HIGH COURT OF AUSTRALIA

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File Number:	S89/2025
File Title:	Obeid v. The King
Registry:	Sydney
Document filed:	AMENDED Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	01 Aug 2025

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Moses Edward Obeid
Appellant

and

The King
Respondent

AMENDED 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 to misconduct in public office.

Part III: Notice Under the *Judiciary Act*

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

Part IV: First Instance and Appeal Judgments

4. *R v Macdonald* (2021) 290 A Crim R 264; *Macdonald v The King* (2023) 112 NSWLR 402; (2023) 412 ALR 167.

Part V: Narrative Statement of Facts

Factual background

5. Given the way the Crown framed the alleged conspiracy, the factual background may be stated simply and generally. As at 2008, exploration for minerals in NSW could only be conducted with the approval of the Minister. Those interested in particular areas could identify the area, express interest to the Minister or the Department of Primary Industries (**DPI**) to release the area and a decision could be made to release the area (by tender, by expression of interest (**EOI**) process or

direct allocation). The Minister and DPI could also identify areas for release and regularly released information about coal reserves to the industry. As at 2008, the State had financially benefitted from the release of two 'large' exploration areas but had limited financial capacity to prove up and release other 'large' areas in a timely way. Macdonald was an energetic Minister with enthusiasm for the coal industry in NSW. While market conditions were good, Macdonald progressed a policy with the DPI to release a package of 'small' and 'medium' exploration areas by way of an EOI process. That process was prepared in early to late 2008 and released in September 2008. One of the 11 areas was described as 'Mount Penny' and comprised a smaller eastern part of a larger area referred to as 'North Bylong-Mount Penny'. Releasing that part left to the State the option of proving up, releasing and profiting from the more valuable remaining portion in the west.

6. From 2007, the Obeid family owned an attractive rural grazing property in the Bylong Valley called Cherrydale. Cherrydale was partly within what became the Mount Penny coal release area. The Crown did not allege that the purchase of Cherrydale was part of the alleged conspiracy. The Crown instead relied on what happened primarily from June 2008 onwards, namely, where Moses, Paul and Gerard Obeid took steps to procure two smaller adjacent properties, Donola and Coggan Creek and form a joint venture with mining company, Monaro Mining.

7. In late 2008, Monaro Mining expressed interest in various coal release areas including the Mount Penny area. In January 2009, Macdonald re-opened the process to allow additional parties to express interest. In early 2009, Monaro was forced to withdraw its application and the Obeid interests instead partnered with Cascade Coal. Cascade Coal was successful and, later down the track, bought out the Obeid interests in the venture following media alleging Obeid involvement.

The Crown Case

8. The accused was charged with a single count of conspiracy to commit misconduct in public office. The Crown sought to prove that conspiracy principally by a list of nine instances of alleged misconduct said to have been committed between 9 May 2008 and January 2009. The first and second acts of misconduct alleged inquiries were made by Macdonald about the extent and nature of coal reserves in the Mount Penny area on 9 and 14 May 2008. The third and fifth misconduct

alleged Macdonald gave directions to the DPI relevant to the Mount Penny area and the EOI process. The fourth and sixth to ninth acts of misconduct alleged Macdonald shared documents or information in relation to the forthcoming EOI process with persons associated with Edward or Moses Obeid.

9. The Crown alleged an agreement that had to be in place prior to the first alleged misconduct on 9 May 2008.[1] No verdict was available on any other basis.[2]

10. Notwithstanding the list of nine alleged acts of misconduct (all of which occurred after the agreement alleged was said to be in force), the alleged agreement was not to commit that particular conduct (or indeed any particular conduct) but was an agreement *"at a much higher level"*.[3] It was a matter for Macdonald what misconduct would be committed and the other parties would not necessarily have had a shared understanding of what the misconduct would be or what duties Macdonald would breach. The Crown alleged a single conspiracy that Macdonald would breach his duties of impartiality *"and/or"* his duties of confidentiality.[4] The Crown said *"the conspiracy is for [Macdonald] to commit misconduct in public office. As to the method for that misconduct, that is a matter of particulars"*.[5] The Crown said *"[a]s to the method that Macdonald chose and whether that constituted a breach of impartiality or a breach of confidentiality, it would not be necessary for all parties to have one shared understanding of how it was, that is the method that would be used, by which he committed the misconduct in public office"*.[6] The high level agreement was to effect the *"common object or purpose in the way described in the indictment"* and it was never *"the Crown case that the conspirators had agreed on a particular method to achieve that objective"*.[7] The conspirators *"didn't and couldn't have known what would be the particular acts of misconduct that Macdonald would commit*

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[1] Crown Opening, Day 1, 12 February 2020, T26-32 **AABFM 1 144**; Crown Closing Submissions [136] **AABFM 1 144.**

[2] 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 **AABFM 2 480**.

