Sentencing Advisory Council

Sentencing Occupational Health and Safety Offences in Victoria

Consultation Paper

VICTORIA State Government

The Sentencing Advisory Council bridges the gap between the community, the courts and the government by informing, educating and advising on sentencing issues.

The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the *Sentencing Act 1991*. The functions of the Council are to:

- provide statistical information on sentencing, including information on current sentencing practices
- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

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- two people with broad experience in community issues affecting the courts
- one senior academic
- one highly experienced defence lawyer
- one highly experienced prosecution lawyer
- one member of a victim of crime support or advocacy group
- one person involved in the management of a victim of crime support or advocacy group who is a victim of crime or a representative of victims of crime
- one member of the police force of the rank of senior sergeant or below who is actively engaged in criminal law enforcement duties
- the remainder must have experience in the operation of the criminal justice system.

For more information about the Council and sentencing generally, visit:
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One and all, our stakeholders have been generous with their time and uniformly committed to ensuring sentencing standards are capable of contributing to safer workplaces in Victoria.

About the Sentencing Advisory Council

The Sentencing Advisory Council is an independent statutory body established in the *Sentencing Act 1991* (Vic). Our mission is to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing.

Our functions include:

- **providing statistical information** on sentencing;
- **conducting research** on sentencing and sharing it with interested persons;
- **gauging public opinion** and **consulting** on sentencing matters; and
- **advising the Attorney-General** on sentencing matters.

A note on terminology

For simplicity, in this consultation paper, we use the term ***company*** to broadly refer to all non-natural persons, including companies registered under the *Corporations Act 2001* (Cth), incorporated and unincorporated associations, public entities and charitable organisations.

Call for submissions

We are seeking submissions on the sentencing of occupational health and safety offences in Victoria, especially in response to the 19 questions posed in this consultation paper. Your submissions are intended to inform the recommendations in our final report. We welcome and encourage submissions from legal stakeholders, employers and their representatives, employees and their representatives, as well as the broader community.

The deadline for submissions is **Friday 31 May 2024**. Submissions can be emailed to contact@sentencingcouncil.vic.gov.au.

When making a submission, please identify how you would like your submission to be treated based on the following three categories:

Public submission: we may publish and refer to your submission, and name you as the source of the submission in any publications.

Anonymous submission: we may publish and refer to your submission, but will not identify you as the source of the submission in any publications.

Confidential submission: we will only use the submission to inform us generally in our deliberations. We will not publish or refer to the submission, or provide the submission to any third parties.

We reserve the right not to publish any submission that we consider potentially defamatory or offensive.

As additional or alternative opportunities for you to share your views with us, we will also be running a survey via the Engage Victoria website, and hosting a series of community consultations in regional Victoria and suburban and central Melbourne. You can access the Engage Victoria page at **engage.vic.gov.au/sentencing-ohs-offences-in-victoria**.

Terms of reference

On 5 January 2024, we received the following request for advice pursuant to section 108C of the *Sentencing Act 1991*:

> The Sentencing Advisory Council (the Council) is asked to review and report on the sentencing of offences contrary to the *Occupational Health and Safety Act 2004* and make any recommendations for reform that it considers appropriate.
>
> In undertaking this review, the Council should:
>
> 1. examine current sentencing practices for occupational health and safety offences in Victoria,
> 2. consult with stakeholders and the broader Victorian community in relation to any issues associated with the sentencing of occupational health and safety offences,
> 3. consider whether current sentencing practices align with community expectations,
> 4. consider the role of injured workers and the families of deceased workers in the sentencing of occupational health and safety offences, and
> 5. examine the enforcement of sentencing orders, especially court fines.

We have been asked to deliver our final report by 31 December 2024.

Executive summary

All Victorians have the right to be safe at work, and for their loved ones to be safe at work. Ensuring appropriate sentencing practices for occupational health and safety (OHS) offences is an important part of the broader regulation of workplace health and safety in Victoria.

Our state's dedicated workplace health and safety regulator, WorkSafe Victoria, uses a broad range of tools to ensure workplaces are as safe as possible. First and foremost, WorkSafe encourages a positive and proactive approach by employers and anyone else with health and safety responsibilities, through the delivery of educational programs and campaigns, and by offering advice and support. WorkSafe also undertakes tens of thousands of workplace inspections each year, gives informal warnings, and issues various improvement and prohibition notices requiring remedial works. And in the worst cases, WorkSafe can prosecute individuals and companies for OHS offences.

In order for the criminal justice system to play its small but important role in ensuring workplace health and safety standards in Victoria, it's critical that the sentencing of OHS offences – the how, the what and the why – is fit for purpose. If sentencing standards are too inconsistent with community expectations, if injured workers and their loved ones feel improperly excluded from the process, or if fines for unsafe work practices are just 'the cost of doing business', then the system is not working.

Background

The sentencing of OHS offences in Victoria and Australia has been the subject of a number of reviews over the last 30 years or so. By and large, the findings and recommendations of these reviews have been consistent: that fines for OHS offences are too low to change companies' behaviour, that sentencing orders other than fines should be available and used in a wider range of OHS cases, and that there should be some improved guidance for courts about the sentencing of OHS offences.

Our aim in this consultation paper is to explore afresh potential reforms to improve the sentencing of OHS offences in Victoria.

Our project is directed at the sentencing of all offences in the *Occupational Health and Safety Act 2004* (Vic) and the associated regulations. To that end, we have examined all sentencing outcomes from the commencement of that Act in July 2005 through to 30 June 2021, giving us a 16-year reference period. However, while our remit is broad, our primary focus will be breach of duty offences, which collectively made up 78% of

all OHS offences sentenced in that reference period. Especially, employer breaches of their duties to employees and the public made up 66% of all sentenced OHS offences. Similarly, while we are exploring the sentencing of OHS offences committed by both individuals and companies (including public entities and not-for-profit organisations), we are primarily focusing on the sentencing of companies (as opposed to individuals), which made up 83% of 1,197 OHS offenders in the reference period.

To assist with our project, we have collected quantitative and qualitative data from multiple sources (Victorian courts, WorkSafe Victoria, Fines Victoria and the Australasian Legal Information Institute (AustLII)) and presented that information in a separate statistical report, which is published alongside this consultation paper. That data has allowed us to examine the number and types of OHS offences sentenced, the scenarios leading to prosecution, the types of sentences imposed, the success rates of sentence appeals, and payment rates for fines imposed in OHS cases. The data shared or made public by those organisations has been crucial in identifying some key issues for consideration, and we hope that the data will also be of use to those who make submissions. We also undertook preliminary consultation with dozens of individuals and organisations to better understand the topics that we should be exploring. Stakeholder insights have been instrumental in framing our understanding of the key issues.

Relevant factors in sentencing OHS cases

Sentencing in Victoria is governed by the *Sentencing Act 1991* (Vic). That legislation specifies five purposes of sentencing: deterrence, rehabilitation, denunciation, protection of the community, and just punishment. Victorian courts are required to balance these five purposes in deciding an appropriate sentence in all cases, whether it's a driving offence, a homicide committed by an individual or an OHS offence committed by a company. We are interested in stakeholder views about which of these purposes should usually be the most important in sentencing OHS offences (**Question 1**).

There are then two primary categories of factors that courts consider in deciding an appropriate sentence: objective factors, which are related to the seriousness of the offending; and subjective factors, which are specific to the offender.

We are first seeking feedback about what the most important *objective* factors should be when courts are determining an appropriate sentence in OHS cases (**Question 2**). A matter of particular interest is whether the fact that someone has been harmed or killed as a result of an OHS offence should be an aggravating factor in sentencing, requiring a more severe sentence (**Question 3**). This is an important question.

While case law in Victoria says that the fact of a death or injury in an OHS case should be of little relevance to sentencing, our statistical findings clearly indicate that the fact someone has died almost always significantly increases the value of the fine imposed.

We are also interested to hear what should ordinarily be the most important *subjective* factors courts should consider in determining an appropriate sentence, such as pleas of guilty, good corporate citizenship, prior history, and remedial actions since the relevant incident or, if there was no incident, since identification of the risk (**Question 4**).

One factor in particular that warrants further discussion is the extent to which the size of the company should be relevant in setting the value of any fine imposed, and if so, how to measure the size of a company (**Questions 5 and 6**). In order to achieve the purposes of sentencing, a fine needs to have a 'real sting' to it, and arguably the only way to achieve that sting is for larger companies to receive larger fines.

We also heard in our preliminary consultations some scepticism about whether companies should be entitled to mitigation based on their 'good character', especially when donations seem to sometimes be made to local charities soon after a relevant workplace incident. We are seeking views about the role that good character should play in determining the appropriate sentence in an OHS case (**Question 7**).

Victims and their loved ones in OHS cases

OHS breach of duty offences occupy a relatively unique space in criminal law. They are sometimes referred to as 'risk-based' offences, because the offences are constituted by someone failing to take reasonable steps to ensure the health and safety of another person (or, sometimes, themselves). The offence occurs regardless of whether someone is injured. The problem with not having causation built into the offences is that there are then barriers to victims and their loved ones participating in subsequent criminal proceedings. We have found OHS cases where causation was questionable yet victim impact statements were admitted, and conversely, cases where causation was more apparent but victim impact statements were refused. We are seeking views on whether there is a need to broaden or clarify when a victim impact statement should be admitted in an OHS case (**Question 8**).

We also heard from both employee and employer representatives that there is a desire for restorative justice conferences to be made available in OHS cases, especially where someone has died. Restorative justice conferences would likely run parallel to the sentencing process, and enable a measure of healing to occur and relationships to potentially begin to be repaired. We'd therefore want to hear from interested persons and organisations about the potential use of restorative justice conferences in OHS cases (**Question 9**).

The availability of diversion in OHS cases

We are also exploring whether there are any opportunities to increase or improve the use of court-ordered diversion in OHS cases (**Question 10**). If a defendant acknowledges responsibility for the alleged offending, the prosecution consents to the diversion, and the court considers that a diversion plan would be an appropriate outcome, the court can adjourn proceedings for up to 12 months to enable the defendant to complete certain conditions. The benefit of diversion to the defendant is that if they complete those conditions to the satisfaction of the court, then the criminal proceedings come to an end and no finding of guilt is recorded. We heard during preliminary consultation that this could be very appealing to the many defendant companies that are keen to avoid a finding of guilt. For the relevant industry and organisation, diversion would also likely be more effective than most fines, because the conditions of the diversion plan could cost more than a fine (at their current levels), while also improving safety.

Unfortunately, detailed consideration of enforceable undertakings (which function similarly to diversion) is beyond the scope of this project. Enforceable undertakings involve a defendant proposing that they do certain things (typically projects related to improving health and safety in both their own organisation and in the wider industry) and WorkSafe agreeing to not proceed with prosecution. There have been 70 enforceable undertakings entered into since 2012 (less than 10 a year). We have been told that developing a proposed enforceable undertaking for consideration by WorkSafe is an expensive endeavour and therefore only truly available to larger companies, the process can be quite involved, and there is no guarantee that an enforceable undertaking will be accepted. Given that enforceable undertakings are two steps removed from sentencing – in that the defendant is not found guilty, *and* the decision is made by the prosecuting agency, not the courts – we have decided that they are beyond our remit. We do, however, summarise the enforceable undertakings that have been entered into, as they offer very useful illustration of the types of behavioural conditions that could be utilised more frequently in diversion plans, health and safety undertakings, and adjourned undertakings.

Is there a need to change sentencing practices?

About 87% of all OHS offences receive a fine. Most of the remainder receive an adjourned undertaking (better known as a 'good behaviour order'), with the only optional condition usually being to make some sort of charitable donation, which is functionally very similar to a fine. Under 2% of OHS offences receive another type of sentence, including diversion, imprisonment, and community orders.

There may, however, be good reason to consider increased use of alternative sentencing orders in OHS cases. We heard from a number of stakeholders that imprisonment should be a more realistic option for individuals for a wider range of OHS offences (**Questions 11 and 12**). And we heard that there can be significant value in defendant companies in particular being ordered to undertake certain works or programs via health and safety undertakings (a specific sentencing order available in OHS cases) and/or being made to publicise the nature and consequences of their offending, especially in forums that will deter others from engaging in similar conduct (**Question 13**).

We are also interested in better understanding the implications for companies of having a conviction recorded in OHS cases (**Question 14**). The only two consequences we could identify were a (possible) limitation on their ability to engage in government work and the perceived damage to their reputation.

Turning next to the values of fines imposed for OHS offences, this was perhaps the most significant cause of concern in all our preliminary consultations. For defendant companies in particular, court fines for OHS offences should not be so low that they are just 'the cost of doing business', or cheaper than implementing appropriate remedial works. We are therefore seeking views from stakeholders and the broader community about whether there is a need to increase the values of fines for OHS offences, and if so, the best mechanisms to achieve that increase (**Questions 15 and 16**).

Fine payment rates in OHS cases

One of the topics that we have specifically investigated is the rate of payments for fines imposed in OHS cases. This is important because it is difficult to argue that fines have much punitive effect if they are not, in fact, paid. We found that 67% of all fines were fully paid (263 of 392 cases sentenced in the 4.5 years to 30 June 2021), and 61% of the total values of fines imposed in those cases was paid ($12,982,080 of the total $23,871,305 imposed in those 392 cases). There are then 27% of offenders who never pay their fines at all, amounting to over $2.3 million a year in unpaid fines. Some of this is explained by fines imposed on companies already in, or on their way to, liquidation (some of these may be what are often described as 'phoenix' companies, which involve the same people, plant and functions re-emerging under a new name). We are seeking views on whether there are opportunities to improve payment rates of fines imposed in OHS cases (**Question 17**).

We are also asking whether there may be opportunities to improve or simplify the process for paying fines imposed in OHS cases (**Question 18**). This is because, at the moment, a fine can be paid in the court registry on the day, a fine can be referred to Fines Victoria for enforcement, or sometimes WorkSafe can directly invoice offenders.

And if fines are paid to the court registry or Fines Victoria, the courts may send the funds to WorkSafe directly, or WorkSafe may send an invoice to Fines Victoria. There are also some cases where the court retains the role of monitoring and enforcing a fine, rather than referring the fine to Fines Victoria. There also seems to be alternating approaches to whether the monies paid to Fines Victoria and the courts are sent to consolidated revenue or are given to WorkSafe. While it is helpful for offenders to have multiple avenues to pay their fines, there does not appear to be any one agency with holistic oversight of fine payment rates nor a shared understanding of the intended destination of funds from fines.

Other issues

Finally, it is important to note that these are the key issues that we have identified. However, there may be other relevant issues that we have not covered. Our final question asks if there are any other issues arising from the sentencing of OHS offences that you think we should consider (**Question 19**).

Where to from here?

Upon the joint release of this consultation paper and the associated statistical report, in February 2024, we will be launching a survey to seek community feedback via the Engage Victoria website, and inviting written submissions to the various questions posed throughout this consultation paper. We'll also meet with stakeholders interested in the sentencing of OHS offences (employer and employee representatives, lawyers, judicial officers and government departments), and hosting regional and metropolitan community consultation events to gauge community expectations around the sentencing of OHS offences. Once our consultation phase is finalised, we will develop draft recommendations for reform, test them with stakeholders, make appropriate revisions, and then deliver a final report with recommendations.

List of consultation questions

We will consult with a diverse range of stakeholders on issues arising from the sentencing of OHS offences, and any options for reform. The questions we are asking below are broad in scope, with different questions being relevant to different stakeholders. In responding to these questions, feel free to address the questions/issues relevant to you and/or your organisation. It is not necessary to respond to all questions.

Chapter 2: Purposes of sentencing in OHS cases

1. In your view, what are the most important purposes of sentencing in OHS cases?

Chapter 3: Assessing the seriousness of breach of duty offences

2. What do you believe should ordinarily be the most important factors for courts in assessing the seriousness of an OHS offence?
3. In the sentencing of an OHS case, should the severity of the harm caused (such as death or serious injury) be relevant to assessing the seriousness of the offence? If so, to what extent?

Chapter 4: Circumstances of the offender in OHS cases

4. What factors specific to the offender do you believe should ordinarily be most significant in sentencing an OHS offender?
5. When imposing a fine on a company in an OHS case, should the size of the company be relevant? If so, why? If not, why not?
6. If the size of a company *should* be relevant to the choice of fine amount to be imposed on a company in an OHS case, what are the best measures for courts to assess the size of a company, and what are the best ways for courts to be informed about the size of the company?
7. In sentencing a company for an OHS offence, should 'good character' be relevant to determining the most appropriate sentence? If so, what matters should ordinarily be most relevant to assessing a company's good character?

Chapter 5: The role of victims in OHS cases

8. Is there a need to broaden or clarify the circumstances in which victim impact statements can be made in OHS cases?
9. Would restorative justice conferences be appropriate and useful in OHS cases? If so, what features of an OHS case would make it suitable for restorative justice conferences?

Chapter 6: The availability of diversion in OHS cases

10. Should there be an increased use of diversion in OHS cases? If so, in which types of cases?

Chapter 7: The available sentencing orders for OHS offences: Do sentencing practices need to change?

11. Are there any OHS offences that do not currently attract a maximum penalty of imprisonment, but should? If so, which offences, in what circumstances, and what should the maximum prison term be?
12. Should the current maximum penalty of 5 years' imprisonment for reckless conduct endangering serious injury in a workplace (section 32 of the *OHS Act*) be increased? If so, why and to what? If not, why not?
13. Should sentencing orders other than fines (for example, community correction orders, adjourned undertakings, health and safety undertakings, adverse publicity orders) be used more frequently in OHS cases?
14. What do you believe should ordinarily be the most significant factors for courts in deciding whether or not to record a conviction for an OHS offence?

Chapter 8: Fine amounts for OHS offences: Do sentencing practices need to change?

15. In your view, is there a need to increase fine amounts for OHS offences, either generally or in specific types of cases? If so, why, and in which types of cases? If not, why not?
16. If fine amounts for OHS offences should be increased, what would be the best way to achieve that increase?

Chapter 9: Payment of fines in OHS cases

17. What could be some opportunities to simplify or improve the process for paying fines imposed in OHS cases?
18. What could be some opportunities to improve fine payment rates for OHS offences?

Other issues

19. Are there any other issues arising from the sentencing of OHS offences that you think we should consider?

1. Project background and approach

1.1 In 2018, there were over 623,000 work-related injuries and illnesses in Australia, costing the Australian economy about $28.6 billion, $7.15 billion of which was in Victoria.[1] And in 2021, there were 169 work-related fatalities in Australia, 34 of which were in Victoria.[2] There are significant human and financial costs in failing to prioritise workplace health and safety. One of the ways we as a society demonstrate our commitment to workplace health and safety is by maintaining a robust regulatory system in which we monitor and enforce compliance with both high-level principles and specific requirements. In turn, one of the critical features of that robust regulatory system is the establishment of appropriate sentencing standards and processes.

1.2 On 5 January 2024, the Victorian Government provided the Sentencing Advisory Council with terms of reference seeking its advice about the sentencing of OHS offences in Victoria. Those terms of reference are as follows:

> The Sentencing Advisory Council (the Council) is asked to review and report on the sentencing of offences contrary to the *Occupational Health and Safety Act 2004* and make any recommendations for reform that it considers appropriate.
>
> In undertaking this review, the Council should:
>
> 1. examine current sentencing practices for occupational health and safety offences in Victoria,
> 2. consult with stakeholders and the broader Victorian community in relation to any issues associated with the sentencing of occupational health and safety offences,
> 3. consider whether current sentencing practices align with community expectations,
> 4. consider the role of injured workers and the families of deceased workers in the sentencing of occupational health and safety offences, and
> 5. examine the enforcement of sentencing orders, especially court fines.

The Council has been asked to deliver its final report by 31 December 2024.

1. Deloitte Access Economics, *Safer, Healthier, Wealthier: The Economic Value of Reducing Work-Related Injuries and Illnesses* (2022) 3–4.
2. Safe Work Australia, 'Key Work Health and Safety Statistics Australia, 2023' (data.safeworkaustralia.gov.au, 2023).

About us

1.3 The Sentencing Advisory Council is an independent statutory body established in 2004 under the *Sentencing Act 1991* (Vic) ('the *Sentencing Act*'). We are undertaking this project in line with our functions, which are set out in legislation and include providing statistical information on sentencing, conducting research on sentencing, consulting with stakeholders and the community about sentencing, and advising the Attorney-General about sentencing matters.[3]

Aims of the project

1.4 The aims of this project are to review sentencing practices in cases involving occupational health and safety (OHS) offences in Victoria for the 16-year period from July 2005 to June 2021 (the reference period),[4] identify potential opportunities for reform and make recommendations. Consistent with the terms of reference, our focus is the offences contained in the most recent Victorian OHS legislation, the *Occupational Health and Safety Act 2004* (Vic) ('the *OHS Act*).[5]

1.5 The issues raised by the sentencing of these offences are, though, part of a broader context, including the prosecution of offending under other related regulatory frameworks, such as those relating to dangerous goods,[6] the environment[7] and heavy vehicles;[8] the challenges of prosecuting defendant companies; and the role of victims in sentencing. Where appropriate, this consultation paper will discuss the broader context in which these issues arise.

3. *Sentencing Act 1991* (Vic) s 108C.
4. This reference period reflects the years between the commencement of the *Occupational Health and Safety Act 2004* (Vic) on 1 July 2005, and the most recent court data that the Council had available (to 30 June 2021).
5. This consultation paper will not consider the sentencing of offences contained in federal legislation, namely, the *Work Health and Safety Act 2011* (Cth), which are prosecuted by the Commonwealth Director of Public Prosecutions and/or Comcare.
6. Regulated by the *Dangerous Goods Act 1985* (Vic).
7. Regulated by the *Environment Protection Act 2017* (Vic), repealing the *Environment Protection Act 1970* (Vic).
8. Regulated by the *Heavy Vehicle National Law* (Queensland) which is adopted in Victoria pursuant to the *Heavy Vehicle National Law Application Act 2013* (Vic).

Phases of the project

1.6 The first stage of this project was preliminary consultation. In mid-2023, we met with stakeholders – prosecutors, defence lawyers, judicial officers, employer representatives, employee representatives and people affected by OHS incidents – to identify the key issues relating to the sentencing of OHS offences in Victoria. The process of identifying relevant stakeholders was iterative; there were a number of meetings where the relevant organisation or individual suggested further stakeholders with whom we should meet. In total, we met with 28 organisations and individuals between June 2023 and September 2023 (see Appendix 1).

1.7 Data analysis occurred alongside that preliminary consultation. That analysis involved examining court data relating to all cases where an OHS offence was sentenced in Victoria during the reference period, and then linking that court data with data provided by WorkSafe (prosecution summaries and *de novo* County Court appeal outcomes); judgments published on AustLII; and fine payment data from WorkSafe, Fines Victoria and the courts.

1.8 Following preliminary consultation and data analysis, we have prepared two publications: this consultation paper and a statistical report. The two publications are intended to be read in tandem, with the statistical report providing evidence to enable interested persons to respond to the questions raised in this consultation paper.

1.9 The release of these two publications represents the beginning of the next phase of our work: consultation on key issues. Over the next few months, we will be inviting written submissions in response to the consultation questions outlined in this consultation paper, including through the Engage Victoria website (the Victorian Government's online consultation platform). We will also be hosting various community forums in metropolitan Melbourne, suburban Melbourne and regional Victoria to better understand community expectations in relation to the sentencing of OHS offences.

1.10 Once those consultations are complete, we will then review the various submissions and observations made during consultation, develop draft recommendations for reform, test those reforms with stakeholders, make appropriate revisions as required and then deliver a final report with recommendations.

About this consultation paper

1.11 This consultation paper contains 19 questions that seek your views on a variety of issues relating to the sentencing of OHS offences in Victoria. These issues have been identified through preliminary consultation as well as a review of the case law and research in this area. The consultation paper initially considers the purposes of sentencing in OHS cases (Chapter 2), how to determine the seriousness of an OHS offence (Chapter 3) and the relevant circumstances of an OHS offender that might be relevant to sentencing (Chapter 4). It considers the role of victims in OHS cases (Chapter 5) and the pre-sentence option of diversion in OHS cases (Chapter 6). It then considers whether sentencing practices need to change, drawing on findings from the statistical report released alongside this consultation paper. This includes the orders available in sentencing OHS offences (Chapter 7) as well as the appropriate ranges of fines imposed (Chapter 8). In considering these issues and the questions we raise, you may find it useful to also refer to the findings in the statistical report.

Data used in this project

1.12 This project brings together data from a number of sources and organisations including WorkSafe Victoria, Court Services Victoria, the Magistrates' Court of Victoria, the County Court of Victoria and Fines Victoria. The project team also reviewed publicly available sentencing remarks and appeal judgments in OHS cases on AustLII, unpublished County Court sentencing remarks provided to us on a regular basis by the higher courts, and WorkSafe prosecution summaries that are available on WorkSafe's website.[9] The findings from that analysis are presented in the statistical report.

9. It is necessary to review WorkSafe prosecution summaries of Magistrates' Court cases because there are only two published Magistrates' Court judgments in OHS criminal cases, and they are judgments about findings of guilt, not sentencing: *VWA v Paper Australia Pty Ltd* [2018] VMC 1; *VWA v Patrick Stevedoring Pty Ltd* [2011] VMC 14. Most Australian jurisdictions rely on the regulatory body responsible for prosecutions to publish summaries: see, for example, Office of the Work Health and Safety Prosecutor, 'Court Reports' (owhsp.qld.gov.au, 2023); SafeWork SA, 'Prosecutions' (safework.sa.gov.au, 2023).

Existing sentencing guidance for OHS offences in Victoria

1.13 The Judicial College of Victoria's *Sentencing Manual* contains a detailed chapter on OHS offences, including a summary of the relevant matters to be taken into account in sentencing OHS offences.[10] The Judicial College also maintains and updates a table of case summaries for OHS matters, covering Court of Appeal and County Court decisions dating back to 2015 and 2016 respectively.[11]

Past reviews of the sentencing of OHS offences

1.14 There have been at least half-a-dozen reviews in the last 30 years that have indirectly touched on, or directly focused on, the sentencing of OHS offences, either specifically in Victoria or more generally across Australia. These have included the 1995 Industry Commission[12] review of occupational health and safety;[13] the 2004 *Maxwell Review* of OHS legislation in Victoria;[14] the 2007 *Stensholt Review* of the *OHS Act 2004* in Victoria;[15] the 2008 national review of model OHS laws;[16] the 2018 Senate Inquiry into Industrial Deaths;[17] and the 2018 Boland Review into the operation of model OHS laws.[18]

1.15 The findings and recommendations of those various reviews have been very consistent as they relate to sentencing. First, fine amounts have remained stubbornly low and are unlikely to deter unsafe work practices.[19]

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10. Judicial College of Victoria, '31 – Occupational Health and Safety Offences', *Victorian Sentencing Manual* (4th ed., 2022).
11. Judicial College of Victoria, 'VSM Case Summaries – 10 – Occupational Health and Safety Offences', *Sentencing Manual Case Summaries* (2022).
12. In 1998, the Industry Commission was merged with a number of other entities to form what is now the Productivity Commission: *Productivity Commission Act 1998* (Cth).
13. Industry Commission, *Work, Health and Safety: An Inquiry into Occupational Health and Safety, Volume 1: Report* (1995) iv.
14. Chris Maxwell, *Occupational Health and Safety Act Review* (2004) (henceforth, *'Maxwell Review').*
15. Bob Stensholt, *A Report on the Occupational Health and Safety Act 2004: Administrative Review* (2007).
16. Australian Government, *National Review into Model Occupational Health and Safety Laws: First Report* (2008).
17. Australian Senate, Education and Employment References Committee, *They Never Came Home – The Framework Surrounding the Prevention, Investigation and Prosecution of Industrial Deaths in Australia* (2018).
18. Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (2018).
19. Industry Commission (1995), above n 13, 103–104; *Maxwell Review,* 14; Australian Senate, Education and Employment References Committee (2018), above n 17, 70; Boland (2018), above n 18, 127–128. Some of the organisations that criticised the low values of fines in 1995 included the Australian Council of Trade Unions, the Community and Public Sector Union, and the Australian Liquor, Hospitality and Miscellaneous Workers Union: Industry Commission, *Work, Health and Safety: An Inquiry into Occupational Health and Safety, Volume 2: Report* (1995) 412. Some of the organisations that criticised the low values of fines in 2018 were Maurice Blackburn and the Australian Council of Trade Unions: Australian Senate, Education and Employment References Committee (2018), above n 17, 70; Boland (2018), above n 18, 54, 68.

Second, courts largely do not use sentencing options other than fines in OHS cases, but should.[20] Third, there would be utility in having specialist judicial officers dealing with OHS matters.[21] Fourth, maximum penalties for OHS offences should be increased significantly.[22] And fifth, that sentencing guidelines may improve consistency in sentencing OHS offences, as well as address the low values of fines.[23]

1.16 We will be exploring many of these same issues afresh in our review. But there is a unique challenge in doing so: if 30 years of reviews and recommendations have not yet achieved the changes they've so consistently sought, what can be done differently that might actually make change happen?

20. Industry Commission (1995), above n 13, 124–126; *Maxwell Review,* 376–381; Stensholt (2007), above n 15, 81, 85; Australian Government (2008), above n 16, 148–149.
21. Industry Commission (1995), above n 13, 112–113; *Maxwell Review,* 384–386.
22. Industry Commission (1995), above n 13, 116–118; *Maxwell Review,* 14, 367–369; Australian Government (2008), above n 16, 139 ('In our view, the maximum penalties provided in some jurisdictions are too low to have a meaningful value as a deterrent or as a potential punishment for a breach … higher maximum fines are necessary'); Australian Senate, Education and Employment References Committee (2018), above n 17, 70.
23. Australian Government (2008), above n 16, 164; Maxwell Review, 384–386 (although Maxwell preferred guideline judgments over sentencing guidelines); Australian Senate, Education and Employment References Committee (2018), above n 17, 70; Boland (2018), above n 18, 129, 131. For an overview of sentencing guidelines, see Sentencing Advisory Council, A Sentencing Guidelines Council for Victoria: Issues Paper (2017).

2. Purposes of sentencing in OHS cases

2.1 This chapter considers the purposes of sentencing in OHS cases. It includes references to the legislative purposes that sentencing courts appear to have been prioritising in OHS cases for which we had sentencing remarks.

