HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA No S148/2022
SYDNEY REGISTRY

BETWEEN:

THE KING
Appellant

and

JACOBS GROUP (AUSTRALIA) PTY LTD formerly known as Sinclair Knight Merz
Respondent

RESPONDENT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: CONCISE STATEMENT OF ISSUES

2. Where a corporate offender obtains a contract by bribing a foreign public official, and where the parties agree:
    a. that the relevant benefit obtained can be determined;
    b. the value of the fees earned by the respondent in relation to the unlawfully obtained contract; and
    c. the value of the 'untainted' costs associated with the performance of the contract;

   whether the maximum penalty to be calculated under s 70.2(5)(b) of the *Criminal Code* (Cth) ***(Criminal Code)*** by reference to the "value of the benefit" of that contract is (a) the contract price less the (untainted) costs of performing it or (b) the contract price.

PART III: SECTION 78B NOTICE

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PATY IV: RESPONSE TO APPELLANT'S SUBMISSIONS ON FACTS

4. As noted in the appellant's submissions (**AS**) at [7], the respondent was sentenced on an agreed statement of facts tendered at the sentencing hearing. No issue is taken with the appellant's summary of those relevant facts: AS[10]-[11].

10 5. In AS[15] the appellant asserts that "the CCA accepted that 70.2 uses "benefit" to mean gross amounts rather than gross amounts less any cost to the bribed individual [but] held that the presumption of consistent meaning was displaced in this case such that "benefit" meant something different in s 70.2(5)". The appellant refers to **CCA[99]** [**CAB 122**] in support of that proposition. That submission is wrong. No foundation for it can be found in **CCA[99]** [**CAB 122**] or elsewhere in the CCA's reasons. Rather, in **CCA[99]** [**CAB 122**], Bell CJ (with whom the other members of the Court agreed), simply acknowledged that "benefit" is broadly defined in s 70.1 and it is obvious why that is so: bribes may be monetary or not and need not be proprietary. The CCA did not differentiate the meaning of
20 "benefit" where it appears in ss 70.2(1) and 70.2(5)(b). Rather, the Court drew attention to the focus in the latter provision being "the *value* of the benefit". Accordingly, whilst "benefit" consistently retains its broad definition throughout the provision, it carries different inflections in subsections (1) and (5). In s 70.2(1) the benefit is the bribe. The Court is – explicitly – not to value that benefit: s 70.2(2)(b). Whereas in s 70.2(5), a provision concerned with the formulae for setting the maximum penalty, the Court is required to assess the value of the benefit obtained (if it can be determined).

PART V: ARGUMENT

A. Introduction

6. If a company wins a contract, how should a court value the benefit thereby obtained? That is the question raised in this appeal. The exercise of valuation is a familiar one: it is an exercise which requires a measurement of worth.

7. The nature of a contract is one of mutual rights and obligations; benefits and burdens. The task of assessing the overall value of a contract is one that requires aggregating the value of the associated rights and obligations.

8. The appellant's case is that the Court should confine itself to one side of the ledger. To do so would result in a peculiar reading of "the value of the benefit", unfamiliar to courts, accountants and businesspeople.

9. The respondent submits that no resistance is justified to the natural, ordinary and familiar understanding of the task posed by s 70.2(5)(b). The plain text of the provision, the extrinsic materials and legislative history and evident purpose combine to underwrite that conclusion.

B. The offence

10. The offence is called 'Bribing a foreign public official'. The offence requires the offender to provide or offer a bribe with the intention of obtaining or retaining business or some illegitimate business advantage: s 70.2(1) *Criminal Code*.

11. The instant offence – whereby foreign public officials were bribed to win contracts – is paradigmatical: **J[149] [CAB 56**]; **CCA[66]** [**CAB 113**]. But the provision would also capture other kinds of corrupt conduct including, for example, bribing a foreign official in order to pay less tax, or bribing a public law officer to either abstain from prosecuting an employee or to initiate a prosecution of a commercial rival.

C. The maximum penalty scheme

12. Section 70.2(5) sets a ceiling for the maximum penalty, with two limbs. The first limb sets the maximum penalty at 100,000 penalty units ($11 million).

