EJCE's historical record. First, the Court expressly recognised that the Court in *Johns* did not consider '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'.<sup>105</sup> And secondly, the Court noted that *Chan Wing-Siu*, while hinting that the foreseeing party would be liable in such a situation, provided '[n]o explicit answer'.<sup>106</sup> Those observations were entirely correct. But critically, after making those observations, the Court proceeded to approve Professor Smith's contrary interpretation of *Chan Wing-Siu*, the Court of Appeal's endorsement of that interpretation in *Hyde* and the Privy Council's endorsement of *Hyde* in *Hui Chi-Ming v The Queen*.<sup>107</sup> The only reason the Court offered for accepting this interpretation was Professor Smith's rationalisation of *Chan Wing-Siu*, observing that it was consistent with the principle that 'a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it'.<sup>108</sup> Accordingly, the High Court held that the trial judge's direction was correct and dismissed the appeal.

In doing so, the Court built the EJCE principle upon an internally inconsistent foundation of authorities. The authorities after *Chan Wing-Siu* that the Court relied on to import the EJCE rule into Australia were predicated on a misreading of *Johns* and a questionable interpretation of *Chan Wing-Siu* that not even the Court accepted as accurate. The result was that the Court recognised EJCE liability in Australia on the strength of cases that were self-referential in terms of the authorities said to support the existence of this newfound development in common purpose liability (which the Court

<sup>104</sup> Ibid 113.

<sup>105</sup> Ibid 117.

<sup>106</sup> Ibid 115.

<sup>107</sup> Ibid 116–17.

<sup>108</sup> *McAuliffe* (n 2) 118.

dubbed ‘JCE’ liability). But perhaps more importantly, the High Court’s judgment went no further than *Johns* in the authorities it examined to determine if EJCE should be recognised. In solely relying on the recent English authority it did, it omitted the 70 years of Australian common law authorities thoroughly opposed to this largely accidental development in the law. Consequently, the Court not only introduced a principle that had developed aberrantly, but one that was at odds with the Australian common law of criminal complicity as it had stood for several decades.

#### F *Post-McAuliffe Correction?*

For 21 years after *McAuliffe*, the stark inconsistency of EJCE with prior precedent remained unaddressed by the High Court, notwithstanding the Court re-endorsing the principle in *Gillard* (2003) and rejecting a direct challenge to the principle in *Clayton* (2006).<sup>109</sup> It was not until the doctrine was challenged again in *Miller* (2016) that the Court engaged in an examination of the historical development of the doctrine.

The facts and procedural history of *Miller* (2016) were fairly simple. The three appellants — Miller, Presley and Smith — were three Aboriginal persons who had been convicted of murder in South Australia after accompanying another individual, Betts (‘B’), to confront the deceased, who had earlier directed racial slurs at the group. When the group arrived at the deceased’s house (armed with a knife, a shovel and a baseball bat), the group began attacking the deceased, culminating in B knifing the deceased and killing him.<sup>110</sup> After the Full Court of the South Australian Supreme Court dismissed the appellants’ appeals against their convictions,<sup>111</sup> the appellants successfully sought special leave from the High Court to contend that *McAuliffe* should be overruled.

Both the High Court’s decision to grant special leave and the need to consider the doctrine’s development in *Miller* (2016) arose from the UK Supreme Court’s decision to abolish the English equivalent of EJCE (PAL) in *Jogee*, which was handed down earlier that year. In its unanimous judgment, the Court extensively reviewed English common law authorities prior to *Chan Wing-Siu*, and formed the conclusion that *Chan Wing-Siu*’s introduction of PAL was ‘based on an incomplete, and in some respects erroneous, reading of

<sup>109</sup> *Gillard* (n 8) 14 [25] (Gleeson CJ and Callinan J), 36–9 [110]–[124] (Hayne J); *Clayton* (n 9) 443–4 [14]–[21].

<sup>110</sup> *Miller* (2016) (n 10) 404–5 [52]–[56]; see also at 409 [77].