2.2 When sentencing someone for criminal offending – including OHS offences – Victorian courts are required to balance a number of specified legislative purposes. Courts must try and ensure the sentence:

- **deters** the offender and others from committing similar offences;
- **punishes** the offender in a just manner;
- **facilitates** the rehabilitation of the offender;
- **denounces** the behaviour that the offender engaged in; and
- **protects** the community from the offender.[24]

2.3 Sometimes these purposes will conflict, and sometimes they will be compatible. The task of sentencing courts is to balance these purposes as best they can.[25]

Deterrence

2.4 There are two components to the legislative objective of deterrence. The first is the deterrence of others who might engage in similar behaviour to the offender (*general deterrence*). The second is the deterrence of the sentenced offender from engaging in further offending (*specific deterrence*).

General deterrence

2.5 The principle of general deterrence reflects an intent for sentences imposed in one case to deter other would-be offenders from engaging in similar behaviour. The idea that general deterrence can be achieved through sentencing has fallen into disfavour in recent years, for a number of reasons.

24. *Sentencing Act 1991* (Vic) s 5(1).
25. See, for example, *DPP v Condo* [2019] VSCA 181, [33].

2.6 First, deterrence of others is only possible if the potential misbehaviour is a product of some rational choice,[26] when in truth many crimes are not, in fact, rational.[27]

2.7 Second, like the people who don't hear the proverbial tree falling in the forest, the people intended to experience the deterrent effect of sentencing are rarely aware of sentences imposed. There are almost 100,000 cases sentenced in Victoria each year,[28] and even those working in the justice system would only be aware of the smallest fraction of these. As the then President of the Court of Appeal said in 2009: 'If the community is unaware of what sentences are being imposed, general deterrence is simply a fiction'.[29]

2.8 Third, research has consistently shown that the *severity* of a potential punishment has relatively little deterrent effect.[30] Instead, it is the perceived risk of getting caught that best functions as an effective deterrent of criminal behaviour. This is, for example, why physical guardianship (such as the presence of a dog)[31] or even symbolic guardianship (such as a 'beware of dog' sign)[32] can be effective deterrents against burglary and property crime. It's also why people slow down when they believe a speed camera is nearby.[33] Therefore, even if the relevant offending was the product of rational choice and the intended group of would-be offenders were fully aware of current sentencing practices, it may not matter how severe the penalties are when it comes to deterring their offending.

2.9 That said, there is a second dimension to general deterrence. The High Court has observed that if sentences imposed fail to consistently reflect community expectations, this can damage the perceived legitimacy of the justice system and

26. See, for example, Derek B. Cornish and Ronald V. Clarke (eds), *The Reasoning Criminal: Rational Choice Perspectives on Offending* (1986).
27. For instance, research has consistently shown a strong association between substance use and offending, with the former limiting rationality: Trevor Bennett et al., 'The Statistical Association Between Drug Misuse and Crime: A Meta-Analysis' (2008) 13(2) *Aggression and Violent Behavior* 107.
28. Sentencing Advisory Council, 'Cases Sentenced in the Higher Courts' (sentencingcouncil.vic.gov.au, 2023); Sentencing Advisory Council, 'Cases Sentenced in the Magistrates' Court' (sentencingcouncil.vic.gov.au, 2023).
29. Justice Chris Maxwell, 'A New Approach to Criminal Appeals' (Speech, Victorian Bar, 7 October 2009).
30. Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (2011).
31. Wes Grooms and DJ Biddle, 'Dogs and Crime: Reduced Rates of Property Crime in Homes with Dogs in Milwaukee' (2018) 26(1) *Society & Animals* 34 (finding that homes with dogs had a slightly increased deterrent effect in relation to property crime rates compared to similarly zoned homes without dogs).
32. Iris van Sintemaartensdijk et al., 'Assessing the Deterrent Effect of Symbolic Guardianship through Neighbourhood Watch Signs and Police Signs: A Virtual Reality Study' (2022) *Psychology, Crime & Law* (DOI 10.1080/106831.6X.2022.2059480) (finding that the presence of neighbourhood watch signs had a slightly increased deterrent effect).
33. James Freeman et al., 'Is There an Observational Effect? An Exploratory Study into Speed Cameras and Self-Reported Offending Behaviour' (2017) 108(1) *Accident Analysis & Prevention* 201.

reduce the community's overall trust in it.[34] In turn, this can, for example, lead to legislative attempts to intervene in how courts exercise judicial discretion, undermining their independence[35] It can even lead to a reduced willingness to comply with the law. So while enhancing penalties may not directly deter criminal behaviour, allowing them to fall (or remain) too far below community expectations can enable misbehaviour or, at the very least, risk undesirable legislative intervention in the exercise of judicial discretion.

General deterrence in OHS cases

2.10 Despite the growing disfavour of general deterrence more broadly, companies (who make up the majority of OHS offenders) are arguably more susceptible to being deterred than individuals.[36]

- Corporations are, by their very nature, 'closer to … "pure reason" than any person'.[37] They are more likely than individuals to undertake a cost–benefit analysis,[38] carefully examining the financial and reputational implications of their actions.[39]
- Compared with individuals, companies (especially large ones) are more likely to be aware of relevant prosecutions and penalties imposed. For instance, 63% of 233 firms surveyed in the United States reported changing their compliance behaviour in response to learning about the prosecution of other organisations in the same industry.[40] Further, while very few summary jurisdiction prosecutions result in published sentencing remarks,[41]

34. *Markarian v The Queen* [2005] HCA 25, [82]:

    > Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.

    As cited with approval in *Kennedy v The King* [2022] NSWCCA 215, [43]; *R v Khayat & Anor (No 14)* [2019] NSWSC 1817, [129]; *DPP v Swan* [2016] TASCCA 9, [45]; *R v O'Connor* [2014] NSWCCA 53, [89].

35. David Indermaur and Lynne Roberts, *Confidence in the Criminal Justice System*, Trends & Issues in Crime and Criminal Justice no. 387 (2009); Arie Freiberg, 'Bridging Gaps, Not Leaping Chasms: Trust, Confidence and Sentencing Councils' (2021) 12(3) *International Journal for Court Administration* 1, 6.
36. Steve Tombs and David Whyte, 'The Myths and Realities of Deterrence in Workplace Safety Regulation' (2013) 53(5) *British Journal of Criminology* 746, 750–751.
37. Edwin H. Sutherland, *White Collar Crime: The Uncut Version* (1983) 236.
38. Raymond Paternoster and Sally Simpson, 'A Rational Choice Theory of Corporate Crime' in Ronald V. Clarke and Marcus Felston (eds), *Routine Activity and Rational Choice* (1993) 38; John Braithwaite and Gilbert Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28(2) *Crime & Delinquency* 292.
39. Paternoster and Simpson (1993), above n 38, 41.
40. Dorothy Thornton et al., 'General Deterrence and Corporate Environmental Behavior' (2005) 27(2) *Law & Policy* 262.
41. Maxwell expressly made the point in 2004 that '[o]ne obstacle to consistency in sentencing is that magistrates seldom give written reasons for their decisions': *Maxwell Review*, 385.

WorkSafe Victoria maintains an almost exhaustive database of finalised prosecutions on its website,[42] which numerous stakeholders told us is accessed often by OHS representatives in various industries.

- And while, even for corporations, the certainty of being prosecuted is a more effective deterrent than the likely penalty,[43] the severity of the likely penalty can nevertheless be relevant.[44] For example, a recent Canadian study found that while OHS inspections have a deterrent effect in their own right, that effect is enhanced when the inspections are accompanied by the imposition of on-the-spot fines.[45]

2.11 It is perhaps because of the inherent rationality of corporate entities that Victorian courts have unwaveringly described general deterrence as the most important objective in sentencing OHS offences.[46]

2.12 For instance, in the Court of Appeal:

> The cases in this Court in relation to offences under the OHSA consistently highlight the importance of general deterrence[.]
>
> ***DPP v Heavy Mechanics* [2023] VSCA 69, [83]**

> [G]eneral deterrence is of particular importance in offending of this kind. The sentences imposed need to draw attention to the importance of workplace safety, and to send a message to employers that failure to eliminate or mitigate safety risks will attract significant punishment.
>
> ***DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55, [233]**

42. WorkSafe Victoria, 'Prosecution Result Summaries and Enforceable Undertakings' (worksafe.vic.gov.au, 2023).
43. For instance, one US study in the early 1980s found that workplace injuries decreased 'significantly … after increases in general enforcement and after specific contacts with enforcement agencies': John T. Scholz and Wayne B. Gray, 'OSHA Enforcement and Workplace Injuries: A Behavioral Approach to Risk Assessment' (1990) 3(3) *Journal of Risk and Uncertainty* 283, 302. See also John Mendeloff and Wayne B. Gray, 'Inside the Black Box: How do OSHA Inspections Lead to Reductions in Workplace Injuries?' (2005) 27(2) *Law & Policy* 219; Richard Johnstone, 'Rethinking OHS Enforcement', in Elizabeth Bluff et al. (eds), *OHS Regulation for a Changing World of Work* (2004) 154; Suzanne Jamieson et al., 'OHS Prosecutions: Do They Deter Other Companies from Offending?' (2010) 26(3) *Journal of Health, Safety and Environment* 213; Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement' (2021) 37(2–3) *International Journal of Comparative Labour Law and Industrial Relations* 133; Toni Schofield et al., 'Deterrence and OHS Prosecutions: Prosecuted Employers' Responses' (2009) 25(4) *Journal of Occupational Health and Safety – Australia and New Zealand* 263.
44. Toni Schofield, 'Deterring Workplace Deaths and Injuries: Legal Sanctions and Outcomes or Institutional Process?' (Paper presented at the Annual Conference of the Australian and New Zealand Associations of Sociology, University of Auckland, 3–7 December 2007).
45. Rebecca Casey et al., 'Using Tickets in Employment Standards Inspections: Deterrence as Effective Enforcement in Ontario, Canada' (2018) 29(2) *The Economic and Labour Relations Review* 228.
46. Note, however, that judicial officers consistently rank general deterrence as the most important purpose of sentencing more broadly, not just in OHS cases: Kate Warner et al., 'Why Sentence? Comparing the Views of Jurors, Judges and the Legislature on the Purposes of Sentencing in Victoria, Australia' (2019) 19(1) *Criminology & Criminal Justice* 26 (finding that in a series of cases where jurors were surveyed or interviewed, 35% of judges considered general deterrence the driving objective, compared to just 9% of jurors involved in those same cases).

> [F]or offending of this kind, general deterrence is a consideration of great importance. We respectfully agree with the view of the Industrial Commission of New South Wales in Court Session, that 'the fundamental duty of the Court in this important area of public concern ... [is] to ensure a level of penalty for a breach as will compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace'.
>
> ***Orbit Drilling Pty Ltd & Anor v The Queen* [2012] VSCA 82, [60]**

> The object of the legislative enactment upon which the charges were based is to provide protection to employees in the workplace. The exposure of individuals to risk of death or injury as they earn their living is an extremely serious matter. Not only should this be reflected in the penalties imposed, but the notion that it may be more cost effective to take the chance that nothing will happen rather than incur the expense involved in removal of the danger, must be dispelled.
>
> ***DPP v Amcor Packaging Pty Ltd* [2005] VSCA 219, [21]**

2.13 The same is true in cases in the County Court:[47]

> [G]eneral deterrence is of real significance here. It is important to send a message to all employers that if they fail to eliminate or mitigate risks to health and safety, then they should expect to be charged and receive a significant penalty.
>
> ***DPP v Melbourne Health* [2021] VCC 407, [28]**

> In cases involving breaches of the OHSA, general deterrence is the predominant sentencing consideration.
>
> ***DPP v Hungry Jacks & Ors* [2018] VCC 1454, [47]**

> [I]n cases where a duty has been imposed to protect the lives and wellbeing of those who may be affected by a breach, deterrence as a sentencing consideration is emphasised. In effect, the penalty … must send a strong deterrent message to employers who place operational considerations ahead of safety or who are simply complacent about implementing and enforcing safety policies and procedures.
>
> ***DPP v AirRoad Pty Ltd* [2012] VCC 1960, [55]**

> Superior courts have consistently emphasised the importance of general deterrence in cases involving breaches of occupational health and safety legislation.
>
> ***R v Barro Group Pty Ltd* [2009] VCC 1623, [43]**

47. See also *DPP v L Arthur Pty Ltd* [2013] VCC 1051, [24]; *DPP v Kenneally & Anor* [2019] VCC 658, [27]; *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053, [28]; *DPP v Mainline Developments Pty Ltd* [2020] VCC 47, [22]; *DPP v SJ & TA Structural Pty Ltd* [2019] VCC 2016, [33]; *DPP v United Access Pty Ltd* [2020] VCC 1085, [22].

2.14 Similarly, when the Sentencing Council for England and Wales consulted on its draft sentencing guideline relating to health and safety offences, 85% of respondents said that deterrence and punishment should be the primary objectives in sentencing these types of offences, because 'it should not be cheaper to offend than to take the appropriate precautions'.[48]

2.15 That said, despite persistent judicial commentary on the importance of general deterrence in OHS cases, interviews with 16 New South Wales and Victorian judicial officers about a decade ago suggest that they may actually be more sceptical about their ability to achieve that deterrence than the case law otherwise suggests.[49] The researchers found:

> In discussing general deterrence, almost all judges were concerned that information about OHS cases was not reaching the community, so that would-be offenders lacked knowledge of how they might be dealt with by the courts. The popular media tended not to report OHS cases, and when they did, the media reported aspects of the case that did not provide impetus for safety improvements.[50]

2.16 Current sentencing practices may also play a role in limiting the deterrent value of sentencing in OHS cases. We heard from numerous stakeholders during preliminary consultation that there are businesses, especially larger businesses, that currently view potential fines for OHS offences as 'the cost of doing business', especially as businesses know the likely size of the fine that could be imposed (based on current sentencing practices). The literature and case law are rife with this same concern, that criminal penalties may fail to have any deterrent effect if they are low enough to be absorbed as 'the cost of doing business'.[51]

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48. Sentencing Council for England and Wales, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Response to Consultation* (2015) 7–8.
49. Ron McCallum et al., 'The Role of the Judiciary in Occupational Health and Safety Prosecutions: Institutional Processes and the Production of Deterrence' (2012) 54(5) *Journal of Industrial Relations* 688.
50. Ibid 699–700.
51. *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876, [173], [211], [273]; *DPP (Cth) v Alkaloids of Australia Pty Ltd* [2022] FCA 1424, [127]; *DPP (Cth) v Vina Money Transfer Pty Ltd* [2022] FCA 665, [111], [185], [217]; *Volkswagen Aktiengesellschaft v ACCC* [2021] FCAFC 49, [152], [167]; *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20, [62], cited with approval in *ACCC v TPG Internet Pty Ltd* [2013] HCA 54, [64]. See also Cam H. Truong and Luisa F. Alampi, 'Increased Civil Pecuniary Penalties – The "Cost of Doing Business" or an Effective Deterrent?' (2020) 28(1) *Australian Journal of Competition and Consumer Law* 101; Dorothy S. Lund and Natasha Sarin, 'Corporate Crime and Punishment Post-Crisis: An Empirical Study' (2021) 100 *Texas Law Review* 285; National Judicial College of Australia, 'Sentencing Corporations' (csd.njca.com.au, 2023).

2.17 In effect, general deterrence is the primary objective that both the community and judicial officers want prioritised in the sentencing of OHS offences. But there is also good reason to be sceptical about just how achievable general deterrence is when sentencing OHS offences, especially so long as fine amounts remain low enough to be perceived as the cost of doing business.

Specific deterrence

2.18 In trying to achieve specific deterrence, courts are trying to deter the defendant from further offending. The most significant consideration in deciding how much weight should be afforded to specific deterrence in the sentencing exercise will usually be the offender's criminal history.[52] Consistent with this, courts in OHS cases tend to discuss the relevance of specific deterrence by reference to the past OHS record of the defendant. They do, though, also often discuss the actions that the defendant had taken since the relevant incident or risk identification.

2.19 In most OHS cases in the higher courts, specific deterrence had 'only a modest role' to play because the defendant had a good prior safety record,[53] had actively taken remedial steps in the intervening period since the incident/risk,[54] or both.[55] For instance, in *DPP v Fergusson & Anor*, the court said:

> In view of the salutary experience of this tragic accident, your lack of prior convictions or subsequent matters, and the steps you have taken to reduce risk in the workplace, I need only place minimal weight on specific deterrence.[56]

52. See, for example, *Whitten v The King* [2023] VSCA 181, [26]; *Tseros v The King* [2023] VSCA 179, [17]; *Uzun v The Queen* [2015] VSCA 292, [33]; *Pasznyk v The Queen* [2014] VSCA 87, [67]; *Berichon & Anor v The Queen* [2013] VSCA 319, [44].
53. *DPP v AirRoad Pty Ltd* [2012] VCC 1960, [37]; *DPP v AM Design and Construction Pty Ltd & Anor* [2018] VCC 373, [37]–[38]; *DPP v DHHS* [2018] VCC 886, [31]; *DPP v W.F. Montague Pty Ltd* [2018] VCC 1553, [42]; *DPP v Keilor-Melton Quarries Pty Ltd* [2018] VCC 2139, [13]; *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [52].
54. *DPP v L Arthur Pty Ltd* [2013] VCC 1051, [22]–[24]; *DPP v WCA (Vic) Pty Ltd* [2013] VCC 980, [23]; *DPP v Frewstal Pty Ltd* [2015] VCC 731, [64]; *DPP v ABD Group Pty Ltd* [2016] VCC 1450, [10], [15]–[16]. See also *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278, [158] (finding that the company's cooperation with authorities coupled with significant post-incident remedial measures meant 'specific deterrence is not a relevant sentencing consideration' at all).
55. *R v Barro Group Pty Ltd* [2009] VCC 1623, [43]; *DPP v Melbourne Water Corporation* [2014] VCC 184, [20]; *DPP v Tooradin Excavations Pty Ltd* [2014] VCC 1419, [9]; *DPP v CLM Infrastructure Pty Ltd* [2017] VCC 192, [17]–[19]; *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021, [131]; *DPP v Ricegrowers Ltd* [2018] VCC 542, [38]; *DPP v Kenneally & Anor* [2019] VCC 658, [27]; *DPP v SJ & TA Structural Pty Ltd* [2019] VCC 2016, [32]–[33]; *DPP v Melbourne Health* [2021] VCC 407, [28].
56. *DPP v Fergusson & Anor* [2017] VCC 1276, [49].

2.20 Conversely, there were some cases where courts considered that specific deterrence deserved more weight because the defendant did have relevant prior convictions. For instance, in *DPP v Thiess Services Pty Ltd*, the court said that while the company had 'taken significant steps to improve its occupational health and safety regimes since these offences', specific deterrence remained relevant because of three past OHS convictions.[57] The same was true in *DPP v Toll Transport Pty Ltd*, where the court considered it appropriate to 'emphasise' and 'attach fairly significant weight to' specific deterrence due to the various prior OHS convictions of the company.[58] And in *DPP v Coates Hire Operations Pty Ltd*, the Court of Appeal said that although 'profound' changes had been made since the workplace fatality in that case – including the company tripling the size of its OHS team, implementing new processes and allocating a new OHS budget of $8 million – 'specific deterrence still had a role to play … [given] the company's two prior convictions for breaches of occupational health and safety law'.[59]

2.21 The size of the company will also be a relevant consideration in determining the extent to which specific deterrence is required, because larger companies will invariably be prone to a higher likelihood of risks, even if they have a commitment to positive OHS practices. As the court acknowledged in *DPP v Hungry Jacks & Ors*:

> Each of the defendant companies admitted their prior criminal records. However … each of the defendant companies are large national companies and as such, in my view the prior offending must be viewed in the context of the size of the company … All three companies have established health and safety systems and although the risk in this instance was foreseeable, it is not an example of a serious disregard to the safety of persons other than employees. Thus, in my opinion, specific deterrence while relevant, carries less weight[.][60]

2.22 There is then a question about the relevance of specific deterrence in the context of companies that no longer exist or are in the process of being wound up. In *DPP v Specialised Concrete Pumping Victoria Pty Ltd*, the sentencing court said that the fact that the company had gone into voluntary administration and ceased trading meant 'specific deterrence has little or no part to play in the sentencing exercise'.[61] Similarly, in *DPP v YJ Auto Repairs Pty Ltd*, the court said that because a

57. *DPP v Thiess Services Pty Ltd* [2015] VCC 1954, [31], [43].
58. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [53]–[54], [69].
59. *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131, [74]–[78]. See also *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053, [30]; *DPP v Mainline Developments Pty Ltd* [2020] VCC 47, [45]–[46].
60. *DPP v Hungry Jacks & Ors* [2018] VCC 1454, [48]. See also *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053, [31].
61. *DPP v Specialised Concrete Pumping Victoria Pty Ltd* [2018] VCC 105, [24].

company had been wound up, 'there is no risk that this Company will reoffend and there is *no need* for the sentence to really reflect specific deterrence'.[62] But in *DPP v Eliott Engineering Pty Ltd*, the court said that the company's prior offending – 'the company had only been before the Magistrates Court less than a year prior to this event' – meant that despite having been wound up, 'specific deterrence is a relevant consideration'.[63] This conundrum about specific deterrence in OHS cases involving companies that have been wound up was discussed in detail in *DPP v Phelpsys Construction Pty Ltd*:

> Now I am told that liquidation is virtually certain and that this should reduce the weight to be given to specific deterrence. I am not so sure about that. There is something of a fiction in seeking to deter a company. I suppose in reality one is seeking to deter those responsible for the running of the company … I cannot know for certain if the company will cease to exist, but even if it does the directors will continue on in life as individuals. Will they operate in this area again? Will there be a corporate structure again? Whether there is or not, will they employ others? Will they manage or have any control over workplaces? The potential liquidation … does not permit me to ignore the need to deter specifically. I still believe some weight must be given to specific deterrence given the gravity of this offence.[64]

2.23 Finally, there were also two cases where it was not the offender's prior or subsequent OHS record that elevated the importance of specific deterrence. Instead, in *DPP v Dotmar Epp Pty Ltd*, the court said that specific deterrence was important because of the defendant's conduct *during* the proceedings, including a late plea of guilty and limited evidence of remorse:

> Dotmar has no prior history of this type of offending and has taken steps to ensure that safety measures are improved at the Dingley premises. Despite that, I consider specific deterrence needs to be given some weight in sentence. The background to these offences, the conduct of the committal proceeding and the late plea of guilty, together with the matters set out in the Defence Reply and in submissions, lead me to conclude that the company has limited remorse and that a sentence is required which serves to deter it from future complacency or inactivity in respect of employee safety issues.[65]

62. *DPP v YJ Auto Repairs Pty Ltd* [2023] VCC 1759, [37] (emphasis added).
63. *DPP v Eliott Engineering Pty Ltd* [2014] VCC 266, [54]–[55].
64. *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394, [44]–[45].
65. *DPP v Dotmar Epp Pty Ltd* [2014] VCC 1326, [58]. See also *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132, [40] ('I place some weight on specific deterrence in view of the … lack of insightful remorse').

Just punishment

2.24 Sometimes referred to as 'just deserts', the sentencing purpose of just punishment requires courts to ensure the sentences imposed 'reflect the community's expectation that the offender will suffer punishment'; this is because if sentencing outcomes are perceived as unfairly lenient, then 'public confidence in the courts to do justice would be likely to be lost'.[66] It is often via this sentencing purpose that community expectations have a critical role to play in sentencing. As society evolves, so too do expectations around what constitutes just punishment for certain types of offences, such as family violence[67] and sex offences.[68]

2.25 In the context of OHS cases, courts appear to have often acknowledged that 'just punishment [is] an appropriate',[69] if not 'highly significant',[70] consideration, and that employers who place employees' safety at risk 'should know that they will be met with strong punishment',[71] 'a punishment which is just in all of the circumstances'.[72] In *DPP v Vibro-Pile (Aust) Pty Ltd & Anor*, the Court of Appeal wrote that:

> The sentences imposed need to draw attention to the importance of workplace safety, and to send a message to employers that failure to eliminate or mitigate safety risks will attract significant punishment.[73]

2.26 In that context, just punishment can be seen as important to maintaining community confidence in the justice system, by ensuring sentencing standards align with community expectations.

66. *Ryan v R* [2001] HCA 21, [46] (citations omitted).
67. See, for example, the increasing rate of imprisonment for breaches of family violence orders in Victoria: Sentencing Advisory Council, *Sentencing Breaches of Family Violence Safety Notices and Intervention Orders: Third Monitoring Report* (2022) 62.
68. See, for example, the increasing length of imprisonment sentences for sex offences, especially against children: Sentencing Advisory Council, *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (2021) 75. The Council has also previously found that sex offences against children are now viewed as 'among the most serious' of all crimes: Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (2012) 55–58.
69. *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021, [131]. See also *DPP v Fergusson & Anor* [2017] VCC 1276, [21]; *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472, [17]–[18].
70. *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241, [27]; *DPP v Thiess Services Pty Ltd* [2015] VCC 1954, [43].
71. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [47].
72. *DPP v Frewstal Pty Ltd* [2015] VCC 731, [64].
73. *DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55, [233].

Rehabilitation

2.27 Rehabilitation tends to play a less significant role in OHS cases. In the context of a defendant company, rehabilitation has at times been described as an 'effectively meaningless' proposition.[74] Indeed, the Law Commission for England and Wales has actively recommended against rehabilitation as a guiding purpose in sentencing defendant companies.[75]

2.28 That said, Victorian courts have often considered the offender's prospects of rehabilitation in OHS cases, especially the steps taken since their offending to remedy their OHS deficiencies and prevent future breaches.[76]

2.29 Conversely, an offender's perceived prospects of rehabilitation have been considered more limited if there was evidence of further enforcement action by WorkSafe.[77]

Denunciation

2.30 Justice Kirby of the High Court once described denunciation as follows:

> A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined without our substantive criminal law'.[78]

2.31 Denunciation is thus a somewhat communicative and symbolic purpose of sentencing, directed at ensuring the process and language of sentencing condemn the behaviour.[79] But there is also a substantive component to denunciation. As the court noted in *DPP v Resource Recovery Victoria Pty Ltd*, it also encourages the court to ensure the sentence imposed is proportionate to the offending, because (in the context of OHS offences) '[t]he penalty must reflect the denunciation of a civilised and affluent society such as ours for such cavalier disregard for workers' safety'.[80]

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74. *DPP v Multiworks* [2021] VCC 1553, [41].
75. Law Commission for England and Wales, *Corporate Criminal Liability: An Options Paper* (2022) 140.
76. See, for example, *R v P & O Ports Ltd* [2006] VCC 667, [80].
77. *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132, [36].
78. *Ryan v R* [2001] HCA 21, [118] (citation omitted).
79. Arie Freiberg and Victoria Moore, 'Disbelieving Suspense: Suspended Sentences of Imprisonment and Public Confidence in the Criminal Justice System' (2009) 42(1) *Australian & New Zealand Journal of Criminology* 104 ('The purpose of denunciation is a symbolic one, often linked with retributivism').
80. *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472, [18].

2.32 Where courts made express note of denunciation in OHS cases, it tended to be mostly in passing,[81] even if the court described denunciation as 'highly significant'.[82] For instance, in *DPP v Hazelwood Power Corporation Pty Ltd*, the court simply noted that '[t]he sentence imposed must reflect denunciation of the [OHS] breaches'.[83] In *DPP v De Kort*, the court said, 'the sentence must properly denunciate the offending'.[84] And in *DPP v Phelpsys Construction Pty Ltd*, the court said, 'I must also denounce the company's conduct and I do'.[85]

2.33 There were no cases that elucidated precisely how denunciation affected the sentence imposed.

Protection of the community

2.34 Historically, the sentencing purpose of protecting the community has been interpreted as primarily meaning 'incapacitation of the offender for an appropriate period' (i.e. imprisonment).[86] More recently, it is increasingly accepted that one of the primary ways in which the community is protected from further offending is by rehabilitating the offender, thereby reducing their risk of recidivism.[87]

2.35 In the context of OHS offending, then, the community is often best protected when the sentence imposed promotes improved safety practices by the sentenced offender. Community protection was the least discussed sentencing purpose in OHS cases, likely because it is primarily achieved through the objective of rehabilitation, which itself was rarely relevant. For instance, in *DPP v Phelpsys Construction Pty Ltd*, the court said that there was a reduced need for community protection because the company had a good OHS record and had 'tak[en] the matter very seriously' since the incident that prompted the prosecution.[88]

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81. *DPP v Melbourne Health* [2021] VCC 407, [29]; *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278, [159]; *DPP v De Kort* [2019] VCC 291, [12]; *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394, [50]; *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [46]; *DPP v Australian Box Recycling Pty Ltd* [2016] VCC 1056, [26]; *DPP v BPL Melbourne Pty Ltd* [2016] VCC 282, [13]; *DPP v Hansen Yuncken Pty Ltd* [2013] VCC 1543, [18]; *R v Barro Group Pty Ltd* [2009] VCC 1623, [44].
82. *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241, [27]; *DPP v Thiess Services Pty Ltd* [2015] VCC 1954, [43].
83. *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278, [159].
84. *DPP v De Kort* [2019] VCC 291, [12].
85. *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394, [50].
86. *R v Benbrika & Ors* [2009] VSC 21, [139]. See also *DPP (Cth) v Besim* [2017] VSCA 158, [113].
87. See, for example, *DPP v Buhagiar and Anor* [1998] 4 VR 540, 547, cited with approval and quoted in *Winch v The Queen* [2010] VSCA 141, [51] and *Henry v The King* [2023] VSCA 100, [105] ('there are cases where a judge may reach the view that … a sentence is appropriate … because it may be productive of reformation, which offers the greatest protection to society'). See further *R v Zamagias* [2002] NSWCCA 17, [32]; Mirko Bagaric, 'In Search of a Coherent Approach to Community Protection in Sentencing' (2020) 46(3) *Monash University Law Review* 79.
88. *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394, [55].

So why do we prosecute and sentence OHS offences?

