

Neutral Case Citation	<i>Miller v The Queen</i> [2016] HCA 30
Reported Case Citation	
Date	24 August 2016
Court	High Court of Australia
Bench	Majority Judgment: French CJ, Kiefel, Bell, Nettle, Gordon JJ Concurring Opinion: Keane J Dissent: Gageler J
Criminal/Civil	Criminal
Facts	Homicide case. Facts irrelevant for the extended joint criminal liability part of the judgment.
Procedural History	On appeal from a decision of the SCASA.
Legal Questions	<ol style="list-style-type: none"> Whether doctrine of extended joint criminal enterprise liability should be confined or abandoned. Whether <i>McAuliffe v The Queen</i> (1995) 183 CLR 108 should be reopened and overruled.
Outcome/Answers	<p>Answers per Majority (and Keane J, concurring)</p> <ol style="list-style-type: none"> No No <p>Answers per Gageler J</p> <ol style="list-style-type: none"> Yes, abandoned Yes. <p>Outcome: appeal successful on other grounds, irrelevant for our purposes.</p>
Reasons	<p>Per Majority</p> <p>Essentially, the majority say it is a matter for parliament. One principle of secondary liability should not be modified without a thorough review of the related principles; no occasioned injustice has been demonstrated; and, moreover, each of the Australian states and territories has made its own treatment of the principle. The test for reopening settled authority has not been satisfied. [43] “In light of this history, it is not appropriate for this Court to now decide to abandon extended joint criminal enterprise liability and require, in the case of joint criminal enterprise liability, proof of intention in line with <i>Jogee</i>. For the same reasons, it is not appropriate to depart from <i>McAuliffe</i> by substituting a requirement of foresight of the probability of the commission of the incidental offence.”</p> <p>Per Gageler J (Dissent)</p> <p>[129] “The doctrine of extended joint criminal enterprise is anomalous and unjust. The occasion for its reconsideration having been squarely presented, I cannot countenance its perpetuation. Dissenting from the view of the majority, I would reopen and overrule <i>McAuliffe</i>.”</p>
Other Useful Dicta	<p>Per Majority</p> <p>Description of the principles: Joint Criminal Enterprise and “Extended” Joint Criminal Enterprise</p> <p>[4] “The law, as stated in <i>McAuliffe</i>, is that a joint criminal enterprise comes into being when two or more persons agree to commit a crime. The existence of the agreement need not be express and may be an inference from the parties' conduct. If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty, regardless of the part that each has played in the conduct that constitutes the actus reus. Each party</p>

is also guilty of any other crime ("the incidental crime") committed by a co-venturer that is within the scope of the agreement ("**joint criminal enterprise**" liability). An incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement. Moreover, a party to a joint criminal enterprise who **foresees, but does not agree to, the commission of the incidental crime** in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence ("**extended joint criminal enterprise**" liability)." Citations omitted.

History of the principles

See [6] onwards.

Uncertain relationship between principles

[33] "The relationship of joint criminal enterprise and extended joint criminal enterprise to general concepts of complicity is contested. Professor JC Smith saw no difficulty locating both within ordinary principles of accessorial liability. ... The alternative view, proposed by Professor Simester, is that joint criminal enterprise is a sui generis [unique] form of secondary participation in a crime and not merely a sub-species of accessorial liability." Citations omitted. At [34], the majority appear to endorse the *sui generis* view.

Justification for the principle

At [36], the majority cite Lord Steyn's comment in *Powell (R v Powell)* [1999] 1 AC 1 at 14), describing it as "an important justification for the doctrine grounded in practical considerations":

"In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases. Moreover, the proposed change in the law must be put in context. The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed."

See also, [38].

Per Gageler J (Dissent):

Description of the principles: accessorial v joint criminal enterprise

[84] "The common law imposes criminal liability on one person, a secondary party, for an offence committed by another person, a primary party, where the secondary party intentionally assists or encourages the commission of the offence by the primary party. The common law also imposes criminal liability on a secondary party where the primary party commits the offence as part of a criminal enterprise in which the secondary party participates. The criminal liability of the secondary party in the first of those circumstances is commonly referred to as "accessorial liability". The criminal liability of the secondary party in the second of those circumstances is commonly referred to as "joint criminal enterprise liability"."

