HIGH COURT OF AUSTRALIA

KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

THE QUEEN APPELLANT

AND

FRANCIS ROBERT KEENAN RESPONDENT

The Queen v Keenan
[2009] HCA 1
2 February 2009
B23/2008

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 11 December 2007 and, in their place, order that the appeal against conviction to that Court be dismissed.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Queensland to determine the application for leave to appeal against sentence.*

On appeal from the Supreme Court of Queensland

Representation

W Sofronoff QC, Solicitor-General of the State of Queensland with R G Martin SC for the appellant (instructed by Director of Public Prosecutions (Qld))

B W Walker SC with A J Kimmins for the respondent (instructed by Potts Lawyers)

CATCHWORDS

The Queen v Keenan

Criminal law – Criminal responsibility – *Criminal Code* (Q), s 8 provided that, where common intention to prosecute unlawful purpose, and in prosecution of such purpose offence committed of such a nature that commission was a probable consequence of prosecution of unlawful purpose, each person deemed to have committed offence – Meaning of "offence … of such a nature" – Whether "offence … of such a nature" limited to precise acts committed.

Criminal law – Criminal responsibility – Nature of connection between unlawful purpose and offence ultimately committed – Determination of unlawful purpose – Relevance of means by which offence committed – Whether purpose may be infliction of level of harm – "Probable consequence" as objective test – Distinction between offence of such a nature that commission was probable consequence of prosecution of unlawful purpose, and precise acts that parties to common intention foresaw might be committed.

Criminal law – Practice and procedure – Directions to jury – Directions required in connection with charge under s 8 – Identification of real question for jury – Relevance of *R v Barlow* (1997) 188 CLR 1 – Whether directions given gave rise to miscarriage of justice.

Criminal law – Practice and procedure – Directions to jury – Whether circumstances required direction that jury can only find, by inference, element of offence charged if no other inference favourable to accused reasonably open on facts – Standard of proof.

Criminal law – Practice and procedure – Directions to jury – Whether circumstances required that alternative charge of grievous bodily harm simpliciter be put to jury – Whether failure to put alternative charge to jury constituted miscarriage of justice.

Criminal law – Practice and procedure – Where alleged miscarriage arising from jury direction – Appropriate course on appeal – Whether Court of Appeal should have ordered new trial rather than entering verdict of acquittal.

Words and phrases – "common intention", "common purpose", "offence of such a nature", "probable consequence", "unlawful purpose".

Criminal Code (Q), ss 2, 7, 8, 10A.

1 KIRBY J. This appeal from unanimous orders of the Court of Appeal of the Supreme Court of Queensland[1] once again[2] requires this Court to consider the meaning and application of s 8 of the *Criminal Code*[3] (Qld) ("the Code"). That section defines the criminal liability of secondary offenders who form an intention to prosecute an unlawful purpose during the execution of which a crime is committed by the primary offender.

2 In *R v Rahman*, Lord Bingham of Cornhill observed[4]:

> "Any coherent criminal law must develop a theory of accessory liability which will embrace those whose responsibility merits conviction and punishment even though they are not the primary offenders.
>
> English law has developed a small number of rules to address this problem, usually grouped under the general heading of 'joint enterprise'. These rules, as Lord Steyn pointed out in *R v Powell (Anthony); R v Edwards*[5], are not applicable only to cases of murder but apply to most criminal offences."

3 As the Privy Council said in *Brown v The State (Trinidad and Tobago)*[6]:

> "The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability … [or] the plain vanilla version of joint enterprise."

4 Lord Bingham of Cornhill in *Rahman* said that in *R v Powell (Anthony)*, the Privy Council had to consider a more difficult question[7]:

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1 *R v Keenan* [2007] QCA 440.

2 See *R v Barlow* (1997) 188 CLR 1; [1997] HCA 19.

3 The Code is a Schedule to the *Criminal Code Act* 1899 (Qld).

4 [2008] 3 WLR 264 at 267-268 [7]-[8]; [2008] 4 All ER 351 at 355.

5 [1999] 1 AC 1 at 12.

6 [2003] UKPC 10 at [8] and [13]; cf *Chan Wing-Siu v The Queen* [1985] AC 168 at 175.

7 [2008] 3 WLR 264 at 268 [10]; [2008] 4 All ER 351 at 356 citing *R v Powell (Anthony)* [1999] 1 AC 1 at 16 per Lord Hutton.

> "[T]he liability of a participant in a joint criminal enterprise when another participant in that enterprise is guilty of a crime, the commission of which was not the purpose of the enterprise."

5 The reasons of this Court should not be needlessly encumbered with references to *dicta* in cases of this kind that have arisen under the laws of the several jurisdictions of Australia and overseas. The cases usually arise, as here, in the context of contested directions given to a jury at trial. Ultimately, however, the question for decision is comparatively straightforward. In Queensland, it is resolved by examining the text of s 8 of the Code, ascertaining its meaning and then applying that meaning to the facts and circumstances of the case.

6 As will be shown, there is an ambiguity in the meaning of that section. It has been acknowledged in earlier decisions of the Queensland courts[8] and of this Court[9]. In resolving the ambiguity, we are assisted in this appeal by the forthright ways in which the respective interpretations favoured below were successively stated by the trial judge in the Supreme Court of Queensland before whom Mr Francis Keenan ("the respondent") was tried (de Jersey CJ), and by the Court of Appeal which upheld his challenge to the trial judge's directions to the jury. The Court of Appeal decided that no retrial should be ordered. It quashed the respondent's conviction and ordered his acquittal.

7 In essence, the trial judge was of the view that, properly interpreted, s 8 of the Code required the jury to decide whether a generic offence ("to inflict a serious assault … by way of revenge or retribution" on the victim) was sufficient (although he was a secondary offender) to render the respondent liable for the "offence" committed by his co-accused, Mr Dion Spizzirri. He so instructed the jury[10].

8 By reference to authority, the Court of Appeal rejected the trial judge's approach. It held that s 8 of the Code requires that directions be given to the jury addressing the features of the "offence" by Mr Spizzirri and asking whether that offence, as executed by him, had been proved to be within the "common intention to prosecute an unlawful purpose" in the course of committing which the happening of an offence "of such a nature" was a probable consequence.

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8 See eg *R v Jervis* [1993] 1 Qd R 643 at 652.

9 See eg *Barlow* (1997) 188 CLR 1 at 32-33.

10 The passage is cited at [2007] QCA 440 at [4].

9 The majority of this Court now endorses the view taken by the trial judge as to the meaning of s 8 of the Code[11]. It accepts the accuracy (and sufficiency) of his directions to the jury framed at a level of "generic" generality. I disagree. I do so by reference to:

- The language and purpose of the Code;
- The authority of this Court in *R v Barlow*[12], which the Court of Appeal correctly applied;
- The general conformity of the Court of Appeal's interpretation with concurrent developments in the common law upon a shared question of basic criminal liability;
- Other considerations of legal principle and policy to which reference may properly be made in deciding the controversy; and
- The elements in the evidence at trial which illustrate the correctness of the Court of Appeal's decision about the error found in the trial judge's directions.

10 These reasons will seek to show that the interpretation of s 8 of the Code favoured by the Court of Appeal was the correct one. However, with respect to that Court, having found an error in the directions given to the jury by the trial judge, the relief proper in the circumstances was not acquittal of the respondent but an order for retrial where a fresh jury could be properly instructed on the governing law. Such an order was not futile. Upon this view, and the orders that follow it, an outstanding sentencing appeal, brought by the respondent, does not arise for consideration at this stage.

The facts and legislation

11 *The facts*: Most of the facts relevant to these reasons are contained in the reasons of Kiefel J[13]. Her Honour also sets out critical passages in the directions which the trial judge gave to the jury[14] and provides references to some of the key passages in the reasons of the Court of Appeal, explaining the contrary

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11 See reasons of Hayne J at [84] and reasons of Kiefel J at [126]-[127].

12 (1997) 188 CLR 1.

13 Reasons of Kiefel J at [94]-[99].

14 Reasons of Kiefel J at [106]. See also [2007] QCA 440 at [22].

opinion it held on the principal issue[15]. I incorporate this material by reference. I will elaborate it only to the extent that is necessary to do so in highlighting my points of difference from the majority reasoning.

12 *The legislation*: Also set out in the reasons of Kiefel J are relevant excerpts from, or references to, the provisions of the Code[16]. The central issue in the appeal concerns the meaning of s 8. It is as well to repeat that provision:

> "When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

13 Just as important for these reasons, (as demonstrated in the earlier analysis of this Court in *Barlow*[17]) is the definition of "offence" contained in s 2 of the Code. That word is there given prominence and elaboration in a separate definitional section which reads[18]:

> "An act or omission which renders the person doing the act or making the omission liable to punishment is called an '**offence**'".

14 It is also important to note the provisions that surround s 8 in the Code. Most significant, as the Court of Appeal acknowledged[19], are the terms of ss 7, 9 and 10A of the Code. Because of the way it was deployed in argument by both sides, the language of s 9 should also be set out[20]:

> "(1) When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the *offence actually committed* is the same as that counselled or a different one, or whether the offence is committed in the way counselled, or in a different way, provided in either case that the facts constituting the

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15 Reasons of Kiefel J at [107]-[113].

16 Reasons of Kiefel J at [100]-[102].

17 (1997) 188 CLR 1.

18 See also [2007] QCA 440 at [28].

19 [2007] QCA 440 at [29]-[32].

20 [2007] QCA 440 at [31] (emphasis added).

offence actually committed are a probable consequence of carrying out the counsel.

(2) In either case the person who gave the counsel is deemed to have counselled the other person to commit the *offence actually committed* by the other person."

The issues

15 *Issues in the appeal*: Three issues arise in the appeal, namely:

(1) *Meaning of s 8 of the Code*: What is the meaning and proper application of s 8 of the Code? Is it the meaning attributed by the trial judge or the different meaning preferred by the Court of Appeal? Having regard to the assigned meaning, were the directions given by the trial judge to the jury correct or incorrect in law?;

(2) *Acquittal or retrial?*: If the Court of Appeal was correct in the conclusion that it reached concerning the meaning and application of s 8 of the Code, did it nonetheless err in concluding that no retrial of the respondent should be ordered? Having regard to that Court's entry of a verdict of acquittal, should this Court, in discharging its functions, quash the acquittal and order the retrial of the respondent to give effect to the relief normal to a conclusion that a trial has miscarried by reason of misdirections of law to the first jury?; and

(3) *Excessive sentence?*: In the event that the prosecution succeeds in the appeal to this Court, should this Court decide the still outstanding sentencing appeal or remit it to the Court of Appeal for argument and disposition?

16 Because mine is a minority opinion, it is sufficient for me to state very briefly the conclusions that I would reach on the second and third issues.

17 *Resolution of the acquittal issue*: As to the second issue (raised by the respondent's ground of appeal 2(d)) it will become apparent that I am of the view that the Court of Appeal erred in entering a verdict of acquittal. I take into account the respect that is owed to the intermediate appellate court in determining whether there has been a miscarriage of justice and, if so, the relief proper to the case, once a jury misdirection is found (as it was here). In disposing of criminal appeals, large powers have been granted by the Queensland Parliament to the Court of Appeal. Upon quashing a conviction for errors in directions at the first trial those powers extend to the substitution of a verdict of

acquittal which will bring the proceedings to a conclusion[21]. In addition, the Court of Appeal has the power to make an order for a new trial[22].

18 Nevertheless, the relief ordinarily appropriate to an identification of significant error in judicial directions, given to a jury in a criminal trial, is the quashing of the conviction and an order for a retrial from which the identified errors will inferentially be expunged[23]. Such relief gives effect to the limited judicial function in such appeals of correcting legal error whilst respecting the proper province of a jury to resolve all outstanding factual questions. The substitution of a verdict of acquittal is effectively reserved to those cases where, in the appellate court's opinion, no reasonable view of the facts and no accurate application of the law would justify a new trial.

