Maximum Penalties for Repeat Drink Driving

Report

Sentencing Advisory Council
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## Appendix 2—Relevant Legislation in Other Australian Jurisdictions

The primary legislation containing drink driving offences for each jurisdiction other than Victoria is as follows.

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<th>Legislation</th>
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<td>• Road Transport (Safety and Traffic Management) Regulation Act 2000 (ACT)</td>
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Appendix 1—Section 49(1)–(3) Road Safety Act 1986 (Vic)

Section 49(1) provides:

(1) A person is guilty of an offence if he or she—
   (a) drives a motor vehicle or is in charge of a motor vehicle while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor vehicle; or
   (b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath; or
   ... (c) refuses to undergo a preliminary breath test in accordance with section 53 when required under that section to do so; or
   ... (d) refuses or fails to comply with a request or signal to stop a motor vehicle, and remain stopped, given under section 54(3); or
   (e) refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A); or
   ... (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
      (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
      (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; or
   (g) has had a sample of blood taken from him or her in accordance with section 55, 55B, 55E or 56 within 3 hours after driving or being in charge of a motor vehicle and—
      (i) the sample has been analysed within 12 months after it was taken by a properly qualified analyst within the meaning of section 57 and the analyst has found that at the time of analysis the prescribed concentration of alcohol or more than the prescribed concentration of alcohol was present in that sample; and
      (ii) the concentration of alcohol found by the analyst to be present in that sample was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle.
   ...

(2) A person who is guilty of an offence under paragraph (a) of sub-section (1), other than an accompanying driver offence, is liable—
   (a) in the case of a first offence, to a fine of not more than 25 penalty units or to imprisonment for a term of not more than 3 months; and
   (b) in the case of a subsequent offence, to imprisonment for a term of not more than 12 months.

(3) A person who is guilty of an offence under paragraph (b), (ba), (c), (ca), (d), (e), (ea), (f) or (g) of sub-section (1), other than an accompanying driver offence, is liable—
   (a) in the case of a first offence, to a fine of not more than 12 penalty units; and
   (b) in the case of a subsequent offence, to a fine of not more than 25 penalty units or to imprisonment for a term of not more than 3 months.
1. Introduction

This project arose from concerns expressed by Victorian magistrates and police about the statutory maximum penalty of three months’ imprisonment currently available for repeat drink drivers. These groups, and others, have called for increases in the statutory maximum penalties for repeat drink driving offences.

The offences under review are contained in section 49(1)(b), (c), (d), (e), (f) and (g) of the Road Safety Act 1986 (Vic) (RSA). For the purposes of this paper, these sub-sections will be referred to as the ‘relevant provisions’ and the offences therein as the ‘relevant offences’. The relevant offences can be divided into two categories—

Category A – Driving or being in charge of a motor vehicle with a blood alcohol concentration (BAC) present in the blood or breath which reaches or exceeds the prescribed concentration of alcohol (PCA); or within three hours of driving or being in charge of a motor vehicle having a BAC shown on a breath analysing instrument or present in a blood sample which equals or is more than the PCA and is not due solely to alcohol consumed after driving or being in charge of the motor vehicle.

Category B – Refusing to agree to a preliminary breath test [PBT]; refusing or failing to obey a request or signal to stop a motor vehicle at a PBT station; or refusing to agree to a breath test or a blood test.

The current statutory maximum penalty for someone found guilty of a first offence against the relevant provisions is a fine of 12 penalty units ($1,257.72). This penalty is not under review. The current statutory maximum penalty for someone found guilty of a repeat offence against the relevant provisions is a fine of 25 penalty units ($2,620.25) or a maximum term of imprisonment of three months. This paper examines whether the maximum three months’ imprisonment is sufficient.

This paper does not review the statutory maximum penalty for the offence of driving under the influence (section 49(1)(a) of the RSA). This more serious offence arises when a person drives or is in charge of a motor vehicle whilst under the influence of intoxicating liquor or any drug to such an extent as to be incapable of having proper control of the motor vehicle. A first time offender found guilty of this offence is liable to a maximum fine of 25 penalty units ($2,620.25) or up to 3 months’ imprisonment. Subsequent offences attract a maximum term of imprisonment of 12 months.¹

This paper addresses the specific issue of the adequacy of the current statutory maximum sentence of imprisonment for repeat drink drivers who commit one of the offences under review. In addressing this issue, this paper sets out the functions of a statutory maximum penalty and considers whether these functions are fulfilled. In approaching this task the Council is cognisant of the fact that such a review is only one part of a broader strategy to combat drink driving and will not, in itself, address the fundamental problems related to repeat drink driving.

The Council recognises that drink driving is a highly complex social, economic and public health issue. Drink drivers, and particularly repeat offenders, frequently face a range of socio-economic and health problems. The Council also recognises that the effective management and rehabilitation of drink driving offenders is of paramount importance and, despite the comprehensive approach of the Victorian system, there are areas in which the current sentencing options and ancillary penalties could be improved.

The rehabilitation and education of drink drivers in Victoria has recently been reviewed in a research report commissioned by the Royal Automobile Club of Victoria Ltd (RACV). The RACV commissioned the Centre for Accident Research and Road Safety—Queensland (CARRS-Q) to review the current

¹ Road Safety Act 1986 (Vic) s 49(2).
Victorian drink driver program to ‘determine what best practice drink drive rehabilitation is and compare this to what is currently delivered in Victoria’. The research report outlined a number of shortcomings of the Victorian system and provided recommendations for improving drink driver rehabilitation in Victoria. Some of these recommendations are referred to in this paper.

The issue of repeat drink drivers has recently received considerable media attention with a number of well publicised arrests for drink driving offences—

- On 27 June 2005 a truck driver was pulled over by police for erratic driving and was found to have a BAC of 0.179. The truck driver thought that he was in Benalla when in fact he was in Benwick.
- On 23 June 2005 a motorist, with his two children in the back seat of his car, was arrested in Werribee for speeding and was found to have a BAC of 0.22. The motorist had been disqualified from driving, had eight previous convictions for drink driving and 16 for driving while disqualified.
- On 17 June 2005 a NSW motorist was involved in a collision in Highnett, Victoria. He had a BAC of 0.311. His three children were in the car.
- Early in June a serial drink driver, who was unlicensed and more than four times over the limit, crashed into a car killing two people. He received a minimum ten year jail term.