13. The second limb poses alternatives within it. If the court can determine the "value of the benefit…obtained", then the first alternative applies, providing that three

times that value, if greater that 100,000 penalty units, will form the maximum penalty. If the court cannot determine the "value of that benefit", then its other alternative applies which sets the maximum penalty at 10% of the company's turnover for the preceding 12 months (providing that figure is greater than 100,000 penalty units).

14. By this mechanism, the provision encourages offenders to disclose the benefit obtained by the offending conduct: a matter which an offender is in a pre-eminent position to establish since, particularly for large companies who operate internationally, a three times multiplier of the benefit is likely to be less than 10% turnover: **J[130]** [**CAB 49**].

15. This appeal focuses attention on the first alternative in the second limb. Subsection 70.2(5)(b) provides that "*if the court can determine the value of the benefit that the body corporate…obtained directly or indirectly… – three times the value of that benefit*".

D. The meaning of "benefit"

16. Benefit is defined, non-exhaustively, to mean "any advantage and is not limited to property": s 70.1. In many cases, the determination of benefit will lend itself to a pecuniary assessment. For instance, in the first example provided (at [11] above), the benefit may readily be determined as the amount of tax evaded as a result of a bribe. In other cases – such as the prosecutorial examples provided above – the commercial advantage may be difficult or impossible to quantify.

A broad definition of "benefit"

17. Much of the appellant's argument focuses on the breadth of the definition of "benefit". The respondent agrees with the appellant's submissions concerning the breadth of "benefit". However, the appellant's focus on the breadth of the definition is, here, misplaced. In the instant case, the parties agreed, before the sentencing judge, that the benefit was (i) ascertainable; and (ii) comprised solely from the fact that the contract was awarded to the respondent.

18. A contract may be imbued with benefits in addition to a straightforward pecuniary assessment. Contracts may foster or strengthen commercial relationships; they may enhance reputations; they may lead to future opportunities; in an international context, they may secure a foothold in a new jurisdiction. The Crown suggested

none of these kinds of benefits before the sentencing judge and there was no reference to them in the agreed facts.

19. Before the sentencing judge, the only disagreement between the parties was whether the 'untainted' (i.e. legitimate) costs of performing the contract ought to be deducted from the revenue earned from the contract.

20. Accordingly, in this case, it is only the *value obtained* by the respondent by virtue of that contract which falls to be assessed by reference to s 70.2(5)(b). In this case rhetorical focus on the breadth and richness of the concept of benefit is misplaced.

21. At AS[18] the appellant submits that *benefit's* broad, ordinary meaning is "*not limited to net amounts after deducting expenses*." As noted above, it may be accepted that "benefit" captures any advantage whatsoever. The appellant's submission, however, misdirects attention away from the exercise required by s 70.2(5)(b): the valuation of the benefit obtained (in this case agreed to come from the contract alone). The appellant submits that a vernacular application of "benefit" suggests it is commensurable with "receipts rather than profits" and gives the example of a person saying "I won a $5 million contract". That example rather illustrates the point. No one hearing those words would consider the "value of the benefit" represented by the $5 million contract is $5 million.

22. The dictionary definitions quoted in AS[19] favour the respondent's construction. In any event, one need not have recourse to dictionaries where the legislation provides its own definition.

23. At AS[20], the appellant submits that "gross receipts" is commonly used as a "meaningful statutory concept from which to work" and draws an analogy to federal income tax where gross receipts are described as "assessable income" from which deductions are then made to arrive at "taxable income". How comparison with the tax statute can assist this Court with the discrimination between the competing constructions contended for is not apparent. In any event, the appellant's example favours the respondent's contention: the tax is levied on gross receipts *less* legitimate expenses.

24. At AS[22], the appellant submits that the breadth of the inclusive statutory definition tends against a construction that arrives at net benefit. But where the parties have agreed that the benefit is the contract, nothing about the breadth of "benefit" meaningfully informs how the court should approach the determination of how that benefit (i.e. the contract), in the respondent's hands, should be valued.

The natural meaning of "benefit" is 'net benefit'

25. Unsurprisingly, benefit falls for assessment in an array of statutory contexts. The preponderance of authority favours the construction arrived at by the sentencing judge and the CCA.

