

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

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THE KING

APPELLANT

AND

JACOBS GROUP (AUSTRALIA) PTY LTD  
FORMERLY KNOWN AS SINCLAIR KNIGHT MERZ    RESPONDENT

*The King v Jacobs Group (Australia) Pty Ltd*  
[2023] HCA 23  
*Date of Hearing: 12 April 2023*  
*Date of Judgment: 2 August 2023*  
S148/2022

## ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Criminal Appeal of New South Wales made on 11 July 2022, in so far as it dismissed the appeal against sentence for sequence three, and remit the matter to that Court for redetermination of that part of the appellant's appeal under s 5D of the Criminal Appeal Act 1912 (NSW).*

On appeal from the Supreme Court of New South Wales

### Representation

J T Gleeson SC with C J Tran for the appellant (instructed by Commonwealth Director of Public Prosecutions)

B W Walker SC with N M Kirby for the respondent (instructed by Jones Day)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **The King v Jacobs Group (Australia) Pty Ltd**

Statutes – Construction – Where respondent pleaded guilty to offences of conspiracy to cause offer of provision of bribe to foreign public official contrary to ss 11.5 and 70.2(1) of *Criminal Code* (Cth) – Where s 70.2(5) of *Criminal Code* (Cth) relevantly prescribed maximum monetary penalty for offence as not more than greatest of: (a) 100,000 penalty units; or (b) if court can determine value of benefit that body corporate obtained that is reasonably attributable to conduct constituting offence, three times value of that benefit – Where parties agreed "benefit" obtained was securing contracts for carrying out construction projects – Where parties also agreed "benefit" obtained was money received for performing contracts – Whether s 70.2(5)(b) required value of benefit obtained by respondent to be determined as sum of amounts respondent in fact received under contracts secured by bribery – Whether deduction could properly be made for any costs incurred in performing contracts.

Words and phrases – "any advantage", "benefit", "bribery", "effective, proportionate, and dissuasive", "fine", "foreign public official", "gross amount", "international obligations", "maximum penalty", "monetary penalty", "net benefit", "obtained directly or indirectly", "OECD Convention", "reasonably attributable", "sentence", "value of the benefit".

*Criminal Code* (Cth), s 70.2.



1 KIEFEL CJ, GAGELER, GORDON, STEWARD, GLEESON AND JAGOT JJ.  
If a body corporate bribes, or conspires to bribe, a foreign public official<sup>1</sup>, it is liable to be punished on conviction by a monetary penalty<sup>2</sup>. The issue in this appeal is the proper construction of s 70.2(5) of the *Criminal Code* (Cth)<sup>3</sup>, which is a provision that prescribes the maximum monetary penalty for that offence as a fine not more than the greatest of the following:

- "(a) 100,000 penalty units<sup>[4]</sup>;
- (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."

2 The respondent pleaded guilty to three charges of conspiracy to cause an offer of the provision of a bribe to a foreign official. This appeal is concerned only with the third count, which related to a period after the maximum penalty provision was amended by the insertion of s 70.2(5) in the terms identified above<sup>5</sup>.

3 Before the primary judge in the Supreme Court of New South Wales, it was common ground that the benefit the respondent and its related bodies corporate

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1 The offence provision is s 70.2(1) of the *Criminal Code* (Cth). Section 11.5 of the *Criminal Code* provides for the same penalty for a person who conspires with another to commit that offence.

2 *Criminal Code*, s 70.2(5).

3 See s 3 and the Schedule to the *Criminal Code Act 1995* (Cth).

4 At the time, each penalty unit was \$110 (s 4AA of the *Crimes Act 1914* (Cth)) so that 100,000 penalty units gave a penalty of \$11 million.

5 *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth), Sch 8, item 3.

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obtained, directly or indirectly, and that was reasonably attributable to the conduct constituting the third count was securing contracts for the carrying out of three construction projects. It was also agreed that the "value of the benefit" that the respondent so obtained involved the money received for performing those contracts, a sum which could be determined<sup>6</sup>.

4 The respondent contended that the value of the benefit it obtained was the amount it received for performing its obligations under the contracts less the costs it paid to third parties to enable that performance, excluding all such costs paid, or possibly paid, as part of the bribery offence. This was referred to as a "net benefit" approach. Before the primary judge, the respondent's position was that:

"The net amount received by [the respondent] and its related body corporates in respect of the conduct ... was **AUD \$2,680,816**. It is [the respondent's] position that this is the relevant benefit that should be used to determine the maximum penalty in accordance with s 70.2(5)(b) of the Code. As three times this amount is less than \$11,000,000.00, the maximum penalty would be calculated in accordance with s 70.2(5)(a), which is \$11,000,000."

5 The Crown contended that the value of the benefit the respondent obtained was the total gross amount the respondent received for performing its obligations under the contracts. Before the primary judge, the Crown's position was that:

"The total gross amount received by [the respondent] in respect of the three projects ... was **AUD \$10,130,354**. It is the Crown's position that this is the relevant benefit that should be used to determine the maximum penalty in accordance with s 70.2(5)(b) of the Code."

6 While the parties referred to the Crown's approach as the "contract price" approach (in contrast to the respondent's "net benefit" approach), that is a misnomer. The sum of the contract prices for the three projects is unknown. What is known is the gross amount the respondent received for the performance of these contracts and the external costs the respondent incurred in that performance. Accordingly, the label "contract price", in this case, does not mean the amount promised to be paid under the contracts, but the amount in fact received under the contracts.

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6 *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [125].

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7 The primary judge held that the respondent's "net benefit" approach was correct<sup>7</sup>. As three times the value of the benefit yielded by this approach was less than the 100,000 penalty units in s 70.2(5)(a) of the *Criminal Code*, the maximum penalty for the relevant bribery offence was 100,000 penalty units or \$11 million<sup>8</sup>. The primary judge assessed the penalty to be imposed for the relevant offence based on this maximum penalty<sup>9</sup>. If the Crown's "contract price" approach had been adopted, three times the value of the benefit yielded (totalling \$30,391,062) would have been greater than the amount in s 70.2(5)(a) of the *Criminal Code* (\$11 million), so that the maximum penalty would have been as specified in s 70.2(5)(b)<sup>10</sup>.

8 The Crown appealed against sentence. The Court of Criminal Appeal of New South Wales dismissed the appeal<sup>11</sup>.

9 The Crown was granted special leave to appeal. The only issue in this Court is that described at the hearing before the primary judge – whether, as the Crown contended, the value of the benefit that the respondent obtained as a result of the bribery offence was the amount it received in performing the contracts or whether, as the respondent contended, the value of the benefit was that amount net of costs, expenses, or other outgoings incurred in performing the contracts, other than costs or expenses paid, or possibly paid, as part of the bribery.

