HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No S88/2025

EDWARD MOSES OBEID — APPELLANT

AND

THE KING — RESPONDENT

Matter No S89/2025

MOSES EDWARD OBEID — APPELLANT

AND

THE KING — RESPONDENT

Matter No S93/2025

IAN MICHAEL MACDONALD — APPELLANT

AND

THE KING — RESPONDENT

Obeid v The King
Obeid v The King
Macdonald v The King
[2026] HCA 1
Date of Hearing: 6 November 2025
Date of Judgment: 4 February 2026
S88/2025, S89/2025 & S93/2025

ORDER

In each matter:

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

P D Lange SC with A Chhabra for the appellant in S88/2025 (instructed by Michael Bowe Solicitors)

B W Walker SC with M S Kalyk for the appellant in S89/2025 (instructed by Murphy's Lawyers Inc)

C Parkin with J J Lang for the appellant in S93/2025 (instructed by HWL Ebsworth)

J T Gleeson SC with E R Nicholson SC, C J Tran and N A Wootton for the respondent in each appeal (instructed by Director of Public Prosecutions (NSW))

CATCHWORDS

Obeid v The King
Obeid v The King
Macdonald v The King

Criminal law – Conspiracy – Common law offence of conspiracy to commit misconduct in public office – Where accused charged on indictment with single count of conspiring together that one of them would wilfully commit misconduct in public office – Where prosecution did not allege agreement to do particular acts that amounted to misconduct in public office – Where prosecution case was that agreement to undertake acts fell within cumulative elements of charge – Whether prosecution put case at trial capable at law of amounting to conspiracy to commit misconduct in public office.

Words and phrases – "but for", "conspiracy", "conspiracy to commit misconduct in public office", "conspirator", "conspiratorial agreement", "elements of conspiracy", "elements of misconduct in public office", "improper purpose", "misconduct", "misconduct in public office", "overt acts", "predicate offence", "public official", "serious and meriting criminal punishment", "wilfully misconduct".

Mining Act 1992 (NSW), Pt 5.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. The appellants, Edward Moses Obeid, Moses Edward Obeid, and Ian Michael Macdonald, were charged on indictment with a single count of conspiring together that one of them, Mr Macdonald, would wilfully misconduct himself, without reasonable cause or justification, in public office, namely as the Minister for Mineral Resources in the Executive Government of the State of New South Wales, in connection with the granting of an exploration licence ("EL") at Mount Penny in New South Wales. A trial proceeded on that indictment in the Supreme Court of New South Wales before Fullerton J sitting without a jury. The trial judge delivered her verdict and reasons, finding each of the appellants guilty.[1] Subsequently, her Honour sentenced each of the appellants to a term of imprisonment.[2] Each appellant appealed his conviction in the Court of Criminal Appeal of the Supreme Court of New South Wales, which dismissed the appeals.[3]

2 In this Court, each appellant was given leave to raise a single ground of appeal – whether the Crown put a case at trial capable at law of amounting to a conspiracy to commit misconduct in public office where the Crown did not allege an agreement for Mr Macdonald to do a particular act or particular acts that amounted to misconduct in public office. The ground of appeal did not raise any issue about what the Crown must plead in an indictment and what can be left to particulars.[4] The appellants' complaint was that the case that the Crown put at trial was incapable at law of amounting to a conspiracy to commit misconduct in public office.

3 For the reasons that follow, each appeal must be dismissed. The agreement alleged by the Crown in its indictment, as particularised during the trial, was a complete offence of conspiracy to commit misconduct in public office. The alleged agreement contemplated acts to be undertaken by Mr Macdonald that necessarily satisfied the elements of the predicate offence, albeit that it was not known and

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1 *R v Macdonald [No 17]* (2021) 290 A Crim R 264; [2021] NSWSC 858.

2 *R v Macdonald [No 18]* (2021) 394 ALR 125.

3 *Macdonald v The King* (2023) 112 NSWLR 402.

4 See, eg, *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 557-558 [26].

could not be known at the time the agreement was made what "particular acts" Mr Macdonald would undertake to bring about the objects of the agreement.

Background

Brief factual overview[5]

4 Two material facts founded the prosecution of the appellants. First, on 27 September 2007, Locaway Pty Ltd ("Locaway"), a company associated with the Obeid family, entered into a contract to purchase "Cherrydale Park", a property to the west of Mount Penny at Bylong, north of the Hunter Valley. Locaway was a trustee of the Moona Plains Family Trust, the beneficiaries of which were members of the Obeid family. The directors of Locaway were sons of Mr Edward Obeid. Settlement occurred on 15 November 2007.