19 In effect, this was the conclusion which the Court of Appeal reached, being of the view that, on the evidence, a fresh jury, properly instructed on the law, could not convict Mr Keenan of doing grievous bodily harm with intent or grievous bodily harm simpliciter in relation to the victim of the serious assault, Mr Darren Coffey[24].

20 Upon the premise that, to convict the respondent, it was necessary for the prosecution to establish, on the evidence, that he had formed a common intention with either or both of the other participants (Messrs Spizzirri and Booth) to prosecute an unlawful purpose, a probable consequence of which was that Mr Coffey would suffer grievous bodily harm by an act of shooting, the Court of Appeal concluded that this could not be demonstrated on the evidence tendered at trial. The prosecution should not therefore have a second chance to improve its evidence. The Court of Appeal denied an order of a retrial on the basis that[25]:

> "A reasonable jury properly instructed on the present evidence could not honestly exclude the reasonable inference that Spizzirri, in shooting Coffey, was acting independently of the common planned intention."

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21 The Code, s 668E.

22 The Code, s 669.

23 cf *Dyers v The Queen* (2002) 210 CLR 285 at 297 [23] per Gaudron and Hayne JJ, 313-315 [79]-]83] and 316-317 [86]-[90] of my own reasons; [2002] HCA 45.

24 The respondent at his trial was acquitted by the jury of the charge in the first count of the indictment (attempted murder). See [2007] QCA 440 at [1].

25 [2007] QCA 440 at [60].

21 I cannot accept that this was so. Indeed, properly, the respondent's counsel conceded before this Court that the reasoning of the Court of Appeal on this issue was defective[26]. The alternative ways in which the respondent sought to justify maintenance of the acquittal were unconvincing. The result is that the proper outcome on confirmation of the Court of Appeal's general approach on the first issue, is the substitution by this Court of an order for retrial.

22 *Resolution of the sentencing issue*: This leaves the appeal against sentence, left undecided by the Court of Appeal given the conclusion it reached on the first two issues. As a matter of general principle, this Court has insisted that, only in exceptional cases will it grant special leave to appeal where the prosecution seeks to appeal against an order quashing a conviction[27]. However, special leave having been granted to the prosecution in this case, for reasons of general legal principle; the acquittal having been entered by the intermediate court, not after a jury verdict after a trial on the merits[28], and the disposition of the proceedings being alive within the Judicature[29], it is undoubtedly competent for this Court to make the orders that ought to have been made by the Court of Appeal[30]. No argument to the contrary was advanced.

23 Similarly, there was no dispute that, if the prosecution were to succeed in restoring the respondent's conviction, as entered at trial, the proceedings would have to be returned to the Court of Appeal to resolve the outstanding sentencing appeal[31]. The Court of Appeal expressed an opinion that the circumstances of the respondent's offence were not such as to justify the maximum penalty of life imprisonment, imposed by the trial judge[32]. However, in the event that this issue was revived by this appeal, it would be inappropriate for this Court to resolve it. Apart from everything else, doing so would deprive the parties of the facility to seek appellate review of a fully considered appellate opinion on the subject which has not yet been given.

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26 [2008] HCATrans 347 at 3555.

27 *R v Van Den Bemd* (1994) 179 CLR 137 at 139; [1994] HCA 56.

28 cf *Davern v Messel* (1984) 155 CLR 21 at 32, 53, 65, 70; cf at 64, 70; [1984] HCA 34.

29 *R v Benz* (1989) 168 CLR 110 at 112; [1989] HCA 64; cf *Gipp v The Queen* (1998) 194 CLR 106 at 154-155 [138]; [1998] HCA 21; see also *Barlow* (1997) 188 CLR 1 at 45 and *Palko v Connecticut* 302 US 319 at 325 (1937).

30 *Judiciary Act* 1903 (Cth), s 37.

31 [2007] QCA 440 at [63].

32 [2007] QCA 440 at [62].

24 Having cleared away all of the issues, save for the primary one upon which special leave was granted, it is now appropriate for me to return to the considerations that I have identified earlier in these reasons[33]. On the primary issue, the nominated considerations bring me to a conclusion different from that reached by the majority of this Court.

Textual analysis of s 8 of the Code

25 *Definition of offence*: Crucial to the respondent's argument, which was accepted by the Court of Appeal, was the submission that the reference in s 8 of the Code to "an offence" picked up the special definition of "offence" expressed in s 2 of the Code. Thus, in identifying whatever was the "offence" committed, for the purpose of enlivening s 8, the word "offence" was not being used in a general, conversational or non-textual sense. It was being used in the special sense defined for this purpose by the Code itself. This approach was apparently accepted by the trial judge. However, the Court of Appeal concluded that it had not been given its correct weight and application.

26 To resolve the question whether, in referring to "an offence [that] is committed" s 8 of the Code intends to refer to the "offence" at a high level of generality ("generic") or at a level of specificity defined by the "acts or omissions" of the primary offender, it is essential to derive as much assistance as can be secured from the statutory definition of "offence" thereby incorporated, by way of s 2, into s 8.

27 When regard is had to the definition in s 2, it is tolerably clear that the word "offence" is addressed to a particular, specific and concrete act or omission "which renders the person doing the act or making the omission liable to punishment". Such a definition supports the respondent's submission that s 8 is addressed not to "offences" of a generic or general kind (as the trial judge said in his instructions to the jury). Instead, it is addressed to the specific acts or omissions that enliven the operation of s 8 to draw a secondary offender (such as the respondent) into criminal liability for the acts or omissions constituting the "offence" committed by the primary offender (here, Mr Spizzirri).

28 Concluding in this way involves nothing more or less than giving the language of s 8 of the Code its meaning, once such meaning is understood with the assistance of the special definition of "offence" contained in s 2. With respect to the trial judge, and to the majority of this Court, this is the basic error of the construction urged for the prosecution. It ignores, or gives insufficient weight to, the precise definition of "offence" stated in the Code. Once that

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33 Above, these reasons at [6], [10].

definition is ignored or not given due weight, it is all too easy for the decision-maker to read s 8 as referring to "an offence" of a "generic" character. But that would be contrary to what s 2 requires the reader of the Code to do, which is to descend into the particularities of the "offence" of the primary offender as it occurred that allegedly attracts the operation of that section to apply to the secondary offender. Thus, in the present case, the definition in s 2 focuses the attention of the Court upon the particular acts or omissions of Mr Spizzirri which are alleged, by virtue of s 8, to impose on the respondent criminal liability for what was done or omitted to be done by someone else in the offence against Mr Coffey.

29 *Provisions of s 9 of the Code*: There is further textual support for this interpretation in the surrounding provisions of s 9 of the Code. Although that section is not conclusive of the present controversy (and was invoked by the prosecution to advance, by way of contrast, its contrary argument) the threefold mention in s 9(1) of an offence "actually committed", arguably indicates that its provisions, which immediately follow the contested language of s 8, are similarly addressed to the particularities of conduct. So interpreted, ss 8 and 9 are both addressed to the particular facts and circumstances actually constituting "an offence" rather than to the generic descriptions of potential substantive offences found elsewhere in the Code. Although "actually committed" is not an expression that appears in s 8, this can be explained by the respective purposes of ss 8 and 9 of the Code. The drafter appreciated that "offence" in s 8 was intended to attract the definition in s 2. Accordingly, the drafter did not need to repeat a reference to the actual acts or omissions for this was made clear by the use in s 8 of the word "offence", defined in s 2.

30 *Trial judge's direction*: If this is the correct textual interpretation of s 8 of the Code, the approach adopted throughout the trial judge's directions to the jury fell short of what was required by the focus of the Code upon the particular "acts or omissions" which rendered the person doing the act or making the omission (here Mr Spizzirri) himself liable to punishment. This was obviously not the view which the trial judge took of the meaning and application of s 8. Thus, the trial judge told the jury of the prosecution's contention[34]:

> "… that depending on how you assess it the evidence warrants a conclusion that all three accused formed a common intention or plan and that the object of that plan was to *inflict some serious physical harm upon Mr Coffey*; that the three of them implemented that plan. That in the course of implementing the plan the offence of attempted murder or, alternatively, doing grievous bodily harm with intent was committed and

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34 Cited [2007] QCA 440 at [22] (emphasis added).

that the commission of whichever of those offences was committed, was a probable consequence of the implementation of the plan."

31 In the central passage in the trial judge's directions[35], his Honour left the issue to be considered by the jury at a general ("generic") level, rather than bringing that issue down so as to oblige the jury to address the particularities of the acts or omissions of Mr Spizzirri which, the prosecution contended, could be brought home to the respondent by way of the common intention liability for which s 8 applies.

32 *Court of Appeal's correction*: The Court of Appeal noted that the offence of which the respondent was convicted (grievous bodily harm with intent) rested, in part, on expert medical evidence which was unchallenged. This established that the cause of the very serious injury (paraplegia) suffered by Mr Coffey "was the entry of bullets into Mr Coffey's spine"[36] amounting to the grievous bodily harm which the prosecution sought to use s 8 of the Code to bring home to the respondent. Given that the prosecution case was that the person responsible for firing the bullets was not the respondent but Mr Spizzirri alone, it was clearly vital, if the case against the respondent were to be made good, to show that s 8 of the Code, as read with s 2, rendered the respondent criminally liable for the "act or omission" involved in Mr Spizzirri's *use of his firearm*. To the extent that, instead, the trial judge told the jury that to establish such liability it was sufficient "that the unlawful purpose was to inflict some *serious harm* upon Coffey"[37], his Honour diverted the jury's attention from the relevant "offence", as s 2 of the Code defines it.

33 In the interpretation and application of a codified restatement of the law, it is essential to approach the problem in the foregoing way. The first loyalty is to the Code, understood according to its text[38]. General provisions of a code, such as the provisions of ss 2 and 8 of the Code applicable here, were intended to be understood and applied, according to their ordinary meaning. Thus, properly, the trial judge read those provisions to the jury. However, with respect, he then failed to explain to the jury the definition of "offence" provided by s 2 and its significance for the operation of s 8 in this case. Had he done so, this would have reminded the jury both of the obligation to start the inquiry about common purpose liability with an identification of the act or omission that was primarily relevant (here the act or omission involved in Mr Spizzirri discharging his

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35 Quoted by Kiefel J at [106].

36 [2007] QCA 440 at [21].

37 Cited [2007] QCA 440 at [22] (emphasis in original).

38 *Barlow* (1997) 188 CLR 1 at 32; *Jervis* (1993) 1 Qd R 643 at 647.

firearm at Mr Coffey). Doing this would have encouraged the trial judge to explain to the jury the purpose of s 8, read with s 2, which is (in the defined circumstances) to extend the liability of a person such as the respondent to liability for the "offence" (act or omission) done by another person.

34 *Conclusion: direction erroneous*: Instead of following this course, as the language of the Code required, the trial judge bypassed the identification of the particular acts and omissions in question. Incorrectly, he focused the jury's attention on the suggested generic offence of unlawful purpose "to inflict some serious physical harm upon Mr Coffey". Respectfully, that was not the inquiry that the language of the Code required the jury to consider.

The interpretation is decided by the majority in *Barlow*

35 *Obedience to the Court's authority*: In recent years, this Court has repeatedly reminded judges at trial and intermediate courts of their duty to conform to the rulings of this Court in matters submitted to it for its decision[39]. It has instructed them to observe "seriously considered dicta uttered by a majority of this Court"[40]. Although, respectfully, I question whether the legal duty of obedience extends beyond obedience to the *rationes decidendi* of earlier decisions[41], I certainly agree that, where such decisions exist, the legal principles for which they stand must be applied by judicial officers subject to this Court's authority as an aspect of the rule of obedience to the doctrine of judicial precedent that applies throughout the Judicature of this country.