2.36 Health and safety in Victoria is governed by a complex regulatory system. For the most part, employers and others are expected to self-manage their own health and safety standards and practices. There are numerous opportunities for employers and others to receive guidance and participate in collaborative and educative processes to improve those standards and practices. In order to maintain compliance with mandatory standards, there is a system of monitoring through routine inspections. And in order to legitimise those standards, there are enforcement processes in place: prosecution and punishment. This is effectively what has been described as 'compliance-oriented regulation', which the Australian Law Reform Commission has summarised as involving three key elements:

1. incentives and encouragement to voluntarily comply, nurturing the ability for private actors to secure compliance through self-regulation, internal management systems and market mechanisms;
2. informed (and targeted) monitoring for non-compliance; and
3. when necessary, enforcement in the event of non-compliance.[89]

2.37 In this context, the role of sentencing in OHS cases is arguably to contribute to the ongoing legitimacy of the system within which workplace health and safety practices are maintained. As Braithwaite and Grabosky argued in 1985, the majority of companies are likely to comply with their obligations, but only 'if the threat of punishing the incorrigible 5 per cent is convincing'.[90]

2.38 Furthermore, as noted above with respect to specific deterrence, for some offenders the experience of prosecution itself, with a sentencing date in view, can be a powerful catalyst for profound change in approaches to safety. As just one example, the prosecution of one company led to a 'concentrated effort' to improve its systems over the course of the three years between the offending and sentence, leading to a self-reported 50% reduction in the frequency rates of recordable injuries and high-potential incidents.[91] Similarly, another company showed significant improvement in its safety practices in the three years between the offending and sentence, resulting in its time-lost-to-injury rates, WorkCover claims and insurance premium rates decreasing to around 'one-third of the industry average'.[92]

89. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, *Volume 1,* ALRC Report 108 (2008) 238–240, 248–251, citing extensively from Christine Parker, 'Reinventing Regulation Within the Corporation: Compliance-Oriented Regulatory Innovation' (2000) 32(5) *Administration & Society* 529.
90. John Braithwaite and Peter Grabosky, *Occupational Health and Safety Enforcement in Australia*: *A Report to the National Occupational Health and Safety Commission* (1985) 81, 104.
91. *DPP v Thiess Services Pty Ltd* [2015] VCC 1954, [32].
92. *DPP v L Arthur Pty Ltd* [2013] VCC 1051, [22].

2.39 Notwithstanding, the review of case law and evidence in this chapter suggests that (a) specific deterrence often isn't particularly relevant because most companies implement proper safety measures in response to incidents and do not reoffend, (b) rehabilitation and community protection are not common objectives in OHS cases and (c) general deterrence, as it is often understood, may not be as easily achievable as the case law suggests. Instead, in a regulatory system governed primarily through a self-management approach, it may actually be denunciation and just punishment that rise to the fore as the most justifiable objectives in sentencing OHS offences. This is because compliance depends on the system as a whole being perceived as legitimate, thereby requiring sentencing standards to have a high level of alignment with community expectations. Further, given that the OHS regulatory system is more about fostering positive health and safety practices than about 'deterring' *mis*conduct, appropriate penalties may be best understood as a means of 'encouraging' compliance.

Sentencing purposes in OHS cases

Question 1: In your view, what are the most important purposes of sentencing in OHS cases?

3. Assessing the seriousness of breach of duty offences

3.1 Sentencing courts in Victoria are required to consider 'the nature and gravity' of an offence in deciding the most appropriate sentence.[93] This chapter considers how courts evaluate the seriousness of an OHS offence, focusing especially on breach of duty offences.

3.2 In our review of sentencing remarks, we found that courts often assess the seriousness of a breach of duty offence by reference to two key factors: the extent of an offender's departure from their obligations and the level of risk created by that departure. In turn, assessing the level of risk requires a court to consider the likelihood of an incident occurring and the seriousness of the potential consequences of such an incident.[94]

3.3 Breaches of duties under the *OHS Act* are 'risk-based' offences, meaning those offences criminalise failures to eliminate or reduce *risks* to health and safety.[95] The causing of actual harm through such failures is not an element of the offence. This means that prosecutors do not have to establish that the breach of duty *caused* harm to a person and, in turn, sentencing courts have usually focused on the breach itself, not its consequences.

Extent of departure from duty

3.4 In considering how far the offender has fallen short of compliance with their duty, courts sometimes assess the level of disregard – for the safety of employees and other people – demonstrated by the offending.[96] This assessment can be informed by factors such as:

- what the person knew, or ought to reasonably have known, about the hazard or risk, and any ways of eliminating or reducing the risk;
- the availability and suitability of ways to eliminate or reduce the risk; and
- the cost of eliminating or reducing the risk.[97]

93. *Sentencing Act 1991* (Vic) s 5(2)(c).
94. *DPP v Frewstal Pty Ltd* [2015] VSCA 266, [127]; *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241, [23].
95. The offences have also been referred to as 'inchoate offences': Richard Johnstone, 'Work Health and Safety and the Criminal Law in Australia' (2013) 11(2) *Policy and Practice in Health and Safety* 25, 27.
96. *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241, [23].
97. *DPP v Saloon Park Pty Ltd* [2023] VCC 709, [40]–[57].

3.5 In some cases, courts refer to whether the offender 'treated the legislation in a cavalier manner' and simply hoped for incidents not to occur, but otherwise left the issue to chance.

3.6 The assessment of objective seriousness has sometimes been determined by reference to section 20(2) of the *OHS Act*, which provides five factors that must be considered when determining what are 'reasonably practicable' steps to ensure safety.

Level and likelihood of the risk

3.7 The level of risk created by the offender's breach is informed by matters such as the number of persons exposed to the risk[98] and the extent to which the risk of injury was foreseeable.[99] It will be an especially aggravating factor if the offender actually foresaw the risk and did not implement adequate measures to eliminate or reduce it (such as after receiving an improvement or prohibition notice from WorkSafe).

The relevance of death or injury

3.8 Given that breaches of duties in the *OHS Act* are risk-based offences, the fact that a risk results in actual harm (such as an injury or death) is not an element of the offence. Because of this, the current approach to sentencing these offences is such that the fact that a risk did *not* cause harm does not necessarily reduce the seriousness of the offence,[100] and conversely, the fact that a risk *did* cause harm does not necessarily increase the seriousness of the offence. Instead, the fact that the breach in the particular case resulted in death 'is relevant only in the sense that it might manifest or demonstrate the degree of seriousness of the relevant threat to health or safety resulting from the breach'.[101]

98. *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278, [142]; *DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55, [232].
99. See, for example, *DPP v Hungry Jacks & Ors* [2018] VCC 1454, [23] (describing the risk as 'at the outer limits of foreseeability').
100. In *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241 at [21], the appellant unsuccessfully attempted to deploy this reasoning, using the sentence imposed in *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131 as a benchmark sentence for a breach involving death, against which the sentence imposed on the appellant had to be assessed.
101. *DPP v Frewstal Pty Ltd* [2015] VSCA 266, [127].

3.9 That said, our findings in the statistical report clearly highlight that the fact that someone died as a result of an OHS offence tends to lead to quite stark increases in the values of fines imposed. There is therefore a clear inconsistency in the sentencing of OHS offences: the case law seems to suggest that the fact that an OHS offence resulted in a death should play only a very small role in the sentencing exercise, but sentencing practices in both the higher courts and the Magistrates' Court make patently clear that the fact of death is a very significant factor, both in the choice of jurisdiction and in the fine amount imposed. This inconsistency should be rectified.

3.10 As these are risk-based offences for which the causing of harm is not an element, it may be possible to reconcile the law and practice by having death or injury acknowledged in the sentencing phase of criminal proceedings. We are interested in hearing from stakeholders and the community as to whether courts in OHS cases should more expressly be allowed to take into account the fact that a risk-based offence resulted in someone being injured or killed (so long as causation is established).

3.11 In New South Wales, for example, courts in OHS cases have found that the causing of actual harm is an aggravating factor.[102] In Western Australia, the fact that an OHS offence caused death or injury increases the maximum fine for the offence.[103] The same is true in Scotland. In *HMA v Broomhall Ltd*, a case where an employee was severely injured by a forklift, a Scottish Sheriff Court said, 'that there was a life-changing injury to an employee must weigh heavily with the court – although that is not a dominant feature for sentencing'.[104] And in England and Wales, the sentencing guideline for health and safety offences requires courts to consider whether an OHS offence was a significant cause of actual harm, and enhance the sentence imposed if it was.[105] Soon after that sentencing guideline came into effect, the Court of Appeal said that:

> a consistent feature of sentencing policy in recent years, reflected both in statute and judgments of this court, has been to treat the fact of death as something that substantially increases a sentence, as required by the second stage of the assessment of harm at step one. Without more, we consider that the fact of death would justify a move not only into the next category but to the top of the next category range[.]

Accordingly, the court found that the fact of a death raised the sentencing range from £140,000 to around £250,000.[106]

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102. *SafeWork NSW v MHE-Demag Australia Pty Ltd* [2023] NSWDC 261,[74].
103. *Work Health and Safety Act 2020* (WA) s 31.
104. Judiciary of Scotland, 'Sentencing Statements (HMA v Broomhall Ltd)' (judiciary.scot.com, 2023).
105. Sentencing Council for England and Wales, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline* (2016) 5.
106. *R v Whirlpool Appliances Ltd* [2017] EWCA Crim 2186.

3.12 In England and Wales, there is recognition that, while OHS offences are risk-based offences, the fact that harm occurred as a result of that risk is nevertheless relevant to sentencing. As Lord Justice Treacy said in discussing the introduction of a sentencing guideline for OHS offences:

> Health and safety offences differ from many others as the offence is in creating the risk of harm; harm does not need to have occurred in order for an offence to have been committed. The approach to assessing harm therefore needs to guide sentencers in assessing the likelihood of harm occurring – high, medium or low – and then providing a mechanism to move up to a higher category or substantially move within the category range if actual harm has occurred.[107]

3.13 Accordingly, the sentencing guideline for OHS offences in England and Wales provides that the level of actual harm caused by an offence informs the court as to whether to move up in a category or harm range:

> For … reasons of principle and practicality, the Council has concluded that the risk posed by the offender's breach must be considered foremost in assessing harm. However, the Council still considers that the harm actually caused by the offence is *central* to assessing seriousness for the purposes of sentencing. Not only is this recognised in legislation but the Council believes it is important to recognise any harm suffered by victims as a fundamental aspect of the seriousness of an offence. This is necessary to reflect the impact that has been caused to victims of offending.[108]

Factors relevant to assessing seriousness

Question 2: What do you believe should ordinarily be the most important factors for courts in assessing the seriousness of an OHS offence?

The relevance of death or injury

Question 3: In the sentencing of an OHS case, should the severity of the harm caused (such as death or serious injury) be relevant to assessing the seriousness of the offence? If so, to what extent?

107. Lord Justice Treacy, 'Keynote Address: Criminal Law Review Conference' (Public Lecture, Criminal Law Conference, 3 December 2015).

108. Sentencing Council for England and Wales, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Guidelines: Consultation* (2014) 25 (emphasis added).

4. Circumstances of the offender in OHS cases

4.1 This chapter discusses the circumstances specific to offenders (especially companies) that are relevant to sentencing OHS offences. These include the size of the company and its financial circumstances, the good character of the offender, the offender's plea, their criminal history and safety record, and their post-offence conduct.

4.2 While we discuss these topics in detail below, we would also be interested to hear about which factors, in general, should ordinarily be most relevant to sentencing an OHS offender.

Factors specific to the offender

Question 4: What factors specific to the offender do you believe should ordinarily be most significant in sentencing an OHS offender?

The size of the company

4.3 When sentencing an offender to a fine (for any type of offending), courts are required by section 52 of the *Sentencing Act* to 'take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose' in deciding 'the amount and method of payment of the fine'.[109] This requirement exists in every Australian jurisdiction; courts must consider a defendant's financial circumstances before fining them,[110] although courts can still fine someone if they can't ascertain the person's or company's financial circumstances.[111]

109. *Sentencing Act 1991* (Vic) s 52(1).

110. *Crimes (Sentencing) Act 2005* (ACT) s 14(3); *Fines Act 1996* (NSW) s 6; *Penalties and Sentences Act 1992* (Qld) s 48(1); *Sentencing Act 2017* (SA) s 120; *Sentencing Act 1995* (WA) s 53(1); *Sentencing Act 1995* (NT) s 17(1). In Tasmania, see *Campbell v Turner* [2001] TASSC 91, [10]; *Lefever & Smith v White* [2002] TASSC 19, [7]; *Reeves v Ranson* [1999] TASSC 52, [21].

111. *Sentencing Act 1991* (Vic) s 52(2).

4.4 In the available OHS cases, courts seem to have often taken into account each company's (and person's[112]) financial circumstances,[113] so long as the court was advised of such by the parties.[114] Sometimes the assessment of financial circumstances appears to have been relatively straightforward. For instance, in *DPP v Mainline Developments Pty Ltd*, the court 'was simply told that in light of the company's ongoing work any fine I impose will be met'.[115] In contrast, in other cases the examination of the company's financial circumstances was more involved:

> part of the defendant company's outline of submissions … were profit and loss statements for the financial years 2014 through to 2018, as well as a profit and loss estimate for the financial year 2018/19. Over the years, the company's profit margin has ranged from 3.3 per cent to 5.6 per cent … The consequent loss of work as a result of the cancellation of this contract, imposed significant strain upon the defendant company. Despite the financial difficulties, the defendant company is still trading and … has no intention of winding up.[116]

4.5 As highlighted in *DPP v De Kort*, the assessment of a company's financial circumstances can be especially difficult when it exists within a complex corporate structure:

> I was provided in evidence with the balance sheet of the trust … It shows the trust has net assets of only $8,935.00 … The balance sheet does not … attempt to value the business of the company. The document which reports the tax profit for the years 2016 to 2018 shows that profits per year on average exceed around $200,000 …

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112. *DPP v Handcock* [2019] VCC 444, [23], [28] ('I have taken into account … that you are of modest financial means').
113. *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132, [41]; *DPP v United Access Pty Ltd* [2020] VCC 1085, [34]–[35]; *DPP v Mainline Developments Pty Ltd* [2020] VCC 47, [47]; *DPP v SJ & TA Structural Pty Ltd* [2019] VCC 2016, [16], [24]; *DPP v Kenneally & Anor* [2019] VCC 658, [27]; *DPP v AM Design and Construction Pty Ltd & Anor* [2018] VCC 373, [33]; *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394, [27], [29], [38], [54]; *DPP v Redback Tree Services* [2017] VCC 1602, [11] ('I was informed that the company is financially successful and has the capacity to pay an appropriate fine … the company turned over in excess of $1m in the last financial year'); *DPP v Fergusson & Anor* [2017] VCC 1276, [47]–[49]; *DPP v Australian Box Recycling Pty Ltd* [2016] VCC 1056, [25] ('beyond the bare fact of liquidation the resources that remain available to meet any penalty are not known. What is known from the record of interview, is that at the time, the company was … turning over something in excess of $1 million a year'); *DPP v Bilic Homes Pty Ltd* [2016] VCC 810, [21]; *DPP v Cool Dynamics Refrigeration Pty Ltd* [2015] VCC 1882, [21] ('It is clear that the accused is able to pay a significant fine'); *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472, [32]–[34]; *DPP v WCA (Vic) Pty Ltd* [2013] VCC 980, [35]; *DPP v Orbit Drilling Pty Ltd & Anor* [2010] VCC 417, [56]; *DPP v AirRoad Pty Ltd* [2012] VCC 1960, [58].
114. In *Di Tonto & Anor v The Queen* [2018] VSCA 312 at [30], the Court of Appeal indicated that the sentencing court had not received as much supporting evidence as might have been ideal:
    > It is true that perhaps more could have been put before the sentencing judge to support the contention that fines of the order that her Honour ultimately fixed would be ruinous, and disproportionate to the financial circumstances of each appellant.
115. *DPP v Mainline Developments Pty Ltd* [2020] VCC 47, [47]. See also *DPP v Tooradin Excavations Pty Ltd* [2014] VCC 1419, [10] (The defendant company 'has the capacity to pay a fine within that range'); *DPP v Dotmar Epp Pty Ltd* [2014] VCC 1326, [51] ('Defence counsel indicated that there would be no issues as to the company's capacity to pay any fine imposed'); *DPP v Orbit Drilling Pty Ltd & Anor* [2010] VCC 417, [56] ('The company therefore remains a trading entity … [and has] the means to be able to pay the fine'.)
116. *DPP v SJ & TA Structural Pty Ltd* [2019] VCC 2016, [16], [24].

> One expense not shown is rent. I was told the facility where De Kort operates the academy is owned by another company to which De Kort pays rent. That is a related company to De Kort sharing common shareholders and directors. I do not know what the financial arrangements are between De Kort and the company that owns the land. I have concluded that … De Kort is a successful business capable of making appropriate arrangements to pay a fine[.][117]

4.6 In one case, rather than referring directly to the financial position of the company, the court instead referred to the size of the company, as measured by the number of employees. For example, in *DPP v Toll Transport Pty Ltd*, the court 'factor[ed] in the defendant company's size … and the number of Australian employees, being 15,194', before imposing a $1 million fine.[118]

4.7 We did, though, find numerous cases where there was no apparent evidence of – or at least no discussion in the sentencing remarks about – the company's financial circumstances or size.[119] It seems that courts tend to interpret this as meaning that the company has capacity to pay whatever fine is imposed.[120]

4.8 But if a company's financial circumstances are known, what role should they play in the sentencing exercise? It seems that they have played a varied role.

4.9 Where the company is small and still functioning, or struggling financially, the crippling effect of a substantial fine can mitigate the sentence imposed. In *DPP v WCA (Vic) Pty Ltd*, the court said that it would reduce the fine to a value that 'would [not] force the company into liquidation', in part to ensure the company could pay the fine.[121] In *DPP v United Access Pty Ltd*, the court said, 'the aggregate fine I will impose on this small family company will be much harder felt than if it were applied to a bigger company or indeed a multinational such

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117. *DPP v De Kort* [2019] VCC 291, [18]–[19]. See also *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472, [34] ('it appears that Resource Recovery operates the waste recycling centre, and its associated companies, Moorabbin Bulk Bins and Combined Bulk Bins are the major supplier of the waste material it processes … All three companies are linked or controlled … I was provided with financial statements of all 3 companies').
118. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [64].
119. *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278; *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400; *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053; *DPP v Keilor-Melton Quarries Pty Ltd* [2018] VCC 2139; *DPP v W.F. Montague Pty Ltd* [2018] VCC 1553; *DPP v Hungry Jacks & Ors* [2018] VCC 1454; *DPP v Ricegrowers Ltd* [2018] VCC 542; *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021; *DPP v CLM Infrastructure Pty Ltd* [2017] VCC 192; *DPP v ABD Group Pty Ltd* [2016] VCC 1450; *DPP v BPL Melbourne Pty Ltd* [2016] VCC 282; *DPP v Thiess Services Pty Ltd* [2015] VCC 1954; *DPP v Frewstal Pty Ltd* [2015] VCC 731; *DPP v Melbourne Water Corporation* [2014] VCC 184; *DPP v L Arthur Pty Ltd* [2013] VCC 1051.
120. *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053, [38] ('I note the capacity to pay was not raised as an issue'); *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [49] ('No issue arose as to whether New Sector had the capacity to pay an appropriate penalty').
121. *DPP v WCA (Vic) Pty Ltd* [2013] VCC 980, [35]. At [34] the court observed, having received a letter from the company's accountant about its financial position, 'that a crushingly large fine payable immediately would prevent the company from continuing to trade'.

as "Hungry Jacks"'.[122] In *Arthur's Seat Scenic Chairlift Pty Ltd v The Queen*, the Court of Appeal reduced a $110,000 fine to $60,000 in part because the financial information showed that the company had 'suffered substantial operating losses', to the point where 'the chairlift is still moribund'.[123] And in *Di Tonto & Anor v The Queen*, the Court of Appeal reduced $480,000 in fines imposed on 'a modestly sized business' and its sole director to $240,000, largely because 'it is he who will suffer the financial penalty imposed when the two fines are combined … [because he] proposes to meet whatever fines are imposed, and continue to run his business … [and not] recommence trading through a phoenix entity'.[124]

4.10 Courts have, though, also said that even if a fine will have a 'devastating effect' on a company and force it into liquidation, that should not trump the 'paramount purpose' of 'general deterrence'.[125]

4.11 There are, then, circumstances in which the company has already gone into liquidation. In those cases, courts will often prioritise general deterrence even more and not reduce the fine despite the company's inability to pay, because the size of the fine is thought to serve a primarily denunciatory and deterrent role.[126] For instance, in *DPP v Kenneally & Anor*, the court said that the company's:

> lack of financial viability is not the primary consideration in determining the level of the fine. General deterrence must … be given significant weight. The message must be clear and consistent that breaches of this legislation placing workers at risk will not be tolerated and significant penalties will result[.][127]

4.12 In contrast to these scenarios, though, where fines can be reduced in response to the corporation's financial circumstances, rarely do courts *enhance* the fine imposed when the OHS offence was committed by a very large organisation. For instance, in the 2018 case of *DPP v Hungry Jacks & Ors*, the court imposed a $275,000 fine for an OHS breach that resulted in a death. This is on par with fines imposed in similar cases involving much smaller companies, despite Hungry Jack's having (at the time) an annual revenue in excess of $1 billion and eight-figure profit margins.[128]

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122. *DPP v United Access Pty Ltd* [2020] VCC 1085, [34]–[35].
123. *Arthur's Seat Scenic Chairlift Pty Ltd v The Queen* [2010] VSCA 269, [26].
124. *Di Tonto & Anor v The Queen* [2018] VSCA 312, [28]–[32].
125. *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394, [54], [63]. See also *DPP v Fergusson & Anor* [2017] VCC 1276, [47]–[49].
126. *DPP v Concorp Group Pty Ltd* [2019] VCC 1846, [24]; *DPP v Kenneally & Anor* [2019] VCC 658, [27]; *DPP v Specialised Concrete Pumping Victoria Pty Ltd* [2018] VCC 105, [20].
127. *DPP v Kenneally & Anor* [2019] VCC 658, [27].
128. *DPP v Hungry Jacks & Ors* [2018] VCC 1454; Madeleine Heffernan, 'Are the Profits Better at Hungry Jack's?', *Sydney Morning Herald* (17 February 2017).

Similarly, a company with an annual turnover of $160 million in 2009–10 was sentenced to a $500,000 fine (after a successful DPP sentence appeal) in a case where 'an extremely dangerous work practice' had led to an employee's death.[129]

4.13 Our finding that there has been a compression of fine amounts in OHS cases, regardless of the size of the company, is similar to what the Sentencing Council in England and Wales found in 2015. As Lord Justice Treacy explained at the time:

> [T]he Council reviewed a sample of offences which all caused death and were broadly comparable in terms of culpability. A micro company, with a turnover of around £1 million, was fined £50,000 following an early guilty plea – the fine being five per cent of its turnover. Whereas a very large company, with turnover in the region of £900 million, was fined £300,000 after trial for a similar offence – the fine being just 0.03 per cent of its turnover. There was an unacceptable degree of compression of the sentencing range.[130]

The approach in England and Wales

4.14 The Sentencing Council for England and Wales publishes a variety of sentencing guidelines[131] to assist courts achieve consistency in sentencing. Those guidelines tend to set out the process for deciding an appropriate sentence for a particular offence, a comprehensive and non-exhaustive list of relevant considerations, and sentencing ranges based on that list of considerations.[132] While courts are required to consider relevant sentencing guidelines, those guidelines are not binding, and courts can move outside the specified sentencing ranges if it would be appropriate to do so. One of the many sentencing guidelines that the Sentencing Council has published covers how to sentence health and safety offences, among other things.[133]

129. *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131, [1], [5].
130. Lord Justice Treacy, 'Keynote Address: Criminal Law Review Conference' (Public Lecture, Criminal Law Conference, 3 December 2015).
131. In 2018, in response to terms of reference from the Victorian Government, we published an issues paper and final report outlining how a sentencing guidelines council could be established in Victoria to produce these sorts of guidelines: Sentencing Advisory Council (2017), above n 23; Sentencing Advisory Council, *A Sentencing Guidelines Council for Victoria: Report* (2018).
132. As the Court of Appeal (Criminal Division) in England and Wales confirmed in *R v Whirlpool Appliances Ltd* [2017] EWCA Crim 2186 at [12], despite the guideline offering numerical sentencing ranges of fine amounts, the sentencing of OHS offences remains 'an exercise of judgment appropriately structured by the Guideline … not straitjacketed by it'.
133. Sentencing Council for England and Wales (2016), above n 105, 3–20.

4.15 There are three criteria that the sentencing guideline uses to triangulate a suggested sentencing range for OHS offending. First is the *culpability* of the offender, based largely on how far below the requisite safety standard the behaviour fell. Second is the level of *harm* caused, with the most severe category of harm being 'level A harm' (which includes death and debilitating injury). And third is the organisation's annual *turnover* or equivalent[134] financial information. A number of sentencing guidelines offer the following statement of principle, which was recently endorsed by the Law Commission for England and Wales: '[w]hen sentencing organisations the fine must be sufficiently substantial to have a real economic impact'.[135]

4.16 To illustrate these criteria, assume a company has committed an OHS offence that resulted in a death, and its behaviour 'fell far short of the appropriate standard'. This would mean that the company has exhibited high culpability and caused level A harm. Below are the initial category ranges courts would be required to consider based on the annual turnover or equivalent of the company:

Micro (not more than £2 million)	£150,000–£450,000
Small (between £2 million and £10 million)	£300,000–£1,600,000
Medium (between £10 million and £50 million)	£1,000,000–£4,000,000
Large (£50 million or more)	£2,600,000–£10,000,000

4.17 The values of fines imposed on micro and large companies can therefore differ by a factor of 20 or more, based solely on the size of the company. The guideline also acknowledges that there may even be 'very large organisations' (for example, large multinationals), whose turnover or equivalent so very greatly exceeds the threshold for large organisations that 'it may be necessary to move outside the suggested range to achieve a proportionate sentence'.[136] Though again, courts retain discretion whether to do so in such instances.[137]

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134. For instance, the guideline notes that public bodies should have their financial position assessed by their 'Annual Revenue Budget' (i.e., appropriation): ibid 6.

135. Law Commission for England and Wales (2022), above n 75, 141, citing Sentencing Council for England and Wales, *General Guideline: Overarching Principles* (2019). See also Sentencing Council for England and Wales, *Corporate Manslaughter* (2016); Sentencing Council for England and Wales, *Corporate Offenders: Fraud, Bribery and Money Laundering* (2014); Sentencing Council for England and Wales, *Organisations: Breach of Food Safety and Food Hygiene Regulations* (2016).

136. See, for example, *R v Nestle UK* [2021] EWCA Crim 1681, [39]–[40]; *R v Tata Steel UK Ltd* [2017] EWCA Crim 704, [31]; *R v Thames Water Utilities* [2015] EWCA Crim 960, [29]–[42].

137. See, for example, *R v Essex* Partnership *University NHS Foundation Trust* (Chelmsford Crown Court, Cavanagh J, 16 June 2021), [91] ('I am satisfied that the Trust is a Large Organisation … Its most recent annual revenue … is about £325 million'); *R v University College London* [2018] EWCA Crim 835, [16]–[18]; *Whirlpool UK Appliances Limited v The Queen* [2017] EWCA Crim 2186, [33] ('the turnover of the appellant was of the order of £700m. Although the judge did not say in terms that the appellant was therefore a very large organisation within the language of the Guideline it is clear to us that it must be … It was therefore permissible to move outside the appropriate range in order to achieve a proportionate sentence).

4.18 This approach in England and Wales stands in stark contrast to the present approach in Victoria. In England and Wales, the financial position of the organisation is a major contributing factor to the initial decision about the fine amount to be imposed. This is to ensure the fine is experienced similarly by each defendant company and to account for the vastly different sizes of companies. In Victoria, fines in OHS cases involving a fatality were quite consistently between about $200,000 and $400,000,[138] regardless of the size of the company.

4.19 The Judicial College notes in the *Victorian Sentencing Manual*:

> The amount of the fine must be sufficient to both punish the offender and deter those who may consider committing similar offences. It cannot be so low that it becomes merely a tax on the illegal conduct. In order to be sufficiently punitive and deterrent, the fine must 'have some real sting in it' from the point of view of the offender.[139]

4.20 Similarly, the County Court said in *DPP v Resource Recovery Victoria Pty Ltd*, in the specific context of OHS offences:

> It is little deterrent or punishment if a fine is calculated so as to allow a company to absorb it as just another cost of doing business.[140]

4.21 It may be worth considering whether this approach should be more expressly endorsed in Victoria. The size of the company is arguably *the* most important factor in the sentencing guideline for OHS offences in England and Wales,[141] it is a mandatory consideration in the *Sentencing Act*,[142] and it is viewed as one of the most important factors for consideration in sentencing corporations more generally.[143] And while it could be argued that different fine amounts for the same type of offending undermine consistency in sentencing, it could equally be said that ensuring the size of the fine is proportionate to the size of the company would promote such consistency.

138. *Statistical Report*, 39.
139. Judicial College of Victoria,'12.3.1 – Financial Circumstances', *Victorian Sentencing Manual* (4th ed., 2022) 233 (citations omitted).
140. *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472, [32].
141. Sentencing Council for England and Wales (2016), above n 105.
142. *Sentencing Act 1991* (Vic) s 52(1).
143. Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 479–480.

Ascertaining an offender's financial circumstances

4.22 If the financial circumstances of an offender are to play a greater role in sentencing for OHS offences, it is necessary to consider how courts should be apprised of each offender's financial situation.

4.23 According to the England and Wales sentencing guideline, courts can expect to be provided with 'comprehensive [financial] accounts for the last three years, to enable the court to make an accurate assessment of [the company's] financial status'.[144] If those accounts are not forthcoming, 'the court will be entitled to draw reasonable inferences … which may include … that the offender can pay any fine'.[145]

4.24 In Victoria, there are a number of potential options to facilitate providing courts with detailed financial information about corporate offenders. One option could be to follow the approach in New South Wales, where legal representatives are required to present an affidavit to the court about their client's financial circumstances. Legislation could potentially require the provision of that information in advance of any sentencing hearing. Another option could be the introduction of a practice direction or similar obligation requiring such information to be provided to courts. While practice directions are not legally binding, failing to comply with a practice direction can result in the court exercising its 'case management and costs powers'.[146]

Financial circumstances of the offender

Question 5: When imposing a fine on a company in an OHS case, should the size of the company be relevant? If so, why? If not, why not?

Question 6: If the size of a company should be relevant to the choice of fine amount to be imposed on a company in an OHS case, what are the best measures for courts to assess the size of a company, and what are the best ways for courts to be informed about the size of the company?

144. Sentencing Council for England and Wales (2016), above n 105, 6.
145. Ibid 6.
146. Supreme Court of Victoria, General, *Practice Note SC Gen 1: Practice Notes and Notice to the Profession* (30 January 2017) 1.

