IN THE HIGH COURT OF AUSTRALIA **No. A22 of 2015**
ADELAIDE OFFICE OF THE REGISTRY

BETWEEN

WAYNE DOUGLAS SMITH
Applicant

THE QUEEN
Respondent

APPLICANT'S ~~SUMMARY OF ARGUMENT~~ SUBMISSIONS

Part I: Internet Publication

10 1. The applicant certifies that this submission is in a form suitable for publication on the internet.

Part II: Statement of Issues

2. Should the doctrine known as "extended joint enterprise", enunciated in *McAuliffe v The Queen* (1995) 183 CLR 108, be reconsidered and revised or abandoned, in light of the decision of the Supreme Court of the United Kingdom in *R v Jogee* [2016] 2 WLR 681?

3. In a case in which the evidence established the applicant to have been intoxicated at the time of the fatal act, and the jury were invited to find the applicant guilty of murder on the basis of his involvement in a joint criminal enterprise or by way of extended joint enterprise, should the Court below have found that the verdicts of guilty against the applicant were unreasonable or insupportable?

20 **Part III: Notices under s 78B of the *Judiciary Act***

4. The applicant does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is required to be given.

Part IV: Citation for the reasons of the court below

5. The application relates to a decision of the Full Court of the South Australian Supreme Court, (**'the Full Court'**) unreported, *R v Presley, Miller and Smith* [2015] SASCFC 53.[1]

Part V: Factual Background and Issues

6. The applicant, and three others, were found guilty of the murder of Clifford Hall on 12 December 2012 (**'Hall'**), contrary to s 11 of the *Criminal Law Consolidation Act 1935* (SA) (**'CLCA'**) and aggravated causing harm with intent to cause harm in relation to Wayne King
30 (**'King'**), contrary to s 24 of the *CLCA*.

7. The relevant background facts are set out in paragraphs [6]-[44] of the Summary of Argument of the appellant Miller, filed on 23 December 2015, in number A28 of 2015.

[1] References in this document to "FC" relate to paragraphs in the Full Court's judgment.

Legal Services Commission
Solicitors for the applicant
Windsor Building, Elizabeth City Centre
ELIZABETH SA 5112

Telephone: (08) 8111 5415
Facsimile: (08) 8207 9333
Julia.Davey@lsc.sa.gov.au.au
23 March 2016

8. Like Miller, Smith had been drinking, and smoking cannabis, with the witness Willis on the afternoon and into the evening of 12 December 2012.[2]

9. There was no evidence that Betts was seen to have a knife prior to the fatal stabbing of Hall[3] although the observable presence of a baseball bat and / or a pole of some description was common to the evidence concerning the lead up to the fatal altercation (FC [10], [13], [15], [17]).

10. There was some evidence that a man whose description was not inconsistent with the applicant had possession of a shovel (FC [14], [17]) at the time of the altercation. However that evidence was imprecise and its capacity to prove the applicant's involvement in any violence was disputed.[4] No witnesses to the altercation identified the applicant and the witnesses' descriptions (FC [14], [17]) of the clothing being worn by the man menacing others with a shovel was not consistent with the clothing worn by the applicant when discovered by police in the early hours of 13 December 2012.[5] Whilst the applicant's fingerprints were also found on the base / bottom of a Passionpop bottle in a manner consistent with holding the bottle in an upright or upside down fashion[6], there was no forensic evidence linking the applicant to Hall or King and no evidence linking the applicant with the shovel found near the scene of the altercation, and which might have come from Hall's property.[7]

11. At 5:15am on 13 December 2012 (some 6 hours after the fatal altercation in Grant Street), the applicant was woken as he slept in a car and spoken to by police (FC [22]). He said he had been drinking at Ricky Warrior's house between 6:30pm and 11:30pm on 12 December 2012. There was no dispute at trial that this statement was false (FC, [22]) although its utility as evidence of a consciousness of guilt (FC [130]-[151]) was contested, primarily because of its compatibility with innocent explanations.[8]

12. Around 24 hours after the events in Grant Street, the applicant provided a blood sample which was subjected to toxicological analysis. The blood sample contained a zero blood alcohol concentration, but traces of prescription drugs and cannabis were detected. There was uncontradicted evidence that the applicant had been drinking throughout 12 December 2012 and the blood alcohol concentrations of his co-accused from samples taken much closer to the events in question provided important circumstantial evidence of the applicant's likely state of intoxication. It was unsurprising that the applicant's blood alcohol concentration in the sample obtained almost 24 hours after the fatal altercation was zero. Dr Madjumder, a pharmacologist called by the appellant Miller gave evidence of the usual rates of elimination of alcohol from the body being around 0.015%-0.02% per hour.[9]

13. So far as the applicant's case was concerned, the controversy between the parties related to: the applicant's presence in Grant Street at the time of the fatal altercation and participation in any attack being carried out against Hall or King; the applicant's complicity in any proved agreement to assault anyone in Grant Street, either generally or with intention to kill or cause grievous bodily harm; and, in the alternative, whether the applicant actually contemplated the

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[2] T760-761, 817, 830, 843-844.
[3] AB66 (SU63).
[4] AB262-279 (SU259-276).
[5] AB279 (SU276). Bateman: T293 (red basketball shirt, shorts, white sneakers); Turner: T430 (green t-shirt, red shorts): Casell (the police officer who discovered the applicant on 13 December 2012): T1001 (black t-shirt with white motif, black shorts, grey socks, black sandals).
[6] AB265 (SU262).
[7] AB264, 279) (SU261, 276).
[8] AB269-270 (SU266-267).
[9] T1543-1544.

possibility of another acting with murderous intent[10] in the execution of any agreement to which the applicant was a party.

14. In light of the evidence concerning the applicant's consumption of alcohol and the difficulty in demarcating the scope of any agreement in which the applicant was complicit, it is reasonable to approach the jury's verdicts on the assumption that the most likely pathway to a finding of murder was by way of extended joint enterprise. There was a paucity of evidence concerning the existence and scope of any agreement to kill or cause grievous bodily harm. The comments attributed to Presley (FC[10]) after the "first altercation" (FC[9]) were against any agreement to murder. Equally, there was no evidence that pointed to knowledge of Betts' possession of a knife[11] and the jury were entitled to treat the other weapons referred to by the witnesses (FC[13]-[26]) as being qualitatively different to the weapon which killed Hall. The prosecution case distilled to a contention that the other members of the group must have known Betts had a knife because its proportions would have made it difficult to conceal.[12] That assertion was nothing more than a possibility, which was undermined by the evidence of the eye witnesses. In any event, the likelihood that the applicant (and others) discerned the presence of a knife and agreed to embark on violence with an intention to cause grievous bodily harm was highly questionable in light of his intoxication.

15. In these circumstances, it is highly likely that the applicant's conviction rested on extended joint enterprise.

5.1 The summing up on joint enterprise and extended joint enterprise

16. The learned trial judge summed up to the jury on the applicant's liability for murder on the basis of joint enterprise[13] and extended joint enterprise[14] in what have, since 1995 at least, been conventional terms. It was put to the jury that proof of an agreement to assault[15] would be sufficient to prove murder, if the applicant was party to that agreement and foresaw the possibility of another acting with intention to kill or cause grievous bodily harm.

17. In the alternative, the jury were invited to return a verdict of manslaughter if it were proved that the applicant was party to an agreement to assault Hall or King in Grant Street in a manner that a reasonable person would have realised created an appreciable risk of serious injury and that, in the pursuit of that agreement, Betts unlawfully killed Hall (other than by way of excessive self defence).[16]

18. As to the offence of aggravated causing harm, the case against the applicant was put on the basis of a joint enterprise to cause King harm.

5.2 The approach of the Full Court

19. The applicant's appeal to the Full Court was limited to three complaints. Relevantly, the applicant contended that the verdicts of guilty were unreasonable having regard to the evidence.[17] The Full Court dismissed the applicant's complaint on the basis that it was open to

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[10] Reference to "murderous intent" throughout this document should be read as meaning either an intention to kill or cause grievous bodily harm.
[11] AB66 (SU63).
[12] Eg, AB280-281 (SU277-278).
[13] AB39-42 (SU36-39). As to Presley: AB222 (SU219); As to Miller: AB228-229 (SU225-226), AB239 (SU236). As to Smith: AB261- 262 (SU258-259).
[14] AB43-45 (SU40-42). Specific directions as to each accused were given in similar terms: see footnote 114.
[15] AB43 (SU40) - Which might have been nothing more than a summary offence against s 20(3) of the *CLCA*.
[16] AB52-53 (SU49-50). Generally: AB259-260 (SU256-257). As to Presley: AB225-226 (SU222-223). As to Miller: AB239-242 (SU236-239). As to Smith: AB285-286 (SU282-283).
[17] *Criminal Law Consolidation Act 1935* (SA), s 353(1).

the jury to find he was present and that he participated in the attack "with the necessary intent" (FC, [156]).[18] Beyond this conclusion, the Full Court did not refer to or analyse the evidence going to the applicant's intoxication and its relationship to proof of his guilt of either charge by way of joint enterprise or extended joint enterprise.