36 *Contemporary questioning of Barlow*: When in 1997 this Court heard the appeal in *Barlow*, it was required to resolve a challenge to a decision of the Court of Appeal of Queensland concerning a direction given to the jury in that case by the trial judge (who, by chance, was also the trial judge in the present case). After the decision of this Court in *Barlow*, the learned trial judge published a comment suggesting that the interpretation of s 8 of the Code, as previously accepted by the Court of Appeal, had been "tolerably clear" and that this Court had "gone to quite extraordinary lengths to secure a national uniformity of

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39 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17] per Gaudron, McHugh, Gummow and Hayne JJ; [1998] HCA 48.

40 *Farah Constructions Pty Ltd v Say-dee Pty Ltd* (2007) 230 CLR 89 at 159 [158]; [2007] HCA 22.

41 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 420-421 [64] of my own reasons.

approach … which should ordinarily have been considered by the legislature, not the court"[42].

37 In his article, the trial judge recognised that the issue for consideration in *Barlow* was the meaning of s 8 of the Code. He expressed his preference for the dissenting opinion in *Barlow* of McHugh J, who would have dismissed the appeal from the Court of Appeal's orders[43]. He favoured what he termed the "literalist" or "natural meaning" interpretation of s 8 rather than what he saw as an interpretation of s 8, preferred by the majority of this Court in *Barlow*, based on suggested policy grounds rather than textual analysis[44]. I mention this discourse only because there is more than a hint in the directions given by the trial judge in the present case of the approach that his Honour had advocated in his published comment that followed the decision in *Barlow*.

38 Without descending into criticism (or worse), for I am not myself overly-sensitive to proper intellectual discourse on issues of broad legal controversy, it is certainly necessary, where an earlier holding of this Court resolves a legal issue, for this Court to insist that trial judges and intermediate courts give effect to the Court's rulings unless the earlier ruling is varied, distinguished or overridden by Parliament. This is what I take the Court of Appeal to have done in the reasons that sustained its conclusion, in the present case, that the trial judge's directions to the jury were erroneous, measured against the standard expressed by the majority of this Court in *Barlow*.

39 *Analysis of majority in Barlow*: Let there be no doubt that the foundation for the Court of Appeal's present decision was its application of the ruling in *Barlow*. Thus, at the outset of its analysis, the Court of Appeal said[45]:

> "The High Court of Australia gave detailed consideration to the construction of s 8 in *R v Barlow*, ultimately concluding that s 8 did not preclude a secondary offender from conviction of manslaughter when the principal offender was convicted of murder."

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42 de Jersey, "Murder, Manslaughter or Nothing: Delicious Irony, or, Will this Trial Judge Ever be Satisfied?", (1997) 71 *Australian Law Journal* 716 at 722.

43 (1997) 71 *Australian Law Journal* 716 at 720-722.

44 Reference was made to his Honour's dissenting reasons in *R v Jervis* [1993] 1 Qd R 643 approved in the Court of Appeal in *Barlow sub nom Alexanderson* (1996) 86 A Crim R 77 at 92, 98-99. See (1997) 71 *Australian Law Journal* 716 at 716, but disapproved by the majority in *Barlow*.

45 [2007] QCA 440 at [33] (citation omitted).

40 Their Honours went on to extract five substantial passages from the reasoning of the majority in *Barlow*, namely four from the joint plurality reasons of Brennan CJ, Dawson and Toohey JJ[46] and an extended quotation from my own reasons in that decision to like effect[47].

41 In the passages extracted from the joint reasons in *Barlow*, the point is made (repeating what is stated above) that[48]:

> "Section 2 of the Code makes it clear that 'offence' is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment. Section 7(a) confirms that 'offence' is used to denote the element of conduct in that sense. By the ordinary rules of interpretation, the term must bear the same meaning in pars (b), (c) and (d) of s 7 as it bears in par (a). Section 8, which complements s 7 and extends the net of criminal liability for an offence to the parties who have formed a common intention of the kind therein mentioned, reveals no ground for attributing a different meaning to 'offence' in s 8."

42 In a manner appropriate to the issue presented by the evidence at the respondent's trial, the Court of Appeal in the present case went on to quote from a later passage in the joint reasons in *Barlow*[49]:

> "'[O]ffence' in s 8 must be understood to refer to an act done or omission made. So interpreting the section, it deems a person falling within its terms to have done the act or to have made the omission which the principal offender has done or made. *It fastens on the conduct of the principal offender*, but it does not deem the secondary party to be liable to the same extent as the principal offender. It sheets home to the secondary offender such conduct (act or omission) of the principal offender as (1) renders the principal offender liable to punishment but (2) only to the extent that that conduct (the doing of the act or the making of the omission) was a probable consequence of prosecuting a common unlawful purpose. The secondary party is deemed to have done an act or made an

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46 [2007] QCA 440 at [33]-[37] referring to *Barlow* (1997) 188 CLR 1 at 8-9, 10, 11, 13.

47 [2007] QCA 440 at [38] citing *Barlow* (1997) 188 CLR 1 at 43-44.

48 (1997) 188 CLR 1 at 9. See also reasons of Kiefel J at [131]-[132].

49 [2007] QCA 440 at [34] citing *Barlow* (1997) 188 CLR 1 at 10 (emphasis added).

> omission but only to the extent that the act was done or the omission was made in such circumstances or with such a result or with such a state of mind (which may include a specific intent) as was a probable consequence of prosecuting the common unlawful purpose. … Thus *the unlawful striking of a blow* by a principal offender will constitute an offence the nature of which depends on whether the blow causes bodily harm or grievous bodily harm or death and on the specific intent with which the blow is inflicted."

43 I call particular attention to the emphasised passages from the joint reasons in *Barlow*. These make it clear beyond doubt that, reading s 8 of the Code in the light of s 2, takes the interpreter down the scale from a *generic* classification of the "offence" (that, in colloquial terms, might attribute a designated crime to all of the offenders) so as to focus attention, instead, on the *particularity* of the "conduct of the principal offender".

44 Any doubt about what the joint reasons were intending is removed by the specific reference to "the unlawful striking of a blow". This is not the language of generic offences. Still less is it language that adopts a textual definition of an "offence" in the Code. It is (as s 2 requires of the application of s 8 of the Code) the language of the particular acts or omissions of the primary (or principal) offender which s 8 of the Code is being invoked to "sheet home" to the "secondary offender".

45 Applying this approach to the present case, *Barlow* holds that the proper application of s 8 of the Code is to ask what the act or omission of the principal offender is. In this case, it was Mr Spizzirri whose shooting caused the profound injury to Mr Coffey. To render the respondent criminally responsible for Mr Spizzirri's "offence", so defined, in order that the respondent should be deemed to have committed the offence, demands that the following question be answered in the affirmative[50]:

> "Was the nature of the blow actually struck such that its infliction was a probable consequence of the prosecution of the relevant unlawful purpose?"

46 The joint majority reasons in *Barlow* were thus sufficient to establish the binding rule established by that decision. Moreover, a passage cited by the Court

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50 [2007] QCA 440 at [35] citing *Barlow* (1997) 188 CLR 1 at 10. See also reasons of Hayne J at [86].

of Appeal from my own reasons in *Barlow* endorses the same reasoning and puts the holding of this Court in that case beyond contest[51]:

> "This approach to the definition of 'offence' in s 8 of the Code is reinforced by reference to the definition of 'offence' in s 2. That section defines 'offence' in terms of the 'act or omission' of the accused. *It does not do so in terms of the classification of the particular crime as appearing elsewhere in the Code*. The definition of 'offence', when applied to s 8, therefore permits, if it does not compel, a differentiation between the acts and omissions respectively of the principal offender and of the common purpose co-offender. In the case of unlawful killing, the 'offence' which is committed by the principal is the act or omission constituting the unlawful killing referred to in s 300 of the Code."

47 Instructed by these tolerably clear interpretations of s 8, read with s 2 and as explained in *Barlow*, the Court of Appeal in the present case concluded[52]:

> "The application of these observations in *Barlow* to the present case supports the appellant's contention to the extent that 'offence … of such a nature' in s 8 here refers to the act of intentionally shooting Coffey and so causing him grievous bodily harm, not merely (as the trial judge told the jury) the generic offence of intentionally doing Coffey grievous bodily harm."

48 *Conclusions: Court of Appeal correct*: The Court of Appeal was correct in deriving the instruction that they did from *Barlow*. All of the participants in this Court's joint majority reasons in *Barlow* were greatly respected exponents of the criminal law. In particular, Brennan and Toohey JJ were each highly knowledgeable practitioners of the Griffith Code, applicable respectively in Queensland and Western Australia. No suggestion was made in the argument of this appeal that this Court should reconsider the correctness of its decision in *Barlow*.

49 Various unconvincing attempts were made to distinguish the holding in *Barlow* from the circumstances of the present case. In my view it is indistinguishable. This Court should uphold the Court of Appeal's application of what it held in *Barlow*. Nothing has been shown to demonstrate that what was said there was wrong. On the contrary, it is anchored in the text. Contrary to the apparent belief expressed at the time by the trial judge, it applies the natural meaning of the section to a case such as the present, once it is appreciated that

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51 *Barlow* (1997) 188 CLR 1 at 43-44, cited in [2007] QCA 440 at [38] (emphasis added).

52 [2007] QCA 440 at [39].

the word "offence" in s 8 of the Code must be understood with the particular meaning that is afforded by s 2.

50 This Court's demands for obedience to its binding rulings on law should not be confined to rulings made in civil litigation or in much loved areas of commercial law. The rule applies equally when invoked in criminal trials by offenders such as the respondent. Judicial neutrality requires nothing less.

Maintaining *Barlow* and common basic legal principles

51 *Upholding basic principles*: Although the trial judge, in the article earlier cited[53], was critical of what he described as the "extraordinary lengths" to which the majority of this Court had gone in *Barlow* "to secure a national uniformity of approach"[54], with respect, that criticism is misplaced. To the extent that it influenced, however unconsciously, a reluctance on his Honour's part to apply the *Barlow* rule to the jury instructions in the present case, it led to the error exposed by the reasons of the Court of Appeal.

52 It is well established by the authority of this Court that, at least in matters of basic legal principle, where there is an ambiguity in an Australian criminal code, such as the Code under consideration here, and where alternative constructions are arguable, this Court will ordinarily favour the meaning that achieves consistency in the interpretation of like provisions in the codes of the other Australian code jurisdictions[55]. Moreover, it is also well established that this Court will tend to favour an interpretation of the Code that achieves consistency as between the code jurisdictions and the expression of analogous general principles of the common law existing elsewhere in the nation.

53 The explanation for such an approach scarcely needs elaboration or justification. It is no more than a proper contribution by this Court, where its analysis of the text permits, to the achievement of "a desirable uniformity in basic principles of the criminal law throughout Australia". As I further explained in *Barlow*[56]:

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53 (1997) 71 *Australian Law Journal* 716 at 722.

54 cf *Vallance v The Queen* (1961) 108 CLR 56 at 75-76; [1961] HCA 42.

55 *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 665; [1987] HCA 26.

56 (1997) 188 CLR 1 at 32.

> "Variations in local opinion may result in divergencies in matters of detail in the criminal law. But in matters of general principle, it is highly desirable that unnecessary discrepancies be avoided or, at least, reduced."

