

Sentencing Occupational Health and Safety Offences in Victoria A Statistical Report

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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- 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.

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Sentencing Occupational Health and Safety Offences in Victoria A Statistical Report

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About the Sentencing Advisory Council

The Sentencing Advisory Council is an independent statutory body established by 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 report, 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.

In this report, a **charge** means a single proven count of an offence. A **case** may contain one or more **charges**. Those charges may involve the same **offence**, or more than one type of offence.

Executive summary

This statistical report is being released alongside a detailed consultation paper in which we are seeking stakeholder and community views about a variety of questions related to the sentencing of occupational health and safety (OHS) offences. This report is designed to perform two functions: first, to be a standalone report that can provide a useful overview of the sentencing of OHS offences in the 16 years to 30 June 2021 (the reference period); and second, to provide a transparent evidence base to which stakeholders and the community can refer in making written submissions to, or consulting with, us as we consider the various opportunities for reform.

The focus of this report

This report examines all offences sentenced under the *Occupational Health and Safety Act 2004* (Vic) since its commencement in July 2005, as well as under the *Occupational Health and Safety Regulations 2007* (Vic) and *Occupational Health and Safety Regulations 2017* (Vic). Our inquiry is not limited to any particular court jurisdiction, so for the reference period we examine all 1,086 cases involving OHS offences sentenced in the Magistrates' Court, 110 cases involving OHS offences sentenced in the County Court, and the 1 case involving OHS offences sentenced in the Supreme Court (*DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278). Early in the report, we do briefly include offences contrary to the *Occupational Health and Safety Act 1985* (Vic), which was replaced by the *OHS Act 2004*, but only to give a true overview of the prevalence of sentenced OHS offences; after that, offences under the *OHS Act 1985* are excluded.

Key findings

There were 1,903 OHS offences sentenced in 1,197 cases during the reference period. Most offenders were companies (83.3%), and most individual offenders were male. There were only 6 females sentenced for OHS offences during the reference period (0.5%), one of whom was also the only person to receive a prison sentence for an OHS offence (for recklessly endangering serious injury in a workplace (section 32)).

Given their respective populations, most justice regions in Victoria were proportionately represented in the number of OHS offences and cases sentenced. There was, though, a significant over-representation of OHS cases in the Barwon South West region (especially in Geelong), where there were 13% of OHS cases despite only 6% of Victoria's businesses being in that region, and a corresponding under-representation in metropolitan Melbourne (67.1% of cases).

Most OHS cases sentenced in the higher courts involved a death (80% or 62 of 78 cases with available sentencing remarks) and most of the remaining OHS cases in the higher courts involved someone being injured (12% or 10 cases). There were very few OHS cases in the higher courts that involved a risk only (8% or 6 cases). In the Magistrates' Court, the level of harm could be ascertained in 697 cases: 27 involved a death (4%), 483 involved an injury (69%) and 187 involved a 'risk-only' offence where no one was injured or killed (27%).

Employer breach of duty offences (sections 21 and 23)

By far the most common OHS offences sentenced in Victoria are employer breaches of duty to reasonably provide a working environment that is safe and without risks to the health of their employees (section 21) or members of the public (section 23). The maximum penalty for employer breach of duty offences is 9,000 penalty units for companies and 1,800 penalty units for individuals, which in 2023–24 are about \$1.73 million and \$346,000, respectively.

Together, these offences accounted for 66% (1,255 charges) of the 1,903 OHS offences sentenced during the reference period. Of those 1,255 charges, most were sentenced in the Magistrates' Court (1,107 charges or 88%), with the remainder sentenced in the higher courts (12%). Most employer breach of duty offences were committed by companies (1,035 charges or 83%), with the remainder committed by individuals (17%).

The vast majority of offenders pleaded guilty (98% in the Magistrates' Court and 79% in the higher courts), while the remainder were found guilty after contesting the charges.

The most common sentencing outcome, by far, was a fine, at 99% of the 148 charges in the higher courts, and 91% of the 1,107 charges in the Magistrates' Court. Almost all of the remaining offences resulted in either an adjourned undertaking or a diversion plan.

In the Magistrates' Court, the median fine imposed on companies for employer breach of duty offences dropped significantly (in dollar values) between the first and second halves of the reference period (the 8 years to 30 June 2013 and the 8 years to 30 June 2021), from \$40,000 to \$20,000. At the same time, penalty unit values in Victoria increased

from about \$105 in 2005–06 to about \$165 in 2020–21. When expressed as a number of penalty units (and not as dollar amounts), there seemed to have been a real decline of about 70% in the median fine imposed for this offence in the decade to 30 June 2021. As of 2019–20, the median fine imposed on a company in the Magistrates' Court for an employer breach of duty offence was 125 penalty units, representing just 5% of the jurisdictional limit (2,500 penalty units) and 1% of the maximum fine (9,000 penalty units).

Other breach of duty offences

Other breach of duty offences were the next most common type of OHS offence sentenced during the reference period. These relate to health and safety duties owed by self-employed persons (section 24), employees (section 25), managers and controllers of workplaces (section 26), designers of plant (section 27), designers of buildings or structures (section 28), manufacturers (section 29) or suppliers (section 30) of plant or substances, and people who install, erect or commission plant (section 31). Also included here is the duty of employers to monitor and provide information about health and safety to employees (section 22). The maximum penalty for most of these offences is 1,800 penalty units for an individual, and 9,000 penalty units for a company (with offences under sections 22 and 28 being exceptions).

There were 224 other breach of duty offences sentenced in 172 cases during the reference period. The majority of these were sentenced in the Magistrates' Court (210 charges in 159 cases). Managers/controllers breach of duty offences under section 26 (129 charges) and employee breach of duty offences under section 25 (50 charges) were the most common. A relatively high proportion of offenders were individuals (42%); some of these offences do not apply to companies, for example, the duty owed by employees.

A fine was imposed on 179 of the 210 charges sentenced in the Magistrates' Court and 12 of the 14 charges sentenced in the higher courts. Adjourned undertakings were relatively more prevalent for offences of employees failing to take reasonable care for health and safety, with 23% of these offences receiving an adjourned undertaking in the Magistrates' Court. This most likely reflects the higher proportion of individuals prosecuted for these offences.

Fines for these offences in the Magistrates' Court ranged from \$1,000 to \$250,000, with companies receiving a median fine of \$20,000, and individuals a median of \$4,000. In the higher courts, fines for these offences ranged from \$5,000 to \$450,000, with a median fine of \$100,000. The 5 largest fines were all imposed on companies for managers/controllers breach of duty offences under section 26.

Breach of notice offences

Breach of notice offences relate to failures to comply with a notice issued by WorkSafe, including an improvement notice (section 111), a non-disturbance notice (section 110), a prohibition notice (section 112) or a provisional improvement notice (section 62). Breach of undertaking offences concern breaches of an enforceable undertaking that has been entered into by an individual or a company with the consent of WorkSafe (section 16). There were no breach of undertaking offences in the reference period.

There were 134 breach of notice offences sentenced in 71 cases during the reference period, with 131 charges in 69 cases sentenced in the Magistrates' Court. Breaches of improvement notices were most common, making up 105 of the 134 charges. The majority of offenders sentenced for breach of notice offences were companies (85%).

The maximum penalty for the 4 breach of notice offences (and the breach of undertaking offence) is 500 penalty units for an individual and 2,500 penalty units for a company.

Other OHS offences

Other OHS offences involve a board range of non-breach of duty/notice offences (including offences against the *OHS Regulations*) sentenced during the reference period. These other OHS offences include failing to notify WorkSafe of an incident (section 38); failing to preserve an incident site (section 39); conducting work without a licence or registration (section 40); conducting work without prescribed qualifications, experience or supervision (section 41); interfering with or failing to comply with the exercise of an inspector's functions (sections 100, 119, 120, 121); failing to provide information to WorkSafe (section 9); providing false or misleading information (section 153); discriminating against an employee (section 76); and recklessly endangering serious injury in a workplace (section 32).

There were 290 other OHS and regulation offences in 147 cases during the reference period. Most of these were sentenced in the Magistrates court (286 charges in 144 cases). The majority of offenders sentenced for other OHS offences were companies (66%).

Failing to notify WorkSafe of an incident was the most common offence sentenced during the reference period, with 116 charges in 70 cases.

Of the offences against the *OHS Regulations*, the most common involved licence assessors failing to conduct assessments in accordance with WorkSafe's requirements. There were 21 charges in 2 cases sentenced for this offence during the reference period.

Payment of fines for OHS offences

There were 392 cases sentenced between 1 January 2017 and 30 June 2021 for which data on fine payment could be obtained, involving a total of \$24 million. Of these cases, 261 (67%) had fines that were fully paid as of July 2023, representing \$13.1 million (or 54% of the total value of fines imposed). Fines were fully paid for 61% of the value of fines imposed in the Magistrates' Court and 44% of the value of fines imposed in the County Court. Moreover, there was no significant difference in the yearly fine payment rates: fines imposed in OHS cases in 2017 were fully paid at a similar rate (75%) as fines imposed in OHS cases in 2021 (74%).

A number of factors were correlated with higher rates of fine payment. Offenders sentenced without a conviction were more likely than those sentenced with a conviction to have fully paid their fine (77% compared to 55%). Companies were more likely than individuals to have fully paid their fine (70% compared to 42%). And companies that were still operating were far more likely than deregistered companies to have fully paid their fine (79% compared to 6%).

1. Introduction

- 1.1 This report presents a statistical overview of the sentencing of occupational health and safety (OHS) offences in Victoria in the 16 years from 1 July 2005 to 30 June 2021 (the reference period). The overview includes all offences in the *Occupational Health and Safety Act 2004 (Vic)* (the *OHS Act*).
- 1.2 The aims of this report are twofold: (1) to present the first detailed analysis of sentencing for OHS offences in Victoria since the introduction of the *OHS Act* and (2) to complement a consultation paper that we have released alongside this report, calling for submissions on the sentencing of OHS offences and providing information that may assist anyone wanting to make a submission.

The regulation of occupational health and safety in Victoria

- 1.3 All people responsible for workplaces have obligations to ensure that work is done without risks to the health and safety of those tasked to do the work as well as to the general public. In Victoria, these obligations arise from the *OHS Act* and the corresponding *Occupational Health and Safety Regulations* (the *OHS Regulations*). The *OHS Act* sets out the overarching objectives of the OHS regulatory environment in Victoria, including the principles of health and safety protection, and it tasks enterprises, workers and others with certain obligations. The *OHS Regulations* prescribe ways to fulfil those obligations in certain contexts, such as when manual handling or when dealing with hazardous chemicals.

Objectives of the *OHS Act*

- 1.4 The objectives of the *OHS Act* are to protect workers and the public from risks to health, safety and welfare arising from the enterprises of employers and self-employed persons; to eliminate risks at their source; and to provide for the involvement of employees and employers in the development and implementation of health, safety and welfare standards.¹

1. *Occupational Health and Safety Act 2004 (Vic)* s 2(1).

- 1.5 To achieve these objectives, the *OHS Act* places a number of duties on employers, self-employed persons, employees, designers, manufacturers, suppliers and others. These duties require those people to eliminate and reduce risks to health and safety.

Principles of health and safety protection

- 1.6 The *OHS Act* contains five principles of health and safety protection, which guide WorkSafe in applying the Act, and duty holders in discharging their duties.
- 1.7 It is a criminal offence to fail to carry out those duties. As the Court of Appeal has described, the *OHS Act* does not require the perfect prevention of injury, only that all reasonable steps are taken to prevent injury.

The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment. The courts will best assist the attainment of this end by looking at the facts of each case as practicable people would look at them: not with the benefit of hindsight, nor with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them.

Holmes, John Graham v R E Spence & Co Pty Ltd [1992] VicSC 227, 8²

[A]n employer's responsibility for the safety of its workers will not be discharged unless the employer takes 'an active imaginative and flexible approach to potential dangers in the knowledge that human frailty is an ever-present reality'.

Commercial Industrial Construction Group Pty Ltd v The Queen [2006] VSCA 181, [49]³

The objectives of the *OHS Act* are to:

- **secure the health, safety and welfare of employees and other persons at work**
- **eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work**
- **ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons and**
- **provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards –**

having regard to the principles of health and safety protection.

Section 2(1) of the *OHS Act*

2. Cited with approval in *DPP v JCS Fabrications Pty Ltd & Anor* [2019] VSCA 50, [24].

3. Citing *Holmes, John Graham v R E Spence & Co Pty Ltd* [1992] VicSC 227, 9.

The principles of health and safety protection

1. The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
2. Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
3. Employers and self-employed persons should be proactive, and take all reasonably practicable measures to ensure health and safety at workplaces and in the conduct of undertakings.
4. Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.
5. Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

Section 4 of the OHS Act

Enforcement of OHS laws

1.8 Victoria's OHS laws are enforced by WorkSafe.⁴ Where WorkSafe becomes aware that there is a breach of the law, it has a number of enforcement options outside prosecution to attempt to rectify the breach. It can issue a notice – such as a non-disturbance notice,⁵ an improvement notice⁶ or a prohibition notice – against the individual or company.⁷ If a notice has not been complied with, WorkSafe can apply to the Supreme Court for a mandatory or restrictive injunction to compel compliance with the notice, or to prevent a breach of the notice.⁸ WorkSafe can also institute criminal proceedings for non-compliance or breaches of duties.

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4. WorkSafe Victoria is the trading name of the Victorian Workcover Authority, which is established under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) pt 11, and before that by the *Accident Compensation Act 1985* (Vic) pt 2 (as enacted).
 5. *Occupational Health and Safety Act 2004* (Vic) s 110.
 6. *Occupational Health and Safety Act 2004* (Vic) s 111.
 7. *Occupational Health and Safety Act 2004* (Vic) s 112.
 8. *Occupational Health and Safety Act 2004* (Vic) s 118. And, as of 20 July 2021, WorkSafe can now also issue an infringement notice as an alternative to prosecution for summary offences under the *OHS Act* or *OHS Regulations: Occupational Health and Safety Act 2004* (Vic) s 139. Infringement notices are not, however, sentencing outcomes and are therefore outside the scope of this report.

- 1.9 Achieving compliance with OHS laws can vary in terms of the complexity of those laws and the degree to which compliance is certain. It may be assumed that, most of the time, companies and individuals fulfill their duties and obligations by ensuring the work that they do – and the work that they engage others to do – is done in accordance with accepted standards. Equally, not every OHS offence is detected, and not every detected offence results in prosecution or sentencing.
- 1.10 WorkSafe has primary responsibility for commencing criminal proceedings for OHS offences in the Magistrates' Court. If the matter is to be committed to the County Court, the Director of Public Prosecutions takes carriage of the matter,⁹ but remains in close consultation with WorkSafe.

Focus and structure of this report

- 1.11 In July 2005, the *OHS Act 2004* came into effect in Victoria. That Act replaced the preceding *OHS Act 1985*. There are 69 distinct offences in the *OHS Act 2004*. There are also over 200 offences listed in the *OHS Regulations 2017*.¹⁰ Offences under the *OHS Act 2004* and *OHS Regulations* are the focus of this report.
- 1.12 We have grouped these offences into four overarching categories, based in part on the prevalence of the various offences:
- **Chapter 3:** employer breach of duty offences;¹¹
 - **Chapter 4:** other breach of duty offences;¹²
 - **Chapter 5:** breach of notice offences;¹³ and
 - **Chapter 6:** offences other than breach of duty/notice offences, including offences relating to inspection and enforcement,¹⁴ licences and permits,¹⁵ and the various regulations.¹⁶
- 1.13 We also have an additional two chapters relating to:
- **Chapter 7:** outcomes of sentence appeals in OHS cases, in both the Court of Appeal and the County Court; and
 - **Chapter 8:** payment rates for fines imposed in OHS cases.

9. *Public Prosecutions Act 1994* (Vic) s 22(1).

10. Previously the *Occupational Health and Safety Regulations 2007* (Vic).

11. *Occupational Health and Safety Act 2004* (Vic) ss 21(1), 23(1).

12. *Occupational Health and Safety Act 2004* (Vic) ss 22(1), 22(2), 24(1), 25(1), 25(2), 26(1), 27(1), 28(1), 29(1), 30(1), 31(1).

13. *Occupational Health and Safety Act 2004* (Vic) ss 62(1), 110(4), 111(4), 112(5).

14. *Occupational Health and Safety Act 2004* (Vic) ss 38(5) 39(1), 100(2), 108(3), 115(2), 119(3), 120(2), 121, 125(1), 125(2), 126.

15. *Occupational Health and Safety Act 2004* (Vic) ss 40(1), 40(2), 40(3), 40(4), 41, 42.

16. *Occupational Health and Safety Regulations 2017* (Vic); *Occupational Health and Safety Regulations 2007* (Vic).

- I.14 Almost all of the breach of duty offences are indictable (that is, able to be heard in the higher courts), but they may be dealt with summarily in the Magistrates' Court.¹⁷ With the exception of two offences,¹⁸ they carry a maximum penalty of 1,800 penalty units for an individual and 9,000 penalty units for a company. As of 2023–24, a penalty unit is valued at \$192.31,¹⁹ making the maximum fine for a breach of duty offence \$346,158 for an individual and \$1,730,790 for a company.
- I.15 However, the maximum fine that the Magistrates' Court can impose on an offence²⁰ is 500 penalty units for individuals²¹ and 2,500 for companies,²² which in 2023–24 equate to \$96,155 and \$480,775, respectively.

A note on workplace manslaughter

- I.16 On 1 July 2020, the offence of workplace manslaughter came into force.²³ It carries the highest maximum penalty of any offence in the *OHS Act*: 25 years' imprisonment for individuals (the same as manslaughter under the *Crimes Act 1958* (Vic)) or 100,000 penalty units for companies. We acknowledge that there will be significant interest in how this offence is sentenced. However, at the time of writing, no one has been sentenced for this offence, though there are at least two cases ongoing.²⁴

17. *Criminal Procedure Act 2009* (Vic) s 28, sch 2 cl 20. The only exception here is the employer duty to monitor the health of employees and workplace conditions, and provide information to employees concerning health and safety at the workplace: *Occupational Health and Safety Act 2004* s 22(1).

18. The two exceptions are the employer breach of duty to monitor the health of employees and workplace conditions, and provide information to employees concerning health and safety at the workplace, which has a maximum penalty of 1,200 penalty units for a company and 240 for an individual, and the duty of designers of buildings or structures to ensure it is designed to be safe and without risks to health of persons, which has a lower maximum penalty of 2,500 penalty units for a company and 500 for an individual: *Occupational Health and Safety Act 2004* (Vic) ss 22(1), 28(1).

19. See Sentencing Advisory Council, 'Fine' (sentencingcouncil.vic.gov.au, 2023).

20. While section 113B of the *Sentencing Act 1991* (Vic) sets a cumulative maximum prison term that can be imposed in the Magistrates' Court for multiple offences, there is no equivalent provision limiting the cumulative maximum fine that can be imposed in the Magistrates' Court for multiple offences.

21. *Sentencing Act 1991* (Vic) s 112A(1).

22. *Sentencing Act 1991* (Vic) s 113D(1A).

23. *Occupational Health and Safety Act 2004* (Vic) s 39G, as inserted by *Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019* (Vic). In 2004, the Maxwell Review had recommended against an offence of workplace manslaughter: Chris Maxwell, *Occupational Health and Safety Act Review* (2004), 355–365 as discussed in K. Lee Adams, 'Not Quite a Brave New World: Victoria's Occupational Health and Safety Act 2004' (2005) 10(2) *Deakin Law Review* 376, 380.

24. One case involves a subcontractor who was fatally crushed at a factory: Callum Godde, 'First Workplace Manslaughter Charge in Vic', *Ballarat Courier* (25 October 2022). The other case involves an apprentice electrician who was electrocuted while performing maintenance work in a car lift: Brianna Travers, 'Elevator Companies Charged with Manslaughter over Melbourne Electrician's Death', *Herald Sun* (8 February 2023).

OHS laws in other Australian jurisdictions

- 1.17 Each state and territory, as well as the Commonwealth, has its own OHS legislation. Between 2008 and 2009, Safe Work Australia established model work, health and safety (WHS) laws that could be adopted by each jurisdiction, releasing the draft model laws in September 2009. In 2012, the Australian Capital Territory, New South Wales and the Northern Territory implemented model WHS laws, with South Australia and Tasmania following a year later.²⁵ Victoria is now the only Australian jurisdiction with non-harmonised OHS laws, after Western Australia's harmonised laws came into effect in March 2022.²⁶
- 1.18 While there are many similarities between the Victorian *OHS Act* and the model WHS laws, caution is required before comparing sentencing outcomes between jurisdictions. Each jurisdiction has a different legislative framework, different offence structures, sentencing processes and sentencing considerations, and even different sentencing options (such as training orders, prohibitive injunctions and orders for restoration). As a result, we have not undertaken a substantive comparison of sentencing outcomes between jurisdictions.

Data used in this report

- 1.19 This report includes all charges of OHS offences sentenced in the Magistrates' Court, County Court and Supreme Court in the 16 years from 1 July 2005 (when the *OHS Act* came into effect) to 30 June 2021.
- 1.20 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. We also reviewed publicly available sentencing remarks and appeal judgments on the Australasian Legal Information Institute (AustLII) website, unpublished County Court sentencing

25. Safe Work Australia, 'History of the Model WHS Laws' (safeworkaustralia.gov.au, 2023); *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Act 2020* (WA).

26. *Work Health and Safety Act 2020* (WA); Government of Western Australia, Department of Mines, Industry Regulation and Safety, *Overview of Western Australia's Work Health and Safety Act 2020* (2021) 4.

remarks provided to us by the higher courts, and prosecution result summaries available on the WorkSafe website.²⁷

- **Sentencing outcomes:** the base dataset comes from the courts. We receive sentencing data from the Magistrates' Court, County Court and Supreme Court on an ongoing basis. We used the data to identify all OHS cases sentenced during the reference period. The Court of Appeal also provides us with routine notifications of successful conviction and sentence appeals. However, in this report we have examined sentences as initially imposed, with successful appeal outcomes discussed separately.
- **Higher courts sentencing remarks:** we reviewed all available County Court and Supreme Court sentencing remarks for OHS cases sentenced during the reference period. We coded for a number of factors, including the industry in which the offender was operating; the harm (if any) caused by the OHS offence; the court's assessment of the seriousness of the offence and any personal mitigating factors; and the court's application of the legislated purposes of sentencing.
- **Prosecution result summaries (Magistrates' Court):** we received data from WorkSafe on all prosecutions for OHS and related offences initiated since 1 July 2012, including matters that resolved via an enforceable undertaking or court-ordered diversion. The data provides details about the offender, including their industry classification, and it provides information specific to a case, such as whether the offender pleaded guilty or whether the court recorded a conviction. We used the data to inform sentencing outcomes in the Magistrates' Court, as a counterpart to the sentencing remarks available for sentencing outcomes in the County Court and Supreme Court. With the data, we also cross-referenced cases with corresponding prosecution result summaries published by WorkSafe on its website, to ascertain further details including whether actual harm was referred to in the case, and if so, the level of that harm.
- **Appeal outcomes:** we received data from WorkSafe on appeals from the Magistrates' Court to the County Court (*de novo appeals*), and we reviewed all publicly available Court of Appeal judgments (published on *AustLII*).

27. We reviewed WorkSafe prosecution result summaries of cases in the Magistrates' Court because there are only two published Magistrates' Court judgments for 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).

- **Fine payment:** we received data from Fines Victoria, WorkSafe, the Magistrates' Court and the County Court on the status of court fines imposed by Victorian courts in OHS cases that were sentenced in the 4.5 years from 1 January 2017 to 30 June 2021. We used the data to ascertain the proportion of court fines that were fully paid, partly paid or completely unpaid, and we linked the data with data on sentencing outcomes to gauge further insights into the factors associated with fine payment and non-payment.

1.21 The methodology used to link and analyse the data is outlined in Appendix 2.

2. Number and types of sentenced OHS offences in Victoria

2.1 This chapter examines the number of OHS offences that were sentenced in Victoria during the reference period, the types of OHS offences that were sentenced and the justice regions in Victoria in which OHS offences were sentenced.

