HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY**

**BETWEEN:** **S88/2025**
**EDWARD MOSES OBEID**
Appellant

and

**THE KING**
Respondent

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**BETWEEN:** **S89/2025**
**MOSES EDWARD OBEID**
Appellant

and

**THE KING**
Respondent

**BETWEEN:** **S93/2025**
**IAN MICHAEL MACDONALD**
20 Appellant

and

**THE KING**
Respondent

## RESPONDENT'S JOINT SUBMISSIONS IN RESPONSE TO EACH APPEAL

## PART I FORM OF SUBMISSIONS

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

## PART II CONCISE STATEMENT OF ISSUES

2. There was a limited grant of special leave in this matter confined to that part of proposed
30 ground of appeal one in each of the applications for special leave which contends that the

Crown case was defective because it did not allege an agreement for Ian Macdonald to do a particular act or acts that amounted to misconduct in public office.

3. The issue that arises from that limited grant of special leave, set in the context of the trial below, can be stated as follows.

4. The indictment alleged an agreement for Mr Macdonald, in the course of or connected to his public office as the Minister for Mineral Resources, to wilfully misconduct himself, without reasonable cause or justification, by doing acts (a) in connection with the granting of an exploration licence at Mount Penny in 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 his duties and obligations of impartiality and confidentiality as a Minister, such misconduct being serious and meriting criminal punishment: see **ACAB1 6**.

5. Was the agreement alleged capable of amounting to a conspiracy to commit misconduct in public office by reason of its description of the acts as having the three features alleged, as the Court of Criminal Appeal (**CCA**) held and as the respondent contends? Or is it incapable of doing so because (more) particular "act or acts" amounting to the offence of misconduct in public office must be alleged to have been agreed upon by the alleged conspirators, as the appellants contend?

## PART III SECTION 78B NOTICE

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

## PART IV MATERIAL FACTS IN DISPUTE

7. There are no material facts in dispute that are relevant to the single ground of appeal the subject of the limited grant of special leave. That said, the respondent does not accept every matter submitted in the narrative statement of facts in Moses Obeid's written submissions (but not being material to the ground of appeal, these need not be addressed further).

8. As to the quotations in Moses Obeid's narrative statement of facts from submissions made by the Crown, these are selective, and should be read in the context of the submissions as a whole, the indictment and the written particulars. For example, the Crown described the agreement as being at a "much higher level" in the context of making clear that the overt acts relied on in the particulars were not particulars of the agreement itself, but "how the

agreement was carried into action by Minister Macdonald";[1] that is, they were particulars of the acts done in furtherance of the conspiracy. As for the submission that Mr Macdonald did not "know how the financial interests" of the Obeids were to be advanced (**AS [10]**), the passage on which Moses Obeid relies read properly in context involved the Crown making clear to the Court that evidence of the extensive "entrepreneurial activities" of Moses Obeid (being the capitalisation by him of the various benefits the Obeid family had received by reason of Mr Macdonald's breaches of his duties and obligations) were *not* said by the Crown to be acts done in furtherance of the conspiracy.[2] In so far as the Crown case is otherwise relevant to the ground of appeal, the respondent's submissions on how the case was put at trial are set out in Part V below.

## PART V ARGUMENT

### A. GENERAL PRINCIPLES

### A.1 Conspiracy

9. At common law, "[a] conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means".[3] The question this appeal raises goes to the level of generality at which the "proposed act or acts"[4] the subject of the agreement may be stated in order to support an allegation of conspiracy.

10. That is not an unfamiliar question. In *The Law of Criminal Conspiracies and Agreements* published in 1873, R S Wright said:[5]

> … But in general it may be said that the ordinary rules of criminal pleading apply to conspiracy, with exceptions arising from the fact that the design of the conspirators need not have been executed or completely ripened in detail, and

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1 9/04/19 T151.37-47: **AABFM1 55**.

2 01/02/21 T3659.43-47: **AABFM1 307**.

3 *Mulcahy v The Queen* (1868) LR 3 HL 306 at 317 (Willes J); *Ahern v The Queen* (1988) 165 CLR 87 at 93 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ); *R v Rogerson* (1992) 174 CLR 268 at 281 (Brennan and Toohey JJ).

4 *R v LK* (2010) 241 CLR 177 at [114] (Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J agreeing).

5 *The Law of Criminal Conspiracies and Agreements* (Butterworths, 1873) at 72-73. See also Thomas Starkie, *A Treatise on Criminal Pleading, with Precedents, Special Pleas, &c. Adapted to Practice* (J & W T Clarke, 2nd ed, 1822) at 155 ("in such cases it seems, that the general averment that the defendants did conspire, &c. to accomplish an object apparently criminal, is sufficient, without shewing in what manner and by what means the conspiracy, &c. was produced"); *Archbold's Pleading, Evidence & Practice in Criminal Cases* (Sweet & Maxwell Ltd, 26th ed, 1922) at 1423 ("In stating the object of the conspiracy, the same certainty is not required as in an indictment for the offence, etc., conspired to be committed").