26. The appellant has made submissions about potential analogies with proceeds of crime legislation: AS[65]*ff*. The respondent will make further submissions concerning those cases below (at [62]*ff*) but it is convenient to address one matter immediately. The appellant submits (at AS[66]) that "*courts (including this Court) have not permitted a wrongdoer to bring expenses to account in valuing the benefit derived from their wrongdoing where the underlying offending involves dealing in prohibited substances*." One of the authorities cited is *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 486-487 (***McMillan's case***) (AS[66]). That was a case concerning the assessment of a pecuniary penalty pursuant to s 243C of the *Customs Act 1901* (Cth). The Court rejected (at 486) an argument that the phrase "benefits derived" was too imprecise, holding "*What the Court is required to do by the provisions to which we have referred is to "assess", in accordance with s. 243C, "the value of the benefits derived by the person by reason of his having engaged in" the dealing or dealings*." The Court explained (at 487) that the reason for embarking on an assessment of the 'gross benefit' was that "*s. 243C(6) requires the Court to disregard "any expenses or outgoings of the defendant" in connexion with the dealing or dealings*."

27. In *Cornwell v Commissioner of Australian Federal Police* (1990) 94 ALR 495 (***Cornwell***) Wilcox J said at 505:

> The essential problem is that Parliament has used the term "benefits", a word appropriate to describe the net proceeds of a transaction, in a context where "expenses and outgoings" of the transactions are expressly required to be disregarded…It might be objected that a failure to take account of the purchase cost of a narcotic means that the amount of a penalty assessed by reference to the value of the narcotic upon importation into Australia will necessarily exceed the true benefit to the importer of the importation. I agree that this is so. But the objection equally applies to any expense incurred in the implementation of the transaction. None the less, and notwithstanding the ordinary meaning of the word "benefits", the clear policy of sub-s (6) is that such expenses are to be disregarded. Parliament accepted that, to this extent, the benefits assessed by the court may

exceed the actual benefits derived by the offender from the transaction. In my opinion, the consequence of sub-s (6) is that expenditure incurred in the acquisition of the relevant narcotic must be disregarded by the court in making its s 243 c assessment.

28. Likewise, in *Razzi v Commissioner of Australian Federal Police* (1990) 97 ALR 349 (***Razzi***), Jenkinson and Hill JJ considered (at 361) that the presence of s 243C(6) altered the "ordinary English language" meaning of "benefit".

29. As will be seen below, proceeds of crime authorities arrive at the same conclusion.

10 *Benefits need not be pecuniary but are in this case*

30. At AS[23] the appellant submits that an unprofitable contract might nonetheless be beneficial or advantageous. So much may be accepted. As adverted to above, there may well be cases where an offender enjoys an advantage even in the absence of a direct pecuniary gain. The example, provided above at [11], of corrupting the prosecutorial discretion is one such illustration. Another is a loss-making contract which nevertheless gains the offender a foothold in the market. In both of those examples, where precise determination of benefit is a fraught exercise, the maximum penalty may be supplied by the greater of $11 million or 10% of turnover.

20 31. But those examples are not this case. In this case the agreed facts made no allusion to collateral, intangible or indirect benefits. On the contrary, the respondent was sentenced on the agreed fact that the contract was the only benefit and that the court could determine its value. The parties also agreed on the figures representing the revenue flowing from the contract, legitimate costs of the contract's performance and the tainted (or possibly tainted) costs associated with the offending conduct. Accordingly, whilst the statement at **CCA[95]** [**CAB 121**] does not represent a universal proposition – and will not apply where benefits other than direct pecuniary benefits are in play – it is a correct statement in cases such as this where the sentencing exercise is predicated on the parties' agreement.

30 32. At AS[24], the appellant notes that Parliament did not mention 'profit' in the provision, nor attach the word "net" to "benefit". That argument was properly rejected at **CCA[96]** [**CAB 121**].

No legislative guidance required for a court to determine "benefit"

33. At AS[25] the appellant submits that because Parliament did not provide an elaborate accounting methodology for a determination of "the value of the benefit", none whatsoever should be applied. The appellant's submission fails to grapple with the myriad circumstances where a court will be called on to make judgments about the value of the benefit obtained. In some cases (such as tax evaded), the answer may be simple. In other cases (such as a tainted loss-making contract which puts the offending company in a superior position to win a valuable second contract) a more nuanced approach may be required.