Part VI: Argument – Reasons why special leave should be granted and the appeal allowed

20. On the present state of the common law in Australia, an accused may be convicted of murder on the basis that: he or she did all of the things necessary to constitute the charged offence whilst possessing the forbidden state of mind (**'principal'**); was an accessory before or at the time of the charged offence (**'accessorial liability'**), in which case the liability of the accessory is derivative; was party to an agreement to commit murder and participated in the commission of murder in furtherance of the agreement (**'joint enterprise'**), in which case liability is sometimes said to be primary; was party to an agreement to commit an offence other than murder but foresaw the commission of murder as a possible incident of the execution of the original agreement (**'extended joint enterprise'**).[19]

21. By his proposed amended application for special leave, the applicant contends that this Court's decision in *McAuliffe v The Queen* (1995) 183 CLR 108 (**'McAuliffe'**) should be reconsidered and the law of extended joint enterprise revised or disbanded. The correctness of *McAuliffe* has arisen indirectly on a number of occasions;[20] and, more recently (and directly), an invitation to revisit the relevant principles was refused in *Clayton v The Queen* (2006) 81 ALJR 439 (***'Clayton'***) primarily because no demonstrable injustice had been shown to result from their operation[21] and the principles continued to be applied in other common law countries.[22] It was also observed that reform was a matter for the legislature and law reform commissions[23] and that any revision of the principles of extended joint enterprise could not be undertaken without examining the whole of the law of secondary liability.[24]

22. The landscape has now changed significantly. In light of *R v Jogee* [2016] 2 WLR 681 (***'Jogee'***) [25] overturning the Privy Council's decision in *Chan Wing-Siu v The Queen* [1985] AC 168 (***'Chan Wing-Siu'***), which was relied on in *McAuliffe*, and the observations of various Law Reform Commissions that the principles require reformulation,[26] it is respectfully submitted that it is appropriate that this Court revisit the doctrine of extended joint enterprise. The conclusion in *Jogee* does not necessarily correlate with the incorrectness of *McAuliffe*. However, the survey of cases and bases for accessorial liability undertaken in *Jogee* present a compelling case

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[18] See also FC [126]-[127]. Although the Full Court's disposal of Miller's complaint was lengthier, it involved no real amplification of its process of reasoning.

[19] See the discussion in *Osland v The Queen* (1998) 197 CLR 316, [70]-[73], [81] (McHugh J); *Giorgianni v The Queen* (1985) 156 CLR 473; *Handlen v The Queen* (2012) 245 CLR 282, [4] (French CJ, Gummow, Hayne, Kiefel and Bell JJ); *McAuliffe v The Queen* (1995) 183 CLR 108; *Clayton v The Queen* (2006) 81 ALJR 439; *Truong v The Queen* (2004) 223 CLR 122, [190]-[191] (Hayne J).

[20] *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 81 ALJR 439; *R v Taufahema* (2007) 232 CLR 243.

[21] *Clayton v The Queen* (2006) 81 ALJR 439, [16].

[22] *Clayton v The Queen* (2006) 81 ALJR 439, [18].

[23] *Clayton v The Queen* (2006) 81 ALJR 439, [19].

[24] *Clayton v The Queen* (2006) 81 ALJR 439, [20].

[25] *R v Jogee* [2016] 2 WLR 681. In *Clayton v The Queen* (2006) 81 ALJR 439, [18] this was said to be relevant to whether a review of extended joint enterprise was appropriate.

[26] A matter referred to in *Clayton v The Queen* (2006) 81 ALJR 439, [19] as potentially relevant. Since *Clayton* was decided, a number of Law Reform Commissions have considered extended joint enterprise: Weinberg, *Simplification of Jury Directions Project – Complicity, Inferences and Circumstantial Evidence, Other Misconduct Evidence, Jury Warnings / Unreliable Evidence*, August 2012, pg (**'Weinberg Report'**); New South Wales Law Reform Commission, *Complicity* (2010); *Participating in Crime* (2007), the Law Commission (UK). The recommendations of the Weinberg Report now find statutory expression in amendments to the *Crimes Act 1958* (Vic), Pt II (ss 323-326) which abolished the common law of complicity as of 1 November 2014.

for reconsideration of *McAuliffe*. It is equally important to note at the outset that the application in *Clayton* was based on the unstated premise that liability for murder should be confined to cases in which the actor intended to cause death.[27] This application is not built upon the same proposition.

23. By way of summary, the applicant contends:

23.1 *Chan Wing-Siu,* and cases which followed it,[28] were a misstep in the English common law. Accordingly, the premise for the extension of the common law principles in *McAuliffe* is of doubtful persuasiveness.

23.2 The modern doctrine of extended joint enterprise is incongruous. The principles have been described as being in a state of disarray.[29] Its doctrinal foundations have never been satisfactorily articulated and the policy justifications for the extension of criminal liability to crimes which are merely foreseen as a possibility, are un-compelling. In truth, the principles of extended joint enterprise merely provide prosecuting authorities with a means of establishing liability which avoids the rigours of meeting the law's insistence on proof of a sufficiently culpable guilty mind.[30]

23.3 The unilateral contemplation of the possibility of a crime (**'incidental crime'**) being committed other than that which an accused has agreed, authorised or assented to, was, prior to *Chan Wing-Siu* and *McAuliffe*, and should continue to be, an insufficient state of mind for criminal responsibility for the incidental crime. Extended joint enterprise principles create what will be referred to in these submissions as a paradigm anomaly: they expose an accused to liability for an offence he or she may have disapproved of; did not carry out; agree to, authorise, intend, assist, encourage or acknowledge was likely to transpire. A secondary party is made liable for the same crime and to the same punishment as a principal notwithstanding the disparity between their contribution to or commission of the actus reus of an offence and their respective states of mind and culpability. The doctrine is used as a bridge between incompatible ideas.

23.4 Extended joint enterprise does not reconcile easily with established threads of the criminal law which emphasise the importance of the co-existence of mens rea and actus reus.[31] Nor does it reconcile with the law's approach to manslaughter, reckless murder and statutory murder.[32] In fact, the law of extended joint enterprise may be seen as a species of constructive murder, where the foundational act of violence agreed upon by the participants need be no more than a summary offence, as was alleged in this case. It also sits uncomfortably with contemporary sentencing regimes which, at least in cases of homicide, limit a sentencing judge's discretion to such a degree that a sentence may no longer reflect the difference in culpability of a principal and secondary party.

23.5 Extended joint enterprise is incompatible with the law of accessorial liability developed in *Giorgianni v The Queen* (1985) 156 CLR 473 (**'*Giorgianni*'**) and renders it substantially otiose. Extended joint enterprise avoids the need to meet the appropriately demanding burden of demonstrating that an accused, knowing of all relevant facts, intentionally encouraged or assisted an act intended to kill or cause grievous bodily harm. The conflict between the two principles is important. *Giorgianni* carefully

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[27] *Clayton v The Queen* (2006) 81 ALJR 439, [16].
[28] *R v Powell* [1999] 1 AC 1.
[29] New South Wales Law Reform Commission, *Complicity* (2010), [4.22.6], p 126.
[30] See, eg, in a different context, *Cameron v Holt* (1980) 142 CLR 342, 346 (Barwick CJ).
[31] *Myers v The Queen* (1997) 147 ALR 440, 442.
[32] *Criminal Law Consolidation Act 1935* (SA), s 12A. The law of extended joint enterprise impacts many criminal offences but emphasis will generally be placed on crimes of homicide for the purposes of the applicant's submissions.

constructed the principles of accessorial liability in a way that accorded with the broader philosophy and history of the criminal law. Extended joint enterprise has undermined from the importance of the *Giorgianni* approach because of its different focus on knowledge and intention.

23.6 The principles have proved difficult to apply, particularly, but not exclusively, in cases of homicide. However as a principle of general application to all criminal offences, the influence of extended joint enterprise reaches much further than the law of homicide alone. Perhaps because of the unorthodox operation of the principles in the context of the criminal law generally, it has unquestionably added to the complexity of jury directions in already difficult cases that frequently engage with issues of self defence, provocation, intoxication and specific intention, all of which arose in the applicant's trial.[33] The principles have been a recurring source of complaint in intermediate appellate courts.[34] Modification of some form is clearly required.

23.7 The rules of accessorial liability relevant to 'aiding and abetting' and joint enterprise simpliciter are of sufficient breadth to hold secondary participants accountable for their contributions to or participation in agreed criminal ventures in appropriate cases, without the need for extended joint enterprise.

6.1 The reasoning in Chan Wing-Siu v The Queen [1985] AC 168

24. Until *Chan Wing-Siu*, liability of a secondary party for murder depended upon proof that the secondary party aided or abetted the principal by intentionally assisting or encouraging the crime of murder; was party to an agreement to commit the crime of murder; or had tacitly or expressly authorised the commission of murder as a possible incident in the pursuit of a joint criminal objective.

25. The provenance of the doctrine of extended joint enterprise (in Australian common law parlance) is usually traced to *Chan Wing-Siu*, a case of murder and wounding with intent to do grievous bodily harm, in which it was argued that three armed robbers were not guilty of murder unless it was proved that they foresaw the probability of one of their number acting with intention to kill or cause grievous bodily harm to the deceased. Sir Robin Cooke delivered the advice of the Board and, having differentiated the traditional bases of accessorial liability from that left to the jury by the trial judge, held that the appellants' liability depended on a broader principle based on foresight, but not intention. He said at 175:

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

26. The assumption underlying Sir Robin Cooke's exposition was that the earlier cases of *R v Anderson and Morris* [1966] 2 QB 110 (***'Anderson'***), *Johns v The Queen* (1980) 143 CLR 108 (***'Johns'***) and *Miller v The Queen* (1980) 55 ALJR 23 (***'Miller'***) established that unilateral contemplation of a crime (the incidental crime) by those engaged in a common design to

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[33] See eg Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), p 31; Weinberg Report, p 80; Eames, "Tackling the complexity of criminal trial directions: what role for appellate courts?" (2007) 29 *Australian Bar Review* 161, 170-179.