> that the details consequently not only cannot be stated in all cases, but may commonly be immaterial. Thus there may be a criminal design to defraud persons of things by means not yet completely determined; and in such a case these undetermined matters must necessarily be treated as to the jurors unknown or stated generally; and this necessity has given rise to more general rules, such as that in an indictment for a conspiracy to defraud by false pretences — the false pretences, even where they are known, need not be particularly set out. The averment in the indictment of the criminal purpose must show clearly that the purpose was one for which it is criminal to agree; — by general words of art, if such exist which are applicable to the case; or by details. If the averment of the purpose fails in this, but overt acts are laid in such a mode as to show matter indictable irrespectively of the combination, the averment of conspiracy may be disregarded, and the parties may be tried for the joint offence so disclosed; but an insufficient averment of criminal purpose will not be aided by averments of overt acts not shown to be criminal independently of combination.

11. After quoting from Wright's work, Glanville Williams observed that "[t]his laxity … is open to abuse" but also recognised that "it is to some extent a necessary consequence of conspiracy as an inchoate crime".[6] As Brennan and Toohey JJ noted in *R v Rogerson*, the unlawful act that has been agreed upon is "an act which has not occurred when the conspiracy is formed".[7]

12. An illustration of the breadth with which conspiracies can be framed is *R v Weaver*.[8] In that case, this Court took no issue with the sufficiency of an indictment that charged the accused with conspiracy to cheat and defraud one Coggan, and divers other persons, of divers large sums of money,[9] so long as proper particulars of the overt acts relied upon were provided.[10]

13. Another example is *R v Gill*.[11] In that case, an indictment charged that the accused unlawfully did conspire and combine together, by divers false pretences and subtle means and devices, to obtain and acquire divers large sums of money from two victims. Complaint was made on appeal that the pretences and subtle means and devices were not identified. Rejecting that ground, Abbott CJ said:[12]

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6 Glanville Williams, *Criminal Law; The General Part* (Stevens & Sons Ltd, 2nd ed, 1961) at 664.

7 (1992) 174 CLR 268 at 281.

8 (1931) 45 CLR 321.

9 (1931) 45 CLR 321 at 322.

10 (1931) 45 CLR 321 at 333 (Gavan Duffy CJ, Starke and McTiernan JJ). See also *R v Kenrick* (1843) 5 QB 49 at 61-62 [114 ER 1166 at 1171]; *R v Mitchell* [1971] VR 46 at 55 (Winneke CJ, Pape and Lush JJ).

11 (1818) 2 B & Ald 204 [106 ER 341].

12 (1818) 2 B & Ald 204 at 205 [106 ER 341 at 342].

> It is objected that the particular means and devices are not stated. It is, however, possible to conceive that persons might meet together, and might determine and resolve that they would, by some trick and device, cheat and defraud another, without having at that time fixed and settled what the particular means and devices should be. Such a meeting and resolution would nevertheless constitute an offence. If, therefore, a case may be reasonably suggested in which the matters here charged would, if there were nothing more, be an offence against the law, it is impossible, as it seems to me, to conclude that the law should require the particular means to be set forth. The offence of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy. I think, therefore, that no sufficient ground has been stated for arresting the judgment.

14. Bayley J agreed, and added that "When parties have once agreed to cheat a particular person of his monies, although they may not then have fixed on any means for that purpose, the offence of conspiracy is complete".[13] Holroyd J also agreed, and added that:[14]

> … here the conspiracy is the offence; and it is quite sufficient to state only the act of conspiring and the object of the conspiracy in the indictment. Here it is stated that the parties did conspire, and that the object was to obtain, by false pretences, money from a particular person. Now, a conspiracy to do that would be indictable, even where the parties had not settled the means to be employed.

15. *Gill* was relied on in *R v Aspinall*.[15] Part of the indictment in that case alleged "that the defendants agreed to make such false pretences as might appear necessary to deceive the committee [of the Stock Exchange], when the time for them to order should come, into ordering a quotation as if the rules had been fulfilled".[16] Brett JA (Mellish LJ agreeing) rejected an argument that it "was unfair and unjust not to point out to the defendants which of the rules, or what part of the rules it was suggested they intended should not be observed",[17] saying:[18]

> This the argument which was urged in *Gill's Case* and the others, against the general allegation that the defendants agreed to use "false pretences". The answer to such an objection is, that the agreement in those cases may not have determined what the pretences should be, or in this case which rule or which part of a rule should not be observed. The agreement may have been to deceive the committee, by any falsehood which would do so, into believing that whatever

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13 (1818) 2 B & Ald 204 at 205 [106 ER 341 at 342].

14 (1818) 2 B & Ald 204 at 206 [106 ER 341 at 342].

15 (1876) 2 QBD 48.

16 (1876) 2 QBD 48 at 60.

17 (1876) 2 QBD 48 at 60.

18 (1876) 2 QBD 48 at 60-61.

