

Setting the maximum penalty for foreign bribery offences committed by a body corporate

R v Jacobs Group (Australia) Pty Ltd [2023] HCA 23



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Sir Owen Dixon Chambers

In *R v Jacobs Group (Australia) Pty Ltd* (2023) [2023] HCA 23 (*Jacobs Group*), the High Court considered the proper construction of s 70.2(5) of the *Criminal Code* (Cth) (*Criminal Code*), which prescribes the maximum financial penalty for a foreign bribery offence committed by a body corporate. The maximum penalty under s 70.2(5) is the greatest of the following three amounts:

- (a) 100,000 penalty units (\$11 million at the time of the offending);
- (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 per cent of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred (the turnover period).

The court held that the term ‘benefit’ is to be interpreted broadly, extending beyond the mere receipt of money for performance of a contract to any advantage reasonably

attributable to the offending. The relevant ‘value of the benefit’ is the gross value of the whole of the benefit obtained rather than the net value, with no deduction for costs or expenses incurred in obtaining that benefit.

The judgment has relevance beyond the foreign bribery offence, with similar maximum penalty provisions appearing elsewhere in the *Criminal Code* and in other legislation including, inter alia, the *Corporations Act 2001* (Cth) (*Corporations Act*), the *Australian Securities and Investments Commission Act 2001* (Cth), and the *Competition and Consumer Act 2010* (Cth) (*Competition and Consumer Act*).

Background

The respondent, Jacobs Group (Australia) Pty Ltd, pleaded guilty to three counts of conspiracy to bribe a foreign official, contrary to s 70.2(1) of the *Criminal Code*. The High Court was concerned only with the calculation of the maximum penalty in relation to the third count, which was committed after the insertion of s 70.2(5) in its current form.

Before the primary judge in the New South Wales Supreme Court, it was common ground that the relevant ‘benefit’ obtained by the respondent and reasonably attributable to the bribery offence was the securing of contracts for carrying out three construction projects. It was also agreed that the ‘value of the benefit’ involved the money received for performing those contracts, a sum which the court could determine. However, what was not agreed was the means by which that value was to be calculated.

The respondent contended for a ‘net benefit’ approach, whereby the value was calculated as the amount it received for performing its contractual obligations less

the costs it paid to third parties to enable that performance, but with no reduction for such costs said to be tainted by the bribery. The Crown contended for a ‘gross benefit’ approach, whereby the value of the benefit was the total gross amount the respondent received for performing the contracts, with no reduction for the costs it incurred in doing so.

The primary judge held that the respondent’s ‘net benefit’ approach was correct. The New South Wales Court of Criminal Appeal (Bell CJ, Walton and Davies JJ), in dismissing the Crown’s appeal against sentence, found that the primary judge did not err in adopting the ‘net benefit’ approach. The Crown was granted special leave to appeal on the sole ground of the maximum penalty issue.

Meaning of ‘benefit’ and ‘the value of the benefit’

The High Court (Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ, Edelman J agreeing with additional reasons) upheld the Crown appeal, holding that ‘the value of the benefit’ under s 70.2(5) is the gross value of the whole of the benefit obtained rather than the net value, with no deduction for costs or expenses of any kind. Where that benefit is limited to the receipt of money, its value is no more and no less than the sum of money in fact received. In additional reasons, Edelman J observed that ‘[t]he valuation is an objective process: it concerns the value of the benefit to a reasonable person in the position of the offender.’

While the parties had agreed that the attributable benefit in this case was limited to the money received for performing the contracts, the court made clear that ‘no narrow view should be taken of the meaning of the “value of the benefit ... obtained” in s



70.2(5)(b).’ The court instead held that the definition of ‘benefit’ is sufficiently broad to capture other advantages that may take a multiplicity of forms, such as goodwill from the generation of future business, competitive advantages, or value that may accrue from the use of money received, all of which either can or cannot be valued.

The court applied long-standing principles of statutory interpretation, including that statutory provisions should be interpreted, so far as possible, to be consistent with international law. This is particularly so for a provision, like s 70.2(5), that was specifically enacted to give effect to international law. The joint judgment ultimately adopted the following approach in interpreting the provision:

The nature of s 70.2(5) of the *Criminal Code* (setting a maximum penalty for a criminal offence), and the context in and purpose for which it was introduced (that is, to increase the fine for legal persons for the offence of bribing a foreign public official to a level that is effective, proportionate, and dissuasive within the meaning of Art 3.1 of the OECD Convention), require that the provision be construed so as to yield a certain content, capable of consistent application. A construction of the provision involving uncertainty and potential inconsistency in application would not be apt to yield a maximum penalty that is ‘effective’ or ‘dissuasive’ ... A construction which achieves these purposes, including by promoting certainty and consistency in application, is to be preferred to one which would fail to achieve these purposes, including by promoting uncertainty or inconsistency in application.

