



Supreme Court
New South Wales

Case Name: R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 18)

Medium Neutral Citation: [2021] NSWSC 1343

Hearing Date(s): 8-10 September 2021

Decision Date: 21 October 2021

Jurisdiction: Common Law

Before: Fullerton J

Decision: Ian Macdonald – Imprisonment for 9 years and 6 months, commencing on 21 October 2021, comprising a non-parole period of 5 years and 3 months with a balance of term of 4 years and 3 months. He will be eligible for release to parole on 20 January 2027.

Edward Obeid – Imprisonment for 7 years, commencing on 21 October 2021, comprising a non-parole period of 3 years and 10 months, with a balance of term of 3 years and 2 months. He will be eligible for release to parole on 20 August 2025.

Moses Obeid – Imprisonment for 5 years, commencing on 21 October 2021, comprising a non-parole period of 3 years with a balance of term of 2 years. He will be eligible for release to parole on 20 October 2024.

Catchwords: CRIME — Sentencing for a common law conspiracy to commit the common law offence of wilful misconduct in public office — no maximum term of imprisonment provided under statute — relevance of statutory analogue — whether sentencing discretion unfettered — assessment of objective seriousness of a conspiracy unspecific as to the acts of misconduct to

be committed and unlimited as to time — whether institutions of state undermined — assessment of differential criminal culpability of offenders — one conspirator Minister of the Crown — one conspirator Member of Parliament — one conspirator private citizen — significance of delay in the initiation of criminal proceedings following investigation by Independent Commission Against Corruption — subjective circumstances of ill health and age of two offenders — good character — opprobrium experienced by one offender impacting adversely upon mental and physical health — rehabilitation — cooperation — impact of COVID-19 restrictions on sentence

Legislation Cited:

Crimes Act 1900 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Criminal Code Act 1995 (Cth)
Independent Commission Against Corruption Act 1988 (NSW)
Mining Act 1992 (NSW)
State Records Act 1988 (NSW)

Cases Cited:

Blackstock v R [2013] NSWCCA 172
Coles v R [2016] NSWCCA 32
Dickson v R [2016] NSWCCA 105
Devaney v R [2012] NSWCCA 285
Doudar v R [2021] NSWCCA 37
Duncan v R [2012] NSWCCA 78
Elomar v R [2018] NSWCCA 224
Green v The Queen [2011] HCA 49; (2011) 244 CLR 462
Jackson v R; Hakim v R (1988) 33 A Crim R 413
Jaturawong v R [2011] NSWCCA 168
Kenny v R [2010] NSWCCA 6
Maitland v R; Macdonald v R [2019] NSWCCA 32
Marie v R (1983) 13 A Crim R 440
Masters v R (1992) 26 NSWLR 450
Morton v R [2014] NSWCCA 8
Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39
Obeid v R (2017) 96 NSWLR 155; [2017] NSWCCA 221
Postiglione v The Queen (1997) 189 CLR 295; [1997]

HCA 26
R v Baldwin [2001] NSWCCA 320
R v Bruneau (1963) CarswellOnt 22; [1964] 1CCC 97;
[1964] 1 OR 263, 42 CR 93
R v DW (2012) 221 A Crim R 63; [2012] NSWCCA 66
R v Einfeld [2009] NSWSC 119
R v Elzakhem [2008] NSWCCA 31
R v Gent (2005) 162 A Crim R 29; [2005] NSWCCA
370
R v Ghosh [1982] QB 1053
R v Hokin, Burton and Peisely (1922) 22 SR (NSW)
280
R v Hunter (1984) 36 SASR 101
R v Isaacs (1997) 41 NSWLR 374
R v Kane [1975] VR 658
R v Macdonald; R v Edward Obeid; R v Moses Obeid
(No 17) [2021] NSWSC 858
R v Mammone [2006] NSWCCA 138
R v Nuttall (2011) 209 A Crim R 538; [2011] QCA 120
R v Obeid (No 12) [2016] NSWSC 1815
R v Phelan (1993) 66 A Crim R 446
R v Rivkin (2004) 59 NSWLR 284; [2004] NSWCCA 7
R v Sellen (1991) 57 A Crim R 313
R v Simon (2003) 142 A Crim R 166; [2003] NSWCCA
147
R v Smith (2000) 114 A Crim R 8; [2000] NSWCCA
140
R v Wickham [2004] NSWCCA 193
R v Williams (2005) 152 A Crim R 548; [2005]
NSWCCA 315
Raptis v R (1988) 36 A Crim R 362
Savvas v R (No 2) (1991) 58 A Crim R 174
Savvas v The Queen (1995) 183 CLR 1; [1995] HCA
29
Scott v R [2020] NSWCCA 81
Shepherd v The Queen (1990) 170 CLR 573; [1990]
HCA 56
Shepherd (No 2) v R (1988) 37 A Crim R 466
Shum Kwok Sher v HKSAR [2002] 3 HKC 117; (2002)
5 HKCFAR 381
The Queen v De Simoni (1981) 147 CLR 383; [1981]
HCA 31
The Queen v Hoar (1981) 148 CLR 32; [1981] HCA 67
The Queen v Olbrich (1999) 199 CLR 270; [1999]

HCA 54
Toller v R [2021] NSWCCA 204
Weininger v The Queen (2003) 212 CLR 629; [2003]
HCA 14

Category: Principal judgment

Parties: The Crown
Ian Michael Macdonald (Offender)
Edward Moses Obeid (Offender)
Moses Edward Obeid (Offender)

Representation: Counsel:
S Callan SC / R Rodger (Crown)
J Martin (Offender Macdonald)
A Francis (Offender Edward Obeid)
MJ Neil QC (Offender Moses Obeid)

Solicitors:
Solicitor for Public Prosecutions (Crown)
HWL Ebsworth Lawyers (Offender Macdonald)
M Bowe (Offender Edward Obeid)
Murphy's Lawyers Inc (Offender Moses Obeid)

File Number(s): 2015/212910; 2015/214251; 2015/212851

- 1 **HER HONOUR:** On 19 July 2021, after a trial over which I presided without a jury, I convicted Mr Ian Macdonald, Mr Edward Obeid and Mr Moses Obeid of conspiring to commit the common law offence of wilful misconduct in public office, the offence upon which they were arraigned on 11 February 2020 and upon which they each entered a plea of not guilty.
- 2 Given the length of my published reasons for entering verdicts of guilty against each of the offenders, in the proceedings on 19 July 2021 I read a summary of those reasons. My extended reasons (referred to for present purposes as “the verdict judgment”) were published on the “NSW Caselaw” database later that day.¹
- 3 Given the length of my sentencing reasons, I propose to take the same approach. That is, I will read a summary of my reasons for arriving at the

¹ R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 17) [2021] NSWSC 858.

sentences to be imposed. My extended sentencing reasons will be published on the “NSW Caselaw” database at the conclusion of today’s proceedings.

- 4 On 19 July 2021, after convictions were entered, a timetable was fixed for the sentence hearing.
- 5 Those proceedings were heard on 8, 9 and 10 September 2021 after which I reserved my decision.

The evidence adduced on sentence

- 6 All parties filed documentary evidence which was largely admitted without objection.²
- 7 In addition to a body of formal evidence setting out the criminal history of each of the offenders, and the custodial history of Mr Macdonald and Edward Obeid (each of whom has served or partially served a sentence of imprisonment for unrelated offending³), the Crown tendered a chronology of events dating from November 2011 when the Independent Commission Against Corruption of New South Wales (ICAC) commenced its investigation into the alleged corrupt conduct of Mr Macdonald, Edward Obeid and other individuals under s 20 of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act), an investigation which culminated in the initiation of criminal proceedings in July 2015 and a chronology of proceedings in this Court since that date.
- 8 The balance of the Crown’s documentary evidence was principally directed to the protocols put in place by Corrective Services New South Wales (CSNSW) as an institutional response to the COVID-19 pandemic, including the processes that are currently in place for people entering correctional facilities as sentenced prisoners and the systems available to manage and address their health status.
- 9 The extent to which that evidence, supplemented by documentary evidence of various kinds tendered by the offenders, addresses this Court’s concerns as to the adequacy of protections within the prison system to protect against the risk

² A Schedule of the Exhibited Material is annexed as Annexure 1 to this judgment.

³ Sentence imposed on Edward Obeid on 15 December 2016: imprisonment for 5 years with a non-parole period of 3 years. Sentence imposed on Mr Macdonald on 2 June 2017: aggregate sentence of 10 years with a non-parole period of 7 years, conviction quashed on appeal on 25 February 2019.

that any of the offenders may contract COVID-19 upon entering custody will be addressed later. At that time, I will also address the impact, more generally, of restrictions that are currently in place within the New South Wales corrections system responsive to the health pandemic and the impact of that state of affairs on the question of sentence.

10 Each of the offenders filed a compendium of materials concerning their mental and physical health and their personal circumstances, including testimonials from their friends and family members.

11 No oral evidence was adduced either by the Crown or by the offenders.

Submissions on sentence

12 The Crown and counsel for each of the offenders filed comprehensive written submissions which they addressed in oral argument.

The approach to sentence in this case

13 This sentencing exercise contrasts with the fact-finding role of a sentencing judge who has presided over a jury trial where a jury's public pronouncement of its verdict extends no further than a finding that the elements of an offence or offences have been proved beyond reasonable doubt. In those circumstances, it is for the sentencing judge to review the evidence adduced at the trial and to make factual findings for the purposes of sentence that are not inconsistent with the jury's verdict,⁴ including the circumstances in which the offence was committed, its objective seriousness and, in some cases, the role played by an offender in the commission of the offence.

14 My reasons for finding the guilt of each of the offenders established beyond reasonable doubt were extensive. In addition to finding each of the elements of the conspiracy proved beyond reasonable doubt,⁵ I made a range of interrelated factual findings contextual to finding both the existence of the conspiracy proved beyond reasonable doubt and the participation of each of the accused in that conspiracy proved to the same criminal standard.

⁴ R v Isaacs (1997) 41 NSWLR 374.

⁵ Verdict judgment at [1822], [1979] and [2018].

- 15 It will be necessary to refer to a number of those findings in this sentencing judgment. Where possible, I will do so in summary.
- 16 Where factual findings concerning the question of objective seriousness and the culpability of the offenders are either not comprehended by my verdict judgment or not expressly stated as a finding I made to the criminal standard in that judgment, I accept that where those findings are adverse to any of the offenders for sentencing purposes I must be satisfied they are established beyond reasonable doubt. I also acknowledge that where I am invited by counsel for the offenders to take into account, in their favour, circumstances which ameliorate their criminal culpability, it is sufficient that those circumstances are established on the balance of probabilities.⁶
- 17 That said, as the authorities make clear,⁷ if I am unpersuaded of the basis upon which I am urged by counsel for one of the offenders to make a favourable finding as to the degree of that offender's culpability on the balance of probabilities, I am not obliged to sentence the offender on the basis contended for by their counsel unless the prosecution proves the contrary proposition beyond reasonable doubt.⁸ That is because, as recognised by the plurality in *Weininger v The Queen*, the different standards of proof that apply would be ignored. As their Honours emphasised at [24], sentencing is not a syllogistic process but a synthesis of competing factors to the extent that they are known or capable of discernment from the evidence.

Sentencing for an offence at common law

- 18 The offenders are to be sentenced having regard to the purposes of sentencing specified in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Sentencing Act).
- 19 Most relevantly they include:
- (a) ensuring that each offender is adequately punished for the offence (s 3A(a));
 - (b) making each offender accountable for his actions (s 3A(e));

⁶ *The Queen v Olbrich* (1999) 199 CLR 270; [1999] HCA 54.

⁷ *Weininger v The Queen* (2003) 212 CLR 629; [2003] HCA 14 applying *Olbrich*.

⁸ *The Queen v Olbrich*.

- (c) denouncing the conduct of each offender (s 3A(f));
- (d) recognising the harm done to the community by the commission of the offence (s 3A(g)); and
- (e) deterring others from committing similar offences (s 3A(b)).

- 20 It was accepted by counsel for each of the offenders that the offence of conspiracy for which they are to be sentenced is objectively serious and that in sentencing each of them for that offence the need to deter those in public office from contemplating actions that damage or undermine the institution of government, and to denounce those who are convicted of doing so, are the sentencing principles which will be of predominant weight in this sentencing exercise.⁹
- 21 Other provisions of the Sentencing Act are also engaged. They include s 5(1) of the Act which obliges me to make an affirmative finding that, having regard to other sentencing alternatives provided for in the Sentencing Act, no other punishment is appropriate for each of the offenders other than a sentence of imprisonment.
- 22 Of the three offenders, only counsel for Moses Obeid conceded that the statutory threshold in s 5 of the Sentencing Act was satisfied. In their written submissions, counsel for each of Edward Obeid and Mr Macdonald submitted that, properly understood, the agreement that underpinned the conspiracy as framed, particularised and proved by the Crown at trial, did not contemplate that Mr Macdonald would breach his Ministerial duties and obligations in such a way as to amount to an example of gross criminal misconduct and, that being the case, a sentence of imprisonment was not the only available sentencing option.
- 23 In the Crown's submission, the intentional participation of each of the offenders in a conspiracy that was unlimited as to the time within which the unlawful object of the agreement would be achieved, and where each of the offenders, as parties to the conspiracy, impliedly accepted that Mr Macdonald would do what he could when the opportunity presented to further the achievement of the unlawful object of their agreement and the improper purpose inherent in it,

⁹ R v Obeid (No 12) [2016] NSWSC 1815 at [84]-[85].

represents a conspiracy to commit misconduct in public office of a most serious kind.¹⁰

- 24 For the reasons which follow, in particular my assessment of the objective gravity of the conspiracy committed by each of the offenders as high and the criminal culpability of each of them as reflected in the roles they performed as co-conspirators which is also of considerable gravity, I am satisfied the statutory threshold in s 5 of the Sentencing Act has been met and that no sentence other than imprisonment is an appropriate sentencing outcome for all three offenders.
- 25 In the event that I came to that conclusion, counsel for each of the offenders invited me to direct that their sentences of imprisonment be served in the community by way of an Intensive Corrections Order as provided for in Part 4 of the Sentencing Act. In advancing that submission, all counsel acknowledged that s 68(1) of the Sentencing Act provides that an Intensive Corrections Order must not be made if the duration of the term of imprisonment imposed by a sentencing court exceeds two years.
- 26 In different ways and with different emphasis, counsel for each of the offenders submitted that after synthesising the weight of their respective subjective cases together with the objective seriousness of the conspiracy (which they submitted was not at the high level contended for by the Crown), a sentence of no more than two years' imprisonment for each of them was a proportionate and just sentence to be imposed in the circumstances.
- 27 The Crown submitted that in order to reflect an offence at the highest end of objective seriousness, the effect of which was to undermine the importance of the public objects of the office of the Minister for Mineral Resources and to bring that office into disrepute, and in order to address the multiple purposes of sentencing in s 3A of the Sentencing Act, not limited to general deterrence and denunciation but also to ensure each of the offenders are adequately punished for their offending, the term of imprisonment I would impose on each of them would, inevitably, exceed two years.

¹⁰ As damage done to the public forms part of the assessment of the level of criminality involved in the commission of the offence, it cannot be considered as a further aggravating factor under s 21A(2)(g) of the Sentencing Act.

- 28 As will become clear in the reasons for sentence which follow, in addition to finding that the sentencing threshold in s 5 of the Sentencing Act is satisfied, I am also satisfied that the sentence of imprisonment to be imposed on each of the offenders will exceed two years.
- 29 The balance of these sentencing reasons deals with the factual findings I have made in assessing the objective seriousness of the offending comprehended by the conspiracy as of a very high order, together with the weight to be afforded a range of other considerations integral to the exercise of my sentencing discretion, including the personal and subjective circumstances of the offenders, in imposing sentence and fixing the term of imprisonment each of the offenders will be required to serve before becoming eligible for release to parole.

The objective seriousness of the conspiracy

- 30 An assessment of the objective seriousness of the conspiracy in which each of the offenders was an intentional participant is fundamental to this sentencing exercise, as it is in every sentencing exercise.
- 31 In this case, because the conspiracy to commit misconduct in public office is an offence at common law, there is no maximum penalty prescribed by the Parliament against which the objective seriousness of the conspiracy can be assessed. The impact of that fact on this sentencing exercise, and its impact on the sentence to be imposed on each of the offenders, was the subject of considerable debate at the sentence hearing. I will consider that issue later in these sentencing reasons.
- 32 The assessment of the objective seriousness of the conspiracy is to be made not only by reference to its constituent elements, each of which I was satisfied was established beyond reasonable doubt,¹¹ and that the seriousness of the offending merited criminal punishment, the fifth element of the substantive offence of misconduct in public office,¹² but also to the circumstances in which I was satisfied the offence was committed, and what those circumstances reveal

¹¹ Verdict judgment at [1822], [1979], [2018].

¹² Verdict judgment at [2034].

about the objective gravity of the conspiracy and the culpability of each of the offenders as intentional participants in it.

- 33 In undertaking an assessment of the offenders' culpability as co-conspirators, by which I should be taken to mean their moral culpability in the conventional language of a sentencing judgment, I do not intend to conflate the personal circumstances of any one of the offenders which, in other circumstances, might inform moral culpability.¹³ Their subjective circumstances will be dealt with separately when I consider the extent to which matters personal to the offenders operate in mitigation of sentence.
- 34 I have also endeavoured to evaluate the objective seriousness of the offence and the criminal culpability of each of the offenders separately in order to accommodate the need in this sentencing exercise to differentiate between the objective seriousness of a conspiracy of the scope and object of which the offenders were convicted on the one hand, and their complicity as co-conspirators in that conspiracy on the other. That assessment is informed in large part by reference to the acts the offenders committed in furtherance of the conspiracy. An assessment of the criminal culpability of each of the offenders will also inform the application of the principle of parity.
- 35 Stated simply, the application of the principle of parity requires that co-offenders are treated by a sentencing court in a like manner allowing for different sentences to be imposed where different degrees of culpability are either revealed by the evidence or accepted by the Crown. Additionally, and where appropriate, the personal or subjective circumstances of co-offenders, together with the different part each of them has played in committing the offence the subject of the sentencing exercise, should be reflected in the imposition of different sentences where that is warranted in the exercise of the sentencing discretion.¹⁴ Ultimately, it is the obligation of a sentencing court in endeavouring to dispense equal justice when sentencing co-offenders to avoid unjustifiable disparity in the sentences to be imposed on them.¹⁵

¹³ Muldrock v The Queen [2011] HCA 39; 244 CLR 120.

¹⁴ Green v The Queen [2011] HCA 49; (2011) 244 CLR 462.

¹⁵ Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26.