Key findings

- **1,903 OHS offences were sentenced in 1,197 cases from 1 July 2005 to 30 June 2021**
- **Most OHS offenders were companies (83.3%), and most of the individuals were male (16.2% of OHS offenders). Only 6 individuals were female (0.5% of OHS offenders), one of whom was also the only individual to receive an immediate prison sentence for an OHS offence**
- **The Barwon South West region was over-represented, with 13% of OHS cases sentenced there despite only 6% of Victorian businesses being located there**
- **In the higher courts, most OHS cases involved a death (80%), 12% involved someone being injured, and 8% involved someone being exposed to a risk only**
- **In the Magistrates' Court, most OHS cases involved someone being injured (70%), 26% involved someone being exposed to a risk only, and just 4% involved a death**

2.2 To provide context to the data on sentenced OHS offences, this chapter begins with an overview of the annual number of workplace inspections in Victoria, the annual number of WorkCover claims, and the annual number of OHS prosecutions commenced by WorkSafe. The number of workplace inspections and WorkCover claims is important contextual information because the number of prosecuted and sentenced OHS offences represents only the *smallest fraction* of workplace safety incidents, workplace inspections and workplaces in Victoria. This is consistent with WorkSafe's 'constructive compliance strategy',²⁸ which involves promoting safety through a wide combination of regulatory tools designed to both encourage good practices and deter unacceptable performance. An OHS prosecution is just one of those tools, and typically a tool of last resort.

28. WorkSafe Victoria, 'WorkSafe Victoria General Prosecution Guidelines' (worksafe.vic.gov.au, 2022).

Number of workplaces, inspections and claims

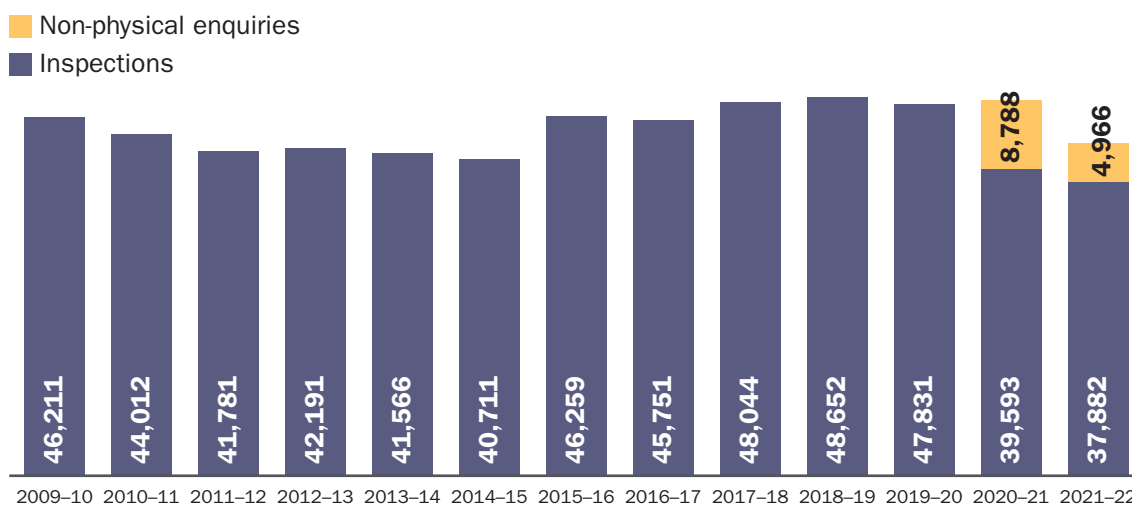
2.3 Data from WorkSafe's annual reports suggests that there are hundreds of thousands of workplaces in Victoria. As of 2021–22, WorkSafe covered 347,978 workplaces.²⁹

2.4 The annual number of workplace inspections (and non-physical enquiries) remained quite stable over the last 13 years, ranging from around 41,000 to around 49,000 (Figure 1).³⁰

In 2021–22, there were:

- 347,978 workplaces in Victoria
- 42,848 workplace inspections and non-physical enquiries
- 28,632 new WorkCover claims
- 9,035 improvement notices issued
- 68 workplace fatalities
- 134 prosecutions commenced

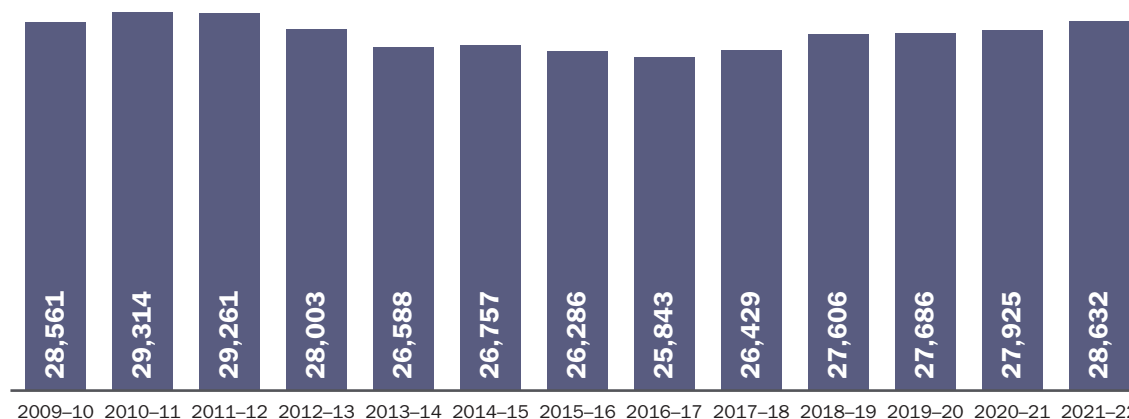
Figure 1: Annual number of workplace inspections and non-physical enquiries carried out by WorkSafe Victoria



2.5 In that same timeframe, the annual number of new WorkCover claims also stayed relatively stable, ranging from around 27,000 to around 29,000 (Figure 2, page 11). Given that Victoria's population increased significantly in that time, from roughly 5.5 million to 6.6 million, the relatively stable number of claims actually represents a per capita decrease in the number of Victorians making WorkCover claims (from 0.52% of Victorians to 0.43%).

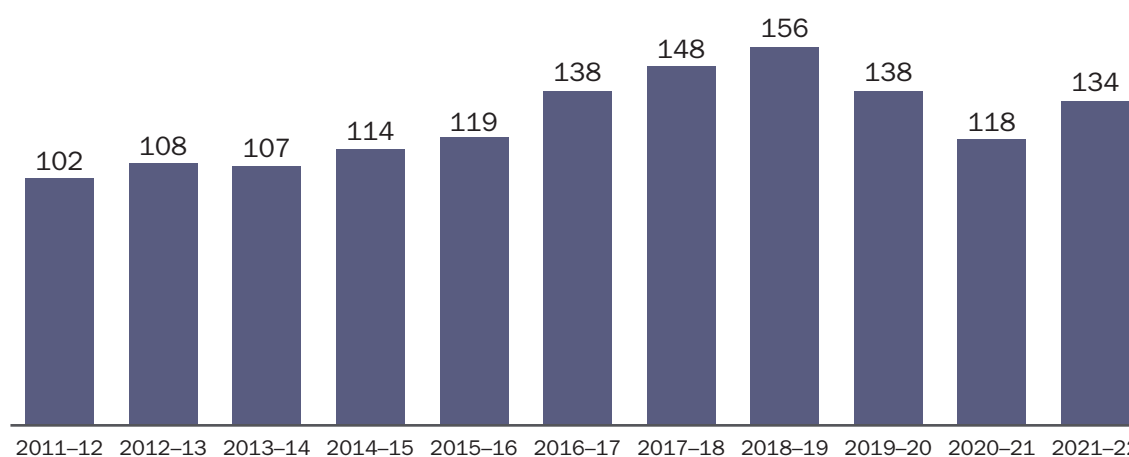
29. WorkSafe Victoria, *Annual Report 2021–22* (2022) 5. This represents a significant increase in recent years, with WorkSafe covering 268,810 workplaces in 2017–18 and 272,071 workplaces in 2018–19: see WorkSafe Victoria, *Annual Report 2017–18* (2018) 4; WorkSafe Victoria, *Annual Report 2018–19* (2019) 2.

30. Non-physical inspections, also referred to as 'virtual enquiries', are inspections that are conducted remotely without an inspector being physically present at the workplace: Safe Work Australia, *Comparative Performance Monitoring Report 24: Work Health Safety Compliance and Enforcement* (2022) 19.

Figure 2: Annual number of new WorkCover claims received by WorkSafe Victoria

Number of OHS prosecutions

2.6 WorkSafe's annual reports for the 11 years to 2021-22³¹ indicate that WorkSafe commenced between 102 and 156 OHS prosecutions each year (Figure 3). Given the effects of COVID-19 on court operations, it is difficult to ascertain any trend from the data in more recent years; however, in the years prior to COVID-19, there was a considerable increase in the number of OHS prosecutions commenced.

Figure 3: Annual number of OHS prosecutions commenced by WorkSafe Victoria, 2011-12 to 2021-22 (1,382 cases)

2.7 According to Safe Work Australia, in the 2021 calendar year, more OHS prosecutions (89) were initiated in Victoria than in any other Australian jurisdiction.³²

31. In the years prior to 2011-12, WorkSafe reported the number of 'completed' prosecutions, rather than the number of 'commenced' prosecutions. 'Completed' and 'commenced' prosecutions are not comparable, so earlier years are not included here.

32. Safe Work Australia, 'WHS Prosecutions' (safeworkaustralia.gov.au, 2023).

Number of sentenced OHS offences

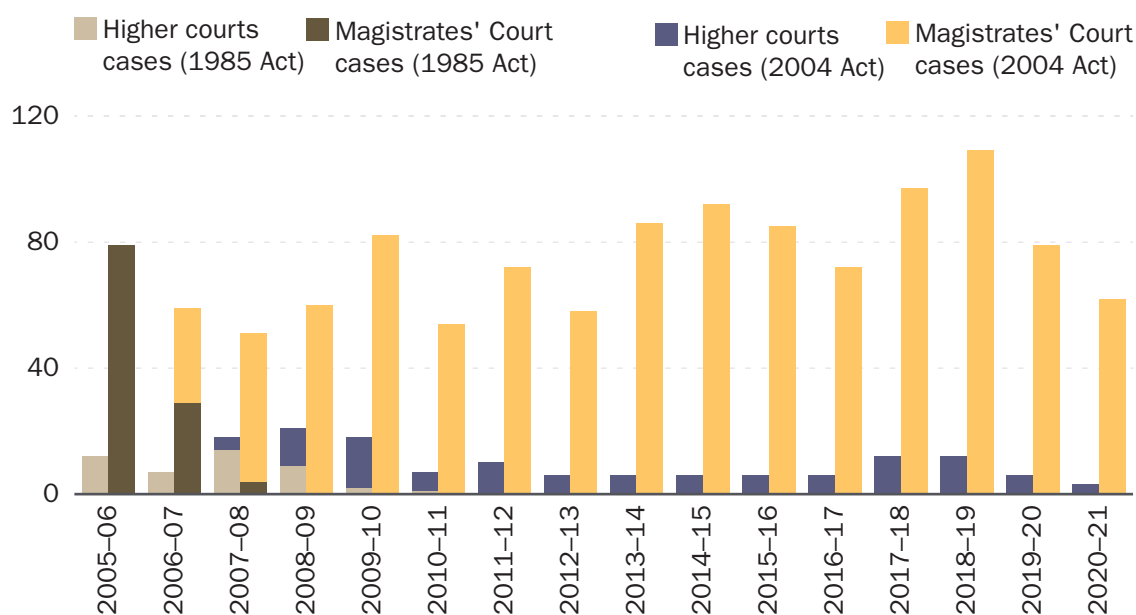
2.8 During the reference period, there were 2,172 OHS offences sentenced in 1,353 cases³³ in Victoria. The vast majority of those offences (91%) and cases (88%) were sentenced in the Magistrates' Court (1,927 charges in 1,197 cases), with an average of 75 OHS cases sentenced in the Magistrates' Court each year.

In the 16 years to 30 June 2021, 1,903 charges contrary to the OHS Act 2004 and OHS Regulations were sentenced in 1,197 cases:

- **1,086 cases in the Magistrates' Court**
- **110 cases in the County Court**
- **1 case in the Supreme Court**

2.9 The annual number of OHS cases fluctuated in both the Magistrates' Court and the higher courts. However, an overall uptrend can be observed in the Magistrates' Court, especially in the decade to 2018–19, prior to COVID-19. Meanwhile, the number of OHS cases in the higher courts appeared to peak in 2008–09 (21 cases in the County Court).

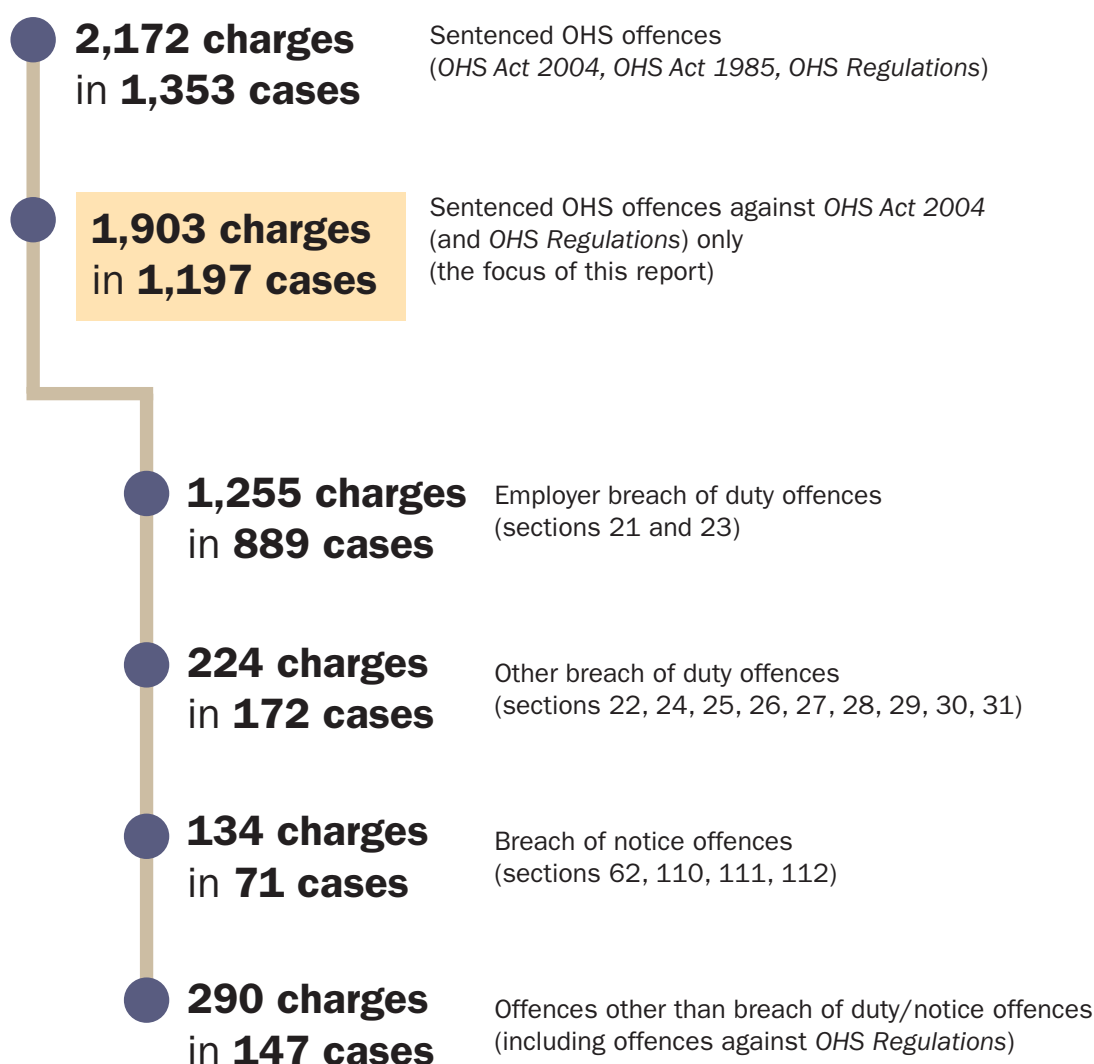
Figure 4: Number of OHS cases sentenced in the Magistrates' Court and higher courts, 2005–06 to 2020–21 (1,197 cases in the Magistrates' Court, 156 cases in the higher courts)



33. For the purposes of this report, a case involves a single OHS offender (an individual or a company) that has been sentenced for one or more OHS offences. There may be some circumstances where two or more OHS offenders are sentenced at the same time; these would be counted as separate cases. The 1,353 cases include offences contrary to the now repealed *Occupational Health and Safety Act 1985* (Vic).

- 2.10 Figure 4 (page 12) includes cases involving offences contrary to the *OHS Act 1985* in order to provide an exhaustive account of sentenced OHS offences during the reference period. Our intent in this report, however, is to examine how OHS offences are sentenced under the current legislation. Therefore, from this point onwards, our focus will be sentenced OHS offences contrary to the *OHS Act 2004* (and to a lesser extent, the *OHS Regulations 2007* and *OHS Regulations 2017*).
- 2.11 Our analysis thus incorporates 1,903 offences contrary to the *OHS Act 2004* and *OHS Regulations*, and these offences were sentenced in 1,197 cases. This includes 1,850 charges under the *OHS Act* and 53 charges under *OHS Regulations*; and 1,086 cases in the Magistrates' Court (involving 1,734 OHS offences) and 111 OHS cases in the higher courts (involving 169 OHS offences).

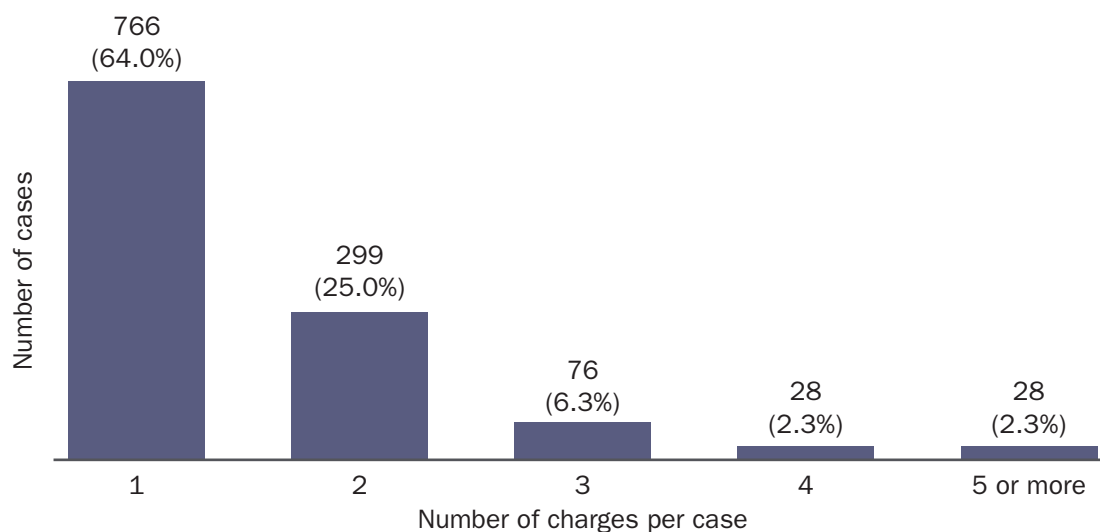
Figure 5: Overview of prevalence of sentenced OHS offences, all courts, 2005–06 to 2020–21



How many charges per OHS case?

2.12 It was common for OHS cases to involve just 1 or 2 charges of OHS offences.³⁴ As shown in Figure 6, almost two-thirds of OHS cases only involved a single charge in the case (64% or 766 cases), and another one-quarter had just 2 charges (25% or 299 cases). There were 3 or more charges in just 11% of OHS cases (132 cases).

Figure 6: Number of charges per OHS case, all courts, 2005–06 to 2020–21 (1,197 cases)



2.13 The largest number of charges in an OHS case was 14 (in the Magistrates' Court). This case involved 14 charges of a licence assessor³⁵ failing to conduct assessments in accordance with WorkSafe's requirements, contrary to *OHS Regulations 2007*.³⁶ The second largest number of charges in a case was 13 (also in the Magistrates' Court). This case involved 5 charges of conducting work without a licence or registration,³⁷ and 8 charges of providing false or misleading information in purportedly complying with the *OHS Act* and *OHS Regulations*.³⁸ In the higher courts, the largest number of charges in a case was 10. This was the only case in the Supreme Court to involve OHS offences during the reference period.³⁹

34. Only charges of offences against the *OHS Act 2004* and *OHS Regulations* are counted. Other non-OHS offences and their prevalence are examined for a subset of OHS cases later in this report (see [2.17], [3.19]).

35. A 'licence assessor' is someone who is authorised to carry out one or more types of assessment of competency, especially in relation to high-risk work: *Occupational Health and Safety Regulations 2007* (Vic) r 1.1.5 (definition of licence assessor).

36. *Occupational Health and Safety Regulations 2007* (Vic) r 3.6.8.

37. *Occupational Health and Safety Act 2004* (Vic) s 40(4).

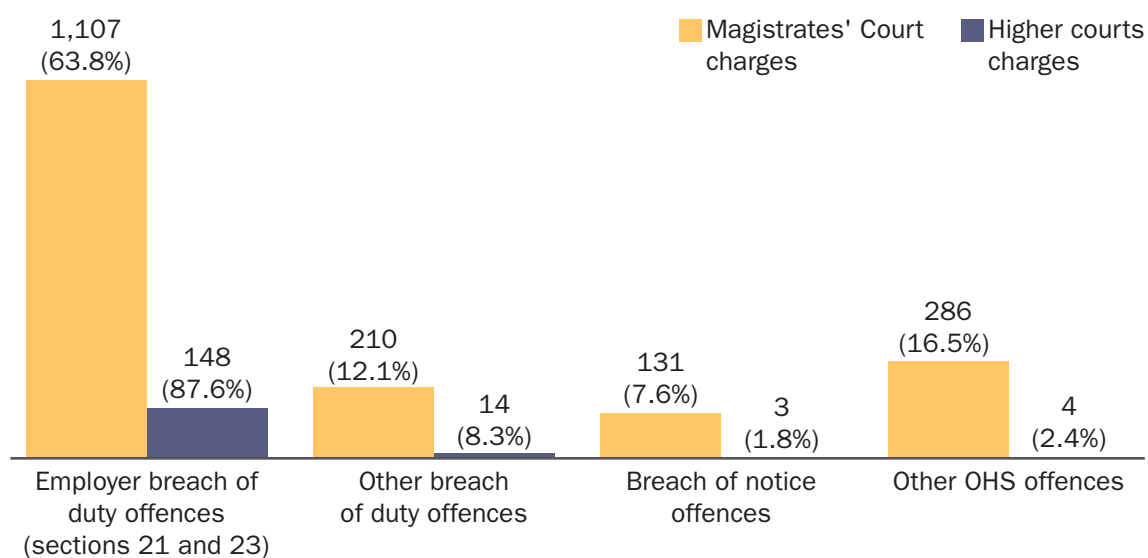
38. *Occupational Health and Safety Act 2004* (Vic) s 153(2).

39. *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278. Hazelwood Power Corporation was sentenced for 5 offences against section 21 and 5 offences against section 23 of the *Occupational Health and Safety Act 2004* (Vic).

What types of OHS offences were sentenced?

2.14 Of the 1,903 charges sentenced under the *OHS Act 2004* and *OHS Regulations* during the reference period, two-thirds (65.9% or 1,255 charges) involved an employer breach of duty offence (sections 21 and 23): this represents 63.8% of OHS offences in the Magistrates' Court and 87.6% in the higher courts. The remaining one-third of OHS offences were other breach of duty offences (11.8%), breach of notice offences (7.0%) and other OHS offences (15.2%), with varying rates in the Magistrates' Court and higher courts (Figure 7).

Figure 7: Sentenced OHS offences, by offence type, all courts, 2005–06 to 2020–21 (1,734 charges in the Magistrates' Court, 169 charges in the higher courts)



2.15 In the higher courts, other OHS offences included 2 charges of recklessly endangering serious injury in a workplace (section 32), and 2 charges of failing to notify WorkSafe of an incident (section 38). In the Magistrates' Court, other OHS offences included 113 charges of failing to notify WorkSafe of an incident (section 38); 53 charges under *OHS Regulations*, the most common being 14 charges of arranging or performing asbestos removal without a licence (regulation 4.3.7); 34 charges of failing to preserve an incident site (section 39); and 13 charges of assaulting, intimidating or threatening an inspector (section 125(2)). There were no sentenced offences of workplace manslaughter during the reference period.