[34] See, eg: *Spilios v The Queen* [2016] SASCFC 6; *May v The Queen* (2012) 215 A Crim R 527, [260]; *R v Jones* (2006) 161 A Crim R 511; *R v Hartwick and Clayton* (2005) 14 VR 125 and *Clayton v The Queen* (2006) 81 ALJR 439; *R v Taufahema* (2007) 228 CLR 232, 275 (Kirby J); *Nguyen v R* (2007) 180 A Crim R 267, [91]-[116]. In its report *Participating in Crime* (2007), the Law Commission (UK), 1.12, described the law of secondary liability as "...developed haphazardly and...permeated with uncertainty". The Commission suggested statutory reformulation of the rules of secondary liability. See also *Huynh v The Queen* (2013) 87 ALJR 434, [21].

commit another crime was a sufficient state of mind for liability for the incidental crime. On analysis of the authorities, that assumption was wrong.

27. In *Anderson* the Court of Appeal quashed a secondary party's verdict of manslaughter in circumstances where the trial judge had directed the jury that the secondary party was guilty of manslaughter if he was a participant in a common design to assault the deceased, irrespective of whether the infliction of grievous bodily harm or death was beyond the scope of the arrangement between the secondary participant and the principal. Lord Parker CJ, delivering the judgment of the Court of Appeal, stated the law established by over 100 years of English authority to be:

> ...that where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that, if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally...it is for the jury in every case to decide whether what was done was part of the joint enterprise or went beyond it and was in fact an act unauthorised by that joint enterprise.[35]

28. As the act for which the secondary party was held liable was beyond the scope of that which had been agreed between the parties as their mutual criminal objective, he could not be liable for the deceased's death. Authorisation or assent was the essence of liability.[36]

29. Similarly, the early Australian cases were also examples of the application of the orthodox principle that an accused who, with another or others, embarked on a common unlawful enterprise, was liable for all crimes expressly or tacitly assented to by the participants and which therefore fell within the scope of the agreement. Thus, in *Johns v The Queen* (1980) 143 CLR 108 the critical plank of the reasons of all members of the Court was that liability for incidental crimes committed in furtherance of a joint criminal enterprise was to be determined by reference to the bilateral acknowledgment of the co-adventurers that the incidental crime would be committed if necessary in order to achieve the primary criminal objective.[37]

30. Accordingly, *Johns* may be described as a case of joint enterprise simpliciter.[38] The scope of the agreement to which *Johns* was a party included the use of violence with murderous intent, if necessary to carry out the arrangement.[39] The clearest indication that *Johns* did not purport to lay down a principle other than that liability for participation in a joint criminal enterprise was to be determined by reference to the scope of the agreement to which the accused was a party, emerged from the reasons of the plurality at 126 and 131:

> The problem here is one of expressing the degree of connexion between the common purpose and the act constituting the offence charged which is required to involve the accessory and the principal in the second degree in complicity...[131] In our opinion these decisions[40] support the conclusion reached by Street CJ, namely, 'that an accessory before the fact bears, as does a principal in the second degree, a

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[35] *R v Anderson and Morris* [1966] 2 QB 110, 118. Lord Parker CJ concluded at 120: " It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today."

[36] The earlier decision in *R v Smith* [1963] 1 WLR 1200, 1206 (Lord Parker CJ) was to the same effect.

[37] Odgers, "Criminal Cases in the High Court of Australia: *McAuliffe* and *McAuliffe*" (1996) 20 *Criminal Law Journal* 43.

[38] It should be noted that Johns was in fact indicted under s 346 of the *Crimes Act 1900* (NSW) (the equivalent to s 267 of the *CLCA*) which makes accessories liable as principals. There might be some conflation of the concepts of aiding and abetting and "joint enterprise" in *Johns*, as there arguably was in *Tangye v The Queen* (1997) 92 A Crim R 545, 556-557.

[39] *Johns v The Queen* (1980) 143 CLR 108, 112-113 (Barwick CJ), 117-118 (Stephen J).

[40] A reference to the cases discussed at 130, which were aid and abet cases.

> 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'. Such an act is one which falls 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.
> ...
> 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, that is the discharge, of a loaded gun, in the event that Morris 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 arise, and that the violence contemplated amounted to grievous bodily harm or homicide.

31. The subsequent decision in *Miller v The Queen* (1980) 55 ALJR 23 provided further confirmation that the limits of liability of a secondary participant for the acts of a co-adventurer were to be determined by reference to the scope of the criminal arrangement, a proposition which was uncontroversial by this time, as illustrated by Gibbs CJ's comments in an earlier case:

> When 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. Thus if two men go out to rob another, with the common design of using whatever force is necessary to achieve their object, even if that involves the killing of, or the infliction of grievous bodily harm on, the victim, both will be guilty of murder if the victim is killed...If the principal assailant has gone completely beyond the scope of the common design, and for example 'has used a weapon and acted in a way which no party to that common design could suspect', the inactive participant is not guilty of either murder or manslaughter.[41]

32. This necessarily brief survey of the authorities supports the conclusion reached recently in *R v Jogee* [2016] 2 WLR 681 (***'Jogee'***) that, contrary to the reasons in *Chan Wing-Siu*, there was, prior to 1985, no established principle of the common law that liability for murder arose merely because a party who embarked on a joint enterprise to commit a crime with another, unilaterally foresaw a mere possibility that murder might be committed. *Chan Wing-Siu* did not restate a principle; it extended the law of secondary liability in a substantial way[42] because of an elision of what should have been separated concepts: contemplation and authorisation or intent.

6.2 Accessorial liability in Australia

33. Before addressing the development of extended joint enterprise in Australia, it is necessary to revisit the rules of accessorial liability generally.[43] One significant feature of the reasoning in *Chan Wing-Siu* was the degree to which it departed from the established doctrine of accessorial liability, simplified somewhat following the abolition of the felony / misdemeanour dichotomy by the *Criminal Law Act* 1967.[44] In South Australia, the dichotomy was abolished in 1994.[45]

34. In light of this abolition, the historical distinction between various forms of accessorial liability is no longer of much relevance[46] and provisions such as s 267[47] of the *Criminal Law*

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[41] *Markby v The Queen* (1978) 140 CLR 108, 112.
[42] Since affirmed in a string of cases: *R v Powell* [1999] 1 AC 1; *R v Hyde* [1991] 1 QB 134 (with the acknowledgment that contemplation and authorisation are not synonymous); *Hui Chi-ming* [1992] 1 AC 34, 52 confirming that unilateral contemplation was sufficient.
[43] For the reasons explained in *Clayton v The Queen* (2006) 81 ALJR 439, [20].
[44] See, passing references in eg, *Gillick v West Norfolk* [1986] 1 AC 112, 135-136; *Moses v The State* [1996] AC 53, 60.
[45] *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA) (no 59 of 1994).
[46] *Osland v The Queen* (1998) 197 CLR 316, 399-400 (Callinan J); Smith, "Criminal Liability of Accessories: Law and Law Reform", (1997) 113 *Law Quarterly Review* 453; see also the passing comments in *Handlen v The Queen* (2012) 245 CLR 282, [6] in relation to the *Criminal Code (Cth)*.
[47] Section 267 provides: A person who aids, abets, counsels or procures the commission of an offence is liable to be prosecuted and punished as a principal offender. See also *Crimes Act 1900* (NSW), ss 345-347.

Consolidation Act 1935 (SA), modelled on the *Accessories and Abettors Act 1861* (UK), have sought to ameliorate the historical difficulties that resulted from the differentiation between accessories before, at and after the fact.

35. Derivative[48] liability as an accessory has always depended on proof of actual knowledge of all of the essential facts which comprised the offence committed by the principal and, with that knowledge, an act of intentional assistance or encouragement – a physical contribution to the crime charged. [49] Negligence, recklessness, suspicion of wrongdoing, or even knowledge of the probability of wrong doing by the principal, do not sustain accessorial liability. [50]

36. But mere knowledge of a crime, although an indispensable threshold requirement, does not make a person guilty of an offence as an accessory. Once knowledge of the requisite degree is established, a person must be shown to have intentionally encouraged or assisted the commission of the charged offence.[51] It is now well established that the intentional encouragement or assistance must be directed to the facilitation of the foundational offence (that is, the offence which the accessory knew the principal to be committing), although it need not be causative in the sense that "but for" the accessory's encouragement, the offence would not have been committed.[52] It is not enough however that an accused might objectively be described as having encouraged or assisted the commission of an offence. A subjective intention to do so must be proved. Equally, a *mere intention* to encourage does not suffice. An *act of wilful encouragement* is necessary.[53]

37. Accordingly, mere presence at the scene of a crime, even with knowledge of the commission of the crime, but absent proof of intentional encouragement or assistance, has never sufficed for liability as an aider and abettor.[54]

6.3 Joint enterprise in Australia

38. The important point to be made about the approach of the law to accessorial liability, as expressed in *Giorgianni*, is its focus on the subjective state of mind of the accessory and proof of a concurrent and intentional act of assistance or encouragement. In this way, the law of accessorial liability resonates with other important concepts of the criminal law, like the need for co-existence of the physical and mental elements of a crime. It also sensibly correlates moral and legal culpability.

