Working Paper 68

The National Review into Model OHS Laws:
Offences Relating to Breaches of the Duties of Care,
Defences and Related Matters

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About the Centre

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Disclaimer

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The paper was drafted with reference to the first and second reports of the National Review into Model Occupational Health and Safety Laws, current Australian OHS legislation (Acts, regulations and codes of practice), relevant cases and peer reviewed publications. These sources are referenced through the paper. Every effort was made to accurately reflect current proposals for the model OHS Act. However, final decisions relating to the model Act were not available at the time of writing. Therefore, before relying on the material in this paper, readers should carefully make their own assessment and check with other sources as to its accuracy, currency, completeness and relevance for their purposes.
1. Introduction

As our contribution to this symposium into the review of model occupational health and safety laws, we have been requested to comment upon parts 3, 4 and 5 of the *First Report to the Workplace Relations Ministers’ Council* (‘the report’) of the National Review Panel (‘the panel’).

These parts of the report respectively cover: offences relating to breaches of duties of care; other matters relevant to duty of care offences, and defences. Out of the 75 recommendations contained in the first report, just over one third, that is 26 recommendations flow from these three sections, and we have set them out in an appendix to this paper.

Many of the recommendations are uncontroversial - certainly to this audience - and do not warrant a detailed unpacking here. However, at this stage it is necessary to "clear the decks" by stating what will not be discussed. The recommendations which will not be discussed are:

- That offences should be criminal in nature;
- That the prosecution should bear the onus of proving breaches beyond reasonable doubt;
- That prosecutions should be brought within two years of the event, etc;
- That crown immunity should not apply;
- That two or more contraventions may be charged as a single offence, etc;
- That provision should be made for victim impact statements;
- That sentencing guidelines should be promulgated; and
- That the rule against double jeopardy should apply.

The key issues which warrant discussion, albeit within the scope of this brief discussion paper are:

- The suggested offences and their categorisation;
- Penalties, sentencing and deterrents;
- Indictable or summary offences; and
- Courts and appeals.

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These issues will be discussed in relation to OHS legislation and its enforcement in Victoria and NSW as these are the States that the authors are most familiar with. We will also briefly refer to a study that we are currently involved in (along with Associate Professor Suzanne Jamieson and Dr Toni Schofield), which examines the deterrent effect of OHS prosecutions in Victoria and NSW. A part of this study involves in-depth, semi-structured interviews with employers who have been prosecuted under OHS legislation in Victoria and NSW, providing relevant empirical evidence for the matters discussed in this paper.

Since the presentation of this paper, the Workplace Relations Ministers’ Council (‘WRMC’) has released their response to the recommendations of the review panel.\(^2\) The framework of recommendations agreed to by the WRMC will be used by Safework Australia to prepare a draft of the model OHS legislation, which will be subject for public comment.\(^3\) With regard to offences and sentencing – the focus of this paper - the WRMC agrees in principle with most recommendations. However it believes that a number, including those relating to sentencing guidelines and the system of appeals, should be dealt with outside the model law because of potential conflicts with existing criminal and procedural laws.\(^4\) This caveat should be borne in mind when reading this discussion of the review panel’s recommendations contained in the first report.

### 2. The suggested offences and their categorisation

Chapter 10 of the report establishes that the fundamental nature of offences will remain the same under the model law. Offences are to be absolute, subject to the qualifications placed on the general duties. Breaches of the duties will be criminal offences (with the prosecution bearing the burden of proof), and the panel stresses that offences will continue to take an inchoate form, i.e. constituted by the culpability and risk created by a breach of a duty, rather than the consequences of a breach.\(^5\)

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\(^4\) WRMC Response, above n 2, 2.