- 36 In making an assessment of the objective gravity of the conspiracy and the culpability of the offenders as co-conspirators, I am conscious, as a matter of law, that proof of a conspiracy consists of what the conspirators intentionally agreed and intended should occur and not whether the unlawful object of their agreement was ultimately achieved.¹⁶ Ms Francis submitted, correctly, that the inchoate offence of conspiracy lies not in the overt acts themselves, injurious though they may be to an ordered society, but in the anterior agreement to commit them.
- 37 The Crown did submit, however, that it was appropriate, as a fact bearing on the objective seriousness of the conspiracy proved in this case, to take into account that the object of the conspiracy was implemented.¹⁷ Although Mr Neil accepted that the offence of conspiracy continues whilst ever the agreement remained unexecuted¹⁸ he also emphasised that for sentencing purposes, the primary focus must be on what the conspirators intended to bring about, not whether the object was achieved.¹⁹ I do not discern any material difference in the approach of counsel. In this sentencing exercise, the offenders will not be punished because the executed conspiracy enabled the Obeid family interests to secure a vast profit from their contractual engagements with Cascade Coal Pty Limited, a chain of events set out exhaustively in my verdict judgment. However, the fact that the agreement was forged in such a way that following its execution those contractual arrangements ultimately materialised does inform the objective seriousness of the conspiracy.
- 38 I am also conscious of the fact that although the evidence adduced at the trial allowed me to find that each of the offenders did and said things to promote or advance achieving the unlawful object of their agreement, evidence which at trial was relevant to prove both the existence of the conspiracy and the participation of each of them in it,²⁰ caution needs to be exercised to ensure that the offenders are not punished additionally for their actions in carrying out

¹⁶ Dickson v R [2016] NSWCCA 105 at [104]-[105].

¹⁷ Savvas v The Queen (1995) 183 CLR 1; [1995] HCA 29 at 7-8; R v DW (2012) 221 A Crim R 63; [2012] NSWCCA 66 at [115].

¹⁸ Masters v R (1992) 26 NSWLR 450 at 458.

¹⁹ Dickson v R [2016] NSWCCA 105 at [104]-[105].

²⁰ An analysis which was set out at length in my verdict judgment.

the conspiracy where those actions might constitute additional or separate criminal conduct.²¹

- 39 That approach is of particular resonance in the sentence to be imposed on Mr Macdonald. Although I was satisfied that between May and September 2008 Mr Macdonald committed five discrete acts of wilful misconduct, each of which constituted a deliberate breach of either or both of his Ministerial duties of impartiality and confidentiality, and on each occasion for the improper purpose of benefiting his co-conspirators and/or their family and associates, as I had occasion to note during the course of delivering my verdict judgment, the Crown elected not to charge Mr Macdonald with any substantive acts of wilful misconduct or to allege that either of Edward Obeid or Moses Obeid were accessories to his commission of those substantive offences. That being the case, it would be an error to sentence Mr Macdonald on the basis that he *in fact* committed a series of substantive offences in the course of executing the agreement with his co-offenders.
- 40 That is not to suggest that what I was satisfied the evidence shows Mr Macdonald did in executing the agreement, or what the evidence shows Edward Obeid or Moses Obeid did, is irrelevant to the sentencing exercise. A sentencing court is entitled to refer to the acts the offenders committed in furtherance of a conspiracy, although a “fine line” must be walked to ensure that an offender is sentenced for the conspiracy²² and is not further penalised for the acts committed in furtherance of achieving the unlawful object of that conspiracy.²³
- 41 The Crown submitted, and I accept, that a principled approach to determining the objective seriousness of the conspiracy in this case allows me to take into account the overt acts committed by each of the offenders in furtherance of achieving the shared objective of the unlawful agreement insofar as those acts bear relevantly upon the terms of the agreement and the nature and degree of criminality involved in its execution.²⁴ In this case, where the unlawful object of

²¹ The Queen v De Simoni (1981) 147 CLR 383; [1981] HCA 31.

²² Savvas v The Queen; The Queen v De Simoni.

²³ The Queen v Hoar (1981) 148 CLR 32; [1981] HCA 67 at 38.

²⁴ R v Kane [1975] VR 658 in Savvas v R (No 2) (1991) 58 A Crim R 174 at 176. See also Raptis v R (1988) 36 A Crim R 362; Marie v R (1983) 13 A Crim R 440; Shepherd (No 2) v R (1988) 37 A Crim R 466 at 478.

the conspiracy contemplated an extended process of execution actioned by Mr Macdonald at his discretion, my approach to sentencing Edward Obeid and Moses Obeid will not be confined to what it was proved each of them actually did in furtherance of the conspiracy. Instead, I propose to have regard to the extent to which they were each complicit in the actions undertaken by each other in pursuit of achieving the object of the agreement,²⁵ including, so far as Moses Obeid and Edward Obeid are concerned, participating in the agreement in the full knowledge that Mr Macdonald would wilfully breach his Ministerial duties and obligations opportunistically, and in circumstances where they knew that as the Minister for Mineral Resources, Mr Macdonald had the authority and ability to act in furtherance of the conspiracy because of the Ministerial office he occupied.²⁶

- 42 Mr Neil did emphasise the importance of the Court maintaining the legal distinction between acts committed by the offenders in furtherance of the conspiracy and acts which proved the participation of each of them in that offence. Whilst that distinction was not always clear on the evidence, the Crown accepted that what Moses Obeid did in what was described as “the entrepreneurial phase”,²⁷ that is after 31 January 2009 through to 2012 when, on the Crown case, the agreement had been fully executed, should not be considered by the Court in informing the objective seriousness of the conspiracy. The Crown did, however, rely on Moses Obeid’s conduct at that time for the limited purpose of establishing, should there be any doubt about it, that he was not a passive recipient of information provided to him by Mr Macdonald in furtherance of the conspiracy but rather that he used that information proactively and for commercial ends. I propose to take that approach.

The facts for sentencing purposes

- 43 The circumstances in which the conspiracy was forged and progressively executed over a period of months between May and September 2008 was the subject of extensive consideration in my verdict judgment.

²⁵ *Savvas v The Queen* at 7-9.

²⁶ *Savvas v R (No 2)* at 177.

²⁷ Verdict judgment at [341], [1944].

- 44 While ordinarily the circumstances in which an offence is committed are set out by a sentencing court in its reasons for sentence, I do not propose to take that course in this case. Suffice to repeat that in finding the guilt of the offenders proved beyond reasonable doubt, I was satisfied that by no later than May 2008 they had each intentionally entered into an agreement with each other that, in his capacity as a Minister of the Crown, at that time holding the office of Minister for Mineral Resources, Mr Macdonald would deliberately breach his Ministerial duties and obligations of confidentiality and/or impartiality for the improper purpose of advancing the private financial interests of Edward Obeid and Moses Obeid and/or their family and/or their associates in connection with the granting of a coal exploration licence at Mount Penny.
- 45 In my verdict judgment I also addressed, and at some length, the various policy and fiscal imperatives that provided context to what the evidence revealed was Mr Macdonald's enthusiasm, as the Minister for Mineral Resources, to exploit unallocated coal resources in New South Wales by the release of additional coal exploration areas under licence at the time the conspiracy was forged.²⁸
- 46 The evidence at trial established that in 2008 and through to 2009, the global appetite for thermal coal and the potential for a government-supported coal mining sector to attract foreign investment in New South Wales were significant factors driving that policy approach. The Crown led evidence of the nature of the relationship Mr Macdonald had with senior officers of the Department of Primary Industries and his engagement with them in pursuit of achieving those policy objectives.
- 47 The Crown also led evidence of the statutory authority afforded the Minister for Mineral Resources in the granting of coal exploration licences under the *Mining Act 1992* (NSW), the office occupied by Mr Macdonald at the time the conspiracy was forged and throughout the course of its execution.
- 48 Finally, I also set out at length in the verdict judgment the statutory scheme in the *Mining Act* which governed the granting of coal exploration licences in New South Wales and how the Coal Allocation Guidelines published by the Department of Primary Industries operated to guide the decisions made by the

²⁸ Verdict judgment at [448] and following, [734] and following.

Department's Coal Allocation Committee concerning the nomination of future coal exploration areas and the administrative processes undertaken by the Department to ensure public confidence in the allocation of coal exploration licences by a process of competitive tender overseen by an external probity auditor.

- 49 Although the Crown submitted at trial that Mr Macdonald took the opportunity in his legitimate dealings with the Department of “slipping in” the Mount Penny Coal Release Area to that competitive tender process,²⁹ that submission was not relied upon by the Crown in support of its case on sentence as a factor illustrative of the extent of Mr Macdonald's complicity as a co-conspirator. That being the case, I do not propose to deal further with it.
- 50 None of the evidence to which I have referred was controversial. What was at issue in the trial was whether such acts of misconduct as the Crown was able to attribute to Mr Macdonald in connection with the granting of the exploration licence at Mount Penny were acts that the Crown was able to prove were committed by him for the improper purpose of advancing the financial interests of Edward Obeid, Moses Obeid or members of their family or associates, in the sense that were it not for that improper purpose Mr Macdonald would not have acted in that way.³⁰
- 51 In finding each of the first and second acts of misconduct proved (a finding of fact which was critical to proof of the existence of the conspiracy in the way the Crown particularised its case at trial), I rejected the case advanced by the accused that, as the responsible Minister, Mr Macdonald's interest in acquiring information from the Department about the availability of coal reserves in the Bylong Valley near Mount Penny, and then pursuing with the Department the prospect of releasing the area it held under Exploration Licence 6676 to tender, was to be understood and explained consistently with Mr Macdonald's legitimate pursuit of policy and fiscal imperatives associated with the promotion of coal exploration in New South Wales, and not for the improper purpose alleged by the Crown.

²⁹ Verdict judgment at [757].

³⁰ Maitland v R; Macdonald v R [2019] NSWCCA 32.

- 52 In proceeding to find the fourth, seventh and eighth acts of misconduct proved, I was also satisfied that the “but for” test for improper purpose was satisfied. The application of “but for” test in the context of finding those three acts of misconduct proved did not attract the same kind of controversy at trial. The matter in issue so far as those acts of misconduct were concerned was whether the Crown had established, as a fact, that Mr Macdonald disseminated confidential information in connection with the granting of an exploration licence at Mount Penny in breach of the duty of confidentiality, or that he otherwise acted in breach of his duty of impartiality in doing so, deliberately breaching the duties by which he was bound as a Minister of the Crown. I was satisfied he did.
- 53 I have taken the time to restate that aspect of my reasons for the verdict in order to address one of the submissions advanced by counsel for Mr Macdonald on sentence to the effect that the Crown’s failure to prove the fifth act of misconduct ameliorates, in a material way, the seriousness of the offence for which Mr Macdonald is to be sentenced.
- 54 Mr Martin submitted that by the Crown abandoning the third act of misconduct, and having failed to prove the fifth act of misconduct, the conspiracy was “a shell” of the conspiracy originally prosecuted by the Crown and a conspiracy of far less objective seriousness that was ascribed to it by the Crown in its sentencing submissions. That submission was allied with a submission advanced by counsel for each of the offenders that the very general terms upon which the agreement was reached, in effect an agreement that Mr Macdonald would do what he could to advance or promote the financial interests of his co-conspirators and/or their family and associates in connection with the granting of an exploration licence at Mount Penny if and when the opportunity presented, and the open-ended timeframe within which the offenders contemplated the object of their agreement might be achieved, had the effect of ameliorating what would otherwise be high level offending where, for example, specified acts of misconduct are proved to have been committed by a Minister of the Crown within a nominated timeframe or by a nominated date and where each act of misconduct is defined and directed to achieving a specific unlawful objective and for a specific improper purpose.

- 55 There can be no doubt that a defining feature of the conspiracy, reflected in the way in which the Crown framed the indictment and the way in which it particularised its case at trial, concerned the very general terms upon which the agreement the subject of the conspiracy was reached and the open-ended timeframe within which the offenders contemplated the object of their agreement might be achieved. In my reasoning to verdict, I was satisfied that those two interrelated features of the agreement reflected, in turn, two interrelated contextual facts that were in play at the time the agreement was reached.
- 56 The first contextual fact which I was satisfied dictated a degree of generality in the terms upon which it was agreed that Mr Macdonald would wilfully commit acts of misconduct in connection with the granting of a coal exploration licence at Mount Penny was that, as at May 2008, when I was satisfied the first act of misconduct was committed, no designated coal release area at or near Mount Penny in the Bylong Valley over which a coal exploration licence might be granted had been identified by the Department as a potential small to medium coal release area that might be included in an expression of interest process for release to market. As I made clear in my verdict judgment, I found as a fact that prior to Mr Macdonald making the focused enquiries of the Department in early May 2008 (the conduct the subject of the first and second acts of misconduct) Mount Penny was not a geographical feature with which the Department was familiar or a topographical marker of a potential coal deposit familiar to anyone in the Department.
- 57 A further contextual fact and one I am prepared to find for sentencing purposes is that each of the offenders knew and appreciated that as the Minister for Mineral Resources Mr Macdonald could exert influence over the Department to create a new coal release area at Mount Penny, even to the extent of issuing a direction to the Department that a new coal release area should be created, however, since there was no certainty at the time the agreement was reached that the exerting of influence over the Department in that way would achieve their shared unlawful objective, even less that any Ministerial direction to the Department would be a safe and sensible way of pursuing the unlawful object of the agreement, those specific matters were not comprehended by the

agreement. Instead, the means of achieving the unlawful objective was left entirely to Mr Macdonald's discretion.

- 58 The Crown submitted that despite the generality of the terms upon which it was agreed Mr Macdonald would commit wilful acts of misconduct, where the level of generality was dictated by the circumstances in which the agreement was forged and the time the agreement was forged, the improper purpose to which Mr Macdonald's acts of misconduct were directed was clear and unambiguous from the outset. I accept the Crown's analysis.
- 59 Each of the offenders submitted that the conspiracy alleged and proved in this case involved an agreement that was vague and lacking a specific goal and without any causal link to any harm the State and the people of New South Wales might suffer by the agreement being reached.
- 60 Those submissions understate entirely the matters which inform the objective seriousness of the conspiracy I found proved. The measure of objective seriousness is not limited to a quantification of loss or benefit in financial terms foregone by the State. I repeat for emphasis what I said in the verdict judgment:

By agreeing to act in wilful breach of his Ministerial duties and obligations in connection with granting of an EL at Mount Penny for the improper purpose of conferring an advantage on a cohort of private people, including the co-conspirators themselves, self-evidently denigrates the public objects which the Office of the Minister for Mineral Resources is designed to serve and the objects which Mr Macdonald was obliged to serve in the public interest.³¹

- 61 I went on to say:

It is fundamental to our system of government that Ministers who occupy office as Members of the Executive Government are entrusted with powers, duties and responsibilities exclusively for the public benefit. That is not simply an arcane feature of the Westminster system as we have inherited it. The people of New South Wales are entitled to expect that, in the Office of a Minister in the Executive Government of New South Wales, consistent with the oath or affirmation that their elected representatives take when admitted to that Office, that he or she will act as a Minister of the Crown at all times conscientiously and honestly in the public interest. The very solemnity of that promise recognises that the exercise of Ministerial powers, duties and responsibilities in the public interest will be rendered nugatory if a Minister is motivated by personal interests or, as is the case here, where Mr Macdonald, in his capacity as Minister for Mineral Resources, agreed with another Member of Parliament and a member of that person's family that he would deliberately breach his

³¹ Verdict judgment at [2042].

duties and obligations to advantage, favour or promote their personal financial interests.³²

- 62 A fact in issue at the trial, which was treated by me as indispensable to proof of the existence of the conspiracy and warranting emphasis for sentencing purposes,³³ was whether the Crown was able to prove to the criminal standard that at the time the agreement was forged Mr Macdonald knew that the Obeid family owned Cherrydale Park, a large rural property in the Bylong Valley proximate to Mount Penny. By a process of reasoning by inference from a comprehensive body of evidence dealt with at length in the verdict judgment and not repeated here, I was satisfied of that fact.³⁴
- 63 Although it was no part of the Crown case at trial that Cherrydale Park was acquired by the Obeid family as an act in furtherance of the conspiracy, or even that the property was purchased in contemplation of entering into an unlawful agreement with Mr Macdonald of the scope and object alleged, I was ultimately satisfied that the evidence established that for some months before 9 May 2008 (by which date I was satisfied the conspiracy had been forged) and at a time when Moses Obeid and Edward Obeid (and likely other members of the Obeid family) had learnt of the existence or likely existence of coal resources underlying Cherrydale Park by legitimate searches of the public record, their interest in exploring the potential to exploit those coal resources was stimulated and eventually overtook any interest in the agricultural value of Cherrydale Park. I was also satisfied that it was Edward Obeid and Moses Obeid's keenness to acquire more detailed and reliable information about the volume of those coal reserves that motivated each of them to enter into the agreement with Mr Macdonald that he would misconduct himself in connection with the granting of a coal exploration licence at Mount Penny in order to promote or advance their financial interests, and that the agreement which was progressively executed by Mr Macdonald by committing successive acts of misconduct, developed to include the prospect of the Obeid family pursuing a joint venture with a mining company who might wish to apply for that licence.³⁵

³² Verdict judgment at [2043].

³³ *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56.

³⁴ Verdict judgment at [812].

³⁵ Verdict judgment at [1700] and following.

That state of affairs also informs the objective seriousness of the conspiracy and, more particularly, the criminal culpability of the offenders.

64 Another fact integral to finding the guilt of the offenders proved beyond reasonable doubt and a fact relevant to an assessment of the objective seriousness of the conspiracy and their criminal culpability is reflected in my finding that each of the offenders knew when they entered into the agreement of the existence and scope of the duties and obligations of confidentiality and impartiality Mr Macdonald was subject to in the discharge of the public office he held as the Minister for Mineral Resources. The scope and content of Mr Macdonald's duties and their provenance within the Ministerial Code of Conduct was discussed at length in the verdict judgment.³⁶

65 For sentencing purposes, it suffices to restate the Code in part.

66 As the words of the preamble to the Code of Conduct make plain:

It is essential for the maintenance of public confidence in the integrity of the Executive Government of the State that Ministers of the Crown exhibit, and be seen to exhibit, the highest standards of probity in the exercise of their offices, and that they pursue, and be seen to pursue, the best interests of the people of New South Wales to the exclusion of any other interest.

67 The two principles which are identified as guiding Ministerial conduct are stated as follows:

1. Ministers will perform their duties *impartially*, disinterestedly [sic] and in the best interests of the people of New South Wales.

2. Ministers will be frank and honest in official dealings with their colleagues and will maintain the *confidentiality of information committed to their secrecy*.

(Emphasis added.)

68 The duty of confidentiality finds further expression as follows:

4.2 A Minister shall not use information obtained in office to gain a direct or indirect private advantage for himself or herself, or for any other person.

69 Finally, and for emphasis, the Code of Conduct includes the following:

Ministers are reminded that, quite apart from their ethical obligations they are subject to the civil and criminal law as holders of public office. In particular they are reminded that they can be held personally responsible in law for (a) their intentional misuse of their office and the powers and duties they have in it; (b) conflicts of interests and the possession of interests which will disqualify them

³⁶ Verdict judgment at [211].

from parliamentary office; (c) the corrupt receipt or solicitation of benefits; and (d) the misuse of confidential information acquired by virtue of office.