10 For the following reasons the appeal must be allowed. On the facts of the present case, the value of the benefit the respondent obtained and that is reasonably attributable to the conduct constituting the offence is the amount it received for performing the contracts. That amount was agreed to be \$10,130,354<sup>12</sup>. As three times that amount is \$30,391,062, being greater than the amount of the penalty of

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7 *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [140].

8 *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [141].

9 *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [142].

10 In this case, three times \$10,130,354 (being the gross amount paid to the respondent for performing the contracts secured by the bribery offence), or \$30,391,062. See *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [126].

11 *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377.

12 *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [126].

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| <i>Steward</i> | <i>J</i>  |
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100,000 penalty units (or \$11 million) in s 70.2(5)(a), the maximum penalty for the third count was \$30,391,062. The penalty to be imposed by way of sentence was to be assessed based on this maximum penalty.

## The statutory scheme

### *History*

- 11 Division 70 of Ch 4 of the *Criminal Code* was enacted as part of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth) "to implement the OECD [Organisation for Economic Co-operation and Development] Convention on Combating Bribery of Foreign Officials in International Business Transactions, which is a very significant response by the international community to the problem of transnational corruption"<sup>13</sup>. The provisions of Div 70 were intended to "convey a message to the world and the Australian community that the parliament takes the problem of bribery seriously"<sup>14</sup>. The reasons given for why "[i]t [was] important that Australia should support the OECD's initiative to combat the bribery of foreign public officials and take a principled stand against corruption"<sup>15</sup> were that "[b]ribery 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"<sup>16</sup>. Further, the Explanatory Memorandum for the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999* (Cth) explained that the Bill ensured "Australia complies with the key feature of the OECD Convention on Combating Bribery of

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13 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 June 1999 at 6044.

14 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 June 1999 at 6044.

15 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 June 1999 at 6044.

16 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 June 1999 at 6044-6045.

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Foreign Public Officials in International Business Transactions ('the OECD Convention')"<sup>17</sup>.

12 A subsequent OECD review of implementation of the OECD Convention<sup>18</sup> exposed that the penalties in Div 70 (which were a maximum fine of \$66,000 for an individual and \$330,000 for a body corporate) were inadequate, having regard to Art 3.1 of the OECD Convention which provides that "[t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties". The OECD Working Group on Bribery in International Business Transactions approved and adopted the recommendation made by the OECD Directorate for Financial and Enterprise Affairs 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 [multinational enterprises] with headquarters in Australia"<sup>19</sup>.

13 Subsequently, Australia introduced the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* (Cth). In the Second Reading Speech for the Bill, the Attorney-General of the Commonwealth explained that the Bill "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"<sup>20</sup>.

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17 Australia, Senate, *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999*, Explanatory Memorandum at 3. Australia became a signatory to the OECD Convention on 7 December 1998.

18 OECD Directorate for Financial and Enterprise Affairs, *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).

19 OECD Directorate for Financial and Enterprise Affairs, *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.

20 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 September 2009 at 9705.

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The Replacement Explanatory Memorandum for the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* identified that the Bill "will 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*)"<sup>21</sup>. It said that the "amendments ensure that penalties for these offences are sufficiently high to deter and punish bribery in the domestic and international spheres"<sup>22</sup>. In other words, the penalty should not be, or be perceived to be, "'a cost of doing business' when international transactions worth millions of dollars occur"<sup>23</sup>. It recorded that the existing penalties had been criticised as insufficient, saying that "in the Phase 2 review of Australia's implementation of the OECD Convention ... in 2006, [the OECD] considered the penalties were not 'effective, proportionate and dissuasive' as required by the Convention"<sup>24</sup>. The Replacement Explanatory Memorandum said that<sup>25</sup>:

"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 [scil \$10,670,000] 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

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21 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 3.

22 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 188.

23 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 188.

24 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 188.

25 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 189.

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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."

*The statutory provisions*

15 Chapter 4 of the *Criminal Code* contains the relevant provisions. Section 70.1 contains definitions including that, in Div 70:

"**benefit** includes any advantage and is not limited to property.

**business advantage** means an advantage in the conduct of business."

16 Section 70.2(1) is the offence provision. At the date of the offence, it was relevantly in these terms:

"(1) A person is guilty of an offence if:

(a) the person:

- (i) provides a benefit to another person; or
- (ii) causes a benefit to be provided to another person; or
- (iii) offers to provide, or promises to provide, a benefit to another person; or
- (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person; and

(c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:

- (i) obtain or retain business; or
- (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient,

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of the business advantage (who may be the first-mentioned person)."

17 By s 70.2(1A), it is not necessary to prove that business, or a business advantage, was actually obtained or retained to prove an offence under s 70.2(1). By s 70.2(2), in working out if a benefit is not legitimately due to a person in a particular situation, the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation, the value of the benefit, and any official tolerance of the benefit are to be disregarded.

18 The penalty provision in s 70.2(5) is set out above<sup>26</sup>. For the purpose of that provision, s 70.2(6) provides that the annual turnover of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than specified supplies.

19 Section 70.3 identifies certain defences, one element of which is that, in effect, the written law in force in the place where the person's conduct is taken to have occurred "requires or permits the provision of the benefit".

20 Section 70.4 provides another defence in these terms:

"(1) A person is not guilty of an offence against section 70.2 if:

- (a) the value of the benefit was of a minor nature; and
- (b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
- (c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and
- (d) any of the following subparagraphs applies:
  - (i) the person has retained that record at all relevant times;

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26 See [1].

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- (ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;
- (iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred."

21 Division 141 of Pt 7.6 in Ch 7 of the *Criminal Code* contains cognate provisions in respect of the bribery of a Commonwealth public official.

### **Construing s 70.2(5)**

22 A "'long standing' principle of interpretation is that statutory provisions should be interpreted, so far as possible, to be consistent with international law"<sup>27</sup>. This is particularly so where a provision, like s 70.2(5) of the *Criminal Code*, seeks to give effect to matters of international law<sup>28</sup>.

23 "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' ... 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed."<sup>29</sup>

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27 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 at [16].

28 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 at [16].

29 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (footnotes omitted).

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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<sup>30</sup> 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". Moreover, in this context, it must be recognised that the overall statutory object of "proportionality" is not focused on the relationship between the benefit obtained by the offender from the bribery offence and the size of the penalty. The phrase, "effective, proportionate and dissuasive criminal penalties", has a clear genesis and meaning in European law<sup>31</sup> which, it may be inferred, informed the language of the OECD Convention. In this context, "proportionate" means proportionate "to the gravity of the infringement"<sup>32</sup>, of which the benefit to the offender may be but one aspect. 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<sup>33</sup>.

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30 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 188.

