IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY No. 22 of 2016

BETWEEN

WAYNE DOUGLAS SMITH
Applicant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: INTERNET PUBLICATION

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

Part II: STATEMENT OF ISSUES

2. The Respondent accepts the issues identified by the Applicant (AS [2][3]) arise in relation to the question of special leave to appeal and submits that the answer to each question is "no". Accordingly, special leave to appeal should be refused.

Part III: NOTICES UNDER s 78B OF THE JUDICIARY ACT

3. The Respondent considers that no notice is required to be given pursuant to s 78B of the *Judiciary Act 1903 (Cth).*

Part IV: FACTUAL BACKGROUND

4. The facts are accurately summarised in the judgment of the Court below.[1] The Applicant does not dispute the accuracy of that summary. The Respondent also relies on the factual summary in his written submissions filed in relation to the matter of Miller. The following factual matters are noted in addition to those facts.

5. There is no basis to contend that extended joint enterprise was the most likely path to guilt (cf: AS [14]).

6. As to the Applicant's presence at the scene, Mr Garry Willis gave unchallenged evidence that he left the house at the same time as the other offenders and afterwards returned with

[1] [2015] 122 SASR 476 at AB1763-1769[2] – [34]; AB1770-1771[45] – [49]; AB1791-1793[135]

Office of the Director of Public Prosecutions
Level 7, 45 Pirie Street
Adelaide, SA, 5000
Telephone: 0882071529
Fax: 0882071799
Ref:

them.[2] As to presence at the scene of the incident Ms Bateman and Ms Pamela Turner give evidence of a man who was a "big, stocky boy",[3] "a lot bigger" and fatter[4] than the others.[5] That description fitted the Applicant.[6] It must not be forgotten that the jury had the benefit of observing for themselves the Applicant's physical appearance in contrast to the other applicants.

7. Someone meeting the description of the Applicant was wielding a shovel[7] and used that shovel to hit Mr Hall.[8] Whilst the expert found insufficient DNA on the shovel for profiling, and accordingly did not find the Applicant's DNA on the shovel,[9] the DNA expert, gave evidence that only three DNA swabs were taken and tested from the shovel,[10] and that a person can hold things without transferring DNA onto that object.[11] Mr Hall's DNA was found on the shovel.[12]

8. There is evidence that nobody in the group of persons who attended the confrontation were just standing around; all participated in some way.[13]

9. As to the Applicant's alleged intoxication there is *no evidence* of how much alcohol he had drunk at or before the attack on Mr Hall.[14] Consequently, unlike the evidence against Miller, there was no expert evidence as to blood alcohol level at the time of the incident and what effect that might have on him. There was expert evidence that the level of benzodiazepine drugs found in the Applicant's blood were at the low end of what might be prescribed therapeutically.[15] There is expert evidence that in determining the effect that alcohol has actually had on a person, an observation as to that person's conduct is "important".[16] At trial the Applicant did not attempt to elicit any evidence as to how much the Applicant had to drink. In that context the Applicant established in cross-examination of the expert that, given his blood alcohol reading was zero 23 hours after the incident, it was impossible to determine the effect on him at the time.[17] The evidence as to intoxication in relation to this Applicant was consequently vague and general in nature.

---

[2] [2015] 122 SASR 476 at [46]; AB616; AB620
[3] AB248:T16-20; [2015] 122 SASR 476 at [135] at [4][5]
[4] AB385:T30-37; [2015] 122 SASR 476 at [135] at [4][5]
[5] See also AB1135:T37-38; AB1676. The Applicant's AB references at fn 4 do not support the assertion that evidence of a man fitting the Applicant's description was "*imprecise*"
[6] AB1135: 37-38: "*...Smith, no doubt the bigger, stockier man in the group...*": Prosecution closing address, the accuracy of which was not challenged
[7] AB246:T30-31; AB251:T10-38; AB378:T11; AB544:T11-12. See also evidence of Finlay-Smith that someone with a pole intimidated him at AB545:T20-27; [2015] 122 SASR 476 at [135] at [4][5]
[8] AB378-379; AB380-381; [2015] 122 SASR 476 at [135] at [4][5]
[9] [2015] 122 SASR 476 at [135] at [6]
[10] AB911:T14-AB912:T7
[11] AB866:T32-AB867:32
[12] [2015] 122 SASR 476 at [135] at [6]
[13] AB253:37-38
[14] Other than general comments that everyone had been drinking, see eg AB614; AB632; AB649
[15] AB837:T1-3; AB834:T1-13
[16] AB1051:T27-36
[17] AB1049:6-15

Part V: APPLICABLE STATUTORY PROVISIONS

10. The Applicant's statement of the relevant provisions is correct.

Part VI: SUMMARY OF ARGUMENT

Ground 1: verdict unreasonable or not supported by the evidence having regard to the Applicant's intoxication

11. The ground referred to this Court was confined to the issue of whether the verdict was unsafe by reason of intoxication. However, the Applicant's argument (AS [75] – [81]) is much broader; it encompasses complaints as to directions and the quality of the evidence that the Applicant was at the scene which are not relevant to the referred ground.[18] The complaint about the intoxication direction was abandoned in the Court below. In the application for special leave no challenge was made that it was not open for the jury to find that the Applicant was present at the scene of the incident and did what was alleged; the challenge was to forming the relevant state of mind.

12. Accordingly, the sole issue is whether this Court is satisfied that on the whole of the evidence, it was *open* to the jury to be satisfied beyond reasonable doubt of the Applicant's guilt.[19] In this regard, the jury had the benefit of seeing and hearing the witnesses, which is particularly relevant given the nature of the evidence that the jury were assessing in this case.

13. While the Court below did not refer to intoxication of the Applicant there is no basis to suppose that they did not take it into account in conducting the independent examination. The intoxication direction recited in the judgment refers to the Applicant. The Court was obviously conscious of the issue.