[3] Crown Submissions, PT Day 4, 9 April 2019, T151.37-42 **AABFM 1 55.**

[4] Crown Submissions, 10 February 2020, T18.8-10 **AABFM 1 97.**

[5] Crown Submissions, 10 February 2020, T36.4-9 **AABFM 1 115**. See also Day 1, T26-32 **AABFM 1 105.**

[6] Crown Submissions, 10 February 2020, T36.11-15 **AABFM 1 115.**

[7] Crown Submissions, Day 69, 26 November 2020, T3611.8-14 **AABFM 1 259.**

in furtherance of the conspiracy".[8] Nor did Macdonald know how the financial interests of the Obeid family *"and/or"* their associates were to be advanced; such a contention was *"too speculative or proscriptive"*.[9]

11. The Trial Judge understood that the indictment was deliberately framed to make clear that the agreement was not that Macdonald would commit *"separate acts of misconduct of a discrete kind or character or in any particular sequence"* nor that he would misconduct himself *"to achieve the discrete objective that an EL would be granted at Mount Penny…"*.[10] The agreement *"did not contemplate that Mr Macdonald would arrange for or ensure that an EL would be granted at Mount Penny or that he would do anything, in particular, to achieve that objective"*.[11] The language in the indictment used broad language: *"in connection with the granting"*, *"concerning the interests of"* the Obeid family *"and/or"* associates and in breach of duties of impartiality *"and/or"* confidentiality.

12. At least as at 9 May 2008, there was no EL at Mount Penny under contemplation by the DPI,[12] it was not the Crown case that Macdonald intended to grant an EL over Mount Penny[13] and it was not the Crown case that the Obeids necessarily wanted an EL over their property.[14] The Crown said that the initial inquiries on 9 and 14 May 2008 were to *"obtain information"* that Macdonald did not already know[15] – and did not put the inquiries as being in furtherance of a pre-conceived goal to release the area.[16] Following Macdonald's general inquiry for information about the area on 9 May 2008,[17] information was provided to Macdonald in the form of briefing note indicating that there were *"significant coal resources"*, the

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[8] Crown Closing, Day 70, 1 February 2021, T3663.33-36 **AABFM 1 311.**
[9] Crown Closing, Day 70, 1 February 2021, T3663.43-47 **AABFM 1 311.**
[10] TJ[1874] **AB1 421**.
[11] TJ[1874] **AB1 421**.
[12] TJ [1875] **AB1 421**.
[13] Crown Closing, Day 71, 2 February 2021, T3695.22-33 **AABFM 1 343.**
[14] The Crown relied in closing to prove an agreement prior to 9 May 2009 on the fact that that having an exploration licence over a landholder's property was potentially harmful and not self-evidently advantageous to a landholder: T3701.25-29 **AABFM 1 349,** T3702.38-T3703.16 **AABFM 1 350.**
[15] CCS [178], [183] **AABFM 2 702**. See also Crown Closing, Day 71, T3693.16-29**AABFM 1 341.**
[16] On the narrative submitted by the Crown, a discussion about releasing the area was not suggested to occur until after the first act of misconduct on 12 or 13 May 2008: CCS [180] **AABFM 2 702**. It was the response to the 9 May 2008 inquiry that the Crown says *"prompted"* the further request as to whether or not they could be released: Crown Closing, Day 71, 1 February 2021, T3688.15-19 **AABFM 1 336.**
[17] TJ [761] **AB1 182**.

DPI held an exploration licence and *"exploration may identify an area suitable for tender"*.[18] The follow up inquiry on 14 May 2008 asked for more details and asked whether it was possible for the DPI to open its holdings for tender.[19]

13. The Crown case was premised on proving as a *Shepherd v The Queen*[20] fact that Macdonald knew that Edward Obeid owned property in the Mount Penny area.[21] It was the counter to an earlier and different Crown case premised on Edward Obeid concealing his personal ownership of assets while making inquiries.[22]

14. Two further matters of relevance are important about how the Crown put its case. Both flow from the fact that the conspiracy did not contemplate the commission of particular conduct. ***First***, while the Crown accepted that to establish the substantive offence of misconduct in public office it was required to establish that Macdonald would not have committed the acts of misconduct 'but for' an improper purpose (following *Maitland v R*[23]), the failure to identify particular conduct meant that it was not said to be the subject of the agreement that Macdonald would commit such conduct in a 'but for' sense.[24] The particulars document furnished by the Crown suggested only that Macdonald in fact committed the nine particularised acts of misconduct with such a purpose; not that the parties agreed that he would so misconduct himself.[25]

15. ***Second***, while the Crown accepted that to establish the substantive offence of misconduct in public office it was required to prove the fifth element of the offence (that the conduct was serious and meriting criminal punishment), the failure to identify particular conduct meant that it was again not said to be the subject of the agreement that Macdonald would commit such conduct. The Crown contention was that the fifth element was not an element *"in the technical sense"* or *"in the classic sense"*.[26] The Crown case was that it was only necessary that

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[18] TJ [776] **AB1 185**.
[19] TJ [780] **AB1 186**.
[20] *Shepherd v The Queen* (1990) 170 CLR 573.
[21] TJ[292] **AB1 86**, [295] **AB1 86**, [813] **AB1 194**.
[22] *Obeid v R* (2017) 96 NSWLR 155 (***Obeid v R* (2017)**) at [18]-[19].
[23] *Maitland v R* [2019] NSWCCA 32 (***Maitland***) at [72]-[73].
[24] E.g. TJ [83] **AB1 39**; Crown Submissions, Day 69, 26 November 2020, T3615.12-23 **AABFM 1 263**; Crown Closing, Day 71, 2 February 2021, T3696.48-T3697.1 **AABFM 1 344**.
[25] Paragraph 3 sets out the misconduct; paragraph 4 alleges that Macdonald would not have *"acted as alleged in paragraph 3 above"* but for the improper purpose.
[26] CCS [11] **AABFM 2 655**, [727] **AABFM 2 807**, [736] **AABFM 2 809**.

the acts Macdonald ultimately committed had such a character.[27]

Part VI: **Summary of Argument**

16. The CCA erred in finding that the Crown alleged a case capable at law of amounting to a conspiracy to commit misconduct in public office. There was no case at law and the CCA should have entered verdicts of not guilty.