5 Second, the Department of Mineral Resources had identified a coal seam which followed the general direction of the Bylong Valley. The eastern section of the coal seam lay under three properties, the most southerly of which was Cherrydale Park. An area which included the three properties was the subject of an EL granted under the *Mining Act 1992* (NSW) known as EL6676, which was held by the Department of Primary Industries ("the DPI"). In late 2007, there was no intention on the part of the DPI to release the area for private exploration because the extent and value of the coal seam had not been assessed. In broad terms, the indictment was directed to steps taken by Mr Macdonald to release the area (including Cherrydale Park) for private exploration, with potential benefits for the Obeid family through their ownership of Cherrydale Park.

Indictment

6 The indictment charged that:

> "Between 1 September 2007 and about 31 January 2009 at Sydney and elsewhere in the State of New South Wales, each of the [appellants] conspired together that Mr Macdonald would, in the course of or connected to his public office as Minister for Mineral Resources in the Executive

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5 The following summary is an extract of the reasons of the Court of Criminal Appeal.

Government of the State of New South Wales, 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 the State of New South Wales; and

(b) concerning the interests of Edward Moses Obeid and/or Moses Edward Obeid and/or their family members and/or associates; and

(c) knowingly in breach of:

(i) his duties and obligations of impartiality as a Minister in the Executive Government of the State of New South Wales; and/or

(ii) his duties and obligations of confidentiality as a Minister in the Executive Government of the State of New South Wales,

such misconduct being serious and meriting criminal punishment having regard to the responsibilities of the Office Mr Macdonald occupied as Minister for Mineral Resources and his responsibilities as the holder of that Office, the importance of the public objects which the Office and Officeholder serve and the nature and extent of the departure from those objects."

Particulars

7 At trial, the Crown did not provide a statement of the acts which it alleged the appellants agreed that Mr Macdonald would undertake. The Crown case was that there was an agreement to undertake acts falling within the cumulative elements of the charge. To that end, the Crown provided particulars, which were revised during the trial, of the acts said to have been undertaken by Mr Macdonald pursuant to, and in furtherance of, the agreement he had reached with Mr Edward Obeid and Mr Moses Obeid. That is, the Crown case at trial was that the unlawful agreement was to be inferred from the subsequent conduct of Mr Macdonald.[6]

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6 *R v Macdonald [No 17]* [2021] NSWSC 858 at [179]-[180], [185]-[187].

8 The Crown in closing ultimately identified eight acts of misconduct, being overt acts alleged to have been committed by Mr Macdonald in furtherance of the conspiracy, which were particularised as follows:

> "FIRST MISCONDUCT: On or about 9 May 2008, Mr Macdonald sought information, via his chief of staff Mr Jamie Gibson, from the Department of Primary Industries (DPI) as to the volume of coal reserves in the area of Mount Penny (in the Bylong Valley, New South Wales) (Mt Penny). He did so in breach of his duty of impartiality as he knew the Obeid family owned property in this location.
>
> SECOND MISCONDUCT: On or about 14 May 2008, Mr Macdonald sought further information, via his chief of staff Mr Jamie Gibson, from the [DPI] about coal reserves in the area of Mt Penny including whether it was possible for the DPI to open its holdings for tender. He did so in breach of his duty of impartiality as he knew the Obeid family owned property in this location.
>
> ...[7]
>
> FOURTH MISCONDUCT: In the period 9 May to 9 July 2008, Mr Macdonald caused Mr Edward Obeid, Mr Moses Obeid or another member of the Obeid family, to be provided with a copy of:
>
> (i) a map titled 'Mt Penny' area, prepared by Ms Leslie Wiles dated 9 May 2008 (Wiles Map 1); and
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> (ii) a map titled 'North Bylong – Mt Penny Area' prepared by Ms Leslie Wiles dated 30 May 2008 (Wiles Map 2).

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7 The revised statement of particulars omitted what had been the third act of misconduct originally relied upon.

He did so in breach of his duty of impartiality as he knew the Obeid family owned property in this location, and in breach of his duty of confidentiality as both maps were confidential.[8]

FIFTH MISCONDUCT: Between 4 and 16 June 2008, Mr Macdonald directed that the 'potential open cut area' depicted in Wiles Map 2 be reduced to a smaller area comprising the eastern portion only. He did so in breach of his duty of impartiality as he knew the Obeid family owned property in this location.