54 *Limiting accessorial liability*: Against the background of these considerations of approach, it is important to realise that, both in this country and in others with similar principles of common intention liability, great care is generally taken to avoid the imposition by law of accessorial liability beyond limits that the judges deem tolerable to the community. Thus, in *Darkan v The Queen*, in an observation noted by the Court of Appeal in the current case[57], the joint reasons of Gleeson CJ, Gummow, Heydon and Crennan JJ remarked[58]:

> "Although the law has long recognised accessorial liability, it has also long attempted to lay down limits to the accessorial liability of a person who shared a common purpose with a wrongdoer, or who instigated a wrongdoer to commit a crime. The alleged accessory is not to be liable for everything a principal offender did, either vicariously or absolutely. Over time the law has employed different techniques for placing accessorial liability within just limits while continuing to give it substantial room for operation. The common law protects against excessively wide liability by demanding actual foresight, albeit of a possibility. Under ss 8 and 9 of the Code the function of protecting against excessively wide liability turns on the need for probability of outcome, independently of the alleged accessory's state of mind. If under ss 8 and 9 of the Code the expression 'a probable consequence' were construed so as to make a possible consequence sufficient, there would be liability in the accessory for whatever the principal offender did, since the fact that the principal offender did it shows that it was possible, and there would be no protection against excessively wide liability."

55 For more than a century, similar concerns have influenced attempts by the courts to mark off the limits of common purpose liability that can be supported by proper legal principle. In a well known passage of his reasons in *R v Anderson; R v Morris*[59], Lord Parker of Waddington CJ suggested that it would "revolt the conscience of people today" if a secondary offender were convicted of manslaughter in circumstances where the principal offender "has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to [the] common design could suspect"[60].

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57 [2007] QCA 440 at [41].

58 (2006) 227 CLR 373 at 397 [76]; [2006] HCA 34.

59 [1966] 2 QB 110.

60 [1966] 2 QB 110 at 120.

56 In *Rahman*[61], several members of the House of Lords referred to the considerations recognised by Lord Parker CJ[62]. Lord Neuberger of Abbotsbury saw Lord Parker CJ's admonition as an adverse comment on *Salisbury's case*[63]. He did so in order to make the point that, at common law, an accessory secondary offender will not be held liable for every particular act or omission of the primary offender. The question of common law will always be whether such acts or omissions fell within the ambit of the "common intention" that was "understood and foreseen". Or whether the primary offender had "completely departed" from that understanding.

57 The test of "complete departure" was expressed by Lord Parker CJ in *Anderson and Morris*[64] in these terms:

> "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."

58 Clearly, in a common law test expressed in such broad terms, there will be room for differences of opinion as to whether the standard of departing completely has, or has not, been met. The decision of the House of Lords in *Rahman* is replete with instances where such differences emerged on appeal. There are many more in the case law of Australia (as well as of Canada, New Zealand and other jurisdictions).

59 A large number of decisions collected and analysed in *Rahman* involved cases where, by the introduction of a knife[65] or any other weapon[66], the principal

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61 [2008] 3 WLR 264; [2008] 4 All ER 351.

62 [2008] 3 WLR 264 at 274 [20] per Lord Bingham of Cornhill, 285 [61] per Lord Brown of Eaton-under-Heywood, 293 [94] per Lord Neuberger of Abbotsbury; [2008] 4 All ER 351 at 361, 372, 379.

63 (1553) 1 Plow 100 [75 ER 158]. See [2008] 3 WLR 264 at 293 [94]; [2008] 4 All ER 351 at 379.

64 [1966] 2 QB 110 at 120 (emphasis added).

65 This was the case in *Rahman*. See [2008] 3 WLR 264 at 272-273 [18]; [2008] 4 All ER 351 at 360 citing the instruction to the jury of the trial judge in that case; cf *R v Anderson; R v Morris* [1966] 2 QB 110 at 113-114; *R v Uddin* [1999] QB 431. See also *R v Powell* [1999] 1 AC 1 at 25-26.

offender "departed completely from the concerted action of the common design"[67]. Running through these cases, admittedly concerned with the principles of the common law, is the realisation that a limit has to be set for common purpose liability. Many of the cases cited indicate that the limit will be reached where the principal offender introduces a gun or a knife where this seriously escalates the level of risk of violence, the potential of serious injury and the nature of the peril inherent in the joint enterprise as initially conceived.

60 It is true that baseball bats[68], wooden posts[69] and even a child's catapult[70] can do serious harm to a victim. However, the introduction of knives and guns by the primary offender may be treated by a jury as involving "actions … of a type entirely different from actions which the others foresaw as part of the attack"[71]. At common law, the determinant is thus the accused's foresight of what a co-offender might do, "an issue to which knowledge of the associate's possession of an obviously lethal weapon such as a gun or a knife would usually be very relevant"[72].

61 *Posing issues apt to jury verdicts*: Conversely, if a jury concluded that the secondary offender was unaware that the primary offender had possession of a potentially lethal weapon, such as a gun or a knife, this could sustain a conclusion that the conduct executed by the primary offender was "in a different league to the kind of battering to which the attackers implicitly agreed upon by the use of those other weapons"[73]. Such a decision is properly one for the jury. But the point important for present purposes is that the law reserves such

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66 See *Chang* [1985] AC 168 at 175.

67 *Rahman* [2008] 3 WLR 264 at 281 [44] per Lord Rodger of Earlsferry citing *R v Anderson; R v Morris* [1966] 2 QB 110 at 120; [2008] 4 All ER 351 at 368.

68 *Rahman* [2008] 3 WLR 264 at 278 [35] per Lord Rodger of Earlsferry; [2008] 4 All ER 351 at 366.

69 [2008] 3 WLR 264 at 269 [12] per Lord Bingham of Cornhill; [2008] 4 All ER 351 at 357.

70 [2008] 3 WLR 264 at 275 [22]; [2008] 4 All ER 351 at 362.

71 *R v Uddin* [1999] QB 431 at 441.

72 *Rahman* [2008] 3 WLR 264 at 275-276 [24] per Lord Bingham of Cornhill; [2008] 4 All ER 351 at 363.

73 The directions to the jury of the trial judge in *Rahman* approved by Lord Bingham of Cornhill: [2008] 3 WLR 264 at 276 [26]; [2008] 4 All ER 351 at 363-364.

considerations for a serious and real assessment by the jury. In doing so, the law leaves it "open to a jury to return a verdict which reflects the measure of the criminality of the accused as established by the evidence"[74].

62 The disadvantage of the directions given to the respondent's jury by the trial judge, now endorsed by a majority of this Court, is that they needlessly divorce the approach adopted to this fundamental question of the liability of common purpose offenders at common law and under the Code. By contrast, in requiring the jury to address their attention to the acts and omissions of the principal offender, the approach adopted in *Barlow* (and followed and applied by the Court of Appeal) permits a jury to consider the offence by the primary offender, as it was committed. It ensures consequent attention to the "nature" of the offence (as determined by the circumstances in which the "act" was done) the intention with which it was done, and its results.

63 *Uniformity in the Code and common law*: Assuming that the ultimate purpose of the Code, in this respect, is the same as, or basically similar to, that of the relevant common law principle (viz to decide when a secondary offender will be criminally liable for the act or omission of the primary offender in the given circumstances) it would not be surprising if s 8 of the Code were to present the jury with questions the same as, or not dissimilar to, those that have to be answered in Australia's common law jurisdictions. On the face of things, in a matter so fundamental and basic to the liability of one person for the criminal conduct of another, it would be desirable for similar questions to be presented for jury verdicts throughout this country. And that they would be real questions obliging the jury to decide, by reference to the respective actions and omissions of the primary offender and the shared common purposes of the secondary offender(s), whether the latter were to be "deemed" to be liable for the criminal "offence(s)" of the former.

64 If the question presented to the jury is expressed at the high level of generality ("generic") deployed by the trial judge and now endorsed by the majority of this Court, the kind of line-drawing found in the common law authorities will not arise. No issue will necessarily be presented as to whether the introduction of much more dangerous weapons (such as knives and guns) constituted a complete departure from the ambit of imputed liability under s 8. Liability will simply attach by reason of nothing more than the involvement by the secondary offender in an "offence" defined at a high, and virtually inescapable, level of generality, such as "to inflict some serious physical harm upon Mr Coffey".

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74 *Barlow* (1997) 188 CLR 1 at 33 per my own reasons, citing *Gilson v The Queen* (1991) 172 CLR 353 at 365; [1991] HCA 24; *Jervis* [1993] 1 Qd R 643 at 665 and *Hind and Harwood* (1995) 80 A Crim R 105 at 135 per Fitzgerald P.

65 Where, as *Barlow* shows, this is not a necessary interpretation of s 8 of the Code, the trend of common law principle applicable in those Australian jurisdictions where it is still relevant, affords an added reason of established legal doctrine, hitherto declared and applied by this Court, for maintaining the particularity of the *Barlow* comparator.

Considerations of policy and principle support the Court of Appeal

66 In *Barlow*[75] I collected additional reasons of legal principle and policy for endorsing the approach favoured by the majority in that decision. On re-reading them, I still consider that they are relevant. They apply to the present case. They include:

- *Reflecting community justice*: Where there is any ambiguity in the Code it should be resolved in a way that will permit juries, without undue complexity, to distinguish between the criminal culpability of an accused secondary offender and the culpability of the primary offender. It is still true that most serious criminal trials in Australia are conducted before juries "whose function is to reflect, in a general way, the community's sense of justice"[76]. Reserving to the jury, by reference to the particular conduct (the act or omission amounting to an "offence" as defined) which, in effect, differentiates between the "nature" of the offence committed and that for which a common intention was formed, reserves to the jury a real, appropriate and proper function apt for their verdict. The "generic" approach favoured by the trial judge and now by a majority of this Court, effectively withholds from the jury a real, appropriate and proper role in setting the bounds of the notional criminal liability for which s 8 provides;

- *Clarifying the jury's substantive role*: Where the relevant determinant is the precise conduct of the primary offender (the "act or omission") this at least affords criteria of criminal liability susceptible to precise proof in the trial. This is a consideration relevant to a case where (as can sometimes happen) the offenders are tried separately. An interpretation of the Code that renders it more simple to apply in practice and more readily understandable to a jury in a substantial criminal trial such as this was, is one that is attractive in an area of the law already replete with subtleties and undue complexities;

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75 (1997) 188 CLR 1 at 40-41.

76 (1997) 188 CLR 1 at 40.

- *Individual liability in fluid criminality*: In the nature of offences in which common purpose liability is typically alleged, co-offenders may sometimes have different intentions or no clearly formulated intention at all. The approach adopted by the Court of Appeal, following *Barlow*, is one that invites a differential assessment of the respective criminal culpability of the co-offenders. Because this accords with the ordinary sense of justice and rationality, as with the normal purposes of the criminal law[77], it is one that should be preferred to an interpretation that risks drawing all participants in conduct of fluid criminality into an undifferentiated liability for what will often be a much more serious crime, conviction of which, upon the legal fiction provided by s 8 of the Code and so understood, will typically attract very heavy punishment[78]; and

- *Sharpening fictions in serious culpability*: Section 8 imports a fiction to the criminal law. This fact alone provides a reason for care in expanding its ambit. The section imposes upon one person liability for the criminal act or omission of another, although that person has not actually performed that act or omission and may not have intended, anticipated or expected them to happen. On the face of things, where such a notional liability with potentially drastic consequences is provided for by law, it should be reserved to cases where a jury's attention has been specifically addressed to the relationship between the respective actions or omissions of the primary and secondary offenders and whether such conduct was of such a nature that it falls within the common intention that all offenders (whether primary or secondary) earlier formed. Only by adopting this approach is the risk of unjust assignment of fictional liability to secondary offenders avoided, permitting juries to decide whether a person such as the respondent had formed a common intention that included, in its prosecution, a purpose to commit an offence of the same nature as that performed by the principal offender.