Further, a construction of a provision that it is consistent with the language and purpose of all the provisions of the statute is ordinarily one in which the same meaning is given to the ‘same words appearing in different parts of a statute’. At the least, it is accepted that there needs to be a reason not to give the same words in the same statute the same meaning ...

Applying this approach, the court’s interpretation of ‘the value of the benefit’ was influenced by the following textual and contextual factors:

- (a) The inclusive and expansive definition of ‘benefit’ in s 70.1, which includes ‘any advantage’ and is not limited to property, indicates that no narrow view should be taken as to its meaning: at [27].
- (b) The definition of ‘benefit’ refers only to advantage and not to any concomitant disadvantage, being one indicator against the ‘net benefit’ approach: at [27].
- (c) The provision uses other expansive language, referring to the benefit the body corporate or any related body corporate obtained directly or indirectly and that is reasonably attributable to the offending: at [28].
- (d) The phrases ‘benefit’ and ‘value of the benefit’ are used elsewhere in ss 70.2 and 70.4 where they clearly mean the ‘gross benefit’, and there is nothing to justify giving the phrase a different meaning across the provisions: at [32]–[36].
- (e) The means by which annual turnover is to be calculated for the purposes of limb (c) is prescribed by s 70.2(6), whereas there is no hint that the ‘value of the benefit’ is to be ascertained by some specific process of valuation. In the absence of legislative specificity, the process of valuation would be highly contestable: at [37].
- (f) Valuation processes are imprecise, opinionative and abound with uncertainties. Such a process is profoundly unsuited to a provision for fixing a maximum penalty for an offence and where the Crown must establish the applicable maximum penalty: at [38]. Section 70.2(5)(b) would become a highly contested field of battle, involving competing expert evidence from forensic accountants, the resolution of which does no more than fix the maximum penalty: at [50]–[52].
- (g) The extrinsic material does not refer to the ‘net benefit’ to the body

corporate, but rather equates the whole transaction with the benefit: at [43].

- (h) The ‘gross benefit’ approach best serves the purpose of the legislation to achieve effective, proportionate and dissuasive penalties for bribery offences: at [45].
- (i) The ‘gross benefit’ approach recognises that if an advantage is secured by a bribery offence, the whole advantage is tainted by illegality, as are all costs incurred: at [41]. That an offender incurred costs in performing its obligations under a tainted contract does nothing to lessen the harm caused by foreign bribery: at [46].
- (j) The provision sets a maximum penalty only. The actual penalty is to be determined on the basis of an instinctive synthesis of many factors, including those under s 16A of the *Crimes Act 1914* (Cth), which provide ample scope for consideration of the alleged ‘net benefit’ when setting a penalty that is proportionate to all the circumstances: at [53]. It would involve double counting to embed those same considerations in the setting of the maximum penalty.

Implications of the decision

Jacobs Group is likely to have implications far beyond the foreign bribery offence, with similar, although not identical, maximum penalty provisions applying to Commonwealth offences under other Acts. For example, similar provisions apply to cartel offences and the offence of misleading and deceptive conduct under the *Competition and Consumer Act*. A broadly similar provision also applies to any offence committed by a body corporate under the *Corporations Act*, where the individual maximum penalty for that offence is at least 10 years imprisonment. The decision will also likely influence the interpretation of similar provisions for fixing the maximum fine applicable in civil penalty proceedings.

The High Court’s broad interpretation of ‘benefit’, and the examples provided of the many forms those benefits might take, may result in the Crown (or regulator, in civil penalty cases) alleging a much broader range of attributable benefits than occurred in *Jacobs Group*. The more remote and intangible those alleged benefits are, the more likely it is that a court will be unable to determine the value of those benefits and will instead apply the greater of limb (a) or the 10 per cent annual turnover figure under limb (c). Importantly, though, this will not always result in a higher maximum penalty: three times the attributable benefit may sometimes amount to a figure greater than 10 per cent of the annual turnover. BN