\(^5\) National OHS Review, above n 1, 92-96.
The report makes the rather novel recommendation of creating three categories of offences for each general duty, differentiated according to offender culpability and the seriousness of the risks created by the breach of the legislation. It is envisaged that the first category of offences will encompass the most serious offences where a high level of risk or serious harm (death or serious injury) is created, and the duty holder was reckless or grossly negligent. Category 2 offences will involve breaches where a high level of risk or harm is created, but without gross negligence or recklessness on the part of the duty holder. The third category will apply to breaches that have occurred without the aggravating factors referred to in the first two categories. One interpretation of the inclusion of references to negligence and recklessness is that although offences will continue to be strict liability ones, the panel wishes to import some notion of blameworthiness or culpability at the sentencing stage.

In the WRMC Response to Recommendations of the National Review into Model OHS Law the reference to “gross negligence” in relation to category 1 and 2 offences is removed. The WRMC believes that gross negligence offences should be dealt with outside the model Act, in order to ensure that they do not cut across state criminal laws and manslaughter provisions. The WRMC would instead differentiate the three categories of offences on the basis of the presence or absence of recklessness on the part of the duty holder, and the creation of risk of serious harm. The WRMC’s categorisation of offences is as follows:

a) Category 1 for the most serious breaches, for an offence of recklessly endangering a person to risk of death or serious injury at a workplace
b) Category 2 for circumstances where there was a high level of risk of serious harm but without recklessness
c) Category 3 for a breach of the duty without recklessness or high risk of serious harm

Consistent with the focus on the culpability of the offender and the creation of risk, the review panel does not make any specific provision for work-related deaths. However the report implies that in the majority of instances a work-related death (or risk of death) will involve a high degree of recklessness (or negligence) on the offender’s part and so most

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6 National OHS Review, above 1, 99.
7 See National OHS Review, above n 1, 99-100.
8 WRMC Response, above n 2, 13.
9 Ibid.
10 National OHS Review, above n 1, 103.
breaches resulting in death will fall within category 1. The report also excludes the possibility of specific provisions for automatic increases in sanctions for re-offenders. The panel notes that with the significantly increased fines it recommends (and discussed further below), it will be possible for sentencing courts to adjust fines to take into account prior offending records where appropriate.

This set of recommendations contained in chapters 10-12, which creates broad categories of offences and rejects specific provisions relating to breaches of the general duties, appears to be aimed at increasing the (already broad) scope of sentencing courts’ discretion to evaluate offences and sentence offenders as they see fit. This is particularly the case given that the report makes little provision for providing sentencing courts with some form of guidance (although it does recommend the promulgation of sentencing guidelines “[s]ubject to wide criminal justice policy considerations”). With regard to re-offenders, the panel notes that there are usually a number of factors that need to be considered when setting the penalty, including whether a prior offence is relevant to the matter at hand. By refusing separate provisions for specific offences or offenders, sentencing courts will be able to adjust the penalty within each category to suit the circumstances of the offence.

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12 National OHS Review, above n 1, 111.
13 Ibid.
15 Johnston, ‘Harmonising Occupational Health and Safety Regulation in Australia,’ above n 6, 57.
16 National OHS Review, above n 1, 127.
17 Ibid 111.
3. Penalties, sentencing and deterrents

Fines

One of the most important recommendations in the report relates to the substantial increase in fines, particularly for breaches involving gross negligence or recklessness, and serious failure to address hazards/risks. For category 1 offences, offending corporations will face a maximum fine of $3,000,000 and for individuals, $600,000. The fines for category 2 and 3 offences are $1,500,000 (for corporate offenders) and $300,000 (for individuals), and $500,000 and $100,000 respectively.\(^{18}\) These penalties constitute almost a doubling of the highest level of fines currently available, which are found in NSW for corporations ($1,650,000 for companies recklessly causing workplace deaths)\(^{19}\) and in Western Australia for individuals ($312,000 for repeat offenders who breach general duty provisions in circumstances of gross negligence).\(^{20}\) The panel also notes that there is significant variation in financial penalties across the Australian OHS statutes.\(^{21}\) In general, the highest fines are available for industrial manslaughter, but even here, fines vary considerably between States.\(^{22}\) One obvious advantage of a model law is that penalty rates will be standardised and will no longer depend on where an offence is committed.