> part of the rules should turn out to be, in fact, incapable of being fulfilled had been fulfilled. …

16. Other examples can be given.[19]

17. At the level of principle, King CJ observed in *R v Lacey* that "[c]ourts have allowed this type of conspiracy to be alleged in fairly general terms".[20] His Honour went on to explain:[21]

> … The reasons are obvious. Although agreement is the gist of the crime of conspiracy, the agreement is not necessarily the type of agreement which is the subject of the law of contract. "It is not necessary", as Jordan CJ put it in *Ongley*, "to adduce such evidence of agreement as would be required in an action of assumpsit. […] If it is established that the accused did things which indicate that they were acting in concert to achieve a common purpose, this supplies all the evidence that is required to establish that they had agreed to achieve that purpose. Indeed, in a prosecution for conspiracy it is unusual for any other evidence of agreement to be tendered than is supplied by evidence of the respective overt acts". Criminal conspirators more often than not do not define the precise terms of their agreement. Frequently the agreement is no more than a generally defined common design or plot. Even if the terms are strictly defined, it is unlikely that they will be known to the prosecuting authorities. It would be unrealistic to expect the authorities to be able to allege the criminal agreement in precise terms.

18. In that case, the particulars of the offence set out in the information were as follows:[22]

> Darryl John Lacey, James Samuel Barlow and Harry Christodoulous between about the 22nd May, 1980 and the 16th April, 1981 at Whyalla, conspired together to extort money from Arthur Leslie Barber, Edward Allan Walker, Geoffrey James White and other persons.

In opening, counsel for the prosecution identified that "the particular form of extortion which was alleged to be the subject of the conspiracy was obtaining money by 'offering to refrain from accusing' of a crime".[23]

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19 See, eg, *R v Kenrick* (1843) 5 QB 49 [114 ER 1166] (conspiracy by divers false pretences and subtle means and devices to obtain diverse large sums of money from a specific person); *R v Blake* (1844) 6 QB 126 [115 ER 49] (conspiracy to procure the importation of goods without paying duty where the indictment did not identify any goods); *Sydserff v The Queen* (1847) 11 QB 245 at 247 [116 ER 467 at 468] (conspiracy to cheat and defraud a person of their goods and chattels); *R v Dean* [1896] 17 NSWR 132 at 152 (conspiracy to pervert the course of justice).

20 *R v Lacey* (1982) 29 SASR 525 at 534-535 (King CJ; Mohr and Matheson JJ agreeing).

21 (1982) 29 SASR 525 at 535 (King CJ; Mohr and Matheson JJ agreeing).

22 (1982) 29 SASR 525 at 527.

23 (1982) 29 SASR 525 at 527.

19. King CJ quoted from the judgment of Jordan CJ in *R v Ongley*.[24] In that case, the accused was convicted of conspiring with two others to cheat and defraud Clive Allan Alley and Edward George Cavanagh of divers large sums of money.[25] The conviction was quashed due to the jury directions given, but Jordan CJ stated as a well established principle that "[a]n agreement to cheat and defraud is an indictable conspiracy notwithstanding that the parties have not yet agreed upon the precise form of cheating to be used nor upon who are to be the victims".[26] His Honour went on to explain:[27]

> Although facts necessary to establish an agreement between the accused must be proved, it is not necessary to adduce such evidence of agreement as would be required in an action of assumpsit. The prosecution is not called upon to define the exact moment at which the conspiracy began or the exact act which marked its inception. If it is established that the accused did things which indicate that they were acting in concert to achieve a common purpose, this supplies all the evidence that is required to establish that they had agreed to achieve that purpose. Indeed, in a prosecution for conspiracy it is unusual for any other evidence of agreement to be tendered than is supplied by evidence of the respective overt acts. …

20. These principles have ongoing vitality. A modern example is *Elomar v R*, which involved an appeal against conviction by five accused who were charged with conspiracy to do an act or acts in preparation for a terrorist act or acts contrary to s 11.5 and 101.6 of the *Criminal Code* (Cth).[28] One of the accused, Mr Khaled Cheiko, argued on appeal that "the Crown was unable to exclude the possibility of multiple conspiracies. This, it was said, was because of the Crown's inability to identify any particular act of terrorism that was the subject of the agreement alleged".[29] The Court of Criminal Appeal (Bathurst CJ, Hoeben CJ at CL and Simpson J) rejected that argument:[30]

> The evidence here was clearly capable of establishing that the various alleged co-conspirators shared a common goal; the common goal was that a (yet unspecified) terrorist act (or acts) would be committed. It is not to the point that they had not, or the Crown could not prove that they had, finalised with precision what that terrorist act or those terrorist acts would be, or who should be the actual perpetrator or perpetrators. What was alleged was plainly a single conspiracy.

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24 (1940) 57 WN (NSW) 116 at 117.

25 (1940) 57 WN (NSW) 116 at 116.

26 (1940) 57 WN (NSW) 116 at 117 (citations omitted). See also *B v R* (2008) 76 NSWLR 533 at [48] (Spigelman CJ; James and Howie JJ).

27 (1940) 57 WN (NSW) 116 at 117 (citations omitted).

28 (2014) 316 ALR 206.

29 (2014) 316 ALR 206 at [603].

30 (2014) 316 ALR 206 at [608].

