

SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2025

No.	Name of Matter	Page No
<u>Tuesday, 4 November 2025 and Wednesday, 5 November 2025</u>		
1.	CCDM Holdings, LLC & Ors v The Republic of India	1
<u>Thursday, 6 November 2025</u>		
2.	Obeid v The King; Obeid v The King; Macdonald v The King	4
<u>Tuesday, 11 November 2025</u>		
3.	Abdel-Hady v Commonwealth of Australia	6
<u>Wednesday, 12 November 2025</u>		
4.	Deripaska v Minister for Foreign Affairs	8
<u>Thursday, 13 November 2025</u>		
5.	The King v AR	10

CCDM HOLDINGS, LLC & ORS v THE REPUBLIC OF INDIA (S90/2025)

Court appealed from: Full Court of the Federal Court of Australia
[2025] FCAFC 2

Date of judgment: 31 January 2025

Special leave granted: 12 June 2025

The issue in this appeal is whether the respondent, the Republic of India ('India'), a Contracting State to the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('the Convention'), has submitted to the jurisdiction of an Australian court for the purposes of section 10 of the *Foreign States Immunities Act 1985* (Cth) ('the FSIA') in proceedings to enforce an arbitral award.

Summary of legal provisions

Article III of the Convention provides, *inter alia*, that '*[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*'. However, India has made a declaration under Art I(3) that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law ('Commercial Reservation').

Meanwhile, s 9 of the FSIA states that '*[e]xcept as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding*'. However, s 10(1) provides an exception that '*[a] foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section*', and s 10(2) further provides that a State may submit to jurisdiction '*by agreement or otherwise*'.

Background

The appellants are Mauritian companies and shareholders in a company incorporated in India, which had entered into an agreement with a corporation owned by India for the leasing of part of the electromagnetic spectrum on two satellites ('the Agreement').

In 2011, the Agreement was annulled by India. In 2012, the appellants commenced arbitration proceedings before an International Chamber of Commerce Tribunal in the Netherlands under a bilateral investment treaty ('BIT') entered between India and Mauritius. The BIT provided that a Mauritian investor is entitled to have any claim that India has violated the treaty determined by international arbitration. In 2016, it was held that India had breached the BIT and in 2020, the appellants were awarded substantial damages ('the Award'). After the Award was issued, the Indian corporation was wound up.

Legal proceedings

In 2021, the appellants commenced a proceeding in the Federal Court of Australia, seeking recognition and enforcement of the Award under s 8 of the *International Arbitration Act 1974* (Cth). India made an interlocutory application to

set aside the proceeding on the basis that it had immunity under s 9 of the FSIA. The primary judge dismissed India's application, finding that India had submitted to jurisdiction within the meaning of s 10(2) of the FSIA by ratifying the Convention, and the Commercial Reservation was not directly relevant, as Australia had not made such a reservation.

India appealed this decision to the Full Court of the Federal Court, which considered two issues: firstly, whether by ratifying the Convention, India had waived foreign state immunity in respect of enforcement of an award that was generally within the scope of the Convention but excluded by its Commercial Reservation, and secondly, whether the Award was outside the scope of India's Commercial Reservation.

The Full Court found that India had not waived its foreign state immunity and that any waiver by India of its immunity in proceedings in the Court for the enforcement of an award under the Convention was limited by its Commercial Reservation. In holding that the Award was outside the scope of the Commercial Reservation, the Full Court considered that the 'differences' that were the subject of the Award were not commercial under Indian law, but rather the relevant 'differences' arose from the BIT (which was in the realm of public international law) and the annulment of the Agreement, a decision made by India as a matter of public policy. Therefore, the effect of India's Commercial Reservation was to qualify its obligations under the Convention on a reciprocal basis to only be applicable to awards determining differences arising from legal relationships which are considered as commercial under Indian law.

India appears conditionally in this Court for the purposes described in s 10(7)(b) of the FSIA, namely for the purpose of asserting immunity. The Attorney-General of the Commonwealth has been granted leave to intervene without supporting any party.