31 *Commission of the European Communities v Hellenic Republic* (C-68/88) [1989] ECR 2965 at 2985 [24]. See also, eg, *Anklagemyndigheden v Hansen & Søn I/S* (C-326/88) [1990] ECR I-2911 at I-2935 [17]; *Criminal proceedings against Paul Vandevenne* (C-7/90) [1991] ECR I-4371 at I-4387 [11], I-4388 [13]; *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (C-383/92) [1994] ECR I-2479 at I-2494 [40]; *Siesse – Soluções Integrais em Sistemas Software e Aplicações Lda v Director da Alfândega de Alcântara* (C-36/94) [1995] ECR I-3573 at I-3594 [20].

32 *Commission of the European Communities v Hellenic Republic* (C-210/91) [1992] ECR I-6735 at I-6753 [20]. See also *Ainārs Rēdlihs v Valsts ieņēmumu dienests* (Court of Justice of the European Union, C-263/11, ECLI:EU:C:2012:497, 19 July 2012) at [47].

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

25 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<sup>34</sup>. As will be explained, no such reason is apparent in the provisions of Div 70. To the contrary, the provisions constitute a harmonious scheme in which both "benefit" and "value of the benefit" – being the benefit provided or obtained – take the same meaning in all provisions. That meaning is the value of the advantage as provided or as obtained, no more and no less. In the case of money paid or money received, the value of the advantage is the amount of the money provided or the amount of the money received. In the case of money received to perform a contract secured by bribery, no deduction for costs and expenses of any kind, nor for risk, forms part of the value of the relevant "benefit" obtained.

26 There are several textual indicators that the "value of the benefit ... obtained" in s 70.2(5)(b) is not concerned with the amount of the "net benefit" which the body corporate obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence.

27 The definition of "benefit" as including "any advantage" and not being limited to property in s 70.1 is an important element enabling the legislature's intention of establishing penalties that are effective, proportionate, and dissuasive to be achieved. "[A]ny advantage" means what it says. It means any "advantage", not any advantage less any concomitant disadvantage or burden or risk to which the offender was subject in obtaining the advantage. The inclusive and expansive definition of "benefit" indicates that no narrow view should be taken of the meaning of the "value of the benefit ... obtained" in s 70.2(5)(b). An advantage may take a multiplicity of forms. It includes, but is not limited to, the receipt of money. In this case, it was common ground that the advantage which the respondent obtained was the contracts and the value of that advantage involved the receipt of money for performing those contracts. In such a case, the constructional issue is whether the relevant analysis for ascertaining the maximum penalty under s 70.2(5) is thereby answered – that the value of the benefit is the money received – or if s 70.2(5)(b) requires a further process of netting off against the money received any amounts, be those amounts confined to costs and expenses paid to

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34 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618. See *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 387 [65], fn 52; 328 ALR 375 at 389.

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| <i>Steward</i> | <i>J</i>  |
| <i>Gleeson</i> | <i>J</i>  |
| <i>Jagot</i>   | <i>J</i>  |

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third parties not including any such amounts potentially tainted by the illegality of bribery (as the respondent in this case proposed) or otherwise. The fact that the definition of "benefit" refers only to "advantage" and not to any concomitant disadvantage or burden or risk in securing the advantage is one indicator against the construction for which the respondent advocated and which the courts below accepted.

28       The "value of the benefit ... obtained" does not appear in isolation in s 70.2(5)(b). The provision refers to 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". In common with the definition of "benefit", this is expansive language. The offence need not have caused or resulted in the advantage for the advantage to be within the scope of s 70.2(5)(b). Again, the focus is the obtaining of the advantage. There is again no reference to any disadvantage or burden or risk that might have been involved in the obtaining of the benefit or advantage. This is another indicator against the construction for which the respondent advocated and which the courts below accepted.

29       For example, Bell CJ (with whom Walton and Davies JJ agreed) said that "[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"<sup>35</sup>. This, however, assumes that the benefit is confined to the profit made for performance of that contract. For one thing, the benefit may be broader than securing that contract. It may include other advantages which either can or cannot be valued. An obvious example is a body corporate engaging in a loss leader strategy in a new and foreign market. For another, money received, cash flow, is itself an advantage, irrespective of concomitant costs and expenses.

30       Further, s 70.2(5)(b) is part of a scheme which includes s 70.2(5)(a) and (c). These paragraphs involve a mutually exclusive hierarchy, given that it is the greatest amount of the fine yielded by application of all paragraphs which is the maximum penalty. While the value of the benefit obtained in s 70.2(5)(b) is different from the annual turnover in s 70.2(5)(c), nothing in the language of the scheme suggests that the "value of the benefit ... obtained" involves some netting off process of any kind. If, in the case of money received, the value of the benefit obtained is no more and no less than the money in fact obtained (irrespective of any costs, expenses or risks in obtaining that money), the two integers – value of

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35   *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 398 [95].

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the benefits obtained and turnover – are not the same<sup>36</sup>. Section 70.2(5)(b), relating to the value of the benefit obtained, focuses on the advantage obtained from the bribery offence, if it can be determined. Section 70.2(5)(c), relating to annual turnover, focuses on the "turnover period" which is the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred. Accordingly, it should not be assumed that s 70.2(5)(b) does not mean the gross amount of money a body corporate received from a bribery offence because annual turnover involves gross amounts received as specified in s 70.2(6)<sup>37</sup>. The temporal focus of the paragraphs is different. Moreover, not every advantage obtained will be the payment of money. The expansive language of s 70.2(5)(b) is sufficient to capture the value of all benefits obtained, if that value can be determined.

31 It also should not be assumed that the hierarchy in s 70.2(5) is intended to provide an incentive to a body corporate to disclose the value of the benefit obtained<sup>38</sup>. The value of the benefit obtained may be more or less than the annual turnover calculated in accordance with ss 70.2(5)(c) and 70.2(6). As a result, a body corporate may or may not have an incentive to contend that the value of the benefit can be determined and to disclose its records for that purpose. Assumptions of this kind, which do not hold across the board, cannot inform the process of statutory construction.

32 Section 70.2(1)(a) is also relevant. By s 70.2(1)(a), an element of the offence is that the person provides a benefit (or causes a benefit to be provided, or offers or promises to provide a benefit, or causes an offer or promise to provide a benefit to be made) to another person. In s 70.2(1)(a) "benefit" plainly takes its defined meaning of "any advantage". In the context of s 70.2(1)(a), moreover, the "benefit" is also plainly the advantage (whatever it be) provided to the other person, not the "net cost" to the provider or the "net benefit" provided to the other person.

33 Further, s 70.2(2)(b) says that, in working out if a benefit is not legitimately due to a person in a particular situation, the value of the benefit is to be disregarded.

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36 cf *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 399 [99]; *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [130].

