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

SUBMISSIONS OF THE APPELLANT

10 **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. When an offender obtains a contract by bribing a foreign public official, is the maximum penalty to be calculated under s 70.2(5)(b) of the *Criminal Code* (Cth) (***Criminal Code***) on the basis that "the value of the benefit" of that contract is (a) the contract price less the (untainted) costs to the offender of performing it or (b) the contract price? The sentencing judge and the Court of Criminal Appeal (**CCA**) answered the former, but the Crown contends for the latter.

PART III SECTION 78B NOTICE

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

PART IV DECISIONS BELOW

4. The sentencing remarks have the medium neutral citation [2021] NSWSC 657 (**J**). The CCA's judgment is currently reported at (2022) 367 FLR 365 (**CCA**).

PART V RELEVANT FACTS

A. PROCEDURAL HISTORY

5. The respondent pleaded guilty in the Local Court of New South Wales to three charges of offences contrary to ss 11.5(1) and 70.2(1)(a)(iv) of the *Criminal Code* involving conspiracies to bribe public officials in the Philippines and Vietnam [**CAB 5, 7-8**].

6. Sequence one (ie count one) concerned a conspiracy to cause an offer of a bribe to a
30 foreign public official in the Philippines between 1 January 2000 and 20 May 2005 [**CAB 7**]. Sequence two concerned a conspiracy to cause an offer of a bribe to a foreign public official in Vietnam between 1 December 2006 and 19 February 2010 [**CAB 7**]. Sequence

three concerned the continuation of the same conspiracy as sequence two in Vietnam between 20 February 2010 and 15 June 2012 **[CAB 8]**. Sequences two and three were charged separately to take account of the amendment to the maximum penalty for the offence on and from 20 February 2010, the meaning of which is in issue in this appeal.

7. The matter was committed for sentence to the Supreme Court [**CAB 6**]. Based on a Crown tender bundle that included agreed statements of facts, affidavits filed on behalf of the respondent and limited cross-examination of a police officer, the sentencing judge imposed a fine of $67,500 for sequence one (the maximum penalty was $330,000), a fine of $54,000 for sequence two (the maximum penalty was $330,000) and $1,350,000 for
10 sequence three (after determining that the maximum penalty was $11,000,000) [**CAB 73**].

8. The Crown appealed against each of these sentences. Relevantly, the CCA rejected the ground concerning the sentencing judge's determination of the maximum penalty for sequence three. The CCA otherwise upheld one ground, but dismissed the appeal in the exercise of the residual discretion (**CCA[124]-[131]**) [**CAB 130-132**].

B. FACTS RELEVANT TO "BENEFIT"

9. It is only the sentence for sequence three which remains in issue in this Court, and in dispute is only the question of how to determine the maximum penalty for the offence. That depended on the operation of s 70.2(5) of the *Criminal Code*, which provides:

> An offence against subsection (1) committed by a body corporate is punishable on
> 20 conviction by a fine not more than the greatest of the following:
>
> (a) 100,000 penalty units;[1]
>
> (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
>
> (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the ***turnover period***) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

30 10. While the respondent was charged with a conspiracy rather than a substantive offence, there were agreed facts that the respondent paid money in connection with certain contracts for engineering projects located in Vietnam and that it received those contracts.[2]

[1] The value of a penalty unit at the relevant time was $110.

[2] See Agreed Statement of Facts at [21], [35]-[36], [38], [47], [49] [**ABFM 9, 11-13**]; Further Supplementary Statement of Facts at [5] [**ABFM 51**].

The CCA confirmed that the "benefit" which was obtained by the respondent from these bribes was certain contracts for projects in Vietnam: **CCA[99]** [**CAB 122**].

11. The parties agreed that the "value" of the benefit obtained by the respondent (being the contracts) could be determined, and so the maximum penalty under s 70.2(5) depended on whether or not three times the value of that benefit exceeded 100,000 penalty units (being $11,000,000).[3] But the parties disagreed on what that value was. Instead, there were agreed facts that, under these contracts, the respondent was paid a gross amount of **$10,130,354**.[4] That figure was the value of these benefits on the Crown case, and the maximum penalty was thus **$30,391,062** because this was greater than $11,000,000.[5]
10 There were also agreed facts that the respondent incurred (a) **$7,449,538** in performing the contracts; (b) **$204,661.38** in bribes; (c) **$103,928** in payments to an agent (who performed some lawful actions and some actions connected with the bribery); and (d) unquantified incidental expenses. Items (b) and (c) above formed part of item (a).[6] The respondent contended that the value of the contracts was the gross amount of $10,130,354 less the cost under item (a) of performing the contracts (but excluding items (b) and (c) as reflecting "tainted" or arguably "tainted" costs of performance) and without regard to the unquantified item (d), for a total figure of **$2,680,816**. This amount was referred to in the agreed facts as the "net amount". Because this figure multiplied by three is less than $11,000,000, the maximum penalty according to the respondent was thus **$11,000,000**.

20 C. DECISIONS BELOW

12. The sentencing judge agreed with the respondent, holding that "benefit" in s 70.2(5) refers to the "net benefit" obtained after making certain deductions from gross income: **J[80], [126], [140]** [**CAB 33-34, 47-48, 53**]. The CCA then rejected the ground of appeal challenging this holding.