- 70 It was not in dispute at trial that Mr Macdonald and Edward Obeid were fully aware at all times of the scope and import of the Ministerial Code of Conduct and the content of the dual duties of confidentiality and impartiality which find expression in it.
- 71 Mr Macdonald did not challenge the fact that he had sworn an oath to be bound by the duties imposed on a Minister of the Crown under the Code.
- 72 Given the public offices Edward Obeid had previously held both as the Minister for Mineral Resources and the Minister for Fisheries, and by reason of the time he served as a Member of Parliament more generally, including during the currency of the conspiracy, it was not in dispute at trial that he was aware of the legal obligations by which Mr Macdonald was bound at the time the conspiracy was forged.
- 73 I also found as a fact that Moses Obeid also knew that Mr Macdonald was bound by the dual duties of confidentiality and impartiality as a Minister, including their scope and import, at the time he entered into an agreement with Mr Macdonald that he would deliberately act in breach of them for the improper purpose alleged.
- 74 I came to that conclusion not only because of the close relationship Moses Obeid enjoyed with his father and the length of his father's Parliamentary and Ministerial career, but also by the nature of the information that was progressively disseminated to him by Mr Macdonald during the currency of the conspiracy and its temporal coincidence with the steps he took to monetise the value of that information in his commercial dealings with Mr Brook and Mr Fang from mid-2008, and ultimately in his contractual dealings with Monaro Mining NL from that date.
- 75 Those dealings were designed to strategically position the Obeid family in a joint arrangement with a mining company before the public launch of the expression of interest tender process in September 2008, a process which, by that date, included the Mount Penny Coal Release Area, a newly created coal release area which encompassed Cherrydale Park which was included with Mr

Macdonald's sanction as Minister and which I was satisfied was designated for release by the Department at his "strong suggestion".³⁷

- 76 In the result, I am satisfied that the agreement that Mr Macdonald would commit unspecified acts of misconduct in public office for the improper purpose alleged, an agreement which was by its terms criminal and which I was satisfied each of the accused knew to be so, depended for its success on clandestine steps being taken by Mr Macdonald under cover of his pursuit of legitimate policy outcomes and driven by legitimate policy imperatives, to manoeuvre the Department into designating a new coal release area in an area of the Bylong Valley where he knew the Obeids owned a rural property and where he knew they were keen to exploit the value of that resource.
- 77 I am satisfied, for that complex of reasons, the objective seriousness of the conspiracy was of the highest order.

The criminal culpability of the Obeids and the question of motive

- 78 Considerations of what motivated each of the offenders to enter into the conspiracy³⁸ bears most directly upon an assessment of their criminal culpability.
- 79 It is clear beyond question that each of Edward Obeid and Moses Obeid was motivated to enter into the conspiracy in pursuit of exploiting the value of the coal resource they had learnt underlay Cherrydale Park.
- 80 Their financial motives are patent not only from the terms of the agreement, but also what Moses Obeid did to maximise the advantage generated from Mr Macdonald misconducting himself in the specific ways the Crown succeeded in proving in the way the fourth, seventh and eighth acts of misconduct were particularised, and in the way the other information I was satisfied Mr Macdonald provided to his co-conspirators from time to time as the prospect of Cherrydale Park being designated as a new coal release area developed in Mr Macdonald's dealings with the Department from June 2008. While neither Edward Obeid nor Moses Obeid could have known, when the conspiratorial

³⁷ Verdict judgment at [981].

³⁸ It is noted that in reasoning to verdict the Court held that the question of motive was ultimately of little relevance to proof of the offence: Verdict Judgment [373], footnote 232 and [1896].

agreement was struck, what would be the actual value to them of Mr Macdonald committing misconduct in the office he occupied which I found proved, and the value of his other conduct in furnishing them with valuable inside information of the kind I have described, at the time the agreement was forged Edward Obeid and Moses Obeid were patently motivated by a desire to maximise the financial benefit to them and their family in exploiting the value of the coal underlying Cherrydale Park.

- 81 In relation to Mr Macdonald, no financial benefit has been shown to have accrued to him for his agreement to wilfully breach his Ministerial duties and obligations; neither is there any evidence of any collateral advantage of any kind, or of any promise of an advantage of any kind that might explain why he agreed to act as he did.³⁹ While Mr Macdonald's motives may have included the repayment of a debt of gratitude to Edward Obeid for his political patronage over the years, as well as financial pressures operative upon him at the relevant time and the hope of receiving a financial benefit at a later time, I am unable to reach that finding beyond reasonable doubt. The fact that no evidence of motive is discernible does not mitigate the extreme gravity of his criminal culpability as a co-conspirator. It is obvious beyond doubt that without Mr Macdonald's agreement that he would wilfully misconduct himself as the Minister for Mineral Resources there would have been no conspiracy.

The application of the parity principle

- 82 Although the Crown submitted that the criminal culpability of each of the offenders as participants in an offence would be reflected in the term of imprisonment I would impose upon each of them, the Crown also acknowledged that parity principles, to which I have referred earlier, would also have application in this sentencing exercise.
- 83 The Crown submitted it was open to me to differentiate between the length of the sentences to be imposed on Edward Obeid and Moses Obeid relative to the sentence to be imposed on Mr Macdonald in order to reflect what was, in the Crown's submission, the indispensable role Mr Macdonald agreed to

³⁹ Verdict Judgment at [436].

perform as the Minister for Mineral Resources in the execution of the conspiracy and what I found was his pivotal role in its execution.

- 84 Although, as I have noted now on multiple occasions, the specific nature and number of the acts of misconduct Mr Macdonald agreed to commit were not the subject of specific agreement at the time the conspiracy was forged, and although the duration of the conspiracy was limited only by reference to the progressive achievement of the unlawful objective, I accept the Crown's submission that the agreement contemplated that Mr Macdonald would commit acts of misconduct for the improper purpose alleged as and when the opportunity presented, and that he agreed to wilfully misconduct himself as a Minister of the Crown on those terms, was a distinct feature of his offending as a co-conspirator and a feature which should attract a lengthy period of imprisonment in order to meet the multiple principles of sentencing in his case.
- 85 Mr Macdonald's criminal culpability was not limited to him committing the five acts of misconduct I found proved. It included what I was satisfied was his sharing of critical information about the creation of the Mount Penny Coal Release Area and its inclusion in a pending expression of interest tender process, information he had acquired in his dealings with the Department in June 2008 as the Mount Penny Coal Release Area was under the close consideration of the Department.
- 86 That entire course of conduct necessarily informs my assessment of Mr Macdonald's culpability as a Minister of the Crown in agreeing with each of his co-offenders that he would commit acts of misconduct in the public office he held for their benefit or the benefit of those associated with them as high.
- 87 The Crown further submitted that in assessing the relative culpability of Edward Obeid and Moses Obeid in accordance with parity principles, it was open to me to impose a lesser sentence of imprisonment on Moses Obeid relative to his father. In the Crown's submission, for Edward Obeid to have entered into an agreement that Mr Macdonald would commit acts of misconduct as a Minister of the Crown for the improper purpose of advancing the financial interests of his co-conspirators and/or their family and associates at a time when he was

also a sitting Member of the New South Wales Parliament, is to be contrasted with the position of Moses Obeid relative to both of his co-conspirators.

- 88 Although by intentionally entering into the agreement with his father and with Mr Macdonald (a person with whom I was satisfied he had a personal friendship), I am satisfied that Moses Obeid was enthusiastic, to say the least, about the potential that by Mr Macdonald breaching his Ministerial duties and obligations in connection with the granting of an exploration licence at Mount Penny he and his family would benefit financially, it is important to emphasise that unlike each of his co-conspirators, Moses Obeid did not occupy any public office either at the time of the agreement or in the role he played in execution of it. While I have found that he was motivated by the prospect of his family securing a very significant financial return by Mr Macdonald breaching his Ministerial duties of impartiality and confidentiality on multiple occasions, his receipt and commercial use of that information did not constitute a breach of public trust.
- 89 In the Crown's submission, despite Moses Obeid actively, indeed proactively, seeking to exploit the value of Mr Macdonald's successive acts of misconduct for the benefit of his family, and succeeding in varying degrees through the structured commercial arrangements first with Monaro Mining NL during the currency of the conspiracy made possible by Mr Macdonald's commission of the fourth and seventh acts of misconduct, and despite, by contrast, Edward Obeid's participation in the conspiracy being less overt when compared with Moses Obeid (at least in so far as was revealed by the evidence at trial) Edward Obeid's criminal culpability as a co-conspirator was more egregious because of who he was when he entered the conspiracy.
- 90 Ms Francis submitted that because what she described as the broadly conceptualised conspiracy was executed at Mr Macdonald's sole discretion, and where there is no evidence capable of satisfying me to the criminal standard that Edward Obeid encouraged Mr Macdonald to commit any specific acts of misconduct in furtherance of it, his culpability relative to his co-conspirators as a co-conspirator should be appointed at the lower end of the range. I am not persuaded of that submission.

- 91 Although it was no part of the Crown case at trial that Edward Obeid acted in breach of the Parliamentary Code of Conduct by which he was bound at the time the agreement was forged in May 2008 or at any time throughout the process of its execution through to 31 January 2009, I am satisfied that his status as a Member of the New South Wales Parliament when he conspired with Mr Macdonald as his parliamentary colleague of long-standing that in his position as a Minister of the Crown he would breach the Ministerial Code of Conduct in multiple ways and unlimited respects for the improper purpose of advancing the financial interests of the family of which he was the patriarchal head, is in my view to colour Edward Obeid's criminality for sentencing purposes with a different hue to that of his son.
- 92 In making that finding I am also prepared to find as a fact, and to the criminal standard, that in entering into the conspiracy with his son, Edward Obeid expected him to pursue the prospect of exploiting the coal reserves which they knew or believed lay under Cherrydale Park on behalf of the family. I am also prepared to find as a fact and beyond reasonable doubt that during the currency of the conspiracy Edward Obeid actively encouraged Moses Obeid to monetise the prospective financial gain as it materialised and that he was in fact consulted as those prospects materialised in the course of his son's various commercial dealings.
- 93 In making those factual findings I am not seeking to minimise Moses Obeid's criminal culpability. I do, however, propose to reflect in the sentences imposed upon Moses Obeid and Edward Obeid what I consider to be material differences in their criminal culpability by reason of who they were at the time of the execution of the agreement and throughout its currency, as distinct from measuring Moses Obeid's criminal culpability solely, or even directly, referable to the acts he performed as a conspirator exercising his skill and acumen as a businessman, albeit for criminal purposes.
- 94 Despite the Crown accepting that Moses Obeid's culpability was to be contrasted with the gravity of Mr Macdonald's offending as a Minister of the Crown and his father's offending given his status at all relevant times as a Member of the New South Wales Parliament, and although the Crown also

acknowledged and accepted Moses Obeid's entitlement to rely upon his prior good character as a factor in mitigation of sentence, the Crown maintained the submission that nothing other than a sentence of full-time imprisonment in excess of two years was an appropriate sentencing outcome for Moses Obeid.

- 95 Before turning to consider the circumstances personal to each of the offenders, I should address the effluxion of time between the commission of the offence and today's sentencing proceedings and whether that impacts on sentencing in any material way.

The question of delay

- 96 Ms Francis did not advance the submission that delay operates as a mitigating factor in the sentence to be imposed on Edward Obeid.
- 97 Mr Neil submitted that the delay of nine years between May to September 2008 (when I was satisfied the conspiracy was forged and in the process of execution) and the filing of an indictment in this Court in October 2017, and then a delay of four years before verdicts were delivered in July 2021, has been productive of an uncertain suspense for Moses Obeid which should attract weight as a factor in mitigation of his sentence.⁴⁰ Mr Martin adopted those submissions claiming the same impact on Mr Macdonald in mitigation of his sentence.
- 98 While recognising that the issue of delay is frequently given less prominence in trials of "white collar" offences which are notoriously difficult to detect and successfully prosecute, Mr Neil submitted that the uncertain suspense Moses Obeid has been subjected to in the progress of the matter through to sentence today, a state of suspense heightened by the intervening and protracted ICAC investigation, is a factor to be afforded some weight in mitigation of sentence.
- 99 The Crown relied upon affidavit sworn by Mr Tim Fox, the officer in charge of the ICAC investigation, in which he deposed to the time-intensive tasks involved in obtaining and reviewing documents and examining individuals in connection with a large number of complex interrelated events and transactions undertaken as part of ICAC's investigative function under the

⁴⁰ Coles v R [2016] NSWCCA 32 at [15]-[29].

ICAC Act into the allegations of corrupt conduct by Edward Obeid and Mr Macdonald and other individuals associated with the granting of coal exploration licences launched as Operations Jasper and Acacia.⁴¹ I accept that the same level of complexity obviously impacted the lapse of time between the ODPP receiving the initial brief of evidence from ICAC by mid-2014, following the publication of the Commission's report in July 2013, and criminal charges being laid in July 2015, as it did the procedural path of the trial in this Court through to verdict. An interruption to the trial for some months in 2020 due to the global COVID-19 pandemic also resulted in an unavoidable delay.

- 100 As the authorities make clear, it is not every case where there has been a delay, sometimes of many years, in the prosecution of an offender that will result in the amelioration of sentence when that offender is ultimately prosecuted and convicted. Each case depends upon its own particular facts.
- 101 Although I accept that Moses Obeid was in an increasing state of uncertainty as to whether criminal proceedings would be initiated after the ICAC report was furnished in July 2013 and then, after criminal proceedings were commenced, how those proceedings would ultimately resolve, I am not persuaded that in the circumstances of this case there is delay of a kind which should operate in mitigation of his sentence or in mitigation of Mr Macdonald's sentence.
- 102 That is not to say that the lengthy course of the investigation and the related criminal proceedings have not negatively impacted on Moses Obeid in other ways which are deserving of some mitigating weight in the ultimate appointment of his sentence.
- 103 The extent to which a sentencing Court ought to take into account the impact on an offender of adverse publicity and public humiliation in a protracted investigation culminating in a criminal prosecution was addressed by Beech-Jones J in *Obeid (No 12)* at [99]-[102]. In short, it may be considered only where adverse media attention reaches such proportion as to have a physical or psychological effect on the offender.⁴²

⁴¹ Investigation into the conduct of Ian Macdonald, John Maitland and others; Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others.

⁴² *Obeid (No 12)* at [102] citing *Duncan v R* [2012] NSWCCA 78 at [28] per Basten JA (citing *Kenny v R* [2010] NSWCCA 6 at [49] per Howie J); see also *R v Nuttall* (2011) 209 A Crim R 538; [2011] QCA 120 at [65]). At first

104 The Crown accepted that has been demonstrated in the evidence tendered by Mr Neil on Moses Obeid's behalf. That concession was properly made. There is no evidence of a comparable kind adduced on behalf of Edward Obeid or Mr Macdonald.

105 I propose to deal first with the evidence adduced on behalf of Moses Obeid which bears on that aspect of his subjective circumstances in the context of his subjective circumstances generally, before turning to separately consider the evidence adduced by Mr Macdonald and Edward Obeid as to their personal and subjective circumstances and in that order.

106 However, before turning to that body of evidence, the impact on each of the offenders of the recent outbreak of the Delta variant of COVID-19 in correctional centres in New South Wales needs to be addressed.

The state of the COVID-19 outbreak in correctional facilities

107 The relevance of the recent outbreak of the Delta variant of COVID-19 in various correctional centres in New South Wales for sentencing purposes was addressed by the Crown and counsel for the offenders in the sentence hearing and was supported by the tender of evidence in various forms.

108 The Crown read an affidavit affirmed by Ms Graylin, solicitor, on 1 September 2021 to which she annexed various media reports which dealt with the issue together with publicly available information on the websites of CSNSW current as at 19 August 2021⁴³ and the Bar Association of New South Wales current as at 31 August 2021.

109 At the conclusion of the sentence hearing, I expressed my concern that although the evidence tendered on sentence bearing upon the fact and extent of the COVID-19 outbreak in New South Wales correctional facilities and the institutional responses and dedicated processes implemented to manage that outbreak was current as at the date of the sentence hearing on 10 September 2021, in the event that situation altered materially whilst my sentencing

instance in *R v Einfeld* [2009] NSWSC 119 at [161] per James J, the relevant publicity was found to have that effect).

⁴³ An updated version of that information dated 15 September 2021 was later provided by the Crown, as to which see below.

judgment was reserved I should be provided with updated information by the Crown, preferably with the consent of the offenders.⁴⁴

- 110 Since that date, information pertaining to the COVID-19 outbreak was compiled by the parties and provided to my chambers. That information comprised an updated version of the CSNSW website publication annexed to Ms Graylin's affidavit dated 15 September 2021 and last updated on 5 October 2021; a transcript of evidence given by Ms Wendy Hoey, Executive Director Clinical Operations, Justice Health, and Mr Kevin Corcoran, Acting Commissioner CSNSW, on 17 September 2021 before the New South Wales Public Accountability Committee's public inquiry into the pandemic; further media articles dated variously between 7 and 28 September 2021; and email correspondence between Ms Graylin and each of Mr Peter Sharp, Manager AV, Strategy and Business Links Corrections Strategy and Policy, CSNSW, Ms Rachel MacFarlane, Incident Controller, St Vincent's Correctional Health, Mr Jeremy Tucker, CSNSW, Ms Wendy Hoey, Justice Health New South Wales, and Ms Helen Hong, Principal Council Officer, Committees, Parliament of New South Wales.
- 111 What follows is an analysis of the full complement of evidence tendered on sentence as it relates to the current state of affairs in correctional centres in New South Wales.
- 112 A state-wide lockdown of all New South Wales correctional centres and of indefinite duration commenced on 30 August 2021 in response to the outbreak of COVID-19 in the prison population at Parklea. The lockdown was designed to identify those prisoners who had been transferred from Parklea to other correctional centres, and to isolate those prisoners who returned a positive result from a screening test, with a view to preventing the further spread of the virus.
- 113 As at 17 September 2021, 325 positive cases of COVID-19 had been identified among inmates in correctional centres in New South Wales.

⁴⁴ T 142.

114 As at 2 September 2021, the following correctional centres had been cleared to return to normal operations:

- (1) Junee
- (2) Kirkconnell
- (3) Shortland
- (4) Silverwater Women's Correctional Centre
- (5) Dawn De Loas
- (6) Dillwynia
- (7) Lithgow
- (8) Metropolitan Remand and Reception Centre (MRRC)
- (9) Cessnock
- (10) Cooma
- (11) Geoffrey Pearce
- (12) Goulburn
- (13) Compulsory Drug Treatment Correctional Centre
- (14) Clarence
- (15) Emu Plains
- (16) Glen Innes
- (17) High Risk Management Correctional Centre
- (18) Tamworth
- (19) John Morony
- (20) Mid North Coast
- (21) South Coast
- (22) St Heliers
- (23) Hunter
- (24) Macquarie
- (25) Mannus
- (26) Mary Wafe
- (27) Long Bay Special Purpose Centre

115 By 15 September 2021, only three correctional centres in New South Wales were managing positive COVID-19 cases: MRRC and Silverwater Women's Correctional Centre, being two of the facilities previously cleared for return to

normal operations, and Parklea Correctional Centre, where the outbreak had commenced. As at 17 September 2021, there were 94 positive cases at MRRC, 6 positive cases at Silverwater Women's Correctional Centre, and 85 positive cases at Parklea. As at 11 October 2021, the number of positive cases at Parklea had reduced to 2. As at 15 October 2021, there were 27 positive cases at MRRC and 1 positive case at Silverwater Women's Correctional Centre.