<sup>111</sup> *R v Presley* (2015) 122 SASR 476.

the previous case law.<sup>112</sup> Based on this consideration, and other theoretical objections to the doctrine, the Court held that PAL entailed ‘a serious and anomalous departure’ from the usual precondition of intention for criminal liability.<sup>113</sup> In its view, then, the English law of criminal complicity had taken a ‘wrong turn’ in *Chan Wing-Siu*, a turn that ought to be corrected by restoring the common law to its pre-*Chan Wing-Siu* position.<sup>114</sup>

Thus, the question of whether Australian common law had similarly taken a wrong turn loomed large in *Miller* (2016). In the result, six judges of the High Court held that it had not, those judges holding that EJCE should remain part of the common law, unchanged.<sup>115</sup> Unlike in *Gillard and Clayton*, the Court — in the joint judgment of French CJ, Kiefel, Bell, Nettle and Gordon JJ — undertook a review of authorities predating *Johns* and adopted Professor Smith’s characterisation of the concept of EJCE as ‘long-standing’, based on the objective common purpose rule from 19<sup>th</sup>-century English common law.<sup>116</sup>

To justify that conclusion, amongst other statements of the rule, their Honours quoted Foster’s statement from the 19<sup>th</sup> century that ‘if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony’.<sup>117</sup> After discussing the development of the objective approach in England from that point in history,<sup>118</sup> the Court proceeded to cite two English cases and one Australian case for the proposition that ‘[a]s late as 1930, there are decisions in England, and in this country’ which contain ‘more than a trace of Foster’s objective test’ in the determination of the liability of a party to a robbery for a murder or intentional infliction of grievous bodily harm committed by the principal.<sup>119</sup> The Court then concluded this part of its

<sup>112</sup> *Jogee* (n 14) 415 [79].

<sup>113</sup> *Ibid* 416 [83].

<sup>114</sup> *Ibid* 417 [87].

<sup>115</sup> *Miller* (2016) (n 10) 387–8 [2] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), 429–30 [148] (Keane J).

<sup>116</sup> *Ibid* 388–9 [5].

<sup>117</sup> *Ibid* 389 [6], quoting Sir Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases: To Which Are Added Discourses upon a Few Branches of the Crown Law* (W Clarke and Sons, 3<sup>rd</sup> ed, 1809) 370.

<sup>118</sup> *Miller* (2016) (n 10) 390–1 [12].

<sup>119</sup> *Ibid* 392 [16].

historical account, noting in the next sentence that '[i]t was against this background' that *Johns* was decided.<sup>120</sup>

There are, however, serious difficulties with this account. Chief among those difficulties is that the existence of three cases decided before 1930 with 'more than a trace' of Foster's objective approach does very little to demonstrate any foundation of EJCE in prior common law. That is because, first, as discussed above,<sup>121</sup> the 19<sup>th</sup>-century common purpose rule operated on the assumption — explicitly recognised in both Australian and English decisions in this period — that individuals intend the probable consequences of their actions. Other than the fact that both doctrines extend criminal liability widely, they have nothing in common.

But, secondly, even if the objective common purpose rule is properly characterised as an early antecedent of EJCE, the question arises as to whether after Australian common law rejected an antiquated view of criminal liability, it ever endorsed anything like EJCE before it aberrantly emerged in *McAuliffe*. The Court did not address this question, however. It immediately proceeded from citing three cases decided in 1930 (or earlier) to noting that '[i]t was against this background' that *Johns* was decided.<sup>122</sup> In doing so, the Court skipped over the fifty 50 years of Australian authority on the matter between 1930 and 1980.<sup>123</sup> It also did not discuss the authority prior to 1930 that had rejected liability in an EJCE form.<sup>124</sup> As a result, the background that the joint judgment attributed to *Johns* was far from an accurate reflection of Australian common law as it had developed in the 20<sup>th</sup> century.

This conclusion makes manifest the problems in the joint judgment's discussion of *Johns*. On *Johns*, the Court observed that because the case stands for the proposition that parties to an agreement to commit robbery who foresee murder as a possible incident of that plan will be liable for the murder if it occurs, '[i]t can be seen that the rejection of foresight as a sufficient mental element would affect the foundation of joint criminal enterprise liability generally.'<sup>125</sup> However, on a proper reading of *Johns*, the rejection of foresight as a sufficient mental element would have no such effect because the parties to a JCE both assent to the foreseen crime and intend its commission if

<sup>120</sup> Ibid 392 [17].

<sup>121</sup> See Part II(B)(1).

<sup>122</sup> *Miller* (2016) (n 10) 392 [17].

<sup>123</sup> See, eg, *Kalinowski* (n 48) 379–80; *Surridge* (n 3) 282; *Blackmore* (n 3) 377; *Lovett* (n 28) 421; *Lowery [No 3]* (n 50) 951; *Varley* (n 53) 353; *McConnell* (n 49) 721.

<sup>124</sup> See, eg, *Dowdle* (n 3) 639–40.