13. The CCA commenced not with the statutory text but with what was said in the relevant explanatory memorandum accompanying the Bill that introduced this version of s 70.2(5) into the *Criminal Code*: **CCA[90], [92]-[93]** [**CAB 120-121**]. The explanatory memorandum said this:[7]

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3 See Further Supplementary Statement of Facts at [3] [**ABFM 51**].
4 See Further Supplementary Statement of Facts at [7] [**ABFM 51-52**].
5 See Further Supplementary Statement of Facts at [7] [**ABFM 51-52**].
6 Further Supplementary Statement of Facts at [8]-[16] [**ABFM 52-54**].
7 See Replacement Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth) at 189.

> The temptation to bribe a foreign public official increases with the size of a potential transaction/benefit. The alternative sanctions available under subsection 70.2(5) have the effect of penalising a body corporate proportionately to either the benefit obtained, or 10% of the annual turnover of the body corporate, so that the risk of being successfully prosecuted for this offence outweighs the potential benefit from the transaction/benefit procured through the bribe.

14. The CCA reasoned that the reference to "proportionately" in this passage supported a "net benefit" approach to the provision, because it would be disproportionate to value a benefit without taking into account costs incurred in making the benefit: **CCA[97]** [**CAB 121-** 10 **122**]. The CCA said "[t]here simply will be no benefit to an offender if the body corporate which has engaged in the bribery breaks even or makes a loss from its contractual performance. On either of these scenarios, it will not have obtained <u>any advantage</u> from its commission of the offence": **CCA[95]** (emphasis in original) [**CAB 121**].

15. Only then did the CCA turn to the statutory text. The CCA said that "benefit" is defined in the *Criminal Code* to mean "any advantage", and asserted that there is no "advantage" if there is no profit after deducting expenses: **CCA[95]-[96]** [**CAB 121**]. The CCA accepted that s 70.2 uses "benefit" to mean gross amounts rather than gross amounts less any cost to the bribed individual elsewhere — specifically, an element of the offence is that the offender provide (or cause to provide, offer to provide or cause an offer to 20 provide) a "benefit" to another person which is not due to him or her (that is, a bribe). Yet the CCA held that the presumption of consistent meaning was displaced in this case such that "benefit" meant something different in s 70.2(5): **CCA[99]** [**CAB 122**].

16. Finally, the CCA endorsed the sentencing judge's reasoning (**J[130]**) [**CAB 49**] that to consider gross sums in s 70.2(5)(b) would be to make it have the same "integer" as s 70.2(5)(c): **CCA[99]** [**CAB 122**]. The sentencing judge also said (**J[130]**, citations omitted) [**CAB 49**]:

> The evident purpose of s 70.2(5) is to provide a significant incentive to offenders, such as the company in the present case, to establish the benefit obtained from the offending conduct, which, especially for large companies with substantial businesses, is likely to 30 be less than 10% of their annual turnover. An offender is in a pre-eminent position to establish the benefit obtained since both the knowledge and the means of proof are at its disposal.

PART VI ARGUMENT

17. The Crown submits that when an offender obtains a benefit as a result of bribing a foreign public official which is properly identified as a contract awarded to the offender as a result

of the bribe, the value of that benefit for the purpose of s 70.2(5)(b) is the contract price without deduction of the costs (tainted or untainted) of performing the contract. That result accords with the text, context and purpose of the provision.

A. TEXT

A.1 The ordinary meaning of "benefit"

18. The text of s 70.2(5) is set out at paragraph 9 above. The Parliament has chosen to adopt the word "benefit", which has a very broad ordinary meaning that is not limited to net amounts after deducting expenses. It is not uncommon as a matter of ordinary English usage to use the term "benefit" to encompass receipts rather than profits. A person may
10 well say, intelligibly, "I won a $5 million contract" or "I earned $250,000 worth of fees".

19. Such usage reflects the full range of available dictionary meanings of the term. Courts have recognised the breadth of the term in different contexts.[8] The *Oxford English Dictionary* (online), for example, defines "benefit" broadly to mean "[a]dvantage, profit, good". And even if one focuses only on the term "profit", the range of definitions of "profit" includes some that would deduct expenses — "A financial gain, *esp.* the difference between the amount earned and the amount spent in buying, operating, or producing something" — and some which would not — "A favourable circumstance or condition; advantage, gain; a person's benefit or good", "The advantage or benefit inherent in or resulting from something; favourable potential or outcome".

20 20. It is not unusual to treat gross receipts as a meaningful statutory concept from which to work. In federal income tax, for example, "assessable income" looks to gross receipts, from which deductions are then made to arrive at "taxable income".[9] And in proceeds of crime cases, about which more will be said below, the full value of a benefit without deductions for expenses incurred has been adopted on several occasions.[10]

21. The CCA erred in **CCA[95]-[96]** [**CAB 121**] in failing to recognise the breadth and richness of the ordinary meaning of "benefit".

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[8] See, eg, *James v Northern Territory* (2012) 32 NTLR 107 at [32]; *Matthews v Cool or Cosy Pty Ltd* (2004) 136 IR 156 at [48]; *Western v DPP (SA)* (2017) 271 A Crim R 102 at [134].

[9] See, eg, *Webster v Deputy FCT (WA)* (1926) 39 CLR 130 at 135 (Rich J); *New Zealand Flax Investments Ltd v FCT* (1938) 61 CLR 179 at 199, 206 (Dixon J).

[10] See fn 36 below.

A.2 The inclusive statutory definition of benefit

22. For the purpose of the Division in which s 70.2 is found, s 70.1 of the *Criminal Code* defines "benefit" both inclusively and broadly: "***benefit*** includes any advantage and is not limited to property". It has been said of this term that it "may be wide enough to include all manner of intangible benefits".[11] The breadth of this inclusive statutory definition further diminishes the room to construe and apply s 70.2(5) on the basis that an offender may deduct from the value of the contract certain costs to the offender of performing it for the purpose of determining the maximum penalty.