39. Joint enterprise has occasionally been described as, on the one hand, a facet of the law of accessorial liability[55] and on the other, a stand alone basis of criminal liability.[56] The

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[48] In *R v LK* (2010) 241 CLR 177, [108] accessorial liability was confirmed as being derivative. See also *Arafan v The Queen* (2010) 31 VR 82, [14] (Maxwell P and Weinberg JA).

[49] *Giorgianni v The Queen* (1985) 156 CLR 473; *Huynh v The Queen* (2013) 87 ALJR 434, [22].

[50] *Giorgianni v The Queen* (1985) 156 CLR 473, 482-483, 487 (Gibbs CJ); 504-507 (Wilson, Deane and Dawson JJ); *R v Lowery* [1972] VR 560, 561; *R v Jones* (2006) 161 A Crim R 511, [218]; *R v Phan* (2001) 53 NSWLR 480, 490-491 (Smart JA); See generally *Pereira v Director of Public Prosecutions* [1988] HCA 57; (1988) 63 ALJR 1.

[51] *Giorgianni v The Queen* (1985) 156 CLR 473, 506-507 (Wilson, Dawson and Deane JJ).

[52] *R v Lam* (2005) 159 A Crim R 448, 458-459, 472.

[53] *Arafan v The Queen* (2010) 31 VR 82, [15]-[16]. *R v Jones* (1977) 65 Cr App R 250, 253.

[54] This point was made in the early case of *R v Coney* (1882) 8 QBD 534, 557-558 (Hawkins J); see also *R v Jones* (2006) 161 A Crim R 511, [220] (Duggan J); *R v Beck* [1990] 1 Qd R 30; *R v Phan* (2001) 53 NSWLR 480, 485, 487.

[55] See the analysis by Kourakis CJ in *R v B, FG* (2012) 114 SASR 170; Smith, "Criminal Liability of Accessories: Law and Law Reform", (1997) 113 *Law Quarterly Review* 453, 462. In *Darkan v The Queen* (2006) 227 CLR 373, the Court referred to liability pursuant to extended joint criminal enterprise (in s 8 of the *Criminal Code Act 1899* (Qld) as accessorial liability (see [76], Gleeson, Gummow, Heydon and Crennan JJ); Krebs, "Joint Criminal Enterprise", (2010) 73 *Modern Law Review* 578, 585-587, 592; Cunningham, "Complicating Complicity: Aiding and Abetting Causing Death by Dangerous Driving in *R v Martin*", (2011) 74 *Modern Law Review* 767, 768.

commonly repeated[57] definition of the doctrine[58] emphasises the centrality of bilateral agreement and fixes on the scope of the crime or crimes which the parties to the agreement will pursue.

40. Importantly, whilst the liability of a participant in a joint criminal enterprise is not conditional on conviction of the principal offender[59] (illustrating that liability is said to be primary and not derivative)[60] the justification for the doctrine is the link in purpose between the participants in the joint enterprise. The link in purpose is established through the existence of an agreement; participation in that agreement; and the commission of the charged crime in furtherance of that agreement, without any withdrawal or abandonment by the accused.[61]

10 41. Although there may be some artificiality in the language of agreements and meetings of the mind between co-adventurers in a criminal pursuit, the idea communicated by those terms is important to the rationalisation of joint enterprise liability: bilateral commitment to carry out a crime and, equally importantly, an act of participation in furtherance of the agreement.[62] In cases where all participants to the common design acknowledge that an incidental crime is a possible consequence of carrying out the agreement, the commission of the incidental crime is necessarily within the scope of the agreement. The participants authorise or assent to its commission even if their preference is that it be avoided. Authorisation is, therefore, an important component of the law of joint enterprise. It justifies the imputation of the acts of one to all other participants in the agreement.[63]

20 42. This is an important point of distinction between the principle said to be the foundation for extended joint enterprise and the actual formulation of extended joint enterprise. On the approach taken in *McAuliffe*, the latter specifically disavows agreement, authorisation and assent as important elements of liability.

6.4 McAuliffe v The Queen (1995) 183 CLR 108

43. *McAuliffe* was the first opportunity for this Court to consider the approach that had developed over the preceding 10 years in the United Kingdom.[64] The reasons of the Court in *McAuliffe* did not explore the jurisprudential foundation for what became the doctrine of extended joint enterprise or consider whether it reconciled with the law's approach to mens rea generally and the rules of accessorial liability. The unstated premise on which *McAuliffe* was decided was that
30 *Chan Wing-Siu* was a correct expression of principle. Accordingly, the Court's statement of the relevant principles provided that a participant in a joint enterprise was liable for any incidental crimes committed while the agreement was still on foot and which were contemplated by the participant as a possible incident of carrying out the common design. The principle was said to be supported by the following considerations:

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[56] See comments in *Likiardopoulos v The Queen* (2012) 247 CLR 265, [7], [19]-[28] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Gillard v The Queen* (2003) 219 CLR 1, [109] (Hayne J).

[57] *Gillard v The Queen* (2003) 219 CLR 1, [110] (Hayne J); *Hawi v The Queen* [2014] NSWCCA 83, [329] (Bathurst CJ).

[58] *McAuliffe* at 113.

[59] *Osland v The Queen* (1998) 197 CLR 361; *Hawi v The Queen* [2014] NSWCCA 83, [331] (Bathurst CJ).

[60] *Handlen v The Queen* (2011) 245 CLR 282, [4]. Refer also to footnote 59.

[61] *Huynh v The Queen* (2013) 87 ALJR 434.

[62] *Taufahema v The Queen* (2007) 228 CLR 232, [20] (Gleeson CJ and Callinan J); *Huynh v The Queen* (2013) 87 ALJR 434. Cf *Tangye v The Queen* (1997) 92 A Crim R 545, 557.

[63] *R v Britten and Eger* (1988) 49 SASR 47, 53 (King CJ), resisting the suggestion that *Chan Wing-Siu* had changed the law.

[64] As a preliminary matter, it could be said that, in *McAuliffe*, there was really no need for the Court to consider any extended notion of joint enterprise. Both McAuliffe brothers had gone to a park, armed with weapons and in company of a third assailant, with the stated purpose of "bashing" or "robbing" others. The case could have and we submit should have turned on the scope of the common purpose which must clearly have embraced an intention to do grievous bodily harm.

> [In *Johns*] [t]here was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls with the common purpose. Of course, in that situation the prosecution must prove that the individual concerned foresaw that the incidental crime might be committed and cannot rely upon the existence of the common purpose as establishing that state of mind. But there is no other relevant distinction. 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.[65]

44. The centrepiece of the means of identifying liability developed in *McAuliffe* is the subjective possibilities unilaterally conceived of by an accused.[66] The concepts of mutuality, agreement and assent – the criterion of liability for joint enterprise simpliciter – were discarded. So expressed the concept of extended joint enterprise suffers a number of shortcomings which suggest reconsideration is appropriate.[67]

6.4.1 Asymmetry between joint enterprise and extended joint enterprise

45. In light of the recent characterisation of *Chan Wing-Siu* as a misstep in the development of the common law, the salient question, in the applicant's submission, is how the expression of principle in *McAuliffe* reconciles, logically and analogically,[68] with the existing principles of joint enterprise, accessorial liability and other overarching principles of the criminal law.

46. In the applicant's submission that process of reconciliation is quickly derailed. The concept of agreement is central to the rules of joint enterprise. Parallel conduct by two or more accused in the commission of a criminal act is not, by itself, sufficient to render each liable as a participant in a joint enterprise.[69] The conduct must be the product of an agreement to commit the crime charged, establishing a link in purpose between co-adventurers. The importance of authorisation and assent to the operation of the basic principles is undeniable.

47. *McAuliffe* and *Clayton* demonstrate that mutuality is not part of the law of extended joint enterprise. The principle is not, therefore, a mere extension of the rules of joint enterprise: no agreement to commit the crime *charged* is required and the scope of any agreement between co-adventurers is effectively inconsequential.[70] Neither disapprobation for the commission of the incidental crime nor an agreement to refrain from its commission are impediments to a secondary participant's liability. Indeed, under the *McAuliffe* rules, the concept of agreement serves no purpose other than as a device to engage extended joint enterprise.[71] Authorisation and assent are as irrelevant as the concepts of withdrawal and participation. In fact, as argued below, the principles are a makeweight for cases in which there would ordinarily be an ineradicable deficit in the conduct or fault elements of an offence. The question that then arises is 'what is the guiding premise of extended joint enterprise?' This asymmetry between the concepts may suggest that extended joint enterprise overextends the liability of secondary participants.

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[65] *McAuliffe v The Queen* (1995) 183 CLR 108, 117-118.
[66] *Darkan v The Queen* (2006) 227 CLR 373, [60] (Gleeson CJ, Gummow, Heydon and Crennan JJ).
[67] A number of criticisms of the principles are collected in New South Wales Reform Commission, *Complicity*, (2010) [4.124]-[4.152].
[68] *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ); M McHugh, "The Judicial Method", (1999) 73 *Australian Law Journal* 37.
[69] *R v Taufahema* (2007) 228 CLR 232, [9], [20] (Gleeson CJ and Callinan J).
[70] Perhaps retaining only an evidentiary and temporal significance.
[71] Contra, *Clayton v The Queen* (2006) 81 ALJR 439, [20].