Description of the principle: "extended" joint criminal enterprise

The preceding paragraphs will need to be read for this to make sense: [91] "The common law has of late given a different answer. The bagman and driver need not have intended that the gunman would shoot to kill or cause grievous harm as a possible means of carrying out the plan to rob the bank. It is enough for them to be liable for murder that they foresaw the possibility that the gunman would take it upon himself to shoot to kill or cause grievous harm and that they participated in the plan to rob the bank with that foresight."

History of the principles

See [93] onwards.

Criticism of “extended” joint criminal enterprise liability

[109]-[111] The principle that “a person who intentionally assists in or encourages the commission of a crime may be convicted as a party to that crime... explains accessorial liability and (if there is a difference) joint criminal enterprise liability. ...[but] does not explain why a secondary party should be liable for a crime committed by a primary party which the secondary party neither intentionally assisted nor encouraged. In short, the principle does not explain *McAuliffe's* extension of criminal liability beyond accessorial liability or joint criminal enterprise liability.” And as this was the only basis given in *McAuliffe* for “extending” joint criminal enterprise liability, the extension ought not have been made.

Per Keane J (Concurring Opinion):**Relationship between accessory and criminal enterprise liability**

[139] “The decision in *Jogee* proceeds squarely on the basis that cases of complicity in a crime must be analysed as a subset of accessorial liability. To insist that the liability of participants in a joint criminal enterprise be analysed exclusively in terms of accessorial liability is to fail to recognise that each participant in a joint criminal enterprise is not merely an accessory to a crime committed by someone else. Where parties commit to a joint criminal enterprise, each participant becomes, by reason of that commitment, both the principal and the agent of the other participants: for the purposes of that enterprise they are partners in crime. Each participant also necessarily authorises those acts which he or she foresees as possible incidents of carrying out the enterprise in which he or she has agreed, and continues, to participate. It is to be understood, of course, that the agreement to participate in a joint criminal enterprise, while it may be inferred from the circumstances, must be proved as a fact beyond reasonable doubt.”

“Secondary” liability a misnomer

As far as Keane J is concerned, there is no “secondary” liability in a joint criminal enterprise: every participant is a principal party: [140] And, every participant bears equal moral culpability for incidental crimes foreseen as possible: [141]

Moral Culpability

[141] “Secondly, there is little reason to conclude that the person who commits the actus reus of the incidental crime should bear a greater degree of moral culpability for that crime than those of his or her consorts whose instrument he or she became for the purpose of dealing with the exigencies of carrying the joint enterprise into execution where those exigencies have subjectively been foreseen by them. There is little reason why one who organises a crime should be regarded as less morally culpable for the risks of carrying it out, which he or she foresees, than those deployed to deal with those risks. To say that those who join together to organise the commission of a crime, in circumstances which involve the acceptance of the risk of the commission of an incidental crime in the course of carrying out their enterprise, are less morally culpable for the incidental crime than their consort who actually does the dirty work, is to appeal to a sense of morality which could commend itself only to the criminal elite.”

Policy Basis for extended joint criminal liability

[145] “As a matter of policy, it is well-recognised that the pursuit of a joint criminal enterprise necessarily involves a substantial element of unpredictability, which exposes the participants, their victims and the general public to the unacceptable risk that a crime additional to that which motivated the enterprise might be committed¹⁸⁰. It is perfectly intelligible, as a matter of policy, that the law should expose each participant in a joint criminal enterprise to punishment for an incidental

	<p>crime if he or she actually foresees the risk of the commission of the incidental crime and authorises the eventuation of that risk as part of his or her continued participation in the enterprise.” Citations omitted</p>
<p>Resources</p>	<p>For Victorian Law on “secondary criminal liability”:</p> <p><i>Crimes Act 1958</i> (Vic) ss 323 to 324C</p> <p><i>Simplification of Jury Directions Project: A Report To The Jury Directions Advisory Group August 2012</i> (“Weinberg Report”) (http://assets.justice.vic.gov.au/supreme/resources/1d13e7b0-898a-449f-8f21-a4e4ea0ff75a/simplification+of+jury+directions+project+report+-+weinberg+j.pdf);</p> <p><i>Complicity Reforms: Criminal Law Review</i>, Department of Justice, 2014 (http://assets.justice.vic.gov.au/justice/resources/1157ae80-b668-4b01-92cc-4428973bea62/complicity-reforms.pdf)</p> <p><i>Criminal Charge Book</i>, Judicial College of Victoria, chapter 5.2 (http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19447.htm)</p>