23. The CCA said, in **CCA[95]** [**CAB 121**], that there is no advantage and thus no benefit where an offender breaks even or makes a loss from the contract which it won through bribing a foreign official, but this is wrong. A contract which is not profitable might nonetheless be beneficial or advantageous, and contracts which lead to the same amount of profit based on different amounts of revenue may be of different value. Greater revenue from a contract may itself be a benefit even if no (or the same amount of) profit is made on the contract, for example because it allows more people to be employed or boosts the performing party's reputation and presence in the market. Further, a larger contract may better assist the party to enter a new market. It may be a loss leader.

A.3 What the *Criminal Code* does not say and why that matters

24. It is important to notice the words which the Parliament did not use. There is no mention of "profit". The Parliament did not attach the word "net" to the critical word "benefit". The Parliament could have done so readily had it intended sentencing judges to employ such concepts in fixing the maximum penalty.

25. Moreover, the Parliament provided no legislative guidance on which costs to take into account, and which to ignore, in arriving at the value of the "benefit", if benefit is to be understood to mean gross receipts less deductions as the sentencing judge and the CCA concluded. The absence of any such guidance is telling. It suggests that no such exercise is to be engaged in at the stage of fixing a maximum penalty.

26. Take this case as an example. 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. But there was no statutory foundation for picking and choosing. There

[11] *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235 at [185] (Wigney J).

will be myriad fixed and variable costs that are in play, and no statutory guidance as to how to deal with them. Equally the deduction for "tainted" or arguably "tainted" costs may make the exercise more palatable but finds no footing in the statute.

A.4 Consistent meaning of benefit

27. Section 70.2 uses the term "benefit" in the elements of the offence. In particular, the offender must provide (or cause to provide, or offer to provide, or cause an offer to provide) a "benefit" to another person which is not due to him or her (that is, a bribe). The CCA accepted that "benefit" here means gross amounts rather than gross amounts less any cost to the bribed individual: **CCA[99]** [**CAB 122**]. It should do so in s 70.2(5)
10 also, because it is implausible that the same word in the very same provision would have two different meanings, especially when that word ("benefit") is defined "[i]n this Division" by s 70.1.

28. The CCA concluded that this presumption of consistent meaning was displaced because s 70.2(5), unlike s 70.2(1), directed attention at the "value" of the benefit: **CCA[99]** [**CAB 122**]. But all that the CCA's reasoning did was impermissibly re-characterise the "benefit" in the course of trying to value it. That can be seen by scrutinising **CCA[99]** [**CAB 122**] carefully. The CCA began, correctly, by saying "[t]he benefit is relevantly the contract secured by way of payment of the bribe". But in that same paragraph, in concluding that costs of performance should be deducted, the CCA said the "value or
20 benefit or advantage is not the contract price but the contract price less the costs of its performance". That reasoning does not stay faithful to the "benefit" which was initially identified for valuation. The benefit was not the profit component of the contract, it was the contract itself.

B. PURPOSE OF SECTION 70.2

29. The evident mischief which s 70.2(1) of the *Criminal Code* seeks to stamp out is the harm to a foreign system, and in turn the harm to relations with Australia and to international good governance and commerce, when the foreign system is wrongly induced to make payments and give custom to the offender under Australian law. That this underpins the offence provision is made abundantly clear from the title of this Chapter of the *Criminal*
30 *Code*, which is "The integrity and security of the international community and foreign governments". It is also clear from a review of the extrinsic materials accompanying the

Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 (Cth) which inserted this offence provision into the *Criminal Code*.

30. The explanatory memorandum said this:[12]

> Bribery of foreign public officials in the course of international trade is unacceptable. Although Australian business has high ethical standards, it is important that Australia maintains a good reputation by supporting the OECD in this initiative and therefore benefiting from the improvements it should bring to world trade. In particular, a reduction in the role played by bribery should result in more merit based commercial decisions. This will advantage Australia because as a rule its businesses are
10 competitive.

31. It also said the following:[13]

> The main argument in favour of accepting the OECD Convention is that if countries take action on a multilateral basis to criminalise foreign bribery, serious distortion of trade could be prevented that could otherwise occur if purchasing decisions are made on the basis of the size of the bribe, rather than on the merits of a product or service.
>
> Bribery is a serious international issue and it is in the interests of all countries to prevent the serious distortion of trade that could result if foreign bribery is not prevented.

32. In his second reading speech, the Attorney-General explained:[14]

20
> There is good business sense, as much as morality, in introducing this legislation. Bribery distorts attempts at international competitive bidding, bribes themselves are non-productive and are therefore paid from profits and bribes distort trade in that contracts are not based on merit and can lead to production of poor quality goods and services. In the aid context, bribery can lead to a very poor selection of projects, and this can in turn lead to diversion of resources away from areas of greatest need.
>
> …
>
> I believe this bill will make a significant contribution to Australia's ability to influence the conduct of international business transactions to ensure that decisions are made on the basis of the merits of the product or service and not on the basis of extraneous
30 matters which have no place in development of trading and business relationships. In any case, the bill is also morally right and should be enacted on that basis alone. …

33. These materials referred to the OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* adopted by the Negotiating Conference on 21 November 1997 (**OECD Convention**). The preamble to the OECD Convention recorded that the parties considered that "bribery is a widespread phenomenon in international business transactions, including trade and investment, which

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[12] Explanatory Memorandum, Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 (Cth) at 3 (**EM, 1999 Amendment Bill**).
[13] EM, 1999 Amendment Bill at 7-8.
[14] See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1999 at 6044-6046.

raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions" and that "all countries share a responsibility to combat bribery in international business transactions".

