HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27A—Appellant's submissions

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Edward Moses Obeid**
Appellant

and

The King
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. The submissions are in a form suitable for publication on the internet.

Part II: **Question in the Present Appeal**

2. The question in the present appeal is whether the Crown case was defective in circumstances where it did not allege an agreement for the Minister, Mr Macdonald, to engage in particular conduct that amounted in misconduct in public office.

Part III: Notice under the *Judicary Act*

3. No notice is required under section 78B of the *Judicary Act 1903* (Cth).

Part IV: **First Instance and Appeal Judgments**

4. The decision of the Court of Criminal Appeal (**CCA**) is reported as *Macdonald v R; Obeid v R; Obeid v R* [2023] NSWCCA 250; 112 NSWLR 402; 412 ALR 167 (**J**) (note: paragraphs [99] to [560] are not included in the New South Wales Law Reports).
5. The primary judgment is reported as *R v Macdonald; R Edward Obeid; R v Moses Obeid (No 17)* [2021] NSWSC 858; (2021) 290 A Crim R 264 (**TJ**)

(Note: paragraphs [160] to [2045] are not included in the Australian Criminal Reports).

Part V: **Narrative Statement of Facts**

6. The Appellant (**Mr Edward Moses Obeid**) adopts the factual summary in Part V of the Submissions of Moses Edward Obeid in S89/2025.

Part VI: **Summary of Argument**

7. The Appellant adopts the submissions of Moses Edward Obeid in S89/2025 and Ian Michael Macdonald in S93/2025.
8. Any reference and or footnote relating to 'AABFM' is the Book of further material filed by Moses Edward Obeid in S89/2025 to which the Appellant Edward Moses Obeid S88/2025 relies upon.
9. The Appellants were arraigned on an Indictment[1] which alleged:

> For that they, between about 1, September 2007 and about 31 January 2009 at Sydney and elsewhere in the State of New South Wales, conspired together that Ian Micahel MacDonald would, in the course of or connected to his public office as Minister for Mineral Resources in the Executive Government of the State of New South Wales, wilfully misconduct himself, without reasonable cause or justification, by doing acts:
>
> (a) in connection with granting of an exploration licence at Mount Penny in the State of New South Wales; and
>
> (b) concerning the interests of Edward Moses Obeid and/or Moses Edward Obeid and/or their family members and/or associates; and
>
> (c) knowingly in breach of:
>
> (i) his duties and obligations of impartiality as a Minister in the Executive Government of the State of New South Wales; and/or
>
> (ii) his duties and obligations of confidentiality as a Minister in the Executive Government of the State of New South Wales,
>
> such misconduct being serious and meriting criminal punishment having regard to the responsibilities of the Office Mr Macdonald

[1] Day 1, 12 February 2020, **AABFM1 119 – 120; ACAB 6.**

occupied as Minister for Mineral Resources and his responsibilities as the holder of that Office, the importance of the public objects which the Office and Officeholder serve and the nature and extent of the departure from those objects.

10. It is not controversial that the prosecution were required to prove that there existed a conspiracy in the terms alleged in the Indictment and not a conspiracy different from that alleged.[2]
11. The Crown conceded during the Appellant's closing address[3] that elemental to its case was that the conspiratorial arrangement was forged before 9 May 2008 and not at some time before 31 January 2009. The Crown did not seek to amend the Indictment.
12. Consistent with authority the Crown maintained that "serious" misconduct (described as a "technical"[4] fifth element) was to be evaluated by having regard to "the nature and extent of the departure"[5] from the public objects which Ian Macdonald (Macdonald) was to serve as Minister.
13. Yet at trial the Crown disavowed that it was required to prove that the appellants agreed the commission of particular future conduct (or acts) on Macdonald's part which constituted a serious departure from these objects.[6]
14. The agreement framed variously in the disjunctive alleged a series of possibilities not all of which compelled consensus including that Macdonald would breach a duty of impartiality.
15. A party to the above agreement may only have understood and intended that Macdonald act in ways "connected" with his public office and not "in the course of it" including concerning the interests of any number of stakeholders relating to the grant.

