HIGH COURT OF AUSTRALIA

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Details of Filing

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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

REPLY

PART I FORM OF SUBMISSIONS

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

PART II REPLY

A. Familiarity and simplicity of the valuation exercise?

2. Running through the respondent's written submissions (**RS**) is a contention that valuing the award of a contract is a familiar exercise (**RS [6], [34]**) and will not be difficult to work through as the sentencing process in this case demonstrates (**RS [35]**), particularly where the Parliament has "encourage[d] offenders to disclose the benefit obtained by the offending conduct" (**RS [14]**). Each component of the above cannot withstand scrutiny.

3. Valuation exercises can be conducted in different ways and, on the respondent's case, the Parliament has left it entirely to the sentencing judge to select a valuation methodology as best they can. That submission does not grapple with the clear inference to be drawn from the lack of any express or implied legislative mechanism to guide the judge.

4. Take the respondent's criticism of the Crown for allegedly conflating "net benefit" and "profit" at **RS [41]**. The respondent says that "[t]he agreed facts made no accounting determination of profit … no fixed costs, overheads, finance costs or internal costs were brought to account"; rather a "net income" figure was arrived at representing "the contract price less the payments made to local Vietnamese contractors in order to discharge the respondent's contractual obligations". But if an enquiry into costs is required or permitted, why have not fixed costs, overheads, finance costs or internal costs been brought to account? What is it in the statute that indicates that a "net income" rather than a "profit" basis ought be adopted? Would it have been open to the sentencing judge to select either of them if the difference had mattered on the figures? Such vagueness and fluidity might be tolerated as part of the overall instinctive synthesis. But as **RS [61]** acknowledges in a sightly different way, we are at a stage "anterior" to the determination of the overall sentence. The court *after* the crime is determining the maximum penalty. A

maximum penalty also works to dissuade would be offenders *before* the crime. It does each of these tasks by operating much more clearly and simply than the way the respondent would have it work.

5. The conundrum of choice is not solved by observing that, in this case, the parties agreed figures: **RS [36], [41]**. The Court is here concerned with the interpretation of the *Criminal Code* (Cth) for this and future cases, including where agreement may not be reached. The statute operates on no assumption that the parties at sentence will agree on anything.

6. Nor is the conundrum solved by the suggestion that large corporations with high annual turnover will have an incentive to disclose the benefit because a three times multiplier of the benefit is likely to be less than the turnover limb of the maximum penalty formula: **RS [14]**. Section 70.2(5) operates on offenders large or small who seek ill-gotten benefits large or small. One can readily perceive the opposite incentive on small offenders *not* to disclose or agree on the benefit: see **AS [64]**. For example, an offender with a $50 million annual turnover making a $5 million benefit from the crime will never face the turnover limb (10% of $50 million = $5 million which is less than the minimum maximum of $11 million) and would have a strong incentive to conceal the benefit because it would create a higher maximum (3 x $5 million = $15 million). Approaching the provision as if the Parliament intended, by enacting a maximum penalty, to incentivise disclosure of benefits would be to impute without basis an extra-statutory assumption to the Parliament.[1] Nor is there any suggestion in any of the extrinsic materials that the three-tiered structure of the maximum penalty provision was designed to encourage offenders to disclose information or reach accommodations with the prosecutor as to what to include and what to exclude.

7. Leaving a sentencing judge with this conundrum cannot be explained on the basis that the provision has to apply to diverse kinds of benefits which may be derived by an offender: cf **RS [11], [16], [33]**. The premise that an offender may derive myriad kinds of benefits is accurate, but this does not explain why the Parliament would not have provided guidance as to which costs to include and exclude. If that guidance was not relevant to a particular kind of benefit, the section providing that guidance would simply not apply.

B. Natural meaning and context?

[1] See *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26].

8. The heading to **RS [25]-[29]** boldly claims that "[t]he natural meaning of 'benefit' is 'net benefit'". There, the respondent points to certain proceeds of crime (or equivalent) cases where "benefit" was approached on a gross basis because there was a provision that directed courts to disregard expenses or outgoings. Yet as the respondent later acknowledges at **RS [64]-[66]**, there are other cases where a gross basis has been adopted without there being a provision to disregard expenses and outgoings. The correctness of those cases has never been doubted.

9. What these cases show is that the "natural meaning" of "benefit" is capable of including *both* "net benefit" and gross benefit. Deciding on what is meant in a particular statutory context involves an exercise of interpretation of that statute. In such an exercise, any express direction to disregard expenses of a particular kind will of course be important. But so too will be the general context in which the question arises. That explains the drug cases. Where the underlying offending involves unlawful dealing in drugs, the cost of purchasing them will not be treated by the courts as a cost that can be brought to account.