The substantial enlargement of fines to be found in the model law relates to a broader trend in increasing the severity and range of penalties for OHS breaches in Australia. For instance, in NSW monetary penalties have increased approximately ten-fold over the past 25 years.\(^{23}\) Fines have increased from a maximum of $50,000 for a corporation and $5000 for an individual under the 1983 Act, to $550,000 for a first-time corporate offender and $55,000 for the first offence of an individual.\(^{24}\) For a corporate re-offender, the maximum penalty is $825,000, and for an individual $825,000 or two years imprisonment or both.\(^{25}\) The Victorian *Occupational Health and Safety Act 2004* increased maximum fines for a breach of the general duties from approximately $50,000 for an individual and $250,000 for a corporation,

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\(^{18}\) See National OHS Review, above n 1, 108-109 for tables of proposed fines for breaches of the general duties.

\(^{19}\) *Occupational health and Safety Act 2000* (NSW) s 32A.

\(^{20}\) *Occupational Health and Safety Act 1984* (WA) s 3A(4)(a)(ii); see also National OHS Review, above n 1, 104-105.

\(^{21}\) National OHS Review, above n 1, 104.

\(^{22}\) Ibid, 104-105.


\(^{24}\) *Occupational Health and Safety Act 2000* (NSW) s 12.

\(^{25}\) Ibid.
to $188,000 for an individual offender and $940,000 for a corporate offender.\textsuperscript{26}

Although the model legislation will most likely increase fines for OHS offences, the question remains whether the courts will impose fines that match these new high maxima. A small body of Australian research has found that across all Australian jurisdictions, average fines (whether those imposed on-the-spot by inspectors or by a court) are very low.\textsuperscript{27} In Richard Johnstone’s research on OHS prosecutions in Victoria, fines imposed by magistrates between 1983 to 1999 were just over 21 per cent of the maximum available.\textsuperscript{28} A recent analysis of 22 NSW cases from 1997 to 2005 involving work fatalities found that the NSW Industrial Court imposed fines that averaged 18 per cent of the maximum penalties available.\textsuperscript{29} Johnstone reports that low levels of fines (at least in Victoria) appear to be a product of a range of interacting factors relating to the nature of OHS law and its enforcement, including the “conventionalisation” of breaches of OHS legislation, magistrates’ lack of expertise in dealing with OHS offences, and their practice of reserving the highest fines for the worst cases by the worst offenders.\textsuperscript{30} From our own research, it also appears that judges are alive to the crippling effect that large fines may have on small businesses which are already struggling to make a profit, and engage in a form of means testing when setting fines.\textsuperscript{31}

In the report, the recommended increase in fines is related to the purported increased deterrent effect that will accompany stronger sanctions. As is apparent from its discussion of the deterrent effect of fines,\textsuperscript{32} the panel bases this view on classical deterrence theory, which holds that offenders calculate the costs and benefits of crime, and will choose to commit a crime when it will provide him or her with maximal benefits and has minimal costs attached.\textsuperscript{33} The panel aims to deter breaches of the model law by increasing the financial

\textsuperscript{26} B. Stensholt, \textit{A Report on the Occupational Health and Safety Act 2004; Administrative Review} (2007), 80-81
\textsuperscript{28} Johnstone, ‘Occupational Health and Safety, Courts and Crime,’ above n 9, 201.
\textsuperscript{29} Construction, Forestry, Mining and Energy Union, \textit{Submission to The National Review into Model Occupational Health and Safety Laws} (2008), 196-198 which reports the findings of research by Peggy Trompf on this issue. See also M. Davis, ‘Pinprick fines for workplace deaths,’ \textit{Sydney Morning Herald} (Sydney), 1 August 2008, 9 which discusses the same study.
\textsuperscript{31} See \textit{WorkCover Authority of New South Wales (Inspector Davidson) v Favro Constructions Ltd and Tony Favro} [2007] NSWIRComm 201 [50-51] (Staunton J) for an example of the NSW Industrial Relations Commission’s consideration of a small family-owned company’s financial situation.
\textsuperscript{32} See National OHS Review, above n 1, 106.
penalties for breaches and raising the cost of offending, thus making non-compliance less cost-effective for offenders. In the view of the panel, “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.”

