



Penalising benefits obtained from wrongdoing: more bark than bite?

The High Court of Australia has reserved judgment in an appeal considering how to determine the value of a corporation’s “benefit” derived from foreign bribery, for the purpose of setting the maximum penalty for the offence. This judgment may have far-reaching implications for all corporations and directors that face civil or criminal penalties.

On 12 April 2023, the High Court of Australia heard the appeal in *The King v. Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz*. The appeal concerned the maximum penalty that could be imposed on Jacobs Group, which had pleaded guilty to three counts of conspiring to bribe foreign public officials in the Philippines and Vietnam. The legislation set the maximum penalty for the offending in relation to Vietnam as the greatest amount of three limbs. One of those limbs was: three times the value of the benefit Jacobs Group obtained from the offending.

The question before the High Court is whether “benefit” means:

gross benefit (ie the full amount payable under contracts Jacobs Group won as a result of the bribes)

or

net benefit (ie the gross benefit deducting Jacobs Group’s expenses in fulfilling its obligations under the contracts)

Over the last two decades, the Federal Parliament has widely adopted “benefit” as a benchmark for calculating both civil and criminal penalties across the commercial landscape. While each statute must be interpreted on its own terms, the High Court’s judgment on this issue may still have wide-ranging ramifications.

The case

In 2012, Jacobs Group reported itself to the World Bank, Asian Development Bank, Australian Federal Police and Australian Securities and Investments Commission for possible foreign bribery that had taken place between 2000 – 2012. As a result of its involvement in those bribes, Jacobs Group won urban infrastructure construction contracts in the Philippines and Vietnam. Jacobs Group was ultimately charged with, and pleaded guilty to, three offences of conspiring to bribe foreign public officials contrary to sections 11.5(1) and 70.2(1)(a)(iv) of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). The maximum penalty prescribed by the *Criminal Code* is a formulation found frequently in legislation regulating corporate behaviour, namely the greater of:

100,000

100,000 penalty units (at the time, AUD11m)

3x

if the benefit can be determined – three times the value of the benefit that the corporation obtained and that is reasonably attributable to the conduct constituting the offence

10%

if the benefit cannot be determined – 10% of the corporation's annual turnover

The appeal before the High Court relates only to the calculation of the maximum penalty pertaining to the bribery in Vietnam between 2010 – 2012 (**Sequence 3**). The amount payable to Jacobs Group under the resultant contracts was AUD10.13m, while its net benefit (i.e. deducting its expenses from discharging the contract) was AUD2.68m. The NSW Supreme Court and Court of Appeal had held that “benefit” means net benefit, so the value of the maximum penalty set out in the second limb above was AUD8.04m rather than AUD30.39m. According to the submissions of the Commonwealth Director of Public Prosecutions (**CDPP**) to the High Court, this focus on net benefit meant that “ham-fisted wrongdoers” who performed a contract less efficiently, and hence for lower profit, would be treated more leniently under the legislation.

The NSW Supreme Court ultimately handed down a penalty of AUD1.35m for Sequence 3, which included discounts for, among other things, self-reporting and co-operating with authorities. For some, this was a surprising result as the penalty was lower than the net benefit Jacobs Groups obtained from bribery, raising the question as to whether certain corporations might conclude that the penalty for getting caught is simply a cost of doing business.

The CDPP – which has an official policy of exercising restraint in appealing against sentences – chose to challenge this sentence before Australia's highest court.

The ramifications

Australia's penalty formulation for foreign bribery offences – and numerous other civil penalty contraventions and criminal offences for corporations and directors – was inspired by the penalty provisions in what is now the *Competition and Consumer Act 2010* (Cth). As a result, the High Court's determination of the meaning of "benefits" could have ramifications across the corporate landscape. Similar maximum penalty formulations exist in a myriad of statutes, including relating to:



domestic bribery under the *Criminal Code Act 1995* (Cth)



making certain false or misleading representations or engaging in cartel conduct under the *Competition and Consumer Act 2010* (Cth)



breach of directors' duties and continuous disclosure obligations under the *Corporations Act 2001* (Cth)



engaging in unconscionable conduct or making false or misleading representations in connection with financial services under the *Australian Securities and Investments Commission Act 2001* (Cth)



exporting prohibited goods under the *Export Control Act 2020* (Cth)



licensees suggesting that customers remain in unsuitable credit contracts under the *National Consumer Credit Protection Act 2009* (Cth)

The High Court's judgment may take on either a narrow or broader scope. For example, it could limit its judgment to a determination regarding only whether expenses should be taken into account when assessing the benefit under a contract obtained illegally. Alternatively, it could adopt a general determination that courts should not consider any expenses when calculating a "benefit" in penalty provisions, thereby greatly increasing maximum penalties available for misconduct.

Each individual statute must be interpreted according to its own terms and context. However, given the similarity in wording across these provisions, and the cross-references to other such similar provisions in secondary materials, a definitive ruling from the High Court could have far-reaching implications beyond the *Criminal Code*. These same factors also mean that, if the High Court dismisses the appeal, the Federal Parliament may ask itself whether the current maximum penalty provisions across the corporate landscape are adequate deterrents and, if not, whether legislative reform is required.