

198. Conspiracy – Commonwealth *Criminal Code*

198.1 Legislation

[Last reviewed: September 2024]

Criminal Code (Cth)

[Section 11.5](#) – Conspiracy

198.2 Commentary

[Last reviewed: September 2024]

Section 11.5 deals with conspiracy to commit an offence punishable with more than 12 months imprisonment or a fine of 200 or more penalty units (referred to in this commentary as ‘a subject offence’).

Physical and fault elements

The *Criminal Code Act 1995* (Cth) Ch 2 codifies the general principles of criminal responsibility with respect to offences against the laws of the Commonwealth. It applies to all Commonwealth offences since 15 December 2001: s 2.2. Such offences have physical and fault elements – see ss 3.1-6.2. Judges will therefore need to consult these provisions in crafting appropriate directions.

The offence provision

Section 11.5(1) provides that it is an offence to conspire with another person to commit a subject offence. The offence of conspiracy therefore has a single physical element, namely the defendant conspired with another person to commit the subject offence: *R v LK* ([2010](#)) 241 CLR 177; [\[2010\] HCA 17](#) at [141].

The words ‘conspires’ and ‘conspiracy’ in s 11.5(1) are informed by the meaning of conspiracy at common law, subject to statutory modification: *R v LK* (2010) 241 CLR 177 at [107], [131]. A conspiracy at common law is an agreement between two or more persons to commit an offence; the agreement of the conspirators being the nub of the offence: *Ahern v R* ([1988](#)) 165 CLR 87 at 93; [\[1988\] HCA 39](#).

Because no fault element is specified for the physical element of conduct in s 11.5(1), the default element is intention: s 5.6(1). A defendant has intention with respect to conduct if the defendant means to engage in that conduct: s 5.2(1). It is therefore necessary, pursuant to s 11.5(1), that the defendant meant to enter into an agreement to commit the subject offence: *R v LK* (2010) 241 CLR 177 at [136], [141].

The clarifying role of sub-s (2)

Section 11.5(2) appears to contain elements of the offence in s 11.5(1), but, apparently because there is a risk of confusing conventional conceptions of elements with the detailed element structure in the Commonwealth's *Criminal Code*, the High Court has characterised s 11.5(2) as clarifying s 11.5(1)'s meaning of what it is to 'conspire' with another person to commit a subject offence: *R v LK* (2010) 241 CLR 177 at [133].

The qualifying effect of sub-s (7A)

One source of such confusion is that sub-s (2)(b) requires that the conspirators must have intended an offence would be committed, yet sub-s (2A) of s 11.5 provides sub-s (2) has effect subject to sub-s (7A), which provides that any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence. Special liability provisions can have the effect of dispensing with proof of fault elements such as intention or knowledge.

For example, the offence of importing a commercial quantity of a border controlled drug contrary to s 307.1 attaches absolute liability, at s 307.1(3), to the physical element that the quantity imported is a commercial quantity. That physical element therefore involves no fault element such as intention, knowledge, recklessness or negligence and no defence of mistake of fact applies to it: s 6.2(1). Yet, to prove a conspiracy to commit such an offence the prosecution must prove the scope of the agreement the defendant intended to enter was an agreement to import a commercial quantity of a border controlled drug. The tension between the need to prove that, but not being required to prove the defendant knew or believed the amount to be imported under the agreement would be a commercial quantity, was discussed in *DPP (Cth) v Kola* (2024) 98 ALJR 632 at 639; [2024] HCA 14. The High Court explained the resolution of the tension lies in the focus of a conspiracy being upon the agreement and its scope, not the subjective belief or knowledge of the defendant as to what the anticipated performance of that agreement would entail. The distinction is that there must be proof the scope of the agreement was to import a border controlled drug in a commercial quantity, not proof the defendant intended to import a particular weight of a border controlled drug or knew or believed that would occur: *DPP (Cth) v Kola* (2024) 98 ALJR 632 at 639. The High Court referred favourably to directions given in *Standen v DPP (Cth)* [2011] NSWCCA 187; (2011) 218 A Crim R 28 at [21] and *Le v The Queen* [2016] VSCA 100; (2016) 308 FLR 486 at [9], but emphasised the need for explanation of the above distinction and for trial judges to calibrate their directions to the issues arising in the particular case: *DPP (Cth) v Kola* (2024) 98 ALJR 632 at 641-642.

Acquittals of alleged co-conspirators

Section 11.5(3)(d) *Criminal Code* provides that a person may be found guilty of conspiracy to commit an offence even if 'all other parties to the agreement have been acquitted of the conspiracy'. However, that provision is subject to s 11.5(4)(a) *Criminal Code* which provides that '[a] person cannot be found guilty of conspiracy to commit

an offence if all other parties to the agreement have been acquitted of the conspiracy and a finding of guilty would be inconsistent with their acquittal’.

Overt act

When considering the case on a particular count against a particular defendant, the prosecution must prove at least one ‘overt act’ beyond reasonable doubt and the jury must be in unanimous agreement as to which overt act has been so proved and by whom the overt act was committed: see *R v Lake* [2007] QCA 209 at [67] per Holmes JA. The other members of the Court agreed with Holmes JA that ‘the status of the commission of an overt act as an ingredient of the offence convinces me that, as an essential element requiring proof, it also required unanimity’. This statement was cited with approval in *R v Viet Dung Ong* [2007] VSCA 206; (2007) 176 A Crim R 366 at [25].

The prosecution must also prove that the one overt act was committed with the intention to commit the overt act. This can be satisfied if the one overt act is committed by any party to the agreement. It does not have to be committed by the defendant. Section 11.5(c) *Criminal Code* does not require ‘that an overt act be established against each defendant, merely that a party to the agreement have committed an overt act’. It follows that it is not necessary to direct the jury as to overt acts available against each particular defendant: see *R v Lake* [2007] QCA 209 at [62].