Grounds of appeal

The grounds of appeal are:

1. The Full Court erred in finding that a declaration made by a Contracting State to the 1958 Convention under Art I(3) of the Convention that 'it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law' ('Commercial Reservation') may operate reciprocally in accordance with the rules of customary international law embodied in Art 21 of the 1969 Vienna Convention on the Law of Treaties.
2. Further and alternatively, the Full Court erred in finding that such rules of customary international law applied to limit Australia's obligations under Art III of the Convention to enforce against India an Award made in the Netherlands.
3. Further and alternatively, the Full Court erred in failing to find that India's commercial reservation did not affect its agreement under Art III of the Convention to Australia's right to exercise jurisdiction over it to enforce the Award.

4. The Full Court erred in finding that India's ratification of the Convention was not a waiver of immunity for the purposes of s 10(2) of the FSIA in proceedings to enforce the Award.
5. The Full Court failed to provide procedural fairness to the applicants by failing to seek their submissions on the application of customary international law to India's Commercial Reservation and Australia's rights and obligations under the Convention.

OBEID v THE KING (S88/2025);
OBEID v THE KING (S89/2025);
MACDONALD v THE KING (S93/2025)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
New South Wales
[2023] NSWCCA 250

Date of judgment: 6 October 2023

Special leave granted: 12 June 2025

Three related appeals have been brought against the judgment of the Court of Criminal Appeal of the Supreme Court of New South Wales ('the CCA') given on 6 October 2023. They are being heard together under grants of special leave to appeal on a limited basis.

As at 2008, exploration for minerals in New South Wales could only be conducted with the approval of the Minister for Mineral Resources. At the relevant time, the Obeid family owned a rural grazing property at Mount Penny in the Bylong Valley, which was located partly within the Mount Penny coal release area. In 2020, Mr Edward Moses Obeid, Mr Moses Edward Obeid, and Mr Ian Michael Macdonald (collectively, 'the appellants') were charged with conspiracy to commit the common law offence of wilful misconduct in public office for a series of alleged acts said to have been committed between May 2008 and January 2009. It was alleged that the appellants had agreed for Mr Macdonald (in his capacity as Minister for Mineral Resources) to take steps in connection with the grant of an exploration licence concerning a coal reserve believed to exist under the Obeids' property for the improper purpose of advantaging the Obeids, their family and associates. In doing so, Mr Macdonald is alleged to have wilfully breached his Ministerial duties and obligations of confidentiality and impartiality.

After a trial before the primary judge (Fullerton J) sitting without a jury, the appellants were convicted of conspiracy to commit misconduct in public office. Mr Macdonald was sentenced to nine years and six months imprisonment; Mr Edward Obeid seven years; and Mr Moses Obeid five years. The appellants then appealed to the CCA on a variety of grounds, and each appeal was unanimously dismissed.

There has been a limited grant of special leave to appeal to this Court in each of the three appeals, confined to that part which contends that the Crown case was defective because it did not allege an agreement for Mr Macdonald to do a particular act or acts that amounted to misconduct in public office.

The Appellants' position

The appellants have each filed separate submissions concerning issues with the nature and particulars of the alleged agreement to conspire. The appellants question whether there was an agreement capable of amounting to a conspiracy to commit misconduct in public office. The appellants submit that the common law offence of conspiracy captures agreements to commit certain kinds of conduct. 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. As put by Mr Macdonald, the accused must intend both to enter into the agreement and intend

that the ‘unlawful act’ be carried out pursuant to the agreement. In that regard, the accused must have knowledge of the essential facts and circumstances that make the relevant conduct criminal. Recklessness, or even knowledge of the probability that an offence will be committed, is not sufficient. The appellants contend that this was not a case where the conspiracy to commit conduct satisfied the legal elements of misconduct in public office.

The appellants raise the issue that the simple question in the present case cannot be answered: what conduct did the parties actually agree and intend to take place? It is the clear identification of the conduct that 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 does not suffice that a person may have had some more high level or general criminal intention or culpability.

The appellants submit that the CCA erred in finding that the Crown alleged a case capable at law – there was no case at law and the CCA should have entered verdicts of not guilty.

The Respondent’s position

By way of a joint response to all three appeals, the respondent submits that the Crown case was sufficient in satisfying the legal elements required to amount to an offence of misconduct in public office. The indictment clearly described the proposed acts to be committed in the future pursuant to the conspiracy in a qualitative way, by reference to a class of acts that satisfy four cumulative conditions:

1. The acts would be carried out by Mr Macdonald.
2. The acts be ‘in connection with the granting of an exploration licence at Mount Penny in the State of New South Wales’.
3. The acts concerned ‘the interests of Edward Moses Obeid and/or Moses Edward Obeid and/or their family members and/or associates’.
4. 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.