Agreement to commit an offence, not conduct amounting to an offence

17. The CCA accepted that the Crown case did not allege an agreement that Macdonald would commit specified conduct that amounted to misconduct in public office. The CCA acknowledged the conspiracy alleged was *"unusual"* in that it was an agreement for one person (not any others) to commit an offence[28] and accepted that the agreement had to be in place prior to 9 May 2008.[29] The CCA also accepted the Crown *"did not provide a statement of the acts which it was agreed Mr Macdonald would undertake; rather, it relied upon establishing an agreement to undertake acts falling within the cumulative elements of the charge"*.[30] Leaving for the moment the meaning of the phrase *"cumulative elements of the charge",* it can be seen even from this early starting point that the alleged agreement is contrary to basic principles of conspiracy, themselves informed by the framework of a fair trial.

18. The common law offence of conspiracy only captures agreements to commit certain kinds of conduct.[31] For there to be a common law conspiracy to commit an offence, there must be an agreement to engage in conduct that amounts to an offence. The offence is often identified by reference to *Mulcahy v The Queen*[32] as an *"agreement by two or more people to do an unlawful act, or to do a lawful act by unlawful means".* The second limb is superfluous as both require an agreement

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[27] Indictment **AB1 6;** Crown Submissions, 6 February 2020 **AABFM 2 641**; CCS [727] **AABFM 2 807**, [736] **AABFM 2 809** , [741] **AABFM 2 810**; Crown Closing, Day 71, T3705.41-44 **AABFM 1 353** and T3706.3-7 **AABFM 1 354**; TJ[20]-[21] **AB1 25**.
[28] CCA [4] **AB2 668**.
[29] CCA [14] **AB2 671-672**.
[30] CCA [14] **AB2 671-672**.
[31] *R v Cahill* [1978] 2 NSWLR 453 at 458; *DPP v Withers* [1975] AC 842 (***Withers***) at 858, 859-862, 863, 969 and 873-874; *R v Bhagwan* [1972] AC 60 at 79-81.
[32] *Mulcahy v The Queen* (1868) LR 3 HL 306 (***Mulcahy***) at 317. See *R v Kidman* (1915) 20 CLR 425 at 446-447; *R v Boston* (1923) 33 CLR 386 (***Boston***) at 396; *R v Rogerson* (1992) 174 CLR 268 (***Rogerson***) at 281; *Peters* (1998) 192 CLR 493 (***Peters***) at 513-514; *The Queen v LK* (2009-2010) 241 CLR 177 (***LK***) at [62]; *Trudgeon* (1988) 39 A Crim R 252 (***Trudgeon***) at 254, 256.

to do an unlawful act.[33] The accused must intend both to enter into the agreement and intend that the 'unlawful act' be carried out pursuant to the agreement.[34] It is the intended conduct that makes a conspiracy unlawful,[35] the intended conduct which must be the subject of the agreement by the parties[36] and the intended conduct which provides the rationale for criminalising the preceding agreement.[37]

19. To have intended that the 'unlawful act' be carried out, the accused must have knowledge of the essential facts and circumstances that make the relevant conduct criminal.[38] Recklessness that, advertence to the possibility of, or even knowledge of the probability that, an offence will be committed is not sufficient.[39] That is so even where the substantive offence may provide for a lesser state of mind.[40] An agreement that an 'unlawful act' be committed will not be established merely by knowledge of, or an expectation that, such an act will occur.[41] A person does not agree to supply drugs merely because they are imported and provided to a person with the knowledge that they will be on-supplied.[42]

20. It is the conduct and not its legal consequence that is the relevant object. The relevant agreement must be to engage in conduct that amounts to an offence (whether or not the parties know that it amounts to an offence). The relevant agreement is not to commit an offence that may be committed through conduct (whether or not the parties know what that conduct is). Said differently, the parties must have intended to engage in conduct in circumstances which necessarily involve the commission of the substantive offence or engage in conduct in

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[33] *Peters* (1998) 192 CLR 493 at [51].
[34] *Peters* at 516; *Trudgeon* at 256, 261; *Giorgianni v R* (1985) 156 CLR 473 (***Giorgianni***) at 487-488, 494, 506; *LK* at [52], [62]; *Thomson* (1956) 50 Cr App R 1 at 1-2; *Churchill v Walton* [1967] 2 AC 224 (***Churchill***) at 273; *Director of Public Prosecutions v Nock* [1978] AC 979 at 994; *R v O'Brien* [1954] SCR 666 (***O'Brien* [1954]**) at 668 and 676-677; *R v Gemmell* (1985) 1 CRNZ 496 at 500. See also *R v Saik* [2006 2 Cr App R 26 (***Saik***) at [11], [56]-[57] and [67].
[35] *Rogerson* at 280-281.
[36] *Gerakiteys* at 327 and 334; *Peters* at [62].
[37] *Peters* at [64], citing with approval the statement in: Harno, 'Intent in Criminal Conspiracy' (1941) 89 *University of Pennsylvania Law Review* 624 at 646.
[38] Above, n 34.
[39] *LK* at [67]; *Giorgianni* at 506; *Peters* at 520-521.
[40] Above, n 34.
[41] *Trudgeon* at 256; *Randall* (1983) 1 DLR (4th) 722 (***Randall***) at 734.
[42] *Ibid*. *McNamara (No 1)* (1981) 56 CCC (2d) 193 at 452-453; *Randall* at 734; *Anderson* [1986] AC 27 at 37-39. This factor is consistent with the principles on sentencing an offender for conspiracy where the Court will have regard the *"role"* played by the offender: e.g. *Tyler v R* (2007) 173 A Crim R 458 at [78]. See also *Direct Sales Co v United States* (1943) 63 S Ct 1265 at 1270.