## A.2 Misconduct in public office

21. Drawing upon the judgment of Sir Anthony Mason as a Non-Permanent Judge of the Hong Kong Court of Final Appeal in *Sin Kam Wah Lam Chuen IP v Hong Kong Special Administrative Region*,[31] intermediate appellate court authority establishes that the elements of the common law offence of misconduct in public office are:[32]

(1) a public official;

(2) in the course of or connected to his public office;

(3) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;

(4) without reasonable excuse or justification; and

(5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

22. As to the third element, it has been said that in a case such as the present where the alleged misconduct comprises the exercise of power for an improper purpose, then the prosecution must establish that the power would not have been exercised except for (ie but for) that purpose.[33] That is not, however, without some controversy.[34] It is a controversy which does not arise on the ground of appeal, and which this Court need not resolve.

23. For completeness, the CCA held that the trial judge here found (favourably to the appellants) that the "but for" test needed to be satisfied by the Crown proving that each of the accused knew, appreciated and intended that Mr Macdonald would not have agreed to act in connection the granting of an exploration licence (**EL**) at Mount Penny favouring their private interests "but for" that improper or illegitimate purpose: **ACAB2 698 [69]**. Contrary to Moses Obeid's submissions at **AS [14]**, the Crown case below was in fact conducted on that basis. That is clear from the Crown's submissions on the elements of the offence (**AABFM2 641-642**) the trial judge's adoption of those submissions (**ACAB1**

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31 (2005) HKCFAR 192.

32 *R v Quach* (2010) 27 VR 310 at [46] (Ashley and Redlich JJA and Hansen AJA); *Obeid v R* (2015) 91 NSWLR 226 at [133]; *Maitland v The Queen* (2019) 99 NSWLR 376 at [67]; *R v Maudsley* (2021) 9 QR 587 at [21] (McMurdo JA; Daubney and Boddice JJ agreeing).

33 *Maitland v R* (2019) 99 NSWLR 376 at [84]; *R v Maudsley* (2021) 9 QR 587 at [30]; *Berejiklian v Independent Commission Against Corruption* [2024] NSWCA 177 at [252]-[254].

34 See, eg, *Macdonald v R* (2023) 112 NSWLR 402 at [56]-[69]; *Macdonald v R* [2024] NSWCCA 198 at [43].

**36 [69]**), and the trial judge's rejection of the same argument when it was made by the appellants below (**ACAB1 37-40 [75]-[86]**). The submission made on the basis of the Crown particulars document (**AABFM1 5-14**) is inconsistent with a plain reading of it; paragraph 4 is connected in its terms to the overt acts relied upon by the Crown as being in furtherance of the conspiracy (at paragraph 3), and the Crown alleged that Mr Macdonald would not have in fact committed those overt acts but for the improper purpose alleged. There is nothing in those particulars which gainsays the proposition that the Crown at all times alleged that the appellants agreed that Mr Macdonald would do the acts with the relevant improper purpose.

24. As to the fifth element, the CCA held (correctly) that the conspirators did not need to know or believe that the proposed act or acts would be serious and meriting criminal punishment, because the fifth element was not a matter for agreement between the conspirators but, rather, a matter of characterisation for the tribunal of fact: **ACAB2 699-701 [77]-[81]**.

## B. SUFFICIENCY OF THE CROWN CASE

25. The respondent submits that the CCA was correct to reject the challenge to the Crown case on the basis that the Crown did not allege an agreement for Mr Macdonald to do a particular act or acts that amounted to misconduct in public office.

26. The indictment: The starting point is the indictment: **ACAB1 6**. It described the proposed act or acts to be committed in the future pursuant to the conspiracy in a qualitative way, which is to say by reference to a class of acts that satisfy four cumulative conditions.

26.1. The first condition was that the acts would be carried out by Mr Macdonald.

26.2. The second condition was that the acts be "in connection with the granting of an exploration licence at Mount Penny in the State of New South Wales".

26.3. The third condition was that the acts "concern[] the interests of Edward Moses Obeid and/or Moses Edward Obeid and/or their family members and/or associates".

26.4. The fourth condition was that the acts be carried out in circumstances where Mr Macdonald knew that doing so was in breach of his duties and obligations of impartiality and/or confidentiality as a Minister.

27. Acts satisfying these four conditions are capable of amounting to the offence of misconduct in public office. The fact that "particular" (by which is meant "specific") acts are not identified individually and that acts are instead identified by reference to the satisfaction or intersection of four conditions does not mean that the indictment was impermissibly vague or incapable of amounting to a conspiracy to commit misconduct in public office. The particularity of the indictment in this case fell comfortably within the range of generality allowed by the courts in other cases where conspiracies have been charged.