SIXTH MISCONDUCT: Between 17 June and 23 July 2008, Macdonald communicated to Edward Obeid and/or Moses Obeid that the [expression of interest ('EOI')] process for Mt Penny was to commence at the end of July 2008. He did so in breach of his duty of impartiality, as he knew the Obeid family owned property in a location proposed to be included in the EOI (ie Mt Penny), and in breach of his duty of confidentiality as this information was confidential.

SEVENTH MISCONDUCT: On or after 7 July 2008, Macdonald caused Edward Obeid, Moses Obeid or another member of the Obeid family, to be provided with:

(i) a document titled 'Company EOI 2 July 2008' containing a list of companies proposed to be invited to participate in the EOI; or

(ii) information as to the companies on that list.

He did so in breach of his duty of impartiality, as he knew the Obeid family owned property in a location proposed to be included in the EOI (ie Mt Penny), and in breach of his duty of confidentiality as the list was confidential.

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8 The trial judge found that the fourth act of misconduct was proved, but without finding: (i) that the Crown had proved the provision of Wiles Map 1 as an act of misconduct in furtherance of the conspiracy; and (ii) that the information in Wiles Map 2 was confidential at the time it was provided by Mr Macdonald.

> EIGHTH MISCONDUCT: On or after 23 July 2008, Macdonald caused Edward Obeid, Moses Obeid or another member of the Obeid family, to be provided with:
>
> (i) the page [of a memorandum titled 'Coal allocation' dated 5 August 2008] with the heading 'MEDIUM COAL ALLOCATION AREAS'; and
>
> (ii) a map titled 'Proposed Coal Release Areas for EOIs' prepared by Fred Schiavo dated 21 July 2008 (Schiavo Map 3).
>
> He did so in breach of his duty of impartiality, as he knew the Obeid family owned property in a location proposed to be included in the EOI (ie Mt Penny), and in breach of his duty of confidentiality, as the information in this document was confidential.
>
> NINTH MISCONDUCT: Between 27 November 2008 and 13 January 2009, Macdonald communicated to Edward Obeid and/or Moses Obeid that the EOI process was to be (or was) reopened to allow the 'White Group' of companies (including Cascade Coal) to apply. He did so in breach of his duty of impartiality, as he knew the Obeid family owned property in a location included in the EOI (ie Mt Penny), and in breach of his duty of confidentiality as this information was confidential."[9]

The Crown alleged that Mr Macdonald would not have acted as alleged in those eight acts of misconduct "but for the improper purpose of advancing the interests of" Mr Edward Obeid, Mr Moses Obeid "and/or their family members and/or associates".

9 In relation to other aspects of the indictment, the Crown provided further particulars. First, the nature of the unlawful agreement the subject of the indictment was said to be that Mr Macdonald would misconduct himself in relation to the granting of a coal EL at Mount Penny "so as to favour the interests of" Mr Edward Obeid, Mr Moses Obeid "and/or other family members and/or associates". The meaning of "concerning the interests of" in the indictment was

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9 The trial judge found that the first, second, fourth, seventh and eighth acts of misconduct were established: *R v Macdonald [No 17]* [2021] NSWSC 858 at [1827]-[1873], [1879].

said not to require particularisation beyond the ordinary meaning of the words. The Crown case was that Mr 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".

10 As to the final portion of the indictment, which referred to the fifth element of the offence of misconduct in public office,[10] the Crown relevantly provided the following particulars:

> "(a) the *responsibilities of the Office and the Officeholder* refers to the responsibilities of Ian Macdonald as Minister for Mineral Resources, being a Minister in the Executive Government of the State of New South Wales. Those responsibilities include duties of impartiality and confidentiality as stated in the iterations of the Ministerial Code of Conduct and Ministerial Handbook;
>
> (b) the meaning of *the importance of the public objects which they serve* does not require particularisation beyond the ordinary meaning of the words and will be a matter for the jury. The Crown relies upon the opening paragraphs ... of the iterations of the Ministerial Code of Conduct;
>
> (c) the meaning of *the nature and extent of the departure from those objects* does not require particularisation beyond the ordinary meaning of the words and will be a matter for the jury. The Crown relies upon each act of willful misconduct set out at paragraph 3 above;[11] and
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> (d) as to the allegation that *the alleged misconduct was serious and meriting criminal punishment*, the Crown relies on the whole of the evidence in the Crown case." (emphasis in original)

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10 See [14] below.