67 Where the text of the Code; the authority of *Barlow*; the trend of analogous common law doctrine; and the applicable considerations of legal principle and policy support the Court of Appeal's decision, its approach should be preferred to that of the primary judge now endorsed by the majority in this Court.

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77 cf *R v Jervis* [1993] 1 Qd R 643 cited in *Barlow* (1997) 188 CLR 1 at 40.

78 cf my own reasons in *Clayton v The Queen* (2006) 81 ALJR 439 at 446 [41]; 231 ALR 500 at 509; [2006] HCA 58.

The approach that presents a triable jury issue

68 *Adopting the correct approach*: To the extent that s 8 of the Code abstracts the "offence", to which it refers, to be understood at a high level of generality ("generic"), effectively it becomes self-referential. It removes from any real decision in the trial (usually by a jury) the proper consideration of whether the primary offender has departed completely from the concerted action envisaged in the prosecution of the common purpose of the offenders.

69 Take the present case as an illustration. If the reference to "an offence" means no more than an offence of serious violence to Mr Coffey, the result is to deprive the relevant decision-maker (here the jury) of the function of deciding the boundary of the "common intention". Far from depriving the words "of such a nature" in s 8 of content, the approach favoured by the Court of Appeal (and I believe this Court's decision in *Barlow*) reserves an important decision to the decision-maker at trial. It requires that the boundary of notional criminal liability be fixed by reference to the "nature" of the "offence" (act or omission) which is "committed" by the primary offender. By reference to such "nature", the decision-maker must then compare the "offence" and its "nature" with the antecedent common intention of the participants. Typically, and in the present case, that presents a classic jury question.

70 *Supporting offences of same nature*: So much can be illustrated by the evidence in the present case. In favour of a conclusion that the "nature" of the "offence", as committed by Mr Spizzirri (using a loaded gun to shoot Mr Coffey) *was* within the ambit of s 8 (read with s 2) are the following factual circumstances, in particular:

(1) It was the respondent who conceived and directed what was clearly an intentional violent physical attack on Mr Coffey;

(2) The respondent was the person with a strong motivation to organise, plan and control the attack because of Mr Coffey's presumed defiance in "double-crossing" him over the repayment of drug moneys;

(3) The respondent arguably had very serious violence in mind during the attack if the jury accepted that he had earlier threatened to "cave Coffey's skull in";

(4) The respondent organised the three assailants, including Mr Spizzirri whose capacity for violence was known, and (if the jury accepted the evidence) the respondent knew that his own passenger was armed with a baseball bat, obviously an instrument capable, if deployed in a particular way, of inflicting very serious physical harm to Mr Coffey; and

(5) The respondent pre-planned the removal of Mr Coffey's van, arguably to hide evidence of the violence to Mr Coffey that he had planned out of vengeance and anger.

71 *Against offence of same nature*: On the other hand, there were a number of evidentiary indicators that the acts or omissions of Mr Spizzirri in taking a sawn-off gun with him and then using it to shoot directly at Mr Coffey were unexpected to the respondent and the co-assailants and an offence of a "nature" that fell completely outside the common purpose intended by the respondent and the other participants in respect of the violence against Mr Coffey. This evidence included:

(1) The testimony of Mr Jupp (if accepted by the jury) that the respondent had earlier specifically described the purpose of the enterprise as being to "touch up" Mr Coffey, ie, to punch him and physically assault him but nothing more;

(2) Arguably shooting directly at him, with obviously profound risks to his life and bodily well-being, was completely disproportionate to the sum at stake (between $6,000 and $7,000);

(3) The respondent and Mr Jupp were in a vehicle separate from Mr Spizzirri and Mr Jupp, at least, immediately recounted how he had reacted with shock and disbelief, once he became aware of the use by Mr Spizzirri of a firearm;

(4) An arguable purpose of taking Mr Coffey's van was to sell it to recoup the misappropriated moneys after physically assaulting him, something not really feasible after Mr Coffey was shot; and

(5) The sudden abandonment of the removal of the van and the immediate departure of all of the assailants from the scene arguably suggested a realisation of the unanticipated gravity of Mr Spizzirri's actions whose "nature" had exceeded the common purpose of the joint enterprise[79].

72 It is true that the trial judge reminded the jury that there was no evidence that the respondent knew that Mr Spizzirri had a gun. It is also true that the trial judge alerted the jury to the possibility that "[i]n carrying a gun and contemplating firing it, Spizzirri may have independently thought he would depart from any common plan". However, this last-mentioned possibility was then trivialised and discounted by the trial judge's observations, that followed, to the effect that the "common plan" may "indeed have been pitched at a much

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79 cf [2007] QCA 440 at [60].

lower level, for example, to give Coffey *a good talking to*, or perhaps *a cuff over the ear* or a *slap in the face*, or a punch in the chest, but *nothing too serious*".

73 *Result: a miscarriage of justice*: The trial judge's directions to the jury did not require them to focus their attention upon the relevant legal question that s 8 of the Code obliged them to address. Specifically, it did not oblige them to consider the act or omission of Mr Spizzirri in shooting directly at Mr Coffey and then to ask whether the "offence", so executed, was of such a "nature" that its commission was within any pre-existing "common intention to prosecute an unlawful purpose", shared (relevantly) with the respondent.

74 A jury, properly instructed on the legal requirements of s 8, might have concluded that Mr Spizzirri departed completely from the concerted action; that his act of shooting was an act of an entirely different type; that it was, in effect, "in a different league; or was "fundamentally different"[80]. And that this was confirmed by his omissions once he had unexpectedly introduced the gun into the fray, of using the gun to fire over his head or away from him or simply to confront him with the gun.

75 Although no relevant objection was taken by trial counsel to the trial judge's instructions to the jury, as they were given, it has not been argued that this omission was deliberate or tactical or otherwise undeserving of relief. Nor is the present a case where, if the jury were misdirected as to the proper legal foundation for finding the respondent legally liable for the "offence" as performed by Mr Spizzirri, this Court could uphold the conviction on the basis of the "proviso"[81]. The consequence is that a miscarriage of justice has occurred[82].

Conclusion and orders

76 The majority of this Court has adopted an interpretation of the Code contrary to the one that I prefer. On this basis, and accepting that there is an ambiguity, it is important to remember the cautionary words of Lord Macaulay, written some 150 years ago[83]:

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80 See *Rahman* [2008] 3 WLR 264 at 272 [18]; [2008] 4 All ER 351 at 359 per Lord Bingham of Cornhill.

81 The Code, s 668E(1A). See *Gilbert v The Queen* (2000) 201 CLR 414; [2000] HCA 15; *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72.

82 cf reasons of Hayne J at [91].

83 Amirthalingam, "Clarifying Common Intention and Interpreting Section 34: Should There be a Threshold of Blameworthiness for the Death Penalty?" [2008] *Singapore Journal of Legal Studies* 435 at 435.

> "In criminal cases … we think that the accused party ought always to have the advantage of a doubt on a point of law, if doubt be entertained by the highest judicial authority, as well as a doubt on a matter of fact."

77 Lord Macaulay was one of the drafters of the *Indian Penal Code*, later copied in many other countries of our legal tradition. He knew what he was talking about. Indeed, his draft was the inspiration for the Griffith Code and for the predecessors of the provisions in question in the present appeal.

78 In the result, the Court of Appeal was correct to identify errors and legal inaccuracies in the directions given to the jury by the trial judge. However, that Court erred in deciding that the proper relief was the entry of a verdict of acquittal. The Court of Appeal ought to have ordered a new trial.

79 To give effect to these conclusions, I favour the following orders. Appeal allowed. Set aside order 2 of the orders of the Court of Appeal of the Supreme Court of Queensland. In place of that order, order that a new trial of the respondent be had on counts 2 and 3 of the indictment.

80 HAYNE J. I agree with Kiefel J that, for the reasons she gives, the appeal should be allowed and consequential orders made, setting aside the orders of the Court of Appeal of the Supreme Court of Queensland and in their place ordering that the appeal to that Court against conviction is dismissed. Because the application to the Court of Appeal for leave to appeal against sentence has not been determined, it will be necessary to remit the matter to that Court for its consideration of that application.

81 The Court of Appeal concluded[84] that in applying s 8 of the *Criminal Code* (Q) ("the Code") in this case, it was not sufficient to identify the offence committed by the person who shot the victim as inflicting grievous bodily harm with intent; it was necessary to identify the offence by reference to the offender's conduct of shooting the victim. It followed, so the Court of Appeal held[85], that asking whether the offence that had been committed was an offence of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose required examination of whether the "act of shooting" was a probable consequence.

82 Approaching the matter in this way elides two related but distinct questions.

83 Section 8 deems those who form a common intention to prosecute an unlawful purpose to have committed an offence where "in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose". If, as the Court of Appeal held, the offence that was committed in this case must be identified by reference to the conduct constituting the offence, the condition for the engagement of s 8 in this case can be rendered as follows. First, what was the common purpose? Secondly, was the shooting that happened an *offence of such a nature* that its commission was a *probable consequence* of the prosecution of the purpose? Both questions must be addressed. And s 8 is not to be read as requiring that the offence that was in fact committed (the shooting) was a probable consequence of the prosecution of the unlawful purpose. To do so would give no work to the expression "of such a nature".

84 The Court of Appeal thus erred when it said[86] that:

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84 *R v Keenan* [2007] QCA 440 at [43].

85 [2007] QCA 440 at [43].

86 [2007] QCA 440 at [43].

> "To convict [the respondent] under s 8, the jury had to be satisfied beyond reasonable doubt that he, and either or both [of the co-accused], formed a common intention to unlawfully cause [the victim] serious harm; and that [the shooter's] *act of shooting* resulting in grievous bodily harm *was a probable consequence* of the prosecution of their joint common intention." (emphasis added)

The question is not whether the act of shooting that did occur was a probable consequence, it is whether the act of shooting was an offence of such a nature[87] that its commission was a probable consequence. This latter question directs particular attention to what was the common intention. Was it, as the prosecution alleged, a common intention to inflict serious physical harm on the victim?

85 The Court of Appeal held[88] that because there was no evidence (presumably no direct evidence) in this case that a gun may be used, and no evidence that the common intention was to injure the victim by whatever means were available to the participants, the jury could not exclude the inference that the shooter was acting outside the common intention and, accordingly, the respondent could not be found guilty of the offence that was committed. But by contrast, the Court of Appeal noted[89] that, if the victim had been beaten by the bat which the respondent knew was taken to the scene, s 8 "may well have extended [the respondent's] criminal liability for [the victim's] injuries". This posited difference in outcome could be supported only if the Court of Appeal treated the absence of evidence that the respondent knew that a gun was taken to the scene as determinative of what was the common intention: as an intention at most to administer a beating by use of the bat. But to identify the common intention in this way would focus only upon the means that were to be used to effect the unlawful purpose. Identifying the weapon that was to be used is at best an incomplete description of the purpose that the prosecution alleged the parties had in this case. That purpose was alleged[90] to be the purpose of inflicting some serious physical harm on the victim.

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87 *R v Barlow* (1997) 188 CLR 1 at 10; [1997] HCA 19.

88 [2007] QCA 440 at [56], [60].

89 [2007] QCA 440 at [61].

90 [2007] QCA 440 at [22].

86 It is important to recognise that the second question presented by s 8 – was the offence that was committed an offence of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose? – can be answered in the affirmative even if the possibility that the conduct actually committed would occur was not shown to have been adverted to by any participant in the common intention. So much follows from the fact that what is a "probable consequence" is to be determined objectively[91].