28. The Particulars: Defence of the Crown case at trial could end there, but the sufficiency of that case is reinforced once assessed in the context of the particulars provided by the Crown. The Crown provided particulars of the existence of the alleged conspiracy and each accused's participation in that conspiracy: see **AABFM1 13**. The Crown also provided the following particulars of the agreement at **AABFM1 13-14**:

> 12. The nature of the unlawful agreement the subject of the charge was that Mr Macdonald would conduct himself in relation to the granting of a coal exploration licence at Mt Penny NSW, so as to favour the interests of Edward Moses Obeid, Moses Edward Obeid, and/or other family members and/or associates.
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> 13. The *other places* referred in the Indictment are unknown to the Crown but given the conspiracy alleged could have been carried out in part via telephone. The potential areas captured by the term "elsewhere" include Mudgee, Perisher Valley, the Bylong Valley (including the property *Cherrydale Park*) and Orange.
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> 14. The meaning of *concerning the interests of* in the Indictment does not require particularisation beyond the ordinary meaning of the words. The Crown case is that Ian Macdonald would misconduct himself with the improper purpose of advancing the interests (primarily financial) of Edward and Moses Obeid and/or their family members and/or associates.
>
> 15. The *family members* referred to in the Indictment are Mr Edward Moses Obeid and his wife Mrs Judith Obeid and their descendants.
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> 16. The *associates* referred to in the Indictment include Mr Justin Kennedy Lewis, Messrs Ross and Rocco Triulcio, Mr Giovanni Campo, Ms Tina Chalabian and Mr Sevag Chalabian, Mr Sid Sassine, and Mr Andrew Kaidbay.

## C. SPECIFIC RESPONSES TO MOSES EDWARD OBEID'S SUBMISSIONS [35]

29. It is apparent from **AS [17]** that the distinction for which the appellant contends is between specific acts (the submission of an application, for example) that may be the subject of a conspiracy on the one hand and a class of acts, qualitatively described, on the other hand that (on the appellant's case) may not be the subject of a conspiracy. Thus there is an immediate suggestion that to rely on the undertaking of "acts falling within the cumulative elements of the charge" is to depart from "basic principles of conspiracy". That suggestion should be rejected, having regard to the authorities set out in Part A.1 above.

30. **AS [18]** quotes *Mulcahy v The Queen*,[36] also quoted at [9] above. It presents rather than answers the issues in this appeal, because it presents rather than answers the issue as to the level of generality with which unlawful acts can be articulated for a conspiracy.

31. **AS [19]-[20]** turn to the mental element required for a conspiracy, being intention to enter into or participate in the agreement with knowledge of the facts that make the conduct unlawful. That statement of now established principle[37] is not determinative of the issues before this Court. Whether conduct is confined to specific acts or can be more widely identified by reference to a class of acts, there is no conceptual difficulty in requiring knowledge of facts that make either the specific act or the general class of acts unlawful.

32. **AS [21]** draws attention to the equally well established principle that a count must charge a single conspiracy only and to cases where a prosecution has failed because the Crown has failed to prove that the conspirators entered into or participated in the *same* agreement. That a prosecution that frames a conspiracy in broad rather than specific terms may be more susceptible to failing in such a way does not deny the sufficiency of alleging a conspiracy to commit a class of acts in the future. It is a matter for the tribunal of fact whether or not, on the evidence at trial, the charged conspiracy is established.[38] The question of whether a conspiracy is proved on the evidence in the trial is a different question to whether the Crown case as charged was defective.

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35 These submissions refer to the amended submissions filed by Moses Edward Obeid on 1 August 2025.

36 (1868) LR 3 HLR 306 at 317.

37 See, eg, *R v LK* (2010) 241 CLR 177.

38 See, eg, *R v Saffron [No 1]* (1988) 17 NSWLR 395 at 425-426 (Hope JA; Clarke JA and Hope AJA agreeing).

33. **AS [22]** misunderstands the CCA's reference to the "cumulative elements of the charge" (**ACAB2 671 [14]**) and the Crown case at trial in referring to "the cumulative legal elements of misconduct in public office". The effect of the Crown case was that the agreement was that Mr Macdonald would engage in conduct satisfying the cumulative conditions in the indictment that together describe the class of acts that were agreed upon: see [26] above. Consistently with the authorities referred to above, it did not matter that precisely what Mr Macdonald would do – the precise acts to be committed within the charged class of acts – was unknown and left to the future. What mattered, and what was sufficient to support an allegation of conspiracy, was that every act fitting within the cumulative conditions of the indictment would be capable of amounting to the offence of misconduct in public office.

34. **AS [23]** complains that if the indictment were sufficient, then "a cascading series of substantive and procedural issues" await. The complaint is well overstated, and also leaves out of all account the provision of particulars that further delimits the Crown case: see [28] above. *R v Weaver*[39] illustrates the role of particulars in this regard: see [12] above.

35. The rhetorical question in **AS [24]** is readily answered: the parties agreed and intended that Mr Macdonald would engage in acts that satisfy the cumulative conditions in the indictment. The precise behaviour within the boundaries of the class of acts that satisfy those conditions need not be and has never been required by the common law to be agreed upon.

36. There is a substantial body of case law to the effect that a conspiracy can be charged where the alleged conspirators have agreed upon an unlawful act which is to be the object of the conspiracy but not the means or method by which that object is to be pursued.[40] The attempt to confine this case law in **AS [25]** should not be accepted. Otherwise, the suggestion that the prosecution in this case alleged a conspiracy that merely restated the elements of the offence does not reflect, fairly or at all, the count on the indictment.