2.16 Almost all of the charges in OHS cases were OHS offences. In the higher courts, none of the 111 OHS cases involved non-OHS offences.

2.17 In the Magistrates' Court, there were 49 non-OHS offences in 21 OHS cases. Most of those 49 charges were workplace-related, such as failing to make weekly payments; failing to consult with workers returning to work, contrary to the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); and failing to use chemical products in accordance with the label and failing to ensure a register lists all dangerous goods, contrary to the *Dangerous Goods Act 1985* (Vic) and associated regulations. There was also 1 charge of unlawful assault contrary to the *Summary Offences Act 1966* (Vic), and there were 2 charges of failing to answer bail contrary to the *Bail Act 1977* (Vic).

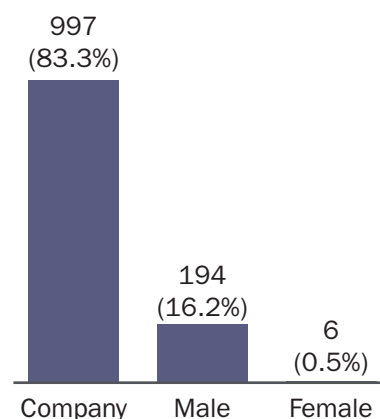
How many OHS offenders were companies?

2.18 Of the 1,197 OHS cases under the *OHS Act 2004* (in all courts), 997 involved a company (83.3%), with an almost identical rate in both the Magistrates' Court (83.2%) and the higher courts (83.8%) (Figure 8).

2.19 During the reference period, companies were sentenced for a total of 80,241 charges in 23,310 cases in the Magistrates' Court. OHS offences constituted 2.4%⁴⁰ of all charges for which companies were sentenced and 5.1% of all cases for which companies were sentenced. Federal taxation offences, road-related offences (such as toll road offences) and food safety offences were the most common offences for which companies were sentenced.

2.20 In the higher courts, OHS offences constituted 73% of all charges for which companies were sentenced during the reference period. As such, OHS offences were the most common offences for which companies were prosecuted in the higher courts.

Figure 8: Types of OHS offenders, all courts, 2005–06 to 2020–21 (1,197 cases)



40. For completeness, this percentage includes offences against the *Occupational Health and Safety Act 1985* (Vic).

How many OHS offenders were individuals?

- 2.21 The remaining 200 OHS cases involved individuals (16.7%). Almost all individuals were male (194), with just 6 females sentenced for OHS offences. All 6 females were sentenced in the Magistrates' Court, whereas 18 of the 194 males were sentenced in the higher courts.
- 2.22 We had sentencing remarks or prosecution result summaries for 108 of those 200 cases, and we used those remarks and summaries to identify the circumstances in which individuals were sentenced for OHS offences. The role of the individual could be determined in 85 of the 108 cases due to the nature of the OHS offence:⁴¹
- 48 individuals were sentenced for *employer* breach of duty offences (57%), including at least 17 company directors and 11 sole traders (specific roles could not be identified for 20 individuals);⁴²
 - 17 individuals were sentenced for *employee* breach of duty offences (20%);⁴³
 - 12 individuals were sentenced for *self-employed persons* breach of duty offences (14%);⁴⁴ and
 - 8 individuals were sentenced for *managers/controllers* breach of duty offences (9%).⁴⁵

Where in Victoria were OHS cases sentenced?

- 2.23 We analysed sentencing outcomes for OHS offences in the following justice regions in Victoria: metropolitan Melbourne, Barwon South West, Gippsland, Grampians, Hume and Loddon Mallee. Figure 9 (page 18) shows how many OHS cases and charges were sentenced in each of those justice regions during the reference period. Two-thirds of OHS cases (67.1%) were sentenced in metropolitan Melbourne, while the other one-third (32.9%) were sentenced in regional Victoria. The Barwon South West region was over-represented, with just 6% of Victoria's businesses⁴⁶ but 13% of sentenced OHS cases and 14% of charges. This could be because WorkSafe's offices are located in Geelong, making the courts in Barwon South West a more likely choice for OHS prosecutions.

41. In the remaining 23 cases, the offences sentenced did not illuminate the individual's role: *Occupational Health and Safety Act 2004* (Vic) ss 32, 39, 40, 119, 125, 153. That said, further analysis showed that 5 of those 23 individuals were officers of the company, 3 were employees, 3 were in management positions, and 4 were sole traders.

42. *Occupational Health and Safety Act 2004* (Vic) ss 21, 22, 23, 144.

43. *Occupational Health and Safety Act 2004* (Vic) s 25.

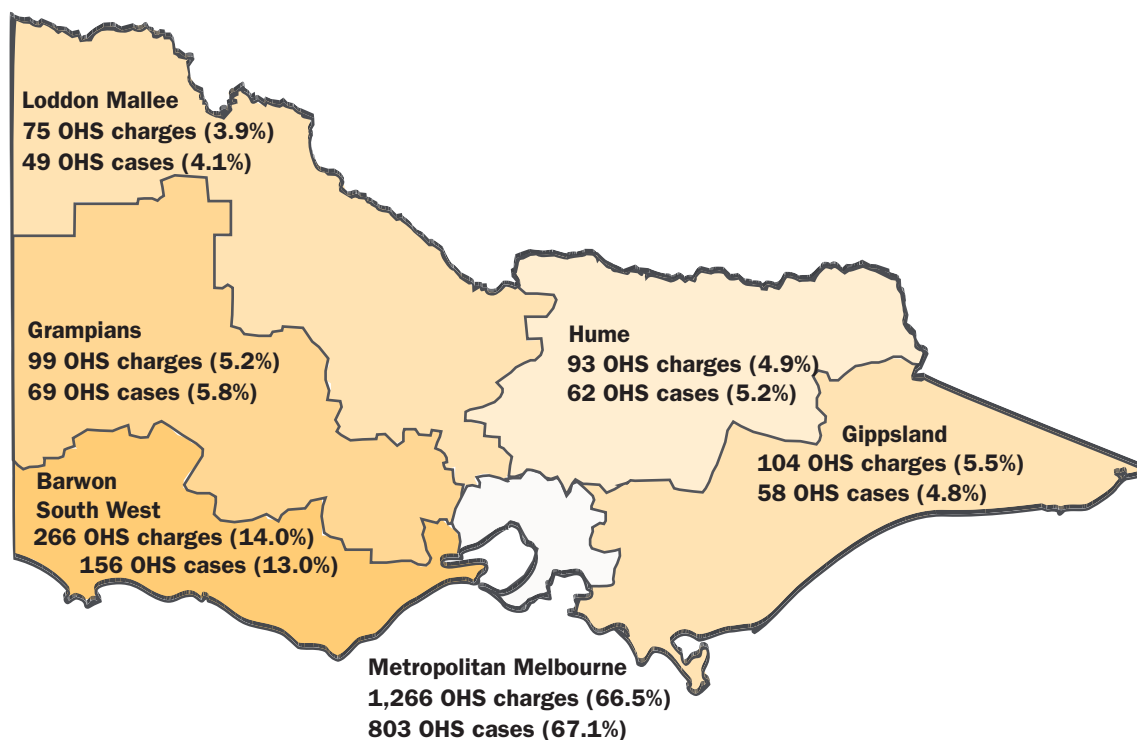
44. *Occupational Health and Safety Act 2004* (Vic) s 24.

45. *Occupational Health and Safety Act 2004* (Vic) s 26.

46. Australian Bureau of Statistics, 'Counts of Australian Businesses, Entries and Exits, 2021–22' (abs.gov.au, 2023).

2.24 The bulk (86%) of the III cases in the higher courts were sentenced in metropolitan Melbourne, with the other 15 cases spread evenly across the other justice regions.

Figure 9: Justice regions in which OHS charges and cases were sentenced, all courts, 2005–06 to 2020–21 (1,903 charges, 1,197 cases)



How were OHS offences sentenced?

2.25 Maximum penalties for OHS offences range from 5 penalty units to 9,000 penalty units, and some offences carry maximum prison terms. Given this, there are significant limitations in examining the sentence types imposed for all OHS offences together. Fines were the predominant sentencing outcome for OHS offences. Of the 1,903 OHS offences sentenced during the reference period, 86.7% received a fine (1,650 charges), another 11.4% received an adjourned undertaking (217 charges), and the remaining 1.9% received a diversion plan (27 charges), a community order (4 charges), an immediate or a suspended prison sentence (4 charges), and a dismissal without conviction (1 charge).

Industries of OHS offenders

2.26 The Australian Bureau of Statistics and Statistics New Zealand have developed a standardised industry classification system (ANZSIC).⁴⁷ Using that system, we were able to determine the industries in which OHS offences occurred (so long as we had sentencing remarks or a prosecution result summary). OHS offenders from the construction and manufacturing industries were by far the most common in both the Magistrates' Court and the higher courts.⁴⁸

2.27 In the 77 OHS cases with available sentencing remarks sentenced in the higher courts, the most common industries were:

- construction (28 cases);
- manufacturing (11 cases);
- electricity, gas, waste and water services (7 cases);
- mining (6 cases);
- transport, postal and warehousing (6 cases); and
- other industries (19 cases).

2.28 Those same industries also appeared most frequently in OHS cases sentenced in the Magistrates' Court. We were able to identify the industry for 659 of 780 offenders sentenced in the Magistrates' Court since January 2012.⁴⁹ The most common industries were:

- construction (237 cases);
- manufacturing (209 cases);
- agriculture, forestry and fishing (32 cases);
- wholesale trade (31 cases);
- retail trade (28 cases); and
- other industries (122 cases).⁵⁰

47. Australian Bureau of Statistics, 'Australian and New Zealand Standard Industrial Classification (ANZSIC)' (abs.gov.au, 2023).

48. The high rate of construction and manufacturing industries is consistent with the two industries that tend to receive the largest number of workplace inspections: WorkSafe Victoria (2019), above n 29, 24.

49. For 89 defendants, either there was no prosecution result summary available or, particularly for earlier cases, there was insufficient detail available. Additionally, individuals sentenced for OHS offending were not attributed an industry in WorkSafe data, so that 32 individuals are not included in this count of industries.

50. The other industries included transport, postal and warehousing (21 cases), electricity, gas, waste and water services (19), administrative and support services (13), accommodation and food services (12), arts and recreation services (10), mining (9), health care and social assistance (8), rental and real estate services (8), public administration (6), education services (3) and professional, scientific and technical services (2). The industry for 11 cases was recorded as 'Other services'.

Deaths and injuries in OHS cases

- 2.29 Where we had access to sentencing remarks or prosecution result summaries, it was possible to determine whether an OHS case involved death or injuries.
- 2.30 We had access to sentencing remarks for 78 of the 111 OHS cases sentenced in the higher courts during the reference period. In almost 80% of those (62 cases), there was a death, in another 12% someone was injured (10 cases), and in 8% of cases no one was injured or killed (risk only) (6 cases). Of the 62 cases where someone died, the victims were employees or contractors in 54 cases, members of the public in 5 cases, a colleague in 1 case and clients in 2 cases.
- 2.31 Prosecution result summaries identified the harms caused in 697 of 780 cases sentenced in the Magistrates' Court since January 2012.⁵¹ There was a death in 4% of cases (27), someone was injured in over 69% of cases (483), and there was a risk only in 27% of cases (187).

Deaths and injuries in OHS cases

Higher courts

- **Death: 80% of cases**
- **Injury: 12% of cases**
- **No death or injury: 8% of cases**

Magistrates' Court

- **Death: 4% of cases**
- **Injury: 69% of cases**
- **No death or injury: 27% of cases**

51. The data received from WorkSafe specified a realised harm (consequence) for whole incidents, not for specific charges sentenced. This analysis considered the most serious harm caused in the case. Additional identification of harms caused depended on details in the online prosecution result summaries, but those details were not always available.

2.32 Companies and individuals in construction and manufacturing committed the largest number of sentenced OHS offences during the reference period. However, Safe Work Australia recently found that the highest per capita fatality rate (per 100,000) in 2021 was in agriculture, forestry and fishing.⁵² Similarly, we found that of the 39 OHS cases with an individual or a company from agriculture, forestry and fishing, 11 involved a death. While this number is lower than the number of OHS cases involving a death in the construction industry (33 cases), the latter is likely to reflect the higher number of workers in the construction industry.⁵³

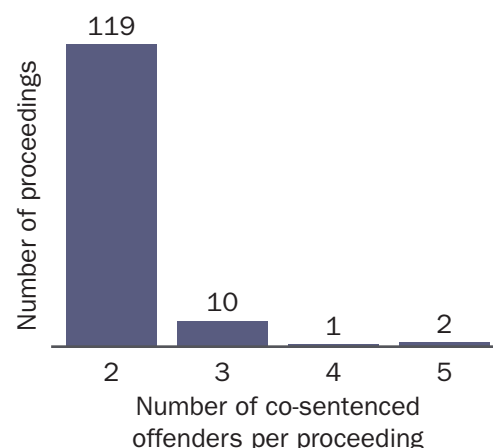
OHS offenders sentenced together (co-offenders)

2.33 It was common for OHS offenders to be co-sentenced alongside other OHS offenders, often because their roles in the offending were connected, either as related companies or as individuals co-sentenced alongside companies.

2.34 There were 1,197 OHS offenders sentenced in the Magistrates' Court during the reference period. Of those, 950 were sentenced on their own. But 247 were sentenced for the same (or related) offending alongside one or more co-offenders.⁵⁴ Similarly, there were 156 OHS offenders sentenced in the higher courts, with 121 sentenced on their own and 35 sentenced alongside co-offenders. Collectively, then, 282 OHS offenders were co-sentenced with one or more other OHS offenders (20.8% of all OHS offenders). As shown in Figure 10, there were 119 proceedings involving 2 co-offenders, 10 proceedings involving 3 co-offenders, 1 proceeding involving 4 co-offenders, and 2 proceedings involving 5 co-offenders, which was the most co-offenders sentenced in the same proceedings (in 2 cases: one in 2009 and another in 2010).

2.35 In those 132 proceedings, 59 involved co-offenders that were *both* companies and individuals, 58 involved companies only, and 15 involved individuals only.

Figure 10: Number of proceedings with co-sentenced OHS offenders, all courts, 2005–06 to 2020–21 (282 OHS offenders in 132 proceedings)



52. Safe Work Australia, *Work-Related Injury Fatalities: Key WHS Statistics Australia 2022* (2023) 5.

53. Data from the Australian Bureau of Statistics suggests that, as of May 2023, 355,300 Victorians were employed in the construction industry: Australian Bureau of Statistics, 'Labour Force, Australia, Detailed' (abs.gov.au, 2023).

54. It is possible for two or more companies to be found guilty and sentenced for the same act or omission that led to a risk of harm in a workplace: see, for example, *DPP v Hungry Jacks & Ors* [2018] VCC 1454.

Types of risk scenarios in sentenced OHS cases

- 2.36 The risk scenario associated with employer breach of duty offences was available in 74 cases sentenced in the higher courts since June 2005.⁵⁵ The most common risk scenarios were falling from a height (23% of cases), being involved in a vehicle-related incident (22%) and being struck by an object (19%).
- 2.37 The risk scenario associated with employer breach of duty offences was available in 632 (of 764) cases sentenced in the Magistrates' Court since January 2012.⁵⁶ The most common risk scenarios were being injured by plant, including machinery, equipment or powered tools (231 cases), falling from a height (154 cases) and being crushed by or between objects (50 cases).

55. Risk scenarios were identified from reading sentencing remarks and are therefore associated with individual charges where possible. Only 3 cases presented differing risk scenarios between different charges.

56. The data received from WorkSafe specified risks for whole incidents, not for specific charges sentenced. This analysis considered the most serious risk in the case. Additional identification of risks depended on the details in the online prosecution result summaries, but those details were not always available.

3. Sentencing employer breach of duty offences

3.1 This chapter focuses on offences that involve an employer failing to take reasonable care in preventing risks to health and safety under sections 21 and 23 of the *OHS Act*. This includes two employer breach of duty offences:

- failing to provide and maintain a safe working environment for employees and contractors; and
- exposing members of the public to risks to health and safety.

3.2 There also exists an employer's duty to monitor the health of employees and workplace conditions, and provide information to employees concerning health and safety at the workplace, contained in section 22 of the *OHS Act*. This breach of duty offence is addressed in Chapter 4, as its maximum penalty is substantially lower than that for the two employer breach of duty offences listed above.

Key findings

- **Employer breach of duty offences under sections 21 and 23 made up 66% of all sentenced OHS offences**
- **Most charges were sentenced in the Magistrates' Court (88%), and most offences were committed by companies (83%)**
- **Most OHS offenders pleaded guilty (98% in the Magistrates' Court and 79% in the higher courts)**
- **Most charges received fines (99% in the higher courts and 91% in the Magistrates' Court)**
- **The median fine imposed on companies in the Magistrates' Court dropped from \$40,000 in the 8 years to 30 June 2013 to \$20,000 in the 8 years to 30 June 2021**
- **In 2019–20, the median fine for an employer breach of duty offence for a company sentenced in the Magistrates' Court was 125 penalty units, representing 5.0% of the Magistrates' Court's jurisdictional limit of 2,500 penalty units, and 1.4% of the maximum fine of 9,000 penalty units**

- 3.3 The *OHS Act* provides a variety of examples of behaviour that might be considered employer breach of duty offences. For instance, section 21(2) of the *OHS Act* specifies that an employer will have failed to provide and maintain a safe working environment for employees if the employer fails to do any of the following:
- provide or maintain safe plant or systems of work;
 - make arrangements for the safe use, handling, storage and transport of plant or substances;
 - maintain the workplace in a safe condition;
 - provide adequate facilities for the welfare of employees at the workplace; and
 - provide such information, instruction, training or supervision as is necessary to enable employees to perform their work safely and without risks to health.
- 3.4 Moreover, the *OHS Regulations 2017* include a number of specific safety measures, such as providing emergency stop devices on plant,⁵⁷ and failure to comply with these will constitute breaches of duty. At the bottom of some regulations is an 'Act compliance' note. Regulation 7, for example, states that where such a note appears, 'the regulation provision sets out the way in which a person's duty or obligation under that section of the Act is to be performed'. Put differently, a failure to satisfy that specific duty will constitute a breach of duty under the *OHS Act*.⁵⁸ There are dozens of regulations that include an Act compliance note referencing the duty of employers to employees and contractors under section 21 of the *OHS Act*.

What are the penalties for employer breach of duty offences?

- 3.5 The maximum fines for employer breach of duty offences under sections 21 and 23 of the *OHS Act* are identical:
- 9,000 penalty units for a company; and
 - 1,800 penalty units for an individual.
- 3.6 The value of a penalty unit has increased significantly since the introduction of the *OHS Act*. The value of a penalty unit in Victoria was precisely \$100 from 1981 to the early 2000s. But since 2004, the Victorian Treasurer has increased the value of a penalty unit annually (to account for inflation) via the *Government Gazette*. In 2023–24, the value of a penalty unit is \$192.31.⁵⁹

57. *Occupational Health and Safety Regulations 2017* (Vic) r 79.

58. An example of such a case is *DPP v Multiworks* [2021] VCC 1553.

59. Sentencing Advisory Council (2023), above n 19.

- 3.7 This means that, in dollar values, the maximum fine for employer breach of duty offences in 2023–24 is:
- \$1,730,090 for a company; and
 - \$346,158 for an individual.
- 3.8 These maximum penalties for employer breach of duty offences are largely congruent with the maximum fines for category 2 breach of duty offences in the jurisdictions that have adopted (in whole or in part) the model WHS laws. In the model *Work Health and Safety Act*, the three primary offences, and their associated maximum fines, are:
- **category 3 offences**, which involve a duty holder failing to comply with a duty (maximum fine – \$700,000 for a company and \$70,000 or \$140,000 for an individual);
 - **category 2 offences**, which involve a duty holder failing to comply with a duty, but in doing so the duty holder actively exposes someone to the risk of death or serious injury (maximum fine – \$2.1 million for a company and \$209,000 or \$418,000 for an individual); and
 - **category 1 offences**, which involve a duty holder actively exposing someone to the risk of death or serious injury, but doing so recklessly or with gross negligence (maximum fine – \$10.4 million for a company and \$1 million or \$2 million for an individual).⁶⁰
- 3.9 Most jurisdictions with harmonised laws have adopted these three primary offences and maximum penalties, with some minor variations. In Western Australia, category 1 offences are constituted by conduct that *actually* results in death or serious injury.⁶¹ Also in Western Australia, the penalties for each category of offence are slightly higher than they are in the model WHS laws (for example, \$1.8 million, rather than \$1.5 million, for a company found guilty of a category 2 offence).⁶² And in New South Wales, penalty unit values are indexed annually, but only for OHS offences (the value of a penalty unit for other offences is simply \$110).⁶³ The value of a penalty unit for an OHS offence in New South Wales in 2023–24 is \$115.29, leading to a maximum fine of \$1,996,246 (the highest in the country) for companies found guilty of a category 2 offence.⁶⁴

60. For each category, the maximum fine for an individual doubles if they were 'conducting a business or undertaking or [operating] as an officer of a person conducting a business or undertaking': *Work Health and Safety Bill 2011 (Cth)* 31–33. In August 2023, these maximums increased substantially. In the case of category 1 offences, the maximum penalty tripled (it was previously \$3 million for a company and \$300,000 or \$600,000 for an individual). These increases are expected to be implemented in model jurisdictions in due course.

61. *Work Health and Safety Act 2020 (WA)* s 31.

62. *Work Health and Safety Act 2020 (WA)* ss 31–33.

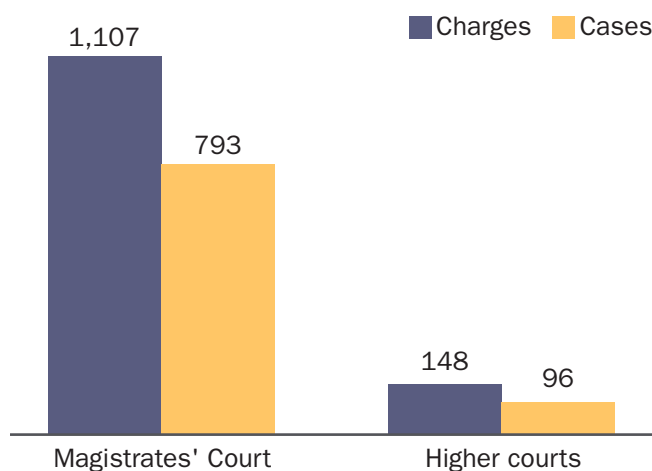
63. *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 17.

64. *Work Health and Safety Act 2011 (NSW)* ss 32, 242B.

Number of sentenced employer breach of duty offences

3.10 There were 1,255 employer breach of duty offences sentenced in Victoria during the reference period: 1,107 in the Magistrates' Court and 148 in the higher courts (Figure 11). These offences were sentenced in 889 cases.

Figure 11: Number of charges and cases of employer breach of duty offences sentenced in the Magistrates' Court and higher courts, 2005–06 to 2020–21



3.11 The large majority of these offences were employer breach of duties to employees (section 21), making up 964 (87%) of the 1,107 OHS offences sentenced in the Magistrates' Court and 113 (76%) of the 148 OHS offences sentenced in the higher courts. The remaining 143 OHS offences sentenced in the Magistrates' Court, and 35 OHS offences sentenced in the higher courts, were employer breach of duties to members of the public (section 23).

Characteristics of sentenced employer breach of duty offences

3.12 Outlined below are some characteristics of employers who breached their duties to employees and to members of the public, and of the cases where employees were sentenced. These characteristics are sourced from 68 relevant higher courts sentencing remarks⁶⁵ as well as 726 relevant prosecution result summaries.

65. These cases accounted for 108 of the 148 employer breach of duty offences sentenced in the higher courts.

Individuals and companies

3.13 In the higher courts, 83 OHS offenders were companies (86.5%), and 13 were individuals (13.5%). All individuals were male. The ages of individuals ranged from 25 to 68 years at sentencing, with a median age of 50. Those individuals were sentenced for 12 offences under section 21 of the *OHS Act*, and 2 offences under section 23.

