

Conspiracy – Commonwealth Criminal Code s 11.5

The Criminal Code 1995 (Cth) Ch 2 codifies the general principles of criminal responsibility with respect to the offences against the laws of the Commonwealth. It applies to all Commonwealth offences since 15 December 2001: s 2.2.

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 eg 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; and**
- 2. 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**
- 3. the defendant or at least one party to the agreement must have committed an overt act pursuant to the agreement.¹**

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.² And it is irrelevant that performance of the offence the subject of the conspiracy is impossible.³

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

¹ Section 11.5(2) Criminal Code.

² 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, “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”.

³ Section 11.5(3)(a) Criminal Code.

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.

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.⁴

The defendant entered into an agreement with one or more other persons

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 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. A person has intention with respect to specified conduct, if the person means to engage in that conduct.

⁴ Section 11.5(5) of the Criminal Code.

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.

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 not complete until either the defendant or at least one other party to the agreement has committed an overt act pursuant to the agreement. Against each defendant in respect of each charge there are many overt acts that are relied on by the prosecution. When it comes to considering the case on a particular count against a particular defendant, 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.⁵ 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.⁶

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.

⁵ See *R v Lake* (2007) 174 A Crim R 491, [2007] QCA 209 at [67] per Holmes JA with whom the other members of the Court agreed 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”.; cited with approval in *R v Viet Dung Ong* (2007) 176 A Crim R 366 at [25].

⁶ Section 11.5(c) of the *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) 174 A Crim R 491 at [62].