One senior magistrate was reported as commenting—

As things stand, a driver can come before us on their fifth drink-driving offence, or their 15th, or their 50th, with a reading of 0.20, and they can’t be sentenced on that charge alone to any more than three months. Community groups have also expressed serious concern with the penalties imposed on repeat drink drivers. Mr Steve Medcraft, spokesperson for People Against Lenient Sentences, suggested that the penalty for first offenders could be three months, 12 months for a second offence and five years for a third offence—

Obviously these people have a drinking problem but they could undergo counselling and compulsory treatment while in a prison farm to get them off the grog and keep the community safe.

Mr Bruce McKenzie, the Victorian Police Association secretary, criticised the inadequacy of the current penalty for repeat drink drivers—

Our members are out there day and night, trying to dissuade people from drink driving, and the magistrates need to be supported by appropriate penalties.

In Victoria between 1988 and 2000 the proportion of repeat drink drivers increased by nine per cent, with more than one in four drink drivers having at least one prior offence since 1992. Of those offenders with prior offences for drink driving, 67 per cent were from metropolitan Melbourne. A repeat drink driver is more likely to be male (over 90 per cent), aged 21 to 29 years (almost 40 per cent), and have a high level BAC (0.15 or more). There is a one in four chance that a repeat offender will be driving without a valid licence.

Research shows that almost half the drink drivers with a high level BAC (0.15 or more) are repeat offenders. Evidence in New South Wales indicates that while the crash risk associated with a BAC of 0.05 is twice that associated with a zero BAC, the crash risk associated with a BAC of 0.15 is 25 times that associated with a zero BAC.

References

Australian Transport Safety Bureau, Alcohol and Road Fatalities (2001) Monograph 5
Lander, H., ‘Road Trauma and Drink Driving a Deadly Double’ (1987) 7 Law Institute Journal 678
RACV, Drink Driver Rehabilitation and Education in Victoria 05/01 (2005) Research Report
RACV, Drink Driver Rehabilitation and Education in Victoria Summary Report 05/01 (2005) Report Summary
VicRoads, Getting Tougher on Drink Drivers Publication Number 01047
von Hirsch, Andrew, Censure and Sanctions (1993)
Figures 19 and 20 illustrate the existing and proposed Victorian statutory maximum for offenders with one prior offence (Figure 19) and two prior offences (Figure 20) committing a new Category A offence with BAC readings of 0.05, 0.10 and 0.15 as against the existing statutory maximum penalties in other Australian jurisdictions.

The functions of a statutory maximum penalty include—
- Defining the boundary of lawful action against an offender, including providing for the worst examples of the offence that sentencers are likely to encounter,
- Reflecting community views about the seriousness of the offence and providing sentencers with a legislative indication of the gravity of the offence relative to other offences,
- Acting as a general deterrent by warning potential offenders of the maximum punitive ‘price’ they are liable to pay if they commit the offence.

The Council has reviewed the maximum term of imprisonment available for repeat drink drivers and is of the opinion that it is inadequate to accommodate sufficiently the worst types of cases, that it does not reflect the seriousness with which the community views repeat drink driving and that it is not sufficiently high to act as a general deterrent to potential offenders. The Council is therefore of the view that the statutory maximum penalty is insufficient.

For Category A offences, the Council is of the view that repeat offenders with a high level BAC (0.15+) are a more serious category of offender and that the maximum term of imprisonment provided for by the legislation should reflect this.

For Category B offences, the Council is of the view that the maximum statutory penalty available should be in line with the maximum penalty available for high level BAC Category A offences. This would reflect the gravity of these offences and ensure that there is no incentive in offenders trying to avoid the operation of drink driving penalties by failing to comply with requirements such as preliminary breath tests.

The Council is also of the opinion that the statutory maximum penalty of imprisonment available for repeat offenders should be dependent on the number of previous offences that the offender has committed.

2. Offences under Review

Section 49(3)(b) of the RSA sets out various drinking offences involving alcohol and other drugs. As discussed above, the relevant offences can be grouped into two categories—[A] reaching or exceeding the prescribed concentration of alcohol, and [B] refusing a blood or breath test or failing to stop or remain stopped. The statutory maximum penalty for these offences is contained in section 49(3) of the RSA. For a first offence a person found guilty is liable to a maximum fine of 12 penalty units ($1,257.72)\(^9\) and for a subsequent offence to a maximum fine of 25 penalty units ($2,620.25) or a maximum term of imprisonment of three months.\(^10\)

In addition to these statutory maximum penalties, there is a comprehensive scheme of mandatory ancillary penalties for drink drivers in Victoria. These place a significant additional burden on offenders over and above the ‘primary’ penalty that they receive. Ancillary sanctions include cancellation of the person’s driver’s licence or permit and disqualification from obtaining a new one.\(^11\) These are discussed in Chapter 7 (below).

In Victoria, a person is classified as a ‘repeat’ offender where they have previously been found guilty or convicted of an offence specified in section 48(2) of the RSA (‘a prior drink driving


\(^10\) See Appendix 1.

\(^11\) Road Safety Act 1986 (Vic) s 49(3)(a).

\(^12\) Road Safety Act 1986 (Vic) s 49(3)(b).

\(^13\) For the purposes of this paper, where an offender’s driver’s licence or permit has been cancelled and the offender has been disqualified from obtaining one for a specified time under section 50 of the Road Safety Act 1986 (Vic), the offender will be referred to as being ‘disqualified from driving’. Where an offender is charged with driving during a period of disqualification from obtaining a licence or permit the offender will be referred to as ‘driving while disqualified’.
offence'). Such offences include an offence against any one of the paragraphs of section 49(1),
For purposes including licence cancellation and disqualification and provisions relating to alcohol
interlocks, the current offence is to be regarded as a first offence where the prior conviction or
finding of guilt was made 10 years or more before the commission of the current offence. The
definition of a repeat offender varies among Australian jurisdictions.