116 Mr Martin tendered a document titled "Report on COVID-19 and the Impact on New South Wales Prisoners" prepared by the Kirby Institute, a medical research organisation affiliated with the University of New South Wales, dated 16 April 2020 (the Kirby Institute Report)⁴⁵ together with a chapter of the *Bugmy Bar Book* titled "COVID-19: Risks and Impacts for Prisoners and Communities" prepared by the New South Wales Public Defenders Office dated 17 August 2021 (the *Bugmy Bar Book*).⁴⁶ The Kirby Institute Report was updated on 9 September 2021. The *Bugmy Bar Book* was updated on 20 September 2021. I refer to the updated versions of those publications in the following analysis.

117 The Kirby Institute Report identified hypertension, cardiovascular disease, diabetes, cancer, immunosuppression and chronic respiratory diseases as increasing "the risk of an individual contracting, suffering severe symptoms, and dying from COVID-19".⁴⁷ Consistent with the prevailing advice from New South Wales Health as to the risks of community transmission of the highly contagious and virulent Delta variant, the rate of infection, the severity of symptoms, including leading to death where infection occurs, for inmates in a correctional facility is related to the age of an inmate, with older inmates being at a higher risk of both contracting the virus and death.

118 The authors of the Report made the following prescient assessment:

[Due to] the higher transmissibility and severity of the Delta variant, and the continuous movement of prison staff and detained persons between prisons and their communities, the risk of any potential index case entering a correctional centre is very high and will remain so until community transmission reduces significantly and community cluster outbreaks are absent.

⁴⁵ Exhibit 21.

⁴⁶ Exhibit 22.

⁴⁷ Exhibit 21 p 6.

- 119 The authors of the Report made the following recommendation obviously addressed to CSNSW:

Given the current threat that COVID-19 presents to places of detention and the wider community, and alongside standard plans to improve prison hygiene, screening, testing and the isolation of sick people in adequate spaces, decarceration strategies ought to be prioritised as a mechanism to reduce cell spatial density thereby reducing the risk of infectious diseases transmission.⁴⁸

- 120 The *Bugmy Bar Book* notes the increased vulnerability of inmates with premorbid chronic health conditions and inmates of advanced age contracting the virus and suffering severe symptoms, with both groups overrepresented in prison communities. The authors endorsed the views expressed in the Kirby Institute Report that the spread of infectious diseases in custodial environments can occur at a greater rate than in the general community due to overcrowding, poor hygiene and lack of ventilation.
- 121 The *Bugmy Bar Book* also observed the negative impact on the mental and physical health of inmates of lockdown measures and changed conditions of detention, with inmates subject to lengthier periods confined to their cells, limiting opportunities for exercise, fresh air, and social engagement both with other inmates and with family and friends. It referred to an article by Professor Thalia Anthony, Senior Lecturer in criminal justice at the University of Technology Sydney, of 26 March 2020 in which she noted that prisons have become increasingly unsafe environments due to an increase in unrest related to COVID-19 restrictions and prisoners' generalised anxiety about contracting the disease.

Institutional responses to COVID-19 in custodial environments in New South Wales

- 122 Ms Graylin also annexed to her affidavit correspondence of 21 July and 30-31 August 2021 with Jeremy Tucker, Director of Correctional Strategy and Executive Services at CSNSW.
- 123 In his email to Ms Graylin dated 31 August 2021, Mr Tucker confirmed that CSNSW, through the coordination of the CSNSW Coronavirus Command Post established in March 2020, was "taking every precaution to protect staff and inmates, and prevent transmission of the virus".

⁴⁸ Exhibit 21 p 12.

124 He outlined the protocol for the reception of new inmates as follows:

All CSNSW staff working with fresh reception inmates are required to correctly apply and wear PPE at all times. This includes gloves, full sleeve gown, eye wear and KN 95 mask. All new inmates undergo mandatory quarantine for a period of 14 days. On completion of the 14 day quarantine period and two negative test results, the medical provider assesses and clears the inmate to move to an appropriate location.

CSNSW protocols mean that any inmate, including *new reception inmates who have cold/flu like symptoms or had close contact with a person diagnosed with or suspected of being exposed to COVID-19*, is placed in isolation. These inmates are placed in a cell, in a designated area within a court location or correctional centre, and referred to the Justice Health and Forensic Mental Health Network or private health provider for assessment. Inmates return to general population once they are cleared by the health provider. (Emphasis added.)

125 Mr Tucker's reference to the isolation of new inmates with "cold/flu like symptoms" or close contacts of those who are either confirmed or suspected COVID-19 as vectors of the virus appears to be an additional measure to the housing of all new inmates for the two week isolation period in a cell with one other inmate.

126 Mr Tucker's advice was reflected in the CSNSW website information also annexed to Ms Graylin's affidavit and the updated publication dated 15 September 2021 which was filed on 8 October 2021. According to that publication, CSNSW and Justice Health accept an ongoing responsibility to identify and monitor those inmates particularly vulnerable to contracting COVID-19 including inmates with chronic illnesses or other premorbid conditions and inmates of advanced age. The updated publication also noted that "to reduce further risk, CSNSW has introduced a 7-day staging process that will ensure inmates transferred from reception centres in metropolitan Sydney are quarantined from the main population in a regional facility for 7-days with a test on day 5 prior to being cleared to join the main population". In his testimony before the New South Wales Public Accountability Committee's public inquiry on 17 September 2021, Mr Corcoran clarified that prisoners who were transferred from metropolitan reception and remand centres to regional correctional facilities were subject to 21 days total quarantine. Ms Hoey confirmed that inmates were tested for COVID-19 on the first and twelfth days of the initial 14 day quarantine period.

127 There was limited evidence as to whether new inmates might be housed in a correctional facility which had been “cleared” of COVID-19 for the duration of their initial two week quarantine upon entering custody. In his testimony, Mr Corcoran described MRRC (together with Silverwater Women’s Correctional Centre) as the “sole repository of all the metropolitan quarantine and isolation”. In her testimony, Ms Hoey explained that as soon as a positive case is identified in a correctional facility anywhere in the State, that person is transferred to a designated COVID-19 hub at either MRRC, Silverwater Women’s or Cobham Youth Justice Centre, in order that appropriate care can be provided, including transfer to a hospital should that be necessary.

128 In that connection Mr Tucker also explained the protocol for managing inmates who have tested positive to COVID-19 as follows:

Isolation hubs have been established to manage inmates confirmed COVID-19 positive. They are staffed by trained officers and are contained environments where inmates can be safely and securely managed with minimal inmate movement and limited direct contact with CSNSW staff. Strict protocols are in place for the management and transport of any COVID-19 positive inmate. CSNSW ensures that inmates have access to services including AVL services for continued contact with family and friends. CSNSW has established a field hospital at the Metropolitan Reception and Remand Centre for COVID-19 positive inmates who become acutely unwell. CSNSW has formal protocols in place for the identification of and managing any case of a positive COVID-19 staff member or visitor to a correctional centre.

129 It follows from the preceding analysis that notwithstanding the incidence of positive cases detected at MRRC, as was the case at least as recently as 15 October 2021, new inmates will continue to be received into that facility and will not be diverted elsewhere. It seems to me from those arrangements that the greater risk, as assessed by CSNSW and Justice Health, is that posed by new inmates who are COVID-19 positive upon reception into custody, rather than the risk posed to newly received inmates by existing prisoners who are COVID-19 positive.

130 Mr Tucker also advised that in-person social visits, external leave programs, custody-based employment programs, and third party and non-essential visitor entry to correctional centres remain suspended as of 31 August 2021. Again, that information was confirmed as current and continuing in the updated CSNSW website publication of 15 September 2021. Other measures which the

CSNSW website indicates are being implemented to address the current situation include replacing in person visits with video visits and screening and temperature checks of all those who enter correctional facilities including staff.

131 Mr Tucker also advised that Justice Health was responsible for the ongoing vaccination program in correctional facilities and that CSNSW would continue to follow the expert advice of New South Wales Health and the Justice Health and Forensic Mental Health Network in their decision-making processes. In her testimony on 17 September 2021, Ms Hoey confirmed that as at that date 35.6 per cent of the adult prison population in New South Wales was fully vaccinated for COVID-19, having received two doses of either the AstraZeneca or Pfizer vaccine. Ms Hoey indicated that 70 per cent of inmates had received one dose of one or other of those vaccines, and that she expected 70 per cent of inmates to be fully vaccinated “in a couple of weeks”.

132 Finally, the Crown tendered a document prepared by Justice Health titled “Justice Health and Forensic Mental Health Network Overview of Services” dated October 2020.⁴⁹ That document provides that Population Health, a team within Justice Health, has state-wide responsibility for coordinating the management of the COVID-19 pandemic and providing expert advice to CSNSW regarding the management of patients and staff diagnosed with, or at risk of contracting, the virus.

The health of the offenders and their vulnerability to contracting COVID-19

Mr Macdonald

133 Only some aspects of Mr Macdonald’s current health profile are relevant to an assessment of both his vulnerability to contracting COVID-19 upon admission to custody (in circumstances where he has not received a second dose of the AstraZeneca vaccine or before the full efficacy of his second dose is achieved) and an assessment of the likely sequelae were he to contract the virus.

134 Mr Macdonald was administered the first dose of the AstraZeneca COVID-19 vaccine on 19 August 2021.⁵⁰ Mr Martin submitted that conflicting medical advice, together with shortages of General Practitioner appointments in the

⁴⁹ Exhibit D.

⁵⁰ Exhibit 1D.

Blue Mountains where Mr Macdonald has resided under conditional bail since his conviction, explained the delay in his receiving the first dose of the AstraZeneca vaccine some months after he became eligible to receive it.

- 135 Mr Macdonald received the first dose despite receiving medical advice that the AstraZeneca vaccine carried the risk of an adverse reaction due to an episode of deep vein thrombosis in his right leg following the rupture of his right anterior cruciate ligament in 1996.⁵¹ His decision to be vaccinated with the AstraZeneca vaccine rather than awaiting access to the Pfizer vaccine was informed by other medical advice he received to the effect that the Pfizer vaccine would place him at risk of developing Bell's Palsy, a condition characterised by facial muscle weakness or paralysis.⁵²
- 136 Mr Martin advised that Mr Macdonald's second AstraZeneca vaccine is scheduled for 29 October 2021 after receiving advice from Dr Mak, Mr Macdonald's treating General Practitioner, that he should not receive the second dose before the expiration of 12 weeks after the administration of the first dose. In Dr Mak's letter of August 2021,⁵³ he noted that "a second vaccination is essential" given Mr Macdonald's "age and propensity for infection".⁵⁴

Edward Obeid

- 137 Edward Obeid has received two doses of the AstraZeneca COVID-19 vaccine. The second dose was administered on an accelerated basis four weeks after the first dose.⁵⁵ The dates on which the vaccines were administered were not the subject of evidence.
- 138 Dr Adib Obeid, Edward Obeid's General Practitioner, assessed him at a "high risk of mortality" were he to contract COVID-19. His risk profile is heightened by his age, the various comorbidities outlined above, in particular the various heart conditions from which he suffers, and the reduced efficacy of the AstraZeneca vaccine where, as here, the two doses of the vaccine were

⁵¹ Exhibit 23.

⁵² Exhibit 1.

⁵³ Exhibit 1.

⁵⁴ Exhibit 1.

⁵⁵ Exhibit 3B.

administered less than three months apart, a very substantial contraction of the recommended 12 week interval between doses, carrying with it a potential reduction in the efficiency of the vaccine.⁵⁶

Moses Obeid

139 Moses Obeid received the first dose of the AstraZeneca vaccine on 3 September 2021. He received that vaccine against medical advice that he should avoid all COVID-19 vaccines due to his history of Bell's Palsy following the administration of an influenza vaccine in 2014.⁵⁷

140 After the first AstraZeneca dose was administered, Moses Obeid experienced a severe headache, neck pain and visual disturbance and was referred to a neurologist.⁵⁸

141 Moses Obeid has since received medical advice that he should not receive the second dose of AstraZeneca any sooner than the recommended 12 week interval between doses.⁵⁹ He is scheduled to receive the second dose on 24 November 2021,⁶⁰ approximately two days short of 12 weeks after the first dose was administered.

The relevance of COVID-19 and the comorbidities of the offenders

142 While the parties were in general agreement that the outbreak of COVID-19 in custodial settings in New South Wales is a relevant consideration for sentencing purposes, precisely how that state of affairs should be taken into account on sentence was in contention.

143 Relying on two recent decisions of the Court of Criminal Appeal, *Doudar*⁶¹ and *Scott*,⁶² the Crown submitted that the Court may take into account the impact of COVID-19 on sentence, including the current suspension of all social and family visits and the reduction in the availability of educational and vocational

⁵⁶ As to which see the publicly available Australian Technical Advisory Group on Immunisation (ATAGI) "Clinical guidance on use of COVID-19 vaccine in Australia in 2021" dated 9 September 2021 <https://www.health.gov.au/sites/default/files/documents/2021/09/covid-19-vaccination-atagi-clinical-guidance-on-covid-19-vaccine-in-australia-in-2021.pdf> p 16.

⁵⁷ Exhibit 16.

⁵⁸ Exhibit 10.

⁵⁹ Exhibit 11.

⁶⁰ Exhibit 9.

⁶¹ *Doudar v R* [2021] NSWCCA 37 at [72].

⁶² *Scott v R* [2020] NSWCCA 81 at [166].

rehabilitation programs as informing the circumstances in which a sentence of imprisonment will be served, by projecting the scenario at the time of sentence into the term of the sentence, despite the uncertainty those projections necessarily entail.

- 144 Counsel for Mr Macdonald and Moses Obeid relied on the decision in *Toller*⁶³ where, at [25], Beech-Jones J said:

As present circumstances clearly demonstrate, the impact of the COVID-19 pandemic on prisoners is far from over. It can be accepted that sentencing judges are entitled to consider those impacts and the potential imposition of restrictions in the future. However, consistent with long established principle, *Cabezuela* confirms that it is not a basis for intervention by this Court with a sentence where, after the time of sentence, the offender's conditions of custody have been rendered more onerous because of the imposition of restrictions by the prison authorities in response to the threat posed by a pandemic.

- 145 In apparent reliance on that passage, Mr Martin and Mr Neil each submitted that the reality of that situation and that the continued impact of COVID-19 in custodial settings generally, exacerbated by the recent outbreak of the virulent Delta strain and the comorbidities of each of Mr Macdonald and Moses Obeid that expose them to the risk of contracting the virus and the likely severity of symptoms were that to occur, are such that any term of imprisonment I might be minded to impose ought to be served in the community by way of an Intensive Corrections Order.⁶⁴

- 146 Ms Francis submitted that the range and extent of Edward Obeid's comorbidities are such that should he contract COVID-19 in prison he would be exposed to a high risk of death. For that reason, she also submitted any term of imprisonment I might be minded to impose should be served by way of an Intensive Corrections Order.⁶⁵

- 147 For reasons earlier referred to, an Intensive Corrections Order is not available as a sentencing option in the case of any of the three offenders, as I have determined that the sentences to be imposed on each of them will exceed two years.

⁶³ *Toller v R* [2021] NSWCCA 204 at [25].

⁶⁴ Sentencing Act, s 7.

⁶⁵ Sentencing Act, s 7.

- 148 I accept that entering custody at this time will expose each of the offenders to an increased risk of contracting COVID-19 than would otherwise be the case were they ordered to serve their sentences in the community where they could monitor and manage their exposure to the risk of community transmission of the virus. However, insofar as the offenders urged the Court to take into account the impact of their various comorbidities as increasing that risk and I am not persuaded that position is supported by the evidence or by the authorities.
- 149 In my view, a principled approach is to take account of those factors when considering whether special circumstances are made out (a matter conceded by the Crown for each offender) with the extent to which the statutory ratio in s 44 of the Sentencing Act is varied to account for that risk.
- 150 In addition, the fact that the impact of COVID-19 pandemic renders any sentence served in full time custody more onerous, a situation which will prevail for the foreseeable future, is also relevant to the sentence to be imposed, I propose to take that fact into account on the same basis by informing the degree to which the statutory ratio between the head sentence and the non-parole period should be altered. I do not intend to give additional weight to it as a factor relevant to the calculation of sentence.⁶⁶

The identification of an appropriate statutory analogue

- 151 When a Court is sentencing for a common law offence, the settled approach in the evaluative exercise entailed by an assessment of the objective seriousness of the particular offending is to use, as a “reference point”, an analogous or relevantly similar statutory offence to which a maximum penalty has been prescribed by Parliament.
- 152 The authorities which have considered that approach are helpfully summarised by Beech-Jones J in *R v Obeid (No 12)*, a sentencing judgment which concerned the common law offence of misconduct in public office and his Honour’s use of s 249B provided for in Part 4A of the *Crimes Act 1900* (NSW) in that sentencing exercise.

⁶⁶ Toller at [25].

153 At [62]-[63] his Honour said:

[T]he absence of a statutory regime governing the conduct of parliamentarians means that resort must be had, at least in part, to the common law to ascertain the relevant principles to be applied in sentencing a parliamentarian who has been convicted of wilful misconduct in public office. In particular, as wilful misconduct in public office is a common law offence there is no specified maximum penalty. This is a significant omission because, in sentencing for offences created by statute, the maximum penalty is a crucial component of the sentencing process because “[t]he maximum penalty for a statutory offence serves as an indication of the relative seriousness of the offence” and “[a]n increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased” (*Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 at [31]).

Instead, in sentencing for common law offences, the Courts adopt an analogous or corresponding statutory offence as a “reference point” for the imposition of a penalty (*R v Hokin, Burton and Peisely* (1922) 22 SR (NSW) 280 at 291; *Jaturawong v Regina* [2011] NSWCCA 168; “*Jaturawong*”; at [5]; *Blackstock v Regina* [2013] NSWCCA 172; “*Blackstock*”; at [8]). However, the adoption of the maximum penalty for a corresponding statutory provision as a reference point does not “fetter the discretion” to impose a sentence “which remains at large” and can be greater than that maximum (*Blackstock* at [11]).

154 Ms Francis submitted that his Honour’s analysis of the authorities as justifying an approach where an analogue provision is used as a reference point and not the maximum penalty ought not to be followed. In her submission, his Honour adopted the erroneous reasoning of this Court in *Blackstock*, a case which she submitted wrongly applied the principle which emerged from the earlier case of *Hokin*. Ms Francis submitted that, despite Campbell J’s approach in *Blackstock* (with whom Macfarlan JA agreed), *Hokin* remains authority for the proposition that a sentencing judge may not permissibly impose a greater sentence for a common law offence than the maximum penalty prescribed for an identified statutory analogue.

155 Ms Francis’ analysis of the authorities is not persuasive. I prefer to follow the analysis applied by RA Hulme J in agreeing with Bathurst CJ that Mr Obeid’s appeal against the sentence imposed by Beech-Jones J should be dismissed. At [390]-[391] his Honour said:

It is uncontroversial and well supported by authority that a court sentencing for a common law offence is not bound to regard the maximum penalty prescribed for an analogous statutory offence as a ceiling for a sentence imposed for a common law offence: see, for example, *R v White* (1875) 33 SCR 339 at 343 (Hargrave J) and 344 (Faucett J); *Blackstock v R* at [10]-[11].