6.4.2 Extended joint enterprise and important principles of the criminal law – actus reus and mens rea deficit

48. Joint enterprise simpliciter imputes the *acts* of a participant in furtherance of a criminal agreement to all other parties to the agreement, overcoming the actus reus deficit[72] that would otherwise arise on the prosecution of the secondary participant. As a participant in a joint enterprise possesses a state of mind traditionally compatible with the law's approach to mens rea (knowing that a crime will be committed and intending for that crime to be committed), and given that each participant has, by virtue of their agreement, authorised the others to do everything necessary to execute their plan, including any other offences that it is at least tacitly accepted may be committed in order to achieve the desired outcome, the imputation of the acts of one to all others is an uncontroversial prospect.

49. Contrastingly, extended joint enterprise diminishes the state of mind necessary for liability to such an extent that it renders an accused criminally accountable for nothing more than the mere thought that a crime might be committed. There is a substantial mens rea deficit in the mind of the secondary party found guilty of a crime pursuant to the rules of extended joint enterprise. There is, to use the concept spoken of by Lord Diplock in *Hyam v DPP* [1975] AC 55 at 86 no "willingness to produce the particular evil consequence" yet the accused remains accountable. Neither the established principles of accessorial liability, nor the early cases of joint enterprise, contemplated liability for offences which were not intended or assented to by the secondary participant.[73] Extended joint enterprise abandons the general requirement of the criminal law for proof of the co-existence of the actus reus and mens rea.[74]

50. The principles also do away with questions of causation so far as the secondary participant's conduct is concerned. It is no part of the extended joint enterprise rules to consider whether the accused's participation in the foundational crime made a substantial, or indeed any, contribution to the commission of the incidental offence. If anything, it is the association between offenders and the mere assumption of a risk that an accused is liable for. In this way, extended joint enterprise is a makeweight in cases where there is both a deficit of the actus reus *and* mens rea.[75]

51. A further problem arises: because the degree of conduct required to prove participation in a joint enterprise is undemanding,[76] but the test for withdrawal from an enterprise quite onerous[77], the actus reus deficit in the context of the incidental offence in cases of extended joint enterprise is more profound. Mere attendance at the scene of the charged offence under the guise of an unlawful agreement is sufficient. The accused need not actively participate in the sense of performing or assisting acts comprising or supporting an element of the offence charged, nor provide encouragement to his or her co-offenders. That is a fundamental departure from the organising principles of accessorial liability: that more than mere presence at the scene of a crime (even if that presence were for an ulterior illegal purpose) is a necessary precondition to liability. Some contribution has to be made to the commission of the charged offence.

52. The paradigm anomaly created by the doctrine of extended joint enterprise is that a secondary participant might be guilty of murder notwithstanding a deficit in the actus reus and mens rea (in the traditional sense) and notwithstanding that the principal offender may him or herself

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[72] Krebs, "Joint Criminal Enterprise", (2010) 73 *Modern Law Review* 578, 579, 590.
[73] Contra *R v Powell* [1999] 1 AC 14 (Lord Steyn).
[74] *Myers v The Queen* (1997) 147 ALR 440, 442 illustrated by the approach of the Victorian Court of Appeal in *R v Zheng* [2013] VSC 559, [28].
[75] Krebs, "Joint Criminal Enterprise", (2010) 73 *Modern Law Review* 578, 579, 590.
[76] *Huynh v The Queen* (2013) 87 ALJR 434 generally and at [41]. See also *Tangye v The Queen* (1997) 92 A Crim R 545, 557.
[77] *R v Sully* (2012) 112 SASR 157; *White v Ridley* (1978) 140 CLR 342.

have lacked the intention necessary for murder.[78] The differential threshold for proof of mens rea attaching to the secondary party and principal means the secondary party is more readily proved guilty of the charged crime, notwithstanding the principal offender committed the fatal act[79] (in a case of murder) and is, accordingly, substantially more culpable than his or her counterpart (at least as a basic proposition). This anomaly reveals a breakdown in the law's reconciliation of legal and moral culpability.[80] Attempts to justify the paradigm anomaly by reference to policy considerations such as giving "effective protection to the public against criminals operating in gangs"[81] do not meet the objection in principle to the rules of extended joint enterprise.[82]

53. Where the law takes the unorthodox step of creating criminal liability notwithstanding the absence of mens rea, or in circumstances where a state of mind less than intention or knowledge is proved, it normally does so having regard to the seriousness of the offence under consideration and any relevant policy considerations. A not dissimilar inquiry is undertaken when examining whether a statutory provision gives rise to an offence of strict liability. The question, in such cases, is whether the nature of the offence, and any underlying policy objectives, justify the displacement of the common law's presumption of mens rea.[83] Considerations of this kind in favour of the undemanding mens rea threshold of extended joint enterprise cannot be convincingly identified. In the applicant's submission, to date, no sound jurisprudential basis has been articulated to extend a secondary participant's liability to the commission of an offence, which, although a possibility – whether remote, fanciful or real – was never expected, desired, authorised or intended to materialise.[84] The comments of Lord Bingham in *R v Rahman* [2009] 1 AC 129, 145 illustrate the point here made: "Any coherent criminal law must develop a theory [of complicity] which will embrace those *whose responsibility merits conviction* and punishment even though they are not the primary offenders". It is respectfully submitted that the rules of extended joint enterprise have not found this balance.[85]

54. In the applicant's submission, it is only if the theoretical underpinnings of extended joint enterprise are identified that the value or disadvantages of its operation can be understood. The difficulty is identifying those doctrinal foundations and justifications. Suggested justifications built upon notions of assumption or enhancement of the risk[86] of the incidental offence being committed, or because of a normative judgment made as to an accused's culpability in such

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[78] For the possibility of different verdicts see eg *Matusevich v The Queen* (1977) 137 CLR 633, 637-638 (Gibbs J), 663-664 (Aickin J) and *R v Barlow* (1997) 188 CLR 1 (a case concerning s 8 of the *Criminal Code* (*Qld*)).

[79] This anomalous position was relied on in *R v Powell* [1999] 1 AC 1 and rejected.

[80] *He Kaw Teh* (1985) 157 CLR 523.The emphasis the law otherwise gives to questions of intention is considered in Weinberg, "Moral Blameworthiness", (2003) 24 *Australian Bar Review* 173.

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

[82] McNamara, "A judicial contribution to over-criminalisation? Extended joint criminal enterprise liability for murder", (2014) 38 *Criminal Law Journal* 104.

[83] See, eg, the general approach to characterisation of offences of strict liability: *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528-529 (Gibbs CJ), 582 (Brennan J); *Lim Chin Aik v The Queen* [1963] AC 160, 174-175; *Thomas v The King* (1937) 59 CLR 279, 305 (Dixon J). The presumption of mens rea will be more readily displaced where the nature of the offence, and the consequences of its commission, may fairly be described as less serious: see, eg, *Proudman v Dayman* (1941) 67 CLR 536, 540 (Dixon J); *Davis v Bates* (1986) 43 SASR 149, 158-159 (von Doussa J); *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745, 750 (Gleeson CJ); *CTM v The Queen* (2008) 236 CLR 440, [7], [35] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

[84] See generally, *Clayton v The Queen* (2006) 81 ALJR 439, [47] (Kirby J).

[85] See the discussion in Krebs, "Joint Criminal Enterprise", (2010) 73 *Modern Law Review* 578, 594-595; Law Commission, *Participating in Crime Report*, (2007). See also Smith, "Criminal Liability of Accessories: Law and Law Reform", (1997) 113 *Law Quarterly Review* 453, 455-456.

[86] See *Gillard v The Queen* (2003) 219 CLR 1, 38-39 (Hayne J).

cases, were not considered at length in *McAuliffe*.[87] In any event, any such policy considerations are overshadowed by the doctrine's departure from general principle.[88]

6.4.3 The possibility / probability dichotomy

55. Although in *Johns* this Court rejected the argument that the scope of a joint enterprise was to be determined by what the parties mutually contemplated as a probable consequence of their venture, the possibility / probability dichotomy was not specifically considered in *McAuliffe*. Having regard to other developments in the law of homicide at or around that time,[89] a revisitation of this aspect of the argument in *Johns* would have exposed the contradiction between the extended joint enterprise formulation and other areas of the criminal law. In *La Fontaine v The Queen* (1976) 136 CLR 62 at 76, Gibbs J remarked relevantly:

> There is a great difference between the state of mind of an accused who is prepared to risk the consequences of death or grievous bodily harm that he foresees as probable and that of an accused who does no more than take the chance that death or serious injury may ensue although it seems an unlikely consequence. The act of the former is much more worthy of blame than that of the latter. To treat knowledge of a possibility as having the same consequences as knowledge of a probability would be to adopt a stringent test which would seem to obliterate almost the distinction between murder and manslaughter.

56. If foresight of the possible consequences was considered an inadequate state of mind for proof of reckless murder against a principal responsible for the commission of a fatal act, there is little to commend the test to sustain the liability of a secondary participant who makes no causative contribution to the charged act and may specifically countermand its commission.