10 34. As the sentencing judge noted, the ascertainment of benefit is a task undertaken daily by courts and "[t]he comparative difficulty of the task is no barrier to its being performed": **J[134]** [**CAB 50-51**] (quoted at **CCA[64]** [**CAB 111**]).

35. At AS[26], the appellant submits that it was "*expedient for the respondent to agree that some categories of expenses should be included and some excluded from the value of the "benefit" obtained*". The appellant submits that the deduction for tainted or arguably tainted costs "*may make the exercise more palatable but finds no footing in the statute*."

36. *First*, that submission rather overlooks the fact that it was *the parties* that agreed to the assessment of gross revenue and net benefit before the sentencing judge.

20 37. *Secondly*, as will be elaborated upon below by analogy with decisions concerning proceeds of crime, the parties' methodology of allowing legitimate expenses and excluding tainted costs has a sound basis in principle.

CCA did not accept that "benefit" is deployed inconsistently within s 70.2

38. AS[27] and [28] substantially repeat the submission made as AS[15] and addressed above at [5]. The CCA did not accept that "benefit" means gross amounts; nor was any presumption of consistent meaning displaced.

39. The appellant concedes that the CCA correctly identified the contract as the benefit. The appellant complains, however, that when it came to valuing the contract, the

30 CCA's failure to accept that the benefit was the full contract price was unfaithful to the statutory definition. The appellant concludes "[t]he benefit was not the profit component of the contract, it was the contract itself."

40. The respondent makes two submissions in response. *First*, the court's task is to "*determine the value of the benefit that the body corporate…obtained*". Where the

benefit is a contract with concomitant benefits and burdens, that task most aptly describes a determination of the net benefit.

41. *Secondly*, something should be said about the appellant's repeated references to "profit". The appellant has, throughout its submissions, conflated the concepts of "net benefit" with "profit" – see, e.g. AS[18], [23], [24], [28], [68]. The agreed facts made no accounting determination of profit: **CCA[5]** [**CAB 90-91**]. For example, no fixed costs, overheads, finance costs or internal costs were brought to account. Rather, in light of the different potential constructions, the parties agreed on the calculation of gross income ($10,130,354) and net income ($2,680,816): **CCA[46]** [**CAB 102**]. The latter figure represented the contract price less the payments made to local Vietnamese contractors in order to discharge the respondent's contractual obligations: **CCA[47]** [**CAB 102-103**].

E. The purpose of s 70.2

42. The appellant submits that mischief to which s 70.2(1) is directed is harm to a foreign system: AS[29]. That is doubtless correct. The appellant submits (AS[34]) that the extrinsic materials support the appellant's favoured construction by suggesting that an offender should not receive any "credit" for costs in performing the contract at the maximum penalty stage. The appellant submits that the costs of performance "*do[] not lessen the damage to the foreign country*" and that the (gross) money flows over the life of the wrongfully obtained contract are a more reliable indicator of the gravity of the offence.

43. *First*, the extrinsic materials do not support the appellant's argument. The materials quoted as AS[30]-[33] elucidate the policy justification for Australia's ratification of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (**the Convention**) and the attempt to stamp out the scourge of foreign bribery. The extrinsic materials are silent on how *the benefit obtained by the offender* ought be determined.

44. *Secondly*, the appellant's argument focuses on the determination of harm to the foreign system rather than the benefit to the offender. As a normative policy consideration justifying the introduction of the legislation, the harm to the foreign system (as well as harm to Australia's international reputation) is a central

consideration. But the text of the relevant provision is focused on the benefit to the offender.[1]

45. *Thirdly*, the appellant submits (AS[35]) that leads to a natural focus on the money 'extracted' from the foreign system: AS[18]. But the appellant's implicit suggestion that the contract price equates to the money 'extracted' is wrong. Indeed, the instant case is a good example of why that submission is wrong (given costs of performing the contract were paid to Vietnamese contractors: **CCA[47]** [**CAB 102-103**]).