<sup>125</sup> *Miller* (2016) (n 10) 390 [10].

the need arises. Mere foresight of a possibility played no part in *Johns*, nor was it ever a sufficient mental element for criminal liability before *Johns*. Even the Court in *McAuliffe*, the case recognising EJCE, propounded this distinction when it observed that *Johns* did not concern ‘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’.<sup>126</sup>

Accordingly, by overlooking this distinction as it applied to the development of EJCE, the Court proceeded upon the interpretation of *Chan Wing-Siu* and later authorities that were uncoupled from the proposition for which *Johns* actually stood. The consequence was that the Court concluded its judgment without ever correcting the interpretational errors leading to the development of EJCE, or modifying the unsatisfactory precedential foundation on which the principle was based. That EJCE continues to form part of Australian common law, notwithstanding this foundation in the misinterpretation of precedent, therefore calls for a serious inquiry into whether it can be sustained on other grounds.

#### IV THE THEORETICAL FOUNDATION OF EJCE IN AUSTRALIA

That is the province of this part: to determine whether aside from the unsatisfactory circumstances of EJCE’s creation, the doctrine can be supported by reference to the theoretical justifications offered by the High Court. The thesis of this part is that it cannot. To make good that proposition, this part begins, first, by contending that the High Court’s only non-precedent reason for incorporating EJCE into Australian law in *McAuliffe* — the conception of the EJCE offender as similar to an intentional aider and abettor — was spurious. This part then moves to the more recent theoretical justification of EJCE liability advanced by the Court in *Clayton* (derived from Professor Simester’s work), and argues that this authorisation model of EJCE liability is similarly unconvincing. The wider conclusion reached by this part is therefore that in addition to being built upon a deficient precedential foundation, the EJCE principle was imported into Australian common law on the basis of an unfounded theoretical model that has never been adequately remedied by the Court.

<sup>126</sup> *McAuliffe* (n 2) 117.



### A *The McAuliffe Theoretical Justification of EJCE*

As noted in the previous part, the Court in *McAuliffe* chose to adopt the EJCE principle for the following reason:

As Sir Robin Cooke observed, the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties. That is in accordance with the general principle of the criminal law that a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it.<sup>127</sup>

In that regard, the High Court viewed ‘the secondary offender ... as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose’.<sup>128</sup>

Although it appears that the Court has since distanced the EJCE principle from this rationale,<sup>129</sup> the Court has never formally rejected it. Moreover, because the response to the rationale covers important analytical ground useful to the discussion of Professor Simester’s theory and the moral culpability of those caught by the EJCE doctrine, it is worth considering in some detail why the foundational premise of the *McAuliffe* theory — that a secondary offender caught by the EJCE doctrine has in some way intentionally assisted with or encouraged the incidental offence — does not hold. Accordingly, this section seeks to explain why this premise is unfounded, on two bases. First, the doctrine extends liability to secondary offenders for incidental offences on the basis of subsequent participation in an enterprise that constitutes neither assistance nor support. Secondly, in the cases that continued participation after foresight does amount to either of these forms of support, it is not comparable to *intentional* support.

#### 1 *Encouragement?*

To make the argument that the EJCE doctrine permits the extension of criminal liability to individuals for offences that they have not encouraged, it is helpful to consider Professor Smith’s contrary argument, relied on by the Court in *McAuliffe*:<sup>130</sup>

<sup>127</sup> *McAuliffe* (n 2) 118.

<sup>128</sup> *Ibid* 117.

<sup>129</sup> See Part II(B).

<sup>130</sup> *McAuliffe* (n 2) 116–17.

If A [(Accessory)] knows that P [(Principal)] is carrying a weapon which he will use to kill or cause [grievous bodily harm] if it is necessary to carry out the joint enterprise and A says to P, 'I do not agree to your using that weapon', but then goes on with the joint enterprise, is A guilty of murder if P uses the weapon to kill? A's words negative any express or tacit agreement that the weapon will be used. 'Understanding' is a less precise word than 'agreement' but it is hard to see that there is any understanding either. A has, however, participated in the venture with the relevant foresight. He has 'lent himself' to the enterprise. By so doing he has given assistance and encouragement to P in carrying out an enterprise which he knows may involve murder.<sup>131</sup>

Professor Smith's conclusion that a secondary offender's subsequent participation in a JCE after experiencing the relevant foresight amounts to *encouragement* of the incidental crime is only accurate if certain assumptions not required by the EJCE doctrine are made. These assumptions were made in Professor Smith's example: the secondary offender foresaw the incidental crime before the JCE was carried out (Assumption 1), and expressly or tacitly acknowledged this foresight to the primary offender (Assumption 2). By then participating in the planned enterprise in light of the shared knowledge of what the primary offender might do, the secondary offender encouraged the primary offender's belief that shooting should be appended to the enterprise if necessary. But this conclusion is fact-dependent. The subsequent participation constitutes encouragement only because the primary offender was aware that the secondary offender foresaw the possibility of the incidental crime and decided to participate regardless.