34. The mischief which these extrinsic materials reveal points powerfully against giving an offender any credit, at the maximum penalty stage, for the costs they incurred in performing the contract which they obtained by bribery. That the offender incurred such costs does not lessen the damage to the foreign country, Australia's reputation or international commerce. Rather, it is that which flowed from the foreign system under the subverted influence of the foreign official to the offender, being the money flows over 10 the life of the wrongfully obtained and retained contracts, which is a more reliable indicator of the gravity of the offence.

35. An appreciation of this purpose of s 70.2 reveals the error in **CCA[92]** [**CAB 120**]. The CCA said that a bribed contract that costs Vietnam $50,000,000 is of equivalent gravity to a bribed contract that costs Vietnam $5,000,000 if the offender in each case made the same profit of $1,000,000. This is entirely divorced from the gravamen of the offence. It fails to interpret s 70.2(5) in a manner that would best achieve the purpose or object of s 70.2 of the *Criminal Code*.[15] A bribe which extracts a larger amount of money from a foreign country is more serious than a bribe which extracts a smaller amount, and that is so even if the offender makes the same amount of profit as a result of each bribe. The 20 CCA did not address the purpose of making the conduct in s 70.2(1) an offence, for which s 70.2(5) prescribes a maximum penalty.

C. THE HISTORY AND PURPOSE OF SECTION 70.2(5)

36. As already noted, the CCA placed great weight on the relevant explanatory memorandum which accompanied the Bill which resulted in s 70.2(5) taking the form relevant to this appeal. Because the CCA did so, it is important to examine the extrinsic materials carefully to show the error in their Honours' reasoning.

C.1 A summary of the extrinsic material

C.1.1 Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010 (Cth)

37. Before 2010, the penalty for an offence against s 70.2(1) was a maximum of 10 years' 30 imprisonment. The formula in s 4B(2)-(3) of the *Crimes Act 1914* (Cth) could then be

15 See *Acts Interpretation Act 1901* (Cth) s 15AA.

applied when sentencing a corporate offender to arrive at a maximum penalty of 10 (years) x 12 (in months) x 5 x 5 = 3000 penalty units. Before 2010, that would amount to $330,000, which was the maximum penalty for both sequence one and sequence two.

38. This was amended in 2010 by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth), which inserted s 70.2(4)-(8) into the *Criminal Code*. The replacement explanatory memorandum accompanying the amending Bill explained:[16]

> This Schedule amends the *Criminal Code Act 1995* (the Criminal Code). The amendments increase the penalties for the offences of bribing a foreign public official (section 70.2 of the Criminal Code) and bribery of a Commonwealth public official (section 141.1 of the Criminal Code). The amendments ensure that penalties for these offences are sufficiently high to deter and punish bribery in the domestic and international spheres.
>
> The existing penalty for both offences is 10 years imprisonment. Section 4B of the *Crimes Act 1914* allows the court to impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty calculated in accordance with the formula under that section. In the case of both offences, this equates to a maximum fine of $66,000 for an individual and $330,000 for a body corporate.
>
> These penalties have been criticised as insufficient. The Organisation for Economic Cooperation and Development (OECD), in the Phase 2 review of Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) in 2006, considered the penalties were not "effective, proportionate and dissuasive" as required by the Convention.

39. The replacement explanatory memorandum went on to say:[17]

> The penalty for an individual will be a maximum of 10 years imprisonment, a fine of 10,000 penalty units ($1,100,000), or both. The inclusion of a significant monetary penalty for individuals is to deter bribery of foreign public officials where the existing financial penalty may be perceived as "a cost of doing business" when international transactions worth millions of dollars occur.
>
> The ratio between the term of imprisonment and penalty units is inconsistent with other provisions in the Criminal Code where, generally, there is a ratio of five penalty units for every month of imprisonment. As explained above, however, the existing fine of $66,000 for an individual is not "effective, proportionate and dissuasive." The increased pecuniary penalty will ensure Australia's compliance with OECD recommendations, as well as promoting good governance, the rule of law and confidence in government.
>
> The maximum penalty for a body corporate will be the greatest of the following:
>
> (a) 100,000 penalty units ($11,000,000)
>
> (b) three times the value of any benefit that was directly or indirectly obtained and that is reasonably attributable to the conduct constituting the offence (including any body corporate related to the body corporate)

[16] Replacement Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2010 (Cth) at 188 (**Replacement EM, 2010 Amendment Bill**).

[17] Replacement EM, 2010 Amendment Bill at 188-189.

(c) if the court cannot determine the value of the benefit under paragraph 70.2(5)(b), 10% of the annual turnover of the body corporate during the 12 months ending at the end of the month in which the conduct constituting the offence occurred.

This formulation is based on the penalty available under section 76 of the Trade Practices Act 1974 (the TP Act) in relation to breaches of Part IV of the TP Act.

The amendments mean that a body corporate found guilty of bribing a foreign public official will face a maximum penalty of at least a $11,000,000 fine, an increase of $10,650,000 from the existing fine of $330,000. This increase will have a significant deterrent effect on those bodies corporate tempted to bribe a foreign public official.