However, there are a significant number of studies which challenge this conception of offenders as undertaking criminal activity on the basis of a rational cost/benefit analysis of the outcomes of their behaviour. A related issue is that it is not clear from empirical studies whether the severity of sanctions for regulatory crime has a deterrent effect on offenders. Our research suggests that the deterrent impact of prosecution stems from the prosecutorial process itself, as opposed to the level of fines imposed.

Custodial sentences

In keeping with a focus on increasing the deterrent effect of OHS sanctions, the panel recommends that significant periods of imprisonment be made available for the worst offences, i.e. indictable offences where there is a high level of offender culpability. Like other sanctioning options available under OHS laws, periods of imprisonment vary across the States and Territories, from six months to seven years. The panel sees this variation as unjust, and would make custodial sentences available for category 1 offences, with a maximum term across all States and Territories of five years. However, it is also worth noting that so far no person in Australia has ever been jailed for an OHS offence.

Other sentencing options

A number of the OHS statutes provide for remedies beyond fines and imprisonment. Typically, these alternative remedies comprise orders requiring defendants to undertake various acts, including rectification to victims, undertaking OHS projects and publishing

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34 National OHS Review, above n 1, 106.
37 National OHS Review, above n 1, 110. Note that the WRMC agrees that the model Act should provide for custodial sentences but would again remove reference to the duty holder’s negligence.
38 Ibid 109.
39 Ibid 110.
information about the company’s OHS transgressions. The panel proposes that a wide range of sentencing options be made available, including adverse publicity orders, remedial orders, corporate probation, community service orders, injunctions, training orders and compensation orders. However, from our research it appears that the Australian courts have made very little use of these types of remedies. In our view this is a pity because they have the capacity to put flesh upon the bones of mere monetary fines. As mentioned by the panel, the desired effects of punishing offenders (i.e. deterring further breaches and improvement of OHS practices) may be enhanced by combining several different sentencing options. For instance, where it appears unlikely that a fine alone will lead to OHS improvements, the courts can additionally order remedial action.

A related remedy is the process of enforceable undertakings. This measure, which had its genus in the area of competition law, requires a defendant (whether or not he or she has admitted guilt) to undertake tasks to make the workplace safer. There is a contractual aspect to these undertakings as they are enforceable by injunctive relief. The panel supports the use of enforceable undertakings, and in the Second Report to the Workplace Relations Ministers’ Council, they are discussed in some detail. In fact, it is likely (and we hope) that these undertakings may in time, rival the processes of prosecution. Several of our study’s participants have stressed that they consider enforceable undertakings a more palatable and effective penalty than prosecution resulting in fines. Some have pointed out that the considerable cost to companies involved in OHS prosecutions mean that there is less money (and time) available for improving the company’s OHS systems. Participants feel that enforceable undertakings would allow for the company’s efforts to be properly directed towards enhancing existing OHS measures, rather than preparing for potentially lengthy court cases. In summary, we agree with the panel that “…the overall objectives of OHS regulation are best served by providing a wide range of sentencing options when there are convictions for breaches of duties of care.”