11 Namely, the acts particularised at [8] above.

Crown: Elements of offence

11 In its closing submissions, the Crown provided to the trial judge the final form of a document headed "Crown: Elements of offence". The document stated:

> "(1) Ian Macdonald and Edward Obeid and Moses Obeid *intentionally* entered into an agreement that Ian Macdonald would commit misconduct in public office. That is, *each of the accused knew or intended that* Mr Macdonald would:
>
> (a) as a *public official*;
>
> - a Minister of the Executive Government of the State of New South Wales is a public official
>
> (b) in the course of, or connected to, his *public office*;
>
> (c) commit *misconduct* by:
>
> (i) intentionally doing acts in connection with the granting of an [EL] at Mount Penny NSW;
>
> (ii) with the *improper purpose* of benefitting Edward and/or Moses Obeid and/or their family members and/or associates;
>
> (d) commit the misconduct set out at (c) above *wilfully*, that is *knowing* that he was acting in breach of:
>
> (i) his duties and obligations of impartiality as a Minister in the Executive Government of the State of New South Wales; and/or
>
> (ii) his duties and obligations of confidentiality as a Minister in the Executive Government of the State of New South Wales;
>
> (e) do so without reasonable excuse or justification.
>
> (2) such misconduct being serious and meriting criminal punishment having regard to the responsibilities of the Office Mr Macdonald

> occupied as Minister for Mineral Resources and his responsibilities as the holder of that Office, the importance of the public objects which the Office and Officeholder serve and the nature and extent of the departure from those objects." (emphasis in original, footnotes omitted)

12 The footnote to element (1)(c)(ii) read:

> "*But for* this improper purpose, Macdonald would not have done such acts. It is not necessary for the improper purpose to be the sole purpose, but it must be proved that the power would not have been exercised except for the improper purpose: *Maitland and Macdonald v R* [2019] NSWCCA 32 at [84]." (emphasis in original)

13 There is no doubt that the Crown accepted that it had to prove the "but for" element. The Crown sought for the trial judge to infer the existence of the alleged agreement from the eight acts of misconduct, and so the relevance of the Crown proving that Mr Macdonald would not have engaged in the acts "but for" the improper purpose lay in showing a causal connection between the acts and the alleged agreement. Further, the trial judge held that the "but for" element needed to be satisfied by the Crown proving that each of the appellants knew, appreciated and intended that Mr Macdonald would not have agreed to act in connection with the granting of an EL at Mount Penny favouring the Obeids' private interests "but for" that improper or illegitimate purpose. Accordingly, it is unnecessary to resolve the question of whether the "but for" element derived from *Maitland v The Queen*[12] truly constitutes an element of the offence of misconduct in public office, or simply describes a particular circumstance in which some types of conduct by a public officer amount to a breach of their duty. To the extent that it is an "element" in respect of the acts described as the object of the agreement, that element was incorporated into the allegations that Mr Macdonald would "wilfully misconduct" himself in breach of his duties and obligations of impartiality and confidentiality, and the element was proved by the Crown.[13]

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12 (2019) 99 NSWLR 376 at 394 [84].

13 *R v Macdonald [No 17]* [2021] NSWSC 858 at [1845], [1862], [1865], [1867]-[1868].

Elements of misconduct in public office and conspiracy

Misconduct in public office

14 The predicate offence of the conspiracy, namely misconduct in public office, is a common law indictable misdemeanour of long lineage.[14] There was no dispute that the elements of misconduct in public office were those stated by Sir Anthony Mason when sitting as a non-permanent judge of the Hong Kong Court of Final Appeal in *Sin Kam Wah v HKSAR*,[15] as developed by intermediate appellate courts in Australia,[16] namely, that an offence is committed where (1) a public official; (2) in the course of or connected to their public office; (3) wilfully misconducts themselves; by act or omission, for example, by wilfully neglecting or failing to perform their duty; (4) without reasonable cause 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.

15 The predicate offence – misconduct in public office – defies precise definition because of the range of misconduct by officials which the offence is designed to cover.[17] For behaviour to qualify as relevant misconduct it may, but need not, involve a contravention of a statute.[18] And as the Court in *HKSAR v Hui Rafael Junior* recognised, not every breach of the law by a person when they

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14 See, eg, *Case 136 Anonymous* (1704) 6 Mod 96 [87 ER 853]; *R v Bembridge* (1783) 22 State Trials 1 at 155-156; Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307.

15 (2005) 8 HKCFAR 192 at 210-211 [45]. See also *HKSAR v Hui Rafael Junior* (2017) 20 HKCFAR 264 at 281 [45].

16 See, eg, *R v Quach* (2010) 27 VR 310 at 323 [45]-[46]; *Obeid v The Queen* (2015) 91 NSWLR 226 at 252-253 [133]; *Maitland* (2019) 99 NSWLR 376 at 391 [67]; *R v Maudsley* (2021) 9 QR 587 at 596 [21].