87 In considering that objective question it will always be necessary to pay very close attention to what is identified as having been the common intention to prosecute an unlawful purpose. But it is necessary to bear steadily in mind that formation of the common intention to prosecute an unlawful purpose may not have been accompanied by any consideration, let alone detailed consideration, of what was to be done, how it was to be done, and who was to do what to bring about the intended purpose. In such cases there will be no direct evidence that the parties to the common intention adverted to the possibility that an offence of the nature of the offence that was committed would be committed; there will be no evidence that the parties to the common intention were aware that commission of the crime that was committed was a probable consequence[92]. Yet as Gibbs J said in *Stuart v The Queen*[93], "in fact the nature of the offence [may be] such that its commission was a probable consequence of the prosecution of the common unlawful purpose".

88 Whether it was, is a question for the jury[94]. It is a question that in this case required examination of what inferences were to be drawn from the whole of the evidence. While it may be accepted that the evidence did not require the inference that the common intention was to inflict serious physical harm on the victim by whatever means seemed appropriate and were available, that inference was open and could be drawn beyond reasonable doubt.

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91 *Stuart v The Queen* (1974) 134 CLR 426 at 442-443 per Gibbs J; [1974] HCA 54.

92 *Stuart* (1974) 134 CLR 426 at 442 per Gibbs J.

93 (1974) 134 CLR 426 at 442.

94 *Stuart* (1974) 134 CLR 426 at 442-443.

89 The Court of Appeal recognised[95] that the premise upon which s 8 is engaged is that s 7 of the Code does not apply, and the accused is not a principal offender within the meaning of the provisions of s 7. Thus the premise upon which it was alleged that s 8 was engaged in the present case was that the respondent was not a person who had done or omitted to do any act for the purpose of enabling or aiding the shooter to shoot the victim[96], that the respondent had not aided the shooter in committing the offence[97], and that the respondent had not counselled or procured the shooter to shoot the victim[98]. Yet the actual conclusions reached by the Court of Appeal were founded on the requirement for proof of matters which, if established, may well have brought the respondent within one or more of the identified categories of principal offender. In particular, the requirement[99] that the shooting that actually occurred be a probable consequence of the prosecution of the unlawful purpose is a conclusion that appears to require proof that the respondent either counselled or procured the shooting or at least enabled or aided the shooting. To construe s 8 in this way would deny that it is an extension of criminal responsibility.

90 The Court of Appeal erred in concluding that the trial judge had not sufficiently directed the jury on the issues that the jury had to decide at the respondent's trial in connection with the application of s 8 of the Code. It also erred in deciding that the evidence led at the respondent's trial could not support his conviction.

91 As Kiefel J demonstrates, the real issues[100] at the respondent's trial were whether there was a common intention and what was that intention. Whether the shooting of the victim was an offence of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose depended upon what that intention was. And the trial judge rightly told the jury to consider whether the shooter had acted "independently of and outside the common intent, or was [his carrying a gun his] reflection of a reasonable means of implementing"

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95 [2007] QCA 440 at [44].

96 s 7(1)(b).

97 s 7(1)(c).

98 s 7(1)(d).

99 [2007] QCA 440 at [43].

100 *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3.

the common intention. It was neither necessary nor appropriate for the trial judge in this case to do more[101].

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101 *Alford v Magee* (1952) 85 CLR 437 at 466; *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49]; [2001] HCA 25.

92 HEYDON J. I agree with the orders proposed by Kiefel J and with the reasons given for those orders by Kiefel J and Hayne J.

93 CRENNAN J. I agree that the appeal should be allowed and that orders be made as proposed by Kiefel J for the reasons given by her Honour. I also agree with the additional reasons given by Hayne J.

94 KIEFEL J. The respondent Francis Robert Keenan, together with Stephen Edward Booth and Dion Francis Spizzirri, was charged with attempting unlawfully to kill Darren Thomas Coffey and, alternatively, intending to and doing him grievous bodily harm. The jury found the respondent not guilty of attempted murder but guilty of unlawfully doing grievous bodily harm with intent. The prosecution case was that the three co-accused and one Jeramie Jupp were parties to a plan to do serious harm to Coffey, as revenge for a wrong he had done the respondent. In the course of the attack Coffey received bullet wounds to his spine which rendered him a paraplegic. Spizzirri was alleged to have been the person who fired the shots. There was no evidence that the use of a gun had been discussed by the three accused in connection with the proposed attack. There was evidence from which the jury could conclude that the respondent knew that one of the parties to the attack went armed with a baseball-type bat.

95 There was evidence that the respondent was the instigator of the plan to attack Coffey. Coffey had collected some $6,000 or $7,000 on the respondent's behalf and failed to pay it to him. Prior to the attack upon him Coffey's girlfriend, the respondent's niece Vonda Muir, received inquiries from the respondent about the money and their whereabouts. He left text messages on her mobile telephone, in which he said that it was a small world and that he would find Coffey one day; and that "he was going to cave his [Coffey's] skull in…".

96 The evidence as to what was said about the planned attack upon Coffey came from Jupp. The respondent came to know of the whereabouts of Coffey through information provided by Jupp to Spizzirri. Jupp then met with Spizzirri and directed him to a house property at Hope Island, in south-east Queensland, where he pointed out the van in which Coffey and Muir then lived. The respondent followed in his motor vehicle. The group drove down the street and discussed their course of action. The respondent had a passenger, the person whom Jupp later identified as Booth. The respondent proposed that he would drive back to the van and let his passenger out. That person would beat up Coffey. Spizzirri and Jupp were to wait further back and drive him away when he had finished.

97 The passenger alighted from the respondent's vehicle carrying a wooden baseball-type bat and approached the van swinging it at Coffey, although Coffey was unable later to say whether the bat struck him. Five or six sounds, described respectively as "pops" or "cracking sounds" by Muir and Jupp, were heard. Coffey fell face down to the ground. The respondent and his passenger rushed back to their vehicle and quickly drove off. Jupp said that Spizzirri ran from behind the van, that they got into Spizzirri's car and drove off. Spizzirri was carrying a shortened rifle or gun. Someone in the respondent's vehicle threw the bat out of the window. A bat, which Jupp said resembled the one used by the respondent's passenger, was recovered by police. The Court of Appeal referred to it as a "less than full-sized wooden baseball bat but … well capable of being

used effectively as a weapon to inflict serious injury."[102] This is an accurate description of the bat produced on the hearing of this appeal.

98 Under cross-examination, Jupp said that he understood there was going to be some physical violence, but he thought it was to be a "punch-up" or "fisticuffs". He had not heard mention of the use of a gun or a bat. He recalled hearing someone, he thought the respondent, saying that his passenger was to give Coffey a "touch-up". It had been intended that Jupp would drive Coffey's van from the scene.

99 The respondent's co-accused were acquitted. Booth was found not guilty by the jury but they could not reach a verdict with respect to Spizzirri, who was retried and found not guilty on both counts. The case against Booth depended upon evidence identifying him as the respondent's passenger; that against Spizzirri required the acceptance of Jupp's evidence as well as that of other witnesses. These outcomes did not affect the case against the respondent, which did not depend upon the conviction of the principal offender, but upon proof of the doing of an act by that person by evidence admissible as against the respondent[103]. And it depended upon the extension of criminal responsibility for offences committed in the prosecution of a common unlawful purpose by s 8 of the *Criminal Code* (Q)[104] ("the Code").

Section 8

100 Section 8 provides:

> "When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

(In the Courts below "common plan", "the plan" and the "common intention" or "common intent" were used as shorthand expressions for the words in s 8, "a common intention to prosecute an unlawful purpose". In these reasons, for the most part, the expression "the common purpose" is used.)

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102 *R v Keenan* [2007] QCA 440 at [16].

103 *R v Barlow* (1997) 188 CLR 1 at 11 per Brennan CJ, Dawson and Toohey JJ; [1997] HCA 19, referring to *Hui Chi-ming v The Queen* [1992] 1 AC 34 at 42-43.

104 The *Criminal Code* is set out in Sched 1 to the *Criminal Code Act* 1899 (Q).

101 Section 8 is preceded by s 7, which deals with persons who are deemed to be principal offenders. It includes "every person who actually does the act or makes the omission which constitutes the offence"[105], and any person who does or omits to do an act for the purpose of enabling or aiding another to commit the offence[106], who aids another in committing the offence[107] and who counsels or procures another to commit the offence[108].

102 The purpose of s 8 is to extend the criminal responsibility of the parties to a common purpose to an offence other than that which was intended to be committed. The section limits the extension of that responsibility by requiring that the nature of the offence committed be such as to be a probable consequence of the common purpose. The test of probable consequence reflects the historical approach of the common law. The foundations for provisions such as s 8 may be traced to Sir Matthew Hale[109] and reference to it is made in *Foster's Crown Law*[110]. Responsibility does not depend upon the foresight of the parties to the common purpose. Although the common law has come to embrace such a test, the test in s 8 is an objective one[111].

103 Section 10A(2) of the Code[112] makes plain that criminal responsibility extends to any offence that is a probable consequence of the prosecution of the common purpose, regardless of what offence is proved against the principal offender.

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105 *Criminal Code*, s 7(1)(a).

106 *Criminal Code*, s 7(1)(b).

107 *Criminal Code*, s 7(1)(c).

108 *Criminal Code*, s 7(1)(d).

109 *Darkan v The Queen* (2006) 227 CLR 373 at 383 [29] per Gleeson CJ, Gummow, Heydon and Crennan JJ; [2006] HCA 34, referring to Hale, *Historia Placitorum Coronae* (1736), vol 1 at 617.

110 Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases,* 3rd ed (1809) at 369.

111 *Stuart v The Queen* (1974) 134 CLR 426 at 442 per Gibbs J, Menzies and Mason JJ agreeing; [1974] HCA 54.

112 Section 10A was inserted by the *Criminal Law Amendment Act* 1997 (Q), Act No 3 of 1997, which relevantly came into operation on 1 July 1997.

The reasoning of the Court of Appeal

104 The Court of Appeal (McMurdo P, Holmes JA and Atkinson J) set aside the conviction but did not order a retrial[113]. The Court entered a verdict of acquittal[114] for the offence for which the respondent had been convicted and for the offence of grievous bodily harm simpliciter[115]. The Court held that a jury, properly instructed, could not have excluded an inference that Spizzirri was acting independently of the common planned intention with respect to the attack upon Coffey[116].

105 The use of the gun in the attack is central to the reasons of the Court. The offence, to which s 8 referred, was the shooting. The possession or use of a gun was considered to be a necessary component of the common purpose, if it was to be concluded that the shooting was a probable consequence of that purpose. It was not necessary for the Court to consider whether, in terms of the section, the offence committed was of such a nature as to be a probable consequence of the common purpose. On the approach the Court took, that test could not be satisfied by the prosecution.

106 The trial judge initially directed the jury by reference to the terms of s 8. His Honour said that it was necessary for the members of the jury to be satisfied beyond reasonable doubt[117]:

> "(1) that there was a common intention to prosecute an unlawful plan. You must consider fully and in detail what was any unlawful purpose and what its prosecution was intended to involve;
>
> (2) *that the offence of attempted murder, or alternatively doing grievous bodily harm with intent, was committed in the prosecution or carrying out of that purpose. You must consider carefully what was the nature of any actual crime committed*; and
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> (3) that any offence in fact committed was of such a nature that its commission was a probable consequence of the prosecution of that purpose." (emphasis as added by the Court of Appeal)

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113 *R v Keenan* [2007] QCA 440.

114 *Criminal Code*, s 668E(1) and (2).

115 *Criminal Code*, s 320.

116 *R v Keenan* [2007] QCA 440 at [60].