14. It was open to the jury to be satisfied of the guilt of the Applicant: evidence (as outlined above) places him at the scene of the confrontation (both leaving the house immediately before the confrontation and arriving back with Betts, Presley and Miller); evidence was that the group of men were armed (between them they had at least a knife, a baseball bat, a shovel and a bottle – some of which could not have been concealed); evidence that the applicants were running[20] and shouting;[21] eyewitness evidence of a person meeting his description at the scene; no evidence that anyone who arrived at the scene was not participating in some way; evidence that a person of the Applicant's description was holding a shovel (Mr Hall was hit with a shovel) and hit Mr Hall with a shovel; a bottle

---

[18] The Applicant abandoned the ground as to the intoxication direction below.
[19] [2015] 122 SASR 476 at [67]; see *M v The Queen* (1994) 181 CLR 487 at 492- 493; *Libke v The Queen* (2007) 230 CLR 559 at [113]
[20] B656:T21; AB657:T1-3; AB749:T13-26
[21] AB246:T19-22; AB383:T25-28

found at the scene had Mr Hall's blood on it,[22] as well as the Applicant's fingerprints;[23], and the Applicant lied to the police as to his whereabouts at the time of the confrontation.[24]

15. While there was evidence that the Applicant had been drinking there was no evidence as to how much he had drunk. There is no evidence that he was behaving in such a way as at be unable to form the relevant state of mind. The Applicant does not point to any evidence as to observations of his behaviour which suggest he was so intoxicated as to be unable to form the relevant state of mind. There was no evidence to suggest he had any difficulty arming himself; making his way to the scene with others; using weapon(s); or leaving after the confrontation. Rather, the evidence points to the fact that he was acting in a purposeful and intentional manner.

16. There is nothing in the evidence as to intoxication which leads to the conclusion that the jury *must* have entertained a reasonable doubt. Indeed, an assessment of all the evidence establishes that it was open for the jury to find that the Applicant was guilty of the offence; that he participated in the joint enterprise with his co-offenders as alleged and, if necessary, foresaw the possibility that one of his group might act with the intent to cause grievous bodily harm.[25]

Proposed ground - Application for leave to re-open *McAuliffe v The Queen*

17. The majority of this Court in *Clayton v The Queen*[26] rejected the argument that the principles of extended common purpose (or joint enterprise) ("EJCE") established in *McAuliffe v The Queen*[27] and *Gillard v The Queen*[28] should be abandoned or at least substantially modified. The decision to review and depart from this Court's previous decisions is not taken lightly.[29] For the reasons set out below, the Applicant has not identified any circumstances which warrant that approach being taken and leave to reopen should be refused.

18. *First*, it is clear that *McAuliffe* rests upon principle which is established in a significant succession of previous cases.[30] It is a considered judgment delivered after full argument.

---

[22] [2015] 122 SASR 476 at [135] at [7] – [10]
[23] T1234; Neilson gives evidence that one of the Applicant's fingerprints is consistent with holding bottle upside down, at the base of the bottle
[24] [2015] 122 SASR 476 at [135] at [11]
[25] *Huynh v The Queen* [2013] HCA 6, 87 ALJR 434 at [38][39]
[26] (2006) 81 ALJR 439
[27] (1995) 183 CLR 108
[28] (2003) 219 CLR 1
[29] See *Johns v Commissioner of Tax* (1989) 166 CLR 417 at 438; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599, 602 and 620; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [65] per French CJ
[30] See *Johns v Commissioner of Tax* (supra) at 438

The decision in *McAuliffe* was unanimous and has been consistently applied by this Court thereafter.[31] It is now well settled and established jurisprudence in Australia.

19. *Second*, an attempt to review *McAuliffe* was refused by this Court in *Clayton*; the Applicant has not identified any compelling circumstances warranting this decision to be overturned. Neither the decision in *Jogee* or observations made by Law Reform Commissions, the two matters relied on by the Applicant (AS [22]), provide a basis for doing so.

20. The arguments now relied on by the Applicant to establish that *McAuliffe* is incorrect (AS [23.2] – [23.7]) are the same as the underlying arguments relied upon, and rejected, in *Clayton*.[32] The arguments that there is discord between the relevant principles of criminal liability; that EJCE lacks utility (and is unnecessary); that public policy does not justify the principle; and that its application has resulted in undue complexity were rejected.[33] Nothing in *R v Jogee*[34] affects the correctness of the Court's conclusion in relation to those matters. Moreover, for the reasons explained below, the decision of *Jogee* and the decision of *Chan Wing-Sui*, which it overturned, do not have the significance contended for by the Applicant. Nor do the observations made by Law Reform Commissions. Indeed, the United Kingdom Law Reform Commission Report (AS [22]) was referred to by the majority in *Clayton*, the Court observing that it rejected the proposal to abolish extended liability.[35] Moreover, the New South Wales Law Reform Commission, which is also relied on by the Applicant, accepted "*that extended joint criminal enterprise has a proper role to play as part of the law of complicity*" and rejected any suggestion that it be abolished.[36]

21. *Third*, the Applicant has pointed to no evidence that *McAuliffe* has led to any injustice. As recognised by the majority in *Clayton;* any contention about unjust results is based on the unstated premise that the crime of murder should be confined to cases where an accused has the mens rea for that offence. That proposition also underpins this application. However, the Applicant's argument does not grapple with the nature of the criminal culpability in extended liability; the liability lies in the *continued participation* in the joint criminal enterprise despite foresight of what may be done. Nothing in *Jogee* affects the underlying policy which has been accepted by this Court.

---

[31] See eg: *Gillard v The Queen* (2003) 219 CLR 1 (cf: Kirby J at [88] – [93]); *Clayton v The Queen* (2006) 81 ALJR 439 (Kirby J dissenting at [98]); *Taufahema v The Queen* (2007) 228 CLR 232; *Huynh v The Queen* (supra) and see references in *Osland v The Queen* (1998) 197 CLR 316

[32] *Clayton v The Queen* (supra) at [15] – [21] and see: application for special leave: [2006] HCATrans 432, 433. This reflects the breadth of the argument made including the criticisms made of the doctrine and policy issues.

[33] Similar arguments were run before this Court in *McAuliffe*, for example, that the principles espoused in *Giorgianni v The Queen* (1985) 156 CLR 473 are inconsistent or incompatible with EJCE: [1995] HCATrans 146 at for example 3, 5, 7, 24, 29 – 30, 35, 62

[34] [2016] 2 WLR 681

[35] *Clayton v The Queen* (supra) at [19] and see Kirby J at [85]

[36] New South Wales Law Reform Commission, Complicity (2010) Report 129 at [4.232]

22. *Fourth*, if *McAuliffe, Gillard* and *Clayton* are to be overruled, this is properly a place for the legislature.[37] Any change to the doctrine of EJCE must be undertaken after examining the whole of this area of secondary liability and EJCE's role in it, as well as its relationship with the law of homicide.[38] As this Court in *Clayton* held, any change to EJCE is, in this context, a task for legislatures and law reform commissions and "*not a step that can or should be taken in the development of the common law*".[39] The Court observed that the UK Law Reform Commission Report (referred to above) illustrates the nature and extent of the difficulties faced in reviewing this area of the law.[40]

Joint Criminal Enterprise

23. This Court in *McAuliffe* held that where a party reaches an agreement with another to commit a crime and foresees as a possible incident of that venture that another crime might be committed and continues to participate knowing of that possibility, then that party is a party to the commission of that other crime even if the party did not agree to it being committed.[41]

24. This statement of principle is not novel. As recognised in *McAuliffe*, the conclusion accords with the general principle of criminal law that a person who assists in the commission of a crime or encourages its commission may be convicted as a party to it. It is not a step taken inconsistently with *Johns*; the principle is founded in established jurisprudence. This principle has been treated historically as part of the law on joint criminal enterprise ("JCE").[42] Properly understood, that remains the case (cf: AS [23.1] [23.3]).