Good character

4.25 The nature of an offender's character is often raised as a relevant factor in sentencing, allowing a court to determine, on a broader level, the nature of the offender and their role in society. For individuals, this is often elucidated through character references. For corporations, good character has been inferred from good corporate citizenship,[147] charity work[148] and a previously positive OHS record.[149]

Good character of company directors

4.26 There seems to be a level of inconsistency in how courts are taking into account whether a *director's* good character is relevant to sentencing a company. In *DPP v Bilic Homes Pty Ltd*, the court took into account that the company director 'has been a good citizen', in addition to and separately from the 'company ha[ving] been a good corporate citizen'.[150] Similarly in *DPP v New Sector Engineering Pty Ltd*, when assessing whether the company was a good corporate citizen, the court took into account character references tendered on behalf of the sole director demonstrating his 'good character' and personal history.[151]

4.27 But in *DPP v Saloon Park Pty Ltd*, the court said that character references regarding the sole director of a company were 'less' relevant to the sentencing task than those relating to the company.[152] And in *DPP v Keilor-Melton Quarries Pty Ltd*, the court said that the directors were 'people of impeccable good character', but this was only taken into account to a 'very limited extent'.[153]

Good character of companies

Question 7: In sentencing a company for an OHS offence, should 'good character' be relevant to determining the most appropriate sentence? If so, what matters should ordinarily be most relevant to assessing a company's good character?

147. *DPP v YJ Auto Repairs Pty Ltd* [2023] VCC 1759, [65]; *DPP v De Kort* [2019] VCC 291, [16].
148. *DPP v L Arthur Pty Ltd* [2013] VCC 1051, [19].
149. See, for example, *DPP v St Vincent's Care Services Ltd* [2021] VCC 1035, [86]; *DPP v United Access Pty Ltd* [2020] VCC 1085, [26].
150. *DPP v Bilic Homes Pty Ltd* [2016] VCC 810, [27].
151. *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [38]–[41].
152. *DPP v Saloon Park Pty Ltd* [2023] VCC 709, [76].
153. *DPP v Keilor-Melton Quarries Pty Ltd* [2018] VCC 2139, [22].

Guilty pleas and remorse

4.28 Defendants who plead guilty are entitled to a discount in their sentence. Through their plea of guilty, they save the community the expense of a trial and also spare any witnesses and victims the need to testify at trial. To incentivise defendants to plead guilty when appropriate, courts in Victoria are required to specify the sentence that would have otherwise been imposed had the defendant not pleaded guilty. This has been in place since 1 July 2008.[154] The Attorney-General at the time outlined the rationale for requiring courts to specify the extent of guilty plea discounts:

> Because the court does not normally identify the amount of any discount, the extent to which a plea of guilty changed the sentence that would otherwise have been imposed is often not clear. This lack of transparency can reduce the confidence of the victim and the community in the sentencing process and can fuel scepticism among defendants about whether an early plea of guilty will make any difference to the sentence imposed on them.[155]

4.29 This requirement for courts to specify the discount that they applied makes it possible to examine the level of discounts that companies received for pleading guilty in OHS cases.[156] Since July 2008, 43 companies sentenced in the higher courts for OHS offences have received a discount in fine amounts after pleading guilty, and the court has specified the discount it applied due to that plea of guilty.[157]

4.30 In one case, there was no difference in the fine amounts that the court would have imposed without a plea of guilty, but this was because the court indicated that it would have recorded a conviction had the defendant company not pleaded guilty.[158]

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154. *Sentencing Act 1991* (Vic) s 6AAA, as inserted by *Criminal Procedure Legislation Amendment Act 2008* (Vic) s 3.
155. Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 2007, 4100 (Rob Hulls, Attorney-General). This amendment was based on our recommendation in Sentencing Advisory Council, *Sentence Indication and Specified Discounts: Final Report* (2007).
156. Recent research does suggest that caution is required in interpreting stated section 6AAA guilty plea discounts, with some defence practitioners and judicial officers describing those statements as 'totally artificial', 'arbitrary', 'pluck[ed] … out of the air', something '[n]obody ever puts any real thought into', and 'a nuisance more than anything else': Asher Flynn and Arie Freiberg, *Plea Negotiations*: *Final Report to the Criminology Research Advisory Council* (2018) 122–128.
157. There was one unpublished judgment in 2010 where the court did not specify the discount despite the defendant company having pleaded guilty.
158. Unpublished sentencing remarks provided to the Council.

4.31 Of the remaining 42 cases, the discount in fine amounts ranged from 12.5% to 50.0%, with a median of 29.3%.[159] While 42 cases is a small sample size, these findings are very consistent with the proportional discounts that people usually receive in their prison sentences for pleading guilty. We have previously found that the majority of discounts in prison sentences (71.7%) are between 20% and less than 40%,[160] and in the 42 OHS cases, the majority of discounts in fine amounts (69.0%) were also between 20% and less than 40%.

4.32 The 50% discount was in a case involving an employee who fell from an improperly secured ladder that had moved against an unlocked, untagged lever, resulting in the release of hot tallow (animal fat) that caused burns to the employee's body. The court in that case said that it reduced the fine from $80,000 to $40,000 because:

> [t]he company has pleaded guilty to the charge and, whilst it did not do so at the earliest possible opportunity, there having been a contested committal hearing, it is nonetheless entitled to a reduction in sentence. The plea of guilty has saved the time and costs of a trial. I also treat the plea of guilty as evidence of remorse.[161]

4.33 In the case with the second highest discount (45.7%, from $700,000 down to $380,000), the court said that the defendant company had pleaded guilty 'at the earliest opportunity', its plea was 'consistent with remorse' and that it had 'a plausible avenue of defence' that it did not pursue.[162] And the third highest discount (44.4%, from $450,000 down to $250,000) was in a case where 'the defendant was fully co-operative with investigators and pleaded guilty at the committal mention stage, which was an early stage to do so' and the plea of guilty 'is indicative of remorse and a willingness to take responsibility'.[163] It seems, then, that in addition to the timing of the plea and saving the justice system and witnesses the ordeal of a trial, plea discounts are highest when the court views the plea of guilty – coupled with other factors – as a genuine demonstration of remorse.

4.34 The smallest proportional discount (12.5%, from $200,000 to $175,000) was in a case involving a forklift hitting and killing a man because neither the forklift driver nor the deceased could see each other.[164] The court indicated that the company was entitled to the benefit of its plea of guilty, having offered to plead to the most

159. *Statistical Report*, 29.
160. Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (2015) 66.
161. *DPP v BPL Melbourne Pty Ltd* [2016] VCC 282, [17].
162. *DPP v AM Design and Construction Pty Ltd & Anor* [2018] VCC 373, [34]–[36].
163. *DPP v Frewstal Pty Ltd* [2015] VCC 731, [63].
164. Unpublished sentencing remarks provided to the Council.

serious aspect of the alleged offending at an early opportunity. The next smallest proportional discount (13.3%, from $300,000 to $260,000) was in a case where a maintenance contractor had been killed.[165] The court in that case offered a detailed rationale for the limited discount applied:

> I take into account that the company has pleaded guilty to this charge and is entitled to some leniency in its sentence for doing so. It does not attract as much leniency as an early plea would have done. This plea of guilty was entered on the second morning of the refixed trial when empanelment of a jury was scheduled to commence … there had been a contested committal at which suggestions had been made that [the deceased] intended his own death. There has been two days of pre-trial argument … as part of which the company alleged that a WorkSafe inspector had used improper means to obtain some evidence … [there were] objection[s] to victim impact statements being received … [all of which] greatly diluted what remorse might have been inferred from the fact of the plea of guilty … the reduction in this case should be lower than it would have been had it occurred much earlier and had there been a more empathetic attitude to which legal points to take, more reflective of remorse.[166]

The offender's history before the offending

4.35 The offender's safety record can be relevant to their moral culpability as well as to the need for specific deterrence. A safety record can include prior convictions for OHS offences but also a broader consideration of the scale of the offender's operations and the number of incidents that have arisen over the offender's history.[167] This is sometimes expressed in terms of the number of work hours performed in the offender's workplaces.[168]

4.36 In *DPP v New Sector Engineering Pty Ltd,* the court noted that the company had been in operation for 26 years with an 'unblemished safety record'.[169] This, the court observed, was in contrast to cases where the company is aware of a risk through previous 'near misses' or convictions and fails to act, demonstrating that

165. *DPP v Ricegrowers Ltd* [2018] VCC 542.
166. *DPP v Ricegrowers Ltd* [2018] VCC 542, [23]–[30].
167. *DPP v Best Benchtops and Stone Pty Ltd* [2022] VCC 2296, [14]. In *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278, at [160], the court noted that the offending company's lack of prior convictions was 'of some significance given the role it has played operating and employing staff at the Hazelwood mine since privatisation in 1996'.
168. *DPP v Hansen Yuncken Pty Ltd* [2013] VCC 1543, [23]: the court accepted that the offending company's industrial safety record was excellent, given that in the preceding decade, approximately 55 million work hours had been performed on its construction sites.
169. *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [39].

the company had not 'wilfully disregarded the risk [that was] the subject of these charges'.[170] The court accepted that the company's exemplary safety record reduced the need for specific deterrence as a sentencing consideration.[171] A similar safety record was observed in *DPP v United Access Pty Ltd*, where the court noted that the company's 20 years of operation without conviction demonstrated an 'excellent safety record'.[172]

4.37 In contrast, the court has emphasised the importance of specific deterrence as a sentencing consideration where the offender has prior convictions for similar offending against the *OHS Act*. In *DPP v Toll Transport Pty Ltd*, the court said that the company's prior convictions carried significant weight in determining the relevance of specific deterrence to the sentence imposed.[173]

4.38 However, the court has also recognised the need to view prior offences against the *OHS Act* in the context of the size and nature of the company.[174] In *DPP v Roads Corporation (trading as VicRoads) & Anor,* the second defendant company, Downer EDI, had three prior convictions in different jurisdictions for OHS offences.[175] However, the court found that the prior convictions, although relevant, did not hold significant weight in determining culpability when framed in the context of Downer's size and the type of activities it undertakes.[176] The court took a similar approach in *DPP v Hungry Jacks & Ors*:

> [E]ach of the defendant companies are large national companies and as such, in my view the prior offending must be viewed in the context of the size of the company, the number of employees and its general exposure to risk as a result. All three companies have established health and safety systems and although the risk in this instance was foreseeable, it is not an example of a serious disregard to the safety of persons other than employees. Thus, in my opinion, specific deterrence while relevant, carries less weight in the sentencing discretion in this case[.][177]

170. *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [46], [58].
171. *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [52], [61].
172. *DPP v United Access Pty Ltd* [2020] VCC 1085, [26].
173. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [53].
174. *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021, [114]; *DPP v Hungry Jacks & Ors* [2018] VCC 1454, [48].
175. *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021, [112].
176. *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021, [114].
177. *DPP v Hungry Jacks & Ors* [2018] VCC 1454, [48].

Prior convictions and enforcement action

4.39 Under the previous 1985 *OHS Act*, it was possible for courts to impose enhanced penalties on offenders found guilty of subsequent OHS offences if they had previously been found guilty of similar offences.[178] This option was removed in the 2004 *OHS Act*. There was some criticism about this change at the time, suggesting that it meant that it was 'no longer possible to take into account the historical record of occupational health and safety compliance' as relevant to sentencing.[179] Far from that being the case though, as the case law shows, a company or person's relevant prior history remains a critical consideration required by the *Sentencing Act*.[180] This in turn informs the need for the court to prioritise specific deterrence or the court's assessment of the offender's prospects of rehabilitation.[181]

4.40 Prior convictions for OHS offences heighten the importance of specific deterrence, which in turn tends towards a more severe sentence. Prior enforcement action taken by WorkSafe in the way of notices, including improvement and prohibition notices, is sometimes advanced by prosecutors to evidence the defendant's safety record. Such notices are, though, treated with more caution than prior convictions.[182]

The offender's conduct after the offending

4.41 In addition to the offender's conduct before the offending, their conduct *after* the offending – including the level of cooperation with the investigation, the steps taken to care for injured workers and their loved ones, the initiative shown to improve safety standards and any subsequent offending – is all relevant to sentencing. These matters are all relevant to assessing the culpability of the offender, their level of remorse and the need for specific deterrence as a sentencing factor.

178. *Occupational Health and Safety Act 1985* (Vic) s 53 (as enacted).
179. K. Lee Adams, 'Not Quite a Brave New World: Victoria's *Occupational Health and Safety Act 2004*' (2005) 10(2) *Deakin Law Review* 376, 389.
180. *Sentencing Act 1991* (Vic) s 5(2)(f), as noted in the *Maxwell Review* itself: *Maxwell Review,* 373.
181. See, for example, *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053, [30]; *DPP v Eliott Engineering Pty Ltd* [2014] VCC 266, [54]–[55]; *DPP v Mainline Developments Pty Ltd* [2020] VCC 47, [45]–[46]; *DPP v Thiess Services Pty Ltd* [2015] VCC 1954, [43]; *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [53]–[54].
182. See, for example, *DPP v Rapid Perforating Pty Ltd* [2023] VCC 1167, [28], [61]–[62].

Cooperation with investigation

4.42 Where an offender has cooperated with an investigation, courts generally acknowledge that as a mitigating factor.[183] Cooperation does not necessarily mean that the offender has pleaded guilty or participated in an interview.[184] It may simply mean cooperating fully with the investigation by WorkSafe. In *DPP v AirRoad Pty Ltd,* the court noted the company's cooperation with the investigation as a mitigating factor, while also noting that such factors in OHS cases 'cannot produce a sentence which does not adequately reflect the seriousness' of the offending.[185]

Supporting victims

4.43 In *DPP v New Sector Engineering Pty Ltd*, the court referred to the efforts of the company's sole director in supporting the injured employee, noting that the director had shown 'commitment' to the victim's recovery and condition.[186] Similar references have been made in other cases where the court was presented with evidence of the defendant's efforts to support the victim. In *DPP v AirRoad Pty Ltd*, the court referred to the defendant's 'supportive gestures' as helping to alleviate some of the impact of the employee's death on the employee's immediate family.[187] Such support can be especially relevant in indicating the defendant's prospects of rehabilitation and level of remorse.[188]

Improvements to safety

4.44 Where the defendant has taken significant steps to eliminate or reduce the risk of future offending, the courts may view this as a mitigating factor, reducing the need for specific deterrence.[189] For example, in *DPP v Melbourne Health*, the court placed little weight on specific deterrence when sentencing the defendant, in part due to the efforts of Melbourne Health to eliminate the hazard that was the subject of the offence.[190]

183. See, for example, *DPP v Frewstal Pty Ltd* [2015] VCC 731, [63]; *DPP v Melbourne Water Corporation* [2014] VCC 184, [18]; *DPP v Dotmar Epp Pty Ltd* [2014] VCC 1326, [59]: 'I have taken into account in mitigation of sentence the plea of guilty which has had considerable utilitarian value. I have also taken into account in mitigation that the company co-operated in the investigation and provided candid information in respect of some matters. It is also to the company's credit that it has taken steps to improve safety at the site'.
184. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [65].
185. *DPP v AirRoad Pty Ltd* [2012] VCC 1960, [57].
186. *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [41].
187. *DPP v AirRoad Pty Ltd* [2012] VCC 1960, [46].
188. *DPP v Melbourne Health* [2021] VCC 407, [22]; *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [57], [61]; *DPP v Thiess Services Pty Ltd* [2015] VCC 1954, [35]; *DPP v AirRoad Pty Ltd* [2012] VCC 1960, [46]; *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [41].
189. *DPP v Melbourne Health* [2021] VCC 407, [28].
190. *DPP v Melbourne Health* [2021] VCC 407, [28].

4.45 There are, however, other cases where the court has considered the post-offence steps taken by the defendant to illustrate how easy it would have been to avoid the risk in the first place. In *DPP v Toll Transport Pty Ltd*, the defendant submitted that it had expended significant time and resources to eliminate the specific hazard relevant to the offence and to improve overall safety in the workplace.[191] While the court accepted that the company's post-offence conduct was a factor in its favour, it also noted that the relative ease with which the company undertook remedial measures demonstrated the 'degree to which the defendant fell short of its duty' in the first place.[192] Similarly, in *DPP v Resource Recovery Victoria Pty Ltd*, the court commended the defendant company for its significant efforts to improve workplace safety following the offence, but also stated that 'the more impressive the evidence of the steps taken to remedy the wrongs after the event, the more inexplicable and inexcusable the failure'.[193] Here, the court imposed fines on the company but declined to reduce the fines by the amount that the company had spent to eliminate the safety issues.[194]

Subsequent offending

4.46 An absence of subsequent convictions, particularly for OHS offences, is generally a matter that is favourable (or at least not unfavourable) to offenders.[195] However, evidence of subsequent enforcement activity by WorkSafe, such as the issuing of improvement or prohibition notices, is not to be equated with subsequent offending, as those notices are based on an investigator's reasonable belief of a breach of the Act, not a finding of guilt by a court.[196]

191. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [60].
192. *DPP v Toll Transport Pty Ltd* [2016] VCC 1975, [61].
193. *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472, [30].
194. *DPP v Resource Recovery Victoria Pty Ltd* [2015] VCC 472, [31].
195. See, for example, *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132, [36].
196. Unpublished sentencing remarks provided to the Council.

5. The role of victims in OHS cases

5.1 This chapter considers the role of victims and their loved ones in OHS cases. This includes consideration of the admissibility of victim impact statements, especially when causation may be in issue; the potential utility of restorative justice conferences in OHS cases; and the role of prosecutors in seeking compensation orders on behalf of victims at sentencing.

Victim impact statements

5.2 One of the most consistent concerns we heard from stakeholders was a perceived inconsistency in whether, and to what extent, courts are receiving, and taking into account, victim impact statements in OHS cases.

What are victim impact statements?

5.3 Since 1994,[197] Victorian courts have been required to receive and consider relevant victim impact statements prior to sentencing. Professor Edna Erez describes a victim impact statement as follows:

> A VIS is a statement made by the victim and addressed to the judge for consideration in sentencing. It usually includes a description of the harm in terms of financial, social, psychological and physical consequences of the crime. In some jurisdictions a VIS also includes a statement concerning the victim's feelings about the crime [and] the offender[.][198]

5.4 Victim impact statements typically serve a dual purpose of informing the court about the consequences of the crime and offering victims a meaningful vehicle to participate in criminal proceedings.

5.5 As to the first purpose, in 2005 the *Sentencing Act* was amended to require sentencing courts to consider 'the impact of the offence on any victim of the offence', whether or not the consequences of the crime were reasonably foreseeable.[199] There are various ways that this consideration can be taken into account. If a victim impact statement illustrates that the offending has caused lifelong debilitating injuries to a victim, the court may conclude that this renders the offending more objectively serious and thus justifies a more severe sentence than would otherwise have been appropriate.[200]

197. *Sentencing (Victim Impact Statement) Act 1994* (Vic).
198. Edna Erez, *Victim Impact Statements*, Trends & Issues in Crime and Criminal Justice no. 33 (1991) 3.
199. *Sentencing Act 1991* (Vic) s 5(2)(daa), as inserted by *Sentencing (Further Amendment Act) 2005* (Vic) s 3; *Eade & Anor v The Queen* [2012] VSCA 142, [34].

Conversely, a victim impact statement may describe forgiveness of the offender and a plea to the court for a more compassionate sentence, potentially reducing the need for just punishment, indicating better prospects of rehabilitation and/or having relevance to assessing the impact of the offending.[201] That said, however powerful a victim impact statement may be, its contents are not allowed to 'swamp all other considerations'.[202] Sentencing remains a delicate balancing exercise of many, often competing considerations.[203]

5.6 As to their second purpose, victim impact statements intentionally operate very flexibly[204] in order to enable their therapeutic objective. They can be made either under oath (if verbal) or via statutory declaration (if written).[205] They can include 'photographs, drawings or poems and other material that relates to the impact of the offence on the victim'.[206] Since 2018, courts can receive the entirety of a victim impact statement even if it contains inadmissible material, and courts need not specify which parts they considered admissible or not.[207] Victim impact statements can have a medical report annexed to them.[208] The victim can request that their victim impact statement be read aloud in court by themselves, someone of their choosing or the prosecutor; however, what can be said aloud is limited to only the admissible parts of the statement.[209] And arrangements can be made to facilitate the victim impact statement being read aloud, such as allowing the victim to appear via videolink, read the victim impact statement from behind a screen or have a support person present, or limiting who is in the courtroom at the time.[210]

5.7 There is, however, one key criterion that must be met before the court will receive a victim impact statement: a victim impact statement can only be made by someone meeting the definition of 'victim'. And a 'victim' is defined as:

> a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a *direct* result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender[.][211]

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200. See, for example, *Tseros v The King* [2023] VSCA 179, [31]; *Donnelly v The King* [2023] VSCA 120, [50]; *DPP v Cole* [2023] VCC 200, [22]–[23]. And in the specific context of OHS offending, see the case of *DPP v Midfield Meat International Pty Ltd* [2021] VCC 2034, [26]–[29].
201. See, for example, *DPP v Reynolds (a pseudonym)* [2022] VSCA 263, [12]; *Doherty v The Queen* [2017] VSCA 215, [34]; *R v Skura* [2004] VSCA 53, [13].
202. *R v Boxtel* [1994] 2 VR 98.
203. As the High Court has observed, no one sentencing factor can ever 'be the controlling factor': *DPP v Dalgliesh (a pseudonym)* [2017] HCA 41, [9], [68].
204. *R v Hester* [2007] VSCA 298, [11] ('the reception of a victim impact statement into evidence on the plea is to be approached by the sentencing judge with a degree of flexibility').
205. *Sentencing Act 1991* (Vic) s 8K(2).
206. *Sentencing Act 1991* (Vic) s 8L(2).
207. *Sentencing Act 1991* (Vic) ss 8L(5)(b), (6)(b), as inserted by *Victims and Other Legislation Amendment Act 2018* (Vic) s 26.
208. *Sentencing Act 1991* (Vic) s 8M.
209. *Sentencing Act 1991* (Vic) s 8Q(1).
210. *Sentencing Act 1991* (Vic) s 8R(1).

5.8 As will become apparent below, the need for the harm to be a 'direct' result of the offending before someone qualifies to make a victim impact statement has proven troublesome in the context of OHS offending.

Victim impact statements in OHS cases

5.9 Based on the available higher courts sentencing remarks, it seems that victim impact statements are regularly made, tendered and accepted by courts in OHS cases.[212] Of the 78 OHS cases for which we had sentencing remarks, one or more victim impact statements were tendered in 54 of them, and of those, the victim impact statement was accepted in 47 cases (87%) and rejected in 7 (13%).

5.10 We heard, however, that there is often considerable uncertainty around the admissibility of victim impact statements in cases where the breach of duty is not alleged or proven to have caused actual harm, such as injury or death. This is because of the requirement for a victim to have suffered harm 'as a direct result' of the offence.[213] We were told that because of this issue, victim impact statements are sometimes not prepared, are objected to by defence counsel or are refused by courts.

5.11 As the Court of Appeal explained in *Vibro-Pile*, whether a court will accept or reject victim impact statements in OHS cases seems to turn on whether the OHS offence was an operative cause of a death or injury:

> The obvious difficulty in sentencing for OHSA breaches is the one discussed earlier, namely, that proof of a breach of the Act does not require proof that the breach led to injury or death … While his Honour was correct that the gravity of the offending did not depend on whether death had been caused, it was nevertheless a relevant sentencing factor … the occurrence of death or injury would not have any bearing on the assessment of the objective gravity of the offence, yet at the same time, it is a matter which must be taken into account in assessing victim impact[.][214]

5.12 We identified a number of cases where courts refused to take victim impact statements into account because of a lack of causation. In *DPP v Hazelwood Power Corporation Pty Ltd*, the Supreme Court refused to take 50 victim impact statements into account because it had 'not [been] established that breaches by HPC resulted in the mine fires'.[215] In *DPP v Cool Dynamics Refrigeration Pty Ltd*, the court said that a number of people did not qualify as 'victims' and could not make victim impact statements because 'in respect

211. *Sentencing Act 1991* (Vic) s 3(1) (emphasis added).
212. WorkSafe Victoria, *Policy for Victims and Persons Adversely Affected by Crime* (2020) 4.
213. The same issue is apparent in England and Wales: Health and Safety Executive, 'The Victim Personal Statement' (hse.gov.uk, 2020) ('in some cases there will not be a clear demonstrable causal link').
214. *DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55, [196]–[200].
215. *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278, [141]. This case resulted in the largest fine of any OHS case during the reference period ($1.56 million): see Nicole Asher et al., 'Hazelwood Power Station Operators Fined Nearly $2 million over 2014 Latrobe Valley Mine Fire', *ABC News* (19 May 2020).

of causation … [t]he precise mode of ignition … was … not precisely identified'.[216] And in *DPP v Roads Corporation (trading as VicRoads) & Anor*, the court took victim impact statements into account in sentencing one co-offender whose behaviour was causative of the death, but not the other co-offender because their behaviour was not.[217] In some instances, courts have refused to even read the victim impact statement.[218]

5.13 Conversely, there were many cases where courts did take victim impact into account, usually (but not always[219]) via a victim impact statement.

5.14 In some of those cases, the court seems to have expressly accepted that the OHS offence was causative of the death or injury.[220] For instance, in *DPP v Fergusson & Anor*, the second floor of a construction site collapsed, killing a man, and the court said, 'the incident was *caused* by the overloading of the second floor trusses with the three packs of flooring'.[221] In *DPP v Frewstal*, the court took into account the impact of the offending on the deceased's widow and mother after noting that 'the breaches … collectively contributed to the fatal accident'.[222] In *DPP v Australian Box Recycling Pty Ltd*, the court described the OHS failure as 'the immediate cause of the risk eventuating'.[223] In *DPP v WCA (Vic) Pty Ltd*, a snorkelling company 'accept[ed] responsibility for the failures … and for the ultimate tragedy that resulted'.[224] And in *DPP v Melbourne Water Corporation*, the company conceded 'that there was a causal link between the missing, misplaced or unsecured grate and [the deceased's] fall and death'.[225]

5.15 In other cases, the court *impliedly* accepted some form of causal link between the OHS breach and the death or injury, despite no express statement to that effect.[226] In *DPP v De Kort*, for example, a girl sustained serious injury when she dived into a pool that was below the required height for safe diving, and the court accepted victim impact statements from her parents.[227]

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216. *DPP v Cool Dynamics Refrigeration Pty Ltd* [2015] VCC 1882, [5], [14].
217. *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021, [31]–[32], [131], [146].
218. See, for example, *DPP v Ricegrowers Ltd* [2018] VCC 542, [22].
219. See, for example, *DPP v AirRoad Pty Ltd* [2012] VCC 1960, [45] ('Whilst no formal victim impact statement was tendered, I infer that the tragic death of a man … likely had a profound impact on his family, especially his widow').
220. *DPP v Fergusson & Anor* [2017] VCC 1276; *DPP v Australian Box Recycling Pty Ltd* [2016] VCC 1056; *DPP v Frewstal Pty Ltd* [2015] VCC 731; *DPP v Melbourne Water Corporation* [2014] VCC 184; *DPP v WCA (Vic) Pty Ltd* [2013] VCC 980; *DPP v Hansen Yuncken Pty Ltd* [2013] VCC 1543, [3] ('the directors and officers of the corporation are deeply remorseful for the offending that caused the death of the deceased'); *DPP v Orbit Drilling Pty Ltd & Anor* [2010] VCC 417, [53] ('it was your failure … as well as the company's recklessness in acting as it did that caused the death of this young man').
221. *DPP v Fergusson & Anor* [2017] VCC 1276, [12] (emphasis added), [23] ('I take into account the victim impact statements').
222. *DPP v Frewstal Pty Ltd* [2015] VCC 731, [13], [45]. On appeal, the court also seemed to acknowledge that 'the breach … resulted in death': *DPP v Frewstal Pty Ltd* [2015] VSCA 266, [127].
223. *DPP v Australian Box Recycling Pty Ltd* [2016] VCC 1056, [16].
224. *DPP v WCA (Vic) Pty Ltd* [2013] VCC 980, [35].
225. *DPP v Melbourne Water Corporation* [2014] VCC 184, [13].
226. See, for example, *DPP v De Kort* [2019] VCC 291; *DPP v SJ & TA Structural Pty Ltd* [2019] VCC 2016; *DPP v Toll Transport Pty Ltd* [2016] VCC 1975; *DPP v Bilic Homes Pty Ltd* [2016] VCC 810; *DPP v Tooradin Excavations Pty Ltd* [2014] VCC 1419, [4]; *DPP v Eliott Engineering Pty Ltd* [2014] VCC 266.

5.16 But in a number of other cases, it is less clear on what basis the OHS breach might have been considered causal of the person's injury or death.[228] For instance:

- in *DPP v Melbourne Health*, a company responsible for a psychiatric facility pleaded guilty for not sufficiently addressing 'the risk of ligature points and ligatures' after a man died by suicide.[229] The court received 11 victim impact statements and said that it was 'required to take into account … the impact on the victims'.[230] It is, however, extremely unusual in criminal law to consider someone else's behaviour as causative of suicide,[231] so it is unclear on what basis those victim impact statements were accepted;
- in *DPP v Seascape Constructions Pty Ltd*, the court said that it was not necessary to resolve a dispute over causation as it is not 'relevant to penalty as such',[232] but the court also accepted a victim impact statement;[233] and
- in *DPP v CLM Infrastructure Pty Ltd*, the court acknowledged that there was no deficiency in the company's training or systems of work, only its documentation, which did not specify certain safety measures or risks.[234] There was no suggestion that deficient documentation led to the fatality in the case, yet the court accepted a victim impact statement of the worker's widow.[235]

5.17 This apparently common practice of accepting victim impact statements in the absence of any express or even implied causal link seems to run contrary to the need for the prosecution to establish causation beyond reasonable doubt.[236] A person must have been harmed as a 'direct result of the offence' in order for a person to qualify to make a victim impact statement. In other words, without causation, there can be no victim impact statement.