57. Statutory incarnations of extended joint enterprise in the various *Criminal Codes* of States and Territories,[90] and in New Zealand and Canada,[91] also incorporate probability based analyses of the consequences of common designs. Either recklessness as to the commission of an incidental crime[92] or knowledge of the probable consequences of the common purpose is required.[93] In Victoria, the law of complicity, including extended joint enterprise, has been abolished and replaced with a statutory regime of considerable clarity.[94] There is now a "great difference"[95] between the common law jurisdictions[96] and statutory jurisdictions, as well as within the common law's internal approach to different aspects of the law of homicide. Although a mere deviation between statutory representations of the doctrine and its common law criteria does not necessarily suggest the common law is wrong, it provides some reason to question whether common law extended joint enterprise is unduly penal, a misstep and in need of correction.[97]

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[87] Krebs, "Joint Criminal Enterprise", (2010) 73 *Modern Law Review* 578, 593-594.
[88] McNamara, "A judicial contribution to over-criminalisation? Extended joint criminal enterprise liability for murder", (2014) 38 *Criminal Law Journal* 104, 113.
[89] *Crabbe v The Queen* (1985) 156 CLR 464, 469-470; *Royall v The Queen* (1991) 172 CLR 378, 394-395 (Mason CJ), 415-417 (Deane and Dawson JJ), 430-431 (Toohey and Gaudron JJ), 452-456 (McHugh J).
[90] See generally 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.
[91] *Crimes Act 1961* (NZ), s 66(2); *Edmonds v The Queen* [2012] 2 NZLR 445; *Criminal Code 1985* (RSC) 1985 c C-46, s 21(2); *R v Logan* [1990] 2 SCR 731.
[92] *Criminal Code 1995* (Cth), Sch 1, s 11.2A(3); *Criminal Code 2002* (ACT), s 45A; *Criminal Code Act* (NT), s 8 and 43BG.
[93] *Criminal Code Act 1899* (Qld), Sch 1, s 8; *Criminal Code Act Compilation Act 1913* (WA), App B, s 8(1); *Criminal Code Act 1924* (Tas), Sch 1, s 4.
[94] *Crimes Act 1958* (Vic), ss 323-326.
[95] *Darkan v The Queen* (2006) 227 CLR 373, [40 (Gleeson CJ, Gummow, Heydon and Crennan JJ).
[96] South Australia and New South Wales.
[97] See the summary contained in *Darkan v The Queen* (2006) 227 CLR 373, [29]-[40] (Gleeson CJ, Gummow, Heydon and Crennan JJ); 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, 50.

58. If the principle of extended joint enterprise is to be retained, there may be numerous benefits of a probability based test.[98] For one, recognition that a consequence is not a mere, real or even substantial possibility but is, conversely, likely to happen or could well happen, is an appropriate way to reconcile criminal and moral responsibility. Probability based tests of extended joint enterprise liability also align more closely with the law's approach to manslaughter (with its focus on appreciable risks) and, as mentioned, reckless murder. Harmonising the margins of secondary liability with other important features of the criminal law, particularly in the area of homicide, can only have positive consequences.

6.4.4 Extended joint enterprise and traditional accessorial liability

59. In *McAuliffe*, the Court observed that the principles of extended joint enterprise were in accordance with the rule that "...a person who intentionally assists in the commission of a crime or encourages its commission may be convicted as a party to it".[99] In the applicant's respectful submission, there is a material difference between the principles of accessorial liability, which were not considered at length in *McAuliffe*, and liability based on extended joint enterprise.

60. Aiders and abettors commit an intentional act of encouragement or assistance knowing of the principal's criminal design. An accused guilty by way of extended joint enterprise need not commit any physical act referable to the charged offence; have any intention to commit the charged offence; or have actual knowledge of the principal's intention. The secondary participant accountable by virtue of extended joint enterprise has both an actus reus and mens rea deficit but remains liable to a verdict of murder on the basis of nothing more than an assumption of risk.[100] This aspect of extended joint enterprise conflicts with the approach to mens rea in aiding and abetting cases, carefully worked out in *Giorgianni* to exclude even recklessness as a satisfactory state of mind for aiding and abetting.

61. The common feature of accessorial liability and joint enterprise simpliciter is that proof of an intention to assist or encourage the charged offence or proof of an agreement to commit the charged offence is an intractable pre-condition to guilt, together with a physical act of some description. These elements respectively acknowledge the need to uphold the principles generally applicable to the determination of criminal liability, and in particular, the need for co-existence of the actus reus and mens rea. As this Court explained in *Myers v The Queen* (1997) 147 ALR 440 at 442:

> The particular act and the intent with which it is done must be proved by the prosecution beyond reasonable doubt. Act and intent must coincide. If the circumstances of a fatal altercation are such that the prosecution can prove that some acts were done with the necessary intent but cannot prove that other acts were done with that intent, no conviction for murder can be returned unless there is evidence on which the jury can reasonably find that the act which caused death was one of those done with the necessary intent.

The law of extended joint enterprises departs from that fundamental principle.[101]

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[98] Cato, "Foresight of murder and complicity in unlawful joint enterprises where death results", (1990) 2 *Bond Law Review* 182. The proposal of the New South Wales Law Reform Commission, *Complicity* (2010), p 128-129 is that liability by way of extended joint enterprise depend on proof of a substantial risk of the incidental offence being committed (non homicide); probability of death resulting from an act with murderous intent (murder); Weinberg Report, p 86.

[99] *McAuliffe v The Queen* (1995) 183 CLR 108, 118.

[100] See generally Smith, "Criminal Liability of Accessories: Law and Law Reform", (1997) *Law Quarterly Review* 453; McNamara, "A judicial contribution to over-criminalisation? Extended joint criminal enterprise liability for murder", (2014) 38 *Criminal Law Journal* 104, 113.

[101] New South Wales Law Reform Commission, *Complicity* (2010), [4.229], p 127.

6.4.5 Extended joint enterprise, reckless murder and manslaughter

62. In *McAuliffe*, there was no examination of the interplay between the concept of extended joint enterprise and the law of mens rea, reckless murder, constructive murder and manslaughter, all of which are important features of the law of homicide.

63. What has been termed in these submissions the paradigm anomaly of the law of extended joint enterprise[102] creates a category of constructive crime and, most significantly, a category of constructive murder, where the foundational crime agreed upon may be no more than a summary offence.[103] The advice of this Court in *Wilson v The Queen* (1992) 174 CLR 313 at 327 was that "[c]onstructive crime should be confined to what is truly unavoidable".[104]

64. One further vice in the law of extended joint enterprise in cases of homicide is that it leaves little practical room for verdicts of manslaughter, notwithstanding a slither of legal leg room which might require the alternative being left to a jury.[105] However, a finding of manslaughter may in fact require more than a finding of murder by way of extended joint enterprise, given the need for the jury to be satisfied that the act contemplated by the accused gave rise to an *appreciable risk* of serious injury. It is well established that the choices available to a jury inevitably affect the outcome of their decision making process.[106] Left, in such circumstances, with a practical choice between acquittal and a conviction of murder, a conviction for murder may be returned in circumstances which would ordinarily lead to a verdict of manslaughter only.[107]

65. It is equally difficult to reconcile how the principles work in a case of reckless murder and what justification there can for lowering the mental element required for proof of liability under extended joint enterprise where it has been said, in respect of cases of reckless murder:

> The conduct of a person who does an act knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or do grievous bodily harm...It is not enough that...[a person] does the act knowing that it is possible but not likely that death or grievous bodily harm might result.[108]

6.4.6 The practical consequences of extended joint enterprise

66. Because of its undemanding criteria, extended joint enterprise is often used where the allegations against an accused would otherwise be dealt with by way of aiding and abetting.[109] This is unsurprising for the reasons set out above. As extended joint enterprise avoids the need to prove knowing or intentional encouragement of the charged act (ie murder), or an agreement

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[102] See paragraphs[23.3], [48]-[52] above.

[103] That was the foundational agreement put to the jury by the learned trial judge in this case. In this way, the prosecution got to murder through an allegation of a plan to commit a summary offence. Compare liability for statutory murder under s 12A of the *Criminal Law Consolidation Act 1935* (SA), which requires proof of an intentional act of violence in the course of committing a major indictable offence with a maximum penalty of 10 years or more, considered in *Arulthilakan v The Queen* (2003) 78 ALJR 257.

[104] *Wilson v The Queen* (1992) 174 CLR 313, 327 (Mason CJ, Toohey, Gaudron and McHugh JJ).

[105] *Gillard v The Queen* (2003) 219 CLR 1; *Clayton*, [110]-[112] (Kirby J).

[106] See *Gilbert v The Queen* (2000) 201 CLR 414, [13]-[16] (Gleeson CJ and Gummow J), [26] (McHugh J), [101] (Callinan J); *Mraz v The Queen* (1955) 93 CLR 493, 508, 513; *James v The Queen* (2014) 88 ALJR 427, [33].

[107] The point is illustrated by the comments of Gibbs J in *La Fontaine v The Queen* (1976) 136 CLR 62, referred to above at [54].

[108] *R v Crabbe* (1985) 156 CLR 464, [8]-[9]. How extended joint enterprise could work in the context of an allegation of reckless murder was considered by the New South Wales Law Reform Commission, *Complicity*, (2010) [4.118].

[109] *Tangye v The Queen* (1997) 92 A Crim R 545; *R v May* [2012] NSWCCA 111, [260]; *R v Tropeano* (2015) 122 SASR 298.

to kill or cause grievous bodily harm, an accused may be found guilty of a serious offence based on the existence of an 'agreement' to commit what may be a somewhat illusory, and comparatively minor foundational offence. *Taufahema v The Queen* (2007) 228 CLR 232 exemplifies this problem. There may be little incentive to set out to prove a more difficult case, particularly because a finding of guilt on the basis of extended joint enterprise will have the same consequences as a finding of guilt based on aiding and abetting or joint enterprise simpliciter. For this reason, extended joint enterprise is invariably used as a third, but much more easily established, path to guilt in murder trials, effectively overtaking the primary bases for establishing murder. This compounds the complexity of jury directions in already difficult cases.[110]

67. Further, it cannot be overlooked that the frame of reference for a jury called upon to apply extended joint enterprise in cases of homicide is that someone has been killed, often as a result of the escalation of what was initially expected to be a violent altercation of some variety. It is a short step for a jury to conclude that the possibility of an intentional killing could not have escaped the contemplation of the participants in the original venture.[111] After all, the possibility has in fact eventuated. This makes the likelihood of a jury resisting a hindsight based assessment of an accused's state of mind all the more unlikely.