circumstances prohibited by the substantive offence.[43] If the parties agreed to conduct which, on the facts known to them, was unlawful, they are not innocent because they did not realise the conduct was criminal; likewise if the parties agreed to conduct which, on the facts known to them, was lawful, they are not rendered artificially guilty by the existence of other facts not known to them giving a different and criminal quality to the agreed acts.[44] A similar conclusion applies in a conspiracy to defraud where the conduct must be identified which has the legal characterisation 'dishonest' as opposed to the accused needing to know the acts have that legal characterisation.[45]

21. A count must charge a single conspiracy only.[46] Where two conspirators agree to effect several unlawful objects and a third person agrees to effect only some of those objects, there are two conspiracies not one.[47] Thus in *Gerakiteys*[48] the conspiracy was bad at law because the Crown *"attempted to subsume several conspiracies within the single conspiracy charged"*. While there was a primary conspiracy to effect a fraud on divers insurers, the respective clients of the primary conspirators only intended to defraud their own insurer. In *R v Maria*[49] a conviction was overturned for a conspiracy to defraud two nominated persons (A and B) where the jury were satisfised only of an intention to defraud A.

22. The effect of the present case is that Macdonald would engage in the cumulative legal elements of misconduct in public office without any agreement as to the conduct that would satisfy those elements. What conduct would be engaged in was not known or agreed upon by the parties, was left to a future time and was left to the unilateral discretion of Macdonald.[50] It was not a conspiracy to commit conduct which satisfies the legal elements of misconduct in public office.

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[43] *Saik* at [4].
[44] *Churchill* at 237.
[45] *Peters* at [18], [80].
[46] *R v Ongley* [1940] 57 WN NSW 116 (***Ongley***) at 117.
[47] *Gerakiteys* at 327; *O'Connell v The Queen* [1844] 11 Cl & F 115 at 236-237; 8 ER (HL) 1061 at 1093; *Ongley* at 117; *R v Dawson* [1960] 1 All ER 558.
[48] *Gerakiteys* at 327.
[49] *R v Maria* [1957] St R Qd 512.
[50] The case was that misconduct would be committed unilaterally by Macdonald *"without that agreement comprehending or even contemplating that either of Edward Obeid or Moses Obeid would do anything to achieve or advance that shared objective"*: TJ [122] **AB1 48**. See also CCA at [4] **AB2 668**.

23. Framing a conspiracy at such a high level of generality artificially precludes or short-circuits the analysis required to prove a conspiracy charge and creates a cascading series of substantive and procedural issues.[51] It leaves the foundational agreement obscure and open ended and thus obfuscates the process of a conspiracy trial. As a matter of element analysis, it cannot be discerned whether there was an agreement (being a meeting of the minds on a common design), what the agreed conduct was, whether any conduct amounted to an offence and whether there were one or more conspiracies being alleged. As a matter of procedure, it defies the kind of proper particularisation necessary for a range of purposes relevant to the criminal law: ensuring an accused knows the case they have to meet, ensuring only admissible evidence is adduced at trial, ensuring unanimity among jurors, ensuring jurors properly understand issues, double jeopardy and sentencing. The lynchpin in conspiracy charges and conspiracy trials is a clear articulation and analysis of the conduct the object of the agreement.

24. The simple question in the present case cannot be answered: what conduct did the parties actually agree and intend to take place? As the Crown put the case, the parties could well have had entirely different ideas, or no ideas at all, as to what conduct (by act or omission) Macdonald would commit, what its substantive or concrete features would be and whether or not it would make out the elements of the substantive offence. Fielding an inquiry about coal reserves, seeking to have a coal area released and sharing information about an upcoming coal area are all very different kinds of conduct and agreements.

Unlawful acts versus method and means

25. ***The first way*** the CCA justifies the alleged conspiracy is the distinction between an *"unlawful act"* (which must be agreed) and the *"precise means or method"* (which need not be agreed). Even leaving aside the fact that the CCA relies upon a principle taken from conspiracy to defraud and not conspiracy to commit an

[51] *R v Cotroni* [1979] 45 CCC (2d) 1 at 23-24 (the Crown cannot group together multiple possible conspiracies *"by the simple technique of positing a very general object"*); Gillies, *The Law of Criminal Conspiracy* (2nd Ed, 1990) (**Gillies (1990)**), p 35, 42 (a *"very generalised conspiracy"* would be improper).

offence,[52] the distinction does not justify a high-level conspiracy that does not identify the conduct which amounts to an offence. The Crown must still identify the conduct or transaction with the necessary specificity that would lift the matter from a general statement of the elements of the offence to the particular agreed conduct which it is said, if carried out, would meet that general statement of elements.[53] The Crown must still identify that conduct so as to make transparent the essential facts and circumstances that must have been the subject of agreement, intention and knowledge.

26. A conspiracy is human conduct that answers the abstract description of an offence. A conspiracy of the kind in this case is an agreement between persons that one or more of them would engage in conduct that would make out the elements of an offence. One cannot *"carry into effect"* an abstract idea.[54] A conspiracy to commit fraud may be made out by way of an agreement to claim false deductions against a client's assessable income even if the client does not know every detail of the falsity or the means by which the falsity was contrived.[55] But that is because those details are not an essential component of identifying the agreed conduct or transaction. A conspiracy will not be made out simply by an agreement to commit fraud without there being an agreement as to the critical conduct or transaction that would meet the description of fraud.

