



## 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: Respondent  
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.

**Form 27F – Outline of oral submissions**

Note: see rule 44.08.2.

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

**RESPONDENT’S OUTLINE OF ORAL SUBMISSIONS****PART I: FORM OF SUBMISSIONS**

---

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

**PART II: OUTLINE OF ORAL SUBMISSIONS**

---

**No error identified**

1. The appellant does not identify error in the orthodox statutory interpretation that produced the concept that the value of the benefit requires assessment of how much better off the offender is.

**Relevant provisions**

2. The case focuses on s 70.2 of the Criminal Code and requires attention to the definitions provision in s 70.1.
3. Benefit is defined to include “any advantage and is not limited to property.” The penalty is set by s 70.2(5). The penalty will be the greater of 100,000 penalty units or an alternative formula which, in turn, depends on whether or not the value of the benefit obtained (directly or indirectly and reasonably attributable to the offending conduct) can be determined.

### **The agreed facts**

4. In this case the parties agreed that the value of the benefit could be determined. They agreed on the “gross amount” obtained (\$10,130,354) and the “net amount” obtained (\$2,680,816). The only disagreement concerned which of those answered the description of the “value of the benefit” in s 70.2(5).
5. In this case the benefit is a ‘direct’ benefit. No attempt was made – or evidence led – to value any indirect or intangible benefit.
6. The appellant and the respondent also agree with the reasoning in the Court below that the benefit obtained is “the contract secured by way of payment of the bribe” AS[28]. It is that contract which falls for valuation. Determining the inherent value of a contract suggests a net benefit approach.

### **Textual arguments**

7. The natural meaning of critical words in context conveys a focus on the worth of the gain secured by the bribe. As a matter of ordinary contextual meaning, it is the outcome of performing a contract – balancing revenues against expenses – that reveals the extent of any gain.
8. The definition of benefit remains constant within s 70.2. The focus, however, changes from one where, in the context of the bribe, the value of the benefit is expressly disregarded (s 70.2(2)) to one where the value of the benefit is the very thing to be determined (s 70.2(5)): RS[5], [38]-[41].
9. The breadth of the definition (RS[17]-[29]); the fact that the legislature stipulated neither ‘net’ or ‘gross’ (RS[32]); and the lack of any statutory machinery provisions for the ascertainment of benefit (RS[33]-[37]) say nothing about the constructional choice concerning the determination of the value of the benefit.

### **Contextual and miscellaneous arguments**

10. The Explanatory Memorandum, the Attorney’s second reading speech and the OECD report, all underscore the evident legislative purpose to substantially increase the maximum penalty. That manifest intention, however, does not assist the question of construction. It cannot be said that the legislature’s intention to massively increase the relevant penalty miscarried.
11. The Courts below correctly understood that the concept of ‘proportionality’ used in the extrinsic materials – originating from Art. 3.1 of the Convention – was concerned with the object of proportionate penalties. That concept found statutory articulation in the adoption of the alternative approaches available in s 70.2(5) including, following the parties’ agreement in this case, the three times multiplier to be applied to the value of the benefit obtained: RS[54]-[61].

12. The proceeds of crime cases adopt a consistent and principled approach for valuing benefit. The apparent difference in those cases' outcomes is explained by reference to whether the entire enterprise is unlawful or whether the unlawful act only touches part of the transaction. In the drug cases, there is no net/ gross dichotomy. A drug supplier does not get credit for the cost of merchandise or precursors. On the other hand, where legitimately obtained shares have been sold with inside information, only the net benefit is confiscated: RS[62]-[70]. The UK cases, in a different statutory context, arrive at substantially similar outcomes: RS[71]-[80].

Dated: 11 April 2023



.....  
Name: Bret Walker

Senior Counsel for the Respondent

Phone: (02) 8257 2527

Email: caroline.davoren@stjames.net.au