46. Bribing a foreign official in order to win a government contract is an unlawful means to a lawful end. In the case of a corruptly-won contract to build a bridge, the performance of the contract will lead to the foreign government receiving a bridge (an asset) plus the associated economic benefit occasioned by the new infrastructure. The amount of money actually 'extracted' from the foreign system is closer to the net benefit than the gross receipts.

F. The history and purpose of s 70.2(5)

47. The *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth) was introduced with the clear intention to respond to the criticism levelled in the OECD's Phase 2 review of Australia's implementation of the Convention.

48. The appellant summarises the OECD's findings in its Phase 2 review in AS[42]. The lead examiners considered it "highly questionable" whether the then maximum penalty was sufficiently "effective, proportionate and dissuasive".

49. As the appellant correctly submitted in the CCA, the 2010 amendments "were intended radically to increase the penalties capable of being imposed for an offence contrary to s 70.2(1) of the *Criminal Code*. Thus, under the predecessor provision, the maximum monetary penalty was $330,000, whereas under s 70.2(5), the "minimum" maximum penalty was $11 million, an increase by a factor of approximately 33": **CCA[81]** [**CAB 118**]. The increase in the maximum penalty for

[1] Some jurisdictions' laws contemplate a pecuniary penalty being based on either an offender's gain or others' loss. For example, 18 U.S. Code § 3571(d) where the maximum penalty is twice the gain or loss. Note: the "gross gain" to be assessed by the courts under that provision is equivalent to the "net proceeds or profits derived from an offence": *United States v Sanford Ltd and James Pogue* (2012) 878 F. Supp 2d 137 at p.138.

corporate offenders was proportionately double the increase for individual offenders.

50. The excerpt of the Attorney-General's second reading speech, quoted at AS[40], discloses the legislature's view that the 'minimum' maximum of $11 million set by s 70.2(5)(a) was, in and of itself, likely to achieve general deterrent effect.

51. The excerpts of the explanatory memorandum, quoted at AS[45] and [46] support the respondent's argument concerning the construction of s 70.2(5)(b). The explanatory memorandum states that the maximum penalty will be "*the greater of $10 million, or three times the gain from the contravention*…" Deploying "gain" as a synonym for "benefit" here is telling as it connotes an inquiry into how much better off the offender is on account of the offending.

52. AS[47] traces the origin of the term "gain" in this context to s 80 of the *Commerce Act 1986* (NZ). It was from that Act that the three-tiered approach in s 70.2(5) was imported into s 76 of the *Trade Practices Act 1974* (Cth). The quote from the Dawson Review that "*an effective sanction… should take into account the expected gains*" suggests that the enquiry is properly focused on the unlawfully obtained windfall which is then trebled and, if the resulting figure is more than the 'minimum' maximum of (then) $10 million, that becomes the maximum penalty.

53. At AS[48] the appellant suggests that the sentencing judge's and CCA's preferred construction of s 70.2(5) punishes "efficient" offending and is more lenient towards "inefficient or ham-fisted wrongdoers". Such a result is not apparent in the sentencing judge's or the CCA's reasons. Nor could it be said that those courts were not explicitly cognisant of the legislative intention to ensure that the risk of successful prosecution outweighed the potential benefit procured through the bribe: **J[128]** [**CAB 48**] quoted at **CCA[64]** [**CAB 110**], *cf* AS[48].

G. Response to criticisms of the lower courts' use of the extrinsic materials

54. It is apparent – both from the text of s 70.2(5) and the extrinsic material – that the legislature intended to calibrate the maximum penalty so that it was sufficiently 'effective' and 'dissuasive' to achieve the general deterrent effect and generally 'proportionate' to the value of the benefit gained by the commission of the offence (at least where, as here, the value can be determined).

55. The extrinsic material does little to advance the appellant's argument. All the extrinsic material shows is that, prior to the amendments, the maximum penalties available were seen to be insufficiently dissuasive.

56. None of the extrinsic materials assist with the constructional choice presented by the need to determine "benefit". That material neither points toward the appellant's favoured construction which equates benefit to the gross contract price; nor does it gainsay the conclusion of the sentencing judge and the CCA that benefit means the net benefit received by the offender.

57. At AS[53] the appellant submits (correctly, with respect) that where the value of the benefit cannot be determined, Parliament has provided a maximum penalty to be supplied by the greater of 100,000 penalty units or 10% of its annual turnover. That, in Parliament's judgment, is a proportionate sanction.