2.1 Category A Offences

These offences consist of—
- Driving or being in charge of a motor vehicle while the prescribed concentration of alcohol or
more than the prescribed concentration of alcohol is present in the blood or breath (section
49(1)(b) RSA).
- Within three hours of driving or being in charge of a motor vehicle having the prescribed
concentration of alcohol or more than the prescribed concentration of alcohol shown on a
breath analysing instrument which is not due solely to consuming alcohol after driving or
being in charge of the motor vehicle (section 49(1)(f) RSA).
- Within three hours of driving or being in charge of a motor vehicle having the prescribed
concentration of alcohol or more than the prescribed concentration of alcohol present in a
blood sample which is not due solely to consuming alcohol after driving or being in charge of
the motor vehicle (section 49(1)(g) RSA).

The prescribed concentration of alcohol for most drivers is 0.05. However, some drivers (for
example, drivers of large vehicles, taxi drivers, learner drivers and probationary drivers) are required
to have a zero BAC.

2.2 Category B Offences

These offences consist of—
- Refusing to agree to a preliminary breath test when required to do so (section 49(1)(c) RSA).
- Refusing or failing to obey a request or signal to stop a motor vehicle, and remain stopped
at a preliminary breath testing station (section 49(1)(d) RSA).
- Refusing to agree to a breath test or a blood test under section 55 (section 49(1)(e) RSA).

3. Role of the Statutory Maximum Penalty

3.1 Introduction

In setting or reviewing a statutory maximum penalty it is necessary to take into account the
functions that a statutory maximum penalty should serve, including—
- Placing a legally defined ‘ceiling’ on the lawful action permitted by the State against an
individual who commits an offence. This ceiling should be sufficiently low to provide
meaningful guidance to sentencers as to the relative gravity of the offence and yet
sufficiently high to provide for the worst examples of the crime that the sentencer may face.
- Reflecting the perceptions of the community about the gravity of the offence and providing an
indication to sentencers as to how to weigh up the seriousness of the offence.
- Serves as a general deterrent to potential offenders by declaring the highest punishment
that they will face if they commit the offence.

14 Apart from an accompanying driver offence, for example, where a licensed driver has a BAC of or above
the PCA while sitting beside a learner driver for the purpose of enabling that learner driver lawfully to
drive a vehicle. Road Safety Act 1986, (Vic) s 49(2).
15 Road Safety Act 1986 (Vic) s 50AA.
16 Road Safety Act 1986 (Vic) s 3.
17 Road Safety Act 1986 (Vic) s 52.
18 Freiberg (2002), above n 9, 55; Fox and Freiberg (1999), above n 9, 236; Sentencing Task Force
(1989), above n 9, 22.

9.3 Category B Offences

Similarly, the Council believes that the statutory maximum penalty for repeat offenders committing
the offences of refusing a breath or blood test and failing to stop or remain stopped at a
preliminary breath testing station should also be increased. The Council considers that any
increase should be consistent with increases for Category A offences with a BAC of 0.15 or more,
both to reflect the objective offence seriousness, and to ensure that there is no penalty incentive
for offenders trying to avoid the operation of drink driving laws.

9.4 Recommendations

<table>
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<th>RECOMMENDATIONS</th>
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| 1. The statutory maximum penalty of imprisonment for repeat offenders committing a relevant
  offence should be dependant on the blood alcohol concentration of the offender and the
  number of prior offences that the offender has committed. |
| 2. The statutory maximum penalty of imprisonment for offenders committing a relevant offence
  should be increased as follows— |
| Offence and priors | Category A offence | Category A offence | Category B offence |
|-------------------|--------------------|--------------------|
| Relevant offence with no drink driving priors | NO CHANGE—Fine of 12 penalty units | NO CHANGE—Fine of 12 penalty units | NO CHANGE—Fine of 12 penalty units |
| Relevant offence with one prior drink-driving offence | 6 months’ imprisonment | 12 months’ imprisonment | 12 months’ imprisonment |
| Relevant offence with two or more prior drink driving offences | 12 months’ imprisonment | 18 months’ imprisonment | 18 months’ imprisonment |

3. If Recommendation 2 is implemented, the statutory maximum fine for a repeat offence under the
relevant provisions should be increased to be consistent with the increased statutory maximum terms of imprisonment.

4. If Recommendation 2 is implemented, the statutory maximum penalty for repeat offences of
driving under the influence under section 49(1)(a) should be reviewed to achieve consistency
with the statutory maximum penalties for the relevant offences. The Council recommends
that the penalty for driving under the influence should be consistent with that for committing
a Category A offence with a BAC of 0.15 or above or a Category B offence.
9. Recommendations

9.1 Number of Prior Offences and BAC

As discussed above, research shows that almost half of drink drivers with a high level BAC (0.15 or more) are repeat offenders. Evidence in New South Wales indicates that while the crash risk associated with a BAC of 0.05 is twice that associated with a zero BAC, the crash risk associated with a BAC of 0.15 is twenty-five times that associated with a zero BAC.\(^ {178} \) The Council is of the view that repeat offenders with a high level BAC constitute a more serious category of offender and that the maximum term of imprisonment provided for by the legislation should reflect this.

The RACV report described a trend in other jurisdictions towards identifying ‘hard-core offenders’—view that repeat offenders with a high level BAC constitute a more serious category of offender and that 0.15 or more and one prior offence (or a BAC below 0.15 and two or more priors) will be the same as the statutory maxima applicable to other offences in the

The Council is of the opinion that the statutory maximum penalty of imprisonment available for repeat offenders should reflect both the number of prior offences that offenders have committed and, for Category A offences, offenders’ BAC.

As discussed above, recent data from Victoria Police examining the number of repeat drink driving offenders in 2003 shows that 63 per cent of repeat offenders had one prior drink driving offence, 22 per cent had two prior offences and 15 per cent had at least three prior offences (see Figure 4 above). The Council is of the opinion that the statutory maximum penalty should be increased for offenders with one prior offence (which according to the 2003 data would apply to just under two-thirds of repeat drink drivers) and that the statutory maximum penalty should be further increased for offenders with two or more prior offences (which would apply to the remaining one-third of repeat offenders).

9.2 Category A Offences

For the reasons discussed above, the Council believes that it is appropriate to increase the maximum term of imprisonment for offenders with one or more prior drink driving offences who are found guilty of an offence against section 49(1)(b), (f) or (g).