The temptation to bribe a foreign public official increases with the size of a potential transaction/benefit. The alternative sanctions available under subsection 70.2(5) have the effect of penalising a body corporate proportionately to either the benefit obtained, or 10% of the annual turnover of the body corporate, so that the risk of being successfully prosecuted for this offence outweighs the potential benefit from the transaction/benefit procured through the bribe.

40. In his second reading speech, the Attorney-General said:[18]

This bill also substantially increases the deterrent effect of the offences in the Criminal Code that deal with those who bribe a foreign or Commonwealth public official, by significantly increasing the financial penalty applicable to the offences.

The amendments provide that, where a body corporate, for instance, is convicted of a bribery offence, it could be liable to a financial penalty of $11 million or, in some circumstances, even greater.

The amendments ensure that penalties for these offences are sufficiently high to deter and punish bribery in the domestic and international spheres.

41. During the parliamentary process, the amending Bill had been referred to the Senate Legal and Constitutional Affairs Legislation Committee for report. The Attorney-General's Department, Australian Crime Commission and Australian Federal Police took on notice a question from a senator as to the "[r]easoning behind bringing in an increase to penalties at this time and status of international obligations". The response given was as follows:[19]

The penalties for bribery offences are being increased to address a recommendation of the OECD Working Group on Bribery in International Business Transactions.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) requires signatories to criminalise bribery and to ensure the offence is punishable by "effective, proportionate and dissuasive criminal penalties".

In 2006, the OECD issued a report on Australia's implementation of the Convention in accordance with its ongoing review of member jurisdictions. The report recommended, inter alia, that Australia increase its penalties for foreign bribery because the current penalty was not considered "effective, proportionate, and dissuasive," considering the potential value of modern business dealings. The current penalty is 10 years

[18] *Parliamentary Debates*, House of Representatives, 16 September 2009 at 9705.

[19] Answers to questions on notice provided by the AGD on 10 November 2009.

> imprisonment, which equates to a financial penalty of $66,000 for individuals and $330,000 for a body corporate.
>
> Increasing bribery penalties will implement the final outstanding recommendation from the OECD's 2006 report and is consistent with Australia's international obligations under the Convention.

OECD material

42. The extrinsic materials refer to the OECD. By way of explanation, on 4 January 2006 a Working Group on Bribery in International Business Transactions approved and adopted a "Phase 2" report on Australia's application of the OECD Convention. The report recommended that "Australia increase the fine for legal persons for the offence of bribing a foreign public official to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia".[20] The lead examiners considered that it was "highly questionable whether the available maximum fine can be sufficiently 'effective, proportionate and dissuasive' given the size and importance of many Australian companies as well as MNEs with headquarters in Australia".[21] In response, the Attorney-General's Department indicated to the lead examiners that "the level of monetary sanctions for legal persons committing the offence of bribing a foreign public official may be an issue that needs to be examined", and pointed to proposed reforms to the *Trade Practices Act 1974* (Cth) (**TPA**) that would set a maximum penalty of the greater of $10 million, three times the gain from the contravention and 10% of turnover.[22]

TPA provisions

43. What were these proposed TPA reforms, which the Attorney-General's Department mentioned to the OECD and which evidently provided the blueprint for s 70.2(5)?

44. Section 76(1A) of the TPA was inserted by the *Trade Practices Legislation Amendment Act (No. 1) 2006* (Cth). It provided as follows:

> The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed: …
>
> (b) for each act or omission to which this section applies that relates to any other provision of Part IV—the greatest of the following:

[20] OECD, *Australia: Phase 2 – Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (2006) at 49 (**Phase 2 Report**). MNEs are multinational enterprises.

[21] Phase 2 Report at 49.

[22] Phase 2 Report at 49.

(i) $10,000,000;

(ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;

(iii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the ***turnover period***) of 12 months ending at the end of the month in which the act or omission occurred; …

10 45. The explanatory memorandum accompanying the amending Bill explained:[23]

> The maximum pecuniary penalty for corporations will be the greater of $10 million, or three times the gain from the contravention, or where gain cannot be readily ascertained, 10 percent of the turnover of the body corporate and all its interconnected bodies corporate (if any). The Court will have the option to exclude an individual implicated in a contravention of the TP Act from being a director of a corporation or being involved in its management and corporations will be prohibited from indemnifying officers, against the imposition of a pecuniary penalty.

46. It later explained that:[24]

> Part 1 of the Schedule amends the TP Act and the Corporations Act 2001 to
20 implement recommendation 10.2.1 of the Dawson Review which provided that the maximum pecuniary penalty for corporations be raised to be the greater of $10 million or three times the gain from the contravention or, where the gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

47. The Dawson Review stated that "[i]t is generally accepted that an effective sanction for cartel activity should take into account the expected gains from the cartel".[25] The Review drew attention to s 80 of the *Commerce Act 1986* (NZ), which contained a three-tiered maximum penalty formula that used the term "commercial gain", and recommended that "the Australian Act should be amended along the same lines".[26] Ultimately it
30 recommended that "the maximum pecuniary penalty for corporations be raised to be the greater of $10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any)".[27]

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23 Explanatory Memorandum, Trade Practices Legislation Amendment Bill (No. 1) 2005 (Cth) at 4 [16] (**EM, TPA Amendment Bill**).

24 EM, TPA Amendment Bill at 118 [1].

25 Trade Practices Act Review, *Review of the Competition Provisions of the Trade Practices Act* (January 2003) at 160 (**Dawson Review**).