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41 National OHS Review, above n 1, 113.
42 Ibid.
43 See Occupational Health and Safety Act 2004 (Vic) s 137, and s 16 where WorkSafe may accept a written undertaking rather than taking an offender to court.
4. Summary or indictable offences

Under current legislation, breaches of OHS duties are treated as summary offences in most jurisdictions.\textsuperscript{46} However, in some jurisdictions - the most prominent being the State of Victoria – offences may be treated as both indictable and summary.\textsuperscript{47} Briefly put, indictable offences are heard in the ordinary criminal courts, with the most serious offences being heard by a judge and a jury. On the other hand, summary offences are always heard by a judge sitting alone.

The history of OHS offences in NSW is of interest. When the \textit{Occupational Health and Safety Act 1983} (NSW) was enacted, its offences were summary offences. At this time, the more serious offences were heard by the Supreme Court, usually by judges sitting alone. It was natural enough for the Parliament in 1983 to make these offences summary ones because this fitted in with the reforms of 1979.\textsuperscript{48} In that year, as a means of combating some forms of white collar crime, a number of offences which had previously been indictable offences became summary ones, meaning that for some types of crime, jury trials were dispensed with. When the jurisdiction to hear OHS offences was transferred from the Supreme Court to what is now the Industrial Court of New South Wales in 1987, this change could be speedily made because summary offences are not heard by juries. Thus the fact that all OHS offences in NSW are summary has enabled its specialist courts since 1987 to build up a useful jurisprudence on the nature and scope of the duties, the breaches of which give rise to criminal liability.

In an interesting compromise, the panel recommends reserving the most significant prosecution option for the most serious breaches, i.e. category 1 offences will be brought on indictment, with other offences dealt with summarily.\textsuperscript{49} This option allows a balance between the different benefits attached to treating offences as either summary or indictable, including quick resolution and the use of specialist judicial expertise in hearing a case, as against strengthening the deterrent effect of offences and making breaches as serious as those found

\textsuperscript{46} National OHS Review, above n 1, 97.
\textsuperscript{47} \textit{Occupational Health and Safety Act 2004} (Vic) s 112 provides a classification of offences as summary or indictable.
\textsuperscript{48} For the background to this change, see \textit{Histollo Pty Ltd v Director-General of the National Parks and Wildlife Service} (1998) 45 NSWLR 661, 665 (Spigelman CJ).
\textsuperscript{49} National OHS Review, above n 1, 98.
in criminal law more generally.\textsuperscript{50}

At a deeper level, the following comments are apposite. First, in reserving the most serious offences for trial by judge and jury in the ordinary criminal courts, the panel can be taken as saying that category 1 offences are real crimes. Put another way, as these offences require negligence or recklessness on the part of the defendant, they are real crimes which should be treated as such by the law through the use of the standard criminal trial. Defendants should run the gauntlet of the ordinary criminal courts and be tried by a criminal judge with a jury. Second, it is surprising that category 2 offences are to be treated differently. After all, most serious OHS breaches will be category 2 offences, but they will be heard by a judge sitting alone and perhaps in some jurisdictions by a specialist court. Will they be seen in time as regulatory crimes, as distinct from real crimes? Third, perhaps the panel is making these recommendations in order to give various jurisdictions sufficient leeway to maintain their existing arrangements for hearing OHS cases. After all, as category 1 offences are likely to be rare, in NSW where a specialist court hears all serious breach of duty cases in summary proceedings, nothing much really needs to change. In Victoria, as we understand the position, in a number of instances juries are not used and County Court judges hear these matters on their own deciding all questions of law and of fact.

5. Courts and appeals

The States and Territories have broadly similar rights to appeal against convictions for breaches and in most States and Territories cases are heard in the Magistrates Court, with the exception of NSW, Victoria and South Australia.\textsuperscript{51} Again, most states give offenders a right of appeal to the Supreme Court, but NSW and Queensland do not have this arrangement, and thus do not allow offenders a final right of appeal to the High Court of Australia.\textsuperscript{52} In addition, NSW is the only state to provide for a right of appeal from an acquittal.\textsuperscript{53} In order to strengthen consistency in the application of the laws, the panel proposes to exclude the right to appeal from an acquittal from the model law, and to create an appeal structure that gives