117 *R v Keenan* [2007] QCA 440 at [22].

107 The Court of Appeal held that the trial judge misdirected the jury as to the description of the "offence … of such a nature" for the purposes of s 8. It said that it was not the "generic offence" of doing grievous bodily harm with intent, as the trial judge had directed, but "the act which rendered Spizzirri liable to punishment, namely, discharging a bullet or bullets and so causing grievous bodily harm."[118] This was said to follow from *R v Barlow*[119] and other authorities[120].

108 It was the view of the Court that an ultimate inference of guilt required that the common purpose involve the possession or use of a gun in the attack or that it expressly permit those actions. At the conclusion of its reasons for making the orders for acquittal the Court said[121]:

> "The present case is distinguishable from *Reg v Smith (Wesley)*[122] where the secondary offender knew that the principal offender, who stabbed the deceased, was carrying a knife. Had the grievous bodily harm in the present case been effected with a baseball bat rather than a gun, then s 8 may well have extended [the respondent's] criminal liability for Coffey's injuries …[123]. But that was not the evidence here."

109 Such an approach explains why the Court of Appeal considered that the trial judge's invitation to the jury, to consider that the common purpose was "to visit a serious assault upon, to occasion some serious harm to Mr Coffey", was misleading. Moreover, the Court considered that there were two alternative inferences open to the jury, which were consistent with the respondent's innocence. The common intention could have been "merely to moderately assault Coffey"[124]. At the other end of the scale it might be inferred that it was intended that he be assaulted with the bat[125]. Critical to the Court's reasoning was that there was no plan for the attackers to possess or use a firearm and no

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118 *R v Keenan* [2007] QCA 440 at [43].

119 (1997) 188 CLR 1.

120 Referring to *R v Brien and Paterson* [1999] 1 Qd R 634; *R v Johnston* [2002] QCA 74.

121 *R v Keenan* [2007] QCA 440 at [61].

122 [1963] 1 WLR 1200; [1963] 3 All ER 597.

123 Referring to *Varley v The Queen* (1976) 51 ALJR 243; 12 ALR 347.

124 *R v Keenan* [2007] QCA 440 at [51].

125 *R v Keenan* [2007] QCA 440 at [51].

evidence of a "broad plan to injure Coffey by whatever means any of the participants might find available or bring to hand"[126].

110 The trial judge had directed the jury in relation to those possible interpretations of the common purpose, and in some detail. The Court of Appeal held that the trial judge should have emphasised the competing inferences and given the direction referred to in *Knight v The Queen*[127] – which the Court stated as being that "if two inferences are reasonably open, the jury can draw the guilty inference only if it is the only inference reasonably open"[128].

111 The Court of Appeal held that the misdirections resulted in a miscarriage of justice. When it came to consider whether a retrial should be ordered, the Court considered what may have been the common purpose and concluded that Spizzirri may have been acting outside it. This conclusion was seen as supported by the abandonment of a plan to remove Coffey's van[129], presumably because that suggested that the shooting may have taken the other parties to the attack by surprise. Inherent in the Court's reasoning was the notion, earlier referred to, that the common purpose must incorporate, in some way, the use of a gun.

112 The starting point in the reasoning of the Court was the two alternative inferences – that the plan may have been only to assault Coffey by the use of fists or that it involved the use of the bat. It followed, in the view of the Court, "that Spizzirri's use of the gun was entirely outside the unlawful common plan instigated by [the respondent]."[130] The Court excluded the possibility that there had been a broader plan, one which permitted the participants to use means of their choice, on the basis that there was no evidence of such a plan[131].

113 The determination of what the common purpose was, and how that determination is reached, are matters for the jury[132]. If there had been a miscarriage of justice arising from misdirection, the Court should not have

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126 *R v Keenan* [2007] QCA 440 at [60].

127 (1992) 175 CLR 495; [1992] HCA 56.

128 *R v Keenan* [2007] QCA 440 at [51].

129 *R v Keenan* [2007] QCA 440 at [60].

130 *R v Keenan* [2007] QCA 440 at [60].

131 *R v Keenan* [2007] QCA 440 at [60].

132 *Brennan v The King* (1936) 55 CLR 253 at 261 per Starke J, 266 per Dixon and Evatt JJ; [1936] HCA 24.

undertaken those tasks for itself and made the orders for acquittal. It ought to have ordered a retrial. It is necessary then to consider the directions given.

The common purpose

114 The approach taken by the Court of Appeal to a finding of common purpose was doubtless influenced by its view that the proper identification of the offence actually committed was the shooting which caused the grievous bodily harm. That factor informed its opinion of what was necessary for the plan to be carried out, if the respondent was to be held criminally responsible.

115 In answering the questions, as to the nature of the offence committed and what was the common purpose, it is necessary to bear in mind how s 8 operates. The ultimate question which the section poses – whether the offence is of such a nature as to be a probable consequence of the common purpose – is directed to the connection between the offence and the common purpose. It is that connection which is the basis for criminal responsibility. The section's test for connection does not suggest as necessary an approach which imports the act involved in the offence into the finding of common purpose.

116 The operation of an identical provision[133] was described by Dixon and Evatt JJ in *Brennan v The King* in these terms[134]:

> "The expression 'offence … of such a nature that its commission was a probable consequence of the prosecution of such purpose' fixes on the purpose which there is a common intention to prosecute. It then takes the nature of the offence actually committed. It makes guilty complicity in that offence depend upon the connection between the prosecution of the purpose and the nature of the offence."

117 The inferences available as to what the common purpose may have been in a given case will depend upon the evidence, viewed as a whole. Section 8 does not require the connection, between the offence actually committed and the common purpose to be prosecuted, to be established at the point when the common purpose is determined as a fact. It provides for the requisite connection to be determined by the application of the test, whether the offence was the probable consequence of the common purpose, after that purpose has been ascertained.

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133 Section 8 of the *Criminal Code* (WA).

134 (1936) 55 CLR 253 at 263-264; and see *Stuart v The Queen* (1974) 134 CLR 426 at 442, 443 per Gibbs J; *R v Jeffrey* [2003] 2 Qd R 306 at 315 per McPherson JA.

118 In some cases, where physical injury or death has resulted, the evidence may identify an unlawful purpose which involves the carrying out of a specific act. In *Stuart v The Queen*[135] it was to light a fire in a nightclub, where persons would be present, in order to extort money from the operators of nightclubs in Brisbane. And the carrying out of an act, to cause physical injury, may be directed to a specific person. In *R v Johnston*[136], to which the Court of Appeal directed attention in its reasons[137], it was said[138]:

> "where there is a plan to do an act of a specific kind to a person, for example to assault him by punching him, an act of an entirely different kind, for example by shooting him, would not be an act of such a nature that its commission was a probable consequence of the prosecution of that plan."

Davies JA went on to say[139]:

> "However here … the jury [was] entitled to infer that the common intention to which the appellant was a party was to do serious harm to [the victim] by whatever means seemed appropriate to ensure his silence".

Similarly in *Brennan*[140] and in *Barlow*[141] it could be inferred that the plan involved the use of such violence as was necessary. In *Brennan* it was necessary that the caretaker be overpowered in order that the robbery succeed. The question which arose for the jury was "whether the death which ensued from the force employed can … be considered as a probable consequence"[142] of the plan. Dixon and Evatt JJ held that it could, if the purpose in which the appellant concurred "made it likely that his confederates would, if necessary, use violence and such a kind or degree of violence as would probably cause death."[143]

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135 (1974) 134 CLR 426.

136 [2002] QCA 74.

137 *R v Keenan* [2007] QCA 440 at [40].

138 *R v Johnston* [2002] QCA 74 at [33] per Davies JA.

139 *R v Johnston* [2002] QCA 74 at [33].

140 (1936) 55 CLR 253.

141 (1997) 188 CLR 1.

142 (1936) 55 CLR 253 at 264 per Dixon and Evatt JJ.

143 (1936) 55 CLR 253 at 264.

119 It is not to be expected that every plan involving the infliction of physical harm will be detailed and include the means by which it is to be inflicted. However it may be possible to infer what level of harm is intended and from that point to determine whether the actual offence committed was a probable consequence of a purpose so described.

120 An inference about the level of harm involved in the common purpose to be prosecuted may be drawn from the general terms in which an intended assault is described, the motive for the attack and the objective sought to be achieved, amongst other factors. Three cases usefully illustrate such an approach. In *Varley v The Queen*[144] the intention, similar to that stated in the present case, was to beat or "rough up" the deceased. It was held that the plan involved such violence as might encompass the use of a baton or cosh by the police involved. In *Johnston*[145], it was said that the jury could infer that the plan was to inflict serious harm upon the victim for two reasons: it was intended to punish him for threatening to go to the police and, more importantly, to ensure he did not do so. The inference was therefore possible that "a probable consequence of the prosecution of this plan would be that serious injury would be inflicted … by whatever means seemed appropriate to achieve those ends."[146] Those means, it was held, included the use of a weapon such as a knife. And in *R v Jeffrey*[147] it was decided to beat up the victim and then to do so again to prevent him remembering the first attack. It could therefore be inferred that an assault of sufficient seriousness was contemplated such that death was a probable consequence[148].

121 Where a method by which physical harm is to be inflicted has been discussed, or may be inferred as intended, it does not follow that the use of other means will prevent a person being held criminally responsible. In some cases the means intended to be used may permit an inference as to the level of harm intended. An offence involving such harm may be a probable consequence of such purpose whatever means came to be used. It may be otherwise where the intended means suggest no serious harm was intended and the offence committed well exceeds such a purpose.

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144 (1976) 51 ALJR 243; 12 ALR 347.

145 [2002] QCA 74.

146 *R v Johnston* [2002] QCA 74 at [29] per Davies JA.

147 [2003] 2 Qd R 306.

148 *R v Jeffrey* [2003] 2 Qd R 306 at 318 per Davies JA.

122 The author of *Foster's Crown Law* contemplated that criminal responsibility would follow[149]:

> "… if the principal in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution …".

In *Markby v The Queen*[150] and in *Varley*[151] the use of the weapon in question was seen to be no more than an unexpected incident in carrying out the common purpose, even if its existence was not known to the secondary offender[152].

123 In the present case the trial judge was right to direct the jury to consider the common purpose for which the prosecution contended, namely that serious harm was to be visited upon Coffey. Such an inference could be drawn from the evidence identified by his Honour, particularly that concerning the respondent's motive for the attack, vengeance, and the inferences which might be drawn as to his level of hostility to Coffey because of Coffey's duplicity. Far from limiting the inference which might be drawn about common purpose, the evidence with respect to the use of the bat supported one of a general purpose, to inflict serious harm. There can be no doubt that such a weapon is capable of inflicting grievous bodily harm, even if a gun may do so more efficiently. It would be an odd result if the respondent could be criminally responsible for grievous bodily harm inflicted by means of a baseball-type bat but not by means of a gun, when the level of harm intended was achieved.

124 There can be no difficulty, in a case such as the present, in describing the unlawful purpose as the infliction of serious physical harm. In such a case it is not correct to approach the determination of the common purpose by reference to the means and thereby determine the connection to which the objective test in s 8 is directed. Further, the test to be applied under s 8 is as to the probable consequences of the common plan, not what the parties might have foreseen. Even if the respondent had not anticipated that a gun might be used, he may nevertheless be held criminally responsible where it was used and caused the very level of harm that had been intended. In a case involving an objective of

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149 Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases,* 3rd ed (1809) at 369 and see *R v Tyler and Price* (1838) 8 C & P 616 [173 ER 643].

150 (1978) 140 CLR 108; [1978] HCA 29.

151 (1976) 51 ALJR 243; 12 ALR 347.