The Council has been mindful of the need to ensure that the revised penalties are consistent with the statutory maxima applicable to other offences in the RSA scheme. Under the Council’s proposals, the statutory maximum imprisonment penalty for a Category A offence with a BAC of 0.15 or more and one prior offence (or a BAC below 0.15 and two or more priors) will be the same as the statutory maximum penalty of imprisonment for driving under the influence\(^ {180} \) with one or more prior offences (12 months’ imprisonment). The Council is of the view that, if the recommendation regarding the penalty for the relevant offences is implemented, the statutory maximum penalty for a repeat offence of driving under the influence should be reviewed and

As part of the exercise of setting the statutory maximum penalty it is also appropriate to consider current sentencing practices and, where possible, informed public opinion.

3.2 Principle of Legality

The statutory maximum penalty provides a finite upper boundary on a sentence’s power and discretion to punish and / or rehabilitate offenders.\(^ {19} \) As well as setting the upper limit of judicial discretion when sentencing offenders, it represents symbolic recognition that the State’s power to deal with offenders must be subject to lawful restraint.

A statutory maximum penalty should be sufficiently limited to provide indication of the relative gravity of the offence and penalty as compared with other offences and yet be broad enough to allow the sentencer sufficient scope to accommodate the worst examples of the offence that are likely to be encountered.\(^ {20} \)

In addition to factors such as the nature and gravity of the offence, the offender’s degree of responsibility for the offence, the previous character of the offender (including prior offences), and any aggravating or mitigating circumstances, the sentencer must have regard to current sentencing practices and the statutory maximum penalty when determining an offender’s sentence.\(^ {21} \)

The Victorian Court of Appeal recently discussed the function of the maximum penalty as follows—

There is no gain saying the importance of the maximum penalty prescribed by Parliament for an offence. It provides authoritative guidance by the legislature as to the relative seriousness of the offence, in the abstract, by comparison with other crimes in the calendar...\(^ {22} \)

It must always be remembered, however, that a maximum penalty is prescribed for the worst class, or one of a number of worst classes, of the offence in question.\(^ {23} \) On some occasions, when Parliament increases the maximum penalty, that suggests that more severe penalties should be imposed not just for offences falling within the worst class but over a range (not necessarily the whole range) of cases. On other occasions, an increase in the maximum penalty means only that Parliament has thought of a worst class of case for which the previous maximum was inadequate...\(^ {24} \)

It is because the maximum penalty is important that s.5(2)(a) of the Sentencing Act lists it first among the matters to which a court sentencing an offender must have regard and, if the judge mistakes the maximum, that re-opens the discretion unless the Court of Appeal is satisfied that the mistake could not have materially affected the sentence...\(^ {25} \)

It is sometimes said that a judge, in obedience to s.5(2)(a), ‘steers by the maximum’. It is a helpful metaphor, but two things should be said of it. One is that there is a difference between steering by the maximum and aiming at the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid. The other is that steering by the maximum may decrease the sentence that might otherwise be imposed as well as increase it, as in Nash v Whitham.\(^ {26} \)

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\(^ {178} \) RACV (2005), above n 2, 41; citing H Simpson, D Mayhew and D Bieirness, Mothers Against Drunk Driving and the National Transportation Safety Board (2000).

\(^ {179} \) RACV (2005), above n 2, 41.

\(^ {180} \) Roads and Traffic Authority (2000), above n 8, 2.

\(^ {19} \) Freiberg (2002), above n 9, 56.

\(^ {20} \) Sentencing Act 1991 (Vic) s 5(2).

\(^ {21} \) DPP v Aydin & Kirsch (2000) VSCA 229, [15]–[21], Callaway JA.


\(^ {23} \) Compare R v Ma (Unreported, Court of Appeal, 18 March 1998) 10–11.

\(^ {24} \) R v Beary (2004) VSCA 229, [15]–[21], Callaway JA and [39], Buchanan JA.

\(^ {25} \) (1972) 2 SASR 333, 334.
3.3 Offence Seriousness

The statutory maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance to the judiciary as to the seriousness of the offence relative to other offences.27

The function of a statutory maximum penalty as a benchmark of offence seriousness stems from the theory of ‘just deserts’.28 Von Hirsch states—

The fundamental principle of desert in punishing convicted persons is that the severity of the punishment should be commensurate with the seriousness of the offender’s criminal conduct. The focus of the commensurate-deserts principle is on the gravity of past conduct, not on the likelihood of future behaviour; this retrospective orientation distinguishes desert from the crime-control goals of deterrence, incapacitation, and rehabilitation. The criterion for judging whether a penalty is deserved is whether it fairly reflects the gravity of the criminal conduct of which the defendant has been convicted, rather than its effectiveness in preventing future crimes by the defendant or other potential offenders.

The rationale of the principle may be stated as follows. Punishment involves blame; it is a defining characteristic of punishment that is not merely unpleasant (so are many other kinds of state intervention) but also characterizes the person punished as a wrongdoer who is being censured or reproved for his or her criminal act. The severity of the punishment connotes the amount of blame: the sterner the punishment, the greater the implicit censure. The amount of punishment therefore ought to comport, as a matter of justice, with the degree of blameworthiness of the offender’s criminal conduct.29

There are a number of difficulties in ranking the relative seriousness of criminal conduct. The report of the Sentencing Task Force states—

Social problems do not lend themselves to simple or elegant mathematical solutions. There is ‘no strict denominator of social problems and no scale for comparing different problems’.30 Despite an individual’s confidence in the merits of his or her intuitive sense of offence seriousness, the concept does convey different things to different people. Offences vary widely in the way they are carried out and in the harm they cause or the interests they infringe. Yet despite the difficulties, ‘the seriousness of criminal acts represents a conceptual dimension of criminality that is indispensable in common everyday discourse, in legal theory and practice, and in sociological work’.31

The seriousness of criminal conduct can be assessed according to the degree of harm caused or risked and the culpability of the offender.32

Harm comprises the ‘degree of injury done or risked by the act’.33 The offences that are the subject of this review would primarily be classified as criminal acts risking injury. Harm inflicted or risked may affect the interests of individuals and the state.34

27 Freiberg (2002), above n 9, 55.
29 Von Hirsch (1983), above n 28, 211.

The Report of the Western Australian Drink Driving Working Group states—

Imprisonment, regarded as the most severe of drink driving penalties, is a component of many deterrence based strategies targeted at the potential and convicted drink driver. It has been suggested that prison sanctions provide a general deterrent and produce a gradual long term effect, whereby the community comes to understand that drink driving is a serious offence demonstrated by the serious penalties imposed.174 However, there is little evidence that imprisonment has an impact on the level of recidivism of convicted drink drivers and there is some evidence that long periods of incarceration increase, rather than decrease, the rate of recidivism amongst multiple offenders.175