\textsuperscript{50} Ibid 97-98.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid.
\textsuperscript{53} Industrial Relations Act 1996 (NSW) s 197A.
access to the High Court to offenders in all States.\textsuperscript{54} On the other hand, the panel leaves the choice of the court to hear cases at first instance up to individual State, Territory or Commonwealth governments to decide.\textsuperscript{55}

Having regard to the panel's three categories of remedies, the provisions in the NSW statute which allow for the Crown to appeal against an acquittal does appear to be somewhat anomalous. As category 1 and 2 offences will be heard by judges with assistance from juries, it now makes little sense to provide that after such proceedings, the Crown should be enabled to require the defendant to run the gauntlet of an appeal and of a possible re-trial. The lack of such an appeal right will, at the very least, make prosecuting agencies more discerning regarding who they will prosecute and when prosecutions will be initiated.

As residents of New South Wales, we wholeheartedly support broadening appeal rights in OHS matters in both Queensland and in New South Wales. Ron McCallum has been arguing for a number of years for there to be appropriate appeal rights to either the NSW Court of Criminal Appeal or to the NSW Court of Appeal where the grounds of a manifest miscarriage of justice can be established.\textsuperscript{56}

6. Some themes in the recommendations

Although this is a very brief overview of the review report, some themes can be drawn out of the recommendations found in parts 3, 4 and 5. It appears that on the whole, the panel wants to ensure that breaches of the duties found in OHS statutes are perceived as serious offences, on par with those found in more “traditional” areas of criminal law.\textsuperscript{57} This is apparent from the panel’s recommendations that offences continue to be criminal (and absolute liability) in nature, that fines be substantially increased and that imprisonment continue to be available for the most serious breaches, as well as the abolishment of specific provisions relating to

\textsuperscript{54} National OHS Review, above n 1, 121.
\textsuperscript{55} Ibid.
\textsuperscript{56} McCallum et al, above n 13, [136-143] (R. McCallum and P. Hall).
workplace fatalities. \(^{58}\) In fact, since imprisonment is technically available for any category 1 offence, the model law would widen the availability of imprisonment for breaches, given that in most states it has previously only been available for industrial manslaughter. At the same time, the panel is careful to see that the model law will be enforced fairly and consistently across the states, for instance by ensuring that all States give offenders a right of appeal to the High Court. This is in keeping with John Braithwaite’s argument that when regulation is enforced in a way that is perceived by offenders to be transparent and procedurally fair, there is a greater likelihood of business compliance. \(^{59}\)

The panel also makes numerous references to strengthening the deterrent effect of sentencing provisions, with deterrence being a traditional aim of the criminal law. It is clear that the panel envisages an “active deterrence” approach, allowing courts and regulators to be responsive in their approach to ensuring compliance, as opposed to fixing specific penalties for different offences. \(^{60}\) As mentioned above, the panel aims to increase the courts’ discretion in sentencing offenders, by creating broad categories of offences and providing the court with a range of sentencing options. The panel envisages a graduated approach to enforcement in line with the pyramid of sanctions approach. \(^{61}\) Thus, the sanctioning measures in the new model Act will operate “…as a continuum that is designed for a progression through various ways of ensuring safety and health at work, leading up to prosecution for non-compliance.” \(^{62}\) The review panel evidently sees prosecutions very much as “last resort sanctions” which will be rarely used, but taken very seriously when applied. \(^{63}\)

When prosecutions are successfully undertaken by regulators, it is likely that the high fines provided by the model act will be reserved for the worst offenders, given the broad range of sentencing options also envisaged, and the prior reluctance of the courts to impose severe

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\(^{60}\) I. Ayres and J. Braithwaite, Responsive Regulation: Transcending the Regulation Debate (1992) 39.

\(^{61}\) Ibid.

\(^{62}\) National OHS Review, above n 1, 93.