27. The requisite identification of the conduct as opposed to an inadequate general statement of elements may be more or less demanding depending on the circumstances and complexity of the offence charged and the relevant conduct. The description 'murder' may readily identify the conduct of deliberately taking human life. That conduct may be quite readily seen to meet the general elements of murder such that the substantive and procedural requirements of conspiracy are met. The *"method"* or *"means"* such as whether or not it is achieved by a

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[52] While being the same common law offence, they have been said to be divided into heads of conspiracy: *Withers* at 856; *Peters* at [53]. They have different conduct as the object of the relevant agreement.
[53] *Mok* at 441; *Partridge* at 412-413; *R v Weaver* (1931) 45 CLR 321 at 333 and 337; *Brodie v R* [1936] SCR 188 at 199; *R v Cotroni* [1979] 45 CCC (2d) 1 at 23-24.
[54] *Mulcahy* at 317; *Trudgeon* at 260; *O'Brien* (1974) 59 Crim App R 222 at 225-226; *Mills* (1963) 47 A Crim App R 49 (***Mills***) at 54; *R v West* [1948] 1 KB 709 at 718; *O'Brien* [1954]; *Hunter* (1985) 23 CCC (3d) 331 at 347; Gillies (1990), p 23.
[55] *Aston* (1987) 26 A Crim R 128 at 132.

gun, a knife or some other means may not be critical to the agreement in some factual scenarios. For instance, in a case where the conspiracy is to arrange for a 'hitman' to murder a nominate person (A), the means are unlikely to be relevant but the identification of the victim may be. In the case of a conspiracy to commit a terrorist act, the means and method may be critical but the identity of the victim may not be.

28. In the case of the offence of misconduct in public office, a mere description of that offence, abstractly, does not convey the nature of the conduct constituting the commission of that offence. On any view, the offence could be committed by a very large range of substantively very different conduct, each giving rise to factual and legal questions requiring resolution in a trial alleging conspiracy to commit that offence. In the present case, the misconduct alleged does not move from the general statement of the offence to a particular conduct or transaction. It deliberately stops short of it. Making an inquiry about coal reserves, requesting the release of an area for coal exploration, releasing some kind of information amount an upcoming release package are all very different kind of conduct or transaction. Different considerations arise with each, including whether and how the conduct satisfies the elements of misconduct in public office and whether the conduct was the subject of one or more agreements. Unlike an unlawful taking of life, an inquiry about coal reserves in NSW where the DPI was industry-facing willing to share with industry information about coal reserves simply does not describe conduct amounting to misconduct in public office.

29. In these circumstances, it is unsurprising to see a drafting convention in indictments for misconduct in public office to allege what the CCA might characterise as the *"method"* or *"means"* by which the accused is said to have committed misconduct in public office. It is typically stated that the accused engaged in misconduct 'by' doing some concrete and specified conduct.[56] This is to be contrasted with the indictment in the present case[57] and the high-level or general conspiracy put at trial. No concrete or specified conduct is identified after

[56] *Boston*; *Obeid v R* (2017); *Maitland*; *Sin Kam Wah v Hong Kong Special Administrative Region* (2005) 8 HKCFAR 192 (***Sin Kam Wah***); *Shum Kwok Sher v HKSAR* (2002) 5 HKFAR 381*; HKSAR v Hui Rafael Junior* (2017) 20 HKCFAR 264 (***Hui***); *R v Speechley* [2004] EWCA Crim 3067.
[57] CCA [13] **AB2 671**.

the word 'by'. What appears after the word 'by' is not an identification of acts but a list of qualities or descriptors that the undescribed acts would have or be consistent with. They nominate a wide and general area within which the conduct or transaction might fall whilst deliberately not identifying it. Of course precisely what conduct or transaction was then *"carried into effect"* was not the subject of an agreement but within the unilateral discretion of Macdonald.

30. The clear identification of the conduct precedes and underpins the analysis of whether that conduct was agreed to be carried out, intended to be carried out and was conduct satisfying the legal elements of the offence. It is the particular conduct agreed that must amount to an offence and it does not suffice that a person may have had some more high level or general criminal intention or culpability.[58] The conduct in fact intended may not, when properly assessed and construed, amount to the relevant criminal offence.[59] It is not sufficient that the parties agreed to conduct (which was not criminal) intending it to be criminal or intending to proceed even if different facts existed which made it criminal.[60] A proper analysis of the conduct may reveal no agreement has been reached to carry conduct into effect. On the one hand, robbers who have planned to rob a bank, being concrete conduct, may have reached such an agreement even if they agree to do so only if there is 'only one guard on duty'.[61] It can be said in that case that the conduct, if carried out in accordance with the parties' intentions, would result in or would necessarily involve the commission of an offence.[62] On the other hand, an analysis of the conduct may show that there are matters left outstanding and reserved of a sufficiently substantial nature that, properly assessed, an agreement has not emerged from what might be characterised as (only)

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[58] *Trudgeon* at 264; *Churchill* at 237.
[59] *Barbouttis* (1995) 82 A Crim R 342 (where the parties agreed to purchase a box of cigarettes that were not in fact stolen and so did not conspire to deal with stolen goods); *Saik* at [31]-[32] and [121]-[123]. The majority rejected the Crown submission that it was sufficient to prove a conspiracy to deal with banknotes the proceeds of crime even where the accused did not know the banknotes were the proceeds of crime by logic that, analogous to conditional intention, the accused intended to deal with the banknotes *even if* they were the proceeds of crime. See also: *Giorgianni* at 506 (where Wilson, Deane and Dawson JJ disapproved of the use of the foresight of the probable consequences of an action to prove intention in a conspiracy case).
[60] *Ibid*.
[61] See *Saik* at [5] and [121].
[62] *Saik* at [5], [12].

intention,[63] discussion,[64] negotiation[65] or an intention to agree.[66] An agreement to do 'acts in connection with' a robbery would obscure that analysis and capture without differentiation acts falling into both the lawful and unlawful categories.