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39 (1931) 45 CLR 321.

40 See, eg, *R v Gill* (1818) 2 B & Ald 204 at 205-206 [106 ER 341 at 342]; *R v Blake* (1844) 6 QB 126 at 133 [115 ER 49 at 52]; *R v Banks* (1873) 12 Cox CC 393 at 398-399 (Quain J); *R v Aspinall* (1876) 2 QBD 48 at 60-61 (Brett JA; Mellish LJ agreeing); *R v Ongley* (1940) 57 WN (NSW) 116 at 117 (Jordan CJ); *R v Mitchell* [1971] VR 46 at 55 (Winneke CJ, Pape and Lush JJ).

37. **AS [26]** suggests that what needs to be agreed is "the critical conduct or transaction". By this submission, the appellant attempts to accommodate the established principle that conspirators need not agree on the precise means or method by which the agreed upon unlawful act is to be perpetrated, by proposing a *new* criterion of validity which is both unstable and unsupported by any existing authority. It follows from the authorities discussed in Part A.1 above that the conduct alleged must (and need only) amount to the offence the subject of the conspiracy. For the reasons set out above, the indictment did so in this case.

38. There is force in the submission in **AS [27]** that what is required for a sufficient allegation of conspiracy will be informed by the nature of the offence which is the object of the conspiracy. *Elomar v R* bears this out: see at [20] above. But the breadth of the conduct that can constitute the offence of misconduct in public office tends to make it more, not less, acceptable to describe the proposed acts in the conspiracy at a higher level of generality, as *Elomar* also bears out: cf **AS [28]**. If the underlying offence can be established by a wide variety of conduct, it stands to reason that a conspiracy to commit that same offence may well involve an agreement to proposed acts falling within a wide description.

39. **AS [29]** is a return to the distinction that first emerged at **AS [17]** about which the parties ultimately join issue. In principle, and consistently with authority, there is no deficiency in describing the proposed acts in a conspiracy by qualities or descriptors rather than in terms of "concrete or specified conduct".

40. The robbery example deployed in **AS [30]** should be treated with caution, and in particular the criticism made of an agreement to do "acts in connection with" a robbery. The indictment in this case did not allege an agreement to do acts in connection with misfeasance in public office. The indictment in this case alleged an agreement to commit the offence of misfeasance in public office. The relational phrase "in connection with" was used in the indictment to identify the class of conduct agreed to be engaged in by Mr Macdonald, which conduct would amount to the offence of misfeasance in public office where the other conditions in the indictment were met.

41. The matters in **AS [30]** do not otherwise deny the sufficiency of the alleged conspiracy in the indictment. At most, the matters in **AS [30]** identify the competing implications for the case of a broad rather than a narrowly articulated conspiracy. Equally, complications

will arise when a conspiracy is narrowly articulated: see, eg, *Rubasha v R*[41] where an unreasonable verdict ground was successful because of the Crown having pleaded a narrow conspiracy to rob a house on a particular street, such that the Court was not satisfied that a jury could have rejected as a rational inference that the object of the conspiracy was to rob a house on any other street (at [31]), and see at [14] "nothing in this judgment should be taken as holding that it was necessary for the Crown to particularise the location of the person to be robbed in the precise manner it did"). That the framing of a charge will necessarily have consequences for how the Crown sets about proving that charge, and how the accused may defend the charge, does not tell against the sufficiency of this indictment.

42. **AS [31]** criticises the respondent's reliance on *HKSAR v Hui Rafael Junior*.[42] The respondent maintains that the case is of some assistance. The Hong Kong Court of Final Appeal considered an appeal against conviction in respect of a conspiracy to commit misconduct in public office, in circumstances where it was alleged that the public officer would, in return for payments made immediately before and in anticipation of his appointment to senior public office, agree to "remain favourably disposed, in office, to commercial interests associated with the other appellants".[43] The question posed for the Court of Final Appeal was whether such an agreement was capable of answering the description of an agreement on the part of the public officer to misconduct himself in the course of or in relation to his public office.

43. As here, the appellants there argued that "remaining favourably disposed" was not a specific enough actus reus sufficiently to amount to the commission of an offence.[44] The Court, comprised of Ma CJ, Fok PJ, Chan, Stock and Gleeson NPJJ, rejected the argument, stating that the "inclination" alleged was "wholly inimical" to his duties and comprised "a continuing act of misconduct whilst he was Chief Secretary".[45] The Court went on to say that by agreeing to "act as Chief Secretary whilst he was in the 'golden fetters' constituted by [the payment] that he conspired to commit an act of misconduct sufficient to satisfy the conduct element of the offence of misconduct in public office".[46]

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41 [2021] NSWCCA 319.
42 (2017) 20 HKCFAR 264.
43 (2017) 20 HKCFAR 264 at [1].
44 (2017) 20 HKCFAR 264 at [72].
45 (2017) 20 HKCFAR 264 at [98]-[99].
46 (2017) 20 HKCFAR 264 at [99].