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[2] *Gerakiteys v R* (1984) 153 CLR 317; *R v Coles* [1984] 1 NSWLR 726; *R v Ongley* (1940) 57 WN (NSW) 116; *DPP v Johnson & Ors (Ruling No. 7)* [2007] VSC 579; *R v Caldwell* (2009) 22 VR 93).
[3] Appellant Closing, Day 74, 10 February 2021, T3818: 48 – T3819: 16 **AABFM 2 470 – 471**; Crown Submissions, Day 74, 10 April 2021, T3823-3825 **AABFM 2 475**, particularly T3823.27-31 **AABFM 2 475**, and T3824.4-7 **AABFM 2 476** ; T3824.4-7 **AABFM 2 476** , T3828.1-T3829.13
[4] CCS [11] **AABFM 2 655**, [727] **AABFM 2 807**, [736] **AABFM 2 809**.
[5] Crown Opening, Day 3, 17 February 2020, T134.21-27 **AABFM 1 252.**
[6] TJ [101] **ACAB 44;** TJ [1876] **ACAB 422**.

16. Neither the public object, or the nature or extent of the departure from it, stood to be evaluated by the terms of the Indictment.
17. The elemental improper purpose which the Crown committed itself to proving was a consensus that Macdonald would not commit the misconduct but for the improper purpose of "*advancing or benefitting Edward Obeid and/or Moses Obeid and/or members of their family and/or associate.*"[7]
18. Relatedly, it was conceded by the Crown Prosecutor, in response to an observation from the trial judge that the prosecution had been "consistently less than concrete in identifying the advantage"[8] that, at such time as the meeting of the minds was forged it was not able to be contemplated, "how that misconduct would be used to best advantage."[9] In any event it was not the Crown case that as at 9 May 2008 the grant of an exploration licence over Obeid property interests at Mt Penny was "an unambiguously positive advantage" generally or in this case.[10]
19. The Indictment alleged no identifiable or partial advantage to one or more persons named in it.
20. The supposedly criminal agreement alleged a consensus that Macdonald would take steps merely "concerning the interests" of some persons (Edward or Moses Obeid) or other persons, a subset of which remained unidentified. This nebulous agreement was incapable of satisfying the *mens rea* the Crown undertook to prove. Many legitimate exercises of public authority or power by a public servant confer incidental advantages on one of more stakeholders.
21. Neither in opening or in closing did the Crown Prosecutor articulate how an unidentified breach of a Ministerial "duty of confidentiality" merely connected with public office, undertaken in relation to the granting of a lawful exploration licence, concerning the unidentified interests of unidentified associates of the Obeids satisfied the elements of the common law offence.
22. The agreement alleged defied articulation as to what was to be done or not to be done.

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[7] Crown Closing, Day 70, 1 February 2021, T 3622: 45-48 **AABM 1 270.**
[8] Crown Closing, Day 70, 1 February 2021, T3663: 43 – 3663: 25 **AABM 1 311.**
[9] Crown Closng, Day 70, 1 February 2021, T 3663: 19-25 **AABM 1 311.**
[10] Crown Closing, Day 71, 2 February 2021, T3702: 40 **AAMB 1 350**.

23. No particulars were provided which removed or diminished the difficulties in an Indictment framed in this way where "the crime" was not identified. The identification of overt acts did not define the crime.

24. The CCA was in error to hold[11] that the above matters described as the "three descriptive limbs of the acts which were agreed to be done" namely doing an act or acts "in connection with the granting of an exploration licence at Mount Penny", "concerning the interests of [the Obeid family]" ("which may be understood" to mean an unidentified advantage) in breach of Macdonald's obligations of impartiality and/or confidentiality "constituted the mental element of the predicate offence".

25. The nature of the breach of duty was unclear, the extent of its deviation from a proper objective or objectives was unclear, the persons whose interests related to the conspiracy were unclear, what those interests might have been were unclear and the conspiracy itself had no identifiable lawful or unlawful objective as at 9 May 2008.

26. The Crown maintained in closing address that it had established that "the misconduct" was serious, not by reference to the alleged consensus articulated on the Indictment, but by reference to conduct later undertaken by Macdonald which went beyond the alleged consensus for example by identifying things Macdonald did in an alleged breach of both duties during the course of his public office[12] yet, this was not the consensus mandated by the agreement alleged on the Indictment. The five factors[13] from which the Crown contended an inference was to be drawn beyond a reasonable doubt that the meeting of the minds contemplated serious misconduct did not define the crime on the Indictment.

27. It is not sufficient to plead a breach of duty in unidentified ways with unidentified objective to satisfy the elements of the common law offence. The objects of a public office and the potential for breach of duties include such a wide and diverse variety of circumstances that many could not possibly justify a charge of criminal misconduct. Unlawfulness cannot simply be assumed.