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227. *DPP v De Kort* [2019] VCC 291, [13].
228. *DPP v Melbourne Health* [2021] VCC 407, [7]–[8]; *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132, [27]; *DPP v United Access Pty Ltd* [2020] VCC 1085, [18]; *DPP v New Sector Engineering Pty Ltd* [2020] VCC 400, [31]–[37]; *DPP v Kenneally & Anor* [2019] VCC 658, [17]; *DPP v Bradken Resources Pty Ltd* [2019] VCC 1053, [9]–[10]; *DPP v W.F. Montague Pty Ltd* [2018] VCC 1553, [17]–[22]; *DPP v Hungry Jacks & Ors* [2018] VCC 1454, [28]–[31]; *DPP v Phelpsys Construction Pty Ltd* [2018] VCC 394, [12]–[26]; *DPP v Specialised Concrete Pumping Victoria Pty Ltd* [2018] VCC 105, [12].
229. *DPP v Melbourne Health* [2021] VCC 407.
230. *DPP v Melbourne Health* [2021] VCC 407, [7]–[8].
231. See, for example, Paul McGorrery and Marilyn McMahon, 'Causing Someone Else to Commit Suicide: Incitement or Manslaughter?' (2019) 44(1) *Alternative Law Journal* 23.
232. *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132, [18].
233. *DPP v Seascape Constructions Pty Ltd* [2020] VCC 1132, [27] ('I have taken into account the impact on the victim or victims in this matter … [via the] victim impact statement').
234. *DPP v CLM Infrastructure Pty Ltd* [2017] VCC 192, [7]–[9].
235. *DPP v CLM Infrastructure Pty Ltd* [2017] VCC 192, [10].
236. *Arthur's Seat Scenic Chairlift Pty Ltd v The Queen* [2010] VSCA 269, [25] ('the question of the cause of the injuries … was an aggravating factor, in respect of which the Crown bore an onus of proof beyond reasonable doubt'); *R v FRH Victoria Pty Ltd* [2010] VSCA 18, [71].

5.18 At the same time, there are forensic and strategic reasons why OHS offenders may not object to the admissibility of victim impact statements. In one case, the sentencing court considered that such an argument undermined the offender's claims of remorse, saying that 'the objection to victim impact statements being received [has], in my view, greatly diluted what remorse might have been inferred from the fact of the plea of guilty'.[237]

5.19 There may be good reason to consider changing the preconditions under which courts receive victim impact statements in OHS cases. Perhaps there should be a lower threshold – not requiring the harm to be a 'direct result of the offence' – for victim impact statements in those cases, as there is in cases involving offences under the *Environment Protection Act 2017* (Vic).[238] Or perhaps there are good reasons to maintain the current criteria, such as ensuring procedural fairness for defendants by not allowing inadmissible material to be presented at their sentencing hearing.

5.20 We are therefore interested in hearing from stakeholders and the broader community about the circumstances in which victim impact statements should be admissible in OHS cases.

5.21 A further issue arises if victims wish to read their victim impact statement aloud in court. Courts are allowed to accept the entirety of a victim impact statement, and are not required to state which parts are inadmissible and disregarded for the purposes of sentencing. However, if the victim impact statement is intended to be read aloud in court, the court is required to make sure that only the admissible parts of the victim impact statement are read aloud, meaning that the court may have to restrict what is contained in the statement. This scenario, and the distress it may cause some victims, does not arise if the victim impact statement is tendered in writing only.[239]

Victim impact statements

Question 8: Is there a need to broaden or clarify the circumstances in which victim impact statements can be made in OHS cases?

237. See, for example, *DPP v Ricegrowers Ltd* [2018] VCC 542, [25].
238. Section 335 of that Act allows impact statements to be made not only by people who suffer 'injury, loss or damage' as a result of the offence, but also by people who can speak to 'the risk of harm to human health or the environment caused by the offence': *Environment Protection Act 2017* (Vic).
239. *Sentencing Act 1991* (Vic) s 8Q. See also the note accompanying section 8L of the *Sentencing Act*.

Restorative justice conferences in OHS cases

5.22 Past research has found that one of the strongest predictors of whether the prosecution process will have a positive or negative effect on victims is the extent to which victims perceive there has been 'procedural justice' along the way, especially the extent to which their views are represented.[240] It is therefore important to identify ways for the criminal justice process to meaningfully acknowledge the views and interests of those affected by crime, such as through admitting victim impact statements in sentencing proceedings or enabling the use of restorative justice conferences.

5.23 During preliminary consultations, a number of stakeholders expressed support for restorative justice conferences in OHS prosecutions. This would involve the offender (if they are a person), or an appropriate representative of the offender (if they are a company), participating in a conversation with an injured worker, an injured worker's loved ones, or a representative of a class of people, to discuss the impact of the offending on others.

5.24 In Victoria, restorative justice conferences are already utilised in certain cases prosecuted in the Children's Court.[241] They recently became available in some family violence cases.[242] The Magistrates' Court and County Court can defer sentencing in any case for a number of reasons, including 'to allow the offender to participate in a program … aimed at addressing the impact of the offending on the victim',[243] which was intended to be a reference to restorative justice conferences.[244] And while not yet used in this context, restorative justice conferences are available in prosecutions under the *Environment Protection Act*.[245]

5.25 The Victorian Law Reform Commission has recommended, multiple times, that the Victorian Government enact legislation 'that creates a clear and comprehensive framework for delivering restorative justice' and that restorative justice conferences should be available 'for all indictable offences'.[246]

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240. Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313.
241. *Children, Youth and Families Act 2005* (Vic) s 415.
242. Department of Justice and Community Safety, 'Restorative Justice for Victim Survivors of Family Violence' (justice.vic.gov.au, 2022).
243. *Sentencing Act 1991* (Vic) s 83A(1A)(d).
244. Sentencing Advisory Council, *Suspended Sentences and Intermediate Sentencing Orders – Suspended Sentences: Final Report—Part 2* (2008) 275.
245. *Environment Protection Act 2017* (Vic) s 336. On the use of restorative justice conferences in an environmental crime context, see Mark Hamilton, *Environmental Crime and Restorative Justice: Justice as Meaningful Involvement* (2021).
246. Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) 206–207; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (2016) 194.

5.26 The Victorian Government also recently said that it 'supports restorative justice services' in the context of workplace sexual harassment (this was in response to a recommendation by a ministerial taskforce specifically on workplace sexual harassment); however, the government also described those processes as an 'alternative … [to] legal processes',[247] as opposed to an additional component of legal processes.

5.27 Given the growing use of, and interest in, restorative justice conferences in Victoria generally, we want to hear from stakeholders about the potential utility of restorative justice conferences in the context of OHS prosecutions. Should they be available in OHS prosecutions? Are there any particular OHS cases they should or shouldn't be used in? Does there need to be a legislative framework in place?[248] Are there unique features of restorative justice conferences in an OHS context that should inform those processes?

5.28 If restorative justice conferences are made available in OHS cases, there are perhaps some likely features, including the following:

- They would only occur *after* a person has pleaded guilty.[249] This is necessary to ensure the fair trial rights of defendants.
- They would supplement criminal justice processes, not replace them. While restorative justice processes can facilitate healing for both offenders and victims, sentencing ensures community confidence in the justice system.
- They would only occur with the consent of both parties. This ensures full and proper participation from everyone involved.
- They would be undertaken on the basis that nothing said could be admissible as evidence in other legal proceedings. There may be current or future civil proceedings, especially workers compensation proceedings, that would otherwise inhibit the offender or victim from full participation.

5.29 In 2016, WorkSafe commissioned RMIT University's Centre for Innovative Justice to 'identify opportunities for restorative justice practices … in WorkSafe's claims and enforcement processes'.[250] The results of that work are not currently publicly available, but the mere commissioning of that work in itself highlights the potential interest in developing appropriate processes.

247. Victorian Government, *Victorian Government Response to the Ministerial Taskforce on Workplace Sexual Harassment* (2022) 16.

248. There is, for example, a specific legislative instrument governing restorative justice processes in the Australian Capital Territory and New Zealand: *Crimes (Restorative Justice) Act 2004* (ACT).

249. The Victorian Law Reform Commission recommended limiting restorative justice conference availability to cases where the offender pleads guilty, as opposed to having been found guilty, because when someone has contested their guilt, subsequent participation in a restorative justice conference 'might be insincere': Victorian Law Reform Commission (2021), above n 246, 208.

250. Centre for Innovative Justice, 'Restorative Justice Practices WorkSafe' (cij.org.au, 2016).

Restorative justice

Question 9: Would restorative justice conferences be appropriate and useful in OHS cases? If so, what features of an OHS case would make it suitable for restorative justice conferences?

Compensation orders

5.30 When sentencing someone, Victorian courts can impose what are known as ancillary orders, which are orders made in addition to sentencing. These can include, for example, orders to produce a forensic sample for police,[251] orders excluding someone from consuming alcohol,[252] and orders suspending or cancelling a person's driver licence.[253]

5.31 Courts can also order an offender 'to pay compensation of such amount as the court thinks fit' if someone has 'suffered an injury as a direct result of the offence'.[254] This is known as a compensation order, and it can include compensation for pain and suffering, medical expenses, counselling expenses, and any other expenses reasonably incurred as a result of the offending.[255] An application for a compensation order can be made on the court's own motion, by a person who has suffered an injury, or on that person's behalf by the prosecutor in the case.[256]

5.32 We have previously identified a number of advantages in compensation order applications being made in sentencing submissions:

- victims do not need to establish their loss before a separate judicial officer;
- victims do not need to establish their loss to the criminal standard of proof (*beyond reasonable doubt*), but rather can satisfy the civil standard (*on the balance of probabilities*);
- victims do not need to pay the costs associated with bringing a claim in a civil court; and
- the process is faster and more streamlined than bringing a separate claim for civil damages.[257]

251. *Crimes Act 1958* (Vic) s 464ZF(2).
252. *Sentencing Act 1991* (Vic) ss 89DC–89DH.
253. *Sentencing Act 1991* (Vic) ss 87P–89DB.
254. *Sentencing Act 1991* (Vic) s 85B(1).
255. *Sentencing Act 1991* (Vic) s 85B(2).
256. *Sentencing Act 1991* (Vic) s 85C(b)(iii).
257. Sentencing Advisory Council, *Restitution and Compensation Orders: Report* (2018) 27.

5.33 Compensation orders are, though, rarely sought or imposed in OHS cases. We could only identify one relevant case from the higher courts involving offences under the *OHS Act 2004* where compensation orders appear to have been made. In *DPP v Melbourne Health*, the court said:

> Melbourne Health was receptive to any compensation claims and agreed to pay the costs of [the deceased's] funeral. Between plea and sentence, the quantum of compensation has been agreed between Melbourne Health and four of the victims, and I will make those compensation orders.[258]

5.34 There were also two Court of Appeal judgments in the mid-2000s relating to compensation orders for offending under the *OHS Act 1985*. In one case, *Esso*, it seems that the primary issue was whether a compensation order in a criminal proceeding is appealed via the civil or via the criminal route in the Court of Appeal, so that judgment is not much of relevance here.[259]

5.35 The other case, *Energy Brix*, on the other hand, is more pertinent. The Court of Appeal in that case increased compensation orders for two children of a man who had been killed at work. Neave JA (concurring) suggested the following factors would be relevant in assessing damages for grief or trauma in the context of compensation orders in criminal proceedings: (1) the circumstances in which the death occurred; (2) the effect on the applicant on hearing of the events that caused loss; (3) the closeness of the relationship between the person seeking compensation and the person who has been killed; (4) the age of the person seeking compensation; (5) the extent of the grief and psychological suffering experienced as a result of the loss; and (6) in cases where the primary victim is injured rather than killed, changes to family life that occur as a result of the injury.[260]

5.36 We had initially considered whether it might be useful for WorkSafe prosecutors to apply for compensation orders in a larger number of OHS cases. The issue was raised by a number of stakeholders, including representatives of injured workers. However, WorkSafe pointed us to section 371 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), which effectively renders such applications redundant. That provision states that a court must not make a compensation order in sentencing an offender if the compensation would be for an injury or death where it appears that the claimant also has an entitlement to compensation, and the injury or death occurred as a result of an OHS offence.[261] While we are mindful that a number of people and organisations raised this issue when we met with them, the complex interplay of workers compensation legislation and ancillary sentencing orders is beyond our appropriate remit and scope.

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258. *DPP v Melbourne Health* [2021] VCC 407, [22].
259. *Esso Australia Pty Ltd v Robertson* [2004] VSCA 79.
260. *DPP v Energy Brix Australia Corporation Pty Ltd* [2006] VSCA 116, [50].
261. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 371; *Sentencing Act 1991* (Vic) pt 4 div 2 subdiv 1.

6. The availability of diversion in OHS cases

6.1 For individuals and companies prosecuted for OHS offences, one option to avoid a formal finding of guilt is to participate in a diversion plan. Section 59 of the *Criminal Procedure Act 2009* (Vic) provides that if a defendant acknowledges responsibility for an offence, the prosecution agrees to the diversion and the court considers diversion appropriate, the defendant can participate in a diversion plan and comply with certain conditions over a period of up to 12 months. If the defendant complies with those conditions, no finding of guilt is recorded.[262]

6.2 The aim of this chapter is to explore the use of diversion in OHS cases and to consider whether there might be opportunities to increase the use of diversion in appropriate cases. It begins with a discussion of enforceable undertakings, which are outside the scope of our review but provide practical examples of the types of conditions that might be useful in diversion plans in OHS cases. We then discuss how diversion is currently being used in OHS cases, before considering the potential advantages of increasing the use of diversion.

Enforceable undertakings in OHS cases

6.3 At any stage during an investigation or prosecution process, WorkSafe can accept what is known as an *enforceable undertaking* from a defendant.[263] The enforceable undertaking is drafted in contractual form, and it typically specifies the duration of the undertaking and the specific actions that the defendant has agreed to take. If WorkSafe accepts the enforceable undertaking, criminal proceedings for the offending behaviour are ceased.[264] The court is not involved in whether WorkSafe agrees or not to an enforceable undertaking. An enforceable undertaking is therefore not a sentence and, in our view, is too far removed from the court process to fall within our remit. Nevertheless, it is instructive to review the types of conditions often included in enforceable undertakings as they could helpfully inform the types of conditions that could be used in diversion plans.

262. *Criminal Procedure Act 2009* (Vic) s 59.
263. *Occupational Health and Safety Act 2004* (Vic) s 16(1).
264. *Occupational Health and Safety Act 2004* (Vic) s 16(4).

How many enforceable undertakings have there been?

6.4 Between 2012 and 2021, there were 70 enforceable undertakings entered into, all by corporate entities: 4 City Councils, 3 schools, 1 not-for-profit organisation and 62 companies.

Conditions of enforceable undertakings

6.5 Most enforceable undertakings (56%) contained a commitment to donate a specified amount to a designated organisation or entity. This is consistent with the fact that most adjourned undertakings imposed for OHS offences primarily require a donation of some sort. The donation amounts in enforceable undertakings ranged from $2,000 to $133,000, with a median of $20,000.

6.6 There were also 5 enforceable undertakings (7%) that required the defendant to sponsor or fund certain community initiatives, such as swimming lessons for members of culturally diverse communities,[265] trade training for disadvantaged community members,[266] and educational workshops and traineeships for local students.[267]

6.7 It was also common for the enforceable undertaking to include safety training for employees (35, or 50% of enforceable undertakings).

Total cost of enforceable undertakings

6.8 Enforceable undertakings commonly specify the amount of money expected to be incurred by the entity in complying with the agreed conditions (58, or 83% of enforceable undertakings). Amounts ranged from $15,750 to $1,000,000. The largest expenditure ($1,000,000) involved a company committing to invest in plant and engineering controls to manage risks arising from working with equipment at heights; donate to a community organisation; establish an intern program for tertiary students; and produce an organisational learning seminar to raise awareness about relevant risks.[268]

265. WorkSafe Victoria, 'Belgravia Health & Leisure Group Pty Ltd' (22 June 2017), *Prosecution Result Summaries and Enforceable Undertakings: A Directory of the Most Recent Prosecution and Enforceable Undertaking Outcomes* (2023) (henceforth *Prosecution Result Summaries*).
266. WorkSafe Victoria, 'Maroondah City Council' (6 October 2016), *Prosecution Result Summaries*.
267. WorkSafe Victoria, 'Mettle Pty Ltd' (19 October 2016), *Prosecution Result Summaries*; WorkSafe Victoria, 'Specialty Packaging Group Pty Ltd' (8 December 2015), *Prosecution Result Summaries*; WorkSafe Victoria, 'Wagstaff Cranbourne Pty Ltd' (11 July 2014), *Prosecution Result Summaries*.
268. WorkSafe Victoria, 'George Weston Foods Limited' (16 July 2020), *Prosecution Result Summaries*.

Durations of enforceable undertakings

6.9 Most enforceable undertakings were 12, 18 or 24 months' duration (73% combined), with 18 months being the most common duration (39%). There were also some undertakings that, instead of specifying a particular duration or operational period, simply indicated that the enforceable undertaking would cease once the conditions had been complied with. For instance, Mettle Pty Ltd agreed to implement new safety equipment, develop software for a safety reporting application and deliver safety training to students in the community.[269] The operational period of this undertaking was to 'cease to operate after all three undertakings are completed'.[270]

Court-ordered diversion in OHS cases

6.10 Of the 1,197 OHS cases sentenced during the reference period, a diversion plan was imposed in 16 cases (covering 27 OHS offences), involving 6 companies and 10 individuals. Diversion was therefore not an especially common outcome of criminal proceedings for OHS offences.

6.11 The *Prosecution Result Summaries* published on WorkSafe's website provide some examples of cases that resulted in a diversion plan, both for a company and for an individual (see Case Studies 1 and 2, page 54). Just like in adjourned undertakings and enforceable undertakings, it seems that the most common condition in diversion plans is to make a donation.[271]

269. WorkSafe Victoria, 'Mettle Pty Ltd' (19 October 2016), *Prosecution Result Summaries*.

270. Ibid.

271. In both case studies, the donation was ordered to be paid into the Court Fund, which is a fund managed by the Magistrates' Court with the monies distributed to charitable and community organisations: Magistrates' Court of Victoria, 'Court Fund' (mcv.vic.gov.au, 2023).

Case study 1: Diversion for a company (section 21)

Two employees were photographed suspended from the slings of a crane, and they were lifted from the second storey of a construction site. No one was injured. The photographs were provided to WorkSafe by an informant.

The company was charged with two offences against sections 21(1) and 21(2)(e) of the *OHS Act* for failing to provide the necessary supervision and training to enable employees to perform their work in a safe manner.

The company was placed on a 12-month diversion plan, with conditions to donate $3,000 to the Court Fund and write a letter of gratitude to the informant.

WorkSafe Victoria, 'Prosecution Result Summaries and Enforceable Undertakings' (worksafe.vic.gov.au, 2023)

Case study 2: Diversion for a director (section 23)

The defendant was the director of a printing company. A new paper mill was being used for the first time in the workplace. Both an employee and an experienced paper maker were injured on the same day using the paper mill. The director was charged with two offences against section 23(1) of the *OHS Act*.

The director was placed on a 12-month diversion plan, which included a condition to donate $2,000 to the Court Fund.

WorkSafe Victoria, 'Prosecution Result Summaries and Enforceable Undertakings' (worksafe.vic.gov.au, 2023)

Advantages of court-ordered diversion in OHS cases

6.12 There are a number of reasons to consider expanding the use of diversion in OHS cases.

6.13 First, research suggests that for companies and individuals that have already been successfully prosecuted for OHS offences, the threat of *further* prosecution has a reduced deterrent effect. This means that diversion could be useful to limit the number of cases that reach sentencing, so long as the circumstances of the case would make a diversion plan an appropriate outcome. As Hopkins has observed:

> First time prosecutions are a shock. They are threatening because they …involve the unknown. In particular, the consequences in terms of bad publicity for the defendant company are unknown and, for that reason, feared. Once the process is known, companies may form the view that they have relatively little to fear and may come to regard prosecution as just one more cost of doing business.[272]

6.14 Second, there simply aren't enough resources in a properly functioning regulatory system to prosecute all identified OHS risks. The ability to funnel cases out of the court system at various points is critical to the overall functioning of an effective regulatory system.

6.15 Third, as seen in the statistical report, the most likely outcome of proceeding to sentencing is for the defendant to receive a modest fine. In contrast, the conditions of a diversion plan have the potential to result in improved safety mechanisms and behavioural penance of some sort (such as providing training opportunities for marginalised groups or students).

6.16 Fourth, court-ordered diversion offers some advantages over enforceable undertakings. In preliminary consultations, we heard a lot of praise for enforceable undertakings and their potential to promote safer workplaces while reducing the strain on court resources. The problem, though, is that enforceable undertakings are often expensive to develop, and they can require a complex and time-consuming process to negotiate and finalise. This means that enforceable undertakings are primarily available to defendants with greater financial means, introducing a question of equitable access to avenues out of the court system. As a point of comparison, while the prosecution (which would still be WorkSafe in the Magistrates' Court) would nonetheless need to agree to a diversion plan, the involvement of the court in the process might enable the conditions to be less complex and the defendant to be accountable to a body other than WorkSafe for

272. Andrew Hopkins, 'Prosecuting for Workplace Death and Injury' (Paper presented at the Australian Institute of Criminology Conference: Crime in the Workplace, Wollongong, 24–26 November 1993).

complying with those conditions (the courts). Given that we heard that companies are especially concerned about their reputation if they are found guilty of OHS offences, they might find the prospect of entering into a diversion plan especially attractive, even if the conditions would ultimately be more expensive than any court fine that might have been imposed.

6.17 One of the main impediments to using diversion in OHS cases is that the maximum duration of a diversion plan is 12 months, whereas more than half of the 70 enforceable undertakings ran for a period longer than 12 months. One possible means of better enabling the availability of diversion in OHS cases could therefore be to extend the maximum duration of diversion plans in the specific context of OHS offending.

Court-ordered diversion

Question 10: Should there be an increased use of diversion in OHS cases? If so, in which types of cases?

7. The available sentencing orders for OHS offences: Do sentencing practices need to change?

7.1 In this chapter we consider whether there is a need to change the types of sentencing orders imposed in OHS cases, either through legislative reform or through changes in court practices. This includes whether imprisonment should be available for more OHS offences and whether sentence types other than fines should be imposed in a wider range of OHS cases; we also consider the practical implications of recording convictions against companies.

7.2 As we identified earlier, 30 years of reviews into the sentencing of OHS offences in Victoria and Australia have suggested that courts should more frequently utilise a broader array of sanctions than fines in OHS cases, especially cases involving corporate entities. The Industry Commission recommended as much in 1995, as did the *Maxwell Review* in 2004 and the national review of model OHS laws in 2008. Yet we have found that 87% of sentencing outcomes in all OHS cases are fines, the remainder are largely constituted by adjourned undertakings with donation conditions (so they function much like fines),[273] and there seems to have been just one adverse publicity order made since 2005.[274]

7.3 There are numerous issues with monetary penalties in the context of defendant companies.[275] Monetary penalties may not result in any internal disciplinary action against the individuals responsible. The burden of monetary penalties is sometimes passed on to shareholders and consumers rather than being felt by those responsible. Monetary penalties can create the impression that OHS breaches are 'purchasable commodities'. Courts can sometimes be forced to choose between (functionally) putting a company into liquidation or imposing a penalty that doesn't reflect the gravity of the offence. Further, companies can avoid payment of fines through various strategies.

273. *Statistical Report*, 18.

274. *DPP v Cranbourne Turf Club Inc* [2023] VCC 506, [120]–[125].

275. *Maxwell Review,* 376–378; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974: Final Report* (1994) [10.3].

7.4 Even in the 1980s, corporations around the world were starting to receive sentencing dispositions that required them to engage in some form of behavioural penance: lending an executive to a charitable organisation for a year to develop an ex-offenders program;[276] having a bakery company donate bread to charitable organisations;[277] and supplying a shed to an organisation that enables Aboriginal and Torres Strait Islander people to learn trade skills and workplace health and safety, as well as organising for a staff member to obtain health and safety qualifications within 12 months.[278] These behavioural conditions, requiring some specific action on the part of the defendant company, have the potential to significantly increase health and safety practices in workplaces, while still achieving the punitive and deterrent effects that a fine might otherwise have had, especially given the significant costs often involved in implementing those conditions.

Imprisonment for OHS offences

7.5 When an individual is prosecuted for a criminal offence, a court can only impose a prison term if the maximum penalty for that offence expressly allows such a sentence.[279] Currently, there are only three offences in the *OHS Act* that carry a potential prison term, including (with their maximum prison terms):

- workplace manslaughter (25 years);[280]
- recklessly endangering serious injury in a workplace (5 years);[281] and
- assaulting, intimidating or threatening an inspector (2 years).[282]

7.6 As noted in the statistical report, there were only four individuals who received a prison sentence for an OHS offence during the reference period.[283] This is unsurprising given that the OHS offences for which most individuals were prosecuted – breach of duty offences – only allow a maximum penalty of a fine, so courts in those cases were not able to impose a prison term.

276. *US v Mitsubishi International Corporation*, 677 F2d 785 (9th Cir, 1982).
277. *US v Danilow Pastry Company,* 563 F Supp 1159 (SDNY, 1983).
278. *Campbell v Maverick Steel Pty Ltd* [2022] SAET 101, [37]–[38].
279. *Sentencing Act 1991* (Vic) s 111.
280. *Occupational Health and Safety Act 2004* (Vic) s 39G ('A person who is not a volunteer … [or] who is an officer of an applicable entity … must not engage in conduct that— (a) is negligent; and (b) constitutes a breach of an applicable duty that the person [or entity] owes to another person; and (c) causes the death of that other person').
281. *Occupational Health and Safety Act 2004* (Vic) s 32 ('A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in danger of serious injury is guilty of an indictable offence').
282. *Occupational Health and Safety Act 2004* (Vic) s 125(2) ('A person must not assault, directly or indirectly intimidate or threaten, or attempt to intimidate or threaten, an inspector or a person assisting an inspector').
283. *Statistical Report*, 18.

Of the four people who received a prison sentence:

- two received a wholly suspended sentence[284] for assaulting an inspector (in the same case);
- one received a wholly suspended sentence for recklessly endangering serious injury in a workplace; and
- one received an immediate term of 6 months' imprisonment for recklessly endangering serious injury in a workplace.

7.7 There are no publicly available sentencing remarks for any of those cases. There was, however, one unreported County Court judgment (Case Study 3), and one case summarised on the WorkSafe website (Case Study 4, page 60).

Case study 3: Wholly suspended prison sentence for an OHS offence

The offender directed a new employee to drive a heavy vehicle in dangerous conditions while knowing that the parking brake was defective. The truck slid downhill on a steep slope, flipped over and landed on its side, and the driver was killed.

The court took into account a wide range of mitigating factors for the offender, many of which resulted from the five-year delay between the offence and sentencing, none of which was attributable to the offender. The court said that as a result of the stress and cost of the protracted criminal proceedings, the offender had separated from his partner, lived alone (no longer lived with his four-year-old son), sold his house to pay for legal fees because he was ineligible for legal aid, frequently travelled interstate and back to Victoria to attend the court proceedings, and found it difficult to find employment because of the pending charges. He had, though, eventually found alternative employment, and he tendered a character reference from his new employer saying that they were very satisfied with his performance in relation to occupational health and safety. He also pleaded guilty prior to trial and assisted authorities with frank responses during the investigation.

***Sentence*: 20 months' imprisonment, wholly suspended for 3 years**

Unpublished sentencing remarks provided to the Council

284. Suspended prison sentences are an abolished sentencing order in Victoria, but they remain available for offences committed prior to 1 September 2013 (in the higher courts) and 1 September 2014 (in the Magistrates' Court): *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic). They enable the offender to serve their sentence in the community, but a court can activate the prison sentence if the person offends during the operational period of their suspended prison sentence.

Case study 4: Immediate prison sentence for an OHS offence

A 72-year-old woman was the owner and operator of a scrap metal business. At the workplace, there was a forklift that she drove. She had never held a forklift licence. She was driving the forklift while moving a large bin in which one of her employees was standing. The employee fell from the bin, the bin fell off the forklift because it was not properly secured, and the bin landed on the employee's head, killing him.

***Sentence*: 6 months' imprisonment and a $10,000 fine**

WorkSafe Victoria, 'Prosecution Result Summaries and Enforceable Undertakings' (worksafe.vic.gov.au, 2023)

7.8 During our preliminary consultations, a number of stakeholders suggested that more OHS offences should be capable of attracting a prison term, in order to emphasise to employers the seriousness of the offences. Some stakeholders also observed that in the *Dangerous Goods Act 1985* (Vic), an individual can receive up to 2 years' imprisonment if they transport goods in an unsafe manner *and* their behaviour actually results in death or serious injury.[285] Stakeholders were keen for us to explore whether general breach of duty offences should be capable of receiving imprisonment if someone is seriously injured or killed as a result of the breach.

Imprisonment for OHS offences

Question 11: Are there any OHS offences that do not currently attract a maximum penalty of imprisonment, but should? If so, which offences, in what circumstances, and what should the maximum prison term be?

285. *Dangerous Goods Act 1985* (Vic) ss 31(1)–(2), (4), 31A(1)–(2), 31B(1).

An overlap between *OHS Act* and *Crimes Act* offences?

7.9 The Victorian offence of recklessly endangering serious injury in a workplace is very similar to a category 1 breach of duty offence in the model OHS laws.[286] The breach of duty offence involves a person creating a risk of death or serious injury through recklessness (New South Wales, Tasmania, Queensland, Australian Capital Territory, South Australia, Northern Territory), gross negligence (New South Wales) or negligence (Australian Capital Territory), or actually causing death or serious harm (Western Australia), and it can potentially result in a prison term of up to five years.[287] The main difference in the Victorian offence is that there is no need to establish that the person was a duty holder who breached a relevant duty.

7.10 We note – as Maxwell did in 2004[288] – that in the *Crimes Act 1958* (Vic) there is already an offence of reckless conduct endangering serious injury, which carries an identical five-year maximum penalty.[289] The only difference between the two offences is that the *OHS Act* offence requires the prosecution to also prove that the conduct occurred 'at a workplace'.[290] Arguably, then, the more specific *OHS Act* offence could be seen as somewhat redundant. There are some advantages to particularism (introducing specific versions of general offences), such as symbolic value, tailored deterrence and fair labelling.[291] But there are also disadvantages, such as making the criminal law more difficult to understand and enforce, and risking inconsistency if similar offences are treated differently.[292]

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286. See section 31 of the Model Work Health and Safety Bill 2023 (Cth).
287. *Work Health and Safety Act 2011* (NSW) s 31; *Work Health and Safety Act 2011* (Qld) s 31; *Work Health and Safety Act 2011* (ACT) s 31; *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 31; *Work Health and Safety Act 2012* (SA) s 31; *Work Health and Safety Act 2012* (Tas) s 31; *Work Health and Safety Act 2020* (WA) s 31.
288. *Maxwell Review*, 168.
289. *Crimes Act 1958* (Vic) s 18. There is also an offence of reckless conduct endangering life, which carries a 10-year maximum penalty, and which has no counterpart in the *OHS Act*: *Crimes Act 1958* (Vic) s 22.
290. Indeed, the County Court has referred to sentencing practices for that *Crimes Act* offence as relevant in determining current sentencing practices for the *OHS Act* offence:

    > There is little in terms of previous authorities on sentence for this charge, because as I say, it is really in its infancy. Some guidance can be taken from s.23 of the Crimes Act because the terms are similar and they provided some guidance when this charge was drawn. Having said that however, it is of course a very different charge in the nature of the circumstances because this relates solely to conduct in a work place.