\(^{63}\) Ayres and Braithwaite, above n 55, discuss the advantages possessed by regulatory agencies that are armed with a range of responses to breaches, including severe sanctions. They argue that when the threat of a “big stick” hangs in the background, regulatory agencies are more likely to be able to induce company compliance using lower level sanctions, even when (and because) the severest of sanctions is rarely used.
sanctions on offenders. This is made clear in the panel’s discussion of the recommended increase in fines, where it states that higher penalties,

…would in our view, have a salutary effect in raising commitment to good OHS. It must be recognised, however, that the application of the highest levels of fines would, for a variety of legal and practical reasons, continue to be rare.64

From this comment, we can conclude that, like the magistrates in Johnstone’s research in Victoria, prosecution will be reserved for the worst OHS breaches and the highest penalties for the worst possible offenders. However it is questionable whether these severe penalties will have the desired effect of deterring companies from re-offending, especially in light of the fact that there has been little systematic Australian research evaluating the effects of sanctions for OHS offences on companies.65

7. Conclusion

From an analysis of the recommendations made in the First Report of the National OHS Review Panel, it appears that the panel intends that breaches of new model OHS legislation will be serious criminal offences. The panel recommends that a range of sanctions be available to punish offenders, but would grant sentencing courts a broad discretion in using these sanctions according to where a breach fell within a new schema of three categories of offences. The range of sanctions coupled with this broadening of the courts’ discretion creates the possibility that the courts will be able to take a truly responsive approach to sentencing, adjusting penalties according to an offender’s individual circumstances, including prior offending, contrition and improvements to OHS systems. On the other hand, by assigning escalating levels of penalties to each of the three categories and making only category 1 offences indictable, the panel runs the risk that only the most serious breaches of the model law will be seen as truly criminal offences, with category 2 and 3 offences perceived to be “regulatory” or “quasi-criminal” in nature. It also remains to be seen whether the courts would use the armoury of sanctions that the panel grants them, especially in light of evidence suggesting that the courts are reluctant to order anything but relatively low fines.

64 National OHS Review, above n 1, 109.
65 See also National OHS Review, above n 1, 113.
Appendix: Recommendations 50-75

RECOMMENDATION 50
To emphasise the seriousness of the obligations and to strengthen their deterrent value, breaches of duties of care should only be criminal offences, with the prosecution bearing the criminal standard of proof for all the elements of the offence.

RECOMMENDATION 51
Penalties should be clearly related to non-compliance with a duty, the culpability of the offender and the level of risk, not merely the actual consequences of the breach.

RECOMMENDATION 52
Offences for a breach of a duty of care should continue to be absolute liability offences, and clearly expressed as such, subject to the qualifier of reasonable practicability, due diligence or reasonable care, as recommended earlier.

RECOMMENDATION 53
Prosecutions for the most serious breaches (i.e. category 1 offences, see recommendation 55) should be brought on indictment, with other offences dealt with summarily.

RECOMMENDATION 54
There should be provision for indictable offences to be dealt with summarily where the Court decides that it is appropriate and the defendant agrees.

RECOMMENDATION 55
There should be three categories of offences for each type of duty of care,
(a) Category 1 for the most serious breaches, where there was a high level of risk of serious harm and the duty holder was reckless or grossly negligent;
(b) Category 2 for circumstances where there was a high level of risk of serious harm but without recklessness or gross negligence; and
(c) Category 3 for a breach of the duty without the aggravating factors present in the first two categories;
with maximum penalties that:
(a) relate to the seriousness of the breach in terms of risk and the offender’s culpability;
(b) strengthen the deterrent effect of the offences; and
(c) allow the courts to impose more meaningful penalties, where that is appropriate.

RECOMMENDATION 56
The model Act should provide that in a case of very high culpability (involving recklessness or gross negligence) in relation to non-compliance with a duty of care where there was serious harm (fatality or serious injury) to any person or a high risk of such harm, the highest of the penalties under the Act should apply, including imprisonment for up to five years.
Note: This would be a Category 1 case in our recommended 3 category system.