10. The context of the offence of foreign bribery points against the respondent's construction of the maximum penalty for that offence. According to the respondent, a net benefit approach allows the offender to receive as a deduction from the gross benefit those amounts that flowed into the foreign country's economy, for example, payments to Vietnamese contractors (**RS [45]**) and approximates the cost to the foreign country of the bribe because the deduction from a gross amount takes account that the foreign country will have received a benefit from the impugned contract (for example, the bridge which the offender bribed a foreign official to obtain the contract to build): **RS [46]**. These submissions profoundly misunderstand the gravamen of the offending. The bribery has corrupted the procurement process, and it is not for the offender to point to the end result as ameliorating the wrong. Any purported benefits which the foreign country has received as a result of the corrupted process is not something that informs the seriousness of the offence or an understanding of the worst case, which are matters to which a maximum penalty speaks. The seriousness of corrupting the foreign process is spoken to eloquently in the extrinsic materials quoted in **AS [30]-[32]** and the Convention material in **AS [33]**. It is a lawful end to seek to win a contract, but to bribe an official to do so renders the *entire enterprise* criminal; it is unhelpful and wrong to characterise it as a mere unlawful means to a lawful end: cf **RS [46], [80]**. The attempt to distinguish "tainted" from "untainted" costs of the enterprise misunderstands the crime and the sentence.

11. A vice of the respondent's argument is that it seeks to extract s 70.2(5) from the context of the offence for which it is proscribing a maximum penalty. That is most clearly done at the bottom of **RS [61]**, where the respondent treats s 70.2(5) as a "constructional enquiry" which is anterior to passing sentence, and that it is at the latter stage that "[t]he gravity of the offending" will be relevant. The nature of the offending and the reason why it is proscribed assists in the constructional enquiry, and it is a proper appreciation of that context which is missing from the respondent's argument and the CCA's analysis.

C. The Convention and the extrinsic material?

12. The respondent has made little effort to defend the CCA's reliance upon the explanatory memorandum or engage with the Crown's trenchant criticism of that reasoning. *First*, the quote from the Dawson Review in **RS [52]** focuses on "expected gains": "an effective sanction … should take into account the expected gains". Expected gains are the money flow over the life of the contract — that is to say, the contract price. The respondent's position more readily approximates actual gains after the event (once one resolves the conundrum of which expenses to take into account). Yet a purpose of a maximum penalty is to speak prospectively to the universe of would-be offenders to disrupt their cost-benefit analysis and ensure that they are dissuaded from offending.[2]

13. *Second*, the respondent suggests at **RS [53]** that it is not apparent why it is that the CCA's construction is more lenient towards inefficient or ham-fisted wrongdoers. Here's why. An offender who incurs more than they need to (anywhere in the world) to perform a contract will be permitted to bring those unnecessary costs to account to reduce the benefit they are said to have obtained. That offender is in a more advantageous position than a slick operation that incurs less expenses. The distinction will be important to the operation of the provision in the future if the respondent's position is correct, yet it is a distinction that is disconnected from the gravamen of the offence which is being penalised.

D. Consistent meaning?

14. At **RS [5] and [38]-[39]**, the respondent contends that (a) the CCA did not accept that "benefit" is used in s 70.2 to mean gross amounts and (b) in any event seeks to distinguish s 70.2(1) on the basis that, there, the "Court" (actually the jury) is not to value the benefit. The submission is wrong. **CCA [84] [CAB 118]** records the Crown's submission about the meaning of benefit in s 70.2(1) and how "benefit" means the same thing in sub-section

[2] See and compare *viagogo AG v ACCC* [2022] FCAFC 87 at [162].

(5). **CCA [98] [CAB 122]** refers back to that argument expressly. The CCA rejects it not because sub-section (1) is not concerned with gross amounts but because, so it is found, the presumption of consistent meaning has been displaced: **CCA [98]-[99] [CAB 122]**.

15. The respondent's submission is also incomplete when it asserts that the Court (the jury) is unconcerned with "value" in the offence provision. Value gets added back in for the jury's consideration if and in so far as there is a possible defence where "the value of the benefit was of a minor nature", potentially engaging the facilitation payments defence in s 70.4(1). That defence must be left to the jury if an accused discharges its evidential burden: s 13.3. What does "the value of the benefit" mean here? Is a $1,000,000 bribe "minor" because the foreign official receiving it has to spend the vast bulk of it leaving only $100 in his or her pocket? No. What matters is the money flow to the foreign official, just as what matters where the offender receives a contract is the money flow under that contract to the offender.

16. The EM referenced, as an example of a possible facilitation payment, "a manager in Australia authorises the payment of $100.00 to a foreign official to expedite the connection of a single telephone in an office that already has 50 telephones".[3] It quoted the OECD that "Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence".[4] It explained "Paragraph 9 of the Commentaries to the OECD Convention indicate that only 'small "facilitation" payments' should be excluded from the offence".[5] And it said "[u]se of the term 'minor nature' ensures that the legislation achieves the intention of the OECD Convention that the quantum be small".[6] So s 70.2 is concerned with the *gross sum* flowing to the bribed official; matched in s 70.2(5) by a concern with the *gross sum* flowing to the offender.

Dated: 2 March 2023

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3 Explanatory Memorandum, Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 (Cth) (**EM, 1999 Bill**) at [28]. See also at [29].
4 EM, 1999 Bill at [36].
5 EM, 1999 Bill at [42].
6 EM, 1999 Bill at [44].