    Unpublished sentencing remarks provided to the Council.
291. See, for example, James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.
292. See Jeremy Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 335.

7.11 One option we would be keen to hear about from stakeholders is whether it may be more fruitful for the offence of recklessly endangering serious injury in a workplace to (a) include an additional element that the person is a duty holder who has breached their duty (similar to category 1 offences in the model laws) but then (b) have an enhanced maximum penalty of 10 years' imprisonment (for example), to reflect the additional element in the *OHS Act* offence when compared to the *Crimes Act* offence. This would be intended to reflect the additional seriousness of the offence when committed by a person with an active duty to preserve the health and safety of others, and also to acknowledge that the crime captures cases where the person's conduct recklessly endangers not just serious injury but death.[293]

Overlap between *Crimes Act* and *OHS Act* offences

Question 12: Should the maximum penalty of 5 years' imprisonment for reckless conduct endangering serious injury in a workplace (section 32 of the *OHS Act*) be increased? If so, why and to what? If not, why not?

Community correction orders for OHS offences

7.12 Community correction orders (CCOs) came into effect in January 2012, replacing a number of previous sentencing options.[294] CCOs are community orders requiring offenders to comply with a number of mandatory conditions[295] and one or more optional conditions,[296] such as engaging in unpaid community work, attending court for judicial supervision, or participating in some form of assessment and treatment. CCOs can be imposed for any offence that carries a maximum penalty of either imprisonment or a fine of more than 5 penalty units[297] (which accounts for almost all OHS offences).

293. In turn, a 10-year maximum penalty would be identical to the penalty applicable for the offence of reckless conduct endangering life in section 22 of the *Crimes Act 1958* (Vic).
294. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).
295. *Sentencing Act 1991* (Vic) s 45.
296. *Sentencing Act 1991* (Vic) pt 3A div 4.
297. *Sentencing Act 1991* (Vic) s 37.

7.13 During the reference period, there was only one CCO imposed for an OHS offence, and that was in 2014 (Case Study 5). There were also three cases prior to 2012 where a now-abolished community-based order was imposed. As these four cases represent just 0.3% of all OHS cases sentenced in the reference period, it is fair to describe these community orders as very rare in OHS cases.

Case study 5: A community correction order for an OHS offence

The offender in this case was an employee of a company that had been contracted to perform sweeper truck works during asphalting of a road. After a number of 'near misses' at that worksite, involving other employees of various companies, the offender reversed his sweeper truck and ran over an employee at the worksite, killing him.

The court received numerous victim impact statements, as well as character references and medical reports relating to the offender, including from a psychologist who was treating him for the emotional distress arising from the incident. He pleaded guilty at the earliest opportunity, showed genuine remorse, had been of good behaviour in the two years since the incident and had the support of his wife and two teenage children.

***Sentence*: 2 year CCO with the following conditions:**

- **supervision by a community corrections officer;**
- **500 hours of unpaid community work (the maximum is 600 hours);**
- **mental health assessment and treatment; and**
- **participation in courses related to the offending.**

The court also recorded a conviction.

Unpublished sentencing remarks provided to the Council

Adjourned undertakings

7.14 An adjourned undertaking is often known as a good behaviour order.[298] It is one of the least severe sentencing orders available in Victoria,[299] but it is also very flexible and can be quite onerous. The only mandatory conditions are to be of good behaviour (i.e. don't reoffend) and attend court if required (which is very rare).[300] Courts can also attach any optional condition they think appropriate,[301] which is why Maxwell observed that adjourned undertakings have significant potential in OHS cases: '[t]he conditions imposed in undertakings have the potential to significantly improve standards by requiring duty holders to adopt a systematic approach to health and safety'.[302] They are available for both individuals and defendant companies.

7.15 During the reference period, adjourned undertakings were imposed in 135 OHS cases in Victoria,[303] representing 11.3% of all OHS cases. This is very similar to Maxwell's finding that, in 2002–03, 12% of OHS cases resulted in an adjourned undertaking.[304]

7.16 For the OHS cases where we were able to ascertain the conditions attached to adjourned undertakings,[305] none of the conditions required any improvements to workplace safety. Instead, the only optional conditions, where there were any, were to require charitable donations. Of six adjourned undertakings imposed in OHS cases in the Magistrates' Court:

- one had no optional conditions;
- one involved a $10,000 donation to the Court Fund, which is managed and distributed by the Magistrates' Court;
- one involved a $50,000 donation to the Lighthouse Foundation (a charity for young people at risk of homelessness); and
- three involved an individual and two defendant companies that were sentenced in the one case following an incident in which a man died.[306]

298. Indeed, we recently recommended that they be renamed as such: Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria: Final Report* (2023) 8.
299. *Sentencing Act 1991* (Vic) s 5(7).
300. *Sentencing Act 1991* (Vic) ss 72(2)(a)–(b), 75(2)(a)–(b).
301. *Sentencing Act 1991* (Vic) ss 72(2)(c), 75(2)(c).
302. *Maxwell Review*, 378.
303. There were 6 imposed in the higher courts and 142 in the Magistrates' Court.
304. *Maxwell Review*, 378 (18 of 149 prosecutions).
305. This is based on the same two-year dataset that we recently used to examine conditions of *all* adjourned undertakings in 2019 and 2020: Sentencing Advisory Council, *Reforming Adjourned Undertakings in Victoria: Consultation Paper* (2022) 88–90.
306. Alexandra Treloar, 'Olam Orchards Australia, Complete Commodity Management Plead Guilty over Carwarp Workplace Death', *ABC News* (18 December 2020).

The individual had to make a $25,000 donation to the Court Fund; one defendant company had to pay $75,000 to Sunraysia Residential Services; and one defendant company had to pay $50,000 to each of Mildura State Emergency Services, Mallee Accommodation Support Program and Sunraysia Rural Counselling Service ($150,000 in total).

7.17 Further, in Case Study 6, the County Court imposed an adjourned undertaking on a government agency and mandated a $50,000 charitable donation.

Case study 6: An adjourned undertaking for an OHS offence

In 2011, an employee working at the Disability Forensic Assessment and Treatment Service Centre (DFATS) was sexually assaulted by a resident at the facility. DFATS was managed by the Department of Health and Human Services (DHHS) and at the time housed residents with intellectual disabilities who had committed sexual offences.

After the incident, it was found that DHHS knew that the resident had previously formed attachments with, and had assaulted, female staff, and that he had thoughts about harming female clinicians. DHHS also had reports that the resident was a high risk of sexual abuse towards female staff, with recommendations that risk management strategies be implemented to ensure female staff's safety. This information had not been disclosed to employees and supervisors working with that resident.

DHHS pleaded guilty to failing to provide the necessary information to employees to maintain a workplace that was safe and without risks to health: *OHS Act 2004* (Vic) ss 21(1) and 21(2)(e).

DHHS was sentenced to a 12-month adjourned undertaking, with a special condition to make a $50,000 donation to Djirra, an organisation that provides support to Aboriginal and Torres Strait Islander people who experience family violence – predominantly women.

***DPP v DHHS* [2018] VCC 886**

7.18 In the context of OHS offending, then, adjourned undertakings are the second most common sentencing outcome (albeit still far less prevalent than fines), but the only optional conditions seem to be charitable donations of similar value to what might otherwise have been imposed as a fine.

Health and safety undertakings

7.19 Health and safety undertakings are a specific sentencing order available in cases involving OHS offences. They are modelled on the adjourned undertaking provisions of the *Sentencing Act*,[307] and they can be imposed in addition to, or instead of, any other order that the court may make in relation to the offence (for example, a fine).[308] Section 137 of the *OHS Act* provides as follows:

> **Release on the giving of a health and safety undertaking**
>
> 1. If a court … finds a person guilty of an offence against this Act or the regulations the court may (with or without recording a conviction) adjourn the proceeding for a period of up to 2 years and make an order for the release of the offender on the offender giving an undertaking with specified conditions.
> 2. An undertaking must specify the following conditions—
>   (a) that the offender attend before the court if called on to do so …
>   (b) that the offender does not commit, during the period of the adjournment, any offence against this Act, the regulations, the *Equipment (Public Safety) Act 1994* or the *Dangerous Goods Act 1985* or regulations made under those Acts;
>   (c) that the offender observes any special conditions imposed by the court.
> 3. Without limiting subsection (2)(c), the court may impose on an offender who is an employer special conditions that the offender—
>   (a) engage a consultant … to advise on or assist with occupational health and safety matters; and
>   (b) develop and implement a systematic approach to managing risks to health or safety that arise or may arise in the conduct of the offender's undertaking; and
>   (c) arrange for the carrying out of an audit of the offender's undertaking in relation to health and safety by an independent person[.]

7.20 In effect, courts can impose a health and safety undertaking for up to 2 years, requiring the offender not to commit any further health and safety offences while also requiring compliance with any other conditions that the court deems appropriate, such as improving workplace safety.

7.21 At the end of the adjournment period, if satisfied that the offender has complied with the conditions of the order, the court 'must discharge the offender without any further hearing'. It is an offence to breach a health and safety undertaking, and a breach can result in the offender having their order varied or being resentenced for the original offending.[309]

307. *Maxwell Review*, 378.
308. *Occupational Health and Safety Act 2004* (Vic) s 137(7).
309. *Occupational Health and Safety Act 2004* (Vic) s 138.

7.22 According to court data, there were no health and safety undertakings imposed at all during the reference period. We are, however, aware of at least three health and safety undertakings imposed, because they are noted on WorkSafe's website.[310] Court data for those same three cases suggests that the outcome was an adjourned undertaking via the *Sentencing Act*, rather than a health and safety undertaking via the *OHS Act*. As such, we cannot exclude the possibility that some of the other 132 adjourned undertakings (according to court data) in OHS cases were in fact health and safety undertakings.

7.23 In one of the three cases with an apparent health and safety undertaking, the WorkSafe prosecution summary does not specify any reported conditions.[311] In the second case, a $40,000 donation was required.[312] And in the third case, the offender was required to engage Australian Industry Group 'to continue to develop and implement any changes to a safety action plan', and also pay a $5,000 donation to the CFA.[313] Again, it seems that donations are the most common condition of these undertakings as well.

7.24 Regardless of how many invisible health and safety undertakings there may be, they are clearly rare. This is, perhaps, unsurprising for two reasons:

- First, many companies often respond to workplace health and safety incidents themselves by improving their practices prior to sentencing, as was apparent in the reduced need for specific deterrence in many OHS cases in the higher courts (see [2.19]). There may therefore be little need to impose behavioural obligations beyond the remedial measures already implemented by the offender since the offending.
- Second, the cost of implementing safety measures will usually exceed the value of any fine that the court will impose, making a fine a more attractive sentencing option than a health and safety undertaking in most cases. (And courts would be required to consider alternative orders if the offender does not consent to a health and safety undertaking.) To illustrate using an example from the Northern Territory, following an incident in 2016, Woolworths itself spent over $500,000 on improvement works, and then also spent almost a further $2.3 million in fulfilling the conditions of a health and safety

310. *Prosecution Result Summaries*.

311. Healy's Building Services Pty Ltd on 20 June 2013: WorkSafe Victoria, 'Healy's Building Services Pty Ltd' (11 July 2014), *Prosecution Result Summaries*.

312. Australian Paper Recovery Pty Ltd on 4 April 2017 (the company was ordered to pay $40,000 to the Institute for Safety, Compensation and Recovery Research): WorkSafe Victoria, 'Australian Paper Recovery Pty Ltd' (12 April 2017), *Prosecution Result Summaries*.

313. Bellevue Orchard Pty Ltd on 20 December 2018: WorkSafe Victoria, 'Bellevue Orchard Pty Ltd' (3 January 2019), *Prosecution Result Summaries*.

undertaking ($2.8 million in total).[314] But the maximum fine applicable to the relevant offence was just $1.5 million.[315] The primary incentives for Woolworths to have consented to the expense of improvement works and the undertaking were likely to be not only to remedy the issue but also to avoid a finding of guilt or a conviction and to mitigate reputational damage, an incentive that is no longer present at the time of sentencing.

7.25 That second reason is a cause of concern. If the cost of implementing improved safety measures is prohibitively more expensive than the value of any fine that might be imposed, there are few circumstances in which a company or an individual would be incentivised to argue for, or consent to, a health and safety undertaking rather than a fine. This is a shame, because sentencing orders requiring remedial works – or even better, safety projects that go 'above and beyond' for a specific company or broader industry – can have longer-lasting effects on safety practices than any fine. It may be that the only way to truly incentivise increased use of these sorts of sentencing orders would be to significantly increase the value of fines currently being imposed in OHS cases. Then defendant companies may begin actively offering more imaginative sentencing orders to courts and agreeing to those orders, thereby tangibly improving safety practices.

Adverse publicity orders

7.26 A court that finds an offender guilty of an offence under the *OHS Act* or the associated regulations may make an order requiring the offender to publicise their offending, the consequences of their offending and the penalty imposed.[316] An adverse publicity order can be made in addition to, or instead of, any other sentencing order, though usually it is *in addition to*. The Australian Law Reform Commission has explained adverse publicity orders as follows:

> Publicity or disclosure orders would require corporations to publicise, or otherwise disclose, information about their unlawful conduct to specific groups of people or to the community at large. Orders could require publication of information through traditional media outlets, as well as new media outlets, such as social media.
>
> These orders may be designed to have a punitive effect on corporations by inflicting reputational damage, as well [as] potentially furthering general deterrence by alerting other corporations to the consequences of the misconduct in question. Such orders may also facilitate consumer choice by alerting consumers to bad corporate behaviour[.][317]

314. NT WorkSafe, 'Woolworths Group Limited' (worksafe.nt.gov.au, 2023).
315. *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 32.
316. *Occupational Health and Safety Act 2004* (Vic) s 135(7). Adverse publicity orders are also available in the model OHS jurisdictions: see, for example, *Work Health and Safety Act 2011* (Cth) s 236.
317. Australian Law Reform Commission, *Final Report: Corporate Criminal Responsibility*, ALRC Report 136 (2020) 353.

7.27 The *OHS Act* does not specify what the specific purposes of an adverse publicity order might be in an OHS case, but case law does offer some guidance. In a recent OHS case in New South Wales, the prosecution asked for an adverse publicity order 'to raise awareness in the building and construction industry of the risk of falling from height during the loading or unloading of plant and materials'.[318] The court granted the order for two main reasons. The first was that it would be consistent with the overarching objectives of the *Work Health and Safety Act 2011* (NSW) 'to publicise the existence of a risk in a particular activity, how risks can be eliminated and how the enforcement measures in the Act are applied'.[319] The second was that such an order would promote the sentencing purposes of denunciation and general deterrence, while also highlighting that 'even a comprehensive system needs to be reviewed'.[320] Effectively, an adverse publicity order can serve both an awareness-raising function (for an industry) and a punitive function (for an offender).[321]

7.28 For whatever reason, adverse publicity orders appear to have almost never been imposed by Victorian courts for OHS offences. The one exception is an OHS case in the County Court from early 2023, in which it was not the prosecution who sought an adverse publicity order but the court on its own motion, feeling that such an order would be appropriate.[322] The defendant company was required to publish a notice (with agreed wording) in *Inside Racing* magazine (specific to the racing industry). The defendant company did this less than three months after being sentenced. A copy of the notice is included in Figure 1 (page 70). Victoria does not appear to be unique, however; adverse publicity orders appear to be rare in OHS cases in all Australian jurisdictions.[323]

318. *SafeWork NSW v Saunders Civibuild Pty Ltd (No 2)* [2022] NSWDC 163, [120].
319. *SafeWork NSW v Saunders Civibuild Pty Ltd (No 2)* [2022] NSWDC 163, [122].
320. *SafeWork NSW v Saunders Civibuild Pty Ltd (No 2)* [2022] NSWDC 163, [123]. The District Court of New South Wales similarly offered 'publicising risks' and 'deterrence and denunciation' for making an adverse publicity order in *SafeWork NSW v Investa Asset Management Pty Ltd* [2019] NSWDC 472, [134]–[135].
321. In an earlier study, researchers found that company executives believed that their company's reputation had been damaged by negative publicity following a conviction: Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983).
322. *DPP v Cranbourne Turf Club Inc* [2023] VCC 506, [120]–[125].
323. There appear to only be a handful of published OHS judgments in other jurisdictions in which adverse publicity orders were made: *SafeWork NSW v Investa Asset Management Pty Ltd* [2019] NSWDC 472; *SafeWork NSW v KD & JT Westbrook Pty Ltd* [2018] NSWDC 255, [206]; *Bradley & Joanne Finnigan Pty Ltd v WorkSafe ACT* [2016] ACTSC 158.

Figure 1: Adverse publicity order imposed in *DPP v Cranbourne Turf Club Inc* [2023] VCC 506. Reproduced with permission

CRANBOURNE TURF CLUB INC

On 13 December 2022, Cranbourne Turf Club Inc (CTC) pleaded guilty in the County Court of Victoria to one charge of failing to ensure, so far as is reasonably practicable, that persons other than its employees were not exposed to risks to their health or safety from the conduct of its undertaking, contrary to section 23(1) of the *Occupational Health and Safety Act 2004*.

CTC operates the Cranbourne Training Complex, which is located in Grant Street, Cranbourne. The Training Complex is used by various licensed horse trainers to conduct horse training activities.

One of the training tracks at the Training Complex is called the Sand Trails, which is a deep sand track that is approximately 1400 metres long. There is no lighting installed around the Sand Trails.

CTC pleaded guilty to offending that occurred on 30 August 2019. At that time, CTC opened the Sand Trails between 4:00am and 9:30am, which meant that track riders were able to ride horses on the Sand Trails in dark conditions. This posed a risk to their health and safety.

CTC admitted that it was reasonably practicable for it to have installed floodlights around the Sand Trails or for it to have restricted access to the Sand Trails to daylight hours only.

In September 2019, CTC changed the opening hours of the Sand Trails, so that it was only open during daylight hours.

On 28 February 2023, CTC was fined $250,000, with conviction.

7.29 An adverse publicity order made in the context of misleading and deceptive conduct, in breach of the *Australian Consumer Law*, is reproduced in Figure 2. That notice was variously required to be published within the first 10 pages of *The Weekly Review* magazine, displayed prominently in the defendant's offices for six months and published on realestate.com.au for six months.[324]

Figure 2: Adverse publicity order imposed in *Director of Consumer Affairs Victoria v Manningham Property Group Pty Ltd* [2017] FCA 1448

ANNEXURE "B" (Newspaper and Website Notice)

IMPORTANT PUBLIC NOTICE

In legal proceedings taken by the Director of Consumer Affairs Victoria, the Federal Court of Australia has declared that **MANNINGHAM PROPERTY GROUP PTY LTD (trading as Hocking Stuart Doncaster)** has contravened the misleading and deceptive conduct and the false or misleading representation provisions concerning the price of land provisions of the Australian Consumer Law. **MANNINGHAM PROPERTY GROUP PTY LTD** breached the law by advertising Victorian land for sale at a price, or price range that was less than the market value or likely selling price of that land, thereby representing to potential purchasers of that land that:

- The vendors would sell that land for a price that was within the advertised price or price range, or not substantially more, when Manningham Property Group Pty Ltd knew that the vendors would not sell that land for the advertised price or within the advertised price range;
- The vendors had instructed Manningham Property Group Pty Ltd to sell the land for the advertised price or within the advertised price range, or not substantially more, when Manningham Property Group knew that the vendors had not done so;
- Manningham Property Group had reasonable grounds for believing and holding the opinion that the land would be sold at the advertised price or within the advertised price range, or not substantially more when it did not have such reasonable grounds for believing and holding such opinion; and
- The likely selling price for the properties was within the price range in the advertisements, or not substantially more than the highest figure in the price range in the advertisements, when the likely selling price was not within the price range in the advertisements, and was substantially more than the highest figure in the price range in the advertisements.

The Federal Court of Australia has imposed upon **MANNINGHAM PROPERTY GROUP PTY LTD:**

- Pecuniary penalties totalling $160,000 in respect of the false or misleading representations, concerning the price of land provisions, of the Australian Consumer Law (Victoria);
- A compliance program designed to ensure no further contraventions of these provisions of the Australian Consumer Law (Victoria); and
- An obligation to publish the details of the order of the Court.

This Notice is published and paid for by **MANNINGHAM PROPERTY GROUP PTY LTD** in accordance with the Order of the Federal Court of Australia made on [*insert date*] in the legal proceedings taken by the Director of Consumer Affairs Victoria.

324. *Director of Consumer Affairs Victoria v Manningham Property Group Pty Ltd* [2017] FCA 1448, [82]. See also *Director of Consumer Affairs Victoria v Fletcher & Parker (Balwyn) Pty Ltd* [2017] FCA 1521; *Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966.

7.30 Below is another example; appearing in the *Wilmington Morning Star* (a local newspaper in North Carolina, USA) in 1990 was a statement by a company found guilty of environmental offending:[325]

> **We Apologize for Polluting the Environment**
>
> General Wood Preserving Company recently pled guilty in federal court to illegally disposing of hazardous waste in 1985 at its plant in Leland, North Carolina. As a result of that crime, General Wood Preserving was fined $150,000, and was ordered to publish this advertisement. We are sorry for what we did, and we hope that our experience will be a lesson to others that environmental laws must be respected.
>
> Board of Directors
> General Wood Preserving Co., Inc

7.31 There is something to be said for the use of language involving the first person 'we' in this example, compared to the third person 'CTC' used in the Cranbourne Turf Club notice. The use of 'we' shows that the corporation took ownership of the offending, it clearly conveyed their remorse, and hearing directly from colleagues arguably improved the deterrent potential of the publication for the intended audience (overcoming the mindset of 'it wouldn't happen to me').

7.32 While there have been few adverse publicity orders made in Victorian OHS cases, these orders are often made in other regulatory contexts, such as the regulation of misleading and deceptive conduct.[326] The purposes of adverse publicity orders in that context have been specified numerous times, and they differ from the purposes of such orders in an OHS context.[327] The cases in which these orders appear, however, do provide a useful illustration of the wide variety of forums in which offenders can be made to publish an adverse publicity order:

- publishing the information in major newspapers;[328]
- publishing the information in newspapers where the company normally advertises;[329]

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325. As reproduced in Dan M. Kahan and Eric A. Posner, 'Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines' (1999) 42(S1) *Journal of Law & Economics* 365, 385.
326. *Competition and Consumer Act 2010* (Cth) sch 2 s 247. Adverse publicity orders are also available under section 330 of the *Environment Protection Act 2017* (Vic).
327. These include (a) to 'alert customers to the fact that there has been misleading and deceptive conduct', (b) to 'protect the public interest by dispelling the incorrect or false impressions that were created by the [behaviour]', and (c) to 'support the primary orders and assist in preventing repetition of the contravening conduct': *ACCC v TPG Internet Pty Ltd (No 2)* [2012] FCA 629, [143].
328. See, for example, *Director of Consumer Affairs Victoria v Dimmeys Stores Pty Ltd* [2013] FCA 1371, [3]; *ACCC v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653, [14.1]; *Director of Consumer Affairs Victoria v Parking Patrols Vic Pty Ltd & Anor* [2012] VSC 137, [164]; *Director of Consumer Affairs Victoria v Australian Tourism Centre Pty Ltd (in liq) & Anor* [2010] VSC 571, [12].
329. See, for example, *Director of Consumer Affairs Victoria v Fletcher & Parker (Balwyn) Pty Ltd* [2017] FCA 1521, [5].

- publishing the information in industry-specific publications (these were all OHS cases);[330]
- displaying the information in the company's store or stores;[331]
- publishing the information on the company's website;[332]
- publishing the information on *other* websites;[333] and
- publishing the matter in the company's annual report[334] or other publications of the company, such as a shopping catalogue.[335]

7.33 The case law also suggests that if there is no need for further publicity beyond what has already occurred during the criminal proceedings,[336] or if the defendant company no longer exists,[337] courts may refuse to make such an order. There was, though, one case where the court ordered the prosecution to bear the costs of publishing the adverse publicity order because the company was in liquidation.[338]

7.34 In the context of defendant companies, and OHS offenders especially, there is a long history of law reform bodies recommending increased use of adverse publicity orders. As we observed in Chapter 1, multiple reviews of the sentencing of OHS offences have suggested increased use of such orders: the Industry Commission review in 1995, the *Maxwell Review* in 2004 and the national review of model OHS laws in 2008. In addition:

- in 2003, the NSW Law Reform Commission published a report on the sentencing of defendant companies. It recommended a number of changes to legislation that would best enable the use of adverse publicity orders in cases involving offending by corporations, including ensuring offenders bear

330. See, for example, *DPP v Cranbourne Turf Club Inc* [2023] VCC 506, [127]; *SafeWork NSW v Investa Asset Management Pty Ltd* [2019] NSWDC 472, [16]; *SafeWork NSW v KD & JT Westbrook Pty Ltd (No 2)* [2019] NSWDC 15, [63].
331. See, for example, *Director of Consumer Affairs Victoria v Hoskins (Maroondah) Pty Ltd* [2019] FCA 1973, [11]–[12]; *Director of Consumer Affairs Victoria v Melbourne South Eastern Real Estate Pty Ltd* [2018] FCA 1763, [113]–[114]; *Director of Consumer Affairs Victoria v Fletcher & Parker (Balwyn) Pty Ltd* [2017] FCA 1521, [5]; *Director of Consumer Affairs Victoria v Midas Trading (Australia) Pty Ltd* [2009] VSC 141, [91].
332. See, for example, *ASIC v Insurance Australia Ltd* [2023] FCA 724, [9]; *ASIC v AMP Superannuation Ltd* [2023] FCA 488, [14]; *ASIC v MLC Ltd* [2023] FCA 539, [8]; *ASIC v Australia and New Zealand Banking Group Ltd* [2022] FCA 1251, [235]; *ACCC v J Hutchinson Pty Ltd (No 2)* [2022] FCA 1007, [124]; *ASIC v Aware Financial Services Australia Ltd* [2022] FCA 146, [6]; *ASIC v Commonwealth Bank of Australia (No 2)* [2021] FCA 966, [1]; *ACCC v Sony Interactive Entertainment Network Europe Ltd* [2020] FCA 787, [109]–[110]; *Director of Consumer Affairs Victoria v Hoskins (Maroondah) Pty Ltd* [2019] FCA 1973, [11]–[12]; *Director of Consumer Affairs Victoria v Fletcher & Parker (Balwyn) Pty Ltd* [2017] FCA 1521, [5]; *ACCC v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653, [13.1].
333. See, for example, *Director of Consumer Affairs Victoria v Melbourne South Eastern Real Estate Pty Ltd* [2018] FCA 1763, [113]–[114] (realestate.com.au).
334. See, for example, *Maxwell Review*, 378. The NSW Law Reform Commission also raised the possibility of a 'shareholder mail-out': NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) 166.
335. *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* [2014] FCA 1434, [5].
336. See, for example, *ACCC v Lactalis Australia Pty Ltd (No 2)* [2023] FCA 839, [157]–[160]; *Linnane (NSW Department of Planning and Environment) v Cummings* [2020] NSWDC 755.
337. See, for example, *ACCC v Safety Compliance Pty Ltd (in liq)* [2015] FCA 211, [299].
338. See, for example, *Director of Consumer Affairs Victoria v Australian Tourism Centre Pty Ltd (in liq) & Anor* [2010] VSC 571, [12].

the costs of the adverse publicity order, and allowing courts to stipulate the target audience, the media or forum in which the notice should occur and the content of the notice;[339]

- in 2006, the Australian Law Reform Commission published a report on the sentencing of federal offenders. It recommended that federal sentencing legislation should enable courts to order corporations to publicise their offending conduct, in order to 'enable judicial officers to impose sentences on corporations that are capable of achieving the purposes of sentencing';[340]
- in 2020, the Australian Law Reform Commission published a report on corporate criminal responsibility. It recommended amending the *Crimes Act 1914* (Cth) to specifically enable courts to order corporations to publicise or disclose certain information;[341] and
- in 2022, the Law Commission for England and Wales published a report on corporate criminal responsibility. They noted that there had already been a handful of adverse publicity orders made against corporate offenders, and while the Law Commission was only detailing options for reform (not making recommendations), it did commend the utility of adverse publicity orders in the sentencing of non-natural persons.[342]

7.35 We are interested in exploring afresh the potential utility of adverse publicity orders in OHS cases, the factors that stakeholders believe might be limiting their current use in Victoria, and how those limitations might be overcome.

Further sentencing orders

7.36 There are also a range of other sentencing orders available in related regulatory schemes. For instance:

- **monetary benefit orders** require an offender to pay back an amount that represents the monetary benefits obtained as a result of an offence;[343]
- **commercial benefits penalty orders** require an offender to pay up to three times the amount that represents the monetary benefits estimated to have been obtained as a result of the offence;[344]

339. NSW Law Reform Commission (2003), above n 334, 159–168.
340. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders,* ALRC Report 103 (2006) 748–750.
341. Australian Law Reform Commission (2020), above n 317, 348, 353–354.
342. Law Commission for England and Wales (2022), above n 75, 145–148.
343. *Environment Protection Act* 2017 (Vic) s 329.
344. *Heavy Vehicle National Law (Queensland)* s 597.

- **restoration and prevention orders** require an offender to take a specific action that the court considers reasonably necessary to rectify actual harm or to prevent the risk of harm resulting from the offence;[345]
- **restorative project orders** require an offender to undertake a project for the benefit of the public;[346]
- **supervisory intervention orders** require an offender to undertake specified actions to improve their compliance with the Act;[347] and
- **prohibition orders** prohibit the offender from having a specific role or responsibility for a certain period of time.[348]

Sentencing orders in OHS cases

Question 13: Should sentencing orders other than fines (for example, community correction orders, adjourned undertakings, health and safety undertakings, adverse publicity orders) be used more frequently in OHS cases?