17 *Hui* (2017) 20 HKCFAR 264 at 281 [46], quoting *R v Boulanger* [2006] 2 SCR 49 at 69 [49]; see also 296-297 [82], quoting *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at 405 [69].

18 *Hui* (2017) 20 HKCFAR 264 at 282 [47].

are a public official is in the course of or in relation to the office held.[19] The breach of the law "must, however, have the necessary link to official powers, duties or responsibilities".[20] As Professor Finn described it:[21] "[t]he kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position". In sum, the "misconduct must be incompatible with the proper discharge of the responsibilities of the office so as to amount to a breach of the confidence which the public has placed in the office, thus giving it its public and criminal character".[22]

Conspiracy

16 Conspiracy consists "in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means".[23] Because the crime is one of agreement, the distinction between the mental element and the physical act may not serve any useful purpose.[24] The conspirators must intend to enter into the agreement, and they must intend that the common design should be carried out.[25] However, it is not necessary that the conspirators should know that what was agreed was unlawful.[26] Any overt acts done in pursuance of the agreement furnish

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19 (2017) 20 HKCFAR 264 at 282 [47].

20 *Hui* (2017) 20 HKCFAR 264 at 282 [47].

21 Finn, "Public Officers: Some Personal Liabilities" (1977) 51 *Australian Law Journal* 313 at 315, quoted in *Hui* (2017) 20 HKCFAR 264 at 282 [47] and *Quach* (2010) 27 VR 310 at 320-321 [37].

22 *Quach* (2010) 27 VR 310 at 321 [40], quoted in *Hui* (2017) 20 HKCFAR 264 at 282 [47]. See also *R v Boston* (1923) 33 CLR 386 at 392, 393, 404.

23 *R v Rogerson* (1992) 174 CLR 268 at 281, quoting *Mulcahy v The Queen* (1868) LR 3 HL 306 at 317. See also *Ahern v The Queen* (1988) 165 CLR 87 at 93.

24 *Peters v The Queen* (1998) 192 CLR 493 at 515 [54].

25 *Peters* (1998) 192 CLR 493 at 516 [55].

26 *Boston* (1923) 33 CLR 386 at 392; *Rogerson* (1992) 174 CLR 268 at 282-283; *R v LK* (2010) 241 CLR 177 at 223-224 [105].

the evidentiary foundation for inferring that a criminal conspiracy was formed, but those acts are not themselves elements of the offence.[27] Although it is unusual to have a conspiracy to commit a predicate offence that can be committed by only one of the conspirators – namely, misconduct in public office – there is no reason in principle why such an unlawful agreement cannot amount to a conspiracy.[28] The elements of conspiracy can be satisfied even where the acts are left to one conspirator.[29]

17 It was common ground between the parties that a conspiracy is complete upon the agreement being made,[30] and may be complete although the precise means or methods by which the conspiracy is to be effected are not known, nor agreed upon. Examples of such agreements include an agreement to "cheat and defraud divers insurance companies", or an agreement "by divers false pretences and subtle means and devices, to obtain from [a person] divers large sums of money, and to cheat and defraud" that person.[31]

18 Accordingly, so far as any alleged conspiracy to commit an unlawful act is concerned, the identification of the scope and object of the conspiracy by the prosecution is constrained by three requirements. The first and second are that there must be alleged and proven beyond reasonable doubt: (i) an agreement[32] (ii) to do an act that necessarily amounts to a crime.[33] The third requirement is that, consistent with the adversary system of criminal justice and the necessity to ensure

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27 *Rogerson* (1992) 174 CLR 268 at 281.

28 See, eg, *Hui* (2017) 20 HKCFAR 264.

29 *Elomar v The Queen* (2014) 316 ALR 206 at 321 [608].

30 See, eg, *Rogerson* (1992) 174 CLR 268 at 280-281; *Truong v The Queen* (2004) 223 CLR 122 at 143 [35].

31 *Gerakiteys v The Queen* (1984) 153 CLR 317 at 323; *R v Gill and Henry* (1818) 2 B & Ald 204 at 204-205 [106 ER 341 at 341-342]. See also *R v Weaver* (1931) 45 CLR 321 at 322.

32 See *LK* (2010) 241 CLR 177 at 231 [131], citing *R v Orton* [1922] VLR 469 at 473 and *Gerakiteys* (1984) 153 CLR 317.