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.

Ground of appeal

The sole ground of appeal is:

- The CCA erred in concluding that the Crown put a case at trial capable at law of amounting to a conspiracy to commit misconduct in public office because the Crown did not allege an agreement for Mr Ian Macdonald to do a particular act or acts that amounted to misconduct in public office.

ABDEL-HADY v COMMONWEALTH OF AUSTRALIA (S65/2021)

Date special case referred to Full Court: 13 August 2025

The plaintiff, a citizen of Austria (and who has never been a citizen of Australia), first arrived in Australia by plane in 1997 on a visitor visa. He was granted several visas of various kinds between 1997 and 2013. In March 2013, he was granted a Partner Visa. In March 2017, a delegate of the Minister cancelled that visa pursuant to section 501(2) of the *Migration Act 1958* (Cth) ('the Migration Act'). In August 2017, the plaintiff was detained under s 189 of the Migration Act. By April 2019, the plaintiff had exhausted all available avenues of appeal, including an application for special leave to appeal.

In May 2021, the plaintiff commenced this proceeding, seeking relief by way of declarations, writs of prohibition and habeas corpus, and damages for false imprisonment, in respect of: a) the visa cancellation decision, which was the subject of grounds one to four; and b) the decision to take the plaintiff into, and keep him in, immigration detention (ground five). In support of ground five, the plaintiff contended that he was subject to indefinite detention and sought to re-open and overturn *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'). On 28 October 2021, Gageler J (as he then was) dismissed grounds one to four, remitted ground five to the Federal Circuit and Family Court of Australia ('the FCFCOA') in so far as it sought relief by way of a declaration or writ of prohibition or habeas corpus in respect of the immigration detention decision, and left the balance of ground five (which concerned the plaintiff's claim for damages for false imprisonment) in the High Court, on the basis that it could not be remitted to any other court.

In November 2023, the High Court made orders and gave reasons in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 ('*NZYQ*'). In *Al-Kateb*, ss 189(1) and 196(1) of the Migration Act had been held validly to authorise and require the detention of an unlawful non-citizen who was detained for the purposes of removal until that non-citizen was actually removed from Australia, even if there was no real prospect of removal becoming practicable in the reasonably foreseeable future. *NZYQ* established that ss 189(1) and 196(1) did not validly authorise or require the detaining officers to keep the plaintiff in immigration detention.

Both before and after the decision in *NZYQ*, there was dispute between the parties as to the plaintiff's fitness to travel from Australia to Austria following an episode of thrombophilia (an extreme tendency to thrombosis) in July 2022. By February 2024, the Commonwealth accepted, having regard to the medical assessments then available, that from July 2022 the plaintiff's thrombophilia had rendered him unfit to travel by any commercial aeroplane. On that basis, the Commonwealth accepted that since July 2022 there has been no reasonable prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future. The plaintiff was granted a Bridging Visa and released from immigration detention on 13 February 2024. In June 2024, consent orders were made by the FCFCOA reflecting the parties' agreement to the grant of relief sought by the plaintiff in the remitted proceedings.

Throughout the relevant period until *Al-Kateb* was overturned by *NZYQ*, the detaining officer, who was required by s 13(4) of the *Public Service Act 1999* (Cth) to comply with all applicable laws, reasonably understood his duty to be to

keep the plaintiff in immigration detention until he was actually removed from Australia.

The plaintiff and defendant have each filed a notice of a constitutional matter. BOE21, a person in a position similar to the plaintiff and who has a claim for false imprisonment on foot in the Federal Court, has been granted leave to intervene, limited to the filing of submissions.

The question of law stated for the opinion of the Full Court in the special case is:

- Do the Commonwealth and its officers have a defence to liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in the period between 28 July 2022 and 8 November 2023?

DERIPASKA v MINISTER FOR FOREIGN AFFAIRS (P34/2025)

Court appealed from: Full Court of the Federal Court of Australia
[2025] FCAFC 36

Date of judgment: 27 March 2025

Special leave granted: 7 August 2025

The appellant is a Russian national who challenges a decision made by the then respondent ('the Minister') to designate him for targeted financial sanctions and declare him for travel bans under the *Autonomous Sanctions Act 2011* (Cth) ('the AS Act') and the *Autonomous Sanctions Regulations 2011* (Cth) ('the AS Reg').