The Court concluded that "the argument advanced to this Court that the judge erred in not directing the jury that it was necessary to prove that specific acts of favour were contemplated by the appellants or that at least it was agreed that favour would be shown if and when that should become necessary, is an argument which necessarily fails".[47]

44. By analogy, there is nothing impermissibly vague about the specific allegations made in this indictment. Indeed, there would have been nothing impermissible about an allegation that Mr Macdonald would do what he could when the opportunity presented itself within the scope of the cumulative conditions in the indictment: **cf AS [31]**. As Hope JA observed in *R v Saffron [No 1]*:[48]

> … I can see no reason why two or more persons could not conspire to defraud company creditors as an when the opportunity arose, and why this would not be as much a single conspiracy as a terrorist conspiracy to murder the representatives or nationals of a particular country as opportunity allowed.

45. **AS [32]-[38]** returns to the key distinction between the parties. The respondent's primary submission in response is that it is consistent with principle and authority that a conspiracy can be committed where the conspirators agreed upon proposed acts falling within a class of acts alleged by the Crown even though precisely what is to be done within that class may not be agreed. There are three subsidiary arguments made by the appellant which are addressed in turn.

46. The appellant's first argument is that the CCA construed the conspiracy as having greater specificity than it did by (incorrectly) suggesting that the CCA concluded the indictment did not identify "conduct" (**AS [33]**). That is a misstatement of the CCA's reasons, the Court was there explaining the functional role of the particulars at trial, stating "[t]he particulars may also 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": **ACAB2 678 [29]**. Nor did the CCA construe the conspiracy with any more particularity than it had (cf **AS [33]**); the CCA's express conclusion was that having regard to the descriptive limbs of the acts which were agreed, *that* constituted a sufficient "degree of particularity in relation to the nature of the acts the subject of the charge": **ACAB2 677 [28]**.

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47 (2017) 20 HKCFAR 264 at [101].

48 (1988) 17 NSWLR 395 at 424 (Hope JA; Clarke JA and Hope AJA agreeing) See also *R v Aspinall* (1876) 2 QBD 48 at 60-61 (Brett JA; Mellish JA agreeing).

47. The second argument is that the conduct the subject of the agreement was so broad as to capture both "no conspiracy and multiple different conspiracies" (**AS [38]**). That submission elides the distinction between whether the indictment contains a charge known to law and whether the Crown was capable of *proving* that charge beyond reasonable doubt on the evidence in the case. If, on the evidence, it in fact emerged that there were rational inferences consistent with no conspiracy, or multiple different conspiracies, then the accused would be entitled to an acquittal. But in this case, *on the evidence,* the trial judge and the CCA were satisfied beyond reasonable doubt that the Crown had proved the existence of the conspiracy in the terms alleged. It was an express part of the appellants (rejected) unreasonableness ground of appeal that there were different and/or narrower agreements between them which were not excluded on the evidence.[49] Those challenges were rejected by the CCA: **ACAB2 794 [378], 797 [384], 850-851 [559]-[560]**. There was no grant of special leave in this case directed to the unreasonableness ground of appeal.

48. The third argument is that the use of "and/or" in the indictment leaves open that the conspirators may have had different ideas about what conduct Mr Macdonald would commit and what duties he would breach. While this argument was raised in the context of ground one in paragraph 27 of the application for special leave,[50] it was a separate and distinct challenge to the indictment in the CCA and does not appear to be within the grant of special leave. In any event, as the CCA correctly found, this was "not a case of duplicity, nor was it submitted by the appellants to be such": **ACAB2 702 [84];** see also the trial judge's rejection of this argument at **ACAB1 46-48 [112]-[119]**. The indictment alleged an agreement as to the doing of "acts" possessing one or more forbidden characteristics.[51] The agreement the Crown sought to prove (and did prove) was an agreement at the level of those acts (and on the basis the acts would have either or both forbidden characteristics). There was nothing irregular, or even unusual, in the indictment being framed in this way. For example, *R v Agius* involved an indictment alleging that the four respondents conspired with each other and one other person "to dishonestly cause a loss, or to dishonestly cause a risk of loss" to the Commonwealth, "knowing or believing

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49 Submissions of Moses Obeid in the CCA dated 7 April 2022 at [313]: **RBFM 7-8** (which were adopted by both Edward Obeid and Ian Macdonald).

50 **RBFM 17**.

51 See *Romeyko v Samuels* (1972) 2 SASR 529 at 552 (Bray CJ).

that the loss would occur or that there was a substantial risk of the loss occurring".[52] Another example is *B v R*, which involved an indictment which alleged a conspiracy to do acts in preparation for a "terrorist act (or acts)".[53]

49. **AS [39]-[48]** stray beyond the limited grant of special leave. That should not be permitted. Those paragraphs reprise and recast the arguments advanced at paragraphs 25 and 26 of the application for special leave relating to separate criticisms of the indictment.[54]

50. But for completeness, even assuming that a "but for" test applies to the third element (which does not arise for consideration in this appeal, see [22] above) that is neutral as to whether it is permissible to identify the proposed acts as a class as compared to concrete or specific acts. Both approaches permit of an analysis as to whether the proposed acts (whether general or specific) would not be engaged in but for the improper purpose. And, even assuming (contrary to the CCA's conclusion and the respondent's contention) that the conspirators must agree the fifth element, that too is neutral on the question of how the acts are to be identified for much the same reason. A class of acts can be assessed for whether such acts have the requisite characterisation of being serious and meriting criminal punishment in the same way as specifically defined acts.