The difficulty attending Assumption 1, however, is that the secondary offender will often not foresee the incidental crime until the enterprise is actually being performed.<sup>132</sup> In those circumstances, the secondary offender's continued participation does not constitute an expression of support for another offence (say, murder) because the secondary offender's conduct is merely referable to what was originally agreed. For example, if during the robbery of a bank, the primary offender screams a death threat at a teller about to press a security alert, the secondary offender's resumption of unloading cash from a nearby drawer does not constitute any expression of encouragement of murder. The secondary offender simply continues to

<sup>131</sup> JC Smith (n 82) 121.

<sup>132</sup> For particularly compelling examples of this proposition, see the facts described in *R v Taufahema* (2007) 228 CLR 232, 238–9 [9]; *R v Safar* [2014] NSWSC 376, [15]–[16]; *R v Jubraeel* [2014] NSWSC 838, [13].

perform a robbery. Of course, if the secondary offender *assents* to this indication of a possible incidental crime (perhaps by nodding at his companion), then the secondary offender encourages the crime. But this situation is covered by the JCE rule; if the secondary offender assents to the possibility of an additional crime, the JCE expands.<sup>133</sup> Accordingly, so long as the secondary offender stays within the bounds of what was originally agreed, in no sensible sense can that offender be said to encouraging the primary offender to commit a crime foreign to that agreement.

Assumption 2 is similarly problematic. EJCE liability does not require that the secondary offender tacitly or expressly acknowledge his or her foresight of the possibility of an additional crime to the primary offender. Consequently, it is difficult to argue that the secondary offender's subsequent participation in the enterprise encourages the primary offender to commit the incidental crime if the primary offender operates on the assumption that the secondary offender has not even considered another crime. Nor is it persuasive to argue that the secondary offender's mere *presence* encourages the primary offender to commit the incidental crime in circumstances where, in law, mere presence at the commission of a crime does not constitute 'encouragement' for the purpose of aiding and abetting,<sup>134</sup> the mode of accessorial liability to which EJCE was being compared. As a result, it is not accurate to say that subsequent participation in a JCE after foresight of an incidental crime always, or even usually, amounts to encouragement of that crime.

## 2 Assistance?

It is also not necessarily the case that subsequent participation in a JCE after foresight of the incidental crime constitutes assistance. It is true that when the primary offender intends to commit the incidental crime at the outset of the JCE and the secondary offender participates in the JCE (irrespective of whether the offender foresees the possibility of the crime), the secondary offender has provided assistance. That is because the secondary offender provides a form of support by participating in a series of acts which leads the primary offender closer to committing the offence, like, for example, driving the primary offender to the place where the primary offender will kill the victim, or performing lookout duty during the robbery in which the primary offender commits murder.<sup>135</sup>

<sup>133</sup> The aforementioned case of *Miller* (1980) (n 67) describes well the process of the expansion of common purpose in light of shared knowledge.

<sup>134</sup> *R v Phan* (2001) 53 NSWLR 480, 485 [69].

<sup>135</sup> See The Law Commission (UK), *Participating in Crime* (Cm 7084, 2007) 61 [3.48]–[3.49].

But it is not typical that the primary offender premeditates the incidental offence. As has been observed many times, these incidental offences often occur because JCEs escalate.<sup>136</sup> Whether the secondary offender's subsequent participation after the primary offender forms the intent to commit the incidental crime is entirely dependent on the function the secondary offender performs in the JCE. In some cases, the secondary offender's continued participation will constitute a form of assistance. But there are also many cases where the secondary offender's participation does not amount to assistance in any form. For example, in *Taufahema*, three occupants of a car were found guilty of murder through EJCE as a result of another occupant spontaneously shooting a police officer pursuing them, notwithstanding the absence of any evidence that the occupants had agreed to anything more than escape by driving.<sup>137</sup> Although the appellant's conviction for murder was ultimately quashed by reason of the evasion of police not constituting an offence, and therefore not a foundational crime that could engage the EJCE doctrine,<sup>138</sup> the case demonstrates the potential of EJCE to attribute criminal liability to individuals for offences that they have in no way assisted to commit.

### 3 *Intentional Assistance or Encouragement?*

But even in the situations that the secondary offender does assist or encourage, the High Court's claim in *McAuliffe* that the attribution of criminal liability is in accordance with the principle whereby 'a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it' is not correct.<sup>139</sup> EJCE's mental element, foresight of the possibility of a result, is plainly not equivalent to an intention to bring about that result. As the High Court said in 2016, the same year *Miller* was decided,

[t]o engage in conduct knowing that it will probably produce a particular harm is reckless. It is evidence which, taken with other evidence, may support a conclusion that the person intended to produce that harm. Nonetheless, foresight of risk of harm is distinct in law from the intention to produce that harm.<sup>140</sup>

<sup>136</sup> See *Miller* (2016) (n 10) 399 [36]; *Simester et al* (n 64) 244, both quoting *R v Powell* [1999] 1 AC 1, 14 (Lord Steyn).