Recording convictions in OHS cases

7.37 When sentencing someone in Victoria, courts have discretion whether or not to record a conviction.[349] There are a number of consequences that flow from a court recording a conviction. For individuals, a conviction can affect access to employment, housing, adoption, travel and more. For companies, many of the traditional consequences of having a conviction recorded fall away.

7.38 During preliminary consultation, we asked stakeholders – especially employer groups and defence lawyers – how the recording of a conviction may affect defendant companies. By and large, stakeholders raised two implications:

- The first was that companies tendering for government work may need to disclose relevant prior convictions, which could hinder their success in procurement processes.[350] It is not clear how many companies sentenced for OHS offences would typically bid for government work such that they would

345. *Environment Protection Act* 2017 (Vic) s 331.
346. *Environment Protection Act* 2017 (Vic) s 332.
347. *Heavy Vehicle National Law (Queensland)* s 600.
348. *Heavy Vehicle National Law (Queensland)* s 607.
349. *Sentencing Act 1991* (Vic) s 8.
350. See, for example, *SafeWork NSW v Saunders Civibuild Pty Ltd (No 2)* [2022] NSWDC 163, [125].

be affected by a conviction in this way. Moreover, we were told that some procurement processes now require companies to disclose whether they have had any 'findings of guilt', which would mean that they would need to disclose the offending regardless of whether or not the court recorded a conviction.

- The second implication is not tangible but instead is reputational. We heard from multiple stakeholders that the priority for many companies sentenced for OHS offences is to avoid having a conviction recorded, with some companies saying that they would rather receive a higher fine if it meant not having a conviction recorded. This is somewhat peculiar, given that the company has still been found guilty of the offence, so the same level of opprobrium should theoretically apply. But if companies do perceive the recording of a conviction as more damaging to their reputation than a simple finding of guilt, this could represent a useful lever in the sentencing exercise to promote just punishment, denunciation and deterrence.

7.39 We are interested in hearing further from stakeholders about the recording of convictions against companies found guilty of OHS offences. Are there further consequences of the recording of convictions that we have not identified here? If not, given that there seem to be relatively limited consequences for the recording of convictions, is there a need to reconsider how the courts' discretion is currently exercised? To that end, we are asking for your views about what the most important considerations should be for courts in deciding whether or not to record a conviction for an OHS offence, especially in cases involving defendant companies.

Recording convictions for OHS offences

Question 14: What do you believe should ordinarily be the most significant factors for courts in deciding whether or not to record a conviction for an OHS offence?

8. Fine amounts for OHS offences: Do sentencing practices need to change?

8.1 This chapter considers whether there might be a need to change the values of fines imposed for OHS offences in Victoria. As we noted at [1.15], the most consistent observation in the 30 years of reviews of sentencing OHS offences has been that the values of fines imposed for OHS offences are not consistent with the seriousness of the offending, especially for offending by larger companies. Indeed, we have found that for some OHS offences, average fines have actually decreased significantly over the last decade.[351]

What are the fine amounts in OHS cases?

8.2 Fines are by far the most common sentencing outcome in OHS cases. They made up 86.7% of all sentencing outcomes for the 1,906 OHS offences sentenced during the reference period (1,652 charges received fines).[352] In our statistical report, we found that the median fines for OHS offences in the Magistrates' Court in the 8 years to 30 June 2021 were:

- $20,000 for companies sentenced for an employer breach of duty offence (sections 21 and 23 of the *OHS Act*);
- $12,500 for individuals sentenced for an employer breach of duty offence (sections 21 and 23 of the *OHS Act*);
- $20,000 for companies sentenced for other breach of duty offences (sections 22 and 24 to 31 of the *OHS Act*);
- $4,000 for individuals sentenced for other breach of duty offences (sections 22 and 24 to 31 of the *OHS Act*);
- $4,500 for companies sentenced for breach of notice offences (sections 62(1), 110(4), 111(4) and 112(5) of the *OHS Act*); and
- $3,250 for individuals sentenced for breach of notice offences (sections 62(1), 110(4), 111(4) and 112(5) of the *OHS Act*).[353]

351. *Statistical Report*, 32–34.
352. Ibid 18.
353. Ibid 32–33, 46, 50.

8.3 Past reviews have found that average court fines for OHS offences in Victoria were $8,000 in 1995,[354] $22,213 in the 3 years to 30 June 2003 (representing 7% of the maximum penalty and 17% of the Magistrates' Court's jurisdictional limit);[355] and $31,000 in the 2 years and 2 months to 1 September 2007.[356] The average fine for an employer breach of duty offence in 2019–20 was $30,980, representing just 2.1% of the available maximum penalty, and 7.5% of the Magistrates' Court's jurisdictional limit.

8.4 In the higher courts, almost all OHS offences sentenced during the reference period were employer breach of duty offences (148 of 169 OHS offences). In the 8 years to 30 June 2021, the median fine for companies sentenced for an employer breach of duty offence was $250,000 (that is, 12.5 times higher than in the Magistrates' Court). And for individuals, it was $100,000 (8 times higher than in the Magistrates' Court).

Why aren't fines increasing?

8.5 There could be a number of reasons for the apparent intractability of fine amounts for OHS offences in Victoria.

8.6 The first reason could simply be that the nature of OHS cases sentenced in Victoria could be changing, such that less serious offences are making up a greater proportion of prosecuted and sentenced OHS offences. This does, however, seem unlikely. During preliminary consultation, no stakeholders identified a change in the nature of OHS cases over the last 20 years. Nor did we identify a change in the characteristics of OHS cases that might explain the difference, such as more cases involving less serious risks, less likely risks or smaller companies, or fewer cases involving death or serious injury.

8.7 The second reason could be that courts are not taking into account the slow but gradual increases in penalty unit values (which therefore increase the maximum penalties for OHS offences). From 1981 to 2003, a penalty unit in Victoria was precisely $100.[357] Since 2003, however, penalty unit values have been indexed annually. As of 1 July 2023, a penalty unit is valued at $192.31, almost twice what it was 20 years ago. Indexation of penalty unit values is intended to ensure that maximum penalties and sentencing practices keep pace with inflation, though there was one year when the penalty unit value increased by an amount well in excess of inflation, with

354. Industry Commission (1995), above n 19, 394.

355. *Maxwell Review,* 370–371, 383.

356. Stensholt (2007), above n 15, 85.

357. *Sentencing Act 1991* (Vic) s 110 (as enacted). Prior to the introduction of penalty units, maximum fines were set as dollar amounts for each offence itself (for example, the maximum penalty for dangerous driving was originally imprisonment 'for a term of not more than two years' or a fine '*of not more than One hundred pounds*': *Crimes Act 1958* (Vic) s 318(1) (as enacted) (emphasis added).

the intention that larger fines would deter people from 'unlawful behaviour'.[358] Our preliminary analysis suggests that the yearly incremental increases in penalty unit values have little effect on the values of fines imposed in the Magistrates' Court.

8.8 The third, and probably most likely, reason is the anchoring effect of current sentencing practices. Section 5(2)(b) of the *Sentencing Act* requires courts to have regard to 'current sentencing practices' when deciding on an appropriate sentence. This requires courts to consider both relevant sentencing statistics and comparable cases,[359] with the objective of achieving consistency in sentencing. The relevance of current sentencing practices in Victoria was somewhat diluted by the High Court in 2017, when it said that 'current sentencing practices must be taken into account, but only as one factor, and not the controlling factor, in the fixing of a just sentence'.[360] Even so, current sentencing practices remain an important consideration for courts, and some research has suggested that judges, even at sentencing, have been heavily influenced by numerical guidance.[361] So long as there is information about fines imposed in recent cases to act as a reference point, courts will likely continue to feel 'anchored'.

8.9 There has also been no attempt by the Director of Public Prosecutions to seek an 'uplift' to sentencing practices for OHS offences. In *Ashdown v The Queen*,[362] the Victorian Court of Appeal took what remains a nationally unique approach to intervention in sentencing practices. Where sentencing outcomes for an offence, *in general*, no longer bear a genuine relationship to the maximum penalty, the court has repeatedly (albeit not recently) indicated a willingness to provide sentencing courts with guidance, calling for an 'uplift' in sentencing practices. For instance, it has called for uplifts in the lengths of prison sentences for incest and aggravated burglary.[363] In the absence of such a declaration, it is difficult to envisage on what basis sentencing courts might feel empowered to unmoor themselves from the values of fines currently being imposed within the present statutory framework.

8.10 As to why fines have not increased but have outright declined, one possibility is that since 2014, prosecutors have been unable to make submissions about sentencing ranges.

358. Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 2012, 2027–2028 (Kim Wells, Treasurer).
359. *DPP v CPD* [2009] VSCA 114, [78].
360. *DPP v Dalgliesh (a pseudonym)* [2017] HCA 41, [37].
361. Birte Englich et al., 'Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32(2) *Personality and Social Psychology Bulletin* 188; Gretchen B. Chapman and Brian H. Bornstein, 'The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts' (1996) 10(6) *Applied Cognitive Psychology* 519; Jeffrey J. Rachlinski et al., 'Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences' (2015) 90(2) *Indiana Law Journal* 695; Mark W. Bennett, 'Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw' (2014) 104(3) *Journal of Criminal Law and Criminology* 489.
362. *Ashdown v The Queen* [2011] VSCA 408, [30]–[32]; see also *Hogarth v The Queen* [2012] VSCA 302, [51].
363. *Hogarth v The Queen* [2012] VSCA 302; *DPP v Dalgliesh (a pseudonym)* [2016] VSCA 148. See also below at [8.32].

Prior to the High Court's decision in *Barbaro* in 2014,[364] Victorian prosecutors frequently made submissions to sentencing courts about what they believed was the appropriate sentencing range in a particular case.[365] For instance, in *DPP v L Arthur Pty Ltd*, the prosecution argued that a fine of between $350,000 and $450,000 would be appropriate (a $330,000 fine was imposed).[366] And in *DPP v AirRoad Pty Ltd*, the prosecution submitted that a fine of between $350,000 and $425,000 would be appropriate (a $375,000 fine was imposed).[367] But in *Barbaro*, the High Court concluded that such submissions were matters of opinion, not law, and were no longer permissible. In the absence of prosecutors being able to make submissions on sentencing ranges, we have been told that an alternative practice has emerged. The prosecution and defence now each tender what they argue are three or so comparable cases from the WorkSafe prosecution summaries, with the implication being that those cases are indicative of a sentencing range.

8.11 It may be that prosecutors' inability to make direct submissions about sentencing ranges and the decline in fine amounts are simply two independent, concurrent changes. It is, though, at least arguable that limiting the ability of prosecutors to assist the court with a recommended sentencing range has somehow contributed to the decline in fine amounts. For instance, OHS offences typically have some of the largest fines of all criminal offences committed by corporations. But many magistrates only hear OHS cases very rarely, so their limited opportunities to determine fine amounts in OHS cases may – in the absence of guidance from a sentencing range – be creating a downward pull on sentencing practices for OHS offences.

Should fines be increased in appropriate OHS cases?

8.12 For years there have been calls to increase the values of fines imposed on corporations found guilty of criminal offending. It was observed over 30 years ago that 'fines have been too low to deter crimes attributed to corporations'.[368] In 1993, now Emeritus Professor Andrew Hopkins wrote that:

> the level of fines is not sufficient to have a significant deterrent effect on large companies. Only if courts are prepared to impose fines much higher than they currently do will these fines in themselves become an influential consideration.[369]

364. *Barbaro & Anor v The Queen* [2014] HCA 2.
365. These were known as 'MacNeil-Brown ranges': *R v MacNeil-Brown & Anor* [2008] VSCA 190.
366. *DPP v L Arthur Pty Ltd* [2013] VCC 1051, [26].
367. *DPP v AirRoad Pty Ltd* [2012] VCC 1960, [59].
368. John Levitske Jr., 'Will the U.S. Sentencing Commission's New Proposed Guidelines for Crimes by Organizations Provide an Effective Deterrent for Crimes Attributed to Corporations? (Or Will the New Proposed Guidelines Put an Exclamation Point in the Sentence for Corporate Crime?)' (1991) 29(4) *Duquesne Law Review* 783, 785.

8.13 In 2004, the *Maxwell Review* recommended 'substantially increasing' maximum penalties for breaches of duties, describing sentencing practices at the time as inadequate. Far from there having been an increase since then, the average fine has fallen from 7% of the available maximum penalty to just 2.1%, and from 17% of the Magistrates' jurisdictional limit to just 7.5%.

Fines for OHS offences

Question 15: In your view, is there a need to increase fine amounts for OHS offences, either generally or in specific types of cases? If so, why, and in which types of cases? If not, why not?

Options for increasing fine amounts for OHS offences

8.14 There are numerous policy options that could be employed in an attempt to increase fine amounts for OHS offences, should this be needed, and we are keen to test those various options with stakeholders.

Increasing the maximum penalty

8.15 One of the most common options typically employed to change sentencing practices is to increase the maximum penalty for an offence. The maximum penalty for an offence is an important yardstick that courts must consider in determining an appropriate sentence in any given case.[370] For instance, maximum fines for OHS offences range from 5 penalty units for people who fail to circulate a provisional improvement notice (about $962)[371] to 100,000 penalty units for corporations found guilty of workplace manslaughter (about $19.2 million).[372]

8.16 The Court of Appeal has said that increasing the maximum penalty for an offence is usually designed to suggest either that sentencing practices as a whole are inadequate[373] or that there are 'worst case' versions of an offence for which the current maximum penalty is not sufficient.[374]

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369. Andrew Hopkins, 'Prosecuting for Workplace Death and Injury' (Paper presented at the Australian Institute of Criminology Conference: Crime in the Workplace, Wollongong, 24–26 November 1993).
370. *Sentencing Act 1991* (Vic) s 5(2)(a); *Markarian v The Queen* [2005] HCA 25, [30]–[31]; *DPP v Aydin & Anor* [2005] VSCA 86, [12].
371. *Occupational Health and Safety Act 2004* (Vic) s 60(4).
372. *Occupational Health and Safety Act 2004* (Vic) s 39G(1).
373. *R v Grossi* [2008] VSCA 51, [45]. See also *Hogarth v The Queen* [2012] VSCA 302, [50].
374. *DPP v Aydin & Anor* [2005] VSCA 86, [8]–[12].

The maximum fine for breach of duty offences is currently about $346,000 for individuals and $1.73 million for corporations

> The maximum penalty prescribed by Parliament for an offence provides authoritative guidance as to its relative seriousness and is prescribed for the worst class of the offence in question. The increase will be relevant whenever the increase shows that Parliament regarded the previous penalties as inadequate. Even in cases where the new maximum is only of general assistance, it becomes the 'yardstick' which must be balanced with all other relevant factors.
>
> ***R v Grossi* [2008] VSCA 51, [45]**

> On some occasions, when Parliament increases the maximum penalty, that suggests that more severe penalties should be imposed not just for offences falling within the worst class but over a range (not necessarily the whole range) of cases … On other occasions, an increase in the maximum penalty means only that Parliament has thought of a worst class of case for which the previous maximum was inadequate.
>
> ***DPP v Aydin & Anor* [2005] VSCA 86, [9]**

8.17 What is the real effect of increasing the maximum penalty for offences, though? Sentencing practices do not always change significantly when a maximum penalty is increased. For example, in 2008 the Victorian Government doubled the maximum prison term for negligently causing serious injury from 5 years to 10 years.[375] But while the maximum penalty doubled, the median prison sentence only increased 25%, from 2 to 2.5 years.[376] This could potentially suggest that while increasing the maximum penalty can increase the severity of sentences imposed, that increase may be more modest than the increase in the maximum penalty.

8.18 Even more specifically, the maximum penalty for employer breach of duty offences was just 2,500 penalty units in the *OHS Act 1985*, and that was almost quadrupled to 9,000 penalty units in the *OHS Act 2004*. In *DPP v Rapid Roller Co Pty Ltd*, the Director of Public Prosecutions argued that sentencing practices should be increased to reflect that increase in the maximum penalty; however, the Court of Appeal said that the case was an inappropriate vehicle for such guidance because the Director was 'not seek[ing] any increase in the actual sentences imposed' on the offender.[377]

8.19 In many respects, the maximum penalty for breach of duty offences is not the problem. The median fine ($20,000) for breach of duty offences sentenced in the Magistrates' Court in 2019 represented just 1.4% of the available maximum penalty.

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375. *Crimes Amendment (Child Homicide) Act 2008* (Vic) s 4, as recommended by us in Sentencing Advisory Council, *Maximum Penalty for Negligently Causing Serious Injury: Report* (2007) 41.
376. Sentencing Advisory Council, *Major Driving Offences: Current Sentencing Practices* (2015) 7, as discussed in *Harrison & Anor v The Queen* [2015] VSCA 349, [97]–[98].
377. *DPP v Rapid Roller Co Pty Ltd* [2011] VSCA 17, [11].

Aside from a handful of OHS cases with especially large fines, the vast majority of fines for OHS offences represent less than 6% of the maximum penalty.

8.20 Maximum fines for breach of duty offences in Victoria are also consistent with maximum penalties for similar OHS offences in other Australian jurisdictions, as well as other similar offences committed by corporations, such as the maximum fine of 10,000 penalty units for failing to reasonably minimise risks of harm to human health or the environment from pollution or waste.[378]

8.21 On the other hand, there are a number of reasons to consider increasing the available maximum penalty for OHS offences:

- it could go some way to increasing the values of fines imposed for OHS offences as a whole, if current sentencing practices are not adequately reflecting the objective seriousness of these offences;
- the current maximum penalty may not allow for sufficient fines to be imposed in cases involving very large corporations – in a similar context, the Federal Court has observed that for defendant companies, maximum penalties in the region of about $1 million 'are arguably inadequate for a corporation the size of Coles',[379] and that 'difficulties … can arise when a penalty regime fixes maximum penalties as to body corporates, without reference to size of the contravener';[380]
- in a comparable jurisdiction (England and Wales), the maximum fine for OHS offences has recently been made unlimited[381] to enable much higher fines in cases involving very large corporations that have committed serious OHS offences; and
- even offenders who have pleaded guilty while subject to the current maximum penalty have received fines of over 75% of the maximum,[382] which in itself could suggest that the penalty ceiling is set too low.

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378. *Environment Protection Act 2017* (Vic) ss 25(1), 314.

379. *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, [106].

380. *ACCC v Apple Pty Ltd (No 4)* [2018] FCA 953, [65]. Consumer Affairs Australia and New Zealand has argued that many maximum fines for corporations are inadequate, and proposed a new system where the maximum fine was significantly increased by reference to either a larger dollar value or the company's recent turnover: Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (2017) 87.

381. *Health and Safety at Work Act 1974* (E&W) sch 3A; *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (E&W) s 85. There have been a handful of Australian offences in the past that have also had no limit on the fine that can be imposed, including serious examples of dangerous driving causing death in WA (*Road Traffic Act 1974* (WA) s 59), unlawfully giving or obtaining information as to Australia's defences (*Defence Act 1903* (Cth) ss 73A, 73F), and black marketing and other offences (*National Security Act 1939* (Cth) s 10). See also *Fraser Henleins Pty Ltd v Cody* [1945] HCA 49; *Ex parte Gerard & Co. Pty Ltd & Anor* (1944) 44 SR (NSW) 370, 373; *Ex parte Zietsch & Anor* (1944) 44 SR (NSW) 360, 364. Arguably, the em-dash in Table 2 of section 109(2) of the *Sentencing Act*, where no maximum fine amount is specified as the monetary equivalent of life imprisonment, could suggest that the *Sentencing Act* already anticipates an offence carrying an unlimited fine. This situation is also not clarified by section 50 of the *Sentencing Act*, which otherwise purports to outline what the maximum fine for any offence shall be, but it does not clarify the maximum for a level 1 fine.

382. *Orbit Drilling Pty Ltd & Anor v The Queen* [2012] VSCA 82, [64] ($750,000 fine); *DPP v Toll Transport Pty Ltd* [2016] VCC 1975 ($1 million fine).

8.22 We are therefore keen to hear from stakeholders about whether there should be an increase in the maximum fine for OHS offences in Victoria, especially for breach of duty offences, and if so, how much of an increase.

Mandatory or presumptive sentencing

8.23 Another option is the introduction of mandatory or presumptive sentences for OHS offences. Mandatory sentencing involves parliament requiring courts to impose a specific sentence type or sentence length/fine amount for a particular offence; presumptive sentences are mostly the same, but there can be exceptions.[383]

8.24 There may be some who feel that if current sentencing practices for OHS offences are inadequate, the introduction of mandatory sentencing could be a useful policy solution. We have commented previously on the undesirability of mandatory sentencing,[384] as 'curtail[ing] judicial discretion and inevitably lead[ing] to injustice'.[385]

Introducing standard sentences for OHS offences

8.25 Standard sentences for OHS offences could be another mechanism of increasing sentences.[386] Standard sentences are the numerical sentence that parliament has indicated should represent the 'middle of the range' of objective seriousness for an offence (not taking account of subjective factors, such as pleas of guilty). They were first introduced in 2018 and currently apply to 13 serious offences, each of which carry a prison term, as opposed to a monetary penalty. The standard sentence is set at 40% of the maximum penalty for almost all of the current standard sentence offences.

8.26 We have previously found that the introduction of standard sentences has increased the lengths of prison sentences imposed for sex offences.[387] Standard sentences may therefore represent one possible mechanism for increasing the values of fines imposed in OHS cases (for example, by introducing a monetary standard sentence for breach of duty offences).

383. See Michael Stanton, 'Instruments of Injustice: The Emergence of Mandatory Sentencing in Victoria' (2022) 48(2) *Monash University Law Review* 1, 2.
384. Sentencing Advisory Council, *Mandatory Sentencing: Information Paper* (2008); Sentencing Advisory Council, *Sentencing Matters: Mandatory Sentencing* (2008).
385. Sentencing Advisory Council (2018), above n 131, v.
386. *Sentencing Act 1991* (Vic) ss 5A–5B.
387. Sentencing Advisory Council (2021), above n 68, 78–79.

8.27 However, standard sentences may be ill-suited to an OHS context for a number of reasons:

- First, standard sentences would make the exercise of sentencing OHS offences even more complex than it already is.
- Second, there may be unintended consequences of imposing a monetary standard sentence for the first time (given that all other standard sentences are currently set as prison terms) and applying a standard sentence to defendant companies for the first time.
- Third, standard sentences for OHS offences have the potential to reinforce and compound the current approach whereby the size of the company appears to have little effect on the size of the penalty in OHS cases. The reason standard sentences may have this effect is that they are intentionally formulated only with reference to the 'objective factors affecting the relative seriousness of that offence'.[388] In contrast, the size of the company is a subjective factor. So while standard sentences for breach of duty offences have the potential to significantly increase sentencing practices, there are two likely scenarios: in the first, sentencing practices hover close to the standard sentence because it has a powerful effect on decision-making, and the size of the company continues to be a largely irrelevant consideration in OHS cases; in the second, sentencing practices start to more significantly reflect the size of the company and diverge widely below and above the standard sentence, such that it is not truly a 'standard' sentence.

A guideline judgment from the Court of Appeal

8.28 Since 2004, the Court of Appeal has had the power to provide sentencing courts with broad sentencing guidance via what are known as 'guideline judgments'.[389] These involve the Court of Appeal providing guidance about qualitative matters, such as the weighting of sentencing purposes or sentencing factors, or quantitative matters, such as 'the appropriate level or range of sentences for a particular offence or class of offence'.[390] The court can give a guideline judgment on application by a party to an appeal, on application by the Attorney-General (since 2017) or on its own motion.[391]

388. *Sentencing Act 1991* (Vic) s 5A(1)(b).
389. *Sentencing Act 1991* (Vic) pt 2AA.
390. *Sentencing Act 1991* (Vic) s 6AC(1)(eb), as inserted by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 40(1), following our recommendation in Sentencing Advisory Council, *Sentencing Guidance in Victoria: Report* (2016) xviii–xix.
391. *Sentencing Act 1991* (Vic) s 6ABA, as inserted by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 39.

8.29 In 2013, the Court of Appeal twice invited an application from the Director of Public Prosecutions for a guideline judgment in relation to the offence of intentionally causing serious injury and suggested that it would consider giving a guideline judgment on its own accord if necessary.[392] That never occurred. In 2016, the Royal Commission into Family Violence recommended that the Director of Public Prosecutions seek a guideline judgment within two years in relation to the sentencing of family violence offences.[393] That also never occurred.

8.30 Instead, there has only been one guideline judgment since guideline judgments were introduced almost 20 years ago.[394] And the Attorney-General has not sought a guideline judgment since being given that power in 2017.

8.31 Guideline judgments were introduced in Victoria as a 'mechanism to promote greater consistency of approach in sentencing' and to allow the Court of Appeal to 'articulate unifying principles to guide the exercise of judicial discretion'.[395] There have been a number of guideline judgments (albeit not since 2004) in New South Wales,[396] where they have been described as 'a mechanism for structuring discretion, rather than restricting discretion'.[397] We have also previously described guideline judgments as 'the best legislative mechanism to provide guidance that will promote consistency of approach and promote public confidence in the criminal justice system'.[398] While we continue to hold that view about the significant potential of guideline judgments, their continued rarity, even in the wake of the 2017 reforms, leaves us dubious about the appetite for a guideline judgment on OHS offences from the various entities required – either the Director of Public Prosecutions or the Attorney-General, and the Court of Appeal itself.

An 'uplift' judgment from the Court of Appeal

8.32 The Victorian Court of Appeal has developed a unique line of case law in Australia with what are loosely described as 'uplift' cases. Similar to a guideline judgment, this is a case where the Court of Appeal scrutinises current sentencing practices for a particular type of offence and, if required, calls for an 'uplift' in sentencing practices by first-instance courts. There have been nine uplift cases since 2010, all but one

392. *Nash v The Queen* [2013] VSCA 172, [12]; *Kumar v The Queen* [2013] VSCA 191, [28].
393. State of Victoria, Royal Commission into Family Violence, *Volume III: Report and Recommendations* (2016) 233.
394. *Boulton & Ors v The Queen* [2014] VSCA 342 (on the use of CCOs as a sentencing order).
395. Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 479 (Rob Hulls, Attorney-General).
396. NSW Sentencing Council, 'Guideline Judgments' (sentencingcouncil.nsw.gov.au, 2023).
397. *R v Jurisic* [1998] NSWSC 423, [2].
398. Sentencing Advisory Council (2016), above n 390, 133.

(*Dalgliesh*) of which were in offender-initiated sentence appeals, relating to the following offences:

- recklessly causing serious injury by glassing (2010);
- confrontational aggravated burglary (2012);
- negligently causing serious injury by driving (2015);
- dangerous driving causing death (2016);
- incest (2016);
- cultivating a commercial quantity of narcotic plants (2016);
- trafficking in a commercial quantity of a drug of dependence (2017);
- rape by digital penetration (2017); and
- incitement to murder (2017).[399]

8.33 Potentially, if there is no appetite for a guideline judgment on OHS offences, the Director of Public Prosecutions could seek an uplift to sentencing practices instead. Indeed, as mentioned, in 2011 the Director of Public Prosecutions asked the Court of Appeal to provide guidance on sentencing ranges in OHS cases.[400] Though the appeal was dismissed (see [8.18]), the court did comment that 'sentencing practice in cases of this kind are in need of appellate consideration … to give some guidance to sentencing judges as to the adequacy of the current sentencing practices'.[401]

8.34 The Director of Public Prosecutions has, though, not sought an 'uplift' to sentencing practices for any offence since 2017.[402] Coupled with not having sought a guideline judgment since 2014, there may be a lack of inclination from the Director to seek an uplift in sentencing for OHS offences.

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399. In the same order as they appear above: *Winch v The Queen* [2010] VSCA 141; *Hogarth v The Queen* [2012] VSCA 302; *Harrison & Anor v The Queen* [2015] VSCA 349; *Stephens v The Queen* [2016] VSCA 121; *DPP v Dalgliesh (a pseudonym)* [2016] VSCA 148; *Nguyen v The Queen* [2016] VSCA 198; *Gregory (a pseudonym) v The Queen* [2017] VSCA 151; *Shrestha v The Queen* [2017] VSCA 364; *Kalala v The Queen* [2017] VSCA 223. Arguably, *Quah v The Queen* [2021] VSCA 164 is also an 'uplift' case in which the Court of Appeal clarified that the call to uplift sentencing practices for trafficking in a commercial quantity of a drug of dependence should have a knock-on effect of also increasing sentencing practices for trafficking in a *large* commercial quantity of a drug of dependence. However, *Quah v The Queen* was simply about maintaining relativity between those two offences, not a standalone commentary on the adequacy of sentencing practices for the latter offence.

400. *DPP v Rapid Roller Co Pty Ltd* [2011] VSCA 17.

401. *DPP v Rapid Roller Co Pty Ltd* [2011] VSCA 17, [15].

402. The last offence for which the Director appears to have sought an uplift was rape by digital penetration: *Shrestha v The Queen* [2017] VSCA 364.

Assessing the penalty unit value at sentencing

8.35 Another avenue to increase the values of fines imposed on OHS offences – and perhaps all offences – could be to change the current prevailing practice of assessing penalty unit values at the date of the offending, and instead apply the relevant penalty unit value at the date of sentencing.

8.36 We heard during consultation that the prevailing approach is to apply the relevant penalty unit value as at the date of offence. The rationale, we were told, is that to do otherwise would represent a retrospective increase in the maximum penalty. The case law in OHS cases certainly supports this position, with courts clearly applying the penalty unit value at the date of offence to determine both the maximum fine and any jurisdictional limits.[403]

8.37 There is, however, an alternative view that warrants consideration. Maximum penalties are not set in dollar values; they are set in penalty units. Arguably, a fine of 10 penalty units in 2009–10 ($1,168.20) is the same as a fine of 10 penalty units in 2019–20 ($1,652.20). They are both 10 penalty units, which is the unit of measurement used to set the maximum penalty. Allowing offenders to benefit from inflation (through the accrual of interest, the free use of those funds during the intervening period and the declining value of a dollar) could be seen as creating an unfair financial advantage for defendant companies that are not sentenced until years after the offending.

8.38 Take, for example, the case of *DPP v Heavy Mechanics*.[404] The offending occurred in the 2014–15 financial year, with an investigation beginning three years later and protracted criminal proceedings (two trials) resulting in the company being found guilty by a jury three and a half years after that. Both the Court of Appeal and the original sentencing court assessed the applicable maximum fine for the employer breach of duty offence as $1,328,490 (9,000 penalty units multiplied by $147.61).[405] The company was, however, not sentenced until February 2022, at which stage the penalty unit value was $181.74. If that penalty unit value had applied, the maximum penalty would have been assessed as $1,635,660 (23% higher).

