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Calculating the Benefit of Corporate Offending:

The High Court Deliberates

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Introduction

- The penalties specified for corporate offences have a number of roles. Deterrence and punishment are two of those roles. In pursuit of these objectives, Parliament has increasingly turned to legislating penalty provisions that provide the courts with a number of options, sometimes with a direction to apply the option that results in the highest penalty. These options frequently seek to ensure that the payment of a monetary penalty is not able to be seen as a cost of doing business by linking the penalty to the benefit obtained.
- But how do you determine the benefit of an offence? This is the question the High Court has been asked to determine in the recent appeal from the NSW Court of Criminal Appeal in *The King v Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz* (S148/2022).
- The court has been asked to determine the proper construction of the phrase "the value of the benefit" as it appears in the corporate penalty provision for foreign bribery offences under the Commonwealth Criminal Code. While this particular case relates to foreign bribery, the statute books are replete with the same (or very similar) penalty provisions, including in the Competition and Consumer Act 2010, the Corporations Act 2001, the Privacy Act 1988 and the Customs Act 1901. The relevant offences include cartel conduct, market manipulation, false and misleading statements, insider trading and serious interferences with privacy.
- In circumstances in which setting the maximum penalty for a corporation involves, where possible, identifying "the value of the benefit" that is reasonably attributable to the contravention (and then multiplying that figure by three), the High Court's view on the meaning of benefit will have a material effect on the calculation of penalties for corporations that contravene any of these offence provisions.

Background

1. *The King v Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz* (S148/2022) was heard by the full bench of the High Court on 12 April 2023. An engineering and technical services company had entered guilty pleas in the Magistrates Court to charges of conspiracy to bribe foreign public officials.
2. The conduct in question was agreed to have occurred over the space of a decade in Vietnam and the Philippines with the bribes paid to secure the award or continuing performance of various philanthropic projects funded by the World Bank or the Asian Development Bank. The appeal from the NSW Court of Criminal Appeal relates to the way in which the maximum penalty for the offending should be determined.

The Penalty Provision

3. The penalty provision for a corporation guilty of foreign bribery is found in section 70.2(5) of the Commonwealth Criminal Code, which provides that the maximum penalty is the greater of:
   a. 100,000 penalty units (currently AU$27.5 million)
   b. If the court can determine the value of the benefit that the body corporate (and any related body corporate) obtained directly or indirectly that is reasonably attributable to the conduct constituting the offence, three times the value of that benefit
   c. If the court cannot determine the value of the benefit, 10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the conduct constituting the offence occurred
4. Prior to the proceedings at first instance, the parties had agreed that the "value of the benefit" could be determined; this excluded the application of the third limb of the penalty provision that calculates the penalty by reference to the annual turnover of the company. However, the parties could not agree on what the value of the benefit actually was. In essence, the prosecution contended that the benefit obtained by the company was the total fee payable to the defendant by the foreign government for each contract obtained by the payment of a bribe. The defendant company (which had essentially only project managed the services the subject of the relevant agreements) contended that the "value of the benefit", properly construed, was the total fee payable less the legitimate costs incurred in performance of the contracts.
5. Because the margins were small, three times this amount was less than 100,000 penalty units (which at the time of the offending was AU$11 million) and so, on the defence case, the maximum penalty was AU$11 million. If the "total contract fee" case put forward by the prosecution was accepted, the maximum penalty would be approximately AU$30 million. At first instance, and in the NSW Court of Criminal Appeal, the defendant company had prevailed on the "benefit" construction argument.[1]

1 *R v Jacobs Group (Australia) Pty Ltd* (2022) 367 FLR 365 per Bell CJ.

The Competing Arguments

6. In the High Court appeal, the crown argued that the term "benefit" is of broad import and not limited to net amounts received by a business after deducting expenses incurred in generating the revenue. The crown contended that its view of the term "benefit" is consistent with the way in which that term is used in the substantive offence provision (i.e. for the bribe) and that the fact that the offender incurred costs of performance did not lessen the damage to the foreign country, Australia's reputation or international commerce. The crown also contended that the absence of any legislative instructions as to how the benefit should be calculated militated against a finding that "complex" deductions should be allowed for legitimate expenses.

7. In response, Jacobs argued that the natural and ordinary meaning of "benefit" is "net benefit", which reflected the view adopted by the judge at first instance and the Court of Criminal Appeal. The company also contended that the crown's suggestion that the contract price equates to money "extracted" to the detriment of the foreign system is misconceived because the foreign government actually received what it had paid for. In the case of a corruptly won contract to build a bridge, the performance of the contract will result in the foreign government receiving a bridge as promised. Jacobs also argued that courts are well versed in tasks akin to the determination of benefit – for example, calculating loss – and the absence of a specific statutory framework to determine benefit is no impediment to that task being undertaken.

Previous Authorities on the Meaning of Benefit

8. Reference was made by both parties to authorities under the proceeds of crime legislation which also requires a determination of "benefit" for the purpose of determining the amount of ill-gotten gains to be recovered from an offender. Those cases fall broadly into two categories.

   a. First, cases relating to insider trading in which the courts have allowed the legitimate cost of purchasing shares to be deducted from the money made by selling those shares while in possession of inside information.[2]

   b. Those cases can be contrasted with the "drug cases" in which the courts have appropriately rejected the proposition that a supplier of drugs should be allowed to discount its costs of precursor materials or production from the profit made by selling the drugs because the whole arrangement is tainted with illegality.[3] These authorities appear to broadly support the defendant company's net benefit approach.

Questions From the Bench

9. Although nothing should be assumed by reference to questions from the High Court bench, one line of questioning focused on certain conceptual issues arising from a premise underpinning the crown's argument, namely that all contracts have a "headline" figure or price by which the "benefit" can be determined. In many instances, the money that might flow under an executory contract will be determined by mechanisms within the agreement that are determined by external factors, and, therefore, at any given time (for example, at the time of sentencing), it may not be feasible to identify a "contract price". The crown riposte to this difficulty is of course that, in those circumstances, the "benefit" cannot be determined and therefore the third limb of the penalty provision is triggered, and the maximum penalty is determined by reference to 10% of the company's annual turnover.

Key Takeaways

- The High Court's decision in relation to the proper construction of the "value of the benefit" will be binding on sentencing courts that are required to determine the benefit obtained by a corporation when setting a maximum penalty. Because of the prevalence of this penalty provision, this will be relevant to a whole range of offence provisions.
- The maximum penalty is used by the sentencing courts as a yardstick when undertaking the "instinctive synthesis" to determine the sentence that is just and appropriate in all of the circumstances of the case. The maximum sentence is reserved for those cases falling within the worst category of offending.
- If the Crown view on benefit prevails, sentencing courts will adopt a "gross" benefit approach to determining the maximum penalty. Conversely, if the decision of the NSW Court of Criminal Appeal is upheld, sentencing courts can take into account, and deduct, legitimate expenses when determining the value of the benefit.

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2 See *Mansfield v DPP* (2007) 33 WAR 227; *Commissioner of Australian Federal Police v Fysh* (2013) A Crim R 523; *DPP v Gay [No 2]* (2015) 256 A Crim R 194.
3 See *DPP v Nieves* [1992] 1 VR 257; *R v Peterson* [1992] 1 VR 297.

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