31. The Crown and the CCA's suggestion that the present case is like that of *Hui* underscores the importance of identifying the conduct the subject of the conspiracy. When analysed, the cases are different in a fundamental way. In *Hui*, the public official was charged with misconduct in public office by: (1) receiving a bribe; and (2) thereby remaining favourably disposed to the entity that paid the bribe.[67] The offence, constituted by the two components together, was committed irrespective of whether or not he in fact did anything at any point in the future.[68] That is distinct and different from the present case where the alleged agreement contemplated and required that Macdonald would take further and future steps of an unknown character which were said to commit the relevant offence. The provision of the bribe coupled with resultant conflict identified the concrete conduct or transaction relied upon by the Crown in that case. The Crown in *Hui* expressly disclaimed a conspiracy the kind of conspiracy found by the Trial Judge here that Macdonald would, in future, do what he could as and when the opportunity arose because the Crown was concerned that such a course of conduct might not necessarily result in the commission of an offence.[69]

A 'series of descriptive phrases'

32. ***The second way*** the CCA upheld the form of the conspiracy alleged was to say that the conduct the subject of the agreement was not *"at large"* but had been *"identified… in a series of descriptive phrases"* in the indictment.[70] This appears to be what was referred to as the *"cumulative elements of the charge"*.[71] The CCA said that the effect of the three descriptive limbs *"involved a degree of*

[63] *Mulcahy* at 317, adopted in *Trudgeon* at 260.
[64] *O'Brien* (1974) 59 Crim App R 222 at 225.
[65] *Mills* at 54.
[66] Above fn 54.
[67] *Hui* at [23]-[31].
[68] *Hui* at [34], [39], [49] and [66].
[69] *Hui* at [34] 277 at [67] and [69].
[70] CCA [25] **AB2 676-677.**
[71] CCA [14] **AB2 671-672**.

particularity in relation to the nature of the acts the subject of the charge"[72] and that the activities the subject of the agreement were *"sufficiently described"*.[73]

33. The analysis of the CCA of each paragraph in the indictment moves, in a way that is unstable in principle, between two erroneous positions. On the one hand, the CCA say that while the indictment does not identify *"conduct"* it is sufficient to identify a *"class"* within which conduct might fall. That means that a valid conspiracy can exist even where parties in fact do not have the same conduct in mind and do not reach a common design but have the same higher level intention or objective. On the other hand, the CCA construes the conspiracy as having an apparent specificity that it never had, namely, that the conspiracy was for Macdonald to take concrete steps to release the Mount Penny area for exploration. Even if that were the Crown case (which it was not), the CCA is unable to say what those concrete steps were; they only list what it they possibly could be. It is not clear whether and to what extent the CCA adopted the Trial Judge's interpretation of the kind of conspiracy disavowed in *Hui* that Macdonald *"would do what he could, if and when the opportunity presented itself"* and *"without the need for further agreement as to what acts he would commit and when he should commit them"*[74] (a 'do what he could' conspiracy).

34. Paragraph (a) of the indictment says that the unidentified acts would be *"in connection with the granting of an exploration licence at Mount Penny in the State of New South Wales"*. The CCA said that while there was *"an element of uncertainty as to the precise acts which would be required, they would fall within the class reflected in the process required to be carried out for the granting of an exploration licence"*.[75] The CCA then set out a very extensive list of steps that *"would"* or *"might"* be taken *"in connection with"* that process.[76]

35. The sheer breadth of conduct that this *"class"* might encompass is manifest and the use of the word *"might"* betrays the lack of any common agreement on concrete conduct, let alone an agreed intention it be carried out. Each conspirator,

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[72] CCA [28] **AB2 677.**
[73] CCA [39] **AB2 687.**
[74] TJ[101] **AB1 44**, [1876] **AB1 422**. See also TJ[179] **AB1 61** and CCA [16] **AB2 673-674**.
[75] CCA [25] **AB2 676**.
[76] CCA [31]-[36] **AB2 678-686**.

if agreeing and intending any particular conduct at all, may have agreed on conduct different from that agreed (if at all) by any other conspirator. The CCA held that the nine particulars of misconduct *"might be seen as illustrating the class of acts which, although not agreed upon in advance, could fall within the class which must have been in contemplation, albeit at a higher level of generality"*.[77] That is, any misconduct that Maconald may in fact himself, by his unilateral decision, come to commit was conduct which, while not agreed to by the parties, fell within the general description or 'class' of acts that might have been agreed. That cannot be a satisfactory statement of the means by which the appellant could be said to have committed the alleged offence of conspiracy before any of those choices by Macdonald being made.