<sup>137</sup> *Taufahema v The Queen* [2006] NSWCCA 152, [2], [10].

<sup>138</sup> *Ibid* [39].

<sup>139</sup> *McAuliffe* (n 2) 118. See also *Gillard* (n 8) 14 [25] (Gleeson CJ and Callinan J), 36 [110]–[112] (Hayne J).

<sup>140</sup> *Zaburoni v The Queen* (2016) 256 CLR 482, 489 [10].

This difference derives from the basal concept of intention: a person who intends a result seeks to bring it about,<sup>141</sup> or on an expansive view of intention, does an act knowing that a result will certainly happen.<sup>142</sup> EJCE's mental element operates well under that threshold. For that reason, the mens rea that the Court in *McAuliffe* imputed to individuals liable under the EJCE rule is also not borne out by what the rule actually requires.

#### 4 Conclusion on the McAuliffe Theory

This section has argued that the Court's theoretical justification of the criminal culpability of the EJCE offender in *McAuliffe* is unconvincing. It is only in a subset of cases that the EJCE offender assists or encourages commission of the incidental offence and, even in that subset, those who merely foresee the possibility of the incidental offence do not intend that result. Thus, since the *McAuliffe* theory was the only non-precedent reason for importing EJCE into Australia, it can properly be said that the EJCE principle became part of Australian law on the basis of a theory that failed to explain why criminal liability should be extended beyond accessorial liability or JCE liability.<sup>143</sup>

#### B The Clayton Theoretical Justification of EJCE

However, it appears that the Court has since resiled from its original endorsement of the *McAuliffe* rationale and has instead adopted a new rationale. In *Clayton* (which concerned whether the Court should reopen *McAuliffe*), the Court made not a single mention of the intentional aiding and abetting comparison, and instead, approved Professor Simester's differentiation between the liability derived from accessorial liability and the liability derived from EJCE.<sup>144</sup> Further confirming the Court's shift away from the *McAuliffe* rationale was the Court's statement in *Miller* that Professor Simester's theory was 'alternative' to that of Professor Smith, and that, '[i]n *Clayton* ... the joint reasons adopt Professor Simester's analysis distinguishing the liability of the aider and abettor.'<sup>145</sup> Thus, as the Court's jurisprudence currently stands, it appears that the *McAuliffe* reasoning no longer prevails as the primary

<sup>141</sup> *Mohan* (n 65) 11.

<sup>142</sup> Simester et al (n 64) 129, 135; Ormerod and Laird (n 64) 116–17.

<sup>143</sup> See *Miller* (2016) (n 10) 418–19 [108]–[110] (Gageler J).

<sup>144</sup> *Clayton* (n 9) 444 [20], discussing AP Simester, 'The Mental Element in Complicity' (2006) 122 *Law Quarterly Review* 578, 596–9.

<sup>145</sup> *Miller* (2016) (n 10) 397–8 [33]–[34].

theoretical justification of the EJCE doctrine in Australia, and has instead been replaced by what the Court said in *Clayton*.

It is therefore necessary to examine whether the Court's newer position is more convincing. In *Clayton*, the Court wrote:

The history of the distinction between joint enterprise liability and secondary liability as an aider, abettor, counsellor or procurer of an offence has recently been traced by Professor Simester. As that author demonstrates, liability as an aider and abettor is grounded in the secondary party's contribution to another's crime. By contrast, in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture.<sup>146</sup>

The fundamental problem with this argument, however, stems from the Court's reliance on the notion of mutuality to justify the EJCE doctrine. As Professor McNamara has observed, '[t]he [only] crime [that was] mutually embarked upon was a different lesser crime.'<sup>147</sup> EJCE liability does not require that the JCE participants are *ad idem* as to the incidental crime. That is JCE. It is this observation that grounds the tenuousness in Professor Simester's argument that 'the execution of the common purpose — including its foreseen attendant risks — is a package deal'.<sup>148</sup> In the part of the article cited by the Court, Professor Simester wrote:

By forming a joint enterprise, S signs up to its goal. In so doing, she accepts responsibility for the wrongs perpetrated in realising that goal, even though they be done by someone else. Her joining with P in a common purpose means that she is no longer fully in command of *how* the purpose is achieved. Given that P is an autonomous agent, S cannot control the precise manner in which P acts. Yet her commitment to the common purpose implies an acceptance of the choices and actions that are taken by P in the course of realising that purpose.<sup>149</sup>

The flaw in this argument, though, is that no implication of the acceptance of the choices and actions taken by P to realise the common purpose can be made from S executing the common purpose. Acceptance of responsibility cannot be drawn from the common purpose because, by definition, a com-

<sup>146</sup> *Clayton* (n 9) 444 [20] (citations omitted).