68. There is a further dimension to the difficulties with extended joint enterprise, beyond abstract questions of principle. Many jurisdictions, including South Australia, now demand life sentences of imprisonment and mandatory minimum non parole periods for those convicted of murder. In South Australia, the mandatory minimum non parole period is 20 years, subject to reduction in very confined circumstances, none of which were held applicable in the present case.[112] The relationship between the rules of extended joint enterprise and modern sentencing regimes means that what might have previously been the options available to a sentencing court to reflect a secondary participant's lesser involvement in a murder, have now been substantially eroded.

6.5 R v Jogee [2016] 2 WLR 681

69. The decision in *Jogee* recognises that the provenance[113] of the modern doctrine of extended joint enterprise was a misapprehension of the meaning of earlier decisions which[114], contrary to the Board's approach in *Chan Wing-Sui*, did not support the contention that liability for murder extended to parties to an agreement to commit crime A but who contemplated, but did not authorise, the commission of murder. At its core, *Jogee* confirms that extended joint enterprise was a legal fiction and that the traditional rules of accessorial liability impose suitable limits on the accountability of secondary participants in crimes.

70. The key propositions which are to be derived from the decision in *Jogee* and which, in the applicant's submission, encourage a reconsideration of the law of extended joint enterprise are:

    70.1 Foresight of the possibility that an incidental crime (crime B) might be committed as a product of the intentional assistance or encouragement of an agreed upon crime (crime

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[110] New South Wales Law Reform Commission, *Complicity*, (2010), [4.22.9], p 127. Examples of the issues the principles give rise to are: *R v Mavropoulos, Votino and Votino* [2009] SASC 190, [61]-[65]; *R v Makin* (2004) 8 VR 262, 263; *Clayton v The Queen* (2006) 81 ALJR 439.

[111] As Hayne J said in *Gillard v The Queen* (2003) 219 CLR 1, [118]: "Common purpose principles rightly require consideration of what an accused foresaw, not just what the accused agreed would be done. The accused is held criminally responsible for his or her continued participation in a joint enterprise, despite having foreseen the possibility of events turning out as in fact they did." See also Krebs, "Joint Criminal Enterprise", (2010) 73 *Modern Law Review* 587, 583-584.

[112] AB320; *Criminal Law (Sentencing) Act 1988* (SA), s 32(5)(ab), s 32A. See *Clayton*, [112] (Kirby J).

[113] *R v Jogee* [2016] 2 WLR 681; [2016] UKSC 8, [18]-[35].

[114] *R v Jogee* [2016] 2 WLR 681; [2016] UKSC 8, [62].

A) is an unsatisfactory criterion for secondary liability. Evidence of foresight of the possibility of an incidental crime being carried out might provide a platform for a circumstantial inference that the secondary party intended to assist or encourage the principal in the commission of the incidental offence, but it should not be treated as a substitute for proof of intention.[115]

70.2 The liability of secondary parties is to be determined by asking whether it has been proved that he or she intentionally assisted or encouraged the commission of the crime charged. The existence of an agreement, pursuant to which both contemplate the possibility that the crime charged would be committed, or the unilateral contemplation of the possibility that the crime charged would be committed, might be evidence of intentional assistance or encouragement, but cannot replace proof of intention.[116]

71. The reasoning of the Supreme Court is unimpeachable and reconciles the central threads of the criminal law and, in particular, the importance of the co-existence of a guilty act and a guilty mind, which is constructively abandoned under the modern law of extended joint enterprise. It represents a proper balance between moral culpability and legal responsibility.[117]

6.6 The approach proposed by the applicant

72. In the applicant's submission, a reformulation of the law of secondary liability would potentially involve the following:

72.1 Liability as an aider and abettor (**traditional accesoryship**), is sustained by proof beyond reasonable doubt, that the accused knew of all of the essential matters which made another's conduct criminal and, with that knowledge, intentionally encouraged or assisted the commission of the charged crime, whether or not that encouragement or assistance was provided prior to the commission of the crime or at the scene of the crime.[118]

72.2 An accused is also liable for a crime committed pursuant to an agreement between the accused and another that, together, they will commit a crime, provided that whilst that agreement is on foot, and before it has been called off or the accused has withdrawn from it, the accused does or one or more participants in the venture do, either individually or collectively, all that is necessary to commit that crime (**joint enterprise**). The accused is not liable for crimes committed by another which are foreign to the scope of the agreement to which he or she is a party. Determining the scope of the agreement is a question of fact.

73. If the applicant's submissions are accepted, it is respectfully submitted that the applicant's convictions should be quashed, having regard to the matters set out in Part V above.

6.7 Whether the verdicts were unreasonable or insupportable

74. In the Full Court, the applicant contended that the verdicts against him could not be supported. The Full Court rejected that complaint, although it did so without much explication of its process of reasoning. Similarly, the Full Court dealt with the argument by the co-accused Miller that his verdicts were unreasonable or insupportable without reference to the evidence concerning intoxication.

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[115] *R v Jogee* [2016] 2 WLR 681; [2016] UKSC 8, [73], [83].
[116] *R v Jogee* [2016] 2 WLR 681; [2016] UKSC 8, [88]-[99].
[117] *Wilson v The Queen* (1992) 174 CLR 313, 327, 334 (Mason CJ, Toohey, Gaudron, McHugh JJ).
[118] *Giorgianni* but the place for conditional intention in *Jogee*, [92] is however accepted as sufficient for liability.

75. The context in which these complaints were made in the Full Court were that the jury had been instructed (in conditional terms) to approach the evidence of intoxication[119] on the basis that it was *potentially* relevant to the applicant's state of mind and, if so relevant, *then* the onus was on the prosecution to prove the requisite state of mind.[120] The evidence concerning intoxication *was* relevant. It was also undisputed.[121] The jury were also instructed in terms which might have conveyed that it was necessary to make a threshold determination about *how intoxicated* the applicant was and, in particular, whether he was so intoxicated as to be incapable of forming the state of mind required to be complicit in a joint enterprise or extended joint enterprise. [122] Additionally, from time to time the learned trial judge's directions may have created some confusion about the onus of proof on the topic of intoxication, as reference was made a number of times to whether the jury were "satisfied" that the accused were intoxicated. [123]

76. Although the applicant's draft notice of appeal goes only to the safety of the verdicts on this subject, the applicant does point to these matters as weaknesses in the way the case was summed up to the jury.

77. The prosecution did not contest that all accused had been drinking and that the applicant's zero blood alcohol concentration almost 24 hours after the events in Grant Street was unsurprising[124]. There was evidence of the blood alcohol concentration of, for example, Presley (FC [92])[125] and Miller, from samples taken closer to the time of the relevant events. There was nothing about the evidence concerning Miller's specific level of intoxication, and the consequences of that level of intoxication,[126] that precluded the jury from treating Miller as a useful comparator in assessing the applicant's level of intoxication, particularly as Miller and the applicant had been drinking in company on 12 December 2012 (see [8] above).

78. Although the jury had been reminded that there was evidence that all the accused had been drinking and that the applicant and Miller had been using cannabis and diazepam,[127] the significance of those facts to the application of the principles of joint enterprise and extended joint enterprise was not crystallised for the jury and the Full Court undertook no analysis of these issues.

79. The importance of these matters had to be considered by the Full Court within the construct of the evidence led against the applicant which was far from overwhelming (see [9]-[14] above). Even if the jury accepted that the applicant was present (and the evidence on this point alone was not conclusive), the evidence that a male (the description of whom went no higher than to establish that the applicant could not be excluded as a possible candidate) said to be the applicant brandished a shovel and struck either King or Hall was intrinsically unpersuasive. The key prosecution witnesses were not only inconsistent on the number of members of the

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[119] There were both general and specific directions on intoxication in relation to the accused: As to Presley: AB224 (SU221), AB226 (SU223), AB228 (SU225). As to Miller: AB237 (SU234), AB241-242 (SU238-239). As to Smith: AB283-285 (SU280-282), AB286 (SU283), AB287 (SU284).

[120] AB51 (SU48). At AB200 (SU197) the trial judge gave a similar direction that "[i]ntoxication *may* be relevant to self defence".

[121] T1705.

[122] AB195-196 (SU192-193). As to Smith: AB284 (SU281) – "whether he was intoxicated to such an extent that the prosecution has failed to prove that he had of the state of mind required..." See also AB224 (SU221), AB238-239 (SU235-236). Cf *R v O'Connor* (1980) 146 CLR 64, 71-72 (Barwick CJ); *Viro v The Queen* (1978) 141 CLR 88, 109-112 (Gibbs J); *R v Tucker* (1986) 36 SASR 135, 138-139 (King CJ); *R v Perks* (1986) 41 SASR 335, 337 (King CJ); *R v Summers* (1986) 22 A Crim R 47, 48 (King CJ); *R v Bedi* (1993) 61 SASR 269, 273.