36. At the same time, the CCA proceeds on the mistaken premise that all such conduct could or should be seen as connected and part of a single transaction to release the Mount Penny area. Yet the conspiracy was not, as the CCA found, an agreement for Macdonald to take steps *"to release the area for exploration"*.[78] Nor was it in agreement that was accompanied by *"the clear expectation… that [the Obeids] would coordinate with Macdonald to take steps to obtain a benefit from the grant of the exploration licence"*.[79] Time and again the Crown disavowed such a conspiracy. Nor could it be. As at 9 May 2008, the misconduct on the Crown case may have taken any number of forms and directions and still be *"connected to"* the granting of an EL over Mount Penny. The Trial Judge said the *"granting of an exploration licence"* included at least 8 different stages, only one of which comprised the granting of an exploration licence.[80] Even taking steps to interfere with the granting of an undesirable EL over Mount Penny would have been covered by the agreement alleged. This is consistent with the broad language of the indictment *("in connection with the granting"*[81] as opposed to something more concrete like *"progressing of the granting"* or the *"granting"*).

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[77] CCA [29] **AB2 678**.
[78] CCA [12] **AB2 670-671** and [26] **AB2 677**.
[79] CCA [42] **AB2 688**.
[80] TJ[691] **AB1 169**, [694] **AB1 170**.
[81] The term *"in connection with"* has been described as being of a category of phrases that are *"wide in their ambit they are also imprecise"*; they are *"capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote"*: *Nye v State of NSW* (2002) 134 A Crim R 245 at [16].

37. Paragraph (b) of the indictment says that the unidentified acts would also be *"concerning the interests of the [Edward Obeid, Moses Obeid, their family members and/or their associates"*. The CCA found that this required that *"steps taken towards the granting of the exploration licence must be undertaken in a manner and with the intention of benefiting the Obeid family"* and that *"steps would be taken by the Minister to release the Mount Peny area for exploration and to ensure that the Obeids were involved in the process so as to allow them to benefit from the opportunity to negotiate with the successful grantee"*.[82] The twin problems again emerge. The conduct is at once within a class while at the same time forming a nebulous transaction towards a goal that was not in truth the subject of the agreement or conduct in any concrete sense.

38. Paragraph (c) of the indictment says that Macdonald would act *"knowingly in breach of his duties of… impartiality… and/or… confidentiality…"*. The CCA does not dwell on this paragraph but it demonstrates the vice in the charge. The indictment alleges breaches of *"partiality" "and/or" "confidentiality"* (being the legal conclusion or general statement of the element of misconduct) without identifying the conduct that is said to meet that general statement. The statements of breach in no way identify or approximate the conduct or transaction that would amount to a breach and can capture a multitude of differing and potentially conflicting forms of conduct or transaction. Further, the use of *"and/or"* plainly and deliberately leaves open the fact that the conspirators may have had different ideas as to both what conduct Macdonald would commit and what duties he would breach. One conspirator might have agreed and intended that Macdonald take steps *vis-à-vis* his department to progress the release of the area while another conspirator might have agreed and intended that Maconald take steps to share information about upcoming areas without exercising any control over what those areas were. By the technique of pitching the conspiracy at a high level, the Crown effectively captures both no conspiracy and multiple different conspiracies.[83]

<u>No agreement to commit conduct amounting to misconduct public office</u>

39. The CCA misconstrued the relationship between conspiracy and misconduct in

[82] CCA [26] **AB2 26-27**.
[83] A practice criticised in *R v Cotroni* [1979] 45 CCC (2d) 1 at 23-24.

public office. This error underscores the importance of identifying the agreed conduct of a conspiracy and the problematic nature of the high-level conspiracy alleged.

40. The accused must have intended conduct be carried out while knowing all the essential facts that made that conduct an offence of misconduct in public office. That meant knowing the essential facts comprising the five elements of misconduct of public office:[84] (1) a public official; (2) in the course of or connected to his/her public office; (3) wilfully misconduct himself/herself; by act or omission, for example, by wilfully neglecting or failing to perform his/her duty; (4) without reasonable excuse or justification; and (5) such misconduct being serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, importance of the public objects which they serve and the nature and extent of the departure from those objects.

41. The 'but for' test and fifth element are of present importance. In *Maitland*, a Full Bench of the NSW Court of Criminal Court considered the offence of misconduct in public office where the conduct was committed with a mixed purpose (one being proper and one being improper). In a single judgment, the Court found in such a situation that the offence can only be committed (subject to other elements being made out) if the power would not have been exercised 'but for' the alleged improper or illegitimate purpose.[85] In *Obeid v R*,[86] the NSW Court of Criminal Appeal held that the qualitative assessment required by the fifth element meant that it was a *"necessary condition that the misconduct have the requisite serious quality"* and that this *"confines the scope of the offence"*. The Crown was required to show that the misconduct in question was *"so serious as to merit criminal punishment, as distinct from civil remedies such as damages, parliamentary*

[84] *R v Quach* [2010] VSCA 106; 201 A Crim R 522 at [46] and *Obeid v R* [2015] NSWCCA 309 (***Obeid v R* (2015)**) at [133] to [142]; *Obeid v R* (2017) at [60]-[61]; *Sin Kam Wah* at [45]-[46].
[85] *Maitland* at [72], [84] and [87]-[90].
[86] *Obeid v R* (2017) at [141]. The appellant contended that the formulation of the elements was wrong in requiring, in formulating the second element, merely that the act in question be *"connected to [the public official's] public office"* when in fact only certain forms of connection should be seen to be sufficient: [134]-[135]. The appellant also contended that framing the elements without a sufficient connection *"is to leave the boundaries of the offence entirely at large"*: [138]. Bathurst CJ relied on the fifth element to reject these arguments.

sanction, or for that matter, public condemnation".[87]

42. For a conspiracy to commit misconduct in public office, the Crown was required to prove an agreement to commit conduct which *inter alia*: (a) was misconduct committed in a 'but for' sense; and (b) was of such a quality as to satisfy the fifth element, namely, be serious and meriting criminal punishment. The conspirators must have intended that such conduct be carried out with knowledge of both essential facts (albeit not their legal character). Yet the high level and general conspiracy alleged did not, except in the circular and illusory way addressed above, allege an agreement to commit conduct which if carried out would necessarily satisfy these elements.

