

Introduction

There has been a final twist in the appellate saga between the Crown and Jacobs Group (Australia) Pty Ltd (Jacobs). The High Court has unanimously overturned the NSW Court of Criminal Appeal's construction of the phrase "the value of the benefit" as it appears in the foreign bribery corporate penalty provision in the Commonwealth Criminal Code.

Although this case related to foreign bribery, the same or similar penalty provisions are found throughout the federal statute books, and so the High Court's broad interpretation of "benefit" may have ramifications for a broad range of corporate offending in Australia.

Background

A detailed summary of the facts of the case can be found in [our previous article on this topic](#). In summary:

1. Jacobs entered guilty pleas to three charges under Section 70.2(1) of the Commonwealth Criminal Code for conspiring to bribe foreign officials to secure contracts for construction and infrastructure projects in the Philippines and Vietnam.
2. Jacobs' third charge was subject to the new maximum penalty under Section 70.2(5) of the code. For that charge, the maximum penalty was the greater of 100,000 penalty units (AU\$11 million when the offending occurred, now \$31.3 million) or three times the "value of the benefit" that was reasonably attributable to the offending.
3. The parties had agreed that the "value of the benefit" could be determined by reference to the contracts procured through bribery but disagreed on what the "value of the benefit" was. The Crown contended it was the total contract fee received (a "gross" approach) while Jacobs contended it was the total contract fee received less the cost of performing the contract (a "net" approach).
4. The Supreme Court of New South Wales and the Court of Criminal Appeal upheld Jacobs' "net benefit" construction, under which legitimate expenses, costs and outgoings are deducted from that gross amount to determine the "value of the benefit". This resulted in a "benefit" obtained under the contracts of AU\$2.7 million. Because this figure multiplied by three is less than AUD\$11 million, the maximum sentence was AUD\$11 million.
5. The Crown was granted special leave to appeal the NSW Court of Criminal Appeal decision to the High Court.

The Reversal

6. The majority (Kiefel CJ, Gageler, Gordon, Stewart, Gleeson and Jagot JJ) rejected the approach taken by the Court of Criminal Appeal, finding that, on the facts of this case, the "value of the benefit" is the gross sum of money received under the contracts and any other intangible advantages. A "benefit" for the purpose of the penalty provision is to be calculated irrespective of any concomitant costs or expenses.
7. The majority judgment draws heavily from Australia's international obligations under the Organisation for Economic Co-operation and Development (OECD) convention on preventing foreign bribery, and reading the legislation in a way that is consistent with international law.
8. The majority held that the "gross benefit" approach aligned with Australia's obligations under the OECD, which were the catalyst for the legislative amendments that introduced the significantly more punitive penalty provision in the first place. In the absence of textual indicators to the contrary, the High Court also found it preferable for the term "benefit" to be read in a way that is consistent across the substantive offence provision (in relation to the bribe) and the penalty provision (in relation to the gain).
9. The court has also rejected the view adopted by the Court of Criminal Appeal that the "value" of a contract is ascertained by identifying the conditional contractual rights to payment, subject to the costs of performance. In the majority view, if an advantage is secured by a bribery offence, the whole advantage is tainted by illegality, as are all costs incurred (both external and internal). This construction, according to the majority, best serves the purpose of the legislation to achieve effective, proportionate and dissuasive penalties for bribery offences.
10. Interestingly, in his separate judgment, Edelman J concedes there is no "value" in contractual rights that will plainly make a company worse off. Nevertheless, in circumstances in which, as in this case, performance had been rendered and payment received, like the majority, His Honour preferred to construe "benefit" by reference to the gross sum received, primarily because there may be additional, cumulative benefits even if it costs more to perform the contract than it was worth. His Honour gives the example of a "loss leader" project where a company may deliberately enter into a contract in which it will lose money, to establish itself in a new market (which itself is a "benefit").

11. The majority judgment also foresaw a “net benefit” approach as being susceptible to unnecessarily complex contests between the parties when attempting to characterise and quantify any permissible deductions. In the High Court’s view, a “net benefit approach” would also introduce unnecessary uncertainty and inconsistency, which would constrict the otherwise expansive reach of the penalty provision to capture any direct and indirect advantages obtained by offenders.
12. Finally, the High Court rejected the respondent’s argument that allowing legitimate deductions would be consistent with proceeds-of-crime cases relating to insider trading, where 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 (as opposed to the “drug cases” where, sensibly, no deductions from profit have been allowed for precursor materials). In the High Court’s view, a legislative purpose of requiring proceeds of crime to be disgorged, of its nature, calls for a targeted approach focusing on the funds tainted by illegality while a maximum penalty for a crime of obtaining benefit through bribery is a different context and requires no such focus.

Key Takeaways

- The effect of the decision is that the maximum penalties applicable to companies engaging in foreign bribery could now turn much upon the industry a company operates in. Companies with large contract fees but low margins will find themselves particularly at risk of very high maximum penalties. Those with low contract fees and high profit margins may in contrast face fines determined by reference to much lower maximums. Quite how this approach will interact with the concept of “proportionality” remains to be seen.
- The effect of this decision is likely to extend far beyond foreign bribery offending. As noted in our previous [article](#), the same or substantially similar penalty provisions can be found in many other federal statutes, including the Competition and Consumer Act 2010, the Corporations Act 2001, the Privacy Act 1988 and the Customs Act 1901. The “gross benefit” approach to construing the “value of the benefit” could increase the maximum penalty for a whole range of offences, including cartel conduct, market manipulation, false and misleading statements, corporate insider trading and serious interferences with privacy.
- The new approach will also impact the “instinctive synthesis” exercise carried out by sentencing courts. In circumstances in which, after legitimate expenses, no money was made under a particular contract tainted by illegality, this will need to be taken into account as a mitigating factor in determining the sentence that is appropriate in all of the circumstances of the case rather than having relevance to the maximum penalty “yardstick”.

Authors



Graeme Slattery

Partner, Sydney
T + 61 2 8248 7876
E graeme.slattery@squirepb.com



Tom Haystead

Senior Associate, Sydney
T + 61 2 8248 7807
E tom.haystead@squirepb.com



Rebecca Heath

Partner, Perth
T + 61 8 9429 7476
E rebecca.heath@squirepb.com



Marcus Lee

Law Graduate, Sydney
T + 61 2 8248 7857
E marcus.lee@squirepb.com