On 17 March 2022, the Minister 'designated' and 'declared' the appellant under regulation 6 of the AS Reg. Relevantly, there are prohibitions contained in the regulations as follows:

- (a) Regulation 14 prohibits anyone from directly or indirectly making any asset available to, or for the benefit of, a designated person or entity; and
- (b) Regulation 15 prohibits a designated person and any other person from using or dealing with a designated person's assets, and from allowing or facilitating such use or dealing.

The above regulations have been declared by the Minister to be 'sanction laws' for the purpose of section 6 of the AS Act and are criminal offences. The Minister may grant a permit under regulation 18 allowing a person to engage in conduct that would otherwise be prohibited by regulations 14 and 15, but only if satisfied that this 'would be in the national interest'. Such a permit may be revoked at any time.

The appellant submits that being 'designated' and 'declared' has the practical consequence of making the appellant's 'access to legal representation a matter for executive discretion'. The appellant contends that without a permit from the Minister, it 'will very likely be impossible for a lawyer effectively to advise or represent' the appellant without committing a criminal offence. The present litigation, and any advice prior to its commencement, was able to take place only by virtue of a permit from the Minister.

The appellant asserts that the sole issue is whether regulations 14 and 15 of the AS Reg may be 'read down' pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) ('the AIA'), as they were by the Full Court of the Federal Court of Australia. Specifically, can those provisions be construed so that they do not apply to conduct that is undertaken 'for the purpose, in an objective sense, of challenging the validity of decisions or actions' under the AS Act pursuant to s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth)? The appellant submits that this partial disapplication of 'reading down' the regulations is problematic, constitutionally impermissible, and results in a failure to safeguard the very jurisdiction that it was designed to protect. The appellant submits that it is well established that s 15A of the AIA does not authorise a court to make a legislative choice between several possible readings down. The appellant submits that even if partial disapplication of the regulations were otherwise permissible, regulations 14 and 15 would remain invalid because of the prohibition on legal

representation in Chapter III courts, and the prohibition on the ability for a person to invoke the jurisdiction in s 75(iii) by leaving it to the discretion of Commonwealth officials. If regulations 14 and 15 are invalid, it follows that when deciding to 'designate' and 'declare' the appellant, the Minister proceeded upon an 'error ... as to an important attribute of the decision to be made', and in such circumstances the decision should be quashed or a declaration made to the effect that the decision is void.

The Minister submits that the issues sought to be raised by the appellant did not properly arise below and do not properly arise in this Court. The Minister contends that the appellant's case confuses the potential for a choice to be made about the expression of the constitutional limitation by reference to which a statutory provision must be partially disapplied (being a choice that does not prevent partial disapplication) with the existence of a choice between different ways to reduce a law to validity (which does prevent partial disapplication). The Minister submits that regulations 14 and 15 are subject to legislated reading down and severance rules. The regulation-making power in s 10 of the AS Act is subject to s 15A of the AIA and, to the extent that s 10 is 'read down' to accommodate a constitutional limitation, the regulations must be construed so far as possible so as not to exceed that power to read down. The Minister's position is that regulations 14 and 15 are valid.

The primary judge (Kennett J) dismissed the appellant's challenge to the Minister's decision and to the validity of regulations 14 and 15. The Full Court of the Federal Court of Australia (Wigney, Stewart and Neskovic JJ) unanimously dismissed the appellant's appeal of the primary judge's decision.

The Attorneys-General for the Commonwealth of Australia (who has filed joint submissions with the respondent) and the State of Victoria have intervened in support of the respondent.

The sole ground of appeal is:

- The Full Court of the Federal Court of Australia erred in failing to hold that regulations 14 and 15 of the AS Reg were invalid.