33 *Rogerson* (1992) 174 CLR 268 at 281.

an accused person has a fair opportunity to defend the charge, there must be provided "as high a degree of particularity concerning [the] criminal charge as the subject matter will bear".[34]

Appellants' arguments

19 The appellants raised various arguments in support of the contention that the Crown put a case at trial that was not capable at law of amounting to a conspiracy to commit misconduct in public office. During the hearing, the appellants' arguments were distilled to two points.

20 First, counsel for Mr Moses Obeid (whose submissions were adopted by the other appellants) submitted that for the common law offence of conspiracy it is obligatory that the future conduct must be the subject of the agreement, and that conduct must amount to an offence if carried out as intended, so that absent specification of a particular act as the object of the conspiracy, it was not possible for the alleged conspirators to agree to acts being committed which would have the requisite quality of being criminal.

21 Second, counsel for Mr Edward Obeid further submitted that the fifth element of the offence of misconduct in public office requires an assessment of whether the misconduct merits criminal punishment and it was only by specification of the alleged acts that a tribunal of fact would be able to assess whether the nature and extent of the alleged departure from the objects of the office were such as to merit criminal punishment. Counsel contended that not all acts within the scope of the indictment would necessarily satisfy the fifth element.

22 Both arguments advanced on behalf of the appellants should be rejected.

No requirement to allege agreement to do specified acts

23 The essential flaw in both the appellants' arguments was to assert that Mr Macdonald's agreement to favour the financial interests of the Obeids could not constitute an agreement that he would commit an offence because it could not

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34 *KRM v The Queen* (2001) 206 CLR 221 at 226-227 [15]. See also *Kirk* (2010) 239 CLR 531 at 557 [26].

be said at the time of the agreement how he would depart from the objects of his office.

24 There was no dispute that, as in any charge of conspiracy, it was necessary to focus on the character of the conspiratorial agreement alleged by the prosecution.[35] There was also no dispute that the offence of conspiracy was complete at the time of the alleged agreement[36] and, on the Crown case, that was said to be no later than 9 May 2008.

25 The indictment in this case was conspiracy to commit misconduct in public office. The indictment identified the public official (Mr Macdonald) and the public office he held (Minister for Mineral Resources). As Minister for Mineral Resources, Mr Macdonald was vested with powers under the *Mining Act*, including the power to grant an EL in New South Wales.[37] There was no dispute in this Court that, as a Minister of the Crown, Mr Macdonald was a public official or public officer[38] for the purposes of establishing the elements of the predicate offence. Further, it was not in dispute in this Court that Mr Macdonald owed the two particularised[39] "duties and obligations" (namely, a duty and obligation of "impartiality" and a duty and obligation of "confidentiality") and that the overt acts found to have been undertaken by Mr Macdonald for the purposes of advancing the interests of the other appellants or their family constituted a breach of either or both of those duties and obligations. At least so far as the duty and obligation of impartiality is concerned, the duty owed by a Minister is no less strict than that

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35 *Hui* (2017) 20 HKCFAR 264 at 299 [93].

36 *Rogerson* (1992) 174 CLR 268 at 280-281.

37 *Mining Act*, Pt 5; *R v Macdonald [No 17]* [2021] NSWSC 858 at [687], [692].

38 See *R v Vaughan* (1769) 4 Burr 2494 [98 ER 308]; *Smith v Christie* (1920) 55 DLR 68.

39 See [10] above.

owed by a member of Parliament, namely "*to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".[40]

26 Paragraphs (a) to (c) of the indictment set out three "descriptive limbs"[41] of the class of acts that it was alleged were contemplated by the appellants' conspiratorial agreement. Those descriptive limbs were that Mr Macdonald's acts would be: (a) in connection with the granting of an EL at Mount Penny; (b) concerning the interests (subsequently particularised as primarily financial) of Mr Edward Obeid and/or Mr Moses Obeid and/or their family members and/or associates; and (c) knowingly in breach of his duties and obligations of impartiality and/or confidentiality. The particulars then specified that Mr Macdonald would misconduct himself so as to favour the interests of Mr Edward Obeid, Mr Moses Obeid and/or their family members and/or associates. The Crown described these descriptive limbs as "cumulative conditions" satisfied by the class of acts it was agreed would be committed in the future. The descriptive limbs explained that the conduct contemplated by the conspiratorial agreement involved Mr Macdonald breaching duties he owed as a public official, in favour of private persons.