3.14 In the Magistrates' Court, 724 OHS offenders were companies (91%) and 69 were individuals (9%). All but 2 of those 69 individuals were male. The ages of individuals ranged from 26 to 75 years at sentencing, with a median age of 52.

3.15 Table 1 shows the number of charges and cases of employer breach of duty offences sentenced in both jurisdictions.

Table 1: Number of charges and cases of employer breach of duty offences, all courts, by jurisdiction and offender type, 2005–06 to 2020–21

| Jurisdiction | Charge or case | Companies | Individuals | Total |
|--------------------|----------------|-----------|-------------|-------|
| Magistrates' Court | Charges | 1,021 | 86 | 1,107 |
| | Cases | 724 | 69 | 793 |
| Higher courts | Charges | 134 | 14 | 148 |
| | Cases | 83 | 13 | 96 |

Number of cases involving death or serious injury

3.16 In the higher courts, of the 68 cases involving an employer breach of duty offence for which sentencing remarks were available, someone was injured or killed in 64 cases (94%). There were, though, 4 cases where no one was injured or killed:

- a mining company that failed to protect members of the public from bushfires;⁶⁶
- a construction company that failed to protect members of the public from the risk of vehicle accidents and that failed to provide a safe and sanitary work environment for employees;⁶⁷ and
- a design and construction company, and its director, that failed to protect members of the public from a structural collapse during excavation work.⁶⁸

66. *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278.

67. *DPP v Mainline Developments Pty Ltd* [2020] VCC 47.

68. *DPP v AM Design and Construction Pty Ltd & Anor* [2018] VCC 373.

3.17 This does not, though, necessarily mean that the courts considered the OHS offending in all of those cases to have caused the death or injury. There were some cases where the court raised questions as to whether the death or injury was caused by the employer's breach of duty. For example:

- in *DPP v Ricegrowers*, the basis for the finding of guilt for the section 21 offence was that the company had failed to locate an emergency stop button within reach of a contractor. The court concluded that it was not 'satisfied beyond a reasonable doubt that the breach of duty in this case did in fact cause or contribute to the [contractor's] death';⁶⁹ and
- in *DPP v VicRoads*, VicRoads was guilty of the section 21 offence because it had failed to ensure a risk assessment was undertaken and a representative had capacity to shut down works in response to imminent risks. However, the court was 'not satisfied that ... the death of [the victim] was the "direct result" of the offending by VicRoads'.⁷⁰

Guilty pleas

3.18 Table 2 (page 29) shows the rate at which offenders in the higher courts and Magistrates' Court pleaded guilty to employer breach of duty offences. Of 68 offenders in the higher courts, most pleaded guilty (54 or 79.4%), including 43 companies and 11 individuals. The remaining 14 offenders were convicted at trial, including 13 companies and 1 individual. And of 669 offenders in the Magistrates' Court, both companies and individuals overwhelmingly pleaded guilty to these offences (97.9% of charges). The remainder were found guilty after contesting the charges.

69. The contractor entered a suspended surge bin without power being isolated from the bin, resulting in him being killed by a screw conveyer mechanism. The court found that the company had numerous safety procedures in place to mitigate the risk posed by the surge bin, and further, the contractor was experienced and had successfully followed safety procedures when entering the confined space just weeks before the incident: *DPP v Ricegrowers Ltd* [2018] VCC 542, [15]–[18].

70. Downer EDI Works was the principal contractor for a road-resurfacing project, during which a subcontractor was struck and killed by another subcontractor driving a street sweeper. Coupled with VicRoads not being in control of the workplace at the time of the incident, the court found that VicRoads had stringent safety procedures in place and had undertaken qualification checks on each of the subcontractors: *DPP v Roads Corporation (trading as VicRoads) & Anor* [2017] VCC 2021, [131].

Table 2: Number and percentage of cases involving employer breach of duty offences, by plea, offender type and jurisdiction, 2005–06 to 2020–21

| Jurisdiction | Plea | Companies | Individuals | Total cases |
|--------------------|--------------------|----------------|---------------|----------------|
| Magistrates' Court | Pleaded guilty | 586 (98.0%) | 69 (97.2%) | 655 (97.9%) |
| | Found guilty | 12 (2.0%) | 2 (2.8%) | 14 (2.1%) |
| | Total cases | 598 | 71 | 669 |
| Higher courts | Pleaded guilty | 43 (76.8%) | 11 (91.7%) | 54 (79.4%) |
| | Found guilty | 13 (23.2%) | 1 (8.3%) | 14 (20.6%) |
| | Total cases | 56 | 12 | 68 |

Co-sentenced offences

3.19 In the 793 cases in the Magistrates' Court involving employer breach of duty offences, there were 1,918 total offences sentenced (an average of 2.4 charges per case). These included:

- 1,107 employer breach of duty offences under the *OHS Act 2004*;
- 716 other breach of duty offences, most prominently, employee breach of duty offences (section 25), managers/controllers breach of duty offences (section 26), breaches of improvement notices, failing to notify WorkSafe of an incident and various offences under the *OHS Act 1985*; and
- 11 non-OHS offences.

3.20 In the higher courts, OHS cases consisted solely of OHS offences, almost all of which were employer breach of duty offences. The 4 exceptions were cases where companies were sentenced for:

- offending contrary to section 21 of the *OHS Act 1985*;
- breach of improvement notice offences (section 111);
- failing to monitor or provide information about health and safety (section 22); and
- managers/controllers breach of duty offences (section 26).

Sentencing outcomes in the higher courts

3.21 Of the 148 employer breach of duty offences sentenced in the higher courts, 146 (98.6%) received a fine. There were just 2 charges that received a sentencing outcome other than a fine, and these involved 2 companies receiving an adjourned undertaking.⁷¹

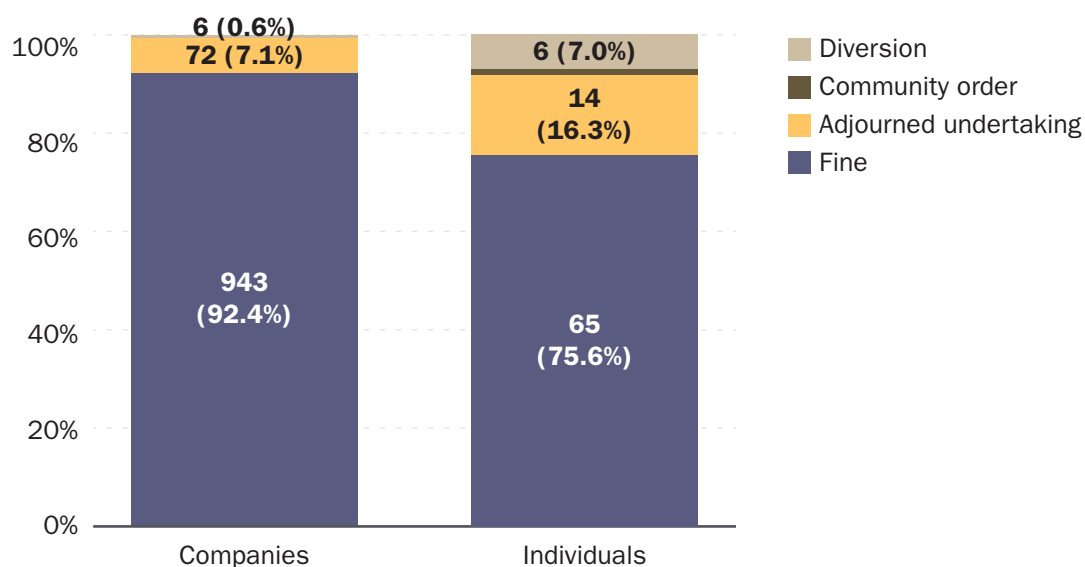
In the higher courts, 99% of employer breach of duty offences received a fine

Sentencing outcomes in the Magistrates' Court

3.22 Fines were the most common sentencing outcome for both companies and individuals, accounting for 91% of all charges of employer breach of duty offences sentenced in the Magistrates' Court (Figure 12).

3.23 The remaining sentencing outcomes were primarily diversion plans and adjourned undertakings. One person received a community-based order (in 2011, when that disposition was still available).

Figure 12: Sentencing outcomes for employer breach of duty offences sentenced in the Magistrates' Court, by offender type, 2005–06 to 2020–21 (1,021 charges against companies, 86 charges against individuals)



71. One of these cases is publicly available: *DPP v DHHS* [2018] VCC 886.

Fine amounts

3.24 The maximum penalty for an employer breach of duty offence is 9,000 penalty units for a company and 1,800 penalty units for an individual. However, the jurisdictional limit in the Magistrates' Court is 2,500 penalty units for a company and 500 penalty units for an individual. This section examines the fines imposed on companies and individuals both in dollar values and in the number of penalty units.

How many charges received fines?

3.25 When examining the lengths of sentences or fine amounts imposed for an offence, only charges that were not part of an aggregate sentence (non-aggregate sentencing outcomes) are useful. This is because when offences collectively receive an aggregate sentence, it is impossible to delineate the contribution that each offence made to the total sentence.

3.26 The power to impose aggregate fines for OHS offences (or any offences) is located in the *Sentencing Act 1991* (Vic). When imposing fines for multiple offences in the same case, the *Sentencing Act* enables courts to impose either a separate fine for each offence or a single aggregate fine without specifying the fine amount for each charge. Aggregate fines can only be imposed if the offences 'are founded on the same facts' or are 'of the same or a similar character'.⁷²

3.27 As shown in Table 3, 43% of fines in the Magistrates' Court and 16% of fines in the higher courts were part of an aggregate fine imposed for employer breach of duty offences during the reference period. These fines are excluded from our analysis of fine amounts imposed for employer breach of duty offences.

Table 3: Number of employer breach of duty offences receiving fines and the proportion that were part of an aggregate fine, by jurisdiction and offender type, 2005–06 to 2020–21

| Jurisdiction | Type of fine | Companies | Individuals | Total charges |
|--------------------|---|------------|-------------|---------------|
| Magistrates' Court | Total charges receiving a fine | 943 | 65 | 1,008 |
| | Percentage of charges that were part of an aggregate fine | 44% | 26% | 43% |
| Higher courts | Total charges receiving a fine | 132 | 14 | 146 |
| | Percentage of charges that were part of an aggregate fine | 17% | 14% | 16% |

72. *Sentencing Act 1991* (Vic) s 51.

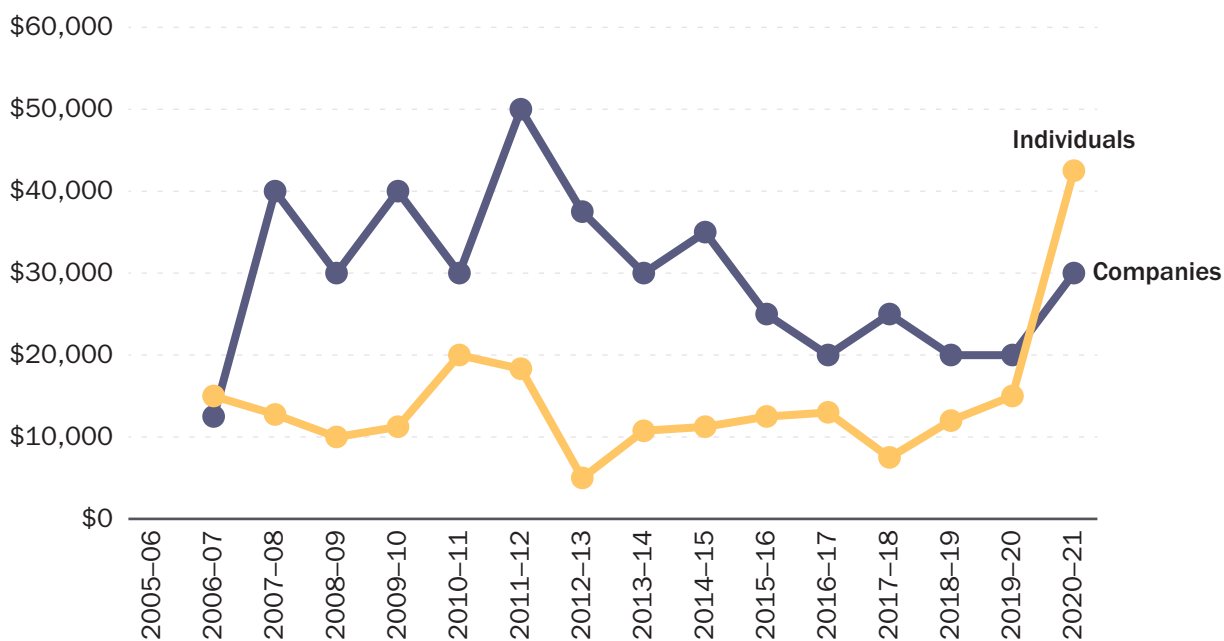
Fine amounts in the Magistrates' Court

- 3.28 There were 573 employer breach of duty offences that received a non-aggregate fine in the Magistrates' Court: 525 were imposed on companies and 48 were imposed on individuals.
- 3.29 The average non-aggregate fine for employer breach of duty offences during the reference period was \$38,701 for companies and \$15,454 for individuals.
- 3.30 In the Magistrates' Court, the largest fines imposed for employer breach of duty offences were in related cases involving a company, which was fined \$338,650,⁷³ and its director, who was fined \$77,730,⁷⁴ in 2020–21.

Trends in fine amounts in the Magistrates' Court

- 3.31 Figure 13 shows the median fine, expressed in dollar amounts, imposed for employer breach of duty offences in each year during the reference period.
- 3.32 For companies, there has been a clear decline in the median fine imposed, peaking at \$50,000 in 2011–12 and declining thereafter to \$20,000 in 2019–20 (we exclude 2020–21 due to the effect of COVID-19 on court operations).

Figure 13: Median fine imposed for employer breach of duty offences in the Magistrates' Court, by offender type and financial year of sentence, 2005–06 to 2020–21 (525 fines for companies, 48 fines for individuals)



73. WorkSafe Victoria, 'Valley Sweep Pty Ltd' (14 October 2020), *Prosecution Result Summaries and Enforceable Undertakings: A Directory of the Most Recent Prosecution and Enforceable Undertaking Outcomes* (2023).

74. WorkSafe Victoria, 'Anton Zakic' (14 October 2020), *Prosecution Result Summaries and Enforceable Undertakings: A Directory of the Most Recent Prosecution and Enforceable Undertaking Outcomes* (2023).

- 3.33 For individuals, there is no clear trend given the few non-aggregate fines imposed (48 in total, with an average of 3 per year). The sudden increase in 2020–21 is in part due to the imposition of the jurisdictional limit of \$77,730 for 1 of 4 non-aggregate fines that year.
- 3.34 Expressed differently, Table 4 shows the median fine for companies and individuals in the first and second halves of the reference period (the 7 years to 30 June 2013 and the 8 years to 30 June 2021).⁷⁵ The median fine for companies precisely halved between those two timeframes, from \$40,000 to \$20,000. The drop in the average fine is less drastic, but that is due to a handful of outliers. In comparison, the median and average fines for individuals increased slightly.

Table 4: Median and average fines imposed in the Magistrates' Court for employer breach of duty offences, by offender type and timeframe within the reference period

| Offender type | Timeframe | Number of charges | Number of non-aggregate fines | Median fine | Average fine |
|---------------|------------------------|-------------------|-------------------------------|--------------------|--------------------|
| Company | July 2006 to June 2013 | 384 | 172 | \$40,000.00 | \$41,761.63 |
| | July 2013 to June 2021 | 637 | 353 | \$20,000.00 | \$37,210.08 |
| | Overall | 1,021 | 525 | \$25,000.00 | \$38,701.25 |
| Individual | July 2006 to June 2013 | 49 | 27 | \$10,000.00 | \$12,585.96 |
| | July 2013 to June 2021 | 37 | 21 | \$12,500.00 | \$19,141.90 |
| | Overall | 86 | 48 | \$12,250.00 | \$15,454.19 |

- 3.35 Of course, the value of a dollar changed in line with inflation during the reference period. According to the Reserve Bank of Australia, \$104.81 in 2005 (the value of a penalty unit in the first year of the reference period) would actually be valued at \$150.85 in 2021 (the final year of the reference period).⁷⁶ To account for inflation, the Victorian Treasurer adjusts the value of a penalty unit each year;⁷⁷ and as of 2020–21, a penalty unit was valued at \$165.22, much higher than it was in 2005.⁷⁸ This represents a 57.6% increase in the value of a penalty unit.

75. There were no non-aggregate fines imposed before July 2006. Therefore, Table 4 only includes 7 years of data for the first half of the reference period.

76. Reserve Bank of Australia, 'Inflation Calculator' (rba.gov.au, 2023).

77. *Monetary Units Act 2004* (Vic) s 5(2) ('The value of a penalty unit is the amount fixed with respect to a financial year by the Treasurer by notice published in the Government Gazette').

78. Sentencing Advisory Council (2023), above n 19.

In turn, the maximum fine for an employer breach of duty offence increased from \$943,290 to \$1,486,980 for a company, and the jurisdictional limit in the Magistrates' Court (2,500 penalty units for companies) increased from \$262,025 to \$413,050.

- 3.36 One way of removing the confounding effect of inflation on fines over time is to express each fine amount as the number of penalty units that each fine represents.⁷⁹ We calculated this number using the applicable penalty unit at the date of offence (as opposed to the date of sentencing),⁸⁰ which appears to be the prevailing approach to assessing applicable penalty units.
- 3.37 In Figure 14 (page 35), we present the fines imposed on companies as the number of penalty units that each fine represents. (Note that while the number of penalty units is calculated using the value of a penalty unit at the date of offence, the penalty units are presented according to the year of sentencing.) Figure 14 uses a box-and-whiskers-plot (box plot) to represent the annual distribution of penalty units for each financial year of the reference period. The box plots show key points of the distribution of penalty units, including the median (represented by the line within each box).⁸¹
- 3.38 Figure 14 even more clearly shows that, in recent years, there has been a significant reduction in the values of fines imposed on companies for employer breach of duty offences. The median fine was highest in 2011–12, at 419 penalty units, and has declined since then, to 125 penalty units in 2019–20. In real terms, then, fines for employer breach of duty offences decreased by about 70% in the decade to 30 June 2021.

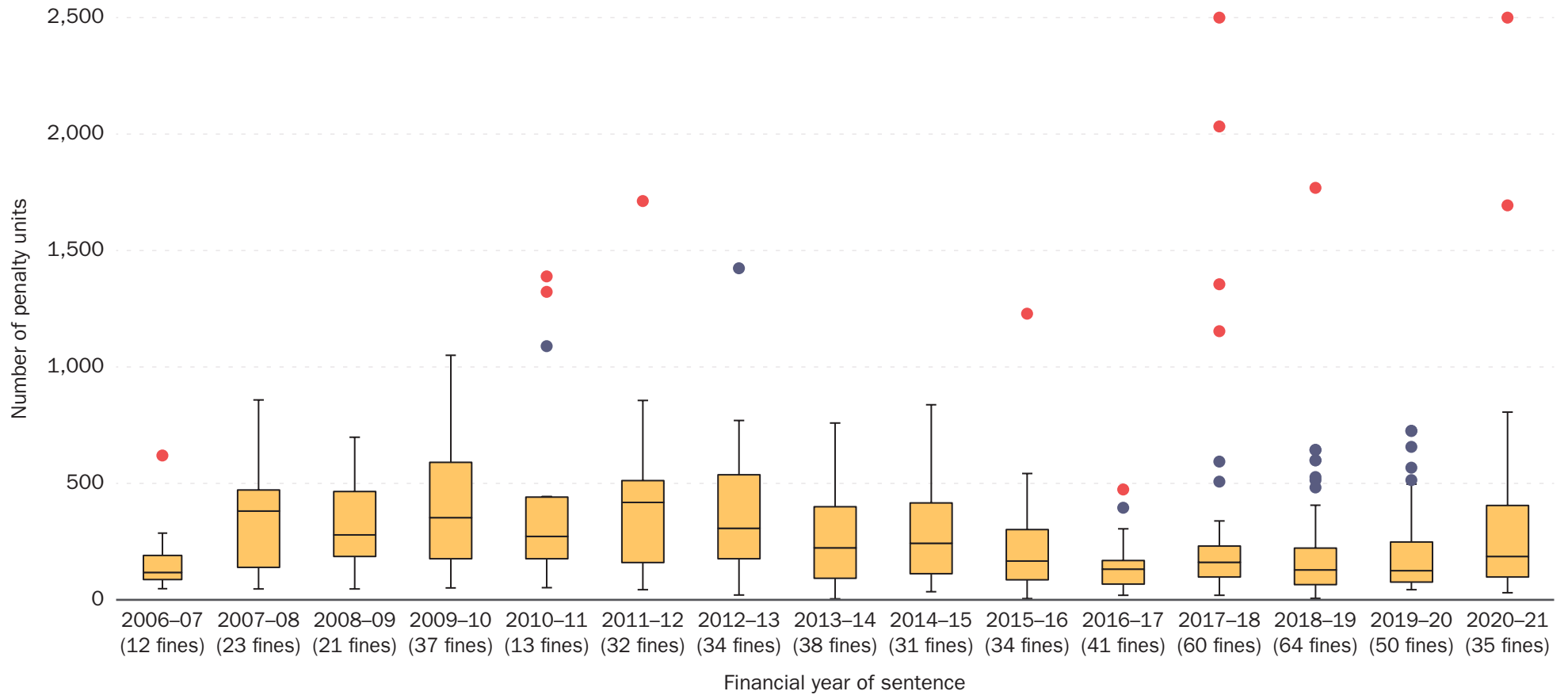
**In real terms,
average fines for
employer breach
of duty offences
decreased by about
70% in the decade
to 30 June 2021**

79. This analysis is possible as Victoria is the only jurisdiction with maximum penalties for OHS offences expressed as penalty units, the value of which is adjusted each financial year in line with inflation. This approach has been the subject of recommendations for reform in the jurisdictions with harmonised OHS laws: see Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (2018) 116–117.

80. Offence dates are known for all charges sentenced in the Magistrates' Court.

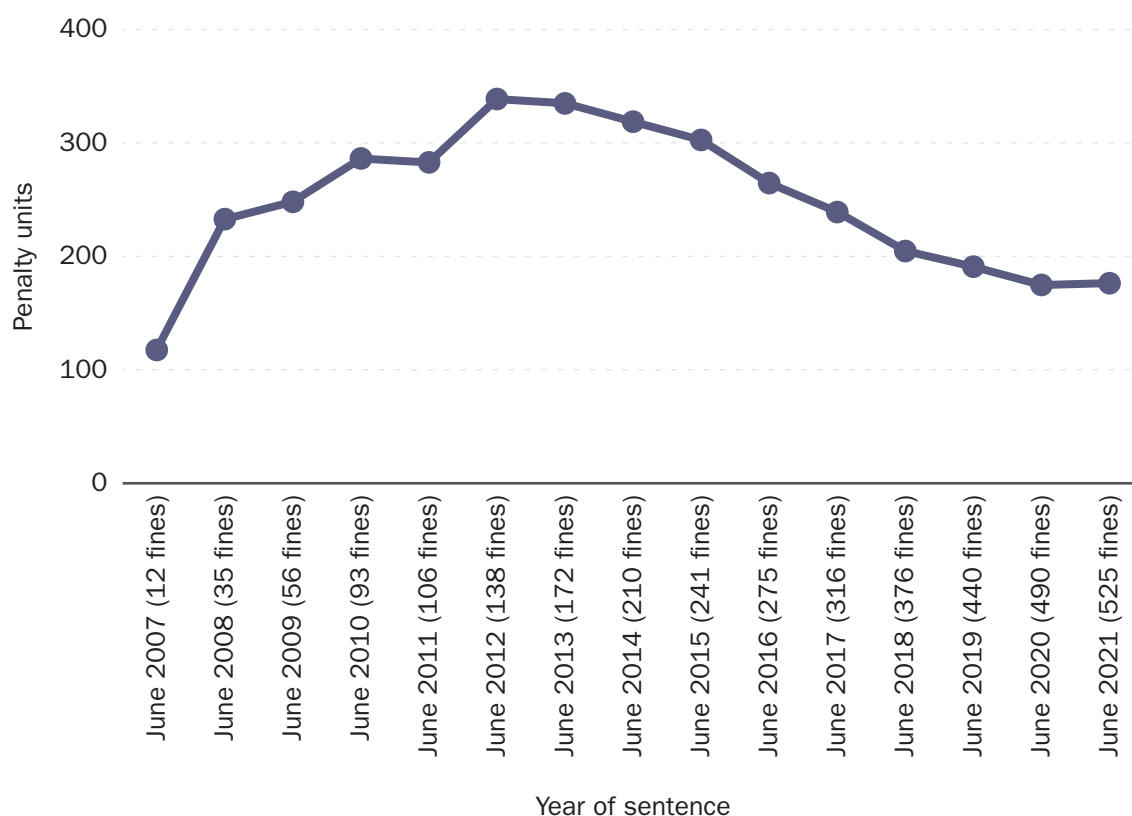
81. Further key points of the distribution include the 25th percentile (first quartile), which is represented by the bottom line of the box and is the value that 25% of the values fall below, and the 75th percentile (third quartile), which is represented by the top line of the box and is the value that 75% of the values fall below. Together, these two measures represent the 'inter-quartile range', which is the spread of the middle half of the annual data and is represented in each box plot by the length of the box. Apart from some values, which are statistical outliers, the full spread of the data, that is, the range from the smallest to the largest value, is represented by the tips of the vertical lines ('whiskers') extending from the box. Statistical outliers are depicted as blue dots (moderate) and red dots (extreme). Outliers are based on annual distributions and are designated by the standard measure: a value beyond the 75th percentile by more than one-and-a-half times the inter-quartile range (for moderate outliers) or three times the inter-quartile range (extreme outliers). See John Tukey, *Exploratory Data Analysis* (1977) 43–44.