37 cf *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 399 [99]; *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [130].

38 cf *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [130].

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| <i>Gageler</i> | <i>J</i>  |
| <i>Gordon</i>  | <i>J</i>  |
| <i>Steward</i> | <i>J</i>  |
| <i>Gleeson</i> | <i>J</i>  |
| <i>Jagot</i>   | <i>J</i>  |

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Section 70.2(2)(b) is a machinery provision. Section 70.2(2)(b) operates if, for example, a person is legitimately due some advantage (eg, payment of \$1,000) but is provided with some benefit which is different from the legitimately due advantage (eg, difficult-to-obtain tickets to an event with a face value of \$1,000). In that case, the apparent value of the benefit, being the tickets to the event (\$1,000), is to be disregarded. The control on liability for the offence would then be whether the tickets to the event were given only with the intention of paying the debt of \$1,000 or with the intention proscribed by s 70.2(1)(c) (to influence a foreign public official in the exercise of the official's duties as a foreign public official in order to obtain or retain business or a business advantage that is not legitimately due to the recipient or intended recipient). In this example, the value of the benefit could not be said to be \$1,000 less the costs incurred in attending the event (which might depend on the profligacy or austerity of the recipient of the tickets). Accordingly, the "value of the benefit" in s 70.2(2)(b) is also not directing attention to the amount of the "net benefit" the person has been provided.

34           Given that s 70.2(5)(b) and s 70.2(2)(b) both use the phrase "value of the benefit", what is the reason to give them a different meaning? The fact that s 70.2(5)(b) refers to the "value of the benefit ... *obtained*" (emphasis added) is not a rational reason. In the offence of bribery there is necessarily an advantage provided in return for some advantage obtained. Div 70 is all about persons providing one advantage to obtain another advantage, whether that other advantage be immediate, future, contingent, or otherwise. Nothing justifies one concept of the value of the benefit provided and a different concept of the value of the benefit obtained.

35           Sections 70.4(1)(a), 70.4(1)(c) and 70.4(3) also weigh against the "value of the benefit ... obtained" in s 70.2(5)(b) meaning the amount of the net benefit to the body corporate that committed the offence. An element of the defence under s 70.4(1)(a) is that "the value of the benefit was of a minor nature". In s 70.4(1)(a) the value of the benefit in question is the benefit unlawfully provided as referred to in the offence provision of s 70.2(1). The "nature" of a benefit is not the same as the "amount" of a benefit. Section 70.4(1)(a) thus recognises that the value of a benefit may be of a "minor nature" without any process of netting off costs and risks against gains. It would be more than surprising if, for example, a person, who would have otherwise committed an offence under s 70.2(1), could succeed in satisfying s 70.4(1)(a) by engaging in a netting off process to work out the value of the benefit either to themselves on a net cost approach or to the person who was paid the bribe on a net benefit approach.

36 Similarly, another element of the defence in s 70.4(1)(c) is that, as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with s 70.4(3). Section 70.4(3)(a) provides that the required record is to set out "the value of the benefit concerned". It would not seriously be suggested that, to set out "the value of the benefit concerned" in compliance with s 70.4(3)(a) to satisfy that element of the defence, the person would not record the amount of money actually paid but instead might have to undertake a valuation exercise either netting off their own costs in providing the benefit or attempting to net off the costs the other person incurred in receiving the benefit.

37 It is also relevant that, unlike s 70.2(5)(c), which is supported by the details in s 70.2(6) prescribing how annual turnover is to be ascertained, there is no hint in s 70.2(5)(b) 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.

38 Valuation processes have been described, rightly, as an "imprecise, opinionative activity involving the consideration of many variables, sometimes with equally legitimate outcomes"<sup>39</sup>. Where legislation requires a type or process of valuation, whether the valuation be judicial or otherwise, "there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others" involving a "lack of demonstrative proof", potentially "abounding with uncertainties" and leaving "more than ordinary room for ... guesswork"<sup>40</sup>. Such a process is profoundly unsuited to a provision such as s 70.2(5)(b) which is part of a scheme for the imposition of a maximum penalty for an offence, and where the Crown must establish the maximum penalty.

39 These textual considerations all point to the "value of the benefit ... obtained" in s 70.2(5)(b) meaning, in the case of the receipt of money, no more and no less than the sum of the money in fact received.

40 Section 70.2(5) is part of Australia's response to complying with its obligations under the OECD Convention. The Preamble to the OECD Convention

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39 *Electricity Commission of New South Wales (trading as Pacific Power) v Arrow* (1994) 85 LGERA 418 at 419.

40 *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373 at 391.

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records that "bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions".

41 Consistent with this context is the recognition that if an advantage is secured by a bribery offence, the whole advantage is tainted by the illegality, as are all costs incurred (external and internal). It accords with this context that the "value of the benefit" in all provisions in Div 70, including s 70.2(5)(b), means the whole advantage provided or secured by the bribery offence.

42 The statement in the Replacement Explanatory Memorandum for the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* that the alternative sanctions in s 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"<sup>41</sup>, on analysis in the overall context, does not support the respondent's "net benefit" approach. The respondent used the reference to "penalising a body corporate proportionately to ... the benefit obtained" as a springboard to submit that "the 'three times multiplier' in the provision only works proportionately if it applies to the benefit calculated as what the company *in fact gained from the conduct*"<sup>42</sup>. The submission assumes its own answer. It assumes that the legislature intended the maximum penalty under s 70.2(5)(b) to be no greater than three times the net benefit. But there is no magic in a multiplier of three or in the concept of "net benefit". The multiplier could have been whatever the legislature chose and the meaning of "value of the benefit" in the provisions is to be resolved in that context, not assumed. Accordingly, this part of the extrinsic material says nothing about the precise means by which to value the benefit obtained by the body corporate offender<sup>43</sup>.

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41 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 189.

42 *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 398 [92] (emphasis in original).

43 cf *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 399 [97].

43 It is also relevant that the statement in the Replacement Explanatory Memorandum does not refer to the "net benefit" to the body corporate. To the contrary, it equates the transaction with the benefit by saying that the "temptation to bribe a foreign public official increases with the size of a potential transaction/benefit" and proposes that the "risk of being successfully prosecuted for this offence [must outweigh] the potential benefit from the transaction/benefit procured through the bribe"<sup>44</sup>. The repeated use of "transaction/benefit" is apparent. The two concepts are being equated in terms of their value to the provider of the bribe. This equivalence is reinforced by the fact that, in ordinary discourse, the "size" of a potential transaction is not the net proceeds obtained by the transaction. The "size" of a transaction is the gross amounts payable or paid to a company under the transaction. The Replacement Explanatory Memorandum, accordingly, supports the Crown's construction, rather than that of the respondent<sup>45</sup>.

