



## HIGH COURT OF AUSTRALIA

2 August 2023

THE KING v JACOBS GROUP (AUSTRALIA) PTY LTD FORMERLY KNOWN AS  
SINCLAIR KNIGHT MERZ  
[2023] HCA 23

Today, the High Court allowed an appeal from a judgment of the Court of Criminal Appeal of New South Wales. The appeal concerned the proper construction of s 70.2(5) of the *Criminal Code* (Cth), which prescribes the maximum monetary penalty for an offence by a body corporate of bribing, or conspiring to bribe, a foreign public official. Relevantly, under s 70.2(5), the maximum penalty is the greatest amount of: (a) 100,000 penalty units (at the time, each penalty unit was \$110); or (b) if the court can determine the value of the benefit obtained that is reasonably attributable to the conduct constituting the offence, then three times the value of that benefit.

In the Supreme Court of New South Wales, the respondent pleaded guilty to three counts of conspiracy to cause an offer of the provision of a bribe to a foreign official contrary to ss 11.5 and 70.2(1) of the *Criminal Code*. It was common ground that the benefit the respondent obtained that was reasonably attributable to the conduct constituting the offence was securing contracts for the carrying out of three construction projects. It was also agreed that the "value of the benefit" the respondent obtained was the money received for performing those contracts, which was a determinable sum.

Before the primary judge, the respondent contended that the value of the benefit was the amount received for performing its obligations under the contracts less the costs it paid to third parties to enable that performance, excluding all costs paid, or possibly paid, as part of the bribery offence (the "net benefit" approach). The Crown contended that the value of the benefit was the total gross amount the respondent received for performing its obligations under the contracts. The primary judge held that the "net benefit" approach was correct. As three times the value of the "net benefit" was less than the 100,000 penalty units (or \$11 million), the primary judge assessed the maximum penalty by reference to s 70.2(5)(a). The Court of Criminal Appeal dismissed the Crown's appeal against sentence.

A majority of the Court held that, on its proper construction, s 70.2(5)(b) required the value of the benefit obtained to be determined as the sum of the amounts in fact received under the contracts secured by the bribery offence. No deduction could properly be made for any costs incurred in performing the contracts. Accordingly, the maximum penalty pursuant to s 70.2(5)(b) was three times the amount received by the respondent, being a total of \$30,391,062. The penalty imposed should have been determined by reference to this maximum penalty. A majority of the Court considered that "benefit" and "value of the benefit" take the same meaning in all provisions in Div 70 of the *Criminal Code*, and that is the value of the advantage as provided or obtained. This approach is consistent with international law, as the provision is part of Australia's response to complying with its obligations under the *OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions*.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*