The effectiveness of imprisonment as a drink driving deterrent has been questioned by a number of researchers indicating that there is little support for this sanction. The majority have concluded that policies based on increasing the certainty and swiftness of punishment have a greater deterrent value than policies based on increasing the severity of punishment.176

Nevertheless, regardless of the deterrent effects of incarceration, there are cases where very strict measures are necessary and public safety needs to be protected and the availability of a custodial sanctions [sic] remains an important option for the courts.177

8.4 The Council’s View

As discussed above, this paper does not review the effectiveness of the statutory maximum penalty and ancillary penalties in rehabilitating drink drivers. Rather it is confined to the narrower question of whether the current statutory maximum penalty is adequate to serve the purposes of a statutory maximum. The Council acknowledges that, in the absence of such an evaluation, increasing the statutory maximum penalty may have limited deterrent effect. However, the importance of the maximum penalty reflecting the expectations of the community in censuring the relevant offences and accommodating ‘worst cases’ of offending against the relevant provisions justifies an increase in the statutory maximum penalty.

The Council believes that the current maximum penalty for repeat drink drivers does not adequately serve its intended functions. It does not provide sufficient scope for sentencing judges to accommodate the worst type of case falling within its prohibition. Nor does it provide an accurate guide as to the seriousness with which the community views the offence. To the extent that a maximum penalty does function as a general deterrent, the current maximum is also inadequate to constitute realistic deterrence.

Although it is beyond the scope of this review, the challenge remains throughout Australia of how to combat repeat drink driving. While repeat offenders need to be deterred from engaging in drink driving offences and punishment needs to be imposed, additional strategies also need to be put in place which are aimed at achieving behavioural changes. Research shows that legal sanctions in isolation are often ineffective in dealing with repeat drink driving behaviour. It is recommended that other measures such as drink driver specific assessment, treatment and education programs should be investigated and implemented to address the problem of drink driving. A comprehensive program would be more beneficial for Victoria because it would provide an opportunity to make some long term changes to the conduct of repeat drink driving offenders. As the program would also include increased statutory maximum terms of imprisonment, public perceptions about the inadequacy of the current statutory maximum would also be addressed, sentences would be equipped to deal adequately with the worst cases and a message would be sent to the community that these offences are viewed seriously.
the majority of magistrates to be ‘the last resort’ however some magistrates were concerned that they need to keep the offender from potentially harming the community'.

The Council is of the view that the current maximum penalty does not provide sufficient scope for sentences to set appropriate sentences for the worst types of cases coming before the courts. For serious repeat offenders with high BAC readings who show scant regard for the law, and from whom the community requires protection, the current statutory maximum penalty is insufficient. The Council believes that sentencing judges and magistrates should be empowered to sentence repeat offenders at the most serious end of the scale to longer than three months’ imprisonment.

8.2 Offence Seriousness

The statutory maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance to the judiciary as to the seriousness of the offence relative to other offences. In assessing the seriousness of criminal conduct it is necessary to have regard to the concepts of harm and culpability as well as current sentencing practice. Culpability is enhanced if the offender has previously been convicted of, and sentenced for, like criminal acts.

The Council is persuaded that the current statutory maximum penalty for repeat offenders does not accord with the community’s view of the seriousness of repeat drink driving offences. The current statutory maximum does not adequately reflect the risk of harm posed by repeat drink drivers to the lives and physical integrity of members of the community; nor does it sufficiently reflect the culpability of offenders who have previously been dealt with for drink driving offences.

Current sentencing practices suggest that, for most cases, sentencing magistrates have sufficient scope to address offending behaviour. However, the Council is of the view that empowering the courts to impose longer sentences of imprisonment for serious repeat offenders would address much of the apparent community concern and send a clear message that the relevant offences are viewed as serious offences.

8.3 Deterrence

The maximum penalty is also intended to function as a general deterrent by ‘warning potential offenders of the maximum punitive “price” they will pay for the commission of such an offence’. The ability of a statutory maximum to achieve deterrence is limited to the extent that it is ‘not known how many potential offenders are accurately aware of the statutory maximum, or are in a position to draw a distinction between it and the level of penalties being imposed by the courts, but in publicity given by government to the consequences of non-compliance with the law the maximum statutory penalty is always given prominence as the deterrent’.

As discussed above at 3.4, the New South Wales study on increased statutory penalties for repeat drink driving found that ‘the overall effect of the increased penalties on recidivism rates was relatively small’ and that ‘focusing efforts on maintaining a high level of enforcement of drink driving offences may therefore be a better use of resources when targeting offending of this nature’.

In relation to crimes, such as drink driving, that threaten the community, the principle of proportionality does not rest on factual claims that making punishment commensurate with the gravity of crimes enhances their general preventative usefulness. Suppose we were to discover evidence that proportionate punishments were no better deterrents, and perhaps not as successful, as disproportionate ones. Suppose, moreover, that new psychological evidence suggested that formal penal sanctions, whether proportionate or not, contributed little to the development of people’s sense of moral self-restraint. Would such evidence mean that we could properly ignore constraints of proportionality? Certainly not. As long as the state continues to respond to criminal conduct through the criminal sanction, it is necessarily treating those whom it punishes as wrongdoers, and condemning them for their conduct. If it condemns, then justice requires that the severity of that condemnation comport with the degree of blameworthiness—that is, the gravity—of their conduct.

3.4 Deterrence

The statutory maximum penalty is also intended to function as a general deterrent by warning potential offenders of the maximum punishment they are liable to receive if they commit an offence. There are, however, difficulties in quantifying the extent to which the level of a maximum penalty may actually deter potential offenders from committing offences.

In its report the Sentencing Task Force stated—

It has also been contended that the legislative statement of the maximum penalty, as well as the judicially imposed one, can function as a general deterrent by warning potential offenders of the maximum punitive “price” they will pay for the commission of such an offence. The doubts cast upon the effectiveness of court imposed sentences in achieving effects of general deterrence would suggest that statutory statements regarding maxima would be of even more dubious value in deterring from crime. It is not known how many potential offenders are accurately aware of the statutory maximum, or are in position to draw a distinction between it and the level of penalties being imposed by the courts, but in publicity given by government to the consequences of non-compliance with the law the maximum statutory penalty is always given prominence as the deterrent.