27 The trial judge correctly characterised the conspiratorial agreement not as an agreement that Mr Macdonald would do individual acts but as an agreement that Mr Macdonald would act if and when the occasion arose. An agreement of that kind is similar to what was described in *Hui*[42] as a "conditional conspiracy, meaning a conspiracy to show favour if and when the occasion presented itself",[43] although in this case the agreement was that Mr Macdonald *would* (and not might) do an act or acts in connection with the granting of the EL at Mount Penny (to favour the financial interests of the Obeids). The conditional aspect of this conspiracy concerned what act(s) Mr Macdonald would do and not whether he

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40 *Boston* (1923) 33 CLR 386 at 400 (emphasis in original), quoted in *McCloy v New South Wales* (2015) 257 CLR 178 at 243 [171]. See also *Re Day [No 2]* (2017) 263 CLR 201 at 221 [49], 251 [179], 271-272 [269].

41 *Macdonald* (2023) 112 NSWLR 402 at 412 [28].

42 (2017) 20 HKCFAR 264.

43 (2017) 20 HKCFAR 264 at 292 [69].

would do any such acts, and whatever those acts were they would satisfy the "cumulative conditions".

28 The appellants' submission that it is obligatory in a conspiracy to specify the particular "act" which is the object of the conspiracy is to be rejected. There is no general principle that states that the object of a conspiracy must be reduced to particular specified acts.[44] Rather, courts have allowed the type of conspiracy to be alleged in fairly general terms. As observed by King CJ in *R v Lacey*, "[c]riminal 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."[45] Similarly, Wright explained that "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 that the details consequently not only cannot be stated in all cases, but may commonly be immaterial".[46]

29 Subject to the constraints identified above,[47] there is no reason why the object of a conspiracy cannot be described by reference to acts having particular characteristics. It must be accepted, however, that the more general that description, the more difficult it may be to prove (i) an agreement, because that description may be seeking to describe something so vague that it reveals no meeting of minds; or (ii) that what was agreed upon necessarily amounted to a crime, because the agreement might (realistically) embrace acts that do not amount to the predicate offence. Ultimately, it is a matter for the tribunal of fact whether or not, on the evidence at trial, the charged conspiracy is established.[48]

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44 See, eg, *Elomar* (2014) 316 ALR 206 at 320 [603], 321 [608]; *R v Saffron* (1988) 17 NSWLR 395 at 424-427.

45 (1982) 29 SASR 525 at 534-535.

46 Wright, *The Law of Criminal Conspiracies and Agreements* (1873) at 72.

47 See [18].

48 See, eg, *Saffron* (1988) 17 NSWLR 395 at 425-426.

30 In this case, the elements of paragraphs (a), (b) and (c) in the indictment,[49] as further particularised[50] and explained,[51] described acts that necessarily amounted to the predicate offence. The offence of misconduct in public office is flexible and designed to cover a range of misconduct.[52] The Crown alleged a conspiracy whereby the parties' alleged agreement was that Mr Macdonald would undertake acts, or take steps, which the conspirators had not identified and probably could not be known, but which would satisfy cumulative elements that satisfied the elements of the predicate offence. It would deny the flexibility of the predicate offence to require the conspiracy charge to achieve a degree of precision to which the subject-matter does not lend itself.[53]

31 Put in different terms, the appellants' submissions must be rejected because the agreement alleged by the Crown (inferred from the overt acts) was an agreement that Mr Macdonald would exercise his ministerial powers with respect to the Mount Penny area in a way that would favour the interests (primarily financial) of the Obeids. At the time of the agreement, the conspirators had not agreed upon and probably could not have agreed upon what powers Mr Macdonald would exercise or how he would exercise them to favour the interests of the Obeids. In that sense, it was not known and could not be known at the time the agreement was made what "particular acts" he would undertake to bring about the desired and intended advantage to the financial interests of the Obeids.

32 The trial judge and the Court of Criminal Appeal each explained the lengthy and complex process involved in applying for and obtaining an EL under the *Mining Act*.[54] That process involved, in abridged form, identifying a particular area to be the subject of a competitive EOI process for allocation of ELs or,

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49 See [6] and [26] above.

50 See [9] above.

51 See [11]-[13] above.

52 *Sher* (2002) 5 HKCFAR 381 at 411 [91].

53 cf *Sher* (2002) 5 HKCFAR 381 at 411 [90], quoting *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 at 642.

54 *R v Macdonald [No 17]* [2021] NSWSC 858 at [650]-[740]; *Macdonald* (2023) 112 NSWLR 402 at 412-419 [32]-[37].

in certain circumstances, the granting of ELs by direct allocation. The competitive EOI process, which took place in this case, then involved further steps, including data collection by the DPI about coal resources; recommendations to the Minister (ie Mr Macdonald) with respect to the release of particular coal resources to tender; preparation and launch of the EOI process; evaluation of EOI applications by an independent committee and probity auditor; and the committee recommending the preferred applicant to the Minister – all before the preferred applicant was granted consent to apply for the EL.