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[11] CCA J [27] **ACAB 667.**
[12] Crown Closing, Day 71, 2 February 2021, T3712: 48 – 3713: 15 **AABFM 1 360 – 361.**
[13] Crown Closing, Day 71, 2 February 2021, T3713: 1 – 44 **AABFM 1 361.**

28. In *Maitland v R; Macdonald v R* [2019] NSWCCA 32 at [88] Bathurst CJ made the observation that dealing with a charge of misconduct in public office " it is incumbent to set out precisely what needs to be proved" and cited with approval what was said in *Boulanger v The Queen* (2006) 2 SCR 49, at [68]-[69] that: *"[p]ublic officers, like other members of the public, are entitled to know where the line lies that distinguishes administrative fault from criminal culpability". Equally, it is important that it be made clear to juries where the line is to be drawn."*[14]
29. It is not unfamiliar to the criminal law that an element of an offence is comprised by wilful conduct of a serious kind for example the intent to inflict grievous bodily harm, unlawful and dangerous act manslaughter or conduct warranting criminal punishment in the context of criminal negligence manslaughter.[15]
30. It has been observed that "the word "criminal" in any attempt to define a crime is perhaps not the most helpful" per Lord Aitkin in *Andrews v Director of Public Prosecutions* [1937] AC 576 at [582] but it is plain that in order to establish criminal liability for "misconduct" in public offic whatever epithet is used it is the nature and intent of the marked departure from the standards expected of the public officer which stands to be evaluated.
31. An agreement to breach a duty in unidentifiable ways including in circumstances envisaged not to be inherent to the office does not for these reasons alone amount to an criminal conspiracy.
32. In the context of criminal negligence and unlawful and dangerous act homicide a breach of regulations does not, for that reason alone, constitute an unlawful state of affairs sufficient to found a charge of manslaughter; *Andrews v Director of Public Prosecutions, op.cit.* at 584 - 585, *R v Pullman (1991)* 25 NSWLR 89 at 97. A breach of a duty, without more, does not define the qualitative nature of the act crime and by analogy a mere allegation of a "breach" of police guidelines or building codes or road rules which do not permit an evaluation of risk can not amount to gross negligence or criminal negligence.

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[14] *Maitland v R; Macdonald v R* [2019] NSWCCA 32 at [88].

[15] In respect of the latter see *Nydam v R* [1977] VR 430 at [445], *Queen v Lavender* (2005) 222 CLR 67 and *Burns v the Queen* (2012) 246 CLR 334.

33. There is no point of principle that a conspiracy to commit such offences is made out by something less than an agreement to commit particular conduct of this elemental kind.

34. If it was assumed that the Appellants agreed that Macdonald would breach his duty and obligations of confidentiality as a Minister in the Executive Government in unidentified ways in connection with the granting of an exploration licence at Mount Penny concerning the unidentified interests of unidentified associates of either Edward or Moses Obeid including to advance those interests there is not established an agreement to commit the common law offence of misconduct in public office.

35. This includes because an agreement of this kind does not establish a consensus as to future misconduct amounting to a serious departure from Ministerial objectives.

36. An Indictment of this kind fails to identify for decision the scope of the agreement and the scope of the departure measured against the influence of other objectives and thereby fails to allege an agreement to carry out misconduct of a kind that warranted criminal punishment.

37. There can be no agreement to commit misconduct in public office without a meeting of the minds as to particular conduct, so as to enable the decisionmaker to evaluate whether the conduct is serious and warranting criminal punishment.

38. As Dhanji J observed in *R v MacDonald; R v Maitland* [2022] NSWSC 1765:

> *"It could be suggested that, where the improper purpose is a minor consideration in the decision made, but, as a result of the balancing of the more significant considerations, has a determinative impact, the conduct is unlikely to be regarded as serious.* This issue does not need to be decided. The Court of Criminal Appeal was, as explained above, only concerned with the element of misconduct. For the reasons given above, I am of the view that, consistent with the Court's reasons, that element is to be expressed as I have indicated. It might be noted in passing, however, that the extent to which the decision was motivated by an improper purpose fits squarely within the notion of misconduct. *Whether the conduct related to something of importance, or something relatively trivial, such as the private use of a relatively minor item of stationery,*

would seem to fit more neatly within this element concerned with the seriousness of the conduct."

39. The conspiracy charged in the Indictment and the case the Crown left to the tribunal of fact failed to allege an agreement to commit criminal misconduct by 9 May 2008.
40. The Indictment, and the Crown case articulated in closing, envisaged acts and agreeements after 9 May 2008 as giving content to the "*fifth element*."

Part VII: Orders Sought

41. (1) Appeal allowed; (2) set aside the orders made by the CCA on 6 October 2023 and quash the conviction; (3) Verdict of acquittal be entered.

Part VIII: **Estimate of Time**

42. 30 minutes will be required.

Dated: 13 August 2025

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