The Report of the Western Australian Drink Driving Working Group suggests that legal sanctions can reduce the incidence of drink driving by deterring drivers from re-offending. Increased knowledge in
the community about drink driving sanctions may deter some drink drivers. Some researchers argue that drink driving behaviour may be modified where the penalty is certain, swiftly applied and severe.\footnote{43}

In September 1998 the New South Wales government increased statutory penalties for drink driving offences. Increases included doubling the maximum term of imprisonment for mid range BAC (0.08 to less than 0.15) and high range BAC (0.15 and more) drink driving offences, doubling the maximum licence disqualification periods and the maximum monetary fines for all drink driving offences.\footnote{44} One of the aims of the amendments was to ‘enhance the deterrent effect of our road penalties and...help improve road safety’.\footnote{45}

The New South Wales Bureau of Crime Statistics and Research undertook a study to determine whether the increased penalties had any impact on the rates of repeat drink driving. The study first identified and ruled out five ways in which the intended deterrent effects of the legislation could have potentially been undermined—(1) a reduction in drink driving charges brought before the courts, (2) an increase in court delay, (3) a reduction in guilty pleas, (4) a reduction in proven offending or (5) no subsequent change to the severity of drink driving penalties imposed by the courts. The study examined these issues by comparing all drink driving offences prosecuted in the New South Wales Local Courts in 1997 with those in 1999 (after the changes were in force). The study found that—

...the 1998 legislation resulted in a significant increase in the average penalties imposed for drink driving offences without having any negative impact on the prosecution of drink driving offences. The only setback in terms of the deterrence aims of the legislation was a statistically significant, but small, decrease in the proportion of offenders being disqualified from driving.\footnote{46}

The study found that there was some evidence of a beneficial impact of the sentencing policy on repeat offending—

Non-Sydney drink-drivers sentenced before the statutory penalties were increased, had higher odds of reappearing for a new offence, and reoffended sooner, than non-Sydney drink-drivers sentenced after the penalties were raised. But this effect was not apparent for Sydney drink-drivers.\footnote{47}

The study noted—

The present findings lend support to one of the central tenets of deterrence theory, that is increasing the formal costs associated with an offence will reduce the rate of offending. However, when considering the importance of these findings it needs to be noted that the overall effect of the increased penalties on recidivism rates was relatively small, with the probability of a drink-driver reoffending being increased by just three percentage points in non-Sydney locations. Given such small effect size from what was essentially a doubling of the statutory penalties for all drink-driving offences, and keeping in mind the associated costs with administering the new penalty regime, the efficiency of this strategy in controlling crime remains questionable. In comparison, strategies that have increased the perceived risk of apprehension, such as RBT (random breath testing), have had substantial and enduring influences on offending rates... Focusing efforts on maintaining a high level of enforcement of


\footnote{New South Wales, Parliamentary Debates (Second Reading, Traffic Amendment (Penalties, Licences and Disqualifications) Bill 1998), Legislative Assembly, 21 May 1998 (Carl Scully, Minister for Transport and Minister for Roads) as cited in Briscoe (2004), above n 44, 1.}

\footnote{Suzanne Briscoe (2004), above n 44, 3.}

\footnote{Ibid 7.}

\footnote{Freiberg (2002), above n 9, 55.}

\footnote{The Sentencing Act 1993 (Vic) sets out the power to hand down an aggregate sentence of imprisonment (s 9) and an aggregate fine (s 51).}

8. Does the Maximum Penalty Serve its Function?

8.1 Principle of Legality

As discussed above, it is a function of the maximum statutory penalty to place a known and legally defined limit on judicial discretion in imposing punishment for an offence. This should be high enough to enable a sentence of case-fittingly with the worst type of case falling within the prohibition, but not so high as to provide no guidance at all to the sentencer as to its relative seriousness.\footnote{164}

Current sentencing practices for the relevant offences suggest that, in most cases, sentencing magistrates are imposing sentences well within the statutory upper limit. Table 3 demonstrates that in relation to first and repeat offences under the relevant provisions during 2001/02 to 2004/05, 75 per cent of the 44, 874 penalties given were fines. However, as Table 3 does not distinguish between first and repeat offenders, a large proportion of the 44, 874 offences evaluated would be first offences for which the maximum penalty that can be imposed is a fine of 12 penalty units.

Figure 13 demonstrates that the median non-aggregate imprisonment term for the relevant offences was two months, which is two-thirds of the statutory maximum. Figure 14 shows however, that only one in four imprisonment terms involves an immediate custodial term to be fully served and one in four is served by way of an intensive correction order. Almost 50 per cent of the imprisonment terms are fully suspended with non-aggregate sentences more likely to be wholly suspended than aggregate sentences. With the exception of the ‘below 0.05 group’, there is a positive relationship between the mean term of imprisonment handed down and the BAC reading recorded. Driving with a high range BAC (0.15 or above) results in an average imprisonment term of more than two-thirds of the maximum penalty (Figure 15).

There is currently a ‘de facto’ method of addressing the most serious repeat offenders despite the three month statutory maximum penalty. Serious repeat offenders frequently attend court charged with multiple offences. The relevant offence may be accompanyed by a charge of unlicensed driving or driving while disqualified. There may also be a charge of dangerous driving. In serious cases where there is more than one charge, magistrates are better equipped to address adequately the offending behaviour through providing an aggregate sentence of imprisonment that is longer than the three month statutory maximum for the single relevant offence. However this is an indirect means of avoiding the current limitations of the statutory maximum penalty which creates the potential for inconsistencies in addressing the problem of serious repeat offenders. Figure 12 illustrates that the median terms of imprisonment handed down for the relevant offences in the Magistrates’ Court in 2004/05 ranged from two months to 3.5 months (mean range: three months to four months). The maximum imprisonment terms attached to the relevant offences exceed the statutory maximum penalty allowable for the offence due to the use of aggregate sentences.\footnote{165}

Fifty-two per cent of imprisonment terms handed down for the relevant offences were aggregate sentences.