<sup>147</sup> McNamara (n 12) 114.

<sup>148</sup> Simester (n 144) 599.

<sup>149</sup> *Ibid* (emphasis in original), cited by *Clayton* (n 9) 444 [20].

mon purpose extends only so far as the common intention and assent of the parties to it. On that basis, it is difficult in the extreme to see how a party's agreement to a defined set of actions (the JCE) can imply acceptance of an action outside that set (the incidental crime).

But nor can foresight of the possibility of an incidental crime and continued participation in the common purpose bridge the gap to extension of criminal responsibility for the incidental crime to the secondary offender. That is because the incidental offence for which the secondary offender is held liable need not advance the fulfilment of the crime within the common purpose. For example, in *R v Nguyen*, the secondary offender was sentenced for manslaughter as a result of the primary offender shooting the victim multiple times, notwithstanding the crime within the parties' common purpose was merely an assault that carried no risk of serious injury.<sup>150</sup> In this kind of typical case where the primary offender goes well beyond the purview of the JCE in committing a serious offence that does not advance the common purpose, it cannot be persuasively said that continued participation in the common purpose amounts to any basis for attributing liability for crimes that have no rational connection to the fulfilment of that purpose.

Once it is apparent that the secondary offender's continued participation need not contribute to the incidental crime, then the ability of foresight of the possibility of the incidental crime to ground criminal culpability also falls away; a mental state alone, without an act contributing to an offence, has rightly never been sufficient for criminal responsibility of any sort. Ultimately, then, the *Clayton* theory's determinative flaw is that it fails to explain why a person who neither encouraged, assisted with nor agreed to a serious crime should potentially be criminally responsible for it — a crime that in many cases is the product of the independent will of another.

### C Conclusion on EJCE's Theoretical Foundation

For the foregoing reasons, it is most unsatisfactory that EJCE relied theoretically on, originally, a construct of EJCE offenders as intentional aiders and abettors and, now, a construct of EJCE offenders as guilty of grave crimes merely by virtue of their agreement to participate in a different, lesser crime. In circumstances where the Court has offered no other central rationale for EJCE liability, the conclusion that arises is that EJCE's continuing existence in

<sup>150</sup> [2005] NSWSC 600, [19].

Australian law rests not only on an anomalous precedential foundation, but also a theoretical foundation that simply does not support it.

## V CRITICISMS OF EJCE

This part of the article connects the preceding analysis to the various criticisms that have been levelled against EJCE liability. Accordingly, this part proceeds by illustrating the misalignment of moral culpability and criminal responsibility engendered by EJCE's false theoretical premise and explaining the criticisms of EJCE by reference to this feature.

### *A Disjunction between Moral Culpability and Legal Responsibility*

The consequence of constructing a rule predicated, originally, on the equation of EJCE offenders with intentional aiders and abettors, and later, on a conception of EJCE offenders as impliedly authorising the crimes of others, is that individuals liable under the EJCE rule are fixed with criminal responsibility that they do not deserve. That is why EJCE's fundamental vice is that it offends the principle of 'close correlation between moral culpability and legal responsibility'.<sup>151</sup> Contrary to the axiom underlying much of the criminal law 'that one is only responsible for one's own moral wrongdoings and shortcomings',<sup>152</sup> EJCE attaches serious criminal liability to persons who committed neither the actus reus of the offence in question, nor intended it to happen, and in some cases, made no causal contribution to the commission of the offence. Professor McNamara puts this point convincingly in the case of murder:

[T]he current rules on EJCE ... catch and label and punish as a murderer the person who foresees the risk of murder even where there is evidence that he/she had an avowed desire that it *not* occur; even where he/she had expressed this view to the member of the group who was the source of the foreseen risk;

<sup>151</sup> *Clayton* (n 9) 456 [91] (Kirby J), quoting *Wilson v The Queen* (1992) 174 CLR 313, 334. See also Hayes and Feld (n 12) 32; Beatrice Krebs, 'Joint Criminal Enterprise' (2010) 73 *Modern Law Review* 578, 603; *Simplification of Jury Directions Project* (n 13) 74–5 [2.189]–[2.195]; McNamara (n 12) 111; William Wilson and David Ormerod, 'Simply Harsh to Fairly Simple: Joint Enterprise Reform' [2015] *Criminal Law Review* 3, 15.