There are two examples of where the statutory offence does, as a matter of practice, provide an upper limit on the sentence to be imposed. First, in *R v Hokin, Burton and Peisely* there is reference to the maximum penalty for a statutory offence providing a limit for sentencing for a common law offence of attempting the same. (This was given statutory recognition in 1974 by the insertion of s 344A of the *Crimes Act* by the *Crimes and Other Acts (Amendment) Act 1974* (NSW)). Secondly, it has been held that a sentence imposed for a common law conspiracy should not generally exceed that prescribed for the substantive offence: *The Queen v Hoar* at 40.⁶⁷

156 As there is no prescribed maximum sentence for the substantive offence of misconduct in public office, neither of the exceptions identified by RA Hulme J apply in the present case.

157 The Crown identified an offence under s 142.2 of the Criminal Code (Cth) as the closest statutory analogue to the offence for which offenders are to be sentenced. That offence attracts a maximum penalty of five years' imprisonment. A conspiracy to commit that offence attracts the same maximum penalty.⁶⁸

142.2 Abuse of public office

(1) A Commonwealth public official commits an offence if:

(a) the official:

(i) exercises any influence that the official has in the official's capacity as a Commonwealth public official; or

(ii) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or

(iii) uses any information that the official has obtained in the official's capacity as a Commonwealth public official; and

(b) the official does so with the intention of:

(i) dishonestly obtaining a benefit for himself or herself or for another person; or (ii) dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

158 Commonwealth public official is defined in the dictionary to the *Criminal Code Act 1995* (Cth) as:

(a) the Governor-General; or

(b) a person appointed to administer the Government of the Commonwealth under section 4 of the Constitution; or

⁶⁷ *Obeid v R* (2017) 96 NSWLR 155; [2017] NSWCCA 221 at [390]-[391] per RA Hulme J.

⁶⁸ Sections 11.5 and 142.2 of the Criminal Code (Cth) provide that a conspiracy to commit the substantive offence of abuse of public office carries a maximum penalty of 5 years' imprisonment.

- (c) a Minister; or
- (d) a Parliamentary Secretary; or
- (e) a member of either House of the Parliament; or
- (f) an individual who holds an appointment under section 67 of the Constitution; or
- (g) the Administrator, an Acting Administrator, or a Deputy Administrator, of the Northern Territory; or
- (i) a Commonwealth judicial officer; or
- (j) an APS employee; or
- (k) an individual employed by the Commonwealth otherwise than under the *Public Service Act 1999*; or
- (l) a member of the Australian Defence Force; or
- (m) a member or special member of the Australian Federal Police; or
- (n) an individual (other than an official of a registered industrial organisation) who holds or performs the duties of an office established by or under a law of the Commonwealth, other than:
 - (i) the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or
 - (ii) the Australian Capital Territory (Self-Government) Act 1988; or
 - (iii) the *Corporations Act 2001*; or
 - (v) the Northern Territory (Self-Government) Act 1978; or
- (o) an officer or employee of a Commonwealth authority; or
- (p) an individual who is a contracted service provider for a Commonwealth contract; or
- (q) an individual who is an officer or employee of a contracted service provider for a Commonwealth contract and who provides services for the purposes (whether direct or indirect) of the Commonwealth contract; or
- (r) an individual (other than an official of a registered industrial organisation) who exercises powers, or performs functions, conferred on the person by or under a law of the Commonwealth, other than:
 - (i) the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or
 - (ii) the Australian Capital Territory (Self-Government) Act 1988; or
 - (iii) the *Corporations Act 2001*; or
 - (v) the Northern Territory (Self-Government) Act 1978; or
 - (vii) a provision specified in the regulations; or
- (s) an individual who exercises powers, or performs functions, conferred on the person under a law in force in the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands or the Territory of Norfolk Island; or
- (t) the Registrar, or a Deputy Registrar, of Aboriginal and Torres Strait Islander Corporations.

159 The offence under s 142.2 may be the subject of a conspiracy charged by operation of s 11.5. That section provides that:

(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, commits the offence of conspiracy to commit that offence and *is punishable as if the offence to which the conspiracy relates had been committed*.

...

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement. (Emphasis added.)

160 The Crown submitted that the offences involving corrupt conduct provided for in Part 4A of the *Crimes Act 1900* (NSW) are not relevantly analogous to this case where the offenders are to be sentenced for a conspiracy to commit the common law offence of misconduct in public office. The Crown further submitted the objective seriousness of that offence is different in type and degree to the particulars of the misconduct committed by Edward Obeid in the public office he occupied in 2007 as a Member of the Legislative Council of New South Wales for which he was sentenced in 2016, an offence which Beech-Jones J treated as analogous to s 249B in that sentencing exercise and an offence which carried the maximum penalty of seven years' imprisonment.

161 Whilst proposing the Commonwealth offence as the closest statutory analogue, the Crown did not advance the submission that it operated other than as a general guide to the determination of sentence. As the Crown explained in its submissions, the Commonwealth offence was relied upon as a statutory analogue in this sentencing exercise largely on the basis of Mason NPJ's findings in *Sher* to the effect that the abuse of power involved in the offence of misconduct in public office can take many forms, including by an individual exercising a power with a "dishonest" or "corrupt" motive in order to confer a benefit or advantage on themselves or a relative or friend.⁶⁹

⁶⁹ Shum Kwok Sher v HKSAR [2002] 3 HKC 117; (2002) 5 HKCFAR 381 at 139 per Mason NPJ.

- 162 The Crown maintained its submission, however, that the elements of an offence under s 142.2 of the Criminal Code (Cth) are different from the constituent elements of the offence which I found proved beyond reasonable doubt.
- 163 The first significant difference is that while an element of the statutory offence is that the public official acted with the intention of dishonestly⁷⁰ obtaining a benefit for themselves or for another person, the offence of conspiracy to commit wilful misconduct in public office as particularised and proved in this case obliged the Crown to prove that the offenders agreed that Mr Macdonald would misconduct himself as the Minister for Mineral Resources for the improper purpose of benefiting them and a cohort of people associated with them, and that “but for” that improper purpose Mr Macdonald would not have agreed to act in the way that he did.
- 164 The second substantive difference identified by the Crown is that the offence created by s 142.2, or a conspiracy to commit that offence, applies to the conduct of current and former Commonwealth public officials in terms wide enough to criminalise the conduct of a wide range of individuals who operate with different levels of authority in the Commonwealth sphere, including third parties who might contract with government. Mr Macdonald was a Minister of the Crown in the Executive Government of the State of New South Wales, not a Commonwealth public official.
- 165 While that factual difference is not a barrier to the use of s 142.2 as a statutory analogue because “[t]he practice of identifying, where possible, a statutory analogue when sentencing for a common law offence where the penalty is at large does not... involve identification of a statutory offence that the offender *committed*, or for which the offender *could have been convicted*” (emphasis in original)⁷¹ a difference of greater significance in my view resides in the fact that, in the present case, the offenders were convicted of complicity in an agreement with each other that Mr Macdonald would knowingly breach the duties of

⁷⁰ As defined in s 130.3 of the Criminal Code (Cth), being dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people. That definition adapted the test in *R v Ghosh* [1982] QB 1053.

⁷¹ *Obeid v R* (2017) 96 NSWLR 221; [2017] NSWCCA 221 at [362] per RA Hulme J.

confidentiality and impartiality owed by him not generally as a public officer but specifically as the Minister for Mineral Resources. Both in my verdict judgment and in these sentencing reasons I have emphasised the importance of the Ministerial duties and obligations imposed on a Minister of the Crown, obligations and duties which find expression in the Ministerial Code of Conduct according to which all Ministers of the Crown are obliged to act honestly and conscientiously solely in the public interest.

166 Finally, it was also the Crown's contention that the common law conspiracy as alleged, particularised and proved in this case, constitutes, in its commission, an objectively more serious offence than an offence under s 142.2 of the Criminal Code (Cth) or a conspiracy to commit that offence. That being the case, in the Crown's submission the maximum penalty of five years' imprisonment fails altogether to reflect of the gravity of Mr Macdonald's substantive breaches of his Ministerial duties, or the criminal agreement he made to act in that way. Neither does the maximum penalty adequately reflect the circumstances in which the offenders in this case acquired and used to their benefit confidential information provided to them by Mr Macdonald in repeated breach of his duties and obligations as Minister.

167 For those reasons, the Crown submitted that the maximum penalty of five years' imprisonment ought not to be given the prominence in the sentencing exercise contended for by Ms Francis and Mr Neil. In the Crown's submission, it was not for the parties to persuade the Court to either arrive at sentences greater or lesser than the statutory maximum prescribed for the Commonwealth offence, or point to material differences between the subject offence and that offence with a view to the Court approaching the exercise of the sentencing discretion in the context of a particular maximum penalty. That approach would impermissibly fetter the Court's discretion to impose a just and proportionate sentence in a sentencing exercise for which no maximum penalty is prescribed.

168 The offenders sought to persuade me to the contrary. Mr Neil adopted the approach proposed by Ms Francis in her analysis of the authorities to the effect that it was not open to me to assess the objective seriousness of the

conspiracy otherwise than against the maximum statutory penalty of five years' imprisonment for an offence against s 142.2 of the Criminal Code (Cth) as the only statutory analogue identified by the Crown. I have already dealt with and disposed of that submission

- 169 Mr Martin submitted that the closest statutory analogue was an offence laid against s 21(1)(b) of the *State Records Act 1988* (NSW) which prohibits a person from transferring, offering to transfer, or being a party to arrangements for the transfer, possession or ownership of a State record. Section 3 of that Act defines public office as including the holder of any office under the Crown. A state record is defined as:

Any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section.

- 170 That offence carries a maximum penalty of 50 penalty units or \$5,500 which he submitted was the maximum penalty that could be imposed this case.
- 171 For reasons that do not require elaboration, the statutory analogue proposed by Mr Martin is wholly inapposite.
- 172 It follows from the preceding analysis that a principled approach to considering the statutory analogue of an offence which carries five years' imprisonment is that I am to use that penalty as a "reference point"⁷² from which I may depart in my discretion.
- 173 Assessing the objective seriousness of a common law offence by that approach is a more complex exercise where the identified statutory analogue is broadly analogous to the common law offence but not equivalent to it. That is the situation which presents in this case.
- 174 In *Obeid*, Beech-Jones J accepted that the sentencing discretion is to be exercised regardless of the extent of equivalence between the common law offence and the statutory analogue. However, his Honour reasoned that where greater substantive differences exist between the subject offence and the analogue, those differences "bear out the justification for the Court not being

⁷² R v Hokin, Burton and Peisely (1922) 22 SR (NSW) 280 at 291; Jaturawong v R [2011] NSWCCA 168 at [5]; Blackstock at [8]; referred to in R v Obeid (No 12) at [63]; endorsed in Obeid v R (2017) at [359].

limited by the maximum penalty for the relevant statutory analogue”.⁷³ It follows that there is not a separate, distinct approach to be taken where the analogue does not closely replicate the subject offence. Rather, that difference merely increases the work to be done in exercise of the sentencing discretion. That approach was accepted and endorsed on appeal.⁷⁴ It is the approach I will adopt in this case.

175 Accordingly, my discretion to impose on each of the offenders an appropriate sentence, having regard to the statutory purposes of sentencing identified in s 3A of the Sentencing Act, is unfettered. That being the case, it is open to me to impose a sentence greater than the maximum penalty of five years’ imprisonment for the offence under s 142.2 the Criminal Code (Cth) (or a conspiracy to commit that offence) the Crown proposed as the relevant statutory analogue in terms of a broad equivalency of elements.

176 That approach reflects and applies what I considered to be the undiluted principle that while a statutory analogue may be used as a “reference point”, when sentencing for a common law offence, it does not confine the sentencing discretion.

Comparatives

177 In many sentencing exercises, an assessment of the objective criminality of particular offending may be usually informed by the sentences imposed in other cases and, in that way, the collective experience of sentencing courts in the application of unifying sentencing principles is available. That exercise is, however, invariably undertaken where an offence against a criminal statute is under consideration and there is a prescribed maximum penalty against which useful comparisons can be made. That is not this case.

178 I was provided by the Crown with a comparative table of cases,⁷⁵ none of which concern a common law conspiracy to commit the common law offence of misconduct in public office and only a relative few concern the analogue offence under s 142.2 of the Criminal Code (Cth). None of those cases have any utility as comparators as none involve a Minister or Member of Parliament

⁷³ R v Obeid (No 12) at [70].

⁷⁴ Obeid v R (2017) at [358].

⁷⁵ Annexed as Annexure 2 to this judgment.

as the relevant Commonwealth public official and none involve conduct in any way comparable to the gravity of Mr Macdonald's misconduct as a Minister of the Crown in entering into a conspiracy of the scope and nature of the conspiracy I found proved.

179 I do however note and respectfully endorse the observations of Muir JA in *R v Nuttall*,⁷⁶ a case which concerned the sentence imposed on a Minister of the Crown convicted of multiple counts of official corruption contrary to s 87 of the Criminal Code (QLD). His Honour said at [52]:

Grave though it is, corrupt behaviour on the part of a servant of the Crown does not have as great a potential to erode public respect for, and confidence in, institutions critical to the good order of government and society as does the conduct of a corrupt Minister of the Crown. If corruption takes hold at the centre of government, its permeation of lower echelons is assured and the ability to eradicate it gravely compromised. The respondent abused his position as Minister of the Crown, an office at the pinnacle of the structure of government in this state. Ministers have responsibility for the affairs of the departments over which they preside.

180 While I do not treat the cases on the schedule as being of no assistance at all in guiding the exercise of the sentencing discretion in this case, they have been of only very limited assistance and do not provide any useful sentencing pattern or range.

181 That said, the following statements of sentencing principle are able to be discerned from the cases of misconduct in public office involving parliamentarians or Ministers which this Court and other state intermediate courts have dealt with in the past:⁷⁷

- (a) emphasis is placed on the onerous duty imposed on parliamentarians or Ministers and the strictness with which a breach or breaches of that duty will be dealt;
- (b) whilst loss or damage occasioned (or a profit made) by the offending is relevant in assessing the objective seriousness of the offending, the real damage caused by the offending is to the institutions of government and public confidence in them;
- (c) considerations of general deterrence and denunciation predominated over other sentencing considerations; and

⁷⁶ (2011) 209 A Crim R 538; [2011] QCA 120.

⁷⁷ *Obeid* (No 12) at [83] citing *Jackson v R*; *Hakim v R* at 436 per Lee J with whom Finlay J agreed; *Nuttall* at [49] per Muir JA with whom Fraser and Chesterman JJA agreed; *R v Bruneau* (1963) CarswellOnt 22; [1964] 1CCC 97; [1964] 1 OR 263, 42 CR 93 at [25] per McLennan JA.

- (d) the prior good character of the offender is afforded less weight in the sentencing process than it would for other offences.

182 Allied with (b) above is the following observation by Lee J in *Jackson & Hakim* at 435 with which I also respectfully agree and which I emphatically endorse:⁷⁸

We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is lead into corruption the very institution of democracy itself is assailed and at the very height of the apex. Democracy can only survive when ordinary men and women have faith in the integrity of those whose responsibility is the preservation of the integrity of Parliament in all its workings. It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not, for their personal advantage, abuse their position.

The personal and subjective circumstances of the offenders that necessarily includes character

The question of good character

183 Edward Obeid has been convicted of misconduct in public office (an offence he committed in 2007) and for which he was sentenced in December 2016 to 5 years' imprisonment with a non-parole period of 3 years. Although he had not been convicted of that offence at the time he became a party to the conspiracy the subject of this sentencing exercise, he is, by reason of that prior conviction, disentitled to the leniency that might otherwise be afforded him on account of good character.⁷⁹

184 Neither Mr Macdonald nor Moses Obeid has any relevant previous convictions.⁸⁰ For that reason, both are entitled to be treated as a person of prior good character for sentencing purposes. However, for the reasons which follow, very little weight will be given to Mr Macdonald's good character.⁸¹

⁷⁸ Verdict judgment at [2043].

⁷⁹ *R v Wickham* [2004] NSWCCA 193 at [24]. In *R v Smith* (2000) 114 A Crim R 8; [2000] NSWCCA 140, a case which involved ongoing misappropriation of funds, the Court of Criminal Appeal said at [21]–[22]: “[The offender] was not a first offender from the time he committed the second offence, only he had not been caught out”. See also *R v Phelan* (1993) 66 A Crim R 446 at 448.

⁸⁰ Mr Macdonald has since served a period of one year and nine months of a 10-year sentence with a non-parole period of 7 years which commenced on 26 May 2017 and was to expire on 25 May 2027. That sentence was imposed in relation to a conviction for two counts of wilful misconduct in public office in 2016. That conviction was quashed on 25 February 2019. See *Maitland v R; Macdonald v R* [2019] NSWCCA 32.

⁸¹ Sentencing Act, s 21A(3)(f). See also *Kenny v R* [2010] NSWCCA 6 where at [16] Basten JA said that approach is “prescribed” when it would not be contrary to a rule of law to do so: s 21A(4) of the Sentencing Act.

- 185 It is well established that in cases of corruption and more generally in offences generically described as “white-collar” offences, prior good character is frequently afforded less weight than it might otherwise attract as a mitigating factor on sentence,⁸²
- 186 It is not “white collar” offending per se that entitles a sentencing court to give less weight to evidence of good character, but rather, the nature and circumstances of that type of offence that may permit that approach.⁸³
- 187 One of the most pervasive differentiating factors identified in the authorities is the relationship between the offender’s “good” character and the commission of the offence. In this case, so far as concerns Mr Macdonald, in my view, that relationship is neither indirect nor tenuous,⁸⁴ since it involves the exploitation of Mr Macdonald’s position as Minister and the trust reposed in him in that capacity.
- 188 Both in applying principles of parity to which I have already referred, and more generally as deserving of weight in mitigation of sentence, it is worthy of emphasis that Moses Obeid has no prior convictions. He is also described by those whose testimonials were tendered on sentence as a person who, prior to this offending, had an unblemished reputation and was highly regarded in business circles as a person who was motivated and hardworking. He is entitled, in my view, to have his good character weigh in his favour in the ultimate imposition of sentence for those reasons.
- 189 As I have sought to make clear in my sentencing remarks, unlike the position of Mr Macdonald, Moses Obeid’s good character was independent of his offending conduct in the sense that it did not facilitate it. Insofar as I can discern from the extensive evidence at trial, Moses Obeid’s role as a co-conspirator, including the many commercial dealings with his lawyers and with third parties, was performed without his good character having any bearing at all on those dealings or their ultimate success. He may have been regarded by

⁸² R v Obeid (No 12) [at [94] citing R v Rivkin (2004) 59 NSWLR 284; [2004] NSWCCA 7 at [410] and R v Williams (2005) 152 A Crim R 548; [2005] NSWCCA 315 at [60] per Wood CJ at CL; Blackstock at [67] per Campbell J with whom Macfarlan JA and Barr AJ agreed.

⁸³ R v Gent (2005) 162 A Crim R 29; [2005] NSWCCA 370.

⁸⁴ Elomar v R [2018] NSWCCA 224 at [134].

those with whom he dealt as having sound commercial and business acumen, but there is nothing in the evidence to indicate that his contractual partners gave any weight at all to his good character in their dealings with him.