THE KING v AR (S111/2025)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
New South Wales
[2025] NSWCCA 22

Date of judgment: 3 March 2025

Special leave granted: 7 August 2025

The respondent, AR, stood trial in the New South Wales District Court on an indictment containing seven counts. On the Crown's case, the seven counts concerned three incidents in respect of the same complainant ('the charged incidents'). By counts 1, 3 and 5, the respondent was charged with having sexual intercourse with a child between the ages of 10 to 14 contrary to section 66C(1) of the *Crimes Act 1900* (NSW) ('the Crimes Act') ('the sexual intercourse counts'). Counts 2, 4 and 6 were alternative counts (to counts 1, 3 and 5 respectively) of sexual touching of a child between the ages of 10 to 16 contrary to s 66DB(a) of the Crimes Act. The last incident was the basis of an additional count (count 7) of sexual touching of a child between the ages of 10 to 16 contrary to s 66DB(a) ('the sexual touching count'). The respondent pleaded not guilty to each of the seven counts. On 10 August 2022, the jury returned verdicts of guilty to two of the sexual intercourse counts (counts 3 and 5) and the sexual touching count (count 7). He was acquitted of the other counts. The respondent was sentenced to nine years and six months imprisonment, with a non-parole period of four years and nine months.

At trial, the Crown sought to rely on tendency evidence. The tendency asserted was that the respondent:

- (a) Had a particular state of mind, namely a sexual interest in the complainant; and
- (b) Had a tendency to act on that sexual interest by penetrating her vagina with his fingers and/or sexually touching her when she had fallen asleep beside him while watching a movie ('the asserted tendency').

The evidence said to establish the asserted tendency was the evidence of the complainant about the respondent's conduct on each of the three charged incidents. The trial judge ruled the tendency evidence admissible. The trial judge gave the jury a tendency direction that was consistent with the tendency direction in the NSW *Criminal Trial Courts Bench Book* (as it was at that time). Relevantly, the direction included instructing the jury to '*decide what conduct occurred*' and then, if satisfied that some or all of the conduct had occurred, decide whether it enabled the inference to be drawn that the respondent had the relevant tendency.

The respondent sought leave to appeal his convictions on counts 3, 5 and 7 to the New South Wales Court of Criminal Appeal ('the CCA'). The respondent advanced a single ground of appeal, with three sub-grounds, impugning aspects of the trial judge's directions to the jury concerning the tendency evidence. Relevantly, the CCA upheld sub-ground 1(b), namely that the trial judge erred by:

- (i) Directing or inviting the jury to make findings in respect of charged conduct in the context of considering whether they are satisfied of the alleged tendency; and
- (ii) Inviting the jury to engage in an impermissible mode of reasoning by directing the jury to consider the conduct 'collectively to decide what conduct occurred' for the purpose of determining whether the tendencies were established.

The CCA concluded that the tendency direction was at odds with *Director of Public Prosecutions v Roder (a pseudonym)* (2024) 98 ALJR 644, and with the preferred course stipulated in *JS v R* [2022] NSWCCA 145. The CCA also concluded that there was a fundamental issue in the framing of the tendency notice. The CCA held that framing the tendency and identifying the evidence to establish it so as to constitute exclusively the offending behaviour itself is '*inconsistent with the nature of tendency evidence*'. Where the tendency is expressed in the same terms as the conduct alleged, and the jury is directed or invited to make findings in respect of that conduct, such a direction is '*likely to encourage, if not require, the jury to engage in ... impermissible circular reasoning*'. Accordingly, although the summing up dealt appropriately and properly with the onus and standard of proof and the need for the element of each charge to be proved beyond reasonable doubt, it was not designed to, and could not adequately, address the difficulties that arose as a result of the tendency being expressed in precisely the same terms as the acts relied upon to establish the tendency and relied upon to establish the guilt of the applicant in respect of the relevant counts.

The CCA was satisfied that a miscarriage of justice was occasioned by a misdirection of law, as the tendency direction did not adequately direct the jury, and it was likely the jury's attention would be deflected from applying the required standard of proof in respect of the offences charged. Accordingly, the CCA quashed the convictions on counts 3, 5, and 7, and ordered that the respondent be retried on those counts. On 7 August 2025, the appellant was granted special leave to appeal to the High Court from part of the judgment of the Court of Criminal Appeal.

The grounds of appeal are:

1. The Court of Criminal Appeal of New South Wales erred in concluding that a miscarriage of justice was occasioned by a misdirection of law.
2. The Court of Criminal Appeal of New South Wales erred by concluding, contrary to the decision of this Court in *R v Bauer (a pseudonym)* (2018) 266 CLR 56 and *Director of Public Prosecutions v Roder (a pseudonym)* (2024) 98 ALJR 644, that reliance upon the same evidence to establish the tendency as the evidence relied upon to establish the counts on the indictment was '*inconsistent with the nature of tendency evidence*'.