<sup>152</sup> New South Wales Law Reform Commission, *Complicity* (Report No 129, December 2010) 100 [4.125].



and even where he/she extracted a promise that that member would not commit murder (to use an admittedly extreme example).<sup>153</sup>

This criticism captures the unfairness occasioned by the disjunction in the criminal liability attributed to a person and the person's level of moral culpability. But since this disjunction does not form part of other areas of the criminal law, the EJCE rule also creates disparity in the severity of sanction as between two equally culpable people. One instantiation of this disparity is that for many crimes (including murder), the EJCE rule imposes a harsher mens rea requirement on secondary offenders than the criminal law generally does on primary offenders.<sup>154</sup> The result is that the actual perpetrator can be acquitted of a crime on account of only foreseeing the possibility of a result, while the secondary offender who possesses this same foresight with respect to the commission of another person's crime while engaged in a JCE will be found guilty. This result runs counter to the difference in moral culpability between the offenders because, as has been pointed out by Charles Cato, the primary offender is the one who has more 'control over the ultimate' crime.<sup>155</sup>

The other anomaly introduced by EJCE is the irreconcilability with that of accessorial liability at common law.<sup>156</sup> As discussed above, accessorial liability for an offence 'require[s] intentional participation in a crime by lending assistance or encouragement'<sup>157</sup> with 'knowledge of the essential facts which constitute the offence'.<sup>158</sup> Consequently, many scenarios can be imagined where a more morally culpable person evades criminal liability in circumstances where a less morally culpable person is found guilty of a criminal offence. A simple example is that the weapons dealer who sells a weapon to a murderer with foresight that the gun would probably be used to kill (but without knowing) is not guilty of murder, but an individual who joins a JCE with no causal contribution to the incidental murder will be guilty of that murder if he or she foresaw only a possibility that it could happen. This result does not appear to be rationalisable by regard to the differences between the

<sup>153</sup> McNamara (n 12) 110–11 (emphasis in original) (citations omitted).

<sup>154</sup> Krebs (n 151) 603; *Simplification of Jury Directions Project* (n 13) 74–5 [2.191], 75 [2.195]; McNamara (n 12) 111–12.

<sup>155</sup> Charles Cato, 'Foresight of Murder and Complicity in Unlawful Joint Enterprises Where Death Results' (1990) 2 *Bond Law Review* 182, 189.

<sup>156</sup> Clayton (n 9) 458 [102]–[103] (Kirby J); Bronitt (n 21) 261; *Simplification of Jury Directions Project* (n 13) 86 [2.238]; McNamara (n 12) 113.

<sup>157</sup> *Giorgianni* (n 23) 506.

<sup>158</sup> *Ibid* 503.

forms of liability, and again, is incompatible with the comparative moral culpability of each individual.

In *Miller* (2016), the Court acknowledged this anomaly, but rationalised it by relying on Professor Simester's view that the aider and abettor's liability is grounded in the secondary party's contribution to another's crime, while the wrong in EJCE cases 'lies in the mutual embarkation on a crime with the awareness that the incidental crime may be committed in executing their agreement'.<sup>159</sup> For the reasons discussed above, though, Professor Simester's theory is attended by serious difficulty in terms of the far-reaching authorisation it imputes to EJCE offenders.<sup>160</sup> Consequently, in circumstances where those caught by the EJCE doctrine cannot be said to have authorised the panoply of incidental crimes available to the primary offender, it still remains unclear why a doctrine that does not require any causal contribution to the incidental offence can rationally impose a significantly lower mens rea threshold than that of accessorial liability, which does require some form of support for the offence in question.

### B *Practical Issues*

From EJCE's disconnect from the moral culpabilities of the individuals caught by the rule flows a number of practical issues that have been raised as exacerbating the unfairness engendered by the doctrine. First, the doctrine's width, in many cases, forecloses the possibility of a manslaughter conviction where it would be an appropriate reflection of the accused's moral culpability.<sup>161</sup> Secondly, the doctrine's unfairness is particularly pronounced when it is applied to 'weak and vulnerable' offenders, who join JCEs out of obedience to the wishes of principal offenders.<sup>162</sup> And thirdly, the doctrine intensifies the difficulty of instructing juries on the already complex law of criminal complicity.<sup>163</sup> This exacerbated difficulty of instructing juries arises because of EJCE's counterintuitive relationship to other principles that the prosecution will

<sup>159</sup> *Miller* (2016) (n 10) 398 [34], citing *Clayton* (n 9) 444 [20], the latter citing Simester (n 144) 598–9.