Figure 14: Distribution of penalty units imposed on companies in the Magistrates' Court for employer breach of duty offences, by financial year of sentence (525 fines)



3.39 To further illustrate the steady decline in the relative value of fines imposed, Figure 15 presents the cumulative median number of penalty units imposed on companies for employee breach of duty offences that received a fine in the Magistrates' Court. As more charges against companies were sentenced and fined, the overall median continued to drop from a high of 338 penalty units in June 2012 (for the 138 fines imposed to that point) to 176 penalty units by the end of the reference period (525 fines in total).

Figure 15: Cumulative median number of penalty units imposed on companies for employer breach of duty offences sentenced in the Magistrates' Court, by financial year of sentence



Trends in fine amounts in the higher courts

3.40 In contrast, the median fine imposed in the higher courts for employer breach of duty offences seems to have increased. While the number of charges each year is relatively low (there were 110 charges overall that received non-aggregate fines), the median fine for companies almost doubled from the first half of the reference period (from \$135,000 in the 6 years to 30 June 2013)⁸² to the second half of the reference period (to \$250,000 in the 8 years to 30 June 2021).

82. There were no non-aggregate fines imposed before July 2007. Therefore, Table 5 only includes 6 years of data for the first half of the reference period.

There was a similar increase in the median fine for individuals, from \$65,000 in the first half to \$100,000 in the second half (Table 5).

Table 5: Median and average fine imposed in the higher courts for employer breach of duty offences, by offender type and timeframe within the reference period

| Offender type | Timeframe | Number of charges | Number of non-aggregate fines | Median fine | Average fine |
|---------------|------------------------|-------------------|-------------------------------|---------------------|---------------------|
| Company | July 2007 to June 2013 | 61 | 50 | \$135,000.00 | \$155,320.00 |
| | July 2013 to June 2021 | 73 | 60 | \$250,000.00 | \$263,750.00 |
| | Overall | 134 | 110 | \$165,000.00 | \$214,463.64 |
| Individual | July 2007 to June 2013 | 9 | 7 | \$65,000.00 | \$68,571.43 |
| | July 2013 to June 2021 | 5 | 5 | \$100,000.00 | \$103,000.00 |
| | Overall | 14 | 12 | \$72,500.00 | \$82,916.67 |

Fine amounts for employer breach of duty offences across justice regions

- 3.41 During the reference period, fines for charges of employer breach of duty offences were fairly evenly imposed across the justice regions in Victoria. The median fine imposed on companies in the Magistrates' Court in metropolitan Melbourne (where 321 charges received non-aggregate fines) was the same as the median fine imposed on companies in the Magistrates' Court in the other justice regions (where 204 charges received non-aggregate fines): \$25,000 (Table 6, page 38). The average fine was larger than the median fine across all justice regions, which shows that very high outlying fines were imposed in all regions.⁸³
- 3.42 Similarly, the median non-aggregate fine imposed in the higher courts in metropolitan Melbourne was the same as the median non-aggregate fine imposed in the higher courts in regional Victoria: \$165,000 (Table 7, page 38).⁸⁴

83. For example, the largest fines in Barwon South West and Gippsland relate to cases where the charges received the Magistrates' Court's jurisdictional limit of 2,500 penalty units. See WorkSafe Victoria, 'Valley Sweep Pty Ltd' (14 October 2020), *Prosecution Result Summaries and Enforceable Undertakings: A Directory of the Most Recent Prosecution and Enforceable Undertaking Outcomes* (2023); WorkSafe Victoria, 'CK Crouch Pty Ltd (in liquidation)' (14 September 2017), *Prosecution Result Summaries and Enforceable Undertakings: A Directory of the Most Recent Prosecution and Enforceable Undertaking Outcomes* (2023).

84. Higher courts data is not broken down into individual justice regions due to small numbers: Hume (1 fine), Loddon Mallee (2 fines), Gippsland (2 fines), Grampians (3 fines), Barwon South West (4 fines).

Table 6: Fine amounts imposed on companies in the Magistrates' Court for employer breach of duty offences, by justice region, 2005–06 to 2020–21

| Justice region | Total number of non-aggregate fines for companies | Smallest fine | Median fine | Average fine | Largest fine |
|------------------------|---|-----------------|--------------------|--------------------|---------------------|
| Metropolitan Melbourne | 321 | \$1,000.00 | \$25,000.00 | \$36,220.82 | \$300,000.00 |
| Barwon South West | 79 | \$750.00 | \$32,000.00 | \$52,272.47 | \$379,175.00 |
| Gippsland | 32 | \$3,000.00 | \$30,000.00 | \$50,598.44 | \$388,650.00 |
| Grampians | 37 | \$600.00 | \$20,000.00 | \$29,718.92 | \$90,000.00 |
| Hume | 31 | \$5,000.00 | \$25,000.00 | \$32,193.55 | \$100,000.00 |
| Loddon Mallee | 25 | \$3,000.00 | \$18,000.00 | \$33,800.00 | \$150,000.00 |
| Overall | 525 | \$600.00 | \$25,000.00 | \$38,701.25 | \$388,650.00 |

Table 7: Fine amounts imposed on companies in the higher courts for employer breach of duty offences, by justice region, 2005–06 to 2020–21

| Justice region | Total number of non-aggregate fines for companies | Smallest fine | Median fine | Average fine | Largest fine |
|------------------------|---|--------------------|---------------------|---------------------|-----------------------|
| Metropolitan Melbourne | 98 | \$10,000.00 | \$165,000.00 | \$221,081.63 | \$1,000,000.00 |
| Regional Victoria | 12 | \$20,000.00 | \$165,000.00 | \$160,416.67 | \$350,000.00 |
| Overall | 110 | \$10,000.00 | \$165,000.00 | \$214,463.64 | \$1,000,000.00 |

Were fine amounts higher in cases involving death?

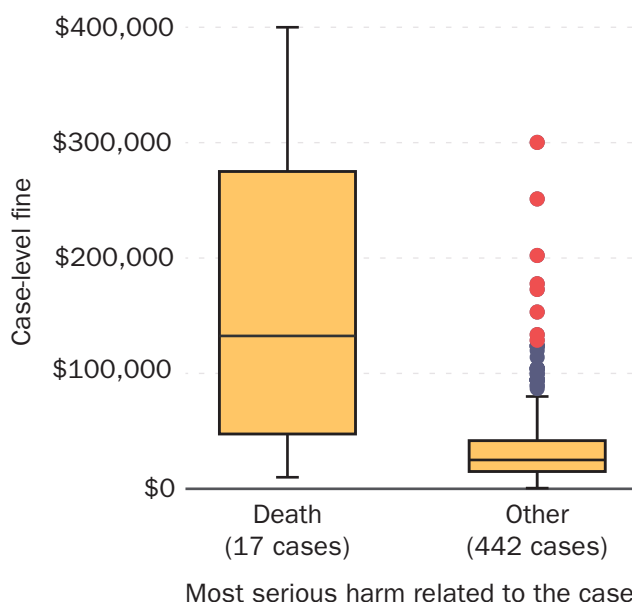
3.43 In both the Magistrates' Court and the higher courts, cases involving death received more severe sentencing outcomes than cases involving injury or no injury. This section examines the distribution of fines imposed on companies in the Magistrates' Court and higher courts with regard to the level of harm described in the case. As a caveat, this analysis does not account for the minority of cases where the court made a finding that the offending did not *cause* the particular harm; instead, it accounts for whether there was such harm in the case. Notwithstanding, the data shows a substantial difference in the values of fines imposed in cases involving death.

3.44 In the Magistrates' Court, the median fine for the 17 cases involving death was \$140,000. In comparison, the median fine for cases that did not involve a death (and instead involved either an injury or no injury) was \$25,000 (Table 8).⁸⁵ The full distribution of these 'case-level' fines is shown in Figure 16,⁸⁶ highlighting that fines are clearly much higher in cases that involve death than in cases that don't.

Table 8: Median fines imposed on companies in the Magistrates' Court for employer breach of duty offences, by harms referred to in the case, January 2012 to June 2021

| Harm referred to in the case | Number of cases involving employer breach of duty offences | Median 'case-level' fine |
|------------------------------|--|--------------------------|
| Death | 17 | \$140,000.00 |
| Other | 442 | \$25,000.00 |
| Harm not known | 12 | \$37,500.00 |
| All companies | 471 | \$25,000.00 |

Figure 16: Distribution of fines imposed on companies in the Magistrates' Court in cases involving employer breach of duty offences, by most serious harm in case, 2012–13 to 2020–21⁸⁷



85. This analysis considers the most serious harm involved in the case, and thus it considers the total fine for a case that involved a charge relating to a death.

86. See at [3.37] and above n 81 for an explanation of box plots.

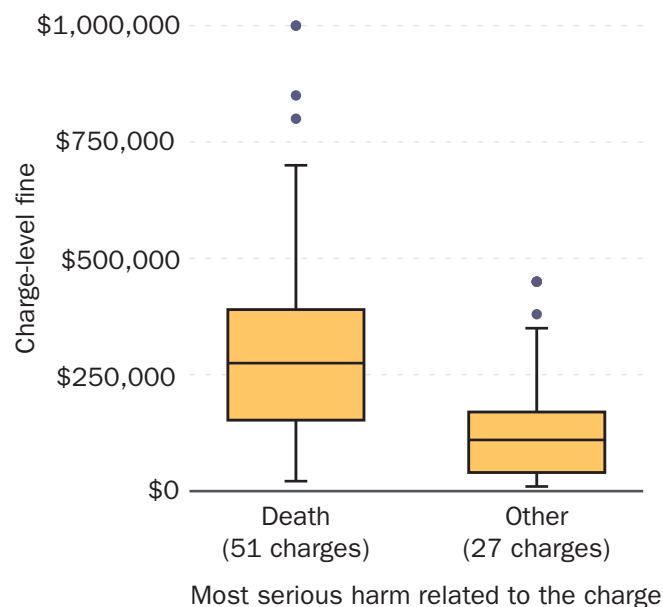
87. Figure 16 excludes 17 employer breach of duty offences (all involving companies), because either no prosecution result summary was available or the level of harm in the case was not mentioned. Further, one case that received a fine of over \$1 million and involved a death is not shown for ease of presentation. That fine is an extreme outlier, and it represents the maximum of 2,500 penalty units imposed on each of 3 charges in the case: WorkSafe Victoria, 'CK Crouch Pty Ltd (in liquidation)' (14 September 2017), *Prosecution Result Summaries and Enforceable Undertakings: A Directory of the Most Recent Prosecution and Enforceable Undertaking Outcomes* (2023).

3.45 In the higher courts, there was a similar difference in fine amounts depending on the harm caused. As shown in Table 9, the median non-aggregate fine for charges of employer breach of duties involving death (\$275,000) was more than twice the median fine where no death was involved (\$110,000). Indeed, there was a clear difference between the entire distributions of 'charge-level' fines based on the harm caused (Figure 17).⁸⁸

Table 9: Values of fines imposed on companies in the higher courts for employer breach of duty offences, by harm caused, 2005–06 to 2020–21

| Harm related to the charge | Number of charges receiving fines | Number of non-aggregate fines | Median non-aggregate fine |
|----------------------------|-----------------------------------|-------------------------------|---------------------------|
| Death | 66 | 51 | \$275,000.00 |
| Other | 28 | 27 | \$110,000.00 |
| <i>Harm not known</i> | 38 | 32 | \$90,000.00 |
| All companies | 132 | 110 | \$165,000.00 |

Figure 17: Distribution of charge-level fines imposed on companies in the higher courts for employer breach of duty offences, by harm related to the charge, 2005–06 to 2020–21⁸⁹



88. See at [3.37] and above n 81 for an explanation of box plots.

89. Sentencing remarks were unavailable for 27 cases in the higher courts; these cases involved 38 charges of employer breach of duty offences for which the actual harm relating to each charge is unknown. All available sentencing remarks clearly identify the harm relating to each charge, that is, there are no 'unknown' harms in Figure 17.

4. Sentencing other breach of duty offences

4.1 This chapter focuses on breach of duty offences under sections 22, 24–30 of the *OHS Act*. These offences include breaches of the following duties:

- **employers** must monitor the health of employees and workplace conditions, and provide information to employees concerning health and safety at the workplace;⁹⁰
- **self-employed persons** must ensure that people are not exposed to risks to health and safety arising from the self-employed person's conduct;⁹¹
- **employees** must take reasonable care for their own health and safety and the health and safety of people who might be affected by the employee's acts or omissions;⁹²
- **managers and controllers of a workplace** must ensure the workplace (and entries/exits) are safe and do not pose risks to health;⁹³
- **designers of plant** must ensure plant is safe and without risks to health when used for its intended purpose;⁹⁴
- **designers of buildings or structures** or part thereof (to be used as a workplace) must ensure it is designed to be safe and without risks to health if used as a workplace as intended;⁹⁵
- **manufacturers of plant or substances** (to be used at a workplace) must ensure it is manufactured to be safe and without risks to health if used as intended;⁹⁶
- **suppliers of plant or a substance** (to be used at a workplace) must ensure that it is safe and without risks to health if used as intended;⁹⁷ and
- people **installing, erecting or commissioning plant** (to be used at a workplace) must ensure nothing about the way it is installed, erected or commissioned makes it unsafe or a risk to health.⁹⁸

90. *Occupational Health and Safety Act 2004* (Vic) s 22(1).

91. *Occupational Health and Safety Act 2004* (Vic) s 24(1).

92. *Occupational Health and Safety Act 2004* (Vic) s 25(1)(b).

93. *Occupational Health and Safety Act 2004* (Vic) s 26(1).

94. *Occupational Health and Safety Act 2004* (Vic) s 27(1).

95. *Occupational Health and Safety Act 2004* (Vic) s 28(1).

96. *Occupational Health and Safety Act 2004* (Vic) s 29(1).

97. *Occupational Health and Safety Act 2004* (Vic) s 30(1).

98. *Occupational Health and Safety Act 2004* (Vic) s 31(1).

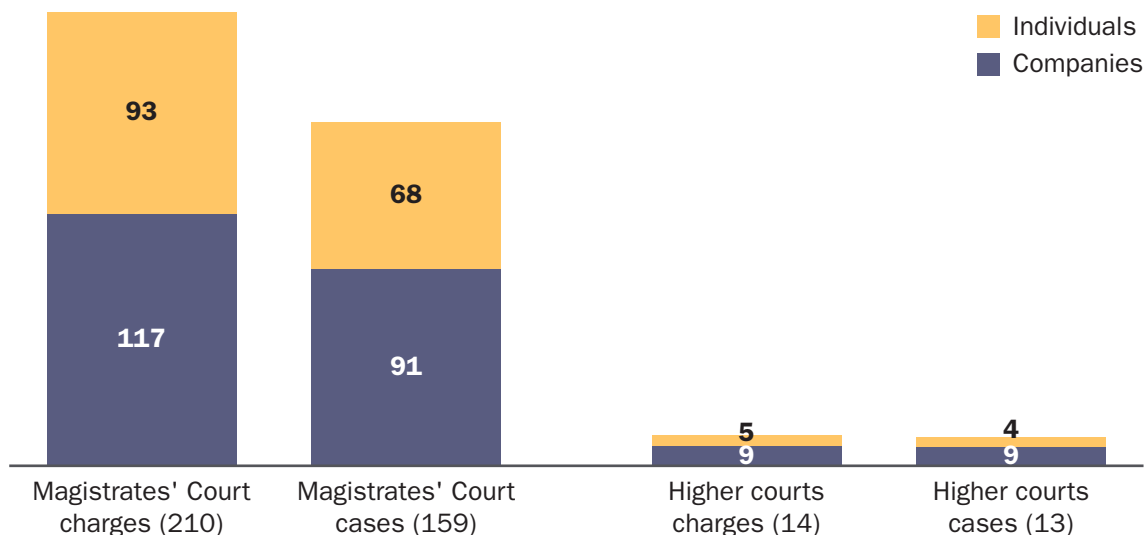
Key findings

- 244 other breach of duty offences were sentenced in 172 cases
- The most common were managers/controllers breach of duty offences (58%) and employee breach of duty offences (22%)
- Deaths were much more common in cases sentenced in the higher courts (46%) than in the Magistrates' Court (3%)
- Fines were the most common sentencing outcome in both the Magistrates' Court (85%) and the higher courts (86%)
- The median fine imposed in the Magistrates' Court was \$20,000 for companies and \$4,000 for individuals

Number of sentenced offences

4.2 There were 224 other breach of duty offences sentenced in Victoria during the reference period: 210 in the Magistrates' Court and 14 in the higher courts (Figure 18). Those 224 charges were sentenced in 172 cases: 159 in the Magistrates' Court and 13 in the higher courts. Of those 172 cases, a significant number involved individual offenders (72 or 41.9%). This is substantially higher than the proportion of individuals involved in *all* OHS cases (16.7%), reflecting that some of these other breach of duty offences are not applicable to companies (e.g. self-employed persons).

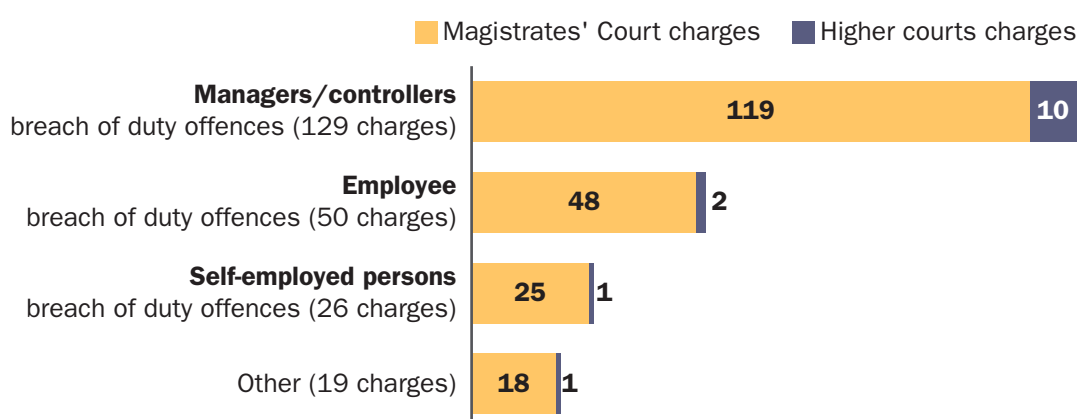
Figure 18: Number of charges and cases of other breach of duty offences sentenced in the Magistrates' Court and higher courts, by offender type, 2005–06 to 2020–21



Characteristics of sentenced offences

4.3 As shown in Figure 19, the most prevalent other breach of duty offence was a manager/controller breach of duty offence (129 charges or 57.6% of 224 charges). The next most prevalent were *employee* breach of duty offences (50 charges or 22.3%) and self-employed persons breach of duty offences (26 charges or 11.6%).

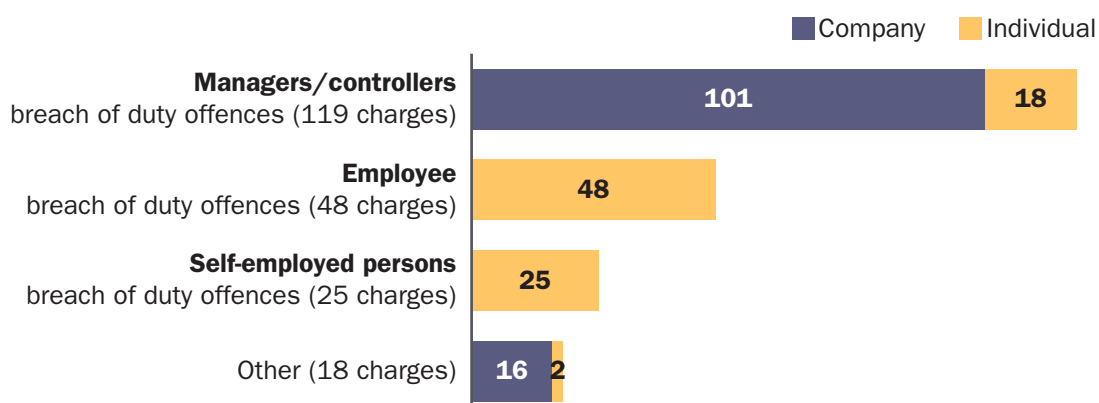
Figure 19: Number of charges of other breach of duty offences, all courts, by specific offence, 2005–06 to 2020–21 (210 charges in the Magistrates' Court, 14 charges in the higher courts)



4.4 In the higher courts, 5 of the 14 other breach of duty offences were committed by individuals: 1 self-employed person, 2 employees and 2 managers/controllers. The other 9 offenders were companies (8 managers/controllers (section 26) and 1 employer (section 22)).

4.5 In the Magistrates' Court, 93 of the 210 other breach of duty offences (44.3%) involved individuals. As Figure 20 shows, this is mostly due to 2 offences: employee breach of duty offences and self-employed persons breach of duty offences. Companies cannot be charged for these 2 offences.

Figure 20: Number of charges of other breach of duty offences sentenced in the Magistrates' Court, by offender type, 2005–06 to 2020–21 (210 charges)



Number of cases involving death or injury

4.6 Of the 13 cases involving other breach of duty offences sentenced in the higher courts, 6 involved a death and 1 involved serious injury. The cases involving death included:

- a quarry company that did not adequately consider the consequences of dump trucks driving on the top of a scoria stockpile (section 26);⁹⁹
- a small construction company that failed to ensure a bobcat was safe to operate (section 26);¹⁰⁰ and
- an abattoir company that failed to ensure an unloading ramp was designed to suit its purpose, properly maintained and used safely (section 26).¹⁰¹

4.7 Of the 159 cases involving other breach of duty offences sentenced in the Magistrates' Court, the level of harm involved in the case was able to be determined in 98 cases. Of these, 55 cases involved injury, 3 involved a death, and 40 did not involve an injury or a death.

Guilty pleas

4.8 In the higher courts, of the 13 cases involving other breach of duty offences, we were able to determine the offender's plea in 8 cases. The offender pleaded guilty in 6 of those cases (75.0%).

4.9 In the Magistrates' Court, plea data was available for 95 of the 159 cases involving other breach of duty offences. The offender pleaded guilty in 92 of those 95 cases (96.8%). The other 3 cases involved companies that were found guilty after contesting the charges.

Sentencing outcomes in the higher courts

4.10 The maximum penalty for all but 2 of these other breach of duty offences was 1,800 penalty units for an individual and 9,000 penalty units for a company. The 2 offences with different maximum penalties were:

- employers failing to monitor or provide information about health and safety (240 penalty units for individuals and 1,800 for companies); and
- designers of buildings or structures breach of duties (500 penalty units for individuals and 2,500 for companies).

99. *DPP v Keilor-Melton Quarries Pty Ltd* [2018] VCC 2139.