198.3 Suggested Direction

[Last reviewed: September 2024]

In general terms, a person who conspires with another person to commit a Commonwealth offence is guilty of the offence of conspiracy to commit that offence.

It is an offence under Australian law for a person to [specify the offence the subject of the conspiracy e.g. import narcotic goods into Australia]. For a defendant to be guilty of conspiracy to commit [specify the offence], the prosecution must prove beyond reasonable doubt that:

- 1. the defendant entered into an agreement with one or more other persons to commit the offence of [specify the offence]; and**
- 2. at the time of the agreement the defendant meant to enter into the agreement; and**
- 3. the defendant and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and**

4. the defendant or at least one party to the agreement must have committed an overt act pursuant to the agreement.

The prosecution must prove each of these matters beyond reasonable doubt. They are cumulative requirements for the offence of conspiracy.

It is not an element of the offence of conspiracy that the offence intended to be committed is in fact committed. And it is irrelevant that performance of the offence the subject of the conspiracy is impossible.

A person cannot be found guilty of conspiracy to commit an offence if, before the commission of the overt act pursuant to the agreement, the person withdrew from the agreement and took all reasonable steps to prevent the commission of the offence.

(The suggested direction goes on to further explain each of the four elements set out above):

1. The defendant entered into an agreement with one or more other persons to commit the offence of [specify the offence].

Looking at the elements of the offence of conspiracy, the prosecution must prove beyond reasonable doubt that the agreement that the defendant entered into was with at least one of those persons identified in the charge. The prosecution does not need to prove that the agreement by the defendant was with all the named persons.

An agreement does not have to be formal. It can be informal or understood. The agreement may have already been in existence when the defendant entered into it. For example, a person may enter into an agreement by indicating his or her agreement to the purpose of the agreement already entered into by other parties to the agreement. A person can enter into an agreement with one or more persons without knowing how many people have previously entered into the agreement or the identity of the other persons.

Parties can join or leave a conspiracy at different times according to their role and level of involvement. It is not necessary that each participant know all of the details of how the scheme was to be carried out. It is not necessary that all parties be in direct communication with each other. They may not even know each other.

You must, however, be in unanimous agreement as to which person the prosecution has proved that the defendant entered into the agreement with. This element of the offence is not satisfied unless the prosecution proves beyond reasonable doubt that the defendant intended to enter into the agreement with one or more of those alleged

co-conspirators. The defendant should only be taken to have intended to have done so if [he/she] *meant* to do so.

The agreement must have been to commit the offence of [specify the offence]. Such an offence, if committed, would be constituted by [here explain the elements of the subject offence and identify any issues of fact for the jury's resolution as to whether the agreement was to commit an offence involving such elements].

2. At the time of the agreement the defendant meant to enter into the agreement.

This element requires you to be satisfied beyond reasonable doubt that in entering into the agreement the defendant did so intentionally, that is, that the defendant meant to enter into it. [If this element is in issue, here identify the issues of fact the jury must resolve to decide whether the element has been proved].

3. The defendant and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement.

A further element of the offence of conspiracy that the prosecution must prove beyond reasonable doubt is that both the defendant and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement. You must be in unanimous agreement as to which other party to the agreement the prosecution has proved also had the intention with the defendant that an offence would be committed pursuant to the agreement.

(If the intention is qualified by the operation of the subject offence's special liability provisions it will be necessary to explain how that bears upon this element but not upon the agreement's requisite scope. The following paragraph provides an example of this, where the offence is importing a commercial quantity of a border controlled drug).

For example, in the present case the alleged conspiracy was to commit the offence of importing a commercial quantity of a border controlled drug. In proving the part of that offence which requires the amount of drug to be a commercial quantity, it would not be necessary to prove the alleged offender actually knew or intended that the border controlled drug being imported was a commercial quantity. Therefore, in considering this element of intention in the context of a conspiracy to import a commercial quantity of a border controlled drug, it is unnecessary to prove an intention as to the quantity of the border controlled drug. It is sufficient to prove an intention that the importation of a border controlled drug would be committed. However, it is essential, as already discussed, that the scope of the agreement

entered into was to import a commercial quantity of a border controlled drug.

4. The defendant or at least one party to the agreement must have committed an overt act pursuant to the agreement.

The offence of conspiracy is more than just the agreement to commit the offence with the requisite intention of the parties. The offence of conspiracy is incomplete unless either the defendant or one other party to the agreement has committed an overt act pursuant to the agreement. An overt act is simply an act done pursuant to the agreement. Another way of expressing an overt act done pursuant to the agreement is a step that is taken towards carrying out the agreement.

The prosecution has to prove at least one overt act beyond reasonable doubt, and you must be in unanimous agreement as to which overt act has been so proved and by whom the overt act was committed. The prosecution must also prove that the one overt act was committed with the intention to commit the overt act. This can be satisfied if the one overt act is committed by any party to the agreement. It does not have to be committed by the defendant.

[Here identify the overt act(s) relied upon and any issues of fact which the jury must resolve in considering this element.]

The circumstantial evidence relied upon by the prosecution to prove the elements of the offence of conspiracy must be such that any reasonable hypothesis consistent with innocence must be excluded. It is for the prosecution to exclude beyond reasonable doubt all hypotheses raised by the whole of the evidence consistent with innocence. The overt acts alleged against a defendant when taken with any relevant surrounding circumstances must be incapable of rational explanation, except as indicating the conspiracy alleged by the prosecution.