25. The Applicant's contentions (AS [23.2] – [23.5]), which underpin his application, misunderstand the development of the doctrine in Australia and the policy rationales behind it. The arguments were correctly rejected in *Clayton.*

26. These submissions address in more detail (1) the Court's reasoning in *McAuliffe* and its subsequent application; (2) the doctrinal history of EJCE; (3) the public policy rationales underlying the doctrine of EJCE; (4) the argument as to discord between EJCE and accessorial liability and murder; and (5) *Jogee.*

---

[37] For example, in Victoria the *Crimes Act* 1958 was amended as of 1 November 2014 to incorporate the principles of complicity in line with the Weinberg Report Recommendations: s 323 – 326. The common law principles were abolished: s 324C. The new provisions maintain extended joint liability is in s 323(1)(d), the test being aware that the offence committed was "probable". And see for more detail: the Respondent's written submission filed in the related matter of Presley.

[38] *Clayton* (supra) at [19]

[39] *Clayton* (supra) at [19]

[40] New South Wales Law Reform Commission, Complicity (2010) Report 129 made a number of recommendations about the law of complicity including as to EJCE. No legislation has been enacted as result.

[41] *McAuliffe v The Queen* (supra) at 117 - 118

[42] For the definition of the concept see: *Gillard v The Queen* (supra) at [110]

McAuliffe and its application

27. There is no error in the reasoning of this Court in *McAuliffe* (or the decisions of this Court which apply it). Contrary to the Applicant's contention (AS [23.1]), it is not premised on the decision in *Chan Wing-Siu* such that the decision in *Jogee* effectively undermines the jurisprudential basis underpinning *McAuliffe*. Regardless, the principle in *McAuliffe* is well established in jurisprudence in Australia and is founded on valid policy considerations such that even if this Court held that the principle of EJCE as espoused in *McAuliffe* constituted new law, that, in and of itself, does not now justify that the doctrine be overturned.

McAuliffe

28. Contrary to the Applicant's contention (AS [43]) the judgment in *McAuliffe* is a considered judgment. There is *no* basis to contend, as the Applicant does, that the Court did not consider the argument in the context of the principles of accessorial liability or the general principles of criminal responsibility.

29. The Court began its consideration with the principles of common purpose and accessorial liability;[43] that was clearly the context in which the decision was made. As noted above, the Court concluded that its decision accords with accepted general principles in the criminal law in that regard.

30. The Court had regard to *Johns v The Queen,*[44] which held that the possible consequences which could be taken into account were those which were within the contemplation of the parties to the EJCE, noting that it did not need to consider the case where one party only had a contemplation of such possible consequences.[45] The Court then referred to the Privy Council in *Chan Wing-Siu,*[46] observing that it did *not* provide an explicit answer to the question they were considering. The Court did refer to, among other things, the remarks made by Sir Robin Cooke[47] in *Chan Wing-Siu,* which suggested that liability would be imposed upon a secondary party acting in concert with a primary offender for acts done by the primary offender of a type which the secondary party foresaw but did not necessarily intend.[48] The Court had regard to academic commentary (and the debate therein) which considered *Chan Wing-Siu,*[49] and noted that the use of the word "authorization" made in *Chan Wing-Siu* was qualified by the Privy Council in *Hui Chi-*

---

[43] *McAuliffe v The Queen* (supra) at 113 - 114
[44] (1980) 143 CLR 108 at 115
[45] *McAuliffe v The Queen* (supra) at 114 - 115
[46] *Chan Wing-Sui* [1985] AC 168
[47] *Chan Wing-Sui* (supra) at 175 per Sir Robin Cooke writing for the Court
[48] *McAuliffe v The Queen* (supra) at 116
[49] See *McAuliffe v The Queen* (supra) at 116 reference to Professor J Smith in *R v Wakely* [1990] *Criminal Law Review* 199 at 120-121 and to Smith and Hogan, *Criminal Law*, 7th ed. (1992) at 142-145. Professor Smith approves the test of foresight of a possibility and stated that test "*should be enough*", even if an accused, before embarking on the JCE says that he does "*not agree*" to a co-accused using a weapon. The test of foresight of possibility *"should be enough"* because the culpability comes from the *participation* in the JCE with that mens rea. Professor Smith does not rely on *Chan Wing-Siu* for this proposition, but refers to that case in support of it.

Ming v The Queen.[50] The Court in that case explained that this word was used to emphasise the fact that mere foresight is not enough; it was meant to explain what was meant by the word "contemplation", not to add a new ingredient.

31. Finally, the Court referred back to *Johns*, recognising that there was no occasion in *Johns* to consider a situation where one party foresees,[51] but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However the Court in *McAuliffe* concluded that in such a situation, the secondary offender is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose.[52] 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.[53]

<u>*McAuliffe* has been repeatedly applied in Australia</u>

32. *McAuliffe* has subsequently been accepted and applied as good law in Australia. It was considered and applied in *Gillard v The Queen.*[54] Kirby J, while agreeing with the result, opined that *McAuliffe* should be reconsidered.[55] On that topic, Hayne J (Gummow J agreeing) noted that reconsideration of *McAuliffe* was not sought but held it was *not* required.[56] As Hayne J observed, the common law in Australia did not, either before or after *McAuliffe,* confine the liability of participants to a JCE to offences in which it was established the parties agreed to commit.[57] As Hayne J concluded:[58]

> *"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. It does not depend upon identifying a coincidence between the wish or agreement of A that an act be done by B and B's doing of that act. The relevant conduct is that of A - in continuing to participate in the venture despite foresight of what may be done by B.*
>
> *If liability is confined to offences for the commission of which the accused has previously agreed, an accused person will not be guilty of any form of homicide in a case where,*