44 Accordingly, the broader context of the statutory provisions also supports the construction of the "value of the benefit ... obtained" in s 70.2(5)(b) as meaning no more and no less than the value of what was received, irrespective of any costs, expenses or risks involved in the receipt.

45 The construction advanced above best serves the purpose of the legislation to achieve effective, proportionate, and dissuasive penalties for bribery offences. In contrast, the respondent's proposed construction would not give the statutory provisions a harmonious and coherent operation and is not apt to achieve the statutory purpose of implementing effective, proportionate, and dissuasive penalties for bribery offences.

46 As the Crown submitted, that an offender incurred costs in performing its obligations under a contract secured by bribery does nothing to lessen the harm to the foreign country's governance which has been corrupted, Australia's reputation, or the integrity of international commerce. Further, if construed as the respondent proposes, the maximum penalty provision in s 70.2(5) may be neither effective nor dissuasive. Nor would it necessarily be proportionate to the gravity of the offence from the relevant perspective of combating transnational corruption, the insidious

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44 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 189.

45 cf *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 399 [97].

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*Gleeson* J  
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effects of which undermine international and national efforts to ensure commercial and governmental integrity.

47 Further, if the respondent's construction is accepted, anomalous examples, manifestly inconsistent with the overall purpose of Div 70 (to fulfil Australia's obligation under the OECD Convention to combat bribery in international business transactions "which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions"<sup>46</sup>), are readily identifiable.

48 For example, consider s 70.2(1)(a) (the element of the offence of providing a benefit to another person). If paying a bribe of \$1,000 to a corrupt recipient costs the corrupt provider \$100 in delivery expenses, the value of the benefit provided within the meaning of s 70.2(1)(a) is plainly \$1,000, not \$900. Equally, if it costs the corrupt recipient \$100 to collect a \$1,000 bribe, the value of the benefit to the corrupt recipient is \$1,000, not \$900. Alternatively, for example, if the bribe is providing a person with a house, the value of the benefit is the value of the house, not the value of the house less costs and expenses incurred in obtaining and keeping the house. Similarly, if a bribe was \$1,000, but the corrupt provider or the corrupt recipient damaged their car along the way to deliver or collect the bribe and had to repair it at a cost of \$990, the value of the benefit for the purpose of the defence in s 70.4(1)(a) could hardly be said to be \$10, being the amount the person either provided or received from the bribe, less the person's costs of performing the act of delivery or collection. Yet the approach the respondent submitted would be applied to the value of the benefit obtained by the body corporate which has committed the offence, and for the purpose of setting the maximum penalty in s 70.2(5)(b) would involve deducting the costs the corrupt provider incurred (third-party expenses<sup>47</sup>) in taking the benefit it obtained (the payment of the money under the contracts).

49 The provisions of Div 70 also would not form a harmonious and coherent scheme on the respondent's proposed construction. First, and as noted, s 70.2(2)(b) would not operate as intended and the operation of ss 70.4(1)(a), 70.4(1)(c) and 70.4(3) would be implausible, to say the least. If ss 70.4(1)(a), 70.4(1)(c) and 70.4(3) operated in accordance with the respondent's proposed construction, the

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46 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Preamble.

47 Excluding all costs paid, or possibly paid, as part of the bribery offence.

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| <i>Kiefel</i>  | <i>CJ</i> |
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| <i>Gordon</i>  | <i>J</i>  |
| <i>Steward</i> | <i>J</i>  |
| <i>Gleeson</i> | <i>J</i>  |
| <i>Jagot</i>   | <i>J</i>  |

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person paying the bribe would have a better chance of making out a defence if they or the person receiving the bribe incurred more costs to do so.

50           Second, and equally important, s 70.2(5)(b) would become a potentially highly contested field of battle in and of itself. It is not that a court is incapable of determining a highly contestable issue. It is that to introduce a new highly contested field of battle, the resolution of which does no more than fix the maximum penalty, would tend to undermine the purpose of ensuring "effective, proportionate and dissuasive" penalties for bribery offences as required by the OECD Convention. As discussed, while it may be accepted that, in many statutory and other contexts, the concept of the "value" of something calls up for consideration a specific type and process of valuation, s 70.2(5)(b) does not suggest that it is concerned with any type or process of valuation. At the least, it does not do so if, by value, what is meant is deducting the costs, expenses, and risks incurred in providing or receiving a corrupt benefit. Given the expansive reach of s 70.2(5)(b) to capture direct and indirect advantages obtained by both the offender and its related bodies corporate, a construction of "value of the benefit ... obtained" as requiring a process of valuation involving deductions to identify a "net benefit" would significantly expand the width and depth of the contestable field.

51           For example, in the present case, the respondent asserted that the "value of the benefit ... obtained" was to be calculated by deducting all costs it paid to third parties to perform the contracts secured by the bribery offence from the gross amounts it received under those contracts. Even on this apparently simple approach to the "value of the benefit ... obtained", uncertainty and potential inconsistency in the application of s 70.2(5)(b) is exposed. The supplementary statement of facts agreed between the parties said that the respondent received \$10,130,354 under the contracts secured by the bribery offence and paid \$8,678,600 in costs to third parties untainted by any aspect of the bribery offence, yielding a "net benefit" to it of \$1,451,754. In a further supplementary statement of facts, some of the money paid to third parties is identified as potentially tainted by the bribery offence, so the untainted third-party costs are revised down to \$7,449,538. As a result, the "net benefit" is said to be \$2,680,816. In other words, the purported "net benefit" nearly doubled as a result of the characterisation of payments to one person, or entities related to that person, who both performed legitimate services and was implicated in the bribery offence. The fact that the respondent agreed to deduct these potentially tainted expenses in arriving at its asserted "net benefit" is not the point. The point is that this example exposes the high degree of contestability that would be involved in adopting the respondent's "net benefit" approach to the meaning of "value of the benefit ... obtained" in s 70.2(5)(b).

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52 Other uncertainties and potential inconsistencies also would arise. The respondent agreed that its asserted "net benefit" should not be calculated by deducting any payment to a third party that was potentially tainted by the bribery offence. What principle underlies this? The contracts as a whole were secured by the bribery offence. All payments the respondent received and all payments it made are equally tainted. Why stop at costs paid to third parties? Why are internal costs of the respondent that it had to incur in order to perform the contracts not also deducted to yield a true "net benefit"? Is intangible property used in performing the illegal contracts to be amortised and, if so, by what method? The existence of local and international accounting standards<sup>48</sup> identifying the range of acceptable accounting approaches to treatment of costs exposes the scope for debate in this field. The fact that there is no hint in the statutory provisions about the costs permitted or required to be deducted to yield the "net benefit" confirms that it is most unlikely that Parliament intended, in the context of s 70.2(5), that the court should be concerned with such issues. The amount of the penalty under s 70.2(5)(b) might also then depend on the ingenuity and persuasiveness of the forensic accountants the parties would have to retain to enable the maximum penalty to be determined. This uncertainty of meaning, complexity in application, and potential inconsistency in outcome could not have been intended to be the effect of increasing the maximum penalty to ensure Australia fulfils its international obligations under the OECD Convention.