100. *DPP v Phelps Construction Pty Ltd* [2018] VCC 394.

101. *DPP v Frewstal Pty Ltd* [2015] VCC 731.

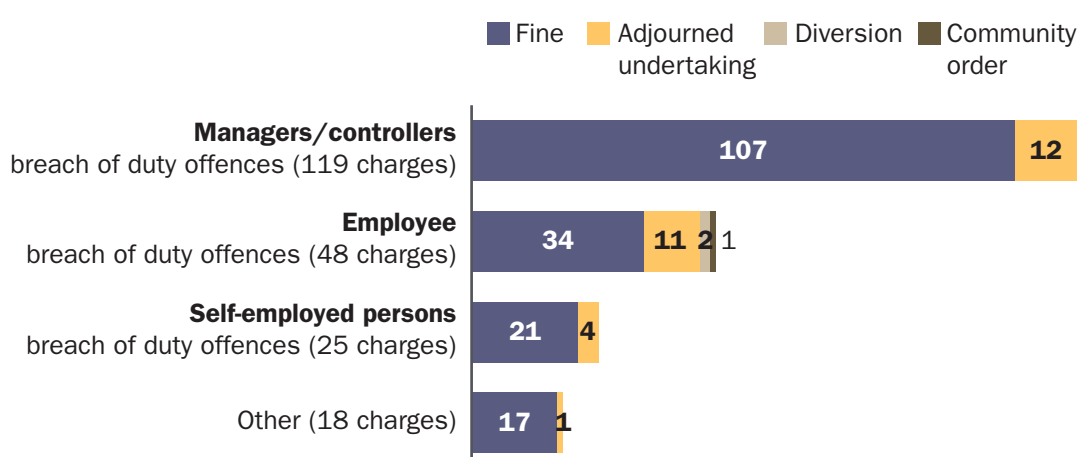
4.11 A fine was imposed for almost all the 14 other breach of duty offences sentenced in the higher courts (12 or 85.7%). Of the other 2 charges, 1 received an adjourned undertaking and 1 received a community correction order. Of those 12 charges receiving fines, 11 were non-aggregate fines (i.e. they were not part of an aggregate sentence). These non-aggregate fines ranged from \$5,000 to \$450,000, with a median of \$100,000. The 5 largest fines were all imposed on companies for managers/controllers breach of duty offences; fines ranged from \$230,000 to \$450,000.

Sentencing outcomes in the Magistrates' Court

4.12 Fines constituted a substantial proportion of sentencing outcomes in the Magistrates' Court: 179 of 210 charges (85.2%). The remaining outcomes were adjourned undertakings (28 charges), diversion (2 charges) and a community order.

4.13 Figure 21 shows the sentencing outcomes by specific offence. Fines were slightly less prevalent for employee breach of duty offences (70.8%). Only individuals can be prosecuted for this offence, so this is probably a key factor in the relatively high use of adjourned undertakings (22.9% or 11 charges) as an alternative sentence to a fine.

Figure 21: Number of charges of other breach of duty offences sentenced in the Magistrates' Court, by sentencing outcome, 2005–06 to 2020–21 (210 charges)



Fine amounts for other breach of duty offences

- 4.14 Of the 179 charges of other breach of duty offences that resulted in fines, 115 were non-aggregate fines that ranged from \$1,000 to \$250,000, with a median of \$15,000.
- 4.15 Table 10 shows that there was a substantial difference between the fines imposed on companies and the fines imposed on individuals. The median fine for companies during the reference period was \$20,000, whereas it was \$4,000 for individuals. The median fine for companies increased from \$15,000 in the first half of the reference period to \$20,000 in the second half. In comparison, the median fine for individuals decreased from \$8,750 to \$4,000.

Table 10: Median and average fines imposed for other breach of duty offences in the Magistrates' Court, by offender type and timeframe within the reference period

| Offender type | Timeframe | Number of charges | Number of non-aggregate fines | Median fine | Average fine |
|---------------|------------------------|-------------------|-------------------------------|-----------------|-----------------|
| Company | July 2005 to June 2013 | 16 | 8 | \$15,000 | \$21,250 |
| | July 2013 to June 2021 | 101 | 71 | \$20,000 | \$31,148 |
| | Overall | 117 | 79 | \$20,000 | \$30,146 |
| Individual | July 2005 to June 2013 | 53 | 16 | \$8,750 | \$12,656 |
| | July 2013 to June 2021 | 40 | 20 | \$4,000 | \$4,865 |
| | Overall | 93 | 36 | \$4,000 | \$8,328 |

- 4.16 Some comparatively large fines were imposed on companies in the second half of the reference period. The largest fine in the first half was \$60,000. In the second half, 6 fines were greater than \$60,000, and they ranged from \$80,000 to \$250,000. All 6 of these fines were for managers/controllers breach of duty offences.

5. Sentencing breach of notice offences

5.1 This chapter focuses on breach of notice offences under sections 62, 110–112 of the *OHS Act*, including breaches of:

- non-disturbance notices,¹⁰² which are issued to prevent the interference or disturbance of a workplace setting to allow WorkSafe inspectors to perform their role;
- improvement notices,¹⁰³ which are issued where a WorkSafe inspector has identified a breach of the *OHS Act* in a workplace;
- prohibition notices,¹⁰⁴ which are issued to prohibit a workplace from continuing an activity that involves a serious risk to health or safety; and
- provisional improvement notices,¹⁰⁵ which are issued temporarily by a WorkSafe inspector where a breach of the *OHS Act* has been identified.

Key findings

- **134 breach of notice offences were sentenced in 71 cases**
- **Almost all of these offences (98%) were sentenced in the Magistrates' Court**
- **The most common offence was a breach of improvement notice (78%)**
- **Most offenders were companies (85%)**
- **Fines were the most common sentencing outcome (82%), followed by adjourned undertakings (18%)**
- **Fines in the Magistrates' Court ranged from \$100 to \$48,000, with a median of \$4,000**
- **Of the 3 offences sentenced in the higher courts, 1 received a fine of \$20,000 and 2 received fines of \$25,000**

102. *Occupational Health and Safety Act 2004* (Vic) s 110(4).

103. *Occupational Health and Safety Act 2004* (Vic) s 111(4).

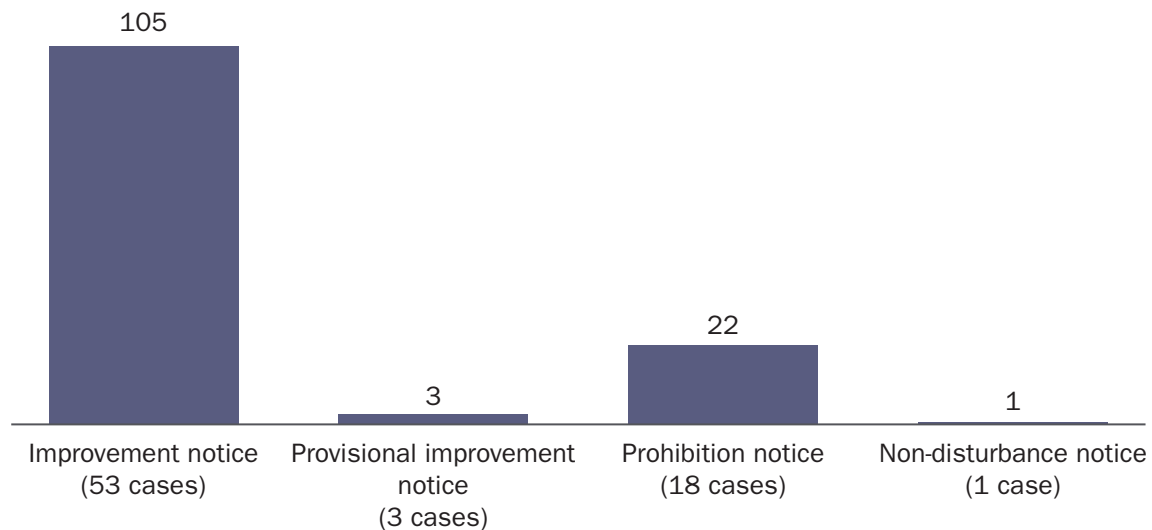
104. *Occupational Health and Safety Act 2004* (Vic) s 112(5).

105. *Occupational Health and Safety Act 2004* (Vic) s 62(1).

Number and type of offences sentenced

5.2 There were 134 breach of notice offences (in 71 cases) sentenced under the *OHS Act* during the reference period. Of these, 131 offences (in 69 cases) were sentenced in the Magistrates' Court, and 3 offences (in 2 cases) were sentenced in the higher courts. Of the 131 offences in the Magistrates' Court, the most common was breach of improvement notice offences (105 charges): see Figure 22.

Figure 22: Number of breach of notice offences sentenced in the Magistrates' Court, by type of notice breached, 2005–06 to 2020–21 (131 charges)¹⁰⁶



106. The number of cases in Figure 22 is greater than 69 because cases involving 2 or more different breach of notice offences are counted more than once.

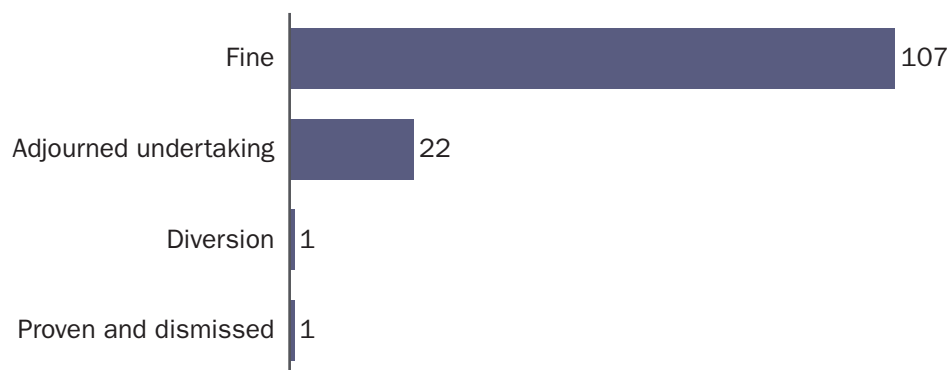
Characteristics of offenders

- 5.3 Of the 69 offenders sentenced in the Magistrates' Court for breach of notice offences, 58 were companies and 11 were individuals (10 male and 1 female). The 2 cases in the higher courts both involved a company.
- 5.4 We were able to determine the offender's plea in 24 cases, and the offender pleaded guilty in all 24 (100%).

Sentencing outcomes

- 5.5 For the 134 breach of notice offences sentenced during the reference period, the most common sentencing outcome was a fine. All 3 offences sentenced in the higher courts received a fine. And in the Magistrates' Court, a fine was imposed for 107 of the 131 offences. Of the other 24 offences, 22 received an adjourned undertaking, 1 received diversion, and 1 received a dismissal without conviction (Figure 23).

Figure 23: Sentencing outcomes for breach of notice offences sentenced in the Magistrates' Court, 2005-06 to 2020-21 (131 charges)



Fine amounts for breach of notice offences

- 5.6 Of the 107 breach of notice offences that received a fine in the Magistrates' Court, 44 were non-aggregate fines, while the remaining 63 were part of an aggregate fine. Non-aggregate fines ranged from \$100 to \$48,000, and the median was \$4,000. Of the 44 non-aggregate fines, 34 were imposed on companies, and the median was \$4,500, compared to \$3,250 for individuals.
- 5.7 Of the 3 breach of notice offences sentenced in the higher courts, 1 received a non-aggregate fine of \$20,000, and 2 received non-aggregate fines of \$25,000.

6. Sentencing of other OHS offences

6.1 This chapter discusses sentencing outcomes for all non-breach of duty/notice offences under the *OHS Act* as well as *OHS Regulations*. These other OHS offences include failing to notify WorkSafe of an incident, failing to preserve an incident site, recklessly endangering serious injury in a workplace, conducting work without a licence or registration, and offences relating to inspection and enforcement.

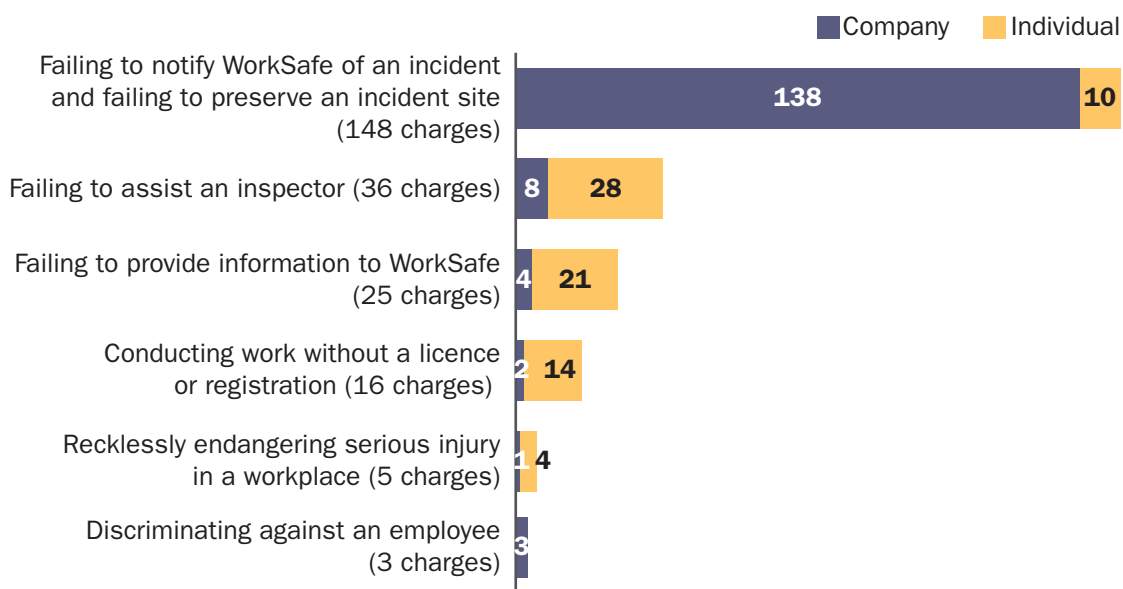
Key findings

- There were 290 other OHS offences sentenced in 147 cases
- Almost all of those offences were sentenced in the Magistrates' Court (99%)
- The most common other OHS offences (64%) were failing to notify WorkSafe of an incident and failing to preserve an incident site
- The most common sentence for other OHS offences was a fine (68%), followed by an adjourned undertaking (27%) and diversion (4%). One charge of recklessly endangering serious injury in a workplace received a prison sentence
- Median fines for most other OHS offences ranged from \$66 to \$10,000, but the median fine for recklessly endangering serious injury in a workplace was \$440,000

Number and type of offences sentenced

- 6.2 There were 290 other OHS offences (in 147 cases) under the *OHS Act* and *OHS Regulations* sentenced during the reference period.
- 6.3 Almost all of those offences (286 or 98.6% in 144 cases) were sentenced in the Magistrates' Court. Of the 144 cases in the Magistrates' Court, 95 involved companies and 49 involved individuals (38 were male). The 3 cases in the higher courts involved 2 companies and 1 individual (a male).
- 6.4 The 286 other OHS offences sentenced in the Magistrates' Court comprise 233 charges under the *OHS Act* and 53 charges under *OHS Regulations*. Of the 233 offences under the *OHS Act* (Figure 24), by far the most common were failing to notify WorkSafe of an incident and failing to preserve an incident site (148 charges or 63.5%). The next most common were inspection and enforcement offences (36 charges or 15.5%), failing to provide information to WorkSafe (25 charges or 10.7%) and conducting work without a licence or registration (16 charges or 6.9%).

Figure 24: Number of other OHS offences under the OHS Act sentenced in the Magistrates' Court, by offender type, 2005–06 to 2020–21 (233 charges)



- 6.5 Of the 53 offences sentenced under *OHS Regulations* during the reference period, the most common related to licence assessors failing to conduct assessments in accordance with WorkSafe's requirements (21 charges),¹⁰⁷ followed by arranging or performing asbestos removal without a licence¹⁰⁸ and failing to ensure asbestos removal is conducted by a licence holder (15 charges).¹⁰⁹
- 6.6 While there were only 53 offences sentenced under *OHS Regulations* during the reference period, it is important to note that breaches of certain *OHS Regulations* can constitute a breach of duty offence. For example, employers failing in their duty to protect the health and safety of employees under *OHS Regulations* may have specific offences charged under the *OHS Act*.¹¹⁰

Sentencing outcomes

- 6.7 The most common sentencing outcome for the 290 *other* OHS offences was a fine (196 charges or 67.6%). Of the remaining offences, 78 received an adjourned undertaking, 12 received diversion, 1 received a wholly suspended sentence, 1 received a now-abolished intensive correction order, and 1 received an immediate prison term. The offender who received the prison term was a 72-year-old woman sentenced to 6 months' imprisonment for recklessly endangering serious injury in a workplace.¹¹¹ The offender who received a wholly suspended sentence (of 20 months) was also sentenced for recklessly endangering serious injury in a workplace.
- 6.8 Table II (page 54–56) details the other OHS offences that received a non-aggregate fine (i.e. a fine that was not part of an aggregate sentence), as well as the lowest and highest fines imposed for each offence, ordered according to the median fine amount.

107. *Occupational Health and Safety Regulations 2007* (Vic) r 3.6.8.

108. *Occupational Health and Safety Regulations 2007* (Vic) r 4.3.7.

109. *Occupational Health and Safety Regulations 2007* (Vic) rr 4.3.7, 4.3.41(1).

110. See, for example, *DPP v Hazelwood Power Corporation Pty Ltd* [2020] VSC 278, [105] ('The duties imposed by the regulations give particular content to the duties under ss 21 and 23 of the *OHS Act*'); *Seascope Constructions Pty Ltd v The Queen* [2022] VSCA 29, [3]; *DPP v Multiworks* [2021] VCC 1553, [18]; *DPP v Kenneally & Anor* [2019] VCC 658, [3]; *DPP v Frewstal Pty Ltd* [2015] VSCA 266, [18]. In a non-criminal context, but making the same point about the interplay between *OHS Regulations* and duties under the *OHS Act*, see *Deal v Father Pius Kodakkathanath* [2016] HCA 31, [64]–[68] (Gageler J, concurring).

111. *Occupational Health and Safety Act 2004* (Vic) s 32.

Table 11: Fine amounts imposed for other OHS offences, all courts, 2005–06 to 2020–21

| Offence | Section/ regulation | Total number of charges | Charges receiving a non- aggregate fine | Lowest fine | Median fine | Highest fine |
|--|------------------------|-------------------------------|---|-------------|-------------|------------------------|
| Offences under the <i>Occupational Health and Safety Act 2004 (Vic)</i> | | | | | | |
| Recklessly endangering serious injury in a workplace | Section 32 | 7 | 2 | \$130,000 | \$440,000 | \$750,000 ^a |
| Failing to provide information to WorkSafe | Section 9 | 6 | 3 | \$5,000 | \$10,000 | \$20,000 |
| Providing false or misleading information | Section 153 | 19 | 2 | \$2,000 | \$4,750 | \$7,500 |
| Power to require production of documents and answers to questions | Section 100 | 3 | 1 | \$3,500 | \$3,500 | \$3,500 |
| Assaulting, intimidating or threatening an inspector | Section 125 | 22 | 5 | \$500 | \$1,800 | \$2,000 |
| Conducting work without a licence or registration | Section 40 | 12 | 2 | \$800 | \$1,650 | \$2,500 |
| Failing to notify WorkSafe of an incident | Section 38 | 116 | 14 | \$500 | \$1,500 | \$5,000 |
| Conducting work without prescribed qualifications, experience or supervision | Section 41 | 4 | 3 | \$1,000 | \$1,000 | \$2,000 |
| Failing to preserve an incident site | Section 39 | 34 | 2 | \$1,000 | \$1,000 | \$1,000 |
| Power to require name and address | Section 119 | 2 | 1 | \$250 | \$250 | \$250 |
| Power to give directions | Section 120 | 8 | 3 | \$66 | \$66 | \$66 |
| Discriminating against an employee | Section 76 | 3 | 0 | 0 | 0 | 0 |
| Power to require persons to assist inspector | Section 121 | 1 | 0 | 0 | 0 | 0 |

- a. A \$750,000 fine was imposed in the County Court for recklessly endangering serious injury in a workplace in a case involving a large drilling company that knowingly instructed an employee to drive a vehicle with defective brakes, resulting in the employee's death: *DPP v Orbit Drilling Pty Ltd & Anor* [2010] VCC 417.

| Offence | Section/ regulation | Total number of charges | Charges receiving a non- aggregate fine | Lowest fine | Median fine | Highest fine |
|---|---------------------------------------|-------------------------------|---|-------------|-------------|--------------|
| Offences under Occupational Health and Safety Regulations 2007 (Vic)^b | | | | | | |
| Failing to retain copy of safe work method statement | Regulation 5.1.11 | 1 | 1 | \$25,000 | \$25,000 | \$25,000 |
| Employer allowing unlicensed employee to perform high-risk work | Regulation 129 (OHS Regulations 2017) | 1 | 1 | \$10,000 | \$10,000 | \$10,000 |
| Employer allowing unlicensed employee to perform high-risk work | Regulation 3.6.2 | 6 | 2 | \$4,000 | \$7,000 | \$10,000 |
| Failing to comply with terms and conditions of exemption | Regulation 7.2.8.3 | 1 | 1 | \$7,000 | \$7,000 | \$7,000 |
| Failing to ensure asbestos removal is conducted by a licence holder | Regulation 4.3.41.1 | 1 | 1 | \$6,500 | \$6,500 | \$6,500 |
| Arranging or performing asbestos removal without a licence | Regulation 4.3.7 | 14 | 4 | \$750 | \$5,000 | \$25,000 |
| Failing to place sign with details of principal contractor at construction site | Regulation 5.1.15.1 | 1 | 1 | \$1,000 | \$1,000 | \$1,000 |
| Failing to carry out assessments | Regulation 3.6.8.1 | 21 | 0 | 0 | 0 | 0 |
| Prohibited storing of asbestos | Regulation 4.3.13.1 | 3 | 0 | 0 | 0 | 0 |

b. Offences are under *OHS Regulations 2007* unless otherwise indicated.

| Offence | Section/ regulation | Total number of charges | Charges receiving a non- aggregate fine | Lowest fine | Median fine | Highest fine |
|--|--------------------------------|--|--|--------------------|--------------------|---------------------|
| Failing to ensure asbestos control plan is accessible during work | Regulation 4.3.70.2 | 1 | 0 | 0 | 0 | 0 |
| Failing to notify WorkSafe 3 days before performing excavation work on a shaft, trench or tunnel | Regulation 5.1.27.1 | 1 | 0 | 0 | 0 | 0 |
| Failing to ensure signs in place while conducting asbestos removal work | Regulation 4.3.74.A | 1 | 0 | 0 | 0 | 0 |
| Failing to label hazardous substance | Regulation 4.1.19.3 | 1 | 0 | 0 | 0 | 0 |

7. Sentence appeals in OHS cases

7.1 This chapter examines sentence appeals in OHS cases. These include 31 *de novo* sentence appeals from the Magistrates' Court to the County Court, as well as 19 sentence appeals from the County Court to the Court of Appeal.