---

[50] [1992] 1 AC 34 at 51

[51] But it is clear from *Johns* that what is required is foresight of a possibility, not intention. This is clear from the example given by the majority in *Johns* (supra) at 131. Here, the security officer was shot during the execution of a JCE to rob premises. It was an improbable occurrence as the JCE was to rob a place which was intended to be empty. It is therefore likely that neither of the parties to the JCE intended that the security officer in attendance at the premises be shot, except in the sense as a possibility

[52] *McAuliffe v The Queen* (supra) at 117 - 118

[53] The Court held that this was 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 (at 117). The Court should not be taken here, by using the word "assist", as moving attention away from the act of participating in the JCE, to a distinct and different test of assistance in the JCE. Such would be directly inconsistent with the preceding sentence that the criminal culpability lies in the participation in the JCE with the necessary foresight

[54] (2003) 219 CLR 1 at [24][25] Gleeson CJ and Callinan J, at [31] Gummow J, at [108]–[120] Hayne J

[55] *Gillard v The Queen* (supra) at [88] – [96]

[56] *Gillard v The Queen* (supra) at [113] – [124]

[57] *Gillard v The Queen* (supra) at [115]

[58] *Gillard v The Queen* (supra) at [118] – [119]

despite foresight of the possibility of violence by a co-offender, the accused has not agreed to its use. That result is unacceptable. That is why the common law principles have developed as they have."

33. As noted above, this Court in *Clayton* refused to reconsider *McAuliffe,* repeating again that it is good law in Australia (Kirby J dissenting). The principle was applied by this Court including in *The Queen v Taufahema*[59] and most recently in *Huynh v The Queen.*[60]

The doctrinal history of EJCE

34. The conclusion reached in *McAuliffe* (and applied thereafter) is not novel. This was recognised in the Weinberg Report[61] which states:

10 *"It is sometimes thought that the doctrine of extended common purpose is a recent development in the common law. Indeed, its critics see it as having been created by judicial fiat as recently as about 1980. That view is incorrect.*

Extended common purpose is by no means a novel doctrine. As Professor J C Smith has said:

'It would be quite wrong to suppose that parasitic accessory liability – liability for a crime not intentionally assisted or encouraged by A but merely foreseen by him – is a recent development in the law, an innovation by the Privy Council in Chan Wing-Siu. The rule imposing liability for offences committed in the course of committing the offence assisted or encouraged seems to be almost as old as the law of aiding and
20 *abetting itself.' [citations omitted]*

Liability for incidental offences committed pursuant to a common purpose or joint enterprise has a long history in England, as well as in this country."

35. Respected academic texts also reflect this:[62] *Russell on Crime* (the 12th edition published in 1964)[63] which is cited in the above article by Professor Smith,[64] refers to the law (following the change in approach from objective to subjective) as follows:

"Nowadays, it is submitted, the test should be subjective and the person charged as accessory should not be held liable for anything but what he either expressly commanded or realized might be involved in the performance of the project agreed upon. It would, on this principle, therefore be a question of evidence to satisfy the jury that the accused
30 *did contemplate the prospect of what the principal has in fact done."*

---

[59] (2007) 228 CLR 232

[60] [2013] HCA 6, (2013) 87 ALJR 434 and see the discussion by McHugh J in *Osland v The Queen* (supra) at 346 - 347

[61] Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group August 2012 at [2.171] – [2.172]

[62] See eg, Foster, *Crown Law* (3rd ed. 1809) at 370, which, under the heading, *"He exceeds the orders"*, states: *"So where the principal goeth beyond the terms of the solicitation, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony."* See also Stephen, *Digest of the Criminal Law* (4th ed, 1887), Art 41; Howard, *Criminal Law* (4th ed, 1982) at 261; Glanville Williams, Criminal Law (2nd ed, 1961) at 398

[63] 12th ed, 1964 at p 162

[64] Professor Smith, *"Criminal Liability of Accessories: Law and Law Reform"*, (1997) 113 *The Law Quarterly Review* 453 and see the discussion at 456 – 457

36. As Professor Smith correctly observes, substituting a subjective test for the previous objective test narrows the application of the common law in this regard.[65]

37. The cases referred to by this Court in *Johns* also demonstrate that the doctrine of extended common purpose is not a recent development in the common law. The language used in some of the cases cited therein refer to an individual contemplation by an accused.

38. For example, in *R v Smith*[66] a barman was killed with a knife by one of the attackers inside the bar whilst the appellant remained outside. The appellant knew that the man who stabbed the barman was carrying a knife. However, there was no common purpose to kill the barman. The Court held that a conviction of manslaughter could be sustained "*on the ground that it must have been within the appellant's contemplation that the knife might be used and that the use was therefore within the scope of the concerted action.*"[67] While the Court referred to the scope of the concerted action, the language in *Smith* is one of *individual* contemplation; it is concerned with the *contemplation of a possibility.*[68]

39. In *R v Vandine*[69] the appellant agreed with others to rob a messenger. The messenger was killed when struck by another accused with an iron bar which, to the appellant's knowledge, he had brought with him. The majority in *Johns* cited Herron CJ in *Vandine* who concluded *that "there was evidence fit for the jury to consider that the appellant knew that McCoy had the bar and must have known that it was intended to be used a natural consequence if the occasion presented itself to [the accused] as necessary to effect their purpose."*[70] Again, this is language of individual contemplation of possible outcomes, in circumstances where one accused has a weapon in his possession.

40. The majority in *Johns* referred to *Smith* and *Vandine* (amongst others) to support the conclusion reached by Street CJ that "*an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention – an act contemplated as a possible incident of the originally planned particular venture*".[71] While the Court was addressing the issue of common purpose, it is clear, however, from *Smith* and *Vandine*, that some of the authorities underlying the conclusion are not necessarily limited in this way.