<sup>160</sup> See Part IV(B).

<sup>161</sup> *Clayton* (n 9) 459–60 [111]–[112] (Kirby J).

<sup>162</sup> *Miller* (2016) (n 10) 423 [125] (Gageler J).

<sup>163</sup> See *Simplification of Jury Directions Project* (n 13) 74–5 [2.189]–[2.195].

commonly rely on in the same trial, like accessorial liability.<sup>164</sup> It is the complexity inherent in, for example, instructing a jury to convict if the accused was party to a JCE and foresaw the possibility of an incidental crime, but acquit if the accused was not and instead was only assisting in that crime without intention to assist, that has caused a great deal of confusion in cases in which EJCE is argued.<sup>165</sup>

## VI CONCLUSION

This article has argued that EJCE is anomalous in its creation, wrong in its theoretical justification and unfair in the results it produces. Amongst the unfairness occasioned by the doctrine includes the consequence that the criminal law extends to individuals criminal convictions and lengthy prison sentences that are not warranted by the moral culpability reflected by the conduct in which they engage. These criticisms have not been assuaged in any of the High Court decisions choosing to retain the doctrine. In those circumstances, this article submits that the EJCE doctrine should not continue to form part of the Australian common law of criminal complicity.

This article accordingly adopts the position that EJCE should be entirely abolished. For the reasons provided when tracing the historical development of the EJCE doctrine, this article agrees with Gageler J's assessment that 'the doctrine was a discrete judicial development'.<sup>166</sup> This article also agrees with Gageler J's response that the doctrine is concomitantly capable of 'discrete judicial reversal'.<sup>167</sup> If EJCE is abolished, the law of JCE will go no further than it did in *Johns*, and therefore will require a person's assent and intention before fixing them with criminal liability. Individuals in JCE will thus only be held criminally liable for acts entailing a commensurate level of moral culpability: those crimes they committed and intended, or those crimes that they authorised others to commit with the intention they should commit them. And secondly, this area of the law will be consonant with the current law on accessorial liability, in which only intention fulfils the necessary mens

<sup>164</sup> See David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5<sup>th</sup> ed, 2011) 986.

<sup>165</sup> *Clayton* (n 9) 460–1 [113]–[117] (Kirby J); Justice Geoff Eames, 'Tackling the Complexity of Criminal Trial Directions: What Role for Appellate Courts?' (2007) 29 *Australian Bar Review* 161, 178; New South Wales Law Reform Commission (n 152) 104–6 [4.140]–[4.152]; Brown et al (n 164) 986; *Simplification of Jury Directions Project* (n 13) 78–80 [2.203]–[2.212].

<sup>166</sup> *Miller* (2016) (n 10) 423 [126].

<sup>167</sup> *Ibid.*

rea for extension of liability for a crime. It is because of the High Court's rejection of foresight of a probability of a result as a sufficient mental element for accessorial liability that this article does not suggest substituting EJCE's foresight of a possibility with that of a probability.<sup>168</sup> If that is the only option, however, it is nonetheless a significant improvement of the law.<sup>169</sup>

Finally, if the High Court were minded one day to reconsider *McAuliffe*, this article submits that the Court's previous endorsements of the EJCE principle should form no barrier to its removal. The EJCE principle was endorsed at least as many times in the United Kingdom before it was eliminated in *Jogee*, and by courts of high authority, such as the Court of Appeal, the Privy Council and the House of Lords.<sup>170</sup> This alone suggests that this step is possible. But more importantly, this article suggests that Gageler J's adage, also repeated in prior High Court authority, is a suitable one to adopt in the circumstances: it is better ... [to] be "ultimately right" than ... "persistently wrong";<sup>171</sup> and to eliminate EJCE 'would do more to strengthen the common law than to weaken it'.<sup>172</sup> This author hopes that this consideration looms large if or when the High Court ever reconsiders the doctrine.

<sup>168</sup> See *Giorgianni* (n 23) 506.

<sup>169</sup> The Victorian Parliament made this change in 2014: see *Crimes Act 1958* (Vic) s 323(1)(b), as inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 6.

<sup>170</sup> *Hyde* (n 5) 139; *Hui Chi-Ming* (n 5) 51; *Powell* (n 136) 14–15 (Lord Steyn), 25 (Lord Hutton).

<sup>171</sup> *Miller* (2016) (n 10) 424 [128], quoting *Wurridjal v Commonwealth* (2009) 237 CLR 309, 350 [65] (French CJ), the latter quoting *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J).

<sup>172</sup> *Miller* (2016) (n 10) 424 [128].