8.39 As far as we could discern, this issue has not been litigated in the Court of Appeal. Instead, it is largely taken for granted that the applicable penalty unit value is that at the date of offence.

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403. See, for example, *Midfield Meat International Pty Ltd v The King* [2023] VSCA 106, [136]; *DPP v Heavy Mechanics* [2023] VSCA 69, [32]; *Di Tonto & Anor v The Queen* [2018] VSCA 312, [2]–[3]; *DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55, [15]; *DPP v Frewstal Pty Ltd* [2015] VSCA 266, fn 22, fn 25; *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241, fn 2.
404. *DPP v Heavy Mechanics* [2023] VSCA 69.
405. *DPP v Heavy Mechanics* [2023] VSCA 69, [32]; *DPP v Heavy Mechanics* [2022] VCC 107, [62].

A sentencing guideline (via a sentencing guidelines council)

8.40 Another option could be to introduce a sentencing guideline for Victorian courts dealing with OHS offences, which would outline various (discretionary) ranges of sentencing outcomes based on a number of factors in the case. For instance, in England and Wales, an employer will be highly culpable for an OHS offence if it fails to make appropriate changes following prior incidents exposing risks to health and safety. Further, the employer will fall into 'harm category 2' if the risk creates a medium likelihood of death, and the employer will be a medium-sized company if it has an annual turnover of between £10 and £50 million pounds. In those circumstances, the court would be required to consider (but not be bound by) the broad sentencing range set out in the sentencing guideline of between £220,000 and £1.2 million, with a starting point of £450,000.

8.41 Setting this sort of numerical guidance for courts has the potential to significantly change sentencing practices. When the new sentencing guideline came into effect in England and Wales, fine amounts for most OHS offences increased, but especially for large and very large organisations, for whom the median fine increased from £25,000 to £370,800 (effectively, a 1,500% increase).[406]

8.42 The potential utility of sentencing guidelines for OHS offences in Australia has been noted on several occasions. They were recommended by the Industry Commission in 1995.[407] Maxwell almost recommended them but concluded that the then forthcoming power for the Court of Appeal to give guideline judgments was a more appropriate vehicle for such guidance.[408] The national review of model OHS laws recommended sentencing guidelines, as did the Boland Review a decade later, when no guidelines had yet been developed.[409] Safe Work Australia has since commissioned a feasibility study about the introduction of sentencing guidelines in the model jurisdictions.[410] In response to that feasibility study, Safe Work's members made the decision not to proceed at this time.[411]

8.43 In 2017 the Victorian Government announced that it would be establishing a sentencing guidelines council, modelled on similar bodies that have been created in England and Wales, and in Scotland. We were asked for advice about the most

406. Sentencing Council for England and Wales, *Assessing the Impact and Implementation of the Sentencing Council's Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline* (2019) 7.

407. Industry Commission (1995), above n 13, 114–116.

408. *Maxwell Review*, 383–384.

409. Boland (2018), above n 18, 131.

410. Safe Work Australia, 'Implementation of WHS Ministers' Agreed Response to the Review of the Model WHS Laws' (safeworkaustralia.gov.au, 2023).

411. Meeting with Safe Work Australia (13 November 2023).

appropriate model for such a body being established in Victoria. In responding to those terms of reference, we published a consultation paper as well as a final report.[412] We received a number of submissions in the course of our inquiry, including from WorkSafe Victoria, which argued strongly in favour of sentencing guidelines to address 'public perceptions of leniency and inconsistency'.[413]

A legislated sentencing guideline

8.44 There is an alternative mechanism for introducing sentencing guidelines that may achieve the same aim of changing sentencing practices. In particular, the Victorian Government could, in the unique context of OHS offences, introduce a legislated sentencing guideline in the *OHS Act*. It would have a similar appearance and function to the health and safety offences sentencing guideline published in England and Wales, but rather than being developed by an independent body, the guideline would be introduced by parliament.

8.45 Such an approach would introduce a sentencing guideline only for a specific type of offence without first needing to establish an entire sentencing guidelines council. Like standard sentence legislation, such a sentencing guideline could unmoor existing sentencing practices by limiting the sentencing practices to which courts should have reference. In the absence of any appetite for an uplift or guideline judgment from the Director of Public Prosecutions or Court of Appeal, a legislative solution may be the next best thing. As with the sentencing guidelines in England and Wales, the only obligation would be for courts to take the sentencing guideline into account, while retaining discretion to sentence anywhere within a particular range, or even outside that range if the circumstances of the case warrant it. The sentencing ranges could be set in penalty units, rather than dollar values. There should not be any constitutional issues given that various other means of structuring judicial discretion have been upheld over time (for example, mandatory sentences). This approach would ideally be the subject of community consultation to ensure any new sentencing guidelines would best reflect community expectations.

Fine amounts for OHS offences

Question 16: If fine amounts for OHS offences should be increased, what would be the best way to achieve that increase?

412. Sentencing Advisory Council (2017), above n 23; Sentencing Advisory Council (2018), above n 131.

413. The full submission (Submission 17) is available on our website: Sentencing Advisory Council, 'A Sentencing Guidelines Council for Victoria: Submissions' (sentencingcouncil.vic.gov.au, 2023).

9. Payment of fines for OHS offences

9.1 This chapter considers the issues that arise in the enforcement of fines imposed for OHS offences. The process for collection of fines is not always straightforward, the ultimate recipient of the money paid is not clear, many fines go unpaid, directors are (currently) never made personally liable for a company's fines, and there is a clear pattern of companies 'phoenixing' – that is, going into liquidation only to re-emerge in form and substance soon after. If fines for OHS offences are not paid, it is not clear how those fines could achieve the various purposes of sentencing for which they were imposed.

9.2 In our statistical report, we found that 43% of total fine amounts imposed in OHS cases in the 4.5-year period to June 2021 went unpaid, amounting to $10.3 million.[414]

Court fines for OHS offences: Where do they go?

9.3 To better understand the process for the collection, management and enforcement of court fines for OHS offences, we spoke with Fines Victoria, WorkSafe and the Magistrates' Court.

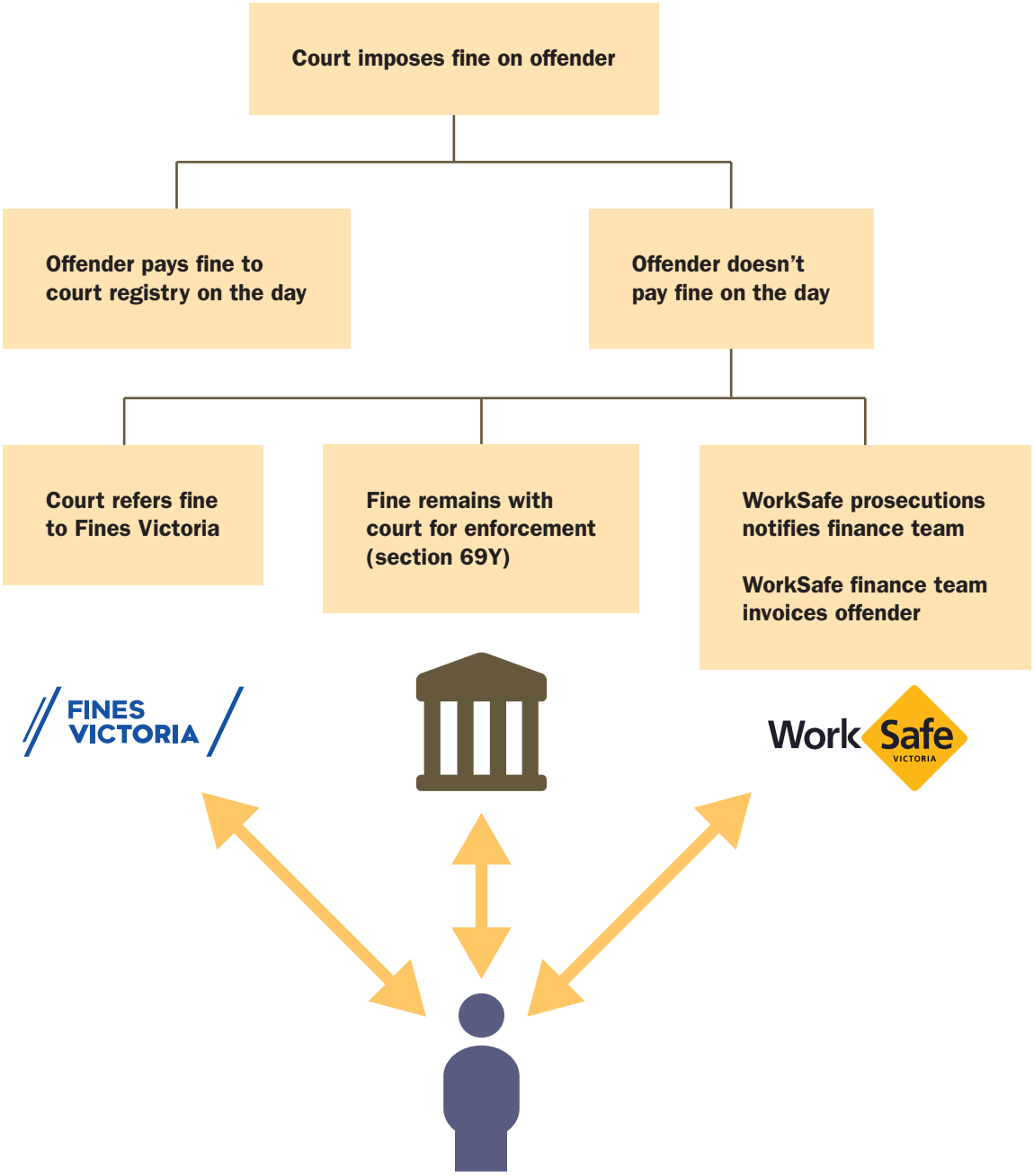
9.4 When a court imposes a fine for an OHS offence, there are four possible avenues for payment. First, if the offender pays the fine to the court registry on the day, enforcement processes are never initiated. Second, if the fine has not been paid on the day, it will usually be referred to Fines Victoria for collection and management (and, if necessary, enforcement).[415] Third, if the fine has not been paid on the day *and* the court has made a specific order under section 69Y of the *Sentencing Act*, the fine remains with the court for enforcement, rather than being referred to Fines Victoria. Fourth, WorkSafe Victoria may invoice the offender directly. We were told that the instructing solicitors in WorkSafe prosecutions will advise their finance team when a fine is imposed, and request that an invoice be generated. The finance team then invoices the courts, Fines Victoria or the offender directly.

414. *Statistical Report*, 66.

415. This is the usual process for all court fines: *Fines Reform Act 2014* (Vic) s 13.

9.5 In all, OHS offenders may potentially be interacting with any of three agencies – the court that imposed the fine, Fines Victoria or WorkSafe – in paying the fine.

Figure 3: Process for paying court fines for OHS offences



9.6 There then appears to be some inconsistency in how court fines for OHS offences are distributed. There is a default position in the *Sentencing Act* that all court fines for any offences 'must be paid into the Consolidated Fund' for general use.[416] Consistent with this, we heard that some court fines in OHS cases are being paid into consolidated revenue.

9.7 There is, however, also a potentially competing provision in the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) that has been interpreted as displacing that default position. That provision reads:

> There must be paid into the [WorkCover Authority] Fund — (a) any amount received or recovered by or on behalf of [WorkSafe] as a fee or as a penalty for an offender under … the **Occupational Health and Safety Act 2004** … unless the regulations expressly provide otherwise.[417]

9.8 Based on this provision, many fines imposed in OHS cases (indeed, most of them) are paid by the courts and Fines Victoria directly to WorkSafe (into the WorkCover Authority Fund).[418] Monies paid into that fund are required to be used in a variety of ways, including paying injured workers any compensation they are entitled to, assisting courts to offset the costs of workers compensation proceedings, and funding WorkSafe itself.[419] Arguably, the Explanatory Memorandum to the Workplace Injury Rehabilitation and Compensation Bill 2013 supports this interpretation, stating that section 513 'provides for payments into and out of the fund … including the payment into the fund for amounts recovered as penalties for offences against Acts administered by WorkSafe Victoria'.[420]

9.9 Our preliminary view is that these two pathways should not be operating in parallel. Ideally, *all* fines for OHS offences would be disbursed *either* to the WorkCover Authority Fund *or* to consolidated revenue. If the legislative intent of section 513 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) was to direct all court fines for OHS offences to WorkSafe, that should be made clear. Other laws state in explicit terms where fines are to be dispersed. For example, the *Environment Protection Act 2017* (Vic) expressly provides that fines for offences under the Act are to go to the Consolidated Fund, except in

416. *Sentencing Act 1991* (Vic) s 69ZB.
417. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 513(3)(a).
418. Above and beyond any costs recovered by the prosecuting agency: *Sentencing Act 1991* (Vic) s 85K.
419. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 513(5).
420. Explanatory Memorandum, Workplace Injury Rehabilitation and Compensation Bill 2013 (Vic) 255.

certain circumstances.[421] New South Wales legislation gives courts discretion, if the court considers it necessary, to direct that a portion (up to 50%) of a fine be paid to the prosecuting agency (for example, SafeWork NSW).[422] In Western Australia, the equivalent *Sentencing Act* contains a schedule specifying the entity or account to which a fine imposed under certain Acts is to be paid or credited.[423]

9.10 WorkSafe is in an unusual position as a regulator that recovers the monetary amounts resulting from its prosecutions. Victoria Police and the Director of Public Prosecutions do not recover fines imposed on offenders they prosecute – those amounts go to consolidated revenue.

Payment of fines

Question 17: What could be some opportunities to simplify or improve the process for paying fines imposed in OHS cases?

Liquidated companies

9.11 The Australian Securities and Investments Commission (ASIC) publishes statistics on the number of companies entering external administration each year. During the reference period, the number of companies entering external administration in Victoria remained relatively stable, ranging from 1,325 to 2,935 per year.[424] A majority of these companies either entered voluntary administration or were wound up by the court or creditors.

9.12 When courts are sentencing a company that has been wound up, or is in the process of liquidation, the current approach is to ignore the likelihood that the fine will never be paid and instead sentence as though the company is still solvent. In *DPP v Concorp Group Pty Ltd*, for example, the court said:

> The sentencing principles in relation to these matters are clear and settled. First, notwithstanding the company is now in liquidation, I take account of the decision of Teague J in *R v Denbo Pty Ltd*. In that decision, Justice Teague proposed to fix a fine at the

421. *Environment Protection Act 1970* (Vic) s 69, as replaced by *Environment Protection Act 2017* (Vic) ss 438–440. If the penalty is brought by a litter authority or a Council, then the fine must be paid to the Environment Protection Fund or that Council respectively. The Environment Protection Fund was established by the 2017 Act, is administered by the treasurer and may be used to fund waste treatment and disposal operations where it is apparent that existing facilities are inadequate to comply with the Act: ss 441–443.

422. *Fines Act 1996* (NSW) s 122. This excludes costs and witnesses' expenses: *Fines Act 1996* (NSW) ss 4(1)(e)–(f), 122(3).

423. *Sentencing Act 1995* (WA) sch 1.

424. Australian Securities and Investments Commission, 'Insolvency Statistics – Series 1: Companies Entering External Administration and Controller Appointments' (asic.gov.au, 2022).

> amount which would have been appropriate if the company had remained as thriving as it appeared to have been at the time of the contravention of the duty. But otherwise, the fine must reflect the need to take into account normal sentencing principles. In other words, I take from *Denbo* that I am to ignore the fact that the company is in liquidation and the fine will never be paid.[425]

9.13 In the statistical report, we found that only 7% of companies that were deregistered as at July 2023 had fully paid their OHS fine, compared with 79% of companies that were still operating.[426]

Improving payment rates of fines in OHS cases

9.14 About $2.5 million in fines for OHS offences goes unpaid each year.[427] On this understanding, it is worth exploring options to improve payment rates. This is in part because that revenue is appropriately received by the Victorian Government to pay for important public services, but more importantly because the purposes of sentencing (including the related confidence of the community in the justice system) depend on sentences being enforced. We have identified two potential avenues to improve fine payment rates: first, making 'phoenix' companies liable for fines imposed on their predecessors, and second, increasing directors' liability for fines imposed on companies.

Phoenix companies

9.15 In 2011, Schmidt described the 'well-known' phenomenon of the *phoenix company* as a scenario where:

> a company is wound up once criminal proceedings are concluded and the business then springs back into life under the guise of a new company without the fine imposed on the old company being paid and the new business not carrying the baggage of the old company's criminal record.[428]

9.16 In 2016, a County Court judge called for legislative intervention to address this 'standard practice' of companies liquidating and reforming to avoid liability for (among other debts) any fines that might be imposed for OHS offences.[429] In that case, the defendant company was found guilty of failing to provide a safe workplace

425. *DPP v Concorp Group Pty Ltd* [2019] VCC 1846, [22]; *DPP v Bradbury Industrial Services Pty Ltd* [2023] VCC 1029, [136]–[137].
426. *Statistical Report*, 69.
427. Approximately $10 million in fines were completely unpaid among cases sentenced between January 2017 and June 2021: ibid 66.
428. Monika Schmidt, 'Sentencing Corporate Offenders: Conundrums and Areas of Potential Law Reform' (2011) 10(2) *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 201, 212.
429. *DPP v Australian Box Recycling Pty Ltd* [2016] VCC 1056, [7].

for employees after an employee had been killed by a suspended cage loaded with flattened cardboard boxes falling on top of him. The company had an annual turnover of about $1 million at the time and employed 11 staff, but soon after the incident the company went into liquidation. The court observed that the company had been sold and was likely trading again. The company received an $800,000 fine with conviction, but because the company was in liquidation, the fine was all but unenforceable. The court said:

> The company has shown no remorse and in evidence on the plea, were a number of documents, demonstrating the positive steps those responsible for its administration have taken to avoid the financial consequences of this offending. In short, the company was placed in liquidation for reasons which are recorded as including a contingent WorkCover debt (whatever that might mean), there was an attempt to deregister the company despite the existence of these charges, and it seems likely that the business has been sold to another related entity and has already risen from the ashes and is trading.
>
> I was informed by the learned prosecutor that this form of rearrangement of companies charged with offences under this Act occurs so often that it is now almost 'standard practice'. It does seem to me that some form of legislative intervention is required to give penalties imposed for breaches of this important legislation some real force.[430]

9.17 There are a number of potential solutions to this practice, some of which could potentially occur in tandem, while others may be too unworkable to be feasible. First, render company directors personally liable (under certain circumstances) if a company goes into liquidation before paying any fines imposed. Second, disqualify directors of the liquidated company from being directors of any other company for a period of time – this may not result in any fines being paid, but it could prevent the company from re-emerging under a different name. Third, introduce the concept of successor liability (as it is known in the United States), where if a liquidated company re-emerges in the near future in a functionally near-identical form (that is, the same director(s), same staff, same functions, etc.) it would be financially liable for past fines.

Director liability for OHS fines

9.18 There are currently three stages of criminal proceedings at which company directors can be rendered liable for fines imposed for OHS offences committed by defendant companies: charged as a co-offender, ordered liable *at* sentencing and ordered liable *after* sentencing. Some directors are already being prosecuted (i.e. the first stage) for one or more OHS offences alongside the company. However, directors do not appear to have ever been ordered liable for fines at or after sentencing (i.e. the second and third stages) in Victoria.

430. *DPP v Australian Box Recycling Pty Ltd* [2016] VCC 1056, [6]–[7].

9.19 Section 55 of the *Sentencing Act* allows a court to order that a director be liable for any fine that it imposes on a company, but only if the company is not able to pay the fine, and there are reasonable grounds to believe that the company 'would not be able to meet any liabilities that it incurred' immediately before the offending.[431] Given that most OHS risks eventuate in companies that are solvent (at the time), it is unlikely that – without legislative reform – this provision could be used very often. One possibility could be to expand the application of this provision to include cases where the company appears to be unable to meet any liabilities at the time of sentencing, rather than immediately before the offending.

9.20 It is also possible for Fines Victoria to deem someone a 'declared director' after sentencing, rendering that person liable for fines imposed on a company.[432] In particular, where the sheriff is unable to locate and recover sufficient property belonging to a company to cover the amount of a fine imposed on it, Fines Victoria may inspect the company's ASIC records and issue a notice declaring that a company director is jointly and severally liable for the fine. Four weeks after the notice has been issued, Fines Victoria may take enforcement action against that director, provided it also supplies the director with a notice of final demand. The director can, though, challenge that declaration on a number of grounds.[433] Until recently, these provisions had not been used, but Fines Victoria advise that it has 'now used the provisions in relation to a small number of fines'.[434]

Disqualification from being a director

9.21 One measure to deter illegal phoenix activity is to give all company directors a unique identifying number. In 2021, a Director Register was established, requiring all company directors to register with ASIC for a director identifying number (DIN). This followed the Australian Law Reform Commission's enquiry into corporate criminal responsibility.[435] It could be plausible for Victorian courts to disqualify people registered on that system from acting as company directors for a period of time. There may, however, be constitutional implications in Victorian courts making orders relating to a federal scheme. This issue would warrant further investigation.

431. *Sentencing Act 1991* (Vic) s 55.
432. *Fines Reform Act 2014* (Vic) s 29.
433. *Fines Reform Act 2014* (Vic) s 30.
434. Email from Fines Victoria (20 November 2023).
435. See Australian Law Reform Commission (2020), above n 317, 513.

Successor liability for phoenix companies

9.22 Successor liability has been described as 'a safety valve ensuring just results in the face of corporate law's limitations on liability'.[436] Effectively, this option would involve an application to a court for a declaration that a company is functionally the same as its predecessor – through an analysis of its directors, staff, plant, clients, etc. – and should therefore be held liable for any court fines (or other debts) imposed on the predecessor.

Payment of fines

Question 18: What could be some opportunities to improve fine payment rates for OHS offences?

436. George W. Kuney, 'A Taxonomy and Evaluation of Successor Liability (Revisited)' (2017) 18 *Transactions: The Tennessee Journal of Business Law* 741, 745.

Appendix 1: Preliminary consultation

Date	Meeting
7 March 2023	Meeting with WorkSafe Victoria
18 April 2023	Meeting with WorkSafe Victoria
9 May 2023	Meeting with Fines Victoria
2 June 2023	Meeting with County Court of Victoria
2 June 2023	Meeting with Rob O'Neill (barrister)
6 June 2023	Meeting with Workplace Incidents Consultative Committee
7 June 2023	Meeting with Victorian Chamber of Commerce and Industry
8 June 2023	Meeting with Herbert Smith Freehills
8 June 2023	Meeting with Duncan Chisholm (barrister)
13 June 2023	Meeting with Tim Bourbon (barrister)
13 June 2023	Meeting with Seyfarth Shaw
14 June 2023	Meeting with Australian Industry Group
15 June 2023	Meeting with Law Institute of Victoria
19 June 2023	Meeting with WorkSafe Victoria
20 June 2023	Meeting with Magistrates' Court of Victoria
20 June 2023	Meeting with Office of Public Prosecutions
28 June 2023	Meeting with Victorian Court of Appeal
28 June 2023	Meeting with Sentencing Council for England and Wales
4 July 2023	Meeting with Victorian Government Solicitor's Office
5 July 2023	Meeting with Andrew Palmer KC (barrister, as he then was)
6 July 2023	Meeting with Victorian Trades Hall Council
11 July 2023	Meeting with Ariadne French (barrister)
11 July 2023	Meeting with Paul Holdenson (barrister)
25 July 2023	Meeting with Comcare
25 July 2023	Meeting with Fines Victoria
27 July 2023	Meeting with Environment Protection Authority Victoria
15 August 2023	Meeting with Victim Services, Support and Reform
17 August 2023	Meeting with Office of the Commonwealth Director of Public Prosecutions
1 September 2023	Meeting with the National Heavy Vehicle Regulator
13 November 2023	Meeting with Safe Work Australia

Appendix 2: Maximum penalties for offences under the *Occupational Health and Safety Act 2004* (Vic)

Offence	Section of *OHS Act*	Maximum penalty individual	Maximum penalty company
Offences with maximum penalties of imprisonment			
Workplace manslaughter	39G	25 years' imprisonment	100,000 penalty units
Recklessly engage in conduct placing another person in danger of serious injury in a workplace	32	5 years' imprisonment 1,800 penalty units	20,000 penalty units
Assault, intimidate or threaten an inspector	125(2)	2 years' imprisonment 240 penalty units	1,200 penalty units
Offences with: • maximum penalties of 9,000 penalty units (for companies) • maximum penalties of 1,800 penalty units (for individuals)			
Employer fail to reasonably provide and maintain a safe working environment for employees	21	1,800 penalty units	9,000 penalty units
Employer fail to reasonably ensure other people not exposed to health and safety risks	23	1,800 penalty units	9,000 penalty units
Self-employed person fail to reasonably ensure other people not exposed to health and safety risks	24	1,800 penalty units	–
Employee fail to reasonably take care for their own safety or the safety of others	25(1)	1,800 penalty units	–
Employee intentionally or recklessly interfering with, or misusing, anything provided for health and safety	25(2)	1,800 penalty units	–

Offence	Section of *OHS Act*	Maximum penalty individual	Maximum penalty company
Manager/controller of workplace fail to reasonably ensure workplace and means of entering/ leaving are safe	26	1,800 penalty units	9,000 penalty units
Designer of plant fail to reasonably ensure it is safe and without risks to health	27	1,800 penalty units	9,000 penalty units
Manufacturer of plant fail to reasonably ensure it is safe and without risks to health	29	1,800 penalty units	9,000 penalty units
Supplier of plant fail to reasonably ensure it is safe and without risks to health	30	1,800 penalty units	9,000 penalty units
Person installing, erecting or commissioning plant fail to reasonably ensure it is safe and without risks to health	31	1,800 penalty units	9,000 penalty units
Offences with: • maximum penalties of 2,500 penalty units (for companies) • maximum penalties of 500 penalty units (for individuals)			
Breach enforceable undertaking	16(3)	500 penalty units	2,500 penalty units
Designer of building or structure fail to reasonably ensure it is safe and without risks to health	28	500 penalty units	2,500 penalty units
Employer or self-employed person carry out work or activity without required licence or registration	40(1)	500 penalty units	2,500 penalty units
Breach provisional improvement notice	62(1) 63(6)	500 penalty units	2,500 penalty units
Discriminating against an employee because they have raised health and safety issues (or similar)	76(4)	500 penalty units	2,500 penalty units
Breach non-disturbance notice	110(4)	500 penalty units	2,500 penalty units
Breach improvement notice	111(4)	500 penalty units	2,500 penalty units
Breach prohibition notice	112(4)	500 penalty units	2,500 penalty units
Fail to comply with inspector's direction	120(2)	500 penalty units	2,500 penalty units

Offence	Section of *OHS Act*	Maximum penalty individual	Maximum penalty company
Offences with: • maximum penalties of 1,200 penalty units (for companies) • maximum penalties of 240 penalty units (for individuals)			
Employer fail to monitor health and conditions	22(1)	240 penalty units	1,200 penalty units
Employer or self-employed person fail to notify of incident	38(1)	240 penalty units	1,200 penalty units
Employer or self-employed person fail to provide written record of incident	38(3)	240 penalty units	1,200 penalty units
Employer or self-employed person fail to keep copy of record of incident	38(4)	240 penalty units	1,200 penalty units
Employer or self-employed person fail to preserve incident site	39	240 penalty units	1,200 penalty units
Give false or misleading information	153(1)	240 penalty units	1,200 penalty units
Product false or misleading document	153(2)	240 penalty units	1,200 penalty units
Offences with: • maximum penalties of 900 or fewer penalty units (for companies) • maximum penalties of 180 or fewer penalty units (for individuals)			
Employer fail to consult with employees	35	180 penalty units	900 penalty units
Employer fail to consult with other employers in relation to labour hire	35A	180 penalty units	900 penalty units
Person use plant that is not appropriately registered or licensed	40(2)	100 penalty units	500 penalty units
Person use substance that is not appropriately registered or licensed	40(3)	100 penalty units	500 penalty units
Person carry out work or activity without registration or licence	40(4)	100 penalty units	500 penalty units
Carry out work without prescribed qualification	41	100 penalty units	500 penalty units

Offence	Section of *OHS Act*	Maximum penalty individual	Maximum penalty company
Carry out work without permit	42	100 penalty units	500 penalty units
Fail to keep information relating to health and safety of employees	22(2)	60 penalty units	300 penalty units
Fail to provide information/ documents to WorkSafe	9(2)	60 penalty units	300 penalty units
Coerce in respect of negotiations for designated working group	53(1)	60 penalty units	300 penalty units
Refuse to allow health and safety representative to attend course	67(7)	60 penalty units	300 penalty units
Fail to provide information to health and safety representatives	69(1)	60 penalty units	300 penalty units
Disclose identifying health information	69(2)	60 penalty units	300 penalty units
Employer fail to ensure its representative in resolving a health and safety issue is an appropriate person	73(2)	60 penalty units	300 penalty units
Authorised representative obstruct, hinder, intimidate or threaten an employer or employee	91	60 penalty units	300 penalty units
Obstruct, hinder, intimidate or threaten an authorised representative	93	60 penalty units	300 penalty units
Impersonate authorised representative	94	60 penalty units	300 penalty units
Fail to produce document to inspector	100(2)	60 penalty units	300 penalty units
Breach WorkSafe terms/ conditions for return of a thing	108(3)	60 penalty units	300 penalty units
Fail to assist inspector	121	60 penalty units	300 penalty units
Fail to allow entry to inspector	122(2)	60 penalty units	300 penalty units
Hinder, obstruct, conceal from or prevent assistance to inspector	125(1)	60 penalty units	300 penalty units
Impersonate inspector	126	60 penalty units	300 penalty units

Offence	Section of *OHS Act*	Maximum penalty individual	Maximum penalty company
Fail to reasonably ensure negotiations start within 14 days	43(3)	10 penalty units	50 penalty units
Fail to give written notice establishing designated working group	44(2)	10 penalty units	50 penalty units
Fail to give written notice of variation of agreement	44(4)	10 penalty units	50 penalty units
Fail to establish health and safety committee within 3 months	72(1)	10 penalty units	50 penalty units
Fail to circulate provisional improvement notice	60(4)	5 penalty units	25 penalty units
Fail to keep list of health and safety representatives	71	5 penalty units	25 penalty units
Fail to circulate notice	115(2)	5 penalty units	25 penalty units
Fail to provide name and address to inspector	119(3)	5 penalty units	–

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