---

[65] Professor Smith, "*Criminal Liability of Accessories: Law and Law Reform*", (supra) at 457
[66] [1963] 1 WLR 1200; referred to in *Johns* at 130 per Mason, Murphy and Wilson JJ
[67] *Johns v The Queen* (supra) at 130; emphasis added; *R v Smith* (supra) at 1206-1207
[68] "might" is the simple past tense of "may", which in turn is defined as an "*auxiliary to express possibility*": The Macquarie Dictionary, definition of "might" and "may"; see also Lord Hutton's consideration of this case in *R v Powell* [1999]1 AC 1 at 18-19
[69] [1970] 1 NSWR 252
[70] *Johns v The Queen* (supra) at 130
[71] *Johns v The Queen* (supra) at 131

41. Stephen J in *Johns* used slightly different language. His Honour puts his reasoning in terms not dissimilar to the mens rea articulated in *McAuliffe*, as follows:[72]

> *"if, in carrying out that contemplated crime, another crime is committed there arises the question of the complicity of those not directly engaged in its commission. The concept of common purpose provides the measure of complicity, the scope of that common purpose determining whether the accessory before the fact to the original crime is also to share in complicity in the other crime. If the scope of the purpose common both to the principal offender and to the accessory is found to include the other crime, the accessory will be fixed with criminal responsibility for it. In determining scope, it may either be restricted to what the accessory regarded as probable consequences of the criminal venture or may be extended to include what he regarded as possibly involved in the venture." [Emphasis added]*

42. His Honour held that the required contemplation was one of possibility. Stephen J considered that, as explained below, contemplation of a probability, as opposed to possibility, was "*singularly inappropriate*" in the law of EJCE.[73] Whilst Stephen J refers to a common purpose had by all participants, his Honour does not identify the scope of that common purpose by reference to proof of joint contemplation (cf: AS [28]). His Honour defines this clearly by reference to *individual contemplation.*

43. Stephen J's reasoning was referred to with approval by this Court in *Miller v R.*[74]

44. Stephen J also referred to *R v Anderson.*[75] Lord Hutton in *R v Powell*[76] considered this case and held that the following passage was applying "*the test of foresight*", and that it was intended by the Court as an "*alternative way of formulating the principle stated in R v Smith*":[77]

> *"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."*[78]

45. An attempt to reconsider *Johns* was then refused by this Court in *Mills v The Queen.*[79] In that case, the High Court said that the law as to criminal liability for acts done in the course of carrying out a common criminal purpose is correctly stated in *Johns*. Consistently with the view that the reasoning in *Johns* supports, or is consistent with, the approach adopted in *McAuliffe*, Gibbs CJ, Mason, Wilson and Dawson JJ stated:

---

[72] *Johns v The Queen* (supra) at 118
[73] *Johns v The Queen* (supra) at 118
[74] (1980) 32 ALR 321 at 325
[75] [1966] 2 QB 110, considered by Stephen J in *Johns* at 119-120
[76] [1999] 1 AC 1
[77] *R v Powell* (supra) at 22
[78] *R v Anderson* (supra) at 120; this passage was also referred to with approval by Gibbs CJ (writing for the Court) in *Markby v The Queen* (1978) 140 CLR 108 at 112. AS [28] are incorrect in relation to *Anderson*: the Court considered that the trial judge had misdirected the jury at law and accordingly, allowed the appeal and quashed the conviction: at 121.
[79] (1986) 61 ALJR 59 at 59

> *"The law as [stated in Johns] is not complex and should not give rise to the difficulties and complexities suggested in argument. In many cases it will be sufficient to direct the jury by adapting to the circumstances the simple formula mentioned by Sir Robin Cooke in Chan Wing-Siu v R [1985] AC 168 at 178: 'For instance, did the particular accused contemplate that in carrying out a common unlawful purpose one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm?'"*

46. This is, respectfully, on all fours with the finding in *McAuliffe* that the appropriate mens rea for EJCE is the *contemplation by the accused of the addition or deviation to the agreed JCE* which in fact eventuated.

47. Subsequently, the Privy Council in *Chan Wing-Siu*[80] referred with approval to the reasoning in *Johns.*[81] Sir Robin Cooke (writing for the Court) stated that the test of mens rea is subjective; it is *"what the individual accused in fact contemplated that matters"*.[82] The relevant test is whether the crime is foreseen by the accused *"as a possible incident of the common unlawful enterprise"*.[83] Certainly, Sir Robin Cooke does not recognize himself in this judgment as taking a novel step in the law of JCE.

48. Both *Chan Wing-Siu* and *R v Hyde*[84] were referred to with approval in *Hui Chi-Ming v The Queen.*[85] In this case, the Court rejected the argument that the contemplation of the accused needed to be the same as the contemplation of the principal, giving the following example to explain its view:

> *"Let it be supposed that two men embark on a robbery. One (the principal) to the knowledge of the other (the accessory) is carrying a gun. The accessory contemplates that the principal may use the gun to wound or kill if resistance is met with or the pair are detected at their work but, although the gun is loaded, the only use initially contemplated by the principal is for the purpose of causing fear, by pointing the gun or even by discharging it, with a view to overcoming resistance or evading capture. Then at the scene the principal changes his mind, perhaps through panic or because to fire for effect offers the only chance of escape, and shoots the victim dead. His act is clearly an incident of the unlawful enterprise and the possibility of its occurrence as such was contemplated by the accomplice. ... Their Lordships have to say that ... they do not consider the prior contemplation of the principal to be a necessary additional ingredient."*

---

[80] [1985] AC 168

[81] *Chan Wing-Sui* (supra) at 176 - 177

[82] *Chan Wing-Sui* (supra) at 177

[83] at 175; we note that the court in *Chan Wing-Siu* was not taken by counsel in this case to *R v Smith*, but was taken to *R v Anderson* – this case was considered by Sir Robin Cooke at 175-176

[84] [1991] 1 QB 134; this decision referred to and applied *Chan Wing-Siu* at 139

[85] [1992] 1 AC 34 at 52; subject to the clarification by the Court in *Hui Chi-Ming* as to what was meant by Sir Robin Cooke in *Chan Wing-Sui* when he referred to "authorisation"; the Court noting that the word was used by Sir Robin Cooke as a means of explaining what is meant by the term "contemplation" – its reference was not intended to add a new ingredient (eg one of authorisation in any other sense): at 53.

49. The Court noted, however, that in most cases the contemplation is likely to be the same between the principal and the accused and, as such, the above example is "*largely theoretical.*"[86]

50. The law of EJCE was then upheld by the Privy Council in *R v Powell.*[87] As explained below (at [74]), Lord Hutton in his judgment carefully traced the doctrinal history in relation to EJCE; his Honour's reasoning did not start or end with *Chan Wing-Sui.*[88]

Policy rationales/justifications for the mens rea in EJCE

51. The policy rationales behind EJCE are compelling. They demonstrate that there is a correlation between the legal responsibility and the moral culpability imposed by EJCE. The rationales are rooted in authority and traditional aims of criminal law (deterrence and public protection) as well as more modern knowledge and research behind the sociology of group behaviour. Much of the justification for the doctrine of EJCE, including its mens rea test, concerns the unique nature or characteristics of a JCE, considered below, in no order of importance.