The 'but for' purpose

43. ***First***, the CCA erred in distinguishing *Maitland* in a conspiracy case. The CCA said the authorities on misconduct in public office did not reference an *"element of the offence expressed in the language of causation"*[88] and that reference to an element in that language *"becomes bizarre when applied to the offence of conspiracy, where the underlying offence need not be committed and yet the unlawful agreement contains an inbuilt element of a causal relationship"*.[89]

44. The CCA's reasoning process is flawed in its conclusion that, if the agreement was to commit misconduct then, by definition, questions of 'but for' do not arise.[90] The question that needed to be answered was whether the conduct agreed and intended would amount to misconduct in public office. Once attention is focused firmly on the conduct that must be agreed and intended and then on whether that conduct is criminal, the application of the 'but for' test comes into focus. For instance, if the agreement were a concrete one that Macdonald would direct the DPI to include the Mount Penny area in an upcoming release, that raises the mixed purpose considered in *Maitland*. The Crown accepted at trial that there were public interest grounds to release the Mount Penny area (and the DPI agreed). The question in that hypothetical conspiracy would be Macdonald's

[87] *Obeid v R* (2017) at [222]-[223]. See also at [217] and *R v Chapman* [2015] QB 883; [2015] EWCA Crim 539 at [30].
[88] CCA [58] **AB2 693**.
[89] CCA [58] **AB2 693**, [67] **AB2 697**.
[90] CCA [67] **AB2 697** and [69] **AB2 697-698**.

motivating purpose (and the conspirators' knowledge of such a purpose).

45. ***Second***, contrary to the CCA's reasoning, the 'but for' test is not about *"causation"* but about the state of mind of the public official. It stems from a proper analysis of the common law offence of misconduct in public office.[91] While the purpose or object of the offence is to prevent public officials from using their office entrusted to them for a public purpose in a corrupt and partial manner (which may have more objective and public-facing rationales such as ensuring that an official be seen to act properly as well as in fact act properly) [92] where the criminal law is concerned there must be a guilty mind (which concerns the subjective motivations of the public official in acting in the way they did).[93] If the public official engages in conduct without such a purpose, they do not commit the offence and such conduct, if agreed to, will not amount to a conspiracy. The Crown here needed to prove a case that there was agreement and intention that Macdonald would not engage in the conduct comprising the substantive offence but for the improper purpose. The misconduct here was not the agreement itself.

46. ***Third***, the CCA erred in finding sufficient that the accused knew and intended that Macdonald *"would not have agreed to act"* in connection with the granting of an EL at Mount Penny favouring their private interests 'but for' that improper purpose.[94] This falls foul of the high level circularity issue in the charge. It is not the agreement that must be entered into with the improper purpose; it is the conduct the subject of the agreement that must be agreed and intended to be engaged in for an improper purpose in the 'but for sense'.

The fifth element

47. Despite it being an element of the offence, the Crown did not allege that the conspirators knew all the facts that rendered the acts of misconduct the subject of the agreement serious and meriting criminal punishment. In the high level way the agreement was put, it could not have been alleged in any sensible way. The fifth element require consideration be given to *"the extent of the departure from*

[91] *Maitland* at [67].
[92] *Maitland* at [68]-[70].
[93] *Maitland* at [77].
[94] CCA [69] **AB2 697-698**; TJ [85] **AB1 40**, [99] **AB1 43**, [155] **AB1 55-56**, [818] **AB1 195**.

those objects" by the public official. Those critical facts cannot be known and agreed to without first knowing what the conduct would be. The Crown at trial said it was the misconduct committed by Macdonald that must be serious and meriting criminal punishment, relying *inter alia* on the particularised acts of misconduct committed and the value of the commercial advantage ultimately and in fact secured.[95] But those matters did not form part of the conduct agreed.

48. The CCA erred in dismissing this defect on the basis that whether misconduct was serious and meriting criminal punishment *"is not a matter about which the conspirators must agree"*[96] and the principle that an accused need not know the legal characterisation of their acts.[97] The fifth element cannot be regarded as merely a legal conclusion about the acts alleged. The quality of misconduct being serious and meriting criminal punishment involves a social judgment of factual circumstances including conduct; like dishonesty. It is a question for the jury. The accused must know the facts that make the conduct an offence and that means knowing the facts that make any misconduct agreed on serious and meriting criminal punishment. An agreement that one of the alleged conspirators will commit conduct that may not have that quality would, obviously, not be an agreement and intention that he commit that offence. Both substantively and as a matter of the requirements of a fair trial, there could not be an offence known to law for persons to agree and intend that unspecified conduct be committed by one of them which may or may not, depending on circumstances not the subject of any agreement or intention, exhibit that quality.

Part VII: Orders Sought

49. (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

50. 3 hours.

31 July 2025

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[95] CCS [741] **AABFM 2 810**.
[96] CCA [77]-[78] **AB2 699-700**.
[97] CCA [81] **AB2 701**, [542] **AB2 845**.

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