RECOMMENDATION 57
The model Act should provide for the penalties for category 1, 2 and 3 offences relating to duties of care, as set out in Tables 11, 12 and 13.

RECOMMENDATION 58
The model Act should separately specify the penalties for natural persons and corporations, with the maximum fine for non-compliance by a corporation being five times the maximum fine for a natural person.

Note: Other sentencing options are considered later in this Chapter.

RECOMMENDATION 59
The model Act should provide for custodial sentences for individuals for up to five years in circumstances (category 1 offence) where:
(a) there was a breach of a duty of care where there was serious harm to a person (fatality or serious injury) or a high risk of serious harm; and
(b) the duty holder has been reckless or grossly negligent.

RECOMMENDATION 60
In light of our other recommendations for higher maximum penalties and a greater range of sentencing options, the model Act should not provide for a further penalty for a repeat offender.

RECOMMENDATION 61
The model Act should provide for the following sentencing options in addition to fines and custodial sentences:
(a) adverse publicity orders;
(b) remedial orders;
(c) corporate probation;
(d) community service orders;
(e) injunctions;
(f) training orders; and
(g) compensation orders.

Note: we support making provision for enforceable undertakings but they are dealt with in our second report to allow a full examination of the options, including providing for such an undertaking as an alternative to a prosecution and as a sentencing option.

RECOMMENDATION 62
The prosecution should bear the onus of proving beyond reasonable doubt all elements of an offence relating to non-compliance with a duty of care.

RECOMMENDATION 63
The model Act should provide for a system of appeals against a finding of guilt in a prosecution, ultimately to the High Court of Australia, commencing with an application for leave to appeal to the Supreme Court.

RECOMMENDATION 64
The model Act should not provide for appeals from acquittals.

RECOMMENDATION 65
Crown immunity should not be provided for in the model Act.

RECOMMENDATION 66
Prosecutions for non-compliance with duties of care should be commenced within two years of whichever is the latest of the following:
(a) the occurrence of the offence;
(b) the offence coming to the regulator’s notice;
or within 1 year of a finding in a coronial proceeding or another official inquiry that an
offence has occurred.

RECOMMENDATION 67
The model Act should provide for or facilitate the presentation of a victim impact statement
to any court that is hearing a category 1 or category 2 case of non-compliance with a duty of
care, including by or on behalf of surviving family members or dependants.

RECOMMENDATION 68
Subject to wider criminal justice policy considerations, the model Act should provide for the
promulgation of sentencing guidelines or, where there are applicable sentencing guidelines,
they should be reviewed for national consistency and compatibility with the OHS regulatory
regime.

RECOMMENDATION 69
The model Act should provide that two or more contraventions of duties of care may be
charged as a single offence if they arise out of the same factual circumstances.

RECOMMENDATION 70
The model Act should enshrine the rule against double jeopardy by providing that no person
is liable to be punished twice for the same offence under the Act or for events arising out of
and related to that offence.

RECOMMENDATION 71
Penalties for non-compliance with duties of care should be specified in the same provisions
as the duties to which they relate.

RECOMMENDATION 72
If recommendation 71 is not accepted, the provisions relating to penalties for non-compliance
with duties of care should be collocated with the provisions specifying the duties.

RECOMMENDATION 73
The model Act should expressly state the dollar amounts of the maximum fines for each
category of breach of a duty of care.

RECOMMENDATION 74
Further advice should be sought on the effects of other laws relating to the jurisdiction,
powers and functions of the courts with jurisdiction over OHS matters to identify whether
those laws have any unintended consequences inimical to the objective of harmonising OHS
laws.

RECOMMENDATION 75
In light of our recommendations about who should bear the onus of proof in relation to
reasonable practicability, the model Act should not provide for defences to prosecutions for
non-compliance with duties of care.