53 Another important consideration that weighs against adopting a "net benefit" construction of the "value of the benefit ... obtained" in s 70.2(5)(b) is that, as has been said above, s 70.2(5) sets a maximum penalty only. The actual sentence to be imposed is to be determined on the basis of an instinctive synthesis of many considerations. This includes: (a) as set out in s 16A(1) of the *Crimes Act 1914* (Cth), that the sentence imposed must be "of a severity appropriate in all the circumstances of the offence"; and (b) under s 16A(2), that the court must take into account "[i]n addition to any other matters ... such of the following matters as are relevant and known to the court" including, in s 16A(2)(a), "the nature and circumstances of the offence" and, in s 16A(2)(e), "any injury, loss or damage resulting from the offence". These provisions involve ample scope for a body corporate defendant to prove its "net benefit" or even its loss as a result of performing a contract secured by a bribery offence. A trial judge can calibrate the relevance of those circumstances, in the context of all other factors to be

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48 eg, Australian Accounting Standards Board, *Accounting Standards*, and International Accounting Standards Board, *International Financial Reporting Standards*.

considered, to ensure the penalty imposed is proportionate to all circumstances of the offence. There is no basis, however, to conclude that s 70.5(2)(b) operates by embedding the same considerations into the setting of the maximum penalty. If that were so, the same considerations would dictate both the setting of the maximum penalty and the fixing of the actual penalty as part of the overall circumstances of the case. Again, that "double" operation of the same considerations would tend to undermine the statutory objects of achieving effective, proportionate, and dissuasive penalties.

54 Finally, there is also no meaningful comparison between the provisions of Div 70 of the *Criminal Code* and the provisions of the *Proceeds of Crime Act 2002* (Cth). Part 2-4 of the latter Act, involving pecuniary penalty orders, is a scheme enabling the court to require a person to disgorge the benefit a person has obtained from certain crimes. The respondent's submission that the consistent and principled approach of the courts in proceeds of crime cases, distinguishing between cases in which the whole transaction is unlawful (eg, drug transactions) and cases where only part of a transaction is unlawful (eg, selling legitimately owned shares using insider information)<sup>49</sup>, supports its "net benefit" approach is misconceived. A legislative purpose of requiring the proceeds of crime to be disgorged, of its nature, calls for a targeted approach focusing on the funds tainted by illegality, albeit subject to any contrary provision. A maximum penalty for a crime of obtaining a benefit by bribery is a different context involving no such focus. For this reason, the UK cases to which the parties referred<sup>50</sup> also provide no assistance.

55 As noted, in the present case, the contracts had been wholly performed and all money due under them had been paid. In these circumstances, on its proper construction, s 70.2(5)(b) required the value of the benefit obtained by the respondent and its related bodies corporate to be determined as the sum of the amounts the respondent in fact received under the contracts secured by the bribery. No deduction could properly be made for any costs incurred in performing the

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49 eg, *Director of Public Prosecutions v Nieves* [1992] 1 VR 257; *R v Peterson* [1992] 1 VR 297; *Lin v Tasmania* [2012] TASCRA 9 compared to *Mansfield v Director of Public Prosecutions* (2007) 33 WAR 227; *Commissioner of Australian Federal Police v Fysh* (2013) 224 A Crim R 523; *Director of Public Prosecutions (Cth) v Gay [No 2]* (2015) 256 A Crim R 194.

50 *R v Waya* [2013] 1 AC 294; *R v Sale* [2014] 1 WLR 663; *R v King (Scott)* [2014] 2 Cr App R (S) 54; *R v Andrewes* [2022] ICR 1404.

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contracts. Deducting such costs is antithetical to the meaning of "value of the benefit ... obtained" in s 70.2(5)(b).

56 Accordingly, the Court of Criminal Appeal erred in holding that the primary judge did not err in determining that the maximum penalty under s 70.2(5) was 100,000 penalty units or \$11 million pursuant to s 70.2(5)(a) of the *Criminal Code*. On the proper construction of s 70.2(5)(b), the maximum penalty in this case was three times \$10,130,354, or \$30,391,062. The penalty imposed should have been determined by reference to this maximum penalty.

### Orders

57 The following orders should be made:

- (1) The appeal be allowed.
- (2) The order of the Court of Criminal Appeal of New South Wales made on 11 July 2022, in so far as it dismissed the appeal against sentence for sequence three, be set aside and the matter be remitted to that Court for redetermination of that part of the appellant's appeal under s 5D of the *Criminal Appeal Act 1912* (NSW).

EDELMAN J.

**This appeal and the starting point for analysis**

58 One form of the criminal offence under s 70.2(1) of the *Criminal Code* (Cth) is to cause an offer of the provision of a benefit, that is not legitimately due, to another person with the intention of influencing a foreign public official in the exercise of their duties in order to obtain or retain business. Section 70.2(5) provides that the maximum penalty for a body corporate is "a fine not more than the greatest" of two amounts. The first amount is a long-stop or baseline maximum penalty of 100,000 penalty units, namely \$11 million<sup>51</sup>. The second amount has two limbs. It is relevantly either: (i) three times the value of the benefit that the body corporate has obtained that is reasonably attributable to the conduct constituting the offence<sup>52</sup>; or, (ii) if the court cannot determine the value of that benefit, then 10% 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<sup>53</sup>.

59 The respondent company pleaded guilty to charges on indictment of conspiracy, under ss 11.5(1) and 70.2(1) of the *Criminal Code*, to cause the offer of the provision of a benefit, not legitimately due, to another person with the intention of influencing foreign public officials in the Philippines and Vietnam in the exercise of the officials' duties as foreign public officials in order to obtain or retain business. In each case, the particulars of the business intended to be obtained by the respondent company referred to business projects or programs. The particulars did not need to, and did not, identify the benefits to the respondent company that were "reasonably attributable to the conduct constituting the offence". But those reasonably attributable benefits are relevant to the penalty capable of being imposed under s 70.2(5)(b).

60 The issue on this appeal concerns the calculation of the possible penalty under limb (i) of the second amount and, in particular, "the value of the benefit that the body corporate ... [has] obtained" that is "reasonably attributable to the conduct constituting the offence". When calculating the penalty under limb (i) of the second amount in s 70.2(5)(b), the benefit that the body corporate has obtained will usually need to be reasonably attributable to that part of the offending conduct which is the illegitimate benefit that is conferred on another person by the body corporate. There might also be different possible benefits that the body corporate has obtained which, if they are all relied upon and cumulative, must all be

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51 *Criminal Code*, s 70.2(5)(a).