Although in considering the question of Mr Brook's credibility in the verdict judgment, I expressed some doubt as to whether he had truthfully accounted for his dealings with Moses Obeid,⁸⁵ that does not allow me to find as a fact for sentencing purposes that Moses Obeid utilised his business standing or his reputation more generally to influence Mr Brook to be less than candid in his dealings with Monaro Mining NL.

The personal and subjective circumstances of the offenders

190 Evidence was also tendered on behalf of each of the offenders as to the state of their physical and mental health as a factor informing their personal and subjective circumstances. It was submitted on behalf of each of the offenders that their ill health should attract considerable weight in the ultimate determination of a just and proportionate sentence and that it would support a finding of special circumstances so as to reduce the length of the non-parole period relative to the overall term of imprisonment.

The subjective circumstances of Moses Obeid

191 Moses Obeid is currently 52 years of age. As at the date of the offending in 2008, he was 39 years of age.

192 Moses Obeid relied on the following character testimonials on sentence:

- A letter from Nicole Obeid, Moses Obeid's wife of 19 years, dated 18 August 2021
- A letter from Matthew Sweeney, Moses Obeid's friend of six years, dated 18 August 2021
- A letter from Daniel Traylen, Moses Obeid's friend of 11 years, dated 20 August 2021
- A letter from Roberto Araneda, the owner of a café frequented by Moses Obeid whom he has known for seven years, dated 18 August 2021
- A letter from Debbie Dickson, a friend and former business associate of Moses Obeid whom he has known for 25 years, dated 23 August 2021

⁸⁵ Verdict judgment at [1767] and following.

193 Those testimonials describe him in different ways but collectively, I accept, he is considered by them to be a person of character, dignity, compassion and integrity with an abiding love and commitment to his teenage children and to his extended family. Others speak of him as a competent and reliable businessman willing and able to provide support and advice when it is asked of him.

194 Nicole Obeid and Moses Obeid's long-standing personal friend Mr Traylen in particular confirm the medical evidence tendered on sentence that, to their observation, Moses Obeid's physical and mental health has slowly deteriorated following the launching of the investigation by ICAC in November 2011 and the gradual disintegration of his family life and the progressive social isolation which has occurred over the last 10 years, to a significant degree responsive to the relentless negative media attention to which he has been subjected.

Moses Obeid's physical and mental health

195 Moses Obeid suffers from ischaemic heart disease which required the insertion of a stent to the main coronary artery in 2018.⁸⁶ He has also suffered from chronic migraine and cluster headaches since 2014.⁸⁷

196 On 6 September 2021, he presented at the Emergency Department at St Vincent's Hospital with an intense left-sided headache, neck pain and visual disturbance following the administration of the first dose of the AstraZeneca vaccination three days earlier.⁸⁸ Following further consultation with Dr Hameiri, his General Practitioner, Moses Obeid was referred for a brain angiogram to investigate the cause of the headache.⁸⁹ At the date of the sentence hearing, a consultation with Dr Sutton, neurologist, was scheduled for 14 September 2021.

197 On 5 October 2021, further evidence was filed and served on behalf of Moses Obeid. That evidence comprised:

- Letter from Dr Sutton to Dr Hameiri dated 14 September 2021.
- Letter from Dr Sutton dated 28 September 2021.

⁸⁶ Exhibit 7; Exhibit 26.

⁸⁷ Exhibit 13.

⁸⁸ Exhibit 10.

⁸⁹ Exhibit 11; Exhibit 12.

- A further letter from Dr Sutton to Dr Hameiri dated 21 September 2021.⁹⁰
- 198 That correspondence confirmed that Moses Obeid has experienced cluster headaches in 2014, 2018, 2019, 2020 and 2021. During the more recent onsets, each episode lasted for around three hours and occurred daily over a period of around nine days. Each episode is associated with extremely severe left retro-orbital pain (pain behind the left eye), left side ptosis (drooping of the eyelid), watering and redness of the eyes and nasal congestion. More recent episodes have also associated with retro-auricular pain, jaw discomfort, pain in the left shoulder, numbness in the left hand and wrist swelling.
- 199 Dr Sutton prescribed Verapamil as a preventative medication and ordered an MRI study.
- 200 Upon further consultation with Mr Obeid on 21 September 2021, Dr Sutton reported that no abnormalities were detected on the MRI study and that the frequency of the headache had subsided from four episodes per day to one episode per day. He also reported that the headaches were relieved by use of an Imigran injection which Mr Obeid self-administers and that he had prescribed Mr Obeid an increased dose of Verapamil.
- 201 Dr Sutton also observed that with the outcome of Mr Obeid's sentence proceedings pending, which may involve a sentence of imprisonment, Mr Obeid is concerned that if his cluster headaches occur in custody, and they occur at night, he will be without access to injectable Imigran. Dr Sutton strongly supported Mr Obeid having access to that medication whilst in custody.
- 202 Mr Obeid had an episode of kidney stones in 2017.⁹¹ Whether he received any treatment was not the subject of any evidence. He also had an episode of right-side Bell's Palsy (characterised by facial muscle weakness or paralysis and neuralgic pain) in 2014 following the administration of an influenza vaccine,⁹² and an episode of Epstein Barr virus (also referred to as glandular fever) at an unspecified time.⁹³ In 2015, he continued to suffer post viral neuritis as a

⁹⁰ Exhibit 26.

⁹¹ Exhibit 7.

⁹² Exhibit 14; Exhibit 16.

⁹³ Exhibit 8.

residual effect of the Bell's Palsy, though by that time the neuralgic pain had resolved.⁹⁴ In a letter dated 31 August 2021, Dr Hameiri reported that Mr Obeid remains on long term treatment associated with the effects of Bell's Palsy and the Epstein Barr virus.⁹⁵

203 Moses Obeid has also suffered from a longstanding anxiety disorder and depressive illness, with periodic suicidal ideation.⁹⁶ In a report dated 6 September 2021, Dr Nielssen, psychiatrist, confirmed these diagnoses, noting a further and separate diagnosis of a panic disorder by Dr Lianos, Mr Obeid's former treating psychologist and psychiatrist. Both anti-depressants and anti-anxiety medication were prescribed by Dr Lianos.

204 Dr Nielssen considered that Mr Obeid's reported poor quality of sleep, fatigue, lack of motivation, withdrawal from social contact, constant negative ruminations, anxiety symptoms and panic attacks, and the negative quality of his responses at interview, as consistent with the presence of a depressive illness. Dr Nielssen considered the main cause of his condition to be associated with:

...ten years of litigation and the public shaming arising from intense media coverage of the proceedings, which included constant harassment by journalists and photographers, [that] has resulted in social and commercial ostracism.

205 Dr Nielssen also identified the serious illness of Mr Obeid's daughter in 2011, financial losses arising from the legal proceedings and the breakdown of his marriage as contributing to his poor mental health.⁹⁷

206 Dr Nielssen went on to report:

With regards to future treatment, Mr Obeid's combination of disorders typically respond to evidence based care, including cognitive behavioural therapy (CBT) based counselling, and if required, a further trial of a more tolerable antidepressant medication. He would find the experience of imprisonment to be more onerous than for many other prisoners because of his background and the publicity surrounding his case, and would probably be classified as a protection prisoner, with reduced access to health and other facilities because of the limitations on the movement of protection prisoners within prisons. Imprisonment would also be expected to exacerbate his depressive illness.

⁹⁴ Exhibit 14.

⁹⁵ Exhibit 8.

⁹⁶ Exhibit 7.

⁹⁷ Exhibit 7.

Mr Obeid was assessed to have good prospects for rehabilitation and to carry a low probability of further offending because of the unique circumstances of this case, which are unlikely to occur again, his age and background, the absence of a substance use disorder, and the absence of any pattern of offending.⁹⁸

The subjective circumstances of Mr Macdonald

207 Mr Macdonald is currently aged 72. He was aged 59 at the time of the offending.

208 Mr Macdonald relied on the following character testimonials on sentence:

- A letter from Andrea Brown, Mr Macdonald's stepdaughter whom he has known since her childhood, dated 30 August 2021
- A letter from Sasha Macdonald, Mr Macdonald's daughter, dated 3 September 2021
- A letter from Anita Gylseth, Mr Macdonald's wife, dated 25 August 2021
- A letter from Anita Macdonald (as Ms Gylseth was then called) dated 26 April 2017
- A letter from John Della Bosca, a former Parliamentary colleague of Mr Macdonald, dated 26 August 2021
- A letter from Colin Donegan, a mining consultant who met regularly with Mr Macdonald in a professional capacity while he was the Minister for Mineral Resources, dated 2 September 2021
- A letter dated 3 September 2021 from Terrence Healey of Counsel, a personal friend of Mr Macdonald of 32 years (initially through a mutual interest in cattle breeding and later when Mr Healey provided legal advice to the Australian Labor Party)⁹⁹

209 As at May 2008, Mr Macdonald held the office of Minister for Mineral Resources, having occupied that office between 2005 and 2010.¹⁰⁰ He retired from political life in June 2010.

210 He is currently self-employed with his wife in a small business offering cleaning services.

211 Mr Macdonald graduated from Latrobe University with a Bachelor of Arts, Honours in History and Philosophy. He served as President of the Australian Union of Students from 1974 until 1976.

⁹⁸ Exhibit 7.

⁹⁹ Exhibit 17.

¹⁰⁰ Verdict judgment at [191] and Trial Exhibit G.

- 212 Prior to entering Parliament as a Member of the New South Wales Legislative Council in 1988, he worked in various roles within the New South Wales public service, including five years as a research officer to the Attorney-General and five years as Senior Policy Officer to the Minister for Housing and Aboriginals.
- 213 Mr Macdonald held various portfolio positions as a Minister before he retired from politics in June 2010. They included Minister for Primary Industries, Minister for Natural Resources, Minister for State and Regional Development, Minister for Major Events and Minister for Energy.
- 214 Mr Macdonald was also described by Mr Della Bosca as diligent and hard-working, attending conscientiously to all aspects of his Parliamentary and Ministerial obligations. Mr Della Bosca also spoke to Mr Macdonald's initiative and commitment across a range of policy responses to various challenges confronted by the New South Wales government. One of those initiatives, which was the subject of evidence at the trial and not contested, was Mr Macdonald's commitment to energy reform in the privatisation debates in 2007 and 2008 and the work he did as Minister for Agriculture dealing with the outbreak of equine influenza in the same timeframe.
- 215 For sentencing purposes I accept that in the various Ministerial portfolios Mr Macdonald held from time to time prior to his offending, he has made a contribution to advancing the interests of the people of New South Wales. That legacy however carries little weight when he is to be sentenced for the serious criminality reflected in his participation in a criminal conspiracy where he agreed to deliberately breach his Ministerial obligations and duties to advance the private interests of a small cohort of people at the expense of the people of New South Wales who were entitled to expect the highest standards of probity and transparency in the exploitation of the State's coal resources.
- 216 Although I accept that Mr Della Bosca has not known Mr Macdonald to conduct himself dishonestly or unethically, the serious criminality in which Mr Macdonald was engaged between May and September 2008 in the office of Minister he occupied at that time disentitles him from any reliance upon Mr Della Bosca's views for sentencing purposes. The views expressed by Terence Healey, barrister, that in his experience of Mr Macdonald over a period of 32

years he has never doubted his honesty and integrity and the views expressed by Mr Donegan to the same effect also carry little weight in the sentencing exercise.

217 Mr Macdonald is variously described by those of his family members who have prepared letters and testimonials as a devoted husband and father who has been unwavering in the love and support he given to his adult stepdaughters, one of whom has an intellectual disability requiring constant care and close supervision.

218 Mr Macdonald submitted that there would be hardship occasioned to his wife and, by extension, to his stepdaughter should he be incarcerated for a lengthy period and that the severity of his sentence should be moderated for that reason.

219 In order to take into account what I accept will be the very considerable impact upon his wife and dependent adult stepdaughter upon Mr Macdonald being sentenced to a term of imprisonment at this time, I would need to be satisfied that they will experience an exceptional degree of hardship beyond the fact that Mr Macdonald will be separated from them and for that reason unable to contribute financially to the family unit or to support his wife in the care she provides to her daughter both within the family home and in her activities outside the family home, including encouraging her participation in various community-based day programs.

220 While I accept that there will be serious disruption to Mr Macdonald's family life by a sentence of imprisonment and that the burden of maintaining stability, including financial stability, for his adult daughter will be borne principally by his wife in his absence, I am unable find that level of hardship to be exceptional so as to reduce what I considered to be an otherwise just and appropriate sentence.

Mr Macdonald's physical health

221 Principal among Mr Macdonald's current health concerns is chronic constipation. His motility issues and associated impaired gastrointestinal function and the efficacy of Faecal Microbiota Transplantation (FMT) as a

procedure to treat those conditions was relied upon in his application for a temporary stay of his trial in July 2019. That application was refused.

222 Reports from Professor Borody, gastroenterologist, of 13 May 2019 and 2 July 2019, and a report from Dr Janu, his treating surgeon, of 18 June 2019 were tendered on the stay application and retendered on sentence. Updated correspondence and reports from various medical professionals, including Dr Jonathan Mak, General Practitioner, and Professor Borody were also tendered on sentence.

223 On 15 July 2019, Mr Macdonald consulted with Dr Ellard, an expert gastroenterologist, at the Crown's request. Dr Ellard provided reports dated 10 and 15 July 2019 which were tendered by the Crown on the stay application and retendered on sentence.¹⁰¹ Dr Ellard and Professor Borody gave evidence on the stay application.

224 In a letter to Dr Mak dated 24 August 2021, Professor Borody advised that Mr Macdonald continues to suffer from severe constipation, bleeding associated with straining, nightly abdominal pain, bloat, lower back pain and sleep disturbance. He advised that Mr Macdonald's motility issues may lead to him developing a hernia.

225 Mr Macdonald's chronic constipation predated the imposition of a sentence of imprisonment following a trial for an unrelated offence in 2017.¹⁰² His condition was exacerbated whilst he was in custody at Cooma Correctional Centre. Despite filing a serious patient self-referral form on 14 October 2017, alerting Justice Health to the fact that his chronic constipation was aggravating a pre-existing hernia, and despite his request for additional medication for relief of his symptoms,¹⁰³ Mr Macdonald developed a large left-sided inguinal hernia including bowel incarceration. On 30 May 2019, shortly after his release from custody after his conviction was quashed, Dr Norman Janu performed an operation to repair what was described by him as a "very large incarcerated indirect left inguinal hernia... the hernia containing bowel and bladder within

¹⁰¹ Exhibit F.

¹⁰² The conviction was subsequently quashed: *Maitland v R; Macdonald v R* [2019] NSWCCA 32.

¹⁰³ Exhibit 1E.

it”.¹⁰⁴ Professor Borody assessed that whilst ever that condition was untreated, as it was by Justice Health for an extended period of almost two years, there was grave risk of strangulation, septicaemia and necrosis.¹⁰⁵

226 The operation was followed by a prolonged period of recovery.

227 Mr Macdonald's motility issues have been managed by a range of medications since that time, including high doses of laxatives which have caused periodic bouts of faecal incontinence. Professor Borody has maintained his advice to Dr Mak that Mr Macdonald would benefit from a Faecal Microbiota Transplantation (FMT). He explained that procedure as follows:

This would require 6-8 weeks of anti-Clostridium tablets then a 'colonic' machine washout we have [at the Centre for Digestive Diseases], followed by multiple faecal infusions.¹⁰⁶

228 Professor Borody explained that it has not been possible to perform the FMT procedure at any time over the past two years, as Mr Macdonald's trial and the COVID-19 pandemic have intervened. He also explained that the pandemic has presented particular safety issues for patients receiving donated biological (faecal) matter which is intrinsic to the FMT procedure. Professor Borody advised Dr Mak that he expected FMT procedures to commence at his clinic “in the near future”.¹⁰⁷

229 Dr Ellard's firm view, as expressed in her reports and in her evidence on the stay application, was to the effect that there was no evidence, emerging from randomised controlled trials, that FMT has a role in treating chronic constipation. She expressed the opinion that the efficacy of the procedure to treat Mr Macdonald's condition is not supported by data or medical research and would not be supported by the broader gastroenterological medical community.¹⁰⁸

230 Ultimately, I was not persuaded that Mr Macdonald's wish to be considered as a candidate to participate in an FMT program to treat his constipation under Professor Borody, a treatment program he described as a “new frontier in

¹⁰⁴ Exhibit 2.

¹⁰⁵ Exhibit 1F.

¹⁰⁶ Exhibit 1.

¹⁰⁷ Exhibit 20.

¹⁰⁸ Exhibit F.

science”, justified delaying the commencement of his trial. I remain unpersuaded of the controversial efficacy of FMT for the treatment of chronic constipation. I am also unpersuaded that Mr Macdonald’s wish to be considered as a candidate for the procedure is relevant to the sentencing exercise. I do accept the chronicity of Mr Macdonald’s motility issues will render conditions of custody more onerous for him with an increased risk of related symptoms also adversely impacting on his experience of custody.

231 As to Mr Macdonald’s other health concerns, he has recently experienced prostate-related abnormalities including urinary frequency and elevated PSA levels.¹⁰⁹ Following a prostate examination conducted by Professor Borody on 17 August 2021, Mr Macdonald was referred to Dr Stricker, urologist, with a view to assessing the potential that his presenting symptoms might indicate the onset of prostate cancer.¹¹⁰ Mr Macdonald had a scheduled consultation with Dr Stricker on 14 October 2021.¹¹¹

232 Mr Macdonald has also suffered from glaucoma for several years,¹¹² and gastro-oesophageal reflux. Both conditions are managed by daily medication.¹¹³

233 Mr Macdonald experiences nightly sinus blockage which affects his sleep and which requires treatment by a nasal congestion medication. Dr Mak noted that during his earlier prison term Mr Macdonald was denied the use of his sinus medication and that he consequently experienced greatly disrupted sleep patterns.¹¹⁴

234 Mr Macdonald requires regular treatment for sunspots which was effectively facilitated by Justice Health during Mr Macdonald’s previous period of incarceration.¹¹⁵

¹⁰⁹ Exhibit 24.

¹¹⁰ Exhibits 1, 1A.

¹¹¹ Exhibit 1.

¹¹² Exhibit 1G.

¹¹³ Exhibit 1.

¹¹⁴ Exhibit 1.

¹¹⁵ Exhibit 1.

The subjective circumstances of Edward Obeid

235 As at the date of sentence, Edward Obeid is 77 years of age. He was aged 64 at the time of the offending.

236 Edward Obeid relied on the following character testimonials on sentence:

- A letter from Gemma Vrana, his daughter, dated 27 August 2021
- A letter from Maree Obeid, his daughter in law, dated 28 August 2021
- A letter from Edward Obeid Jr Jr, his grandson, dated 28 August 2021
- A letter from Angelica Saab, his granddaughter, dated 28 August 2021
- A letter from Edward Obeid Jr, his son, dated 28 August 2021
- A letter from Judith Obeid, his wife, dated 1 September 2021
- A letter from Olivia Achie, his granddaughter, dated 1 September 2021
- A letter from Rebecca Joummaa, his daughter, dated 1 September 2021
- A letter from Patricia Lees, his neighbour of nine years, dated 1 September 2021¹¹⁶

237 The testimonials from Edward Obeid's immediate family members and extended family members, including his grandchildren, collectively describe their husband, father and grandfather as a kind, generous, dignified and loving family man who they continue to hold in the highest esteem not only for his enduring commitment to his family but for his tireless work for the benefit of the Lebanese community here and abroad over the course of his working life.