The RACV report states in relation to the current maximum statutory penalty that ‘in terms of recidivists, magistrates are concerned about the maximum penalty being too short... with one magistrate commenting that this is “a joke”, while another said that it is “ridiculous”’. The report stated that the ‘penalties for high BAC offenders were suggested by many [magistrates] to be inadequate, although one magistrate suggested that “if you combine the fine plus disqualification, then it is a severe penalty”’. The report also stated that ‘placing a recidivist in jail was thought by
The RACV research report also refers to the limitations of the current system in providing rehabilitation for repeat offenders serving a prison sentence. The Report states—

Those assessed as non-problem drinkers and that the programs have been shown generally to have and education strategies for remediation’.

Those most resistant to change and the least responsive to legislative changes, harsher penalties and education strategies for remediation’. 159

The Report of the Western Australian Drink Driving Working Group states that there is evidence that education programs can reduce the likelihood of repeat offending amongst first time offenders and those assessed as non-problem drinkers and that the programs have been shown generally to have positive results. However the report points to literature which ‘identifies repeat drink drivers as those most resistant to change and the least responsive to legislative changes, harsher penalties and education strategies for remediation’. 159

The RACV research report also refers to the limitations of the current system in providing rehabilitation for repeat offenders serving a prison sentence. The Report states—

People in prison, who are often the most serious offenders, remain a group that are not specifically targeted by the current rehabilitation programs... Prison programs for drink driving offenders are almost uniformly unsuccessful. This may in part reflect the fact that successful rehabilitation requires practice in life skills and lifestyle change and this is not available to a prison population. Hence, further research is required into the likely effectiveness of targeting serious drink driving offenders who are in prison, including the option of special post-release programs. 160

7.4 Vehicle Immobilisation, Impoundment and Forfeiture

Vehicle immobilisation (at the offender’s residence) and impoundment prevent a driver from driving his or her vehicle. Vehicle immobilisation and impoundment are harsh penalties that have the potential to impact adversely the families of offenders. There are several additional problems associated with vehicle impoundment including the provision of storage facilities and associated costs. 161 The Northern Territory has enacted laws enabling vehicle impoundment. The review of Victorian drink driving measures commissioned by the RACV included interviewing ‘service administrators’ who were working in the field of drink driving prevention and rehabilitation or had extensive experience in either of these areas. 162 All service administrators rejected impounding vehicles as a penalty. 163

Vehicle forfeiture is an option used by a number of jurisdictions in the United States and is available in the Northern Territory. It is difficult and costly to administer and appears to be used rarely.

drink-driving offences may therefore be a better use of resources when targeting offending of this nature. 48

However, the study identified factors that might have had an effect on the impact of the legislation, as follows—

[The impact of the 1998 legislation could have been greater if licence disqualifications were more systematically applied for drink-driving offences... While the legislative amendments had the effect of increasing the average licence disqualification for drink-driving offences across the State, 20 per cent of guilty offenders still escaped licence disqualification on being found guilty of a drink-driving offence (via a s 10 dismissal) despite the existence of these mandatory minima. Ensuring that almost all offenders are recipients of a licence disqualification once found guilty for a drink-driving offence could have increased the potential returns on investment that are reported here. 49

The study continued—

Further, there is some suggestion that RBT may have less of a deterrent effect in regional or country areas than it does in major urban centres. 50 Fewer police are available to target drink-driving in country and regional locations and those that are available have to cover a much larger region than their city counterparts. These factors would reduce the perceived certainty of apprehension as people come to believe that they can elude RBT by avoiding major roads and arterials and thus diminishing the deterrent efficacy of RBT. The superior effect of raising statutory penalties found for offenders residing in non-Sydney metropolitan locations is, therefore, an important outcome in terms of addressing drink-driving and related issues in country and regional areas. 51

4. Evolution of Drink Driving Laws in Victoria

Drink driving has been identified as one of the most common causes of road crashes. Over the last thirty years, laws and penalties aimed at combating drink driving in Victoria have been constantly evolving, reflecting the severity of the problem and changing community attitudes to drink driving. This development is summarised in the following table:

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948</td>
<td>Introduction of 0.05 as legal BAC limit for drivers of motor vehicles.</td>
</tr>
<tr>
<td>1964</td>
<td>Compulsory blood alcohol analysis for crash victims taken to hospital.</td>
</tr>
<tr>
<td>1983</td>
<td>Electronic preliminary breath testing device introduced.</td>
</tr>
<tr>
<td>1984</td>
<td>Zero BAC for certain classes of offences.</td>
</tr>
<tr>
<td>1986</td>
<td>Road Safety Act 1986—increased penalties, increased disqualification periods, increased time for taking breath tests from 2 hours to 3 hours, introduced immediate licence suspension for certain offences.</td>
</tr>
<tr>
<td>1990</td>
<td>Introduction of purpose built busses and improved drink driving advertising.</td>
</tr>
<tr>
<td>1992</td>
<td>Zero BAC introduced for heavy vehicle drivers.</td>
</tr>
<tr>
<td>1994</td>
<td>Electronic evidential breath testing devices introduced.</td>
</tr>
<tr>
<td>2001</td>
<td>Offences in s 49(1)(b) (f) and (g) altered from having a BAC of ‘more than the prescribed concentration of alcohol’ to a BAC of ‘the prescribed concentration of alcohol or more than the prescribed concentration of alcohol’.</td>
</tr>
<tr>
<td>2002</td>
<td>Alcohol interlocks introduced for repeat drink drivers and high range BAC offenders.</td>
</tr>
</tbody>
</table>

156 Ibid Recommendation 1, 41.  
157 Ibid Recommendation 10, 44.  
158 Ibid Recommendation 12, 44.  
159 Repeat Drink Driving Working Group (2003), above n 42, 42.  
161 Ibid 21.  
162 Ibid 37.  


51 Ibid 9.  
52 Ibid 8–9.  
In 1986 the Phillips Royal Commission of Enquiry into the Liquor Industry concluded that a majority of road accidents resulted from the consumption of alcohol—

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On the basis of much research, it is a well-founded conclusion that a majority of road accidents occur because the driver or drivers involved are suffering impairment of necessary driving skills due to the consumption of alcoholic liquor .... There appears to be a threshold value of blood alcohol concentration up to which no increased risk of accident can be measured ... For the population as a whole, that value appears to be about .05.52
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Consequently the Victorian government introduced 0.05 as the legal limit of alcohol consumption for drivers of motor vehicles. This led to an immediate decline in the road toll. However as time progressed the number of road deaths once again began to increase.53 Over the next twenty years various measures were introduced to endeavour to improve road safety.