52. *First*, a JCE in and of itself will necessarily involve a substantial element of unpredictability, depending of course on the type of foundational offence. This stems from the myriad reactions from victims and circumstances that may arise during the execution of the JCE.[89] This unpredictability exposes both the participants and the public to a risk that an additional crime might be committed. It is the participants to the JCE who should properly bear that risk (and criminal sanction) if they had the foresight to contemplate it; keeping in mind the prosecution needs to prove such contemplation beyond reasonable doubt. This sentiment is picked up by Stephen J's reasoning in *Johns*, where his Honour, in dismissing a contemplation of probability as "singularly inappropriate"[90] explained as follows:[91]

> *"The commission of that other crime will not have been the prime object of the criminal venture; it will in all probability have been committed as a reaction to whatever response is made by the victim, or by others who attempt to frustrate the venture, upon suddenly being confronted by the criminals. There will usually be a variety of possible responses to the criminal act. With each of these contingencies the criminals will have to reckon, if they are at all to plan their future action. What they conceive of as contingent reactions to each possible response will have, interposed between these reactions and the planned crime, at least one and perhaps a whole sequence of spontaneous and relatively unpredictable events.*
>
> *In those circumstances it is understandable that criminal liability should be made to depend upon the jury's assessment of whether or not the accessory before the fact must*

---

[86] *Hui Chi-Ming v R* (supra) at 52 - 53
[87] [1999] 1 AC 1
[88] As to other cases adopting an approach similar to that in *McAuliffe*, see: *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350; Howard, *Criminal Law* (4th ed, 1982) at 261
[89] See for example Gleeson CJ in *Clayton v R* [2006] HCA Trans 331 at 19
[90] The UK Law Commission Report No 305 "Participating in Crime" (2007) at 91 considered that the law would not be improved by a test of the contemplation of a probability (cf possibility)
[91] *Johns v The Queen* (supra) at 118

have been aware of the possibility that responses by the victim or by third parties would produce the reaction by the principal offender which led to the other crime. In such a speculative area, it would be remarkable were the accessory's liability for the other crime to depend upon the jury assessing, in terms of "more probable than not", the degree of probability or improbability which the accessory attached to the happening of the particular reaction by the principal offender which in fact occurred, itself dependent upon the intervening uncertain responses of victim of third parties. Yet that is what would be required were an accessory's responsibility to depend upon such a criterion of probability, necessarily involving a balancing process and often a nice assessment of odds. I have spoken of intervening contingencies dependent upon human responses; however to these must be added those contingencies which may arise without any human intervention."

53. It is because of this unpredictability which is *inherent* in EJCE that the mens rea for this doctrine is appropriate. Lord Steyn in *Powell* explained this as follows:[92]

"If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined...But it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases."

54. *Second*, (and related to the above point) is the important policy of protecting the public from criminals engaging in JCEs.[93] This argument was raised by Lord Steyn in *Powell* when his Honour commented that:[94]

"Experience has shown that [JCEs] only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle[95] is needed and cannot be abolished or relaxed."[citations omitted]

55. The UK Law Commission in Report No 305 "Participating in Crime" (2007) refers to a 2005 Report by the University College London which found that, among other things, there is a:[96]

"strong social science research literature which shows that individuals in groups behave very differently than they do when alone. They take more risks, they feel pressure to conform to the majority and they feel less personal responsibility." [citations omitted]

56. The UK Commission noted findings of the Report that, for example, gang members are much more likely than non-gang members to carry weapons and guns; and that gang

---

[92] *R v Powell* (supra) at 14.

[93] See also A P Simester and G R Sullivan in their text *Criminal Law Theory and Doctrine* 2nd ed (2003) at 248; Simester, "The Mental Element in Complicity", (2006) 122 *Law Quarterly Review* 578 at 592–601.

[94] See also Lord Hutton in *R v Powell* (supra) at 25; and note comments as to his reasoning by the Law Commission Report No 305 at 90; see endorsement of Lord Steyn's policy rationale in *R v Rahman & Ors* [2007] 1 WLR 2191 at [60]

[95] The reference to "accessory" here is intended to refer to the principle of JCE. There is, unfortunately, across the cases and texts different usages of terminology, and accordingly, the meaning of the words used by those writers must be taken from the context in which the term was used.

[96] At 88

members commit over five times as many offences as non-gang members.[97] The Commission stated that:

> *"These studies show that there is sound empirical support for Lord Steyn's opinion [in Powell, above] that, 'experience has shown that [JCE] only too readily escalate into the commission of greater offences.' This opinion has been confirmed by American research. Professor Katyal has argued:*
>
> *'...advances in psychology over the past thirty years have demonstrated that groups cultivate a special social identity. This identity often encourages risky behaviour, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against non-members... a study of active burglars... found that people in groups are more likely to be aroused, raising the possibility that group crimes lead to unplanned violence.'" [citations omitted]*

57. The Commission conceded that it might be considered harsh to found liability in such empirical evidence, but commented that this is "*compensated by three factors*":[98]

> *"First, there is the 'subjectivist' requirement that [the accused] must foresee that [the Principal] may commit the principal offence. Secondly, [the accused] has the opportunity to claim that [the principal's] offence was too remote from the agreed offence to fall within the scope of the joint venture [which is our view, captured by the first requirement]. Thirdly, it is always open to [the accused] to withdraw from the joint venture by negating the effect of the original agreement before [the principal] commits the principal offence."*

58. Similar concerns about the risk of criminal escalation are found in the NSW Law Reform Commission Report 129 (2010) "Complicity". In finding that the doctrine of EJCE should be retained in some form or other, the Commission stated:[99]

> *"Moreover, there is, in our view, a core policy justification for its retention that is based on the inevitable risks that are associated with entry into a joint criminal enterprise. For example, when embarking on an armed robbery there is a clear risk of someone being shot; when joining in a group attack there is a clear risk that it could get out of hand and result in a more serious injury than was planned; when joining a group to extort money by threats there is a clear risk that one participant may become violent and attack a victim. In these situations there is, in our view, a clear and established case for making a secondary participant liable for the actions of others, notwithstanding that the secondary participant did not intend or desire the additional offence."*

59. *Third*, a rationale lies in the mens rea for EJCE reflecting an appropriate standard of blameworthiness and responsibility for a participant in a JCE.[100] As the cases reiterate, the culpability lies in the *continued participation* by the accused in the JCE with the necessary foresight.[101]

---

[97] At 88 - 89
[98] At 89
[99] At [4.233]
[100] See eg *Johns v The Queen* (supra) at 119
[101] See *Clayton* (supra) at [16]-[17]; *Chan Wing-Siu* at 177; *R v Hyde* (supra) at 139; *Hui Chi-Ming v The Queen* (supra) at 53; *Gillard v The Queen* (supra) at [112],[118] per Hayne J; see Simester et al, *Simester and Sullivan's Criminal Law – Theory and Doctrine* (5th ed, 2013) at 236

60. *Fourth*, the practical forensic difficulties in cases of JCE cannot be ignored. Given the nature of group crime, it may be impossible to tell in some cases which of the accused committed the actual fatal act. This is what occurred in *Clayton*; it serves as a factual example of the extreme nature of group violence and these practical evidentiary difficulties.