238 I also note Edward Obeid's public service in other respects. He was a part-time Commissioner of the Ethnic Affairs Commission from 1981 to 1985, Vice President of the Ethnic Press Association of Australia in the same timeframe and also a member of the Board of Governors of the Law Foundation of New South Wales and a Trustee of the Art Gallery of New South Wales. I also note the length of his parliamentary career from 1991 to 2011.

239 I acknowledge the unwavering love and respect Edward Obeid's family have for him and I accept they are genuinely fearful at what they appear to have understood will be the judgment of this Court involving the imposition of a sentence of imprisonment at this time in his life. They confirm what is reflected in the medical evidence, that Edward Obeid's mental and physical health

¹¹⁶ Exhibit 4.

deteriorated following his release from custody in December 2019, with an increasing need for assistance in attending to his daily routine.

- 240 It was not part of the Crown case at trial that Edward Obeid acted in breach of the Parliamentary Code of Conduct by which he was bound at the time the agreement was forged in May 2008 or at any time throughout the process of its execution through to 31 January 2009.

Edward Obeid's physical and mental

- 241 Edward Obeid suffers from a variety of heart conditions including paroxysmal atrial fibrillation (or an irregular heartbeat), coronary artery disease and ischaemic heart disease. Coronary artery bypass surgeries were performed in 1995 and 2005. Cerebral hypoperfusion (inadequate blood flow to the brain) was initially diagnosed in 2005.¹¹⁷ He suffered an acute myocardial infarction in December 2020 which required the insertion of a stent.¹¹⁸
- 242 Edward Obeid has suffered multiple acute lacunar strokes (a type of ischaemic stroke) in early 2020¹¹⁹ and several transient ischaemic strokes in 2016.¹²⁰ As at 5 February 2020, Dr Salman Khan, neurologist, confirmed that he was receiving the maximum secondary prophylaxis to address the risk of suffering further ischaemic strokes without any need for anticoagulation.¹²¹ Referable to an MRI scan performed in October 2020, Dr Sebastian Fung, radiologist, assessed that Mr Obeid had mild to moderate cerebral involutinal change (shrinking of brain tissue) but no evidence of further acute infarction.¹²²
- 243 Edward Obeid also suffers from a range of other conditions including hypertension (high blood pressure), hyperlipidaemia (high cholesterol), osteoarthritis and gastro-oesophageal reflux disease. He also suffered a prolonged episode of Guillain Barre Syndrome (a condition in which the immune system attacks the nerves) after receiving an influenza vaccination.¹²³ The date as to when that occurred was not the subject of evidence.

¹¹⁷ Exhibit 3I.

¹¹⁸ Exhibit 3.

¹¹⁹ Exhibit 3E; Exhibit 3F.

¹²⁰ Exhibit 3I.

¹²¹ Exhibit 3G

¹²² Exhibit 3F.

¹²³ Exhibit 3B.

- 244 Edward Obeid also suffers from Diabetes Mellitus Type 2 which is currently well controlled.¹²⁴
- 245 In a report dated 6 September 2021, Dr Reutens, consultant psychiatrist, diagnosed Mr Obeid with an adjustment disorder with an anxiety disorder. She also noted Mr Obeid's history of depression which has been treated with an anti-depressant medication.¹²⁵ There was no evidence as to how long Mr Obeid has suffered from that condition. Dr Reutens noted that Mr Obeid experienced disturbed sleep and had some memory loss. Dr Reutens confirmed that Mr Obeid does not have dementia but he does have a mild neurocognitive disorder which required follow-up in six months. She noted the findings of Dr Batchelor, neuropsychologist, dated August 2021 of a "mild to moderate reduction in speed of information processing and the ability to determine the temporal content of information after delay. Dr Reutens administered cognitive screening tools under the Montreal Cognitive Assessment. Mr Obeid scored 21 out of 30 with the main deficiencies in language and memory recollection.
- 246 Dr Reutens also noted Mr Obeid's increasing physical frailty, with associated poor balance, visual impairment and the need for supervision during dressing and showering due to risk of suffering a fall.
- 247 Mr Obeid suffers from a number of ophthalmic conditions including macular degeneration, a cataract in the left eye and a concentration of diabetic cystoid macular oedema in the right eye.¹²⁶ During his incarceration at a correctional facility in Bathurst, he underwent right cataract surgery. He also developed diabetic retinopathy whilst a serving prisoner. He was given monthly intravitreal injections for approximately the last 12 to 15 months of his imprisonment. Edward Obeid is still receiving those injections on an "ongoing" basis.¹²⁷ These conditions make reading difficult.¹²⁸

¹²⁴ Exhibit 3I.

¹²⁵ Exhibit 3A.

¹²⁶ Exhibit 3I; Exhibit 3D.

¹²⁷ Exhibit 3I.

¹²⁸ Exhibit 3A.

248 A wide range of medications have been prescribed to manage Mr Obeid's numerous health conditions.¹²⁹ His oral medications are administered from a Webster pack. He reported to Dr Reutens that his wife and daughter monitor his medicinal schedule.¹³⁰

249 Dr Reutens' experience as a psychiatrist who has worked in the custodial system with a particular focus on older inmates is insightful. I quote her views in full for that reason:

Older people experience hardships in prison that are greater than those of younger prisoners. In my experience as an old age psychiatrist who has worked in the custodial setting, older people have fewer peers and are therefore more lonely in prison. They are vulnerable to being stood over by virtue of their physical frailty, and Mr Obeid would be at particular risk of injury if assaulted given his balance problems and age. Younger prisoners often occupy their time by exercising or prison employment, which Mr Obeid would be unable to avail himself of because of his physical impairments. He could not occupy himself by reading because of his vision impairment.

Older prisoners face the realistic possibility that they could die in prison, and this is a prominent concern of Mr Obeid's who is conscious of the risk of contracting COVID-19 in the institutional setting. These added concerns of ill health, vulnerability and the possibility of death, coupled with the anxiety disorder, frailty and mild neurocognitive impairments are likely to make incarceration a greater burden for Mr Obeid compared to the average prisoner.

While he is generally independent, he reports requiring supervision during dressing and showering because of his risk of falls. Formal nursing supervision would only be available in a metropolitan jail such as Long Bay Correctional Centre, which has a unit for older prisoners. However, this unit is in a maximum security setting, and this would result in increased hardship for Mr Obeid, who reported being classified as suitable for a minimum security setting during his last incarceration. It is also not possible to predict if he will be able to be accommodated in such a unit because placement depends on an assessment, the length of the waitlist, and whether there are available beds.

If Mr Obeid is to receive a custodial sentence I recommend the follow:

1. That he be assessed to determine if he requires supervised medication.
2. That he is referred to a GP in the custodial setting who can coordinate his care and refer him to the Aged Care service and Disability services.
3. The dose of the antidepressant medication mirtazapine is an initiation dose and should be increased to 30 mg nocte.¹³¹

250 I strongly recommend Mr Obeid be assessed as a sentenced prisoner informer by Dr Reutens' considered professional opinion which was not challenged by the Crown.

¹²⁹ Exhibit 3B.

¹³⁰ Exhibit 3A.

¹³¹ Exhibit 3.

The Crown's generalised response to the evidence adduced by the offenders

- 251 The Crown tendered a New South Wales Health publication titled "Justice Health and Forensic Mental Health Network Overview of Services" dated October 2021¹³² and a letter from Peter Severin, Commissioner of Corrective Services, dated 26 July 2019 prepared at a time in the pre-trial phase when Mr Obeid's health as a serving prisoner was an issue.
- 252 This evidence was tendered to address the systems that are available to manage and address the complex of health concerns of each of the three offenders as sentenced prisoners.¹³³
- 253 The Health Network Overview of Services publication explains that the Justice Health and Forensic Mental Health Network (the Health Network) is part of New South Wales Health and is responsible for providing health care to prisoners within the New South Wales correctional system. It provides that an interdisciplinary team of doctors, nurses, psychiatrists and allied health staff is available to inmates in correctional facilities.
- 254 In addition to the screening procedures currently in place due to the COVID-19 pandemic addressed elsewhere in these sentencing remarks, the same publication provides that new inmates are subject to a Reception Screening Assessment on reception and, as appropriate, the administration of a Chronic Disease Screen to plan and provide for the ongoing care of identified medical conditions. Thereafter, what is described as an Integrated Care Service is responsible for monitoring an inmate's chronic and complex health conditions. A Chronic Case Clinical Pathways Service is also designed to work with the Integrated Care Service to provide care to those inmates identified as suffering from a chronic disease by coordinating multidisciplinary care and the ongoing assessment of an inmate to ensure against the risk of an inmate's medical conditions being exacerbated in the custodial setting.
- 255 Internal and external medical appointments are coordinated by the Medical Appointments Unit, including liaising with hospitals to schedule surgery, including elective surgery, and specialist treatment where that is warranted.

¹³² Exhibit D

¹³³ Exhibit E.

- 256 The mental health of all adult inmates is the responsibility of the Custodial Mental Health Service. Specialised mental health units are available in various correctional facilities.
- 257 The Aged Care and Rehabilitation Unit at Long Bay Hospital provides specialised care, assessment and rehabilitation services for inmates who are of an advanced age. Admission to the Unit is determined by the Aged Care Bed Demand Committee and is subject to availability. There are a total of 15 beds available at that facility.¹³⁴
- 258 While the Health Network publication notes that requests for a diabetic-appropriate diet can be made to CSNSW Therapeutic Diets, it also notes that “diabetic patients are offered a normal [Corrective Services Industries] diet”.¹³⁵
- 259 Commissioner Severin’s letter, initially prepared in anticipation of Edward Obeid being transported from custody to attend his trial, provided further detailed information about the care of inmates who suffer from diabetes. Commissioner Severin clarified that:
- CSNSW does not provide an alternative diet to diabetic inmates. The regular [Corrective Services Industries] diet menu is provided in accordance with Australian Dietary Guidelines and meets the requirements of Diabetes Australia.
- 260 Commissioner Severin went on to note that during his period of incarceration at Kirkconnell, Mr Obeid was issued CSI meals and did not alert staff to those meals being inappropriate for him as a diabetic. Commissioner Severin also noted that diabetic inmates at Kirkconnell are issued a daily “diabetic pack” containing milk, cereal and a piece of fruit.¹³⁶

Consideration

- 261 Having considered all of the evidence tendered on sentence as bearing upon the current physical and mental health of the offenders and the material tendered by the Crown which is not challenged, I am obliged to proceed to sentence on the basis that each of the offenders will receive adequate treatment whilst in custody and that their individual medical needs as

¹³⁴ Exhibit D.

¹³⁵ Exhibit D.

¹³⁶ Exhibit E.

sentenced prisoners will be identified upon admission and progressively monitored and addressed as symptoms present or their condition deteriorates, including the need for external specialist treatment if required.

The question of remorse

262 The Sentencing Act recognises that where an offender adduces evidence that they have accepted responsibility for their actions and have acknowledged any injury, loss or damage they have caused or have made reparation for it, that may operate in mitigation of sentence.¹³⁷

263 No evidence of remorse was adduced by any of the offenders. No acknowledgement was forthcoming from any of them as to the damage done to the institutions of government and the public confidence in them by their actions. Although they are not to be additionally punished by taking that attitude, their lack of remorse disentitles them to its mitigating effect.

264 Additionally, although the evidence at trial allowed me to find as a fact that a considerable profit resulted from the commercial use Moses Obeid put the information that was derived from Mr Macdonald's successive acts of wilful misconduct, and although there is no evidence that there has been any disgorging of those profits from any of the companies over which members of the Obeid family exercise legal or fiduciary control, neither Moses Obeid nor Edward Obeid are to be additionally punished for that fact.

265 As to whether any of the offenders are unlikely to re-offend such as to allow for positive findings that they have good prospects of rehabilitation as a factor in mitigation,¹³⁸ I am satisfied that despite an absence of remorse or contrition, or any evidence that might allow me to find as a fact that any of the offenders have any insight into their offending, in circumstances where neither Mr Macdonald nor Edward Obeid currently occupy any position of public trust and, given the nature of their offending, they never will again, I am able to find, on the probabilities, that in light of their age and the sentence of imprisonment they will serve before being entitled to release on parole, they are unlikely to have the opportunity to criminally misconduct themselves in the future.

¹³⁷ Sentencing Act, s 21A(3)(i).

¹³⁸ Sentencing Act, s 21A(3)(h).

266 I am, however, able to make a positive finding on the probabilities that, inter alia, by reason of Moses Obeid's age and Dr Nielssen's report, he has sound prospects of rehabilitation and he is unlikely to reoffend.

The cooperation of the offenders during the trial

267 When read together, ss 21A(3)(l) and 22A(1) and (2) of the Sentencing Act allow for pre-trial disclosure by an accused to be taken into account as a mitigating factor in sentencing, including where disclosures are made prior to or during the trial, with the proviso that any reduction in sentence is not disproportionate to the nature and circumstances of the offence.

268 In its written submissions, the Crown recognised the generally cooperative manner in which the trial was conducted by and on behalf of the offenders. I also acknowledge that the pre-trial directions I issued in 2018 in order that objections to aspects of the Crown case be dealt with in an orderly fashion were complied with to the credit of all participating counsel. I also note that in large part the continuity and provenance of documents was not disputed and that there were prepared from time to time during the course of the trial lengthy agreed facts,¹³⁹ and ultimately no opposition to the Crown's tender of a number of summaries prepared pursuant to s 50 of the *Evidence Act*.¹⁴⁰ Finally it must fairly be said that the cross-examination of the Crown witnesses was largely focused and concise with minimal duplication.

269 I will afford weight in the sentences to be imposed on each of the offenders for their cooperation.

Special circumstances

270 A wide range of subjective considerations might attract a finding of special circumstances justifying an alteration in the statutory ratio of 75 per cent in s 44 of the Sentencing Act between the term of imprisonment that an offender must spend in custody before being eligible to be considered for release to parole and the balance of the term of imprisonment imposed.

¹³⁹ Trial Exhibit G, Exhibit H, Exhibit M, Exhibit N, Exhibit AW, Exhibit AX.

¹⁴⁰ Trial Exhibits B-E and various diagrams and summaries styled as aides memoire and marked MFI 6-15. Limited objection to the lengthy expert report of John Temple-Cole tendered as Trial Exhibit AT.

- 271 Although the factors relevant to a finding of special circumstances are not limited to altering the statutory ratio to allow for a longer period on parole where an offender's sound prospects of rehabilitation warrant that finding, in many cases that is a factor which will be worthy of weight.
- 272 In this case, Moses Obeid is the only offender about whom I have made a positive finding of sound prospects of rehabilitation and the only offender who faces imprisonment for the first time. I am also conscious of his current medical condition which carries the risk of the onset of migraine headaches requiring the immediate administration of intravenous medications. Whilst I cannot do other than proceed to sentence on the basis that Justice Health will be aware of Moses Obeid's susceptibility to the debilitating impact of migraine headaches, and that arrangements will be made to ensure he has access to medication as and when required, I accept Moses Obeid's experience of custody for the first time, at the age of 52, will be particularly onerous.
- 273 A finding of special circumstances is warranted in his case for those reasons. I also take into account the conditions of custody to which he will be subject whilst ever the impact of the current health pandemic is dealt with in the correctional system in the ways I have outlined above.
- 274 It is well recognised that an offender's ill health¹⁴¹ and advanced age may also operate to allow a court to vary the statutory ratio allowing for a longer period on parole.¹⁴² Although unlike Moses Obeid this will not be the first time Edward Obeid or Mr Macdonald have been sentenced to imprisonment, the Crown accepted that fact should not disentitle either of them to a finding of special circumstances when their age, coupled with the particular health issues experienced by them at this time, are taken into consideration.
- 275 I am satisfied that the likely hardship Edward Obeid will experience in custody on account of his advanced age and increasing frailty, coupled with the complex of his medical conditions which will require close monitoring by Justice

¹⁴¹ R v Sellen (1991) 57 A Crim R 313 at 320; R v Elzakhem [2008] NSWCCA 31 at [68]; Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39 at [58]; Devaney v R [2012] NSWCCA 285 at [92]; Morton v R [2014] NSWCCA 8 at [19].

¹⁴² R v Mammone [2006] NSWCCA 138 at [54].

Health generally and in the current pandemic even more closely, will justify a finding of special circumstances in his case.

276 Being conscious to ensure against the risk of double counting of those factors, they will be given significant weight in the degree to which I propose that the statutory ratio under s 44 of the Sentencing Act should be altered in the sentence to be imposed on him, but I have not otherwise taken them into account in ameliorating the length of the overall sentence to be imposed.¹⁴³

277 Mr Macdonald is also likely to experience hardship as a sentenced prisoner by reason of the same set of objective circumstances as Edward Obeid will experience. Although his medical conditions are able to be managed without the same level of attendant care that I accept Edward Obeid has progressively come to need in his daily life and will inevitably require as he serves his sentence, and although Mr Macdonald is not at an age where his mobility is compromised, the chronicity of his medical condition will make a sentence of imprisonment onerous for him and likely more so as he serves his sentence. He will also require ongoing assessment by Justice Health to ensure that his custodial conditions do not expose him to the risk of an acute compromise to his gastrointestinal system. That risk materialised when he was sentenced to imprisonment in 2017 in what I am satisfied, on the evidence before me, was a serious breach of care by Justice Health whilst Mr Macdonald was an inmate, requiring immediate surgical intervention upon Mr Macdonald's release from custody in 2019 to avoid what was developing as an untreated inguinal hernia with a grave risk of very serious complications.

278 As with the approach I have taken to Edward Obeid's age and ill health, Mr Macdonald's age and health will be given weight in the degree to which I will vary the statutory ratio between the non-parole period and balance of term as component parts of his sentence but I will not take those factors into account in mitigation of sentence.

¹⁴³ Scott v R [2020] NSWCCA 81 at [167] applying R v Simon (2003) 142 A Crim R 166; [2003] NSWCCA 147 at [33]; R v Baldwin [2001] NSWCCA 320 citing R v Hunter (1984) 36 SASR 101.

Sentencing orders

Ian Michael Macdonald

- (1) For the conspiracy for which Ian Michael Macdonald was convicted on 19 July 2021, I impose a sentence of imprisonment for 9 years and 6 months which, after a finding of special circumstances, comprises a non-parole period of 5 years and 3 months with a balance of term of 4 years and 3 months.
- (2) That sentence is to date from today, 21 October 2021.
- (3) Mr Macdonald will be eligible to be considered for release to parole on 20 January 2027.
- (4) The sentence of imprisonment will expire on 20 April 2031.

Edward Moses Obeid

- (1) For the conspiracy for which Edward Moses Obeid was convicted on 19 July 2021, I impose a sentence of imprisonment for 7 years which, after a finding of special circumstances, comprises a non-parole period of 3 years and 10 months with a balance of term of 3 years and 2 months.
- (2) That sentence is to date from today, 21 October 2021.¹⁴⁴
- (3) Edward Obeid will be eligible to be considered for release to parole on 20 August 2025.
- (4) The sentence of imprisonment will expire on 20 October 2028.