26 Dawson Review at 161.

27 Dawson Review at 164-165.

C.2 Insights from the extrinsic materials

48. What do these extrinsic materials show? In so far as the amended form of s 70.2(5) was motivated by a concern to meet OECD criticisms, the evident purpose of the amendment was to ensure that the penalty for foreign bribery was not a mere cost of doing business. There was nothing to suggest that the statutory maximum, reflecting the Parliament's views about the seriousness of offending, should be seen to depend on the efficiency of the offender. As the replacement explanatory memorandum explained, "The temptation to bribe a foreign public official increases with the size of a potential transaction/benefit" (emphasis added).[28] The Parliament cannot be understood to have taken a more lenient
10 approach to more inefficient or ham-fisted wrongdoers. Section 70.2(5) sought to ensure that "the risk of being successfully prosecuted for this offence outweighs the potential benefit from the transaction/benefit procured through the bribe" (emphasis added).

49. In so far as the amended form of s 70.2(5) was based on s 76(1A) of the TPA, the history of that provision does not suggest a "net benefit" approach. The full contract price can readily be understood as the "gain" made by the offender. And it cannot be overlooked that the Parliament adopted the more open-ended language of "benefit" rather than "gain".

C.3 The lower courts' misreading of the extrinsic materials

50. The courts below relied heavily on the extrinsic materials, but misread them entirely.

51. *First*, as a step towards concluding that the maximum penalty was to be assessed in a
20 manner "proportionate" to the benefit gained, the CCA emphasised the word "proportionately" in this passage of the explanatory memorandum (**CCA[92]-[94]**) [**CAB 120-121**]:[29]

> The alternative sanctions available under subsection 70.2(5) have the effect of penalising a body corporate proportionately to either the benefit obtained, or 10% of the annual turnover of the body corporate, so that the risk of being successfully prosecuted for this offence outweighs the potential benefit from the transaction/benefit procured through the bribe.

52. Yet this passage does not compel that conclusion at all. It is plain that it used the word "proportionately" in a loose rather than a technical sense. It gave two alternatives:
30 s 70.2(5)(b) operated "proportionately to the benefit obtained" (if the second limb applied) or "proportionately … to 10% of the annual turnover" (if the third limb applied).

[28] Replacement EM, 2010 Amendment Bill at 189.
[29] Replacement EM, 2010 Amendment Bill at 189.

The latter possibility shows that "proportionality" is used here to mean nothing more technical than: "calculated by reference to". That leaves wholly unanswered the precise means by which to value the benefit or 10% of annual turnover in any particular case.

53. To say that the alternative sanctions have the effect of penalising the body corporate "proportionately" to either the benefit obtained or 10% of the annual turnover of the body corporate is to make a statement about the upper limit of the penalty reserved usually for the worst case and not to say anything about where the ultimate penalty will end up. In the turnover limb, all it is saying is the Parliament considers it proportionate that in the worst case the offender may be stripped of up to 10% of its annual turnover. This is "proportionate" in the sense the sentence in the explanatory memorandum goes on to make clear: the potential offender knows that if caught it might lose up to 10% of its annual turnover which may "outweigh" whatever benefit it stands to make from the crime.

54. "Proportionate" here is thus not being used in the sense the CCA has understood it, of some form of matching or equality with the benefit obtained from the crime. As the Full Federal Court has observed, the turnover limb is not a "proxy" for the benefit obtained.[30] Nor is it being used in the sense of trying to match or equate with the gravity of the offence. As Wigney J has observed, "in some cases a maximum penalty based on the offending corporation's annual turnover may not provide a realistic guide to the objective seriousness of the offending conduct or criminality involved in the offence".[31]

55. Likewise, when the Parliament says the upper limit of the alternative sanction presently relevant is "proportionate" to the benefit obtained, the same open-ended concept of proportionality is employed. The offender knows that if the value of the benefit can be ascertained, it stands to be stripped of up to three times that benefit, which will likely stand to "outweigh" what it might make out of the crime and thus provide a strong incentive not to commit the crime.

56. *Second*, the CCA drew some comfort from the fact that, even if its construction would empty s 70.2(5)(b) of any dissuasive impact in the case of a break even or loss-making offender, there was still the minimum maximum penalty of $11,000,000 available: **CCA[95]** [**CAB 121**]. The other methods of calculating a maximum are, on this view, reduced almost to mere "icing on the cake". That is an inaccurate way to understand the

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[30] See generally *ACCC v Yazaki Corporation* (2018) 262 FCR 243 at [191]-[198].

[31] *DPP (Cth) v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575 at [274].

legislative intention here. The three tiers form a package. It is the risk of paying a penalty of at least $11,000,000 — but potentially higher calculated by reference to three times the benefit or 10% of annual turnover — which serves to confound the cost-benefit analysis of whether to engage in foreign bribery (or any of the other wrongs where the Commonwealth Parliament has employed the same maximum penalty formula). To point to the $11,000,000 floor therefore says little about how best to interpret "benefit".

57. *Third*, the CCA also regarded as "powerful" the submission that the Crown's approach was "plainly disproportionate" and "does not reflect the relevant criminality involved": **CCA[92], [94]** [**CAB 120-121**]. There are several problems with this.

10 58. The Crown's interpretation does not fail to achieve proportionality. It factors in primarily at the stage of the instinctive synthesis where all considerations, including but not limited to the maximum penalty which is ordinarily reserved for the "worst case", are brought to bear. At this stage, proportionality to the gravity of the offending (including but not limited to any benefit derived from it) will be taken into account.