58. At AS[54] the appellant argues that the CCA has misunderstood proportionate to mean some sort of "matching or equality with the benefit obtained from the crime." The CCA's focus was indeed on valuing the benefit obtained from the offence. That is precisely the exercise that it was called upon to perform in circumstances where the parties had agreed that the benefit was capable of determination.

59. The appellant's argument at AS[56] that, in the context of a break-even or loss-making contract, s 70.2(5)(b) and (c) are "*reduced almost to mere "icing on the cake"*". The parties' agreement was that the benefit was comprised by the contract awarded and was able to be calculated. As noted above (at [31], where indirect benefits arise (e.g. increased market share or some other competitive advantage) those advantages, if susceptible to evaluation, would be accounted for in the "value of the benefit". And, as was noted at **CCA[95]** [**CAB 121**], if those benefits cannot be valued, the maximum penalty will be supplied by s 70.2(5)(a) or (c).

60. At AS[59] the appellant criticises the sentencing judge's conclusion that the concept of proportionality is employed in relation to the benefit obtained by the offender. Rather, the appellant asserts that proportionality, in criminal sentencing, is applied in relation to the gravity of the offending.

61. The appellant mistakes the context in which 'proportionality' was being applied. In the quoted paragraph of the sentencing judge's reasons (**J[132]** [**CAB 50**]), her Honour was considering the construction of s 70.2(5) in light of Art. 3.1 of the Convention that commences: "*The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties*" (a phrase

repeated in the Explanatory Memorandum quoted at AS[38]). It is the Convention that requires proportionate penalties. That constructional enquiry is anterior to the determination of a sentence for particular offending conduct. The gravity of the offending will only be relevant in the sentence pronounced for a particular offender.

H. The proceeds of crime cases

62. As the appellant notes, caution must be exercised when considering authorities in a different statutory context. Nevertheless, the respondent submits that proceeds of crime authorities shed light on a coherent and principled basis upon which to determine the meaning of "the value of the benefit" in s 70.2(5).

63. As the appellant also notes (AS[66]*ff*), the cases involving the supply of drugs (where no account is taken of the costs of the operation) apparently pull in a different direction to the insider trading cases (where the share acquisition costs are accounted for in the determination of benefit).

64. In the drug cases (*DPP v Nieves* [1992] 1 VR 257 (***Nieves***) at 262; *R v Peterson* [1992] 1 VR 297 (***Peterson***) at 302-303; and *R v Pedersen* [1995] 2 NZLR 386 (***Pedersen***) at [39] to [41]) (each cited by the appellant AS[66]), there is every reason to ignore the costs associated with the crime. The *Crimes (Confiscation of Profits) Act 1986* (Vic) (repealed) (**Victorian CCPA**) had no analogue to s 126 of the *Proceeds of Crime Act 2002* (Cth) (**POCA**) that provides:

> In assessing the value of benefits that a person has derived from the commission of an offence or offences (the illegal activity), none of the following are to be subtracted:
>
> (a) expenses or outgoings the person incurred in relation to the illegal activity…

65. In *Nieves*, the Victorian Court of Criminal Appeal determined that "the value of the benefit" in the Victorian CCPA does not require an enquiry into the costs associated with the drug supply. The Court reasoned (at 262) that the whole arrangement is tainted with illegality and said:

> It is inconceivable, therefore, that a court of law should engage itself in the procedure of calculating and setting off against the amount derived from the commission of a crime the expenditures incurred…

66. *Peterson* was also a case involving the payment of cash, by undercover police, for drugs. In that case, however, the evidence established that Peterson immediately

passed the cash on to his principal, receiving some heroin as payment for his services as a courier. There was no evidence about the value of the heroin he received. The Court of Criminal Appeal held (at 301) that "*an inquiry should be made designed to ascertain the value of the benefit actually derived by the particular person 'as the result of committing the offence*'".