Distinction from accessorial liability

61. Contrary to the Applicant's contention (AS [23.5]), it is inaccurate to say that the law of EJCE is incompatible with the law of accessorial liability. It is also inaccurate to say, as the Applicant does (AS [23.7]), that accessorial liability can apply to JCE, such that the law of EJCE is not needed. These arguments misunderstand the differences between the two areas of law; they are structurally unalike.[102] The argument that there is some anomaly or asymmetry in the mens rea required for EJCE and accessorial liability offences of aiding and abetting, counselling and procuring has already been argued before this Court,[103] and was dismissed in *Clayton*. The Court in *Clayton* held that such accessorial liability is grounded in the secondary party's contribution to another's crime; by contrast, in JCE, the wrong lies in the mutual embarkation of a crime.[104] The Court noted that the fact that an accused may be guilty under both doctrines in a particular situation does not does not deny their separate utility.

62. There is no reason why this Court should reach a different conclusion. The position in this regard has not changed since *Clayton* was decided.

63. It is supported by the learned authors in *Simester and Sullivan's Criminal Law – Theory and Doctrine,* who explained the differences between the two offences as follows:[105]

> *"The core of a joint enterprise is its common unlawful purpose. It is this element of shared commitment to commit crime A that triggers the doctrines of joint enterprise liability. ... By contrast, none of aiding, abetting, counselling or procuring presupposes an agreement or common purpose. ...*
>
> *It is submitted that to analyse joint enterprise as a special case of aiding and abetting is misleading, in terms of both criminal law doctrine and its underlying justification. This is because the actus reus requirements of joint enterprise liability differ from those applying to participation by assistance or encouragement. There is no need to show a common purpose in standard cases of aiding and abetting. But it is S's commitment to that common unlawful purpose (to commit crime A) that arguably justifies the law's requiring only that S must foresee the possibility of crime B, rather than demanding that S must help or encourage crime B – which, as we saw, is required in standard cases."*

---

[102] Simester et al, *Simester and Sullivan's Criminal Law – Theory and Doctrine* (5th ed, 2013) at 248

[103] See *Clayton:* Applications for special leave to appeal [2006] HCATrans 331 at 5-8

[104] *Clayton v The Queen* (supra) at [20] and see: *Gillard v The Queen* (supra) at [118][119] per Hayne J (Gummow J agreeing)

[105] Simester et al, *Simester and Sullivan's Criminal Law – Theory and Doctrine* (5th ed, 2013) at 245, see also at 246, when the authors explain why every case of EJCE is not a case of assisting or encouraging the relevant crime, and at 248; see further, AP Simester, "The Mental Element in Complicity", (2006) 122 *Law Quarterly Review* 578 and particularly at 593

64. In explaining the weight that the common law puts on the fact of agreement in JCE, the authors state:[106]

> *"The answer depends on the fact that S's common purpose is unlawful. This is quite different from aiding and abetting, where S's actions need not be in themselves wrongful. Lending someone a knife is unproblematic until we know what P's plans are. What makes S's actions the stuff of criminal law, in other words, is her mens rea with respect to P's conduct. In turn, that is why we should be wary of criminalising aiding and abetting with low levels of foresight. It reduces an ordinary citizen's freedom to do things that may happen to help others commit crimes.*
>
> *This does not apply to joint enterprise. By entering into a common unlawful purpose S becomes, through her own deliberate choice, a participant in a group action to commit a crime. Moreover, her new status has moral significance: she associates herself with the conduct of the other members of the group in a way that the mere aider or abettor, who remains an independent character throughout the episode, does not. The law has a particular hostility to criminal groups. ...the rationale is partly one of dangerousness... Criminal associations are dangerous. They present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address. Moreover, the danger is not just of an immediately physical nature. A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has set itself against the law and order of society at large. Individuals offending alone do not do this. Thus concerted wrongdoing imports additional and special reasons for the law to intervene."*

65. *Finally*, whilst the mens rea and actus reus components in accessorial liability might apply to some cases of EJCE, they will not apply to all of them. As explained above, *inherent in a JCE is the unpredictability* (as a matter of fact) of the actual consequences which flow from the execution of a JCE: what the victims and third parties will do; how the participants will react to the actions of the others in the JCE, and so on. This is not something which the law of accessorial liability easily accommodates.

66. The Applicant has espoused no reason in logic or principal justifying why this Court should reach a decision different to that in *Clayton*.

Distinction from murder

67. The line that the law draws in relation to EJCE reflects the moral culpability reflected in the conduct; it more importantly reflects the public policy rationales justifying the law as it stands. With this clearly in mind, it is not correct, or sufficient, to refer to the mens rea for murder and compare it to that for EJCE to say that there is a disparity between the law and moral culpability.[107] That argument was rejected by this Court in *Clayton*.[108] In this regard, the Applicant has not raised any argument not put before this Court in *Clayton*.

---

[106] At 248

[107] It is worth noting in passing that, as Heydon J and Gleeson CJ pointed out in the *Clayton* special leave hearing, not all forms of murder have the same moral culpability: [2006] HCATrans 331 at T241-259. For example, some people may regard euthanasia as not very morally culpable.

[108] *Clayton v The Queen* (supra) at [16]

68. Nor is it correct to segregate foresight of possibility from the other elements of common purpose, namely, the existence of the common purpose and the persistence in it. As Hayne J stated in the special leave hearing for *Clayton:*[109]

> *"The foresight of possibility takes its legally significant character from the fact that there is a common purpose between, to use the term, the confederates and there is persistence in execution of the purpose."*

69. As the Court reiterated in *Clayton*, the criminal culpability lies in the continued participation in the JCE with the necessary foresight.[110]

Jogee not persuasive

10 70. The fact that the Privy Council in *Jogee* changed the law in relation to the EJCE in the way that it did does not itself provide a reason why this Court should follow suit, as discussed above. Indeed, a consideration of the judgment reflects that contrary to the Applicant's contention (AS [71]) the reasoning is not unimpeachable.