Key findings

- There were 31 sentence appeals in OHS cases from the Magistrates' Court to the County Court: 7 initiated by offenders and 24 initiated by the Director of Public Prosecutions
- Offenders were successful in 4 of 7 appeals, while the Director was successful in 21 of 24 appeals
- The largest increase in a fine following a successful appeal by the Director was from \$225,000 to \$425,000
- There were 19 sentence appeals in OHS cases from the County Court to the Court of Appeal: 9 appeals were based on manifest inadequacy of sentence and 6 were based on manifest excess of sentence
- Of the appeals based on manifest inadequacy, 5 of 9 were successful, and the largest increase in a fine following a successful appeal was from \$100,000 to \$750,000
- Of the appeals based on manifest excess, 2 of 6 were successful, and the largest decrease in a fine following a successful appeal was from \$380,000 to \$190,000

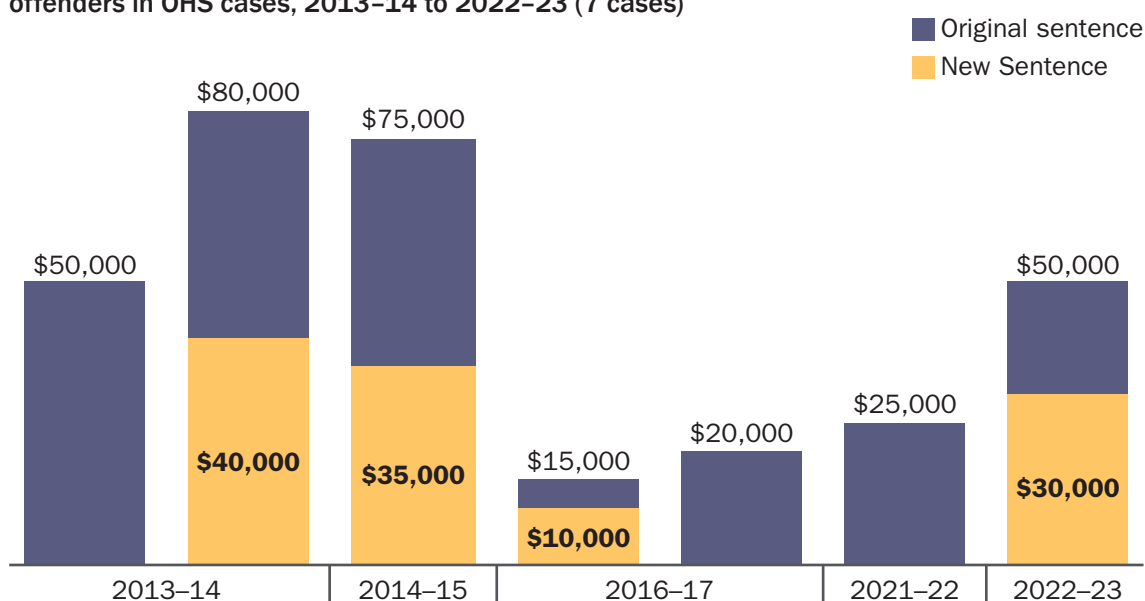
Sentence appeals from the Magistrates' Court to the County Court

7.2 Offenders sentenced in the Magistrates' Court have a right to appeal a finding of guilt¹¹² or the sentence that was imposed.¹¹³ The Director of Public Prosecutions can also appeal the sentence imposed where satisfied that it is in the public interest to do so.¹¹⁴ Appeals from the Magistrates' Court are heard in the County Court as *de novo* appeals, that is, the appeal must be conducted as a rehearing. The County Court is required to set aside the sentence and impose any new sentence that was available in the Magistrates' Court.¹¹⁵

7.3 According to data provided by WorkSafe Victoria, there were 7 *de novo* appeals against sentence by OHS offenders during the reference period (Figure 25). All offenders were companies. The original sentences in those cases were fines that ranged from \$15,000 to \$80,000. The County Court imposed the same sentence that the Magistrates' Court had imposed in 3 of those cases and imposed a lower sentence in the other 4, with reductions in penalties of 50%, 53%, 33% and 40%.

7.4 There were also 24 *de novo* sentence appeals by the Director of Public Prosecutions. All offenders in those cases were also companies. The original sentences in those cases were fines that ranged from \$1,000 to \$225,000, with a median of \$10,000.

Figure 25: Outcomes of sentence appeals from the Magistrates' Court to the County Court by offenders in OHS cases, 2013–14 to 2022–23 (7 cases)



112. *Criminal Procedure Act 2009* (Vic) s 254(1)(a).

113. *Criminal Procedure Act 2009* (Vic) s 254(1)(b).

114. *Criminal Procedure Act 2009* (Vic) s 257(1).

115. *Criminal Procedure Act 2009* (Vic) ss 256, 259.

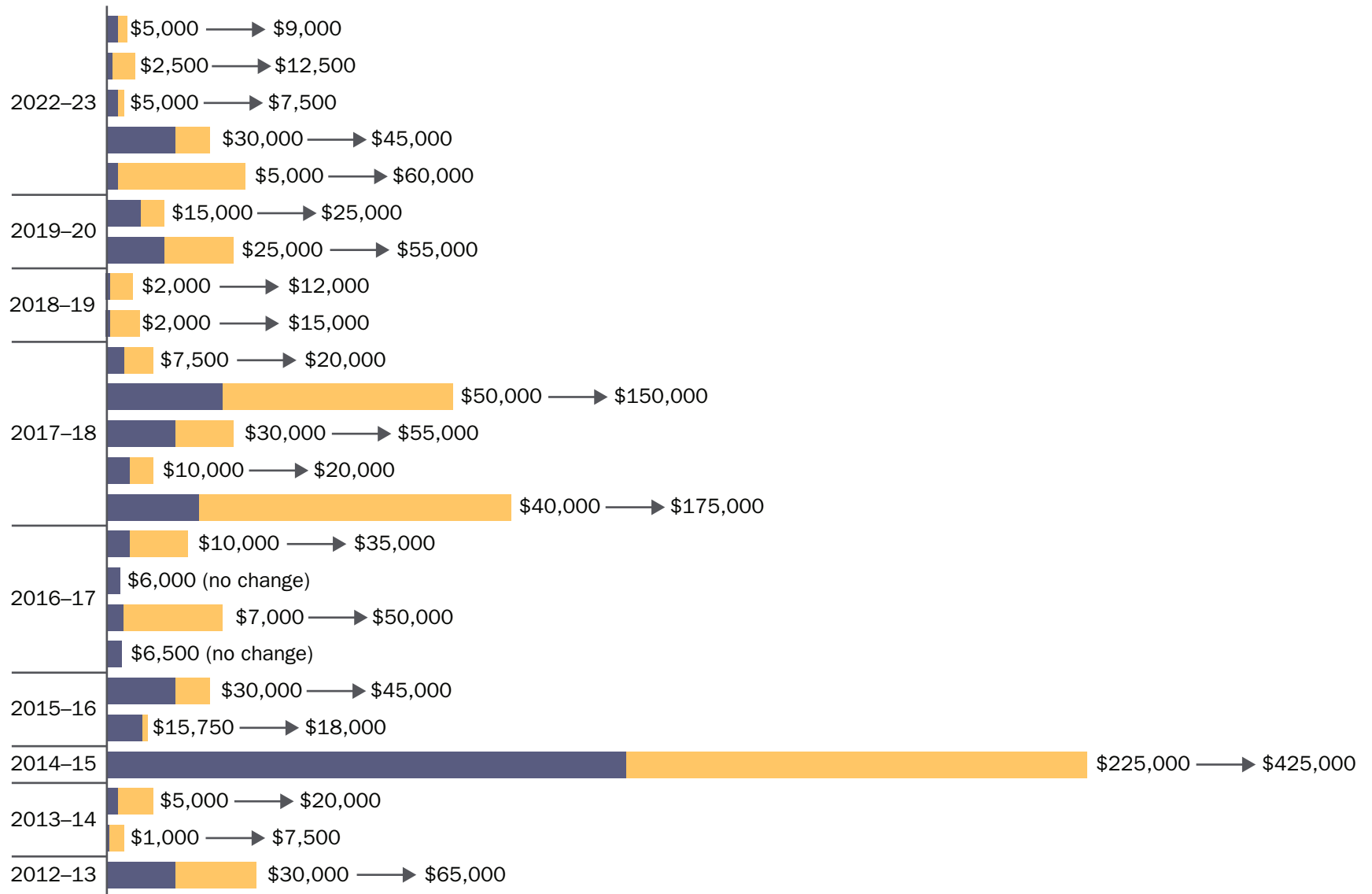
- 7.5 The outcomes of these 24 appeals are illustrated in Figure 26 (page 60). In 2 of those cases, the County Court imposed the same sentence that the Magistrates' Court had imposed (fines of \$6,000 and \$6,500). And in 1 case (in 2012–13), the County Court actually *reduced* the original sentence, from a fine of \$65,000 to \$30,000.
- 7.6 In the majority (21 cases) of *de novo* appeals by the Director of Public Prosecutions, however, the County Court significantly increased the original sentence. The 3 greatest *proportional* increases in penalties were 650% in 2 cases (from \$1,000 to \$7,500, and from \$2,000 to \$15,000) and 614% in 1 case (from \$7,000 to \$50,000). And the three greatest *numerical* increases in penalties were \$200,000 (from \$225,000 to \$425,000), \$135,000 (from \$40,000 to \$175,000) and \$100,000 (from \$50,000 to \$150,000). The average proportional increase in penalties among the 24 cases (including the case where the sentence was reduced) was 206%, effectively tripling the original sentence, and the average numerical increase was \$30,000.

Sentence appeals from the County Court to the Court of Appeal

- 7.7 Unlike *de novo* appeals from the Magistrates' Court, sentence appeals from the County or Supreme Court to the Court of Appeal can only succeed if there is an error in the original sentence. The error can be either specific or non-specific – the latter means that the original sentence was so high or low that it was not reasonably open to the sentencing judge to impose.¹¹⁶
- 7.8 From June 2005 to May 2023, there were 19 published Court of Appeal judgments that involved a sentence appeal by either the prosecution or the offender in an OHS case. Of those 19 cases:
- 10 were sentence appeals by the prosecution – 9 were on the basis that the original sentence was manifestly inadequate (too low), and 1 was on the basis that the compensation orders imposed were inadequate; and
 - 9 were sentence appeals by the offender – 6 were on the basis that the fine imposed was manifestly excessive (too high), while 1 related to an error of law (causation), 1 related to a compensation order (alleging it was excessive), and 1 related to multiple allegations of error in the original sentence.

116. For an overview of the framework for sentence appeals to the Court of Appeal, see Sentencing Advisory Council, *Sentence Appeals in Victoria: Second Statistical Research Report (2018)* 3–5.

Figure 26: Outcomes of sentence appeals from the Magistrates' Court to the County Court by the Director of Public Prosecutions in OHS cases, 2005–06 to 2020–21 (24 cases)



7.9 Of the 19 judgments, 5 involved offences contrary to the *OHS Act 1985*. While offences under the *OHS Act 1985* have been excluded from the majority of this report, those 5 cases are included here to provide an exhaustive account of appeal success rates in OHS cases sentenced during the reference period, especially given how few appeal cases there were.

Sentence appeals by the prosecution in OHS cases

7.10 In 9 sentence appeals, the Director of Public Prosecutions contended that the sentence was manifestly inadequate;¹¹⁷ 4 of those appeals were dismissed (involving 5 offenders).¹¹⁸ In the other 5 cases (involving 6 offenders), the Court of Appeal found that the sentence imposed was manifestly inadequate and resented 5 offenders¹¹⁹ but imposed the same sentence on 1 offender.¹²⁰ The changes made to sentence following successful sentence appeals by the Director of Public Prosecutions are shown in Figure 27 (page 62).

7.11 In 1 sentence appeal, the Director of Public Prosecutions successfully argued that the amounts of compensation orders awarded to the deceased employee's two children were inadequate, and the Court of Appeal increased both amounts, from \$15,000 to \$35,000, and from \$20,000 to \$50,000.¹²¹

117. The Director of Public Prosecutions may appeal to the Court of Appeal against a sentence imposed by an originating court if the Director considers that there is an error in the sentence imposed, that a different sentence should be imposed, and that the appeal should be brought in the public interest: *Criminal Procedure Act 2009* (Vic) s 287. The Court of Appeal has said that 'the ground of manifest inadequacy is a stringent one, difficult to make good', because the sentence imposed must have been 'wholly outside the range of sentencing options available' to the sentencing judge: *DPP v Karazisis & Ors* [2010] VSCA 350, [127].

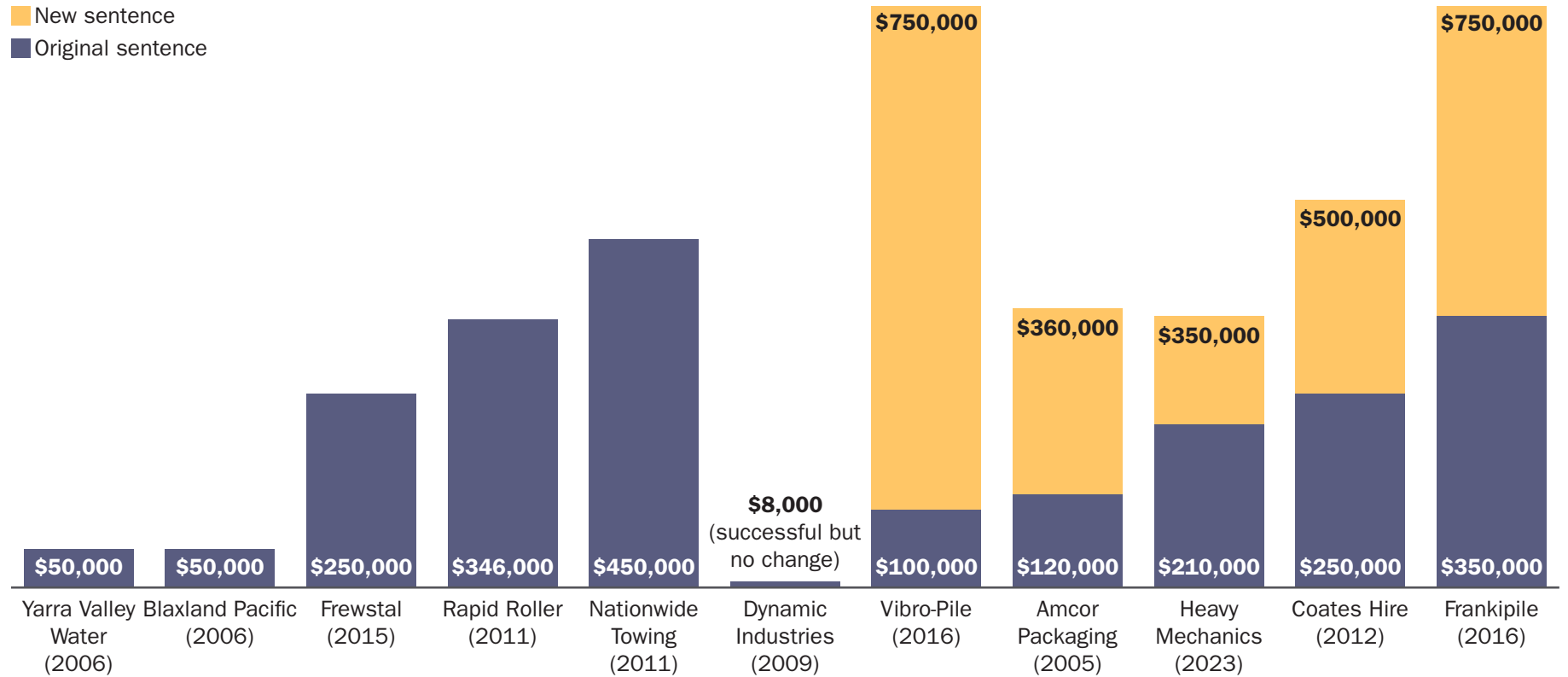
118. *DPP v Frewstal Pty Ltd* [2015] VSCA 266; *DPP v Nationwide Towing & Transport Pty Ltd* [2011] VSCA 291; *DPP v Rapid Roller Co Pty Ltd* [2011] VSCA 17; *DPP v Yarra Valley Water Ltd & Anor* [2006] VSCA 279.

119. *DPP v Heavy Mechanics* [2023] VSCA 69; *DPP v Vibro-Pile (Aust) Pty Ltd & Anor* [2016] VSCA 55; *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131; *DPP v Amcor Packaging Pty Ltd* [2005] VSCA 219.

120. *R v Irvine*; *DPP v Dynamic Industries Pty Ltd & Anor* [2009] VSCA 239. This was due to 'the delay of almost six years between the commission of this offence ... and the hearing of this appeal': at [69].

121. *DPP v Energy Brix Australia Corporation Pty Ltd* [2006] VSCA 116.

Figure 27: Outcomes of sentence appeals from the County Court to the Court of Appeal by the Director of Public Prosecutions in OHS cases, 2005–06 to 2020–21 (11 cases)



Sentence appeals by offenders in OHS cases

- 7.12 In 6 sentence appeals, the offender contended that the sentence was manifestly excessive; 4 of those appeals were unsuccessful (involving 5 offenders).¹²² And 2 appeals were successful (involving three offenders) (Figure 28, page 64). In the first (*Arthur's Seat* in 2010), the Court of Appeal reduced a \$110,000 fine to \$60,000, on the basis that there were significant mitigating factors.¹²³ In the second (in 2018), the Court of Appeal halved the fines imposed on both a construction company and its sole director, from \$380,000 to \$190,000, and from \$100,000 to \$50,000 respectively.¹²⁴
- 7.13 Of the other 3 sentence appeals by an offender, 2 were unsuccessful.¹²⁵ In the 1 successful appeal, the Court of Appeal found the sentencing court was wrong to find, beyond reasonable doubt, that a failure to provide written safety instructions caused an employee's death.¹²⁶

122. *Midfield Meat International Pty Ltd v The King* [2023] VSCA 106; *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241; *Orbit Drilling Pty Ltd & Anor v The Queen* [2012] VSCA 82; *Commercial Industrial Construction Group Pty Ltd v The Queen* [2006] VSCA 181.

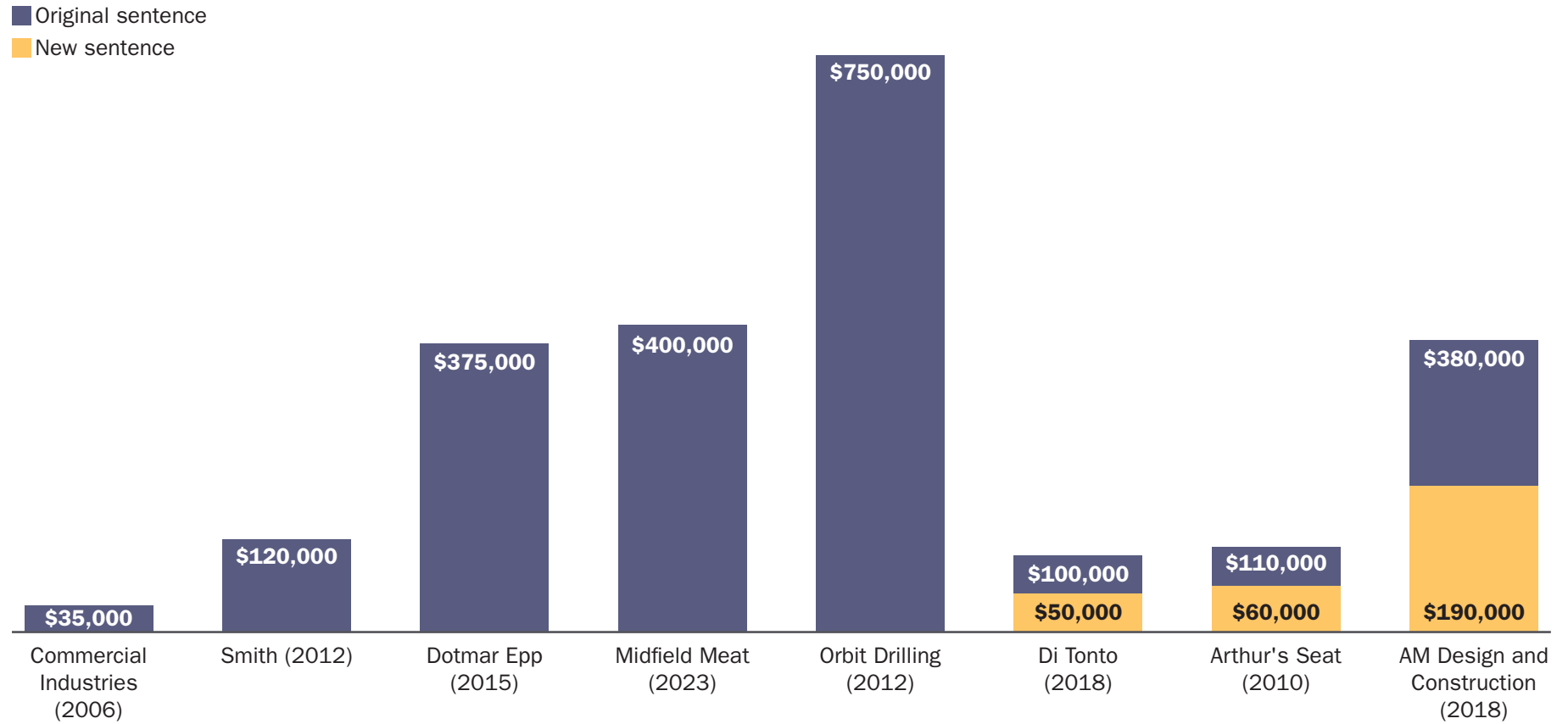
123. *Arthur's Seat Scenic Chairlift Pty Ltd v The Queen* [2010] VSCA 269. The court had particular regard 'to the safety record of the chairlift, its importance to the local economy and the [company's] financial position': at [27].

124. *Di Tonto & Anor v The Queen* [2018] VSCA 312. The Court of Appeal reduced the fines because the sole director was more negligent than reckless, the fines were 'out of kilter' with current sentencing practices for OHS offences at the time, the original fines would have been 'ruinous' to the company, and the court should have taken into account that, as the sole director of the company, 'it is he who will suffer the financial penalty' of both fines: at [28]–[29].

125. In *Esso Australia Pty Ltd v Robertson* [2005] VSCA 138, the offender unsuccessfully argued that a compensation order of \$100,000 was manifestly excessive, in a case involving an employee suffering post-traumatic stress disorder as a direct result of the OHS offences committed; and in *Leorke v The Queen* [2011] VSCA 213, the offender unsuccessfully argued that the sentencing court relied on a non-comparable case for comparison, that it should not have recorded a conviction, and that the offender could not pay the fine amount imposed.

126. *R v FRH Victoria Pty Ltd* [2010] VSCA 18.

Figure 28: Outcomes of sentence appeals from the County Court to the Court of Appeal by the offender in OHS cases, 2005–06 to 2020–21 (8 cases)



8. Payment of fines

8.1 This chapter discusses payment of fines for OHS offences. The management, collection and enforcement of fines for OHS offences are undertaken by the courts, Fines Victoria and WorkSafe, with Fines Victoria most commonly responsible for the monitoring, collection and enforcement of fines. As Fines Victoria's current systems were established in 2017, we requested fine payment data for OHS cases sentenced from 1 January 2017 to 30 June 2021 (4.5 years); Fines Victoria provided fine payment data to July 2023.

Key findings

- **Offenders in 392 OHS cases received a fine between 1 January 2017 and 30 June 2021**
- **354 companies and 38 individuals were fined**
- **Fines were imposed in 360 cases in the Magistrates' Court and 32 cases in the County Court**
- **Fines in the 392 cases totalled \$24 million (\$14.6 million in the Magistrates' Court and \$9.5 million in the County Court)**
- **Two-thirds (67%) of fines were fully paid as of July 2023, representing \$13.1 million (54% of the total value of fines)**
- **Fines were unpaid or only partly paid in 131 cases (fines were partly paid in 18 cases (4%) and were completely unpaid in the remaining 113 cases (29%))**
- **The rate of full payment was higher for companies than for individuals, while deregistered companies were significantly less likely to have fully paid fines**

Cases included in the analysis

- 8.2 Offenders in 392 OHS cases received a fine between 1 January 2017 and 30 June 2021 (360 cases in the Magistrates' Court, and 32 cases in the County Court). These 392 cases are the focus of this chapter.
- 8.3 Offenders in those 392 cases were fined \$24,046,305 in total, at an average of over \$61,000 per case. Fines imposed in the Magistrates' Court totalled \$14.6 million (an average of \$40,000 per case), while fines imposed in the County Court totalled \$9.5 million (an average of \$296,000 per case). We received fine payment data for all but 2 cases: 2 individuals in unrelated cases were fined a total of \$13,000 in the Magistrates' Court. It was assumed that these 2 individuals had not paid their fines.