67. The appellant also cites *Lin v Tasmania* [2012] TASCCA 9 at [238]-[242] (AS[66]). That case concerned the unlawful purchase of rock lobsters. The *Crime (Confiscation of Profits) Act 1986* (Tas) contains an analogue to s 126 of the POCA. Subsection 22(6) stipulates that "*In calculating … the value of benefits derived… any expenses or outgoings… in connection with the commission of the offence are to be disregarded.*" Accordingly, the Court of Criminal Appeal held that where the offence concerned the unlawful purchase itself, the statute required that the costs associated with that purchase be disregarded in the determination of 'the value of benefits.'

68. The insider trading cases (*Mansfield v DPP* (2007) 33 WAR 227 (***Mansfield***); *Commissioner of Australian Federal Police v Fysh* (2013) A Crim R 523 (***Fysh***); *DPP v Gay* (2015) 26 Tas R 149 (***Gay***); *DPP v Gay* [No 2] (2015) 256 A Crim R 194 (***Gay No 2***)) concern the sale of shares whilst in possession of inside information. In one way or another, those cases all adopt a 'net benefit' approach. In *Fysh*, it was determined that the benefit obtained was the share sale price less the share purchase price. In *Mansfield* and *Gay No 2*, it was determined that the benefit equated to the difference between the sale price and the price that the offender would have achieved at the earliest time that he was lawfully able to dispose of those shares.

69. The rationale for the prima facie differential approaches to the drug cases and the insider trading cases is clear: the drug cases are cases where the entire enterprise is unlawful. It would be absurd to suggest that a manufacturer of illicit drugs could claim that his or her receipts (the drug payments he or she received) should be offset by the costs of buying the precursors. The benefit of the offending conduct is the whole (gross) proceeds.

70. On the other hand, the insider trading cases are opportunistic: initial share purchases may have been lawful but the shares' disposal was unlawful. It is only tainted costs which are excluded from the proper assessment of benefit. For example, in *Fysh*, the brokerage costs of selling the shares were not offset from the

calculation of benefit as those costs were part and parcel of the offending conduct (*Fysh* at [54]).

I. The UK cases

71. The UK cases were decided in a statutory context even more strikingly different from the Australian proceeds of crime authorities.

72. In *R v Sale* [2014] 1 WLR 663 commercial contracts were bestowed in return for bribes. About £1.9 million was paid under those contracts. Proceedings were commenced under the *Proceeds of Crime Act 2002* (UK) (**the UK POCA**). At s 76, the UK POCA defines "benefit" differently from how it is defined in s 70.1 of the *Criminal Code*. In particular, subsection 76(4) provides that "*[a] person benefits from conduct if he obtains property as a result of or in connection with the conduct*."

73. At first instance, the judge made a confiscation order for the whole £1.9 million and the defendant appealed. Applying the particular words of the UK POCA, the Court of Appeal considered that it was apt to say that the defendant obtained property in the sum of £1.9 million as a result of or in connection with the impugned conduct. However, as the appellant notes (at AS[69]), on the application of the First Protocol of the European Convention on Human Rights and on the authority of *R v Waya* [2013] 1 AC 294, an order under the UK POCA must be proportionate and the Court concluded that the confiscation order be reduced to the amount of profit and said at [56]:

> Applying those observations to this case and having regard to *R v Waya*, and in particular para 34, had this been an offence whose only criminal effect was upon Network Rail which had been provided with value for money achieved by the performance of a contract which required the company to expend moneys in the ordinary course of business, it would have seemed to us proportionate to limit the confiscation order to the profit made, and to treat the full value given under the contract as analogous to full restoration to the loser.

74. The Court noted that there were additional advantages – beyond profit – to the offender in the nature of obtaining market share, excluding competitors and saving costs on preparing proper tenders (at [57]). However, since the prosecutors had failed to put any material before the Court in those respects, the Court reduced the confiscation order to £197,683.12, commensurate with the profit obtained.

75. In *R v Waya*, the defendant had obtained a loan to purchase a property by making false representations concerning his employment history and earnings.[2] In the event the loan was repaid, but the majority reasoned (at [70]-[71]) that the benefit obtained was commensurate with the capital appreciation in the value of the property obtained proportionate to the amount of the loan. The minority considered that the only benefit was the favourable difference in the terms of the mortgage he secured by deception if compared to terms of a hypothetical mortgage he would have obtained if he had been honest about his employment history and earnings (at [123]).