152 *Varley v The Queen* (1976) 51 ALJR 243 at 246 per Barwick CJ, Stephen, Mason, Jacobs and Aickin JJ agreeing; 12 ALR 347 at 353; *Markby v The Queen* (1978) 140 CLR 108 at 112 per Gibbs ACJ.

this kind the means actually used may not assume importance in the determination of probable consequence.

Directions as to inferences

125 A common purpose involving the use of the bat to assault Coffey is not different in nature from that of which the trial judge spoke, one to occasion Coffey serious harm. Such a purpose does not support a conclusion of the respondent's innocence of the offence of grievous bodily harm. An inference that something less than serious harm was intended might have qualified to support the respondent's innocence, but the drawing of such an inference required acceptance of part of Jupp's evidence and the rejection of other tenable evidence. A direction of the kind spoken of in *Knight*[153] could not be seen as necessary in these circumstances.

126 A direction such as that discussed in *Knight*[154] is not required to be given in every case[155]. The direction, that a jury can only find, by inference, an element of the offence charged if there is no other inference favourable to the accused reasonably open on the facts, may be called for when the prosecution relies upon circumstantial evidence. But it is no more than the amplification of the rule that the prosecution must prove its case beyond reasonable doubt[156].

127 The trial judge directed the jury as to the burden of proof and the drawing of inferences. His Honour was not required to go further, having regard to the evidence. The evidence of Jupp, that something like the use of fists was all that was intended, had to be weighed against his evidence of the respondent's stated intention, that his passenger "beat up" Coffey, of the respondent's possible knowledge of the intended use of the bat, his motive of vengeance, his degree of hostility towards Coffey and his threats. If this evidence was accepted the jury could not conclude that anything less than serious harm was intended.

128 The trial judge reminded the jury of Jupp's evidence and of the evidence to be weighed against it in reaching a conclusion as to what was intended. The

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153 (1992) 175 CLR 495.

154 (1992) 175 CLR 495.

155 *Shepherd v The Queen* (1990) 170 CLR 573 at 578 per Dawson J; [1990] HCA 56.

156 *Knight v The Queen* (1992) 175 CLR 495 at 502 per Mason CJ, Dawson and Toohey JJ, referring inter alia to *Peacock v The King* (1911) 13 CLR 619 at 634; [1911] HCA 66; *Plomp v The Queen* (1963) 110 CLR 234 at 243, 252; [1963] HCA 44; *Shepherd v The Queen* (1990) 170 CLR 573 at 578.

approach taken by his Honour is consistent with what was said in *R v Hillier*[157], namely that a circumstantial case is not to be considered piecemeal[158]. It is of critical importance to recognise, in considering such a case, that "all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence."[159]

129 There was another inference which the Court of Appeal considered should have been brought to the jury's attention. It concerned that part of the plan, of which Jupp spoke, which involved the removal of Coffey's van from the scene. The trial judge had suggested to the jury that the reason for such a plan was to effect the removal of evidence of the attack. The Court of Appeal considered that another inference, more favourable to the respondent, might be that it was intended to sell it to recoup the debt owed by Coffey to the respondent. The evidence as to this aspect of the plan was of marginal relevance at trial. It was not suggested by the Court of Appeal that any failure to mention such an inference could result in a miscarriage of justice. The only relevance of the plan to the reasoning of the Court was as to its abandonment. The Court considered that that fact supported an inference that the shooting was an act independent of the common plan, presumably because it suggested the shooting may have taken the other parties to the attack by surprise. It assumes no importance on this appeal.

The nature of the offence

130 *Barlow*[160] was concerned with whether a verdict of manslaughter was possible against a secondary offender where a principal offender had been convicted of murder. If the "offence", to which s 8 refers, was limited to the offence as defined in the Code, the result would be that a person could avoid liability because the principal alone had intended to commit murder, but the person had been party to a plan to commit serious harm on the deceased[161].

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157 (2007) 228 CLR 618; [2007] HCA 13.

158 *R v Hillier* (2007) 228 CLR 618 at 638 [48] per Gummow, Hayne and Crennan JJ referring to *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 535 per Gibbs CJ and Mason J; [1984] HCA 7.

159 *R v Hillier* (2007) 228 CLR 618 at 637 [46] per Gummow, Hayne and Crennan JJ.

160 (1997) 188 CLR 1.

161 As observed in *Barlow* (1997) 188 CLR 1 at 10-11 per Brennan CJ, Dawson and Toohey JJ.

131 A possible escape from the difficulty of the language of the section was identified by McPherson ACJ in *R v Jervis*[162], namely to read the word "offence" in s 8 in light of the definition in s 2[163]. "Offence" is there defined as "an act or omission which renders the person doing the act or making the omission liable to punishment". Gibbs J in *Stuart* had remarked that, to expand s 8 by reading the definition of "offence" in s 2 into it, might obscure rather than illuminate its meaning, but as McPherson ACJ observed[164], his Honour was speaking by reference to the facts of that case. The solution was applied by Brennan CJ, Dawson and Toohey JJ in *Barlow* where their Honours said[165]:

> "Section 2 of the Code makes it clear that 'offence' is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment."

132 Their Honours pointed out that the section does not refer to the jury's verdict against the principal offender, but their finding on the evidence against the secondary offender[166]. It is the conduct of the principal offender upon which s 8 fastens, the doing of the act or the making of the omission[167]. The circumstances of the offence, including its result and the state of mind which accompanied it define the offence as one of a particular "nature"[168]. Their Honours explained that the unlawful striking of a blow will constitute an offence, the nature of which depends upon whether the blow causes bodily harm or grievous bodily harm or death and upon the specific intent with which the blow is inflicted[169]. Applied to the facts of that case, and absent the intention to cause death or grievous bodily harm, the striking of the blow without justification or excuse and the resultant death rendered the principal offender liable to punishment for manslaughter. If the striking of the blow in those circumstances

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162 [1993] 1 Qd R 643.

163 *R v Jervis* [1993] 1 Qd R 643 at 652.

164 *R v Jervis* [1993] 1 Qd R 643 at 653.

165 *Barlow* (1997) 188 CLR 1 at 9.

166 *Barlow* (1997) 188 CLR 1 at 8-9.

167 *Barlow* (1997) 188 CLR 1 at 10.

168 *Barlow* (1997) 188 CLR 1 at 10.

169 *Barlow* (1997) 188 CLR 1 at 10.

and with that result were the probable consequence of the prosecution of the common purpose, s 8 would render Barlow liable for manslaughter.

133 It is correct to say, following *Barlow*, that the shooting of the gun was the act constituting the offence, the "nature" of which is derived from the grievous bodily harm it caused and the intention with which it was inflicted. The task of the jury, presently under consideration, does not involve the question which arose in *Barlow* and the construction of the section to that end. The question the jury was to address was whether the shooting which caused the grievous bodily harm was an offence of such a nature that its commission was a probable consequence of the common purpose, such as they had found it to be. It was necessary that the jury understood that composite question[170], the facts relevant to it and the relationship of those facts to such other in the application of the section's test. The task of the trial judge was to formulate the issues as questions of fact for the jury[171]. The shooting and the grievous bodily harm it caused were relevant facts and necessary to be considered in connection with the common purpose.

134 The trial judge identified the nature of the offence as the doing of grievous bodily harm and identified the question posed by the section. His Honour told the jury that they must be satisfied beyond reasonable doubt that an offence of grievous bodily harm (or attempted murder) was committed in the prosecution of an unlawful common purpose. If they were, they then had to consider whether they were satisfied beyond reasonable doubt "that the nature of the offence committed was such that its commission was a probable consequence of the prosecution or furtherance or carrying out of the common unlawful purpose". His Honour then directed the jury as to the test of probable consequence and how it might be applied. His Honour did not advert to the fact of the shooting as the cause of the grievous bodily harm, but this would have been apparent to the jury.

135 The Court of Appeal may have been concerned that if the offence was to be understood as involving the infliction of grievous bodily harm and the common purpose involved a similar objective, the jury might consider that it was obliged to conclude that that offence was a probable consequence of that plan. In such a situation the jury would have been so obliged. But such a conclusion would merely reflect the factual coincidence between offence and common purpose. That situation could only arise if the jury had found the common purpose to involve the infliction of such a level of physical harm. The means employed to achieve that level of harm, the shooting, does not assume

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170 *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ; [1952] HCA 3.

171 *Stevens v The Queen* (2005) 227 CLR 319 at 327 [18] per Gleeson CJ and Heydon J; [2005] HCA 65.

significance to such a finding. The absence of a direction that the shooting was the offence for the purposes of s 8 could not have affected the reasoning of the jury to a verdict. In these circumstances there was no miscarriage of justice[172].

136 The shooting was addressed by the trial judge at another point in the summing-up. An issue which had been raised by the defence was whether Spizzirri's possession and use of the gun could have reflected a misunderstanding of any plan, unreasonably went beyond its bounds or was a deliberate departure, on the part of Spizzirri, from it. The resolution of these questions was dependent upon the finding by the jury as to common purpose. The trial judge directed the jury's attention to these considerations. In so doing the shooting was identified as the relevant act to be considered in connection with the purpose.

The alternative charge

137 The Court of Appeal held that the charge of grievous bodily harm simpliciter ought to have been left to the jury[173]. The Court did not give detailed reasons for that opinion. It referred to the provisions which permit such a course[174] and to the decision in *R v Rehavi*[175]. In that case the evidence of an intention to assault was equivocal, but the lesser charge was not put to the jury. The Court considered that there was a real risk that the jury, being persuaded that the appellant had inflicted serious injury, would infer intent rather than acquit him.

138 A trial judge's duty to ensure a fair trial does not mean that the lesser charge must be left to a jury in every case. It is a question of what justice to the accused requires. Putting the lesser charge to a jury might jeopardise the accused's chance of a complete acquittal in some cases[176].

139 It could not be said that the evidence of intention was weak in the present case, having regard to the threats made by the respondent. The defence strategy was to suggest to the respondent's niece that they were not said in such a way, or in a context, which conveyed that they were made seriously. If the jury had

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172 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 14-15 [49] and 18 [60] per McHugh and Gummow JJ; [2003] HCA 40.

173 *R v Keenan* [2007] QCA 440 at [54].

174 *Criminal Code*, ss 575, 579(2).

175 [1999] 2 Qd R 640.

176 *R v Willersdorf* [2001] QCA 183 at [20] per Thomas JA, McPherson JA and Chesterman J agreeing.

accepted this explanation the respondent may have been acquitted altogether, whereas he may well have been convicted of the lesser charge. The fact that the respondent's counsel did not seek to have the lesser charge put to the jury confirms that a forensic advantage was sought by its omission[177]. No miscarriage of justice can be said to have resulted.

Summary

140 A jury, properly instructed, was not obliged to conclude that the shooting was an act independent of the common purpose. Such a conclusion depended upon the jury's finding as to that purpose. It was not necessary to that finding that the jury determine whether the plan of attack included the possession or use of a gun. It was open to the jury to conclude that the common purpose was to inflict serious physical harm upon Coffey and the trial judge was correct to direct the jury's attention to this inference. The means to be used in the prosecution of that purpose do not assume significance. No further direction was required as to other possible inferences beyond those that were given.

141 A trial judge should identify the offence and its nature for the jury, in connection with the ultimate question posed by s 8. However in this case no miscarriage of justice resulted from the trial judge not mentioning the shooting at this point.

Orders

142 The appeal should be allowed and the orders of the Court of Appeal of Queensland set aside. In lieu thereof it should be ordered that the appeal against conviction to that Court be dismissed. The matter should be remitted to that Court to determine the application for leave to appeal against sentence.

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177 See *Harwood v The Queen* (2002) 188 ALR 296 at 300 [16]; [2002] HCA 20.