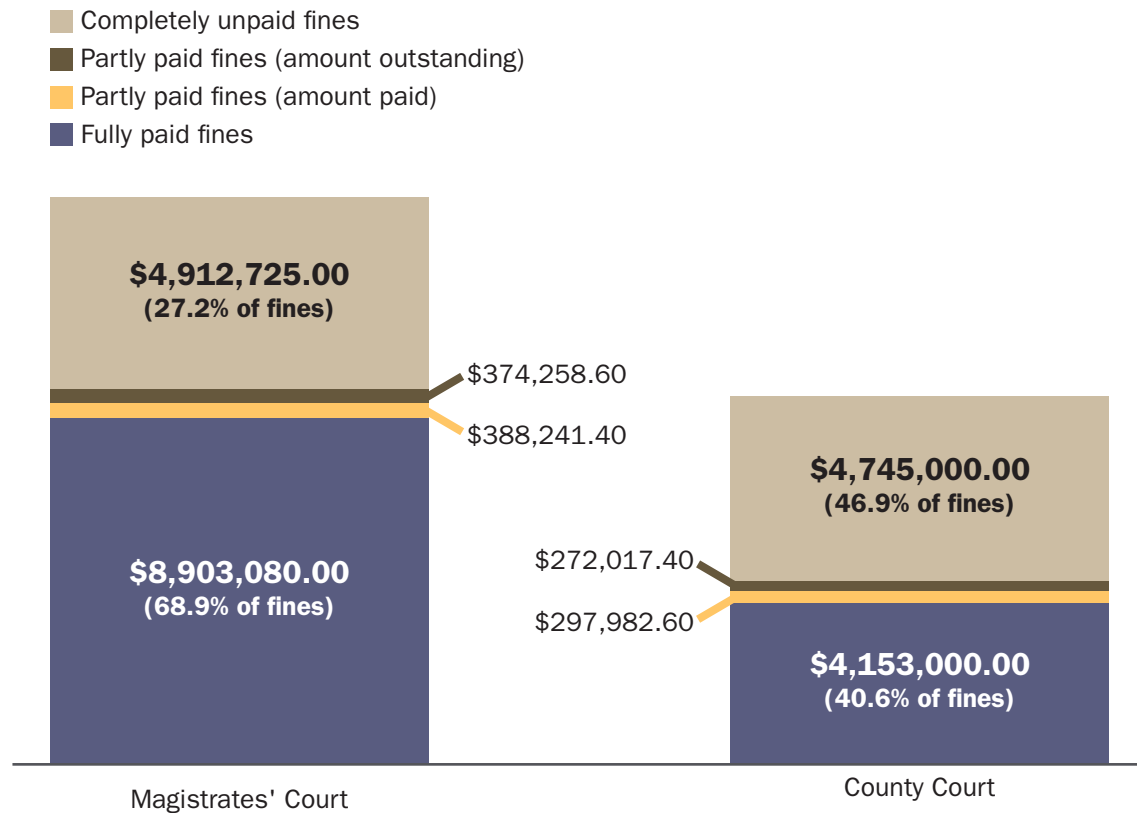
How many fines were fully or partly paid?

- 8.4 Offenders in 261 (66.6%) of the 392 cases had fully paid fines as of July 2023.¹²⁷ These fully paid fines amounted to 61.1% of the total value of fines imposed in the Magistrates' Court, or approximately \$8.9 million, and 43.9% of the total value of fines imposed in the County Court, or \$4.2 million (Figure 29, page 67). Together, the 261 fully paid fines represent just over half (54.3%) of the total dollar value of fines imposed (\$13,056,080 of \$24,046,305). There were also a number of fines that were partly paid,¹²⁸ albeit not many (14 cases in the Magistrates' Court and 4 in the County Court, or 18 in total). And there were 113 fines that were completely unpaid (98 Magistrates' Court fines, and 15 County Court fines). It is important to note that there may be a number of reasons why fines are not fully paid shortly after sentence, including offenders entering into payment arrangements.
- 8.5 To summarise, of the \$24,046,305 of fines imposed in 392 OHS cases during the 4.5-year period, \$10,304,001 imposed in 131 cases remain unpaid (42.9% of the total value of fines).

127. We considered a 'point in time' measure of fine payment to be the only feasible approach to this analysis due to the way the payment data was received. As such, not all cases in the 4.5 years from January 2017 to June 2021 had the same follow-up period in which we assessed whether fines were paid. The most recent fines were imposed in April 2021 in the County Court (1 fine) and in June 2021 in the Magistrates' Court (6 fines), meaning that these fines had a 2-year follow-up period in which to assess whether these fines were paid. All fines were paid by July 2023. Other recent fines imposed since January 2020 included 5 fines in the County Court and 77 fines in the Magistrates' Court. 71% of those 82 fines were fully paid by July 2023.

128. Partial payments are not recorded consistently across the three sources of fine payment data. Where sources of fine payment data do not agree, we have generally used the data that suggests the higher payment.

Figure 29: Total fines imposed in OHS cases, by payment status and jurisdiction, January 2017 to June 2021



- 8.6 Fines imposed in OHS cases in 2017 were fully paid at a similar rate (74.7%) as fines imposed in OHS cases in 2021 (73.5%), even though some fines imposed in 2021 were paid within a 2.5-year period. This suggests that a minimum 2-year follow-up period sufficiently accounts for potential delays in fine payments.
- 8.7 Table 12 (page 68) shows the rate of fully paid fines for individuals and companies sentenced in both the Magistrates' Court and the higher courts (the rates of fully paid fines were higher for companies than for individuals). It also shows the average fine imposed on individuals and companies (companies received higher fines than individuals did) and the average value of fully paid fines for individuals and companies (the values of fully paid fines are roughly comparable to the values of original fines imposed).

Table 12: Number of fines imposed for OHS offences, average fines imposed and average fully paid fines, by jurisdiction and offender type, January 2017 to June 2021

| Jurisdiction | Offender type | Number of fines imposed | Number of fully paid fines | Average fine imposed | Average fully paid fine |
|--------------------|---------------|-------------------------|----------------------------|----------------------|-------------------------|
| Magistrates' Court | Company | 328 | 233 (71.0%) | \$42,958.00 | \$36,923.18 |
| | Individual | 32 | 15 (46.9%) | \$15,252.50 | \$19,998.67 |
| County Court | Company | 26 | 12 (46.2%) | \$341,461.54 | \$339,833.33 |
| | Individual | 6 | 1 (16.7%) | \$98,333.33 | \$75,000.00 |

Factors relating to fine payment

8.8 This section explores the relationship between factors, or 'predictors' (see Appendix 3), identified in OHS cases and the likelihood of offenders paying fines imposed in OHS cases. Table 13 shows the rate of fully paid fines based on these factors (3 cases did not have available sentencing remarks or prosecution result summaries and so were excluded).

Table 13: Rate of fine payment in OHS cases, by factors in OHS cases (389 cases)

| Factor (predictor) | Value | Unpaid/ partly paid | Fully paid | Percentage fully paid |
|---------------------------------|----------------------|------------------------|------------|--------------------------|
| Offender type | Company | 107 | 244 | 69.5% |
| | Person | 22 | 16 | 42.1% |
| Jurisdiction | County Court | 17 | 12 | 41.4% |
| | Magistrates' Court | 112 | 248 | 68.9% |
| Fine amount | \$200,000 or more | 5 | 21 | 80.8% |
| | \$50,001 – \$200,000 | 21 | 42 | 66.7% |
| | \$10,001 – \$50,000 | 74 | 154 | 67.5% |
| | Less than \$10,000 | 29 | 43 | 59.7% |
| Industry | Construction | 57 | 73 | 56.2% |
| | Manufacturing | 22 | 92 | 80.7% |
| | Other | 46 | 90 | 66.2% |
| | Missing | 4 | 5 | 55.6% |
| Employer breach of duty offence | Involved in case | 99 | 225 | 69.4% |
| | Not involved | 30 | 35 | 53.8% |

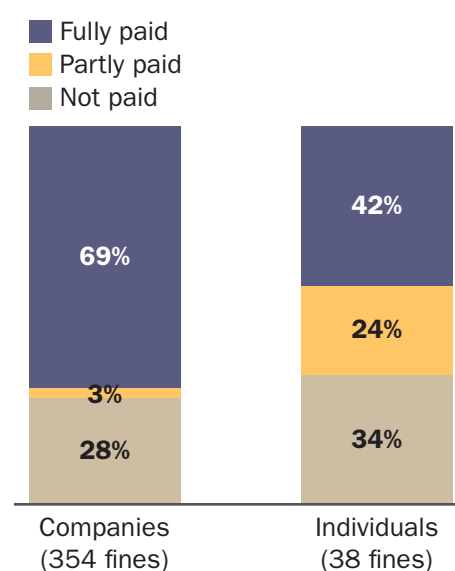
| Factor (predictor) | Value | Unpaid/ partly paid | Fully paid | Percentage fully paid |
|-----------------------------|------------------|------------------------|------------|--------------------------|
| Risk | Plant | 31 | 102 | 76.7% |
| | Fall from height | 44 | 56 | 56.0% |
| | Other | 50 | 98 | 66.2% |
| | <i>Missing</i> | 4 | 4 | 50.0% |
| Harm caused | Injury or death | 82 | 211 | 72.0% |
| | Risk only | 42 | 44 | 51.2% |
| | <i>Missing</i> | 5 | 5 | 50.0% |
| Guilty | Pleaded guilty | 103 | 246 | 70.5% |
| | Found guilty | 4 | 9 | 69.2% |
| | <i>Missing</i> | 22 | 5 | 18.5% |
| Conviction | Yes | 76 | 93 | 55.0% |
| | No | 50 | 163 | 76.5% |
| | <i>Missing</i> | 3 | 4 | 57.1% |
| Deregistration ^a | Yes | 29 | 2 | 6.5% |
| | No | 49 | 185 | 79.1% |
| | <i>Missing</i> | 29 | 57 | 66.3% |
| Total | | 129 | 260 | 66.8% |

a. Since only companies can be deregistered, 38 individuals are excluded from this factor.

8.9 The factors that show the greatest differences in rates of fully paid fines were as follows:

- **Deregistration:** 6.5% of fines for deregistered companies were fully paid, compared to 79.1% of fines for companies that were still active;
- **Offender type:** 42.1% of fines for individuals were fully paid, compared to 69.5% of fines for companies. However, Figure 30 shows that one-quarter of fines for individuals were partly paid, which could reflect payment arrangements under an agreement with Fines Victoria;
- **Conviction:** 55.0% of fines were fully paid where offenders had a conviction recorded, compared to 76.5% of fines where offenders had no conviction recorded;

Figure 30: Percentage of fines imposed for OHS offences, by payment status and offender type, all courts, January 2017 to June 2021



- **Industry:** 80.7% of fines for offenders in the manufacturing industry were fully paid, compared to 56.2% for offenders in the construction industry, and 66.2% for offenders in all other industries; and
- **Harm caused:** 72.0% of fines for cases involving an injury or death were fully paid, compared to 51.2% of fines for cases involving a risk only.

8.10 The strengths of the relationships between these factors and fine payment are determined by their correlation coefficients.¹²⁹ There were 294 cases considered for this analysis (95 cases were excluded due to missing values in any of the factors of interest¹³⁰). The correlation coefficients of the 10 factors are shown in Table 14. A positive value indicates correlation with *non-payment*, and conversely, a negative value indicates correlation with payment.

Table 14: Correlation coefficients for factors in OHS cases in the Magistrates' Court and County Court, January 2017 to June 2021¹³¹

| Factor (predictor) | Value | Spearman's correlation coefficient | Used in the model |
|---------------------------------|---|------------------------------------|-------------------|
| Deregistration | Deregistered offender | 0.447 | Yes |
| Conviction | Offender sentenced with conviction | 0.227 | Yes |
| Harm caused | Risk-only offence | 0.186 | Yes |
| Offender type | Offender is an individual | 0.173 | Yes |
| Jurisdiction | Sentenced in the County Court | 0.153 | Yes |
| Employer breach of duty offence | Employer breach of duty offence was sentenced | -0.124 | Yes |
| Risk | Risk was plant or fall from height | -0.089 | No |
| Industry | Industry was construction or manufacturing | 0.086 | No |
| Fine amount | Increasing fine amount for case | 0.085 | No |
| Plea | Offender pleaded guilty | -0.005 | No |

129. A correlation coefficient measures the proportion of the variance in outcome (fine payment) caused by a single factor (for example, deregistration of a company), without controlling for any other factors. It can have values of between -1 and 1.

130. Of the factors coded from prosecution result summaries and sentencing remarks, the post-sentence status of a company was the most difficult to identify (i.e. whether it had been deregistered), with 91 companies not having a status recorded for this analysis and 4 further cases having other missing values. These are the main reasons for the excluded cases.

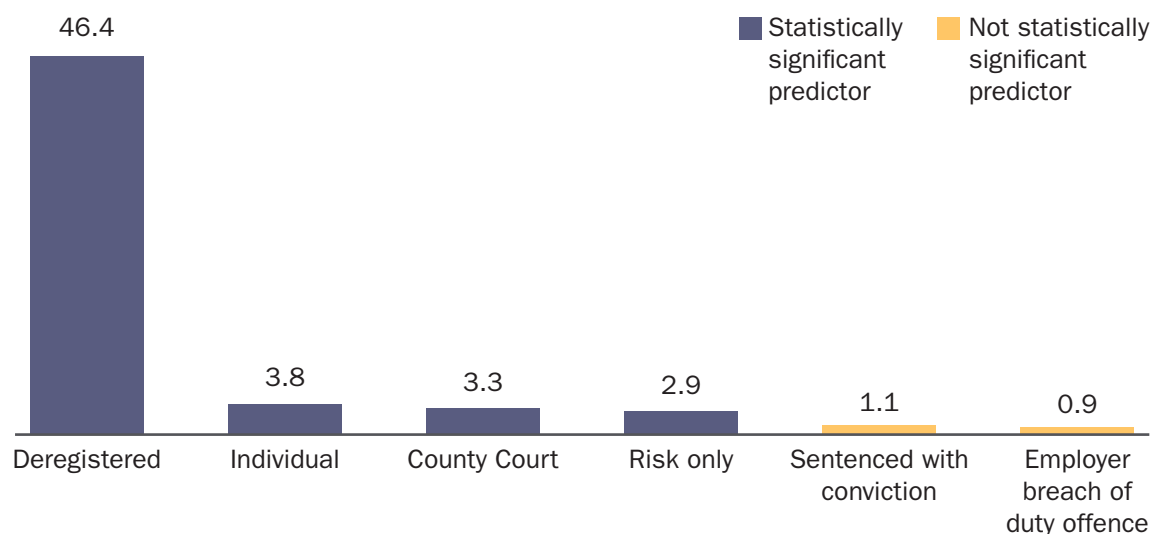
131. The correlation coefficients of the top 6 factors were statistically significant.

8.11 The factors with the greatest correlation to fine *non-payment* were offenders who were individuals, offenders sentenced with conviction, deregistered offenders¹³² and risk-only offences (i.e. offences where no one was injured or killed).

8.12 We examined the extent to which each factor predicts fine non-payment by calculating the odds ratio.¹³³ In this context, an odds ratio is the odds of non-payment among fines *with* a factor (e.g. conviction) divided by the odds of non-payment among fines *without* a factor (e.g. no conviction). Four of the factors had a statistically significant effect on the likelihood of non-payment (Figure 31).¹³⁴ Most strikingly, deregistration increased the likelihood of non-payment by an odds ratio of 46, while offenders being individuals, sentencing in the County Court and risk-only offences all increased the likelihood of non-payment by an odds ratio of 3 to 4.

‘Most strikingly, [a company] being deregistered increased the likelihood of non-payment by an odds ratio of 46’

Figure 31: Odds ratios for non-payment of fines imposed in the Magistrates’ Court and County Court, by factors in OHS cases, January 2017 to June 2021 (294 cases)¹³⁵



132. Excluding the 38 individuals who cannot be deregistered, the correlation of deregistration with non-payment increases to 0.512 for companies only.

133. In more general terms, an odds ratio represents the ratio of the odds in an ‘exposed’ group to the odds in an ‘unexposed’ group.

134. We chose a correlation coefficient of at least ± 0.1 to represent a moderately weak or better correlation with non-payment of fines, and we calculated the odds ratios for those factors.

135. There were 95 cases with missing values that were excluded.

8.13 While offenders who had a conviction recorded were less likely to have fully paid fines (see [8.9]), having a conviction recorded was not a significant predictor of non-payment. Similarly, the type of OHS offence in the case was also not a significant predictor.

8.14 There is some caution required in considering these findings:

- While individuals are more strongly associated with not having a *fully* paid fine, it is important to bear in mind that, as shown in Figure 30, individuals were significantly more likely than companies to have partly paid fines. This suggests that individuals had entered into a payment arrangement and continued to pay their fines after 30 June 2023.
- Fines imposed in the County Court increased the likelihood of non-payment by an odds ratio of 3. As these fines were imposed for offending that was more likely to involve injuries and death, this contrasts with the overall finding that cases involving harm are likely to have fines fully repaid. There seems to be an unidentified factor relating to non-payment among offenders sentenced in the higher courts.

Appendix 1: Penalty units

| Maximum penalties expressed in penalty units | Dollar amount for 2023–24 |
|--|---------------------------|
| 1 | \$192.31 |
| 5 | \$961.55 |
| 25 | \$4,807.75 |
| 60 | \$11,538.60 |
| 100 | \$19,231.00 |
| 180 | \$34,615.80 |
| 240 | \$46,154.40 |
| 300 | \$57,693.00 |
| 500 Maximum fine for individuals in the Magistrates' Court (<i>Sentencing Act 1991</i> (Vic) s 112A) | \$96,155.00 |
| 900 | \$173,079.00 |
| 1,800 | \$346,158.00 |
| 2,500 Maximum fine for companies in the Magistrates' Court (<i>Sentencing Act 1991</i> (Vic) s 113D(1A)) | \$480,775.00 |
| 9,000 | \$1,730,790.00 |
| 20,000 | \$3,846,200.00 |
| 100,000 | \$19,231,000.00 |

Appendix 2: Methodology

Connecting WorkSafe data to Magistrates' Court sentencing outcomes

We obtained prosecution result summary data for all incidents from 2012 to 2023. These incidents were numbered by WorkSafe independently. The majority of WorkSafe data did not include references to Magistrates' Court data to enable exact linkage between the datasets.

The main limitations in matching the data were:

- the company name was not available in the sentencing data in the relevant period;
- case IDs were not available in WorkSafe data prior to 2021;
- total fine amounts for cases are not recorded in the sentencing data;
- WorkSafe data incidents can refer to multiple charges in one case sentenced in the Magistrates' Court;
- WorkSafe data incidents can refer to a sample of charges in one case sentenced in the Magistrates' Court, with the remaining charges recorded under another incident;
- cases of related offenders sentenced separately but on the same date may have the same WorkSafe incident number; and
- fine amounts were missing from WorkSafe data in some cases or did not match the prosecution result summaries.

We matched WorkSafe data to sentencing outcomes on the basis of a best possible match.

If the sentencing date matched the prosecution date, the court locations were the same, and both date and location appeared only once in the WorkSafe and Magistrates' Court datasets, it was deemed a 'perfect' match for the WorkSafe prosecution.

If the sentencing date matched the prosecution date and the court locations were not the same, the sentence in the Magistrates' Court was interrogated to identify the error in the court location. If resolved, the case was deemed a match for the WorkSafe prosecution.

Otherwise, using a subset of data on sentencing outcomes in the Magistrates' Court (798 cases where offences against the *OHS Act 2004* received fines), we matched WorkSafe prosecutions to the:

1. best match: if the sentencing outcomes that share a **date and court location** and the date and court combination exists **just once** in the **sentencing** data, then this WorkSafe case is likely represented in the sentencing data by the case at that date; or
2. next best match: if the sentencing outcomes share a **date** and the date exists **just once** in the sentencing data, then this WorkSafe case is probably represented in the sentencing data, but the court location is wrong in one of the sources.

Otherwise, when there were multiple cases finalised on identical dates and no single WorkSafe incident was connected according to the steps above, we manually checked the incidents and cases occurring on same dates to identify the correct matches between the datasets.

Identifying co-offenders

To identify co-offenders, we relied on data from sentencing remarks, WorkSafe prosecutions, and sentencing data. If only one offender for a case was identified in narrative data from sentencing remarks or prosecution result summaries, we assumed only one offender was involved in a case.

Conversely, if narrative data was not available, we assumed that separate offenders were co-sentenced co-offenders if they were sentenced in different cases but on the same date, at the same court location, and with similar presentment numbers.

We assumed that, in the higher courts, there were 5 related pairs of offenders (in 10 separate cases) where sentencing remarks were not available. We also assumed that, in the Magistrates' Court, there were 118 cases comprising related groups of up to 5 co-sentenced co-offenders where the defendant's names and prosecution result summaries were not available.

Appendix 3: Statistical analysis

Factors associated with fine payment

For categorical variables, correlation was assessed by Spearman's Rho. The 6 predictors (described as factors) chosen for further investigation had a minimum magnitude of Rho of 0.1, and all 6 predictors had p-values of less than 0.05. Therefore, 6 of the 10 predictors were practically important and statistically significant.

Table A1: Predictors chosen for further investigation

| Predictor | Spearman's Rho | p-value |
|--|----------------|------------------|
| Deregistration | 0.447 | <0.001 |
| Conviction | 0.227 | <0.001 |
| Harm caused | 0.186 | <0.001 |
| Offender type | 0.173 | 0.001 |
| Jurisdiction | 0.153 | 0.002 |
| Industry | 0.086 | 0.096 |
| Fine amount | 0.085 | 0.095 |
| Plea | -0.005 | 0.923 |
| Risk | -0.089 | 0.081 |
| Employer breach of duty offence | -0.124 | 0.015 |

Odds ratios were calculated for the 6 significantly correlated predictors. Odds ratios with 95% confidence intervals that encompass 1 were deemed to be not statistically significant.

Table A2: Odds ratios for correlated predictors

| Predictor | Odds ratio | 95% confidence interval for odds ratio | |
|---------------------------------|------------|--|---------|
| | | Lower | Upper |
| Deregistration | 46.376 | 10.188 | 211.110 |
| Conviction | 1.129 | 0.600 | 2.125 |
| Harm caused | 2.880 | 1.472 | 5.633 |
| Offender type | 3.753 | 1.593 | 8.845 |
| Jurisdiction | 3.275 | 1.193 | 8.993 |
| Employer breach of duty offence | 0.912 | 0.396 | 2.105 |

For companies only (351 fines), there were similar results, with 6 sufficiently correlated variables. The company's industry (construction and manufacturing versus all other) and higher fine amounts were correlated with non-payment, compared to all fines.

Table A3: Predictors for companies

| Predictor | Spearman's Rho | p-value |
|----------------|----------------|---------|
| Deregistration | 0.512 | <0.001 |
| Conviction | 0.265 | <0.001 |
| Harm caused | 0.166 | 0.002 |
| Fine amount | 0.144 | 0.007 |
| Industry | 0.136 | 0.011 |
| Jurisdiction | 0.125 | 0.019 |

Only deregistration had a significant odds ratio of 39.7.

Table A4: Odds ratios for companies

| Predictor | Odds ratio | 95% confidence interval for odds ratio | |
|--|------------|--|--------|
| | | Lower | Upper |
| Deregistration | 39.687 | 8.632 | 182.46 |
| Jurisdiction | 2.851 | 0.615 | 13.211 |
| Harm caused | 2.035 | 0.927 | 4.471 |
| Conviction | 1.621 | 0.766 | 3.431 |
| Industry (construction versus other) | 1.566 | 0.739 | 3.319 |
| Fine amount (\$200,000 or more versus less for case) | 0.542 | 0.09 | 3.271 |

For individuals only (38 fines) there were large but not statistically significant correlations, and thus no significant predictors of fine non-payment.

Table A5: Predictors for individuals

| Predictor | Spearman's Rho | p-value |
|---------------------------------|----------------|---------|
| Jurisdiction | 0.223 | 0.178 |
| Harm caused | 0.169 | 0.325 |
| Industry | 0.131 | 0.448 |
| Fine amount | -0.124 | 0.46 |
| Employer breach of duty offence | -0.275 | 0.094 |

Table A6: Odds ratios for individuals

| Predictor | Odds ratio | 95% confidence interval for odds ratio | |
|--|-------------------|---|--------------|
| | | Lower | Upper |
| Jurisdiction | 7.449 | 0.335 | 165.407 |
| Industry (construction versus other) | 1.594 | 0.214 | 11.876 |
| Harm caused | 1.155 | 0.194 | 6.861 |
| Fine amount (\$50,001 to \$200,000 versus less for case) | 0.556 | 0.028 | 10.97 |
| Employer breach of duty offence | 0.246 | 0.041 | 1.481 |

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