71. In any event, any reliance on *Jogee* needs to grapple with a number of problems with its reasoning and come to some understanding as to what the Court is saying in their "restatement of the principle".[111] The Applicant has not addressed these issues. With respect, the purported restatement of the law is confusing and problematic for various reasons. It demonstrates that any change to this area must come from a systematic review of the law of complicity and accessorial liability. For the reasons which follow, *Jogee*
20 should not be followed in Australia (and see the Respondent's written submission filed in the related matter of Presley).

72. *First*, the Court introduces *Chan Wing-Siu* by referring to the principle of "parasitic accessory liability", which it says Professor Smith claims was *"laid down by the Privy Council in Chan Wing-Siu v The Queen"*.[112] This is incorrect. As noted above, Professor Smith[113] was quoted in this article by the Weinberg Report in support of the contention that this principle had existed long before the decision in *Chan Wing-Siu.* In fact, the article referred to states the opposite (as set out above at [34]).[114] The Court's analysis proceeds on an erroneous premise.

73. *Second*, the Court then examines the law on JCE in the 19th century. With respect, it is
30 submitted that not much can be taken from those cases, as it was not until the mid-20th century that the criminal law in the UK changed from an objective to a subjective

---

[109] [2006] HCA Trans 331 at 343 - 345
[110] *Clayton v The Queen* (supra) at [17] See also *McAuliffe* (supra) at 118 and *Gillard* (supra) at [112].
[111] *R v Jogee* (supra) at [88]-[99]
[112] The Court referred to Professor Smith's article in the *Law Quarterly Review*, *"Criminal Liability of Accessories: Law and Law Reform"* (1997) 113 LQR 453, referred to above in these submissions
[113] (1997) 113 LQR 453 at 456
[114] Professor Smith does refer (at p. 455) to *Chan Wing-Sui* as the leading case but thereafter goes on to explain the history of the principle, which includes the reference at p 456 cited in the Weinberg Report.

focus.[115] In any event, the Court refers to the objective approach to the JCE stated by Foster as "*whether the events, although possibly falling out beyond his original intention, were in the ordinary course of things the probable consequence of what B did under the influence, at the instigation of A*", but then argues that the proper subjective counterpart to this is one of intention.[116] This is, with respect, illogical; indeed such a test sits inconsistently with that passage from Foster.

74. *Third*, the primary cases that the Court then considers before *Chan Wing-Sui* are *R v Smith*[117] and *R v Anderson*[118] (which are discussed above at [38][44] respectively). For the reasons explained above, it is submitted that those cases do not stand for the limited proposition contended in *Jogee*. In fact that was the position taken by Lord Hutton in *Powell* (with whom the other judges agreed).[119] The Court in *Jogee* recognised that Lord Hutton cited *R v Smith* and *R v Anderson* in support of the view that there is a "*strong line of authority*" for the mens rea of EJCE being based in the foresight that another party to the JCE may carry out, with the requisite mens rea, an act constituting another crime, and are authorities for this.[120] Indeed, Lord Hutton in *Powell* does not consider that this principle was established in *Chan Wing-Siu*. The Court in *Jogee* appear to place little, if any, weight on this view, seemingly dismissing it (as it is not considered by the Court).[121]

75. *Fourth*, the Court gives no meaningful consideration to the many important public policy justifications underlying the doctrine (as discussed above),[122] and concluded, therefore without basis, that the principle in *Chan Wing-Siu* is grounded in "*questionable public policy arguments*".[123] Given those doctrines ground the moral culpability with which the mens rea in the doctrine is concerned, it is, with respect, inappropriate to amend the doctrine without considering its normative underpinnings.

76. *Fifth*, the restatement of principles (which is set out over two pages, keeping in mind it was "restating" the principle in *Chan Wing-Siu* which is one paragraph) is complex and, with respect, unclear. It appears to be proposing that the law for EJCE be changed to one of "conditional intention,"[124] a concept which has no place in the common law in Australia. Its meaning is not explained. The Court stated the test as including:[125]

---

[115] This is explained by the Court at [73]: "*There has indeed been a progressive move away from the historic tendency of the common law to presume as a matter of law that the "natural and probable consequences" of a man's act were intended, culminating in England and Wales in its statutory removal by section 8 of the Criminal Justice Act 1967.*"
[116] *R v Jogee* (supra) at [73]
[117] [1963] 1 WLR 1200
[118] [1966] 2 QB 110
[119] *R v Powell* (supra) at 18-19
[120] *R v Powell* supra) at 18-20; *R v Jogee* (supra) at [53]
[121] *R v Jogee* (supra) at [52]-[55]
[122] Any discussion is in the context of the statements in *Powell*: eg *R v Jogee* (supra) at [74][75] referring to "*generalised policy arguments*" in the decided cases at [79]
[123] *R v Jogee* (supra) at [79]
[124] *R v Jogee* (supra) at [90] – [93]
[125] *R v Jogee* (supra) at [90] – [92]

> *"...whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element of the offence requires of D1... If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent. ...*
>
> *In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist... may be conditional"*

77. It is unclear how this test would work in practice. That there would be difficulties with its application appears to be accepted by the Court:[126]

> *"In cases where there is a more or less spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the jury to find that there was some form of agreement... "*

78. With respect, that is the very situation which the law of EJCE is directed at targeting, and for the policy reasons set out above, one of the reasons why the law should be maintained. In answer to this, the Court proffered that the law of aiding and abetting can then apply to that situation. But for the reasons stated above – that law does not readily apply to this situation. Were the test in *Jogee* to be adopted in Australia it would result in a lacuna. The Court in *Jogee* did not consider this point. This lacuna is one which is not supported, at all, by public policy considerations. Compelling reasons would be required for this Court to adopt this approach.

Part VII: NOTICE OF CONTENTION OR CROSS APPEAL

79. Not applicable.

Part VIII: TIME ESTIMATE

80. The Respondent estimates that the oral argument will take approximately 3 hours (for the response in relation to all Applicants).

Wendy Abraham QC 13/4/16

Counsel for the Respondent

Phone: (02) 80296319
Email: wendy.abraham@12thfloor.com.au

Jocelyn Williams

(02) 80296322
Jocelyn.williams@12thfloor.com.au

Emily Brown

Phone: (08) 82071871
Fax: (08) 82071799
Email: emily.brown2@sa.gov.au

[126] *R v Jogee* (supra) at [95]