



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 12 Apr 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S148/2022
File Title: The King v. Jacobs Group (Australia) Pty Ltd formerly known
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
Date filed: 12 Apr 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

THE KING
 Appellant

and

**JACOBS GROUP (AUSTRALIA) PTY LTD FORMERLY KNOWN AS SINCLAIR
 KNIGHT MERZ**
 Respondent

10

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. The primary offence provision (s 70.2(1)) employs a wide meaning of “benefit”, which includes flows of money. The expression “value of the benefit” in ss 70.2(2) and 70.4 is used in a way which values a receipt of money as currency and is not concerned with corresponding burdens which the recipient may undertake to receive that benefit. **AS [18]-[23], [27]; Reply [9], [14]-[16]**
- 20 2. The maximum penalty provision in s 70.2(5) has a multi-tiered structure which operates as a package to deter would be offenders. **AS [48], [56]**
3. The purpose of s 70.2(1) is clear: it seeks to dissuade the harm to a foreign system, and in turn to Australia’s business and governmental relations and international good governance and commerce, which is caused by inducing it through bribery to make payments and give custom. The mischief which s 70.5 remedies is also clear: the previous penalty was so low as not to deter. These purposes favour treating the entirety of the contract as the “benefit” and its “value” as the flows of money under it without bringing to account burdens which the offender may undertake in performing what was obtained as part of the crime. **AS [29]-[49]; Reply [10], [12]**
- 30
 - Explanatory Memorandum, Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 (Cth) at 3, 6-8 (**JBA Vol 3 Tab 13**)
 - Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1999 at 6044-6046 (**JBA Vol 3 Tab 14**)
 - Extrinsic material to the 2010 Amendments: OECD, Australia: Phase 2 – Report (**JBA Vol 3 Tab 18**); Replacement Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) (No. 2) 2010 (Cth) at 3,

188-191 (**JBA Vol 3 Tab 15**); Parliamentary Debates, House of Representatives, 16 September 2009 at 9705 (**JBA Vol 3 Tab 16**); Answers to Questions on Notice Provided by the Attorney-General's Department on 10 November 2009 (**JBA Vol 3 Tab 17**). See **AS [37]-[47]**.

4. The CCA's reasoning between [78] and [99] (**CAB 117-122**) miscarried, as to text, context and purpose:

- 10
- (a) **Text:** The benefit is the flow of monies to the offender, secured by the contract, the whole of which is tainted by the crime. Whatever it may cost, at whatever point in time, to perform obligations incurred to perform the wrongly obtained contract does not reduce the value of that benefit: **AS [18]-[20], [23], [34]; Reply [9]-[10], [12], [15]-[16]**
- (b) Section 70.2(5) refers to "benefit" not burden. Further, it contains no standard by which expenses either are, or are not, to be taken into account in ascertaining the value of the relevant benefit. The difficulties are compounded when the standard of proof and limited means of obtaining evidence at the sentencing stage are considered. **AS [61]-[64]; Reply [2]-[6]**
- 20
- (c) The sentencing facts in this case illustrate the complexities where facts are not agreed. The hard questions about the full range of costs which are to be taken into account on the respondent's construction were avoided only because the respondent could identify enough costs to reduce the net benefit (trebled) below \$11,000,000. It cannot be assumed that the parties will always agree costs, or that they will even agree on what costs are relevant. **AS [26]; Reply [5]**
- (d) CCA [95] and [99] (**CAB 121-122**) erred in collapsing the value of the benefit into the opportunity for monetary gain from performance of a contract, and in holding that whether there is any value from a contract, and if so how much, cannot be ascertained until the entire way the contract plays out is known. **AS [23], [61]**
- 30
- (e) SJ [130] (**CAB 49**), embraced at CCA [99] (last sentence) (**CAB 122**), is also in error. The Crown's construction does not collapse the benefit limb in s 70.2(5)(b) into the turnover limb in s 70.2(5)(c). **AS [63]**
- (f) **Context:** CCA [99] (**CAB 122**) rejected the Crown's contextual argument on the basis that the primary offence provision uses "benefit" whereas, "by way of contrast", s 70.2(5) uses the expression "value of the benefit". Yet the composite

term is used in the primary offence, in ss 70.2(2)(b) and 70.4. In both contexts, it has the same meaning, which does not take expenses into account. **AS [27]-[28]; Reply [14]-[16]**

(g) **Purpose:** The CCA at [90], [92]-[94] and [97] (last sentence) (**CAB 120-122**) misread a key passage in the extrinsic material about “proportionality” and placed critical reliance upon an example that points to the opposite conclusion from that reached by the CCA. **AS [50]-[60]; Reply [12]**

(h) Contrary to SJ [130] (**CAB 49**), embraced at **RS [14]** and possibly at CCA [99] (last sentence) (**CAB 122**), construction is not aided by imputing to s 70.2(5) an “evident purpose” of incentivising offenders to establish the benefit obtained from the offending conduct. **AS [64]; Reply [6]**

10

5. The same construction of the maximum penalty provision will follow for the domestic bribery provisions in s 141.1 of the *Criminal Code*.

- *R v Jousif* (2017) 325 FLR 108 at [226] (**JBA Vol 2 Tab 12**)

6. Proceeds of crime legislation uses somewhat similar language but for the purpose of a different exercise. It highlights what is missing from s 70.2, namely any statutory architecture for determining which costs come in and which come out: **AS [25]**. Proceeds of crime case law also illustrates the importance of the underlying nature and character of the offence for identifying the “benefit” derived from it and, then, the valuation of that benefit. **AS [65]-[70]**

20

- *Proceeds of Crime Act 2002* (Cth) s 5, Part 2-4 (**JBA Vol 1 Tab 7**)
- *Mansfield v Director of Public Prosecutions (WA)* (2007) 33 WAR 227 (**JBA Vol 2 Tab 11**)
- *Director of Public Prosecutions v Nieves* [1992] 1 VR 257 (**JBA Vol 2 Tab 10**)

Dated: 12 April 2023



Justin Gleeson SC



Christopher Tran