Moses Edward Obeid

- (1) For the conspiracy for which Moses Edward Obeid was convicted on 19 July 2021, I impose a sentence of imprisonment for 5 years which, after a finding of special circumstances, comprises a non-parole period of 3 years with a balance of term of 2 years.
- (2) That sentence is to date from today, 21 October 2021.
- (3) Moses Obeid will be eligible to be considered for release to parole on 20 October 2024.
- (4) The sentence of imprisonment will expire on 20 October 2026.

¹⁴⁴ To the extent that s 55 of the Sentencing Act has any application in the sentence to be imposed on Edward Obeid, by reason of the sentence imposed by Beech-Jones J on 15 December 2016 having yet to expire (it expires on 14 December 2021), I have taken that fact into account in the sentence to be imposed albeit it has not affected that component of the sentencing order which directs that the sentence is to commence today.

ANNEXURE 1

EXHIBITS – SENTENCE

R v Ian MACDONALD 2015/212910

R v Edward OBEID 2015/214251

R v Moses OBEID 2015/212851

No .	Detail
CROWN	
A	Crown Sentence Summary for Ian Macdonald: - CAN issued 17 July 2015 - Notice of Committal dated 30 May 2017 - Indictment presented 11 Feb 2020 - NSW criminal history as at 23 July 2021 - AFP criminal history as at 24 March 2020 - Custodial History as at 26 July 2021
B	Crown Sentence Summary for Edward Obeid: - CAN issued 17 July 2015 - Notice of Committal dated 30 May 2017 - Indictment presented 11 Feb 2020 - NSW criminal history as at 23 July 2021 - Custodial History as at 26 July 2021
C	Crown Sentence Summary for Moses Obeid:

	- CAN issued 17 July 2015 - Notice of Committal dated 30 May 2017 - Indictment presented 11 Feb 2020 - NSW criminal history as at 30 March 2020
D	Justice Health document - "Overview of Services" – October 2020
E	Letter from Peter Severin, Commissioner, Corrective Services to Fullerton J dated 26 J
F	(1) Report of Dr Katherine Ellard – 10 July 2019 (2) Report of Dr Katherine Ellard – 15 July 2019
G	Various materials relating to the nature and extent of the outbreak of COVID-19 in corre South Wales filed after the sentence hearing.
OFFENDERS	
Macdonald	

1	Letter from Dr Jonathan Mak to Fullerton J [August 2021] plus attachments: (A) Letter from Prof T Borody to Dr Mak – 24 August 2021 (B) Referral to Prof Phillip Stricker by Dr Mak – 25 August 2021(C) Referral to Centre for Health Protection by Dr Mak – 25 August 2021 (D) COVID-19 vaccination report – 19 August 2021 (E) Justice Health – Patient Self-Referral – 14 October 2017 (F) Letter from Prof T Borody to Justice Health – 19 February 2018 (G) Letter from Dr Leanne Cheung to Justice Health – 1 May 2018
2	Letter from Prof Borody to Fullerton J dated 2 July 2019 attaching report of Dr Norman Fullerton dated 18 June 2019
17	Character references: (A) Andrea Brown – 30 August 2021 (B) Anita Gylseth – 25 August 2021 (C) Anita Macdonald – 26 April 2017 (D) John Della Bosca – 26 August 2021 (E) Colin Donegan – 2 September 2021 (parts only) (F) Sasha Macdonald – 3 September 2021 (G) Terrence Healey – 3 September 2021
18	Letter from Anita Gylseth to AFCA – 20 February 2019 – plus attached letters: - From NAB to Anita Gylseth trading as Cleaning Services – 7 February 2019 - From NAB to Anita Gylseth – 7 February 2019 - From Anita Gylseth to NAB – 15 February 2019 - From St George to Anita Gylseth – 11 June 2015 - From Westpac to Anita Gylseth – 12 June 2015

	- From Westpac to Gina Brown – 11 June 2015 - From St George to Anita Gylseth – 25 June 2015
19	Three articles from The Sydney Morning Herald: - “Keeping up with Jones: the history of broadcaster’s praise” – 27 May 2017 - “The secret diary of Ian Macdonald” – 23 September 2017 - “‘Lucky’ at liberty to spill the beans” – 10 February 2020
20	Letter from Prof Borody – 9 September 2021
21	Report on COVID-19 and the impact on New South Wales prisoners – Kirby Institute –
22	The Bugmy Bar Book – NSW Public Defenders – 17 August 2021
23	Handwritten note – Dr Mak – 29 May 2021 plus typed transcript
24	Handwritten letter from Dr Mak to Fullerton J plus Health Summary (and typed transcript)
E Obeid	
3	Index – Expert Reports – Edward Obeid: (A) Dr Sharon Reutens, Consultant Psychiatrist – 6 September 2021 (B) Dr Adib Obeid, GP – 2 September 2021 (C) Dr David Roy, Cardiologist – 12 August 2021

	(D) Dr John Chang, Consultant Ophthalmic Surgeon – 17 March 2020 (E) Dr Pascal Bou-Haidar, Radiologist – 30 January 2020 (F) Dr Sebastian Fung, Radiologist – 19 October 2020 (G) Dr Salman Khan, Neurologist – 5 February 2020 (H) Discharge summary – North Shore Private Hospital – 28 December 2020 (I) Dr Michael Delaney, Ophthalmic Surgeon – 17 December 2019
4	Index – Character references – Edward Obeid: (A) Gemma Vrana – 27 August 2021 (B) Maree Obeid – 28 August 2021 (C) Eddie Obeid Jnr Jnr – 28 August 2021 (D) Angelica Saab – 28 August 2021 (E) Edward Obeid Jnr – 28 August 2021 (F) Judith Obeid – 1 September 2021 (G) Patricia Lees – 1 September 2021 (H) Olivia Achie – 1 September 2021 (I) Rebecca Joummaa – 1 September 2021
M Obeid	
5	Character references: (A) Nicole Obeid – 18 August 2021 (B) Matthew Sweeney – 18 August 2021 (C) Daniel Traylen – 20 August 2021 (D) Roberto Araneda – 18 August 2021 (E) Debbie Dickson – 23 August 2021

6	Letter from Adam Goss, St Joseph's College, to Fullerton J – 20 August 2021
7	Report of Dr Olav Nielssen, Psychiatrist – 6 September 2021
8	Report of Dr Daniel Hameiri – 31 August 2021
9	Medical certificate – Dr Theo Penklis – 3 September 2021
10	Report from St Vincent's Hospital Emergency Department – 6 September 2021
11	Report of Dr Hameiri – 7 September 2021
12	Handwritten note from Dr Hameiri to Dr Sutton – 7 September 2021
13	Letter from Dr Theo Penklis to Dr George Lianos – 29 January 2020
14	Letter from Dr Marc Coughlan to Dr Penklis – 27 June 2015
15	Letter from Dr Penklis to Dr Keith Roberts – 16 July 2015
16	Letter from Dr Hameiri – 17 August 2021
25	Chapter 33: Corrupt conduct findings, s 74A(2) statements and other matters

26	Three letters from Dr Ian Sutton, Consultant Neurologist, dated 14, 21 and 28 September

ANNEXURE 2: SCHEDULE OF COMPARABLE CASES

Offence	Circumstances of offence	Objective seriousness	
<i>R v Hoyn</i> [2020] NSWDC 834 (plea: not guilty)			
Offence: four counts of the common law offence of misconduct in public office and others maximum penalty of analogue provisions: Pt 4A of the <i>Crimes Act 1900</i> (NSW), 7 years	The offender was a police officer who improperly accessed personal information on the police information systems and provided details about that personal information to others between July and December 2018	<i>"It can be seen from my recitation of the nine factors that a number of them are not present in this case, putting this matter lower in the range of objective seriousness than others to which I will now refer."</i> [23]	
<i>R v Obeid (No 12)</i> [2016] NSWSC 1815 (plea: not guilty)			

Offence: one count of the common law offence of wilful misconduct in public office maximum penalty of analogue provisions: offences found in Pt 4A of the <i>Crimes Act 1900</i>, specifically s 249B(1) (corrupt commissions or rewards), 7 years	The offender was a Member of the Legislative Council of NSW. In August 2007 he made representations to a senior officer of the Maritime Authority, to secure lease renewals for two Circular Quay businesses that he and his family had a financial interest in	<i>“a very serious example of the offence because of the onerous nature of the duty owed by him as a parliamentarian compared to other such officials and the extent of his departure from it.”</i> [89]	
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<i>R v Pieper</i> [2014] NSWDC 242 (plea: guilty)			
Offence: six counts of common law offence of misconduct in public office maximum penalty of analogue provisions: ss 156 (larceny by clerks/servants)	The offender was the general manager of a County Council. He orchestrated various frauds that resulted in his misappropriating over \$350,000 between January 2001 and December 2010	<i>"The amount of money involved in these matters is substantial and the period of time over which the offences were committed is lengthy ... there are clearly a multiplicity of dishonest acts and several of them involved an obvious level of sophistication in relation to both their commission and the steps taken to avoid them being uncovered ... the offences were committed for the purpose of</i>	

, 159 (larceny by clerks in public service) and 160 <i>Crimes Act 1900</i> (embezzlement in public service), 10 years		<i>financial gain ... Overall, I would regard the level of criminality involved in each of these matters as quite significant and each are objectively very serious.” [49] to [52]</i>	
<i>Hughes v R</i> [2014] NSWCCA 15 (plea: guilty)			
Offence: two counts of wilful misconduct in public office; two offences of giving false evidence to the Police Integrity Commission contrary to s 107 <i>Police Integrity Commission Act 1996</i> (NSW): maximum penalty 5 years	The offender was a police officer who accessed a police database and created false intelligence reports in 2009 and 2010 to “cover her tracks” having failed to report admissions made by persons involved in stealing a car to help her then boyfriend. She gave false evidence to the Police Integrity Commission in the course of the	<i>“In my view the objective seriousness of the misconduct of a holder of public office offences falls at the upper range of objective seriousness for offences of that kind. In coming to that view I have taken into account and accepted the opinions of Ms Brigida and Dr Ristogi that the [applicant's] mental health history has played some part in the commission of these offences. However, I am unable to agree with Ms Brigida that the [applicant's] mental health history played 'a very big part' in her criminal offending.”</i>	

	investigation of the offences in 2011	[42] On appeal: “... <i>his Honour was correct to treat the misconduct in public office offences as having a high level of objective seriousness.</i>” [50]	
<i>Blackstock v R</i> [2013] NSWCCA 172 (plea: guilty)			
Offence: common law offence of misconduct in public office	The offender was a project officer employed by RailCorp, who between 2003 to 2007 included a business (in which he secretly held an interest) on a list of possible contractors for consideration by his superiors and then “ <i>played a part in the allocation of work</i> ” to the business	“... <i>the objective gravity of this matter is substantial. Millions of dollars of public money have gone through what is in effect a “bodgie” company set up by this man, deliberately for the purpose of obtaining work to which he otherwise would not have been entitled.</i>” [53] On appeal: “<i>His Honour was making the entirely commonplace observation, in this area of discourse, that the amount of money involved is a highly relevant consideration in the assessment of the objective seriousness of the offending. Moreover, as he pointed out, it was indicative of the degree of abuse of office involved in the offending. Given what appears to be the high level of</i>	

		<i>profitability of government contracts in this field, it is essential that the public have complete confidence in the integrity of the processes for the allocation of government contracts on a fair and competitive basis.” [63]</i>	
<i>Jansen v R [2013] NSWCCA 301 (plea: guilty)</i>			
Offence: one count of misconduct in public office	The offender was a police officer who accessed police intelligence and other sensitive information and disseminated it in or about early 2011	<i>“The sentencing judge did not give the mental health problems significant weight. He regarded the offences as "extremely serious". In fact he regarded the objective seriousness as being in the upper range.” [60]</i>	
<i>Jaturawong v R [2011] NSWCCA 168 (plea: guilty)</i>			
Offence: seven counts of accessory before the fact	The principle offender (McPherson) was the manager of a Motor	<i>“The sentencing judge described the offences committed by both Mr McPherson and the applicant</i>	

<i>to the offence of misconduct in public office</i> maximum penalty of analogue provisions: Pt 4A of the Crimes Act 1900, 7 years	Registry who received regular payments to improperly allow applicants to obtain learner permits or drivers licences. The offender (Jaturawong) was an accessory before the fact because (from 2004 to 2006) he received a specific amount of money from each assisted person	<i>as: ‘... very serious indeed. They involved corruption of a public officer, which strikes at the heart of the administration of good Government ...’ [20]</i>	
<i>R v Farrell</i> (unreported) District Court of NSW, 13th February 2013			
Offence: misconduct in public office	The offender was a long serving police officer who agreed to provide police intelligence orally to a businessman who was a close personal friend	Plea: Guilty (late)	
<i>R v Nuttall; ex parte Attorney-General (Qld)</i> [2011] QCA 120; 209 A Crim R 538 (plea: not g			

Offence: five counts of official corruption contrary to s 87 <i>Criminal Code Act 1899</i> (QLD), maximum penalty 14 years if committed by Minister of the Crown; five counts of perjury contrary to s 124 <i>Criminal Code Act 1899</i> (QLD), maximum penalty 14 years	The offender was a member of the Queensland Legislative Assembly. He received secret commissions to plan and promote projects of his associates. About \$130,000 was paid to the offender by a series of payments between October 2005 and April 2006	<i>“In the circumstances of this case, the gravity of the offending conduct, its duration and frequency and the intervening Talbot and Shand offending make the respondent’s previous good character a matter of little weight. Abuse of a position of authority or trust is normally considered a circumstance of aggravation and it plainly is in this case.” [58]</i> <i>“The offending conduct calls for severe punishment to mark its public denunciation in no ambiguous way and to serve as a deterrent to others who may be tempted to abuse high office. In my respectful opinion, the subject sentences do not satisfy these requirements.” [73]</i>	
<i>R v Purcell</i> [2010] NSWDC 98 (plea: guilty)			
Offence:	The offender was a	<i>“In assessing the gravity of this</i>	

misleading Police Integrity Commission; common law offence of misconduct in a public office maximum penalty of analogue provisions: regarding misconduct in a public office, offence under s 201 of the <i>Police Act 1990</i> (NSW) (neglect of duty) which carries a maximum penalty of a fine	police superintendent who persistently and deliberately disobeyed a direction from a superior officer concerning what the offender could say to members of the press about certain sexual assaults committed in the local area under his command in 2006 The offender later mislead the Police Integrity Commission in 2007	<i>offence it is perhaps instructive to consider that the statutory offence most closely covering the offender's conduct is an offence under s 201 of the Police Act which carries a maximum penalty of a fine. The Crown accepts therefore that the offender should not receive a sentence of imprisonment for this offence. Nor should I impose a community service order ..."</i> [5]	
<i>R v Phillip Hans Field</i> (HC Auckland CRI-2007-092-18132, 6 October 2009) (plea: not guilty)			
Offence: 11 counts of corruption and bribery as a Member of Parliament	The offender was a member of the New Zealand Parliament. Between 2003 and 2006 he proffered immigration advice	<i>"Your wrong was to accept a reward for doing your job. That was wrong but it is not as serious, in my view, as accepting a bribe as an inducement for wrongful ends."</i>	

15 counts of attempting to pervert the course of justice (this summary relates only to the corruption and bribery charges) Maximum penalty: 7 years	and assistance to various Thai immigrants – in return he accepted benefits from them in the form of work done on properties he owned (in the nature of tiling, plastering, painting and other building and redecorating work) and sold for profit	[58] <i>“While, ... it was not of the most serious kind, it involved repeated and blatant violations of your duty as a parliamentarian. In my view, a starting point for sentence on the charges of bribery and corruption of five years imprisonment is appropriate.”</i> [64] Aggravating: prepared to exploit the gratitude of the Thai nationals he helped	
<i>HKSAR v Wong Kwong Shun Paul</i> [2009] 4 HKLRD 840 (plea: not guilty)			
Offence: one count of misconduct in public office	The offender was a landscape architect of the Housing Department. Between January 2000 and September 2001, in four Housing Department projects the offender recommended using EPOX products supplied by a company he had a personal relationship	<i>“The applicant’s misconduct was extremely serious whether or not it would cause the Housing Department to use unsuitable products and suffer serious consequences as a result.”</i> [47]	

	with, without disclosing this fact		
<i>DPP v Marks</i> [2005] VSCA 277 (plea: guilty)			
Offence: one count of misconduct in public office, and drug charges (ecstasy) Maximum penalty: 10 years	The offender was a senior constable of police who in 2003 accessed by computer the Victoria Police Law Enforcement Assistance Program and found an entry relating to a suspect on drug charges and shared it with another suspect	<i>"I am unable to accept that the respondent's crime should be sloughed off as a mere error of judgment, falling short of moral turpitude. In my judgment it was a serious offence."</i> [33] <i>"Were it not for the way in which the matter was conducted before the sentencing judge and on this appeal, I have no doubt that the respondent should have been convicted of the offence of misconduct in public office, and that the seriousness of the offence would have warranted a term of imprisonment. It is another matter whether part of the term should have been suspended."</i> [37]	
<i>R v Rouse</i> (Court of Criminal Appeal (Tas), 19 October 1990, unreported) (plea: guilty, entered)			

Offence: one count of offering a bribe to a member of Parliament; one count of improper use of position as an officer of a company Maximum penalty/maximum penalty of analogue provisions: s 72 <i>Criminal Code</i> 1924 (TAS), "anything from fining a man to imposing a sentence of 21 years' imprisonment"	The offender offered a member of Parliament \$110,000 to cross the floor to support the Liberal Government in 1989	<i>"There was no lack of recognition by his Honour of the seriousness of the respondent's conduct in offering the bribe, while in respect of the improper use of the respondent's position as an officer of a company, his Honour observed, 'it is difficult to imagine a more improper use of corporate monies than to employ them in the course of trying to bribe a Member of Parliament, but I accept your statement that you intended to return the money and use your personal funds.'"</i> (pg 7) aggravating factor: Involved a third person	
<i>Jackson & Hakim v R</i> (1988) 33 A Crim R 413 (plea: not guilty)			
Offence: conspiracy with others to bribe in official duty maximum penalty of analogue	The offenders were the Minister for Corrective Services (Jackson) and Hakim who conspired to receive bribes to effect the early	(Regarding Jackson) <i>"The commission of a consistent abuse of high public office involving the receipt of bribes for public favours necessarily calls for a severe sentence to demonstrate public denunciation</i>	

provisions: offences in Part III <i>Crimes Act</i> 1914 (Cth), 10 years = offences in Part IVA of the Crimes Act NSW, 7 years	release of prisoners on parole between 1982 and 1983	<i>of such conduct. The sentence imposed fell significantly short of that which was required.” (413)</i>	
<i>R v Bruneau</i> (1963) CarswellOnt 22; [1964] 1CCC 97; [1964] 1 OR 263, 42 CR 93 (plea: not			
Offence: acceptance of bribe by member of Parliament for the use of his	The offender was a member of the Canadian Parliament who in 1956 received a corrupt payment to use his influence to	<i>“The responsibility of a member of Parliament to his constituency and to the nation requires a rigorous standard of honesty and behaviour, departure from which should not be tolerated.”</i>	

influence “in an official capacity” maximum penalty: 14 years	have the Federal Government purchase the property owned by the payer of the bribe	(103 to 104)	
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