52 *Criminal Code*, s 70.2(5)(b).

53 *Criminal Code*, s 70.2(5)(c).

reasonably attributable to the offending conduct. In any case, it is essential as a first step to identify the particular benefit that the body corporate has obtained. A "benefit" is defined in s 70.1 as including "any advantage" and as "not limited to property". It includes a business advantage which is defined in the same section as "an advantage in the conduct of business".

61 I agree with the orders proposed in the joint judgment allowing this appeal and with the reasoning in the joint judgment that the value of an attributable benefit which is the receipt of money must be calculated without reference to the cost of obtaining it. My additional reasons start the analysis at an earlier point: the proper identification of the reasonably attributable benefit, which is a necessary first step before the valuation of the reasonably attributable benefit.

62 It was common ground in this appeal that the reasonably attributable benefit could be identified either as: (i) the contractual rights sought and received by the respondent company at the time of entry into the contracts; or (ii) the money received by the respondent company in the course of performing those contracts. In the case of a partly or fully performed contract involving the payment of money to an offender, the offender has "obtained directly or indirectly" both: (i) the conditional contractual rights to payment at the time of entry into the contract; and (ii) the later payments of money consequent upon those rights accruing unconditionally.

63 A central premise for the reasoning of the Court of Criminal Appeal of New South Wales was that the benefit to the respondent company was the receipt of conditional contractual rights to payment<sup>54</sup>. On that premise, the reasoning of the Court of Criminal Appeal was indisputably correct. However, the benefits "reasonably attributable to the conduct constituting the offence", properly identified, were not merely the receipt of conditional contractual rights to payment. They were alternatively, and were also claimed in the alternative to be, the receipt of money obtained in the course of performing those contracts. The value of the money when received was its face value, without a discount for the expenses of obtaining it. For this reason, the appeal should be allowed.

### **Accounting in Wonderland**

64 Suppose that a company commits an offence under s 70.2(1) of the *Criminal Code* by paying a bribe to receive a "benefit" of a contractual right to payment of \$5 million. Like many commercial contracts, that contractual right to payment is conditional upon the company's performance of its contractual obligations. A conditional contractual right to payment is not the same as an accrued right to payment.

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<sup>54</sup> *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 399 [99].

65 Suppose also that the company does not appreciate at the time of entry into the contract that the contract is, in fact, a losing one. But the company very soon discovers that the contract obliges it to perform work which will have a net cost to the company of \$10 million in exchange for the promised payment of \$5 million. The company obtains no other advantage from the contract. Is the value of the conditional contractual rights obtained by the company a benefit worth \$5 million if the company will need to incur expenses of \$10 million to earn that \$5 million? Does the company have a \$5 million business advantage by having a contract that it discovers is a massive net liability on its balance sheet? Is it meaningful to say, as the Crown submitted, that the company could assert that it "won a \$5 million contract" and therefore that it received a \$5 million benefit from a contract that is a massive loss?

66 The essence of the reasoning of the sentencing judge (Adamson J)<sup>55</sup> and the Court of Criminal Appeal (Bell CJ, with whom Walton and Davies JJ agreed)<sup>56</sup> was that the benefit that the company obtains in such a case has no value. With respect, their Honours are indisputably correct. Their approach is not one that is concerned with a difference between the gross value of a benefit or the net value of a benefit. There is only one value to be placed on a conditional contractual right. That value cannot ignore the conditional nature of the right without fictitiously treating a conditional contractual right as if it were an accrued contractual right.

67 The central premise upon which the Court of Criminal Appeal decided the case — that the benefit was the receipt of conditional contractual rights sought by the company — is that, although it is a benefit to obtain a contract that has been chosen, there is no value in contractual rights that will plainly and objectively make the company worse off when they are realised. Being worse off is not valuable. Absent any suggestion of some consequential intangible value such as goodwill (which was not relied upon in this appeal), a conditional contractual right to payment is worthless if the cost of satisfying the conditions is more than the promised payment itself. As senior counsel for the respondent company effectively submitted, no one in the real world values a contract without reference to the expenses that are a condition upon which the contractual rights are earned. At least no one can do so honestly or consistently with any proper accounting practice. Neither should courts.

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55 See *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [127]-[140].

56 See *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 399 [99], [101], 406 [132], [133].

68 A penalty in s 70.2(5)(b) that involves calculating a three-fold multiple of the value of conditional contractual rights that are valueless would not exceed the alternative penalty of \$11 million<sup>57</sup>. Three times zero is still zero.

69 This basis upon which the sentencing judge and Court of Criminal Appeal decided the issue reflected, respectively, the focus of argument before the sentencing judge<sup>58</sup> and the focus of argument on appeal to the Court of Criminal Appeal<sup>59</sup> — namely, that the benefit to the respondent company was the receipt of the conditional contractual rights to payment that had been chosen. It was also the focus of the appeal to this Court. If this were the only argument, then the appeal to this Court would have to be dismissed. But there is a difference between the hypothetical example above and the relevant contracts in this case. The contracts in this case were not wholly executory. Performance had been rendered by the respondent company and payment had been received.

70 Senior counsel for the Crown therefore pointed to an alternative benefit that had been obtained by the respondent company and which the parties accepted was reasonably attributable to the payment of the bribes over time. As an alternative to identifying the benefit as the conditional contractual rights to payment, the valuation of which would require consideration of the cost of performing the conditions, the Crown pointed to the "the gross sum received under the contracts". The irresistible logic of this submission is that the benefit of a bird in the hand is different from the benefit of a conditional promise of one in the bush. This is the basis upon which this appeal should be resolved.

### **Identification and valuation of the reasonably attributable benefit**

#### *The separate concepts of benefit and value*

71 Section 70.2(1)(a) of the *Criminal Code* provides that an element of the offence is that a benefit to another person is provided (or caused to be provided), offered to be provided (or caused to be offered to be provided), or promised to be provided (or caused to be promised to be provided) by the person alleged to have committed the offence. It is that benefit to another person that is relevant to the defence under s 70.4(1), which is available if, among other things, the value of the

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57 *Criminal Code*, s 70.2(5)(a).

58 *R v Jacobs Group (Australia) Pty Ltd* [2021] NSWSC 657 at [126]-[127].

59 *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 396 [79].

benefit to the other person was of a minor nature<sup>60</sup> and "the value of the benefit concerned" was recorded by the alleged offender<sup>61</sup>.