[123] AB42, 46 (SU39, 43); AB51 (SU48); AB201-202 (SU198-199). As to Smith: AB287 (SU284) – "satisfied"; See also AB228 (SU225), AB242 (SU232) – "satisfied".

[124] T1705; AB283 (SU280).

[125] AB348.

[126] Accurately described in the Summary of Argument filed on 23 December 2015 on behalf of the appellant, Miller in number A28 of 2015 at [38]-[42], [44], [52]. See also T823.

[127] AB42 (SU39).

group involved in the altercation with King and Hall, they failed to clearly delineate the conduct of the man said to be the applicant in any way capable of sustaining the conclusion that the applicant had participated in the altercation.

80. When the unsatisfactory state of that evidence was combined with the absence of forensic evidence linking the applicant to the attack on King or Hall, the case against the applicant was inconclusive and fell well short of establishing participation in an agreement to assault or actual contemplation of the possibility of murder.

10 81. The Full Court's approach to the rectitude of the verdicts failed to address the complete context of the case against the applicant in these respects. On the whole of the evidence, it was at least reasonably possible that, if the applicant were present, he was *merely present*.[128] The evidence against the applicant required a cautious examination of the inferences that could properly be drawn.[129] His intoxication should have left the jury, and on review of the evidence as a whole, the Full Court, with an ineradicable doubt about the applicant's guilt. There is nothing to indicate that the Full Court turned its attention to the applicant's intoxication (by reference to the evidence applicable to him directly and circumstantially) and its relationship with the case of joint and extended joint enterprise made against him.

20 **PT VII: Applicable Statutory Provisions**

82. See annexure.

PT VIII: Orders

83. The amended application for special leave to appeal be granted.

84. The appeal is allowed.

85. The orders of the Full Court be set aside, and in lieu thereof, it be ordered that:

85.1 If the appeal succeeds in respect of proposed ground 2.1, there be an order for a retrial.

30 85.2 If the appeal succeeds in respect of ground 3.1, there be an order of acquittal or the appeal be remitted to the Full Court for further consideration in accordance with the Court's reasons.

Pt IX: Oral Argument

86. The applicant estimates that the presentation of his oral argument will take 3 hours.

	T A Game	K G Handshin
Phone	(02) 9390 7777	(08) 8205 2966
Fax	(02) 8998 8547	(08) 8212 6590
Email	tgame@forbeschambers.com.au	khandshin@barchambers.com.au

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Counsel for the applicant

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[128] *M v The Queen* (1994) 181 CLR 487, 493-494 (Mason CJ, Deane, Dawson and Toohey JJ); *Jones v The Queen* (1997) 191 CLR 439, 450-452 (Gaudron, McHugh and Gummow JJ); *SKA v The Queen* (2011) 85 ALJR 571, [14] (French CJ, Gummow and Kiefel JJ).

[129] *Knight v The Queen* (1992) 175 CLR 495, 502.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY No. A22/ 2015

BETWEEN: **WAYNE DOUGLAS SMITH**
Applicant

AND: **THE QUEEN**
Respondent

ANNEXURE A
Statutory Provisions

1.	*Criminal Law Consolidation Act* (SA), as at 12.12.2012	ss 11, 12A, 24, 267, 353

Filed on behalf of the Applicant
THE APPLICANT'S SOLICITOR IS:
Julia Davey, Legal Services Commission
Windsor Building, Elizabeth City Centre
ELIZABETH SA 5112
Dated: 23 March 2016

Telephone: (08) 8111 5415
Fax: (08) 8207 9333

Part 3—Offences against the person etc

Division 1—Homicide

11—Murder

Any person who commits murder shall be guilty of an offence and shall be imprisoned for life.

12—Conspiring or soliciting to commit murder

Any person who—

(a) conspires, confederates and agrees with any other person to murder any person, whether he is a subject of Her Majesty or not and whether he is within the Queen's dominions or not;

(b) solicits, encourages, persuades or endeavours to persuade, or proposes to, any person to murder any other person, whether he is a subject of Her Majesty or not and whether he is within the Queen's dominions or not,

shall be guilty of an offence and liable to be imprisoned for life.

12A—Causing death by an intentional act of violence

A person who commits an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more (other than abortion[1]), and thus causes the death of another, is guilty of murder.

Note—

1 ie an offence against section 81(2).

13—Manslaughter

(1) Any person who is convicted of manslaughter shall be liable to be imprisoned for life or to pay such fine as the court awards or to both such imprisonment and fine.

(2) If a court convicting a person of manslaughter is satisfied that the victim's death was caused by the convicted person's use of a motor vehicle, the court must order that the person be disqualified from holding or obtaining a driver's licence for 10 years or such longer period as the court orders.

(3) Where a convicted person is disqualified from holding or obtaining a driver's licence—

(a) the disqualification operates to cancel any driver's licence held by the convicted person as at the commencement of the period of disqualification; and

(b) the disqualification may not be reduced or mitigated in any way or be substituted by any other penalty or sentence.

13A—Criminal liability in relation to suicide

(1) It is not an offence to commit or attempt to commit suicide.

(a) for a basic offence—imprisonment for 20 years;

(b) for an aggravated offence—imprisonment for 25 years.

(2) If, however, the victim in a particular case suffers such serious harm that a penalty exceeding the maximum prescribed in subsection (1) is warranted, the court may, on application by the Director of Public Prosecutions, impose a penalty exceeding the prescribed maximum.

(3) A person who causes serious harm to another, and is reckless in doing so, is guilty of an offence.

Maximum penalty:

(a) for a basic offence—imprisonment for 15 years;

(b) for an aggravated offence—imprisonment for 19 years.

24—Causing harm

(1) A person who causes harm to another, intending to cause harm, is guilty of an offence.

Maximum penalty:

(a) for a basic offence—imprisonment for 10 years;

(b) for an aggravated offence—imprisonment for 13 years.

(2) A person who causes harm to another, and is reckless in doing so, is guilty of an offence.

Maximum penalty:

(a) for a basic offence—imprisonment for 5 years;

(b) for an aggravated offence—imprisonment for 7 years.

25—Alternative verdicts

If—

(a) a jury is not satisfied beyond reasonable doubt that a charge of an offence against this Division has been established; but

(b) the Judge has instructed the jury that it is open to the jury on the evidence to find the defendant guilty of a specified lesser offence or any 1 of a number of specified lesser offences; and

(c) the jury is satisfied beyond reasonable doubt that the specified lesser offence, or a particular 1 of the specified lesser offences, has been established,

the jury may return a verdict that the defendant is not guilty of the offence charged but is guilty of the lesser offence.

29—Acts endangering life or creating risk of serious harm

(1) Where a person, without lawful excuse, does an act or makes an omission—

(a) knowing that the act or omission is likely to endanger the life of another; and

(b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered,

that person is guilty of an offence.

Maximum penalty:

Part 7B—Accessories

267—Aiding and abetting

A person who aids, abets, counsels or procures the commission of an offence is liable to be prosecuted and punished as a principal offender.

(iii) the convicted person or the Director of Public Prosecutions may appeal against sentence passed on the conviction (other than a sentence fixed by law), or a decision of the court to defer sentencing the convicted person, on any ground with the permission of the Full Court;

(ab) if a person is tried on information and acquitted, the Director of Public Prosecutions may, with the permission of the Full Court, appeal against the acquittal on any ground—

(i) if the trial was by judge alone; or

(ii) if the trial was by jury and the judge directed the jury to acquit the person;

(b) if a court makes a decision on an issue antecedent to trial that is adverse to the prosecution, the Director of Public Prosecutions may appeal against the decision—

(i) as of right, on any ground that involves a question of law alone; or

(ii) on any other ground with the permission of the Full Court;

(c) if a court makes a decision on an issue antecedent to trial that is adverse to the defendant—

(i) the defendant may appeal against the decision before the commencement or completion of the trial with the permission of the court of trial (but permission will only be granted if it appears to the court that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial);

(ii) the defendant may, if convicted, appeal against the conviction under paragraph (a) asserting as a ground of appeal that the decision was wrong.

353—Determination of appeals in ordinary cases

(1) The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

(2a) On an appeal against acquittal brought by the Director of Public Prosecutions, the Full Court may exercise any one or more of the following powers:

(a) it may dismiss the appeal;

(b) it may allow the appeal, quash the acquittal and order a new trial;

(c) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(3) If the Full Court orders a new trial under subsection (2a)(b), the Court—

(a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

(b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.

(3a) If an appeal is brought against a decision on an issue antecedent to trial, the Full Court may exercise any one or more of the following powers:

(a) it may confirm, vary or reverse the decision subject to the appeal; and

(b) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances.

(4) Subject to subsection (5), on an appeal against sentence, the Full Court must—

(a) if it thinks that a different sentence should have been passed—

(i) quash the sentence passed at the trial and substitute such other sentence as the Court thinks ought to have been passed (whether more or less severe); or

(ii) quash the sentence passed at the trial and remit the matter to the court of trial for resentencing; or

(b) in any other case—dismiss the appeal.

(5) The Full Court must not increase the severity of a sentence on an appeal by the convicted person except to extend the non-parole period where the Court passes a shorter sentence.

354—Powers of Court in special cases

(1) If it appears to the Full Court that an appellant, although not properly convicted on some count or part of the information, has been properly convicted on some other count or part of the information, the Court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the verdict on the count or part of the information on which the Court considers that the appellant has been properly convicted.

(2) Where an appellant has been convicted of an offence and the jury could, on the information, have found him guilty of some other offence and, on the finding of the jury, it appears to the Full Court that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.