59. More fundamentally, the sentencing judge correctly said that "A requirement of proportionality invites the question: proportional to what?" but then incorrectly responded that "The obvious answer is that the penalty must be proportionate to the benefit obtained by the offender for the criminal conduct" (**J[132]**) [**CAB 50**]. In criminal sentencing, the answer is the gravity of the offending.[32] The CCA's own use of proportionality began

20 with that (correct) understanding of proportionality (**CCA[93]**) [**CAB 120-121**] before pivoting in the ultimate analysis (incorrectly) towards proportionality to the benefit obtained. Only if the benefit obtained is commensurate with the gravity of the offending such that one is a proxy for the other could what the courts below said be right. But they are not proxies for each other.

60. *Fourth* and for completeness, the extrinsic materials also used the term "proportionate" in the composite expression "effective, proportionate and dissuasive" when recording that the OECD had regarded the former penalties ($66,000 for an individual and $330,000 for a corporation) as not "effective, proportionate and dissuasive". To say, in effect, that a maximum penalty of $330,000 was manifestly inadequate says nothing about how to

30 construe "benefit". Nor does the likely history of the composite expression favour a focus on proportionality to the benefit obtained. The expression can be traced to article 3(1) of

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[32] See generally *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472-474.

the OECD Convention, which mandates that "[t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties". Neither the Convention nor its Commentaries defines the expression, but it has a long history in European law that likely informed the Convention language. In 1989, the European Court of Justice said that infringements of Community law must be subject to national penalties that are "effective, proportionate and dissuasive".[33] What proportionate means in that triad is proportionate "to the gravity of the infringement".[34] Proportionality in that sense is achieved in the instinctive synthesis, not through s 70.2(5)(b). Confining s 70.2(5)(b) to "net benefit" does not implement proportionality in the Convention sense, because the
10 offender's benefit is not a proxy for the gravity of the offence: cf **J[131]** [**CAB 49-50**].

D. OTHER CONTEXTUAL MATTERS

61. The Crown makes five additional points. *First*, if deductions have to be brought to account in fixing a maximum penalty, that maximum would vary depending on the time when authorities intervened to bring the criminal conduct to an end. If the investigation was brought to resolution early before substantial costs were incurred or promises about expenditure made, then the "benefit" might be the full contractual sum. If the investigation was brought to resolution later, costs would start to eat into the "benefit" — even though, having been implemented, the conspiracy may well be on foot for longer. These consequences of timing are matters that could factor into the instinctive synthesis.
20 But in a provision which is centrally concerned with the impact of conduct upon foreign countries, it is difficult to see why these consequences should control the identification of a maximum penalty.

62. *Second*, the Crown has always accepted that costs incurred may be relevant in the instinctive synthesis. But if costs are factored into the maximum penalty determination, they will be counted twice. In a provision that tries to ensure that the penalty is not a mere cost of doing business, such double counting to the benefit of the offender has no place.

63. *Third*, the CCA endorsed the sentencing judge's reasoning (**J[130]**) [**CAB 49**] that to consider gross sums in s 70.2(5)(b) would be to make it have the same "integer" as s 70.2(5)(c): **CCA[99]** [**CAB 122**]. This mistakes the relationship between

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33 *Commission v Greece* [1989] ECR 2965 at [24]. See also, eg, *Anklagemyndigheden v Hansen* [1990] ECR I-2911 at [17]; *Commission v United Kingdom* [1994] ECR 1-2479 at [40]; *Vandevenne* [1991] ECR I-4371 at [11], [13]; *Siesse v Director da Alfândega de Alcântara* [1995] ECR I-3573 at [20].

34 *Commission v Greece* [1992] ECR I-6735 at [20]. See also *Ainārs Rēdlihs v Valsts ieņēmumu dienests* (Case C-263/11) at [47].

s 70.2(5)(b)(ii) and (iii). These limbs are not proxies for each other but simply alternative bases where the value of the benefit can or cannot be determined.[35] There is no other relationship between them, and use of the concept of turnover in sub-para (iii) says nothing about the identification of the value of the benefit in sub-para (ii).

64. *Fourth*, the CCA endorsed the sentencing judge's analysis at **J[130]** [**CAB 49**] that s 70.2(5) was structured "to provide a significant incentive to offenders … to establish the benefit obtained from the offending conduct, which, especially for large companies with substantial businesses, is likely to be less than 10% of their annual turnover". But this point adds little to the interpretational exercise. Any corporation with an annual
10 turnover of more than $110,000,000 will indeed have an incentive to ensure that the value of the benefit can be determined, in the hope that the maximum penalty will be less than if sub-para (iii) applies. But equally, smaller corporations, in whose control it is to bring forward the necessary facts or evidence about not only revenue but all manner of expenses, will be able to bring forward this material that is uniquely within their purview to try to ensure that the maximum penalty is no higher than $11,000,000.

65. *Fifth*, a similar issue has arisen under proceeds of crime legislation and it may be of interest to examine that case law briefly. In doing so, one must be cautious in analogising from that different context. Proceeds of crime legislation has its own text and structure that differs from s 70.2(5): cf **J[135]-[140]** [**CAB 51-53**]; see **CCA[100]** [**CAB 122-123**].

20 66. In that context, 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[36] or a conspiracy to purchase goods unlawfully.[37] What these cases show is that, where the commission of an offence concerns the acquisition of unlawful goods (drugs) or lawful goods in an unlawful manner, the relevant benefit derived from the commission of these offences can properly be treated as dealing with goods that should not have been obtained, such that there was no warrant in valuing that benefit for deducting the purchase price. The purchase price was merely a cost of committing the offence.