33 This process did not permit any person, even Mr Macdonald, to identify with specificity, in advance, what steps might be taken, or might need to be taken, to favour the Obeids' financial interests. The steps it might be necessary for Mr Macdonald to take might depend on, for example, the progress of the EOI process, the data collected by the DPI, and the EOI applications submitted. The steps that Mr Macdonald might need to take to influence the EOI process in favour of the Obeids and their financial interests could not be known in advance.

34 As in *Elomar v The Queen*, the evidence here was clearly capable of establishing that the conspirators shared a common goal;[55] the common goal was that an act or acts would be committed by Mr Macdonald, in connection with the granting of an EL at Mount Penny, with the improper purpose of advancing the interests (primarily financial) of Mr Edward Obeid and Mr Moses Obeid and/or their family members and/or associates. It was not to the point that the conspirators had not, or the Crown could not prove that they had, "finalised with precision"[56] what the act or acts would be. What was alleged and proved was an agreement that Mr Macdonald would exercise his ministerial powers with respect to the Mount Penny area in a way that would favour the financial interests of the Obeids where, at the time the agreement was made, it was not and probably could not be known what particular powers Mr Macdonald would exercise or how he would exercise them to do so.

35 However, even allowing for the (permissible) uncertainty of what act(s) in connection with the granting of the EL at Mount Penny it was agreed Mr Macdonald would undertake, the cumulative conditions meant that any such acts would necessarily involve him committing misconduct by wilfully breaching

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55 (2014) 316 ALR 206 at 321 [608].

56 *Elomar* (2014) 316 ALR 206 at 321 [608].

his duties as a Minister. Subject to the point considered next, it follows that the agreement for him to so act and to favour the Obeids' financial interests in doing so necessarily entailed that Mr Macdonald would commit the offence of misconduct in public office.

Fifth element – misconduct serious and meriting criminal punishment

36 The fifth element of the offence of misconduct in public office – that the misconduct be 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 – was satisfied by the misconduct alleged and particularised by the Crown as the subject of the conspirators' agreement. As explained by the Court of Criminal Appeal,[57] the question of whether the misconduct contemplated by the conspiratorial agreement is serious and meriting criminal punishment is not a matter about which the conspirators must agree. It is a matter for the tribunal of fact.

37 The indictment as framed alleged a complete agreement with the object that Mr Macdonald would commit misconduct as the Minister for Mineral Resources in the future by doing acts in connection with the granting of an EL over land at Mount Penny that he knew was owned or controlled by his co-conspirators, and where it was implicit that he would act that way when the opportunity presented itself for him to do so without the need for further agreement as to what acts he would commit and when he should commit them. Given the high office and responsibilities of a government Minister, there were no realistic circumstances in which the acts answering those characteristics[58] would not satisfy the fifth element.[59] His exercising his powers or using his office to favour the Obeids' financial interests would be and was a serious departure from the objects of the office he held and the departure was such as to merit criminal punishment.

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57 *Macdonald* (2023) 112 NSWLR 402 at 428 [77]-[78].

58 See [6], [9] and [11] above.

59 See *Peters* (1998) 192 CLR 493 at 508 [28]-[30] in relation to the characterisation of "dishonest" means in a conspiracy to defraud.

In sum, and as the trial judge found,[60] the scope and object of the agreement comprehended by the conspiracy constituted a gross departure from Mr Macdonald's responsibilities as the Minister for Mineral Resources.

Conclusion and order

38 The abuse of public trust contemplated by the conspirators was clear – the abuse by Mr Macdonald of his official position with respect to the granting of an EL to the financial advantage of the Obeids and their associates. That "kernel of the offence"[61] was present. The appellants did not show that the case put by the Crown was not capable of satisfying any of the specific elements of the predicate offence. To the contrary, similar to *Hui*,[62] there was no doubt that the conduct of the public officer – here, the Minister – that was the object of the conspiracy satisfied the elements of the predicate offence. Accordingly, the agreement that Mr Macdonald would favour the Obeids' financial interests by undertaking whatever acts would be necessary in connection with the granting of an EL at Mount Penny was a completed offence of conspiracy to commit misconduct in public office. The case the Crown put and proved at trial was capable at law of amounting to a conspiracy to commit misconduct in public office.

39 Each appeal is dismissed.

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60 *R v Macdonald [No 17]* [2021] NSWSC 858 at [2041].

61 See [15] above.

62 (2017) 20 HKCFAR 264 at 301 [99].