## D. SPECIFIC RESPONSES TO EDWARD MOSES OBEID'S SUBMISSIONS [55]

51. There are two arguments made by Edward Moses Obeid. The first appears to be the contention that, without alleging a conspiracy to engage in concrete and specific acts, it is not possible to assess the fifth element of the offence of misconduct in public office and for that reason a conspiracy to commit that offence must identify concrete and specific acts rather than a class of acts: see, eg, **AS [13], [16], [25]-[27], [34]-[37]**.

52. The answer to this argument is at [50] above: there is no logical or principled impediment to evaluating the gravity of acts taken as a class as compared to the gravity of acts specified in more concrete and specific terms. At most, the appellant's arguments would tend to suggest that the broader the class of acts relied upon, the more difficult the Crown's case may be at trial in establishing all the elements that must be established in

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52 (2011) 251 FLR 375 at [1], [53]-[83] (Simpson J) (appeals dismissed: *Agius v R* (2011) 80 NSWLR 486; *Agius v The Queen* (2013) 248 CLR 601).

53 (2008) 76 NSWLR 533 at [42]-[69] (Spigelman CJ).

54 **RBFM 16-17**.

55 These submissions refer to the amended submissions filed by Edward Moses Obeid on 1 September 2025.

respect of that class. But that will not always be the case. And it is not a matter that shows there to be any deficiency in the Crown case, or defect in the indictment, at the level of principle.

53. The second appears to be that the descriptive limbs in the indictment of the acts on which the conspirators agreed could have included within them conduct which did not constitute the offence of misconduct in public office: see **AS [21]-[23], [31], [34]-[36]**. That is not accurate because the last (cumulative) limb of the descriptive acts was that, in taking the relevant "steps", Mr Macdonald would act knowingly in breach of his obligations of impartiality and/or confidentiality as a Minister. There is no conduct that could fall within the cumulative descriptive limbs in the indictment of the acts and yet fall outside the scope of the predicate offence.

54. The respondent otherwise relies on its submissions above in response to Edward Moses Obeid's submissions.

## E. SPECIFIC RESPONSES TO IAN MACDONALD'S SUBMISSIONS

55. **AS [12]-[18]** presents rather than answers the issue on the appeal as to the level of generality at which the proposed act or acts in a conspiracy may be identified, while the focus on the mental element in **AS [19]-[24] and [31]-[34]** is neutral for the reasons set out at [31] above.

56. **AS [28]-[30]** misstate the CCA's judgment and the Crown case. The Crown did not allege an agreement for Mr Macdonald to commit the offence of misconduct in public office simpliciter. The distinction between the appellants on the one hand and the CCA and the respondent on the other is whether it is permissible to identify proposed acts in a conspiracy by way of a descriptive class rather than in terms of concrete and specific acts. Neither approach involves a bare allegation of an agreement to commit the offence.

57. The submissions in **AS [39]-[42]** are overstated. The appellant ignores the terms of the indictment, which did confine the conspiracy so that it was not at large: see [26]-[27] above. In so far as a broadly articulated conspiracy makes it more difficult to prove that the conspiracy was actually entered into, that is a matter of evidentiary proof, not principle. The appellant also ignores the significance of the provision of particulars of the overt acts. As the CCA observed, the particulars serve a practical function of "illustrating the class of acts which, although not agreed upon in advance, could fall within the class which must have been in contemplation" **ACAB2 678 [29]**.

58. The submissions in **AS [43]-[51]** invite this Court to be cautious in endorsing the acceptability in this case of identifying proposed acts as a class in a descriptive manner, but overlook that the CCA's approach in this case is consistent with the weight of longstanding authorities. Likewise, inviting the Court to leave any change to the legislature (see **AS [59]-[61]**) ignores that the CCA applied (long) established common law, rather than purporting to change it.

59. Finally, reasoning by analogy or by reference to joint criminal enterprise (see **AS [52]-[58]**) is a distraction given the differences between that doctrine and conspiracy.[56]

## PART VI NOTICE OF CONTENTION OR CROSS-APPEAL

10 60. There is no notice of contention or cross-appeal.

## PART VII ESTIMATE OF TIME FOR ORAL ARGUMENT

61. The respondent notes that the appellants in the three appeals have requested 4 ¼ hours for oral argument. If the Court permits the appeals to be set down for two days, then the respondent requests a total of 3 hours for its oral argument in the three appeals. On the basis that the appeals have currently been listed for a single day only, the respondent requests 2 ¼ hours for oral argument with the appellants sharing the balance for their submissions in chief and reply.

Dated: 10 September 2025

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[56] See generally *R v Rohan* (2024) 280 CLR 288.