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35 See *ACCC v Yazaki Corporation* (2018) 262 FCR 243 at [193].

36 *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 486-487; *DPP v Nieves* [1992] 1 VR 257 at 262; *R v Peterson* [1992] 1 VR 297 at 302-303; *R v Pedersen* [1995] 2 NZLR 386 at [39]-[41].

37 *Lin v Tasmania* [2012] TASCCA 9 at [238]-[242].

67. The courts have reached what appears at first glance to be a different outcome in proceeds of crime cases where the predicate offence was insider trading. In *Mansfield*, for example, the Western Australian Court of Appeal rejected the argument that the value of the "benefit" derived from selling shares at a time when the offender was in possession of inside information was the full proceeds of the sale without deducting the initial purchase price.[38] But that was because the "benefit" was properly to be identified as the difference between what he received as the sale price in selling the shares when he did, and what he would have received had the information been generally available.[39] Selling the shares as such was not an offence. Selling them when in possession of inside information was the
10 offence, and so the whole of the sale price was not the benefit.

68. While now is not the occasion to determine the correctness of everything said in the insider trading proceeds cases, it is enough to say that *Mansfield* is not contrary to a "gross profit" approach. What it illustrates is that the full proceeds of the sale of shares may not be the relevant "benefit" to be valued. The question of valuation is separate from, and subsequent to, the question of identification of the benefit. In a case of selling shares with inside information, the benefit is identified as the gain from selling at that particular time rather than the gain from selling at all. In the present case, the relevant "benefits" were the contracts obtained by bribery, not merely the profitable component of those contracts. The purpose of criminalising this conduct was to stamp out bribery in foreign business
20 transactions as pernicious, anti-competitive and amoral, without regard to the fact that the wrongdoer may well have performed and incurred costs in doing so. The relevant benefit being properly identified in this way, it follows that the costs of incurring the benefit do not factor into its valuation.

69. It may also be of interest to consider United Kingdom cases. *R v **Sale*** concerned bribes made in return for commercial contracts under which about $1.9 million was paid to the wrongdoer. The Court of Appeal held that the "benefit" constituted that flow of money plus the pecuniary advantage from the enhanced reputation of the company as a result of securing those contracts.[40] That supports the Crown's submission here. At the stage of fixing the final order, the Court of Appeal applied the Supreme Court's decision in *R v*

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38 (2007) 33 WAR 227 at [30]. Other cases are *Commissioner of Australian Federal Police v Fysh* (2013) 224 A Crim R 523; *DPP v Gay* (2015) 26 Tas R 149; *Gay [No 2]* (2015) 256 A Crim R 194.

39 See (2007) 33 WAR 227 at [49].

40 [2014] 1 WLR 663 at [45]-[46].

Waya,[41] (which had held that the amount of the final confiscation order must not be disproportionate to the legislative objective of removing the fruits of crime in order to comply with Article 1 of the First Protocol to the European Convention on Human Rights[42]), in concluding that the amount of profit, plus the value of the improved market reputation, was the correct amount.[43] This last step in the reasoning in *Sale* does not undermine the Crown case here, because s 70.2(5) does not contain a proviso against disproportionality, of the kind applied in *Sale*, at the stage of fixing a maximum penalty. Proportionality manifests in the instinctive synthesis, and is anchored by reference not to benefit, but to the gravity of the offending.

10 70. The Supreme Court in *R v Andrewes* referred to *Sale* with approval.[44] The Court held that, in the case of a person fraudulently obtaining employment and proceeding to work and "earn" a salary, it was <u>not</u> disproportionate to confiscate the full net earnings where not having the requisite qualifications constituted a criminal offence. This is akin to the case law referred to in paragraph 66 above.[45] This supports the Crown's submission in the present case, because it is inconsistent with the very purpose of s 70.2 to give any credit, at the maximum penalty stage, for what the offender did to perform the corrupted contract. Once the benefits were identified in the present case as the "contracts", they were not to be valued as if the benefits were, in fact, merely the profit made on the contracts.

PART VII ORDERS SOUGHT

20 71. The Crown seeks the orders in the notice of appeal.

PART VIII ESTIMATE OF TIME FOR ORAL ARGUMENT

72. The Crown will require a total of 2 ¼ hours, which includes time for reply.

Dated: 12 January 2023

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41 [2013] 1 AC 294.
42 See [2013] 1 AC 294 at [12].
43 [2014] 1 WLR 663 at [53], [57]-[58], [60].
44 [2022] ICR 1404.
45 If it had not been an underlying criminal offence, the appropriate measure would have been the difference between the offender's higher earnings and what their qualifications would have earned them; which reflects the analysis in paragraphs 67-68 above about the accurate identification of the benefit to be valued.

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

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

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

No	Description	Version	Provision(s)
1.	*Acts Interpretation Act 1901* (Cth)	Current	s 15AA
2.	*Commerce Act 1986* (NZ)	As at 3 Sept 2007 is sufficient (no material change since Jan 2003)	s 80
3.	*Crimes Act 1914* (Cth)	Compilation prepared on 4 Dec 2009	s 4B
4.	*Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth)	As enacted	
5.	*Criminal Code Act 1995* (Cth)	Compilation prepared on 5 Aug 2009	s 70.2
6.	*Criminal Code Act 1995* (Cth)	Compilation prepared on 4 March 2010	ss 11.5, 70.1, 70.2
7.	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	Current	Preamble, article 3
8.	*Trade Practices Legislation Amendment Act (No. 1) 2006* (Cth)	As enacted	Sched 9, item 4