72 The penalty calculation in s 70.2(5)(b), however, depends as a starting point upon the identification of a different benefit. Unlike the benefit referred to in s 70.2(1)(a) which is the benefit conferred by the offender on another person, the benefit referred to in s 70.2(5)(b) is the benefit to the offender that is reasonably attributable to the conduct constituting the offence. Where the benefit to the offender is the business, or business advantage, that was intended to be obtained or retained as part of the elements of the offence, then that will inevitably be attributable to the conduct constituting the offence. But the notion of reasonable attribution also extends to more remote benefits obtained by the offender.

73 Once the relevant reasonably attributable benefit has been identified for the purposes of s 70.2(5)(b), that paragraph then requires that the reasonably attributable benefit be valued for the purposes of calculating the maximum penalty. The valuation is an objective process: it concerns the value of the benefit to a reasonable person in the position of the offender. It cannot avail the offender to assert that the benefit has a different subjective value to it such as by reference to the subjective preferences of its officers.

*The statutory concept of benefit and its valuation*

74 The inclusive, and non-exhaustive, definition of "benefit" as "any advantage ... not limited to property" in s 70.1 of the *Criminal Code* provides little guidance as to the meaning of that ordinary English word. And it provides little guidance with respect to the scope of reasonably attributable benefits. Nevertheless, the history of Div 70 to which the joint judgment refers, including the implementation of the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)<sup>62</sup>, demonstrates that the concept of a benefit and the extent to which it might be reasonably attributable to the conduct constituting the offence should not be applied narrowly. It must extend at least to anything that has been chosen by the offender. And there are numerous different forms that a benefit might take.

75 An analogy is the broad approach to the types of benefit recognised by the common law when identifying the benefit to be valued in the law of unjust

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60 See *Criminal Code*, s 70.4(1)(a).

61 See *Criminal Code*, s 70.4(3)(a).

62 See [11]-[14].

enrichment. In *Mann v Paterson Constructions Pty Ltd*<sup>63</sup>, three members of this Court described three different enrichments or benefits for which a personal restitutionary remedy might be sought: the receipt of cash; the receipt of services; and the receipt of goods. The archetypal case in which a person may be said to have benefited from such a receipt is where the cash, the performance of services or the goods have been requested and accepted by the person benefited<sup>64</sup>. The enrichment or benefit might also be the receipt of contractual rights. Indeed, "money" in a bank account is just a contractual right, a debt due from the bank. As Burrows has observed, "the personal [contractual] right to payment of a debt ... is as important in the law of unjust enrichment as is money in the form of cash"<sup>65</sup>. The key point is that the identification of the benefit that is objectively chosen (cash, performance of services, goods, or contractual rights) is a necessary and anterior step to the valuation of that benefit<sup>66</sup>.

76 Section 70.2(5) of the *Criminal Code* likewise requires the identification of the benefit as an anterior step. But it goes further than the common law of unjust enrichment in the benefits that can be recognised for the purposes of the valuation. The relevant benefit in the law of unjust enrichment is concerned only with "what has been transferred from the plaintiff to the defendant"<sup>67</sup>. But s 70.2(5) extends to require disgorgement of further, consequential benefits provided that they are "reasonably attributable to the conduct constituting the offence".

77 Once the reasonably attributable benefit has been identified for the purposes of s 70.2(5)(b), it must be valued (if it is possible to do so) for the calculation of the maximum penalty under s 70.2(5). In some cases, the valuation might not be difficult. For instance, the value of cash or bank deposits received is, at least without the time value of the opportunity to use that money, the face value of the money itself. But the value of services received or the value of the rights to goods received might sometimes be more difficult to determine. And the value of

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63 (2019) 267 CLR 560 at 626-627 [167].

64 *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 663 [79]. See also *Stewart v Atco Controls Pty Ltd (In liq)* (2014) 252 CLR 307 at 326-327 [47]-[48].

65 Burrows, *The Law of Restitution*, 3rd ed (2011) at 45.

66 *Benedetti v Sawiris* [2014] AC 938 at 986 [113].

67 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 529 [26], quoting *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75. See also *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 579 [19].

executory, and conditional, contractual rights might sometimes be extremely difficult to determine.

*The reasonably attributable benefit in this case and its value*

78 The benefit that was immediately received by the respondent company in this case was the contractual rights that it had sought in relation to the business projects or programs in the Philippines and Vietnam, which included rights to payment that were conditional upon performance. The rights were a benefit to the respondent company because they were chosen by the respondent company as part of entering into the contracts. But the nature of those conditional contractual rights as a benefit is a separate question from the objective value of those conditional contractual rights to a person in the respondent company's position.

79 The value of the contractual rights to a person in the position of the respondent company depended upon the cost to the respondent company of lawfully performing its contractual obligations and thereby accruing an unconditional right to payment. The simplest valuation of those rights would be the present value of the expected payment less the present value of the cost of performance.

80 Of course, there might be additional, cumulative benefits that arise even if it would cost more to perform the obligations necessary for the conditional contractual rights to payment to accrue unconditionally. For instance, the conditional contractual rights might have value arising from the goodwill associated with the generation of future business, including through a loss leader strategy. But no suggestion of such a benefit was made in this case. On the primary basis on which the Crown's case was put before the Court of Criminal Appeal<sup>68</sup>, and before this Court, with the value of the conditional contractual rights to be assessed by reference to the cost of fulfilling the condition for payment, it was agreed that the value of the contractual rights would be less than \$11 million. Therefore, the maximum penalty would be \$11 million under s 70.2(5)(a). If the benefit to the respondent company could only be identified as the immediate receipt of the conditional contractual rights that it had chosen as part of entering into the contracts, then the Court of Criminal Appeal was correct.

81 The alternative benefit upon which the Crown relied in the Court of Criminal Appeal, and in this Court, was the benefit to the respondent company of the receipt of the payments of money under the contracts amounting to \$10,130,354<sup>69</sup>. There was no dispute that this benefit of the receipt of money was reasonably attributable to the conduct constituting the offence. The submission of

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68 *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 396 [79].

69 *R v Jacobs Group (Australia) Pty Ltd* (2022) 108 NSWLR 377 at 396 [80].

the respondent company was that this benefit (as identified) should be reduced, or netted off, by reference to the contractual expenses incurred in fulfilling the conditions for payment.

- 82 For the reasons given in the joint judgment there is no basis in the text, context, or purpose of s 70.2(5)(b) of the *Criminal Code* to confine the application of the ordinary meaning of benefit in this way. The value of \$10,130,354 received is, at the time of receipt, \$10,130,354, with additional value that may accrue from the opportunity to use, or from the use of, that money which is also reasonably attributable to the conduct constituting the offence. Three times the amount of money received is \$30,391,062. That should have been the maximum penalty under s 70.2(5).

### **Conclusion**

- 83 The appeal should be allowed and orders made as proposed in the joint judgment.