10 76. In *R v Waya*, the majority (Walker and Hughes SCJJ (with whom Hale, Judge, Kerr, Clarke and Wilson SCJJ agreed) said that the need for proportionality might arise particularly in cases where "*for example, the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. He ought no doubt to be punished and, depending on the harm done and the culpability demonstrated, maybe severely, but whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration*."

77. After *R v Waya*, the UK POCA was amended to include a proviso at s 6(5) that stipulates that, the court may only make a confiscation order "*if, or to the extent*
20 *that, it would not be disproportionate to require the defendant to pay the recoverable amount*."[3]

78. The appellant's last-cited case is *R v Andrews* [2022] ICR 1404, where the defendant fraudulently obtained employment by lying about his qualifications. The Supreme Court held (at [45]) that confiscation orders in cases where money is earned from a position dishonesty obtained should focus on the benefit derived by the offender represented by his or her higher earnings. Accordingly, a broad-brush enquiry into what the offender would have earned on the open market would be required (at [48]). The Court noted, however, that if the very fact of the employment would be, itself, an offence (e.g. a surgeon or pilot), then the full net
30 earnings would be susceptible to confiscation: at [42].

79. In *R v Andrews*, the Supreme Court referred to *R v King (Scott)* [2014] 2 Crim App R (S) 54 in which the Court of Appeal said (at [32]):

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[2] Per the majority at [36]
[3] *R v Andrews* [2022] ICR 1404 at [17]

> The authorities reveal [that] there is a clear distinction to be drawn between cases in which the goods or services are provided by way of a lawful contract (or when payment is properly paid for legitimate services) but the transaction is tainted by associated illegality (eg ... the bribery in Sale), and cases in which the entire undertaking is unlawful (eg a business which is conducted illegally ...). When making a confiscation order, the court will need to consider, amongst other things, the difference between these two types of cases. It is to be stressed, however, that this divide is not necessarily determinative because cases differ to a great extent, but it is a relevant factor to be taken into account when deciding whether to make an order that reflects the gross takings of the business.

80. It can therefore be seen that, despite the differences in legislative drafting, the Australian and UK proceeds of crime cases are not so different. The concern in each jurisdiction is to ensure that the whole benefit obtained is disgorged. The Australian cases do so by focusing on the value of the benefit obtained by the offender while the UK cases do so by resorting to notions of proportionality. The result is not radically different. Where the entire enterprise is criminal (an unlawful means to an unlawful end), no account is taken of the offender's costs. However, where an offence is committed but the taint does not cover the whole endeavour (such as the insider trading cases or the bribery in *R v Sale*), the untainted costs may be brought to account in the determination of the value of the benefit obtained by the offender.

81. Be that as it may, at bottom the question in this case is the proper interpretation of an Australian statute. Resemblances, or indeed contrasts, with other jurisdictions' legislative and interpretive approaches may be somewhat informative by example. However, in this case, the appellant gets no assistance from this comparative law.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

82. The respondent will require a total of 2 hours.

Dated 9 February 2023

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IN THE HIGH COURT OF AUSTRALIA No S148/2022
SYDNEY REGISTRY

BETWEEN:

THE KING
Appellant

and

JACOBS GROUP (AUSTRALIA) PTY LTD formerly known as Sinclair Knight Merz
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 2019, the respondent sets out below a list of the particular statutes and Conventions referred to in these submissions.

No.	Description	Version	Provision(s)
1.	*Commerce Act 1986* (NZ)	As at 3 Sept 2007	s 80
2.	*Crimes (Confiscation of Profits) Act 1986* (Tas)	Current	s 22
3.	*Crimes (Confiscation of Profits) Act 1986* (Vic)	As at 1 Sep 1997	
4.	*Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth)	As enacted	
5.	*Criminal Code Act 1995* (Cth)	Current	ss 70.1, 70.2
6.	*Customs Act 1901* (Cth)	As amended on 4 Dec 1979	s 243C
7.	*OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions*	Current	Art. 3.1
8.	*Proceeds of Crime Act 2002* (Cth)	Current	s 126
9.	*Proceeds of Crime Act 2002* (UK)	Current	s 76
10.	*Trade Practices Act 1974* (Cth)	Compilation prepared on 1 January 2007	s 76