On 5 December 1986 the government passed the Road Safety Act 1986 (Vic) (RSA), superseding the Motor Car Act 1958 (Vic). Amongst other things the Act expanded offences relating to alcohol and other drugs and increased penalties for various driving offences.54

The provisions in the RSA relating to drink driving offences were designed to—

```
.... reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; reduce the number of drivers whose driving is impaired by alcohol or other drugs; and provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol.55
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The second reading debate for the RSA reveals that the changes introduced by the Bill to the drink driving laws were viewed by some as "harsh and draconian"56 and "incredibly severe".57

Despite several amendments to the RSA the maximum penalty for repeat offenders committing the relevant offences has not been increased although there has been a slight increase in the value of a penalty unit.58

The Road Safety (Further Amendment) Act 1991 (Vic) included, among other things, clarification that a person released on a bond for a first drink driving offence would be treated as a second time offender if he or she re-offended. The Road Safety (Amendment) Act 1994 (Vic) removed the requirement that convicted drink drivers, who previously held full driver licences, go back to probationary licences. Instead convicted drink drivers are required to comply with a zero BAC limit. Another major change provided that drink driving offences committed 10 years earlier would no longer count as a prior offence in certain circumstances.

Other changes to the RSA include the commencement of the Victorian Drink Driver Program (VDDP) in 1990 and the introduction of alcohol interlocks in 2003. See below at Chapter 7 for discussion of these and other ancillary penalties.

The RACV found that—

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The current interlock program relies on 'high' risk offenders wanting to get re-licensed after serving their suspension period, and may in fact be a disincentive for re-licensing. With no current monitoring of offenders through the suspension period, effectiveness of the program is difficult to determine, as are the re-licensing rates.150
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The RACV research report states that "[l]atest test results seem to indicate that interlocks work best when they are combined with probation or treatment such as counselling or medical monitoring."151

The Report of the Western Australian Drink Driving Working Group stated that—

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Interlock programs have been widely evaluated and there is an accumulating body of evidence to show that interlocks have a beneficial impact on recidivism rates, at least as long as the device is installed. It has been suggested that the fact that re-arrest rates increase after the interlock is removed should not discredit or discount the significant beneficial effects of interlock programs.152
```

Interlocks are not intended to replace existing sanctions, but to provide additional options for preventing drink driving behaviour and as an adjunct to education and treatment. Increasingly, researchers are concluding that improved results will be obtained from interlock programs when they are supported by legislation and integrated with remedial programs that include assessment, drink driving education and treatment for alcohol and other problems.153

### 7.3 Education and Treatment

The Victorian Drink Driver Program (VDDP) commenced in 1990 and is aimed at reducing repeat driving offences. Programs are provided by agencies accredited by the Department of Human Services. Offenders are required to pay for the VDDP.

The RACV research report stated—

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The current Victorian drink driving program largely focuses on measures that offenders need to undertake as part of the re-licensing process. Accredited drink driving agencies provide an 8 hour education program that some offenders are required to attend prior to re-licensing. Recidivists and those convicted with high BAC levels are also required to attend one or more assessments to determine the nature of their alcohol problems prior to attending the education program, and many are also required to have an alcohol interlock fitted to their vehicles as a condition of re-licensing.154
```

It identified a number of shortcomings in the structure and content of the VDDP including155—

- A lack of integrated programs targeting recidivist and high BAC offenders.
- A failure to focus on the rehabilitation of high risk offenders.
- The current system is not the most effective way to encourage offenders to seek treatment and could, in fact, operate as a disincentive to offenders seeking to be re-licenced.
- A lack of communication between agencies involved in the VDDP.
- Deficiencies in the type and mix of programs.

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52 H Lander, ‘Road Trauma and Drink Driving a Deadly Double’ (1987) 7 Law Institute Journal 678, 679.
53 Ibid 679.
54 For example the penalty range for drink driving offences was increased from a range of 7.5 to 15 penalty units to a range of 12 to 100 penalty units: Victoria, Parliamentary Debates (Second Reading Debate, Road Safety Bill 1996), Legislative Assembly, 28 October 1996, 1613-1614 (Mr Brown).
55 Victoria, Parliamentary Debates (Second Reading Speech, Road Safety Bill 1986), Legislative Assembly, 11 September 1986, 228 (Thomas Roper, Minister for Transport).
56 Victoria, Parliamentary Debates (Second Reading Debate on Road Safety Bill 1986), Legislative Assembly, 28 October 1986, 1608 (Mr Brown).
57 Victoria, Parliamentary Debates (Second Reading Debate on Road Safety Bill 1986), Legislative Assembly, 29 October 1986, 1656 (Mr E R Smith). See also ibid 1637-1649 (Mr W D McGrath) and 1658 (Mr Norris).
58 The value of a penalty unit in Victoria as fixed by the Treasurer in accordance with s 11(1)(b) of the Monetary Units Act 2004 (Vic) for the financial year commencing 1 July 2005 is $104.81: Victorian Government Gazette, 14 April 2005, 722.
59 RACV (2005), above n 2, viii.
60 Ibid 9.
62 Repeat Drink Driving Working Group (2003), above n 42, 32.
63 RACV (2005), above n 2, vii.
64 Ibid vii-viii.
Table 12 includes the offences for which an alcohol interlock device will be imposed, the length of disqualification and the length of time that the interlock condition will be on a person’s licence.

<table>
<thead>
<tr>
<th>Offenders</th>
<th>Offence</th>
<th>How long the licence will be cancelled</th>
<th>How long the interlock condition will be on the licence</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Offenders</td>
<td>One only offence, which was a BAC of at least 0.15, or a non-BAC offence (1)</td>
<td>A minimum of 15 months</td>
<td>If court imposes condition, it will be for a minimum of 6 months</td>
</tr>
<tr>
<td>Repeat Offenders</td>
<td>At least one previous drink driving offence within the last 10 years (2) and another offence from 13 May 2002.</td>
<td>Group A: Three or more offences or Two offences where the most recent offence was a BAC of at least 0.15, or a non-BAC offence (1)</td>
<td>A minimum of 30 months</td>
</tr>
<tr>
<td></td>
<td>Group B: Two offences, where the most recent offence was a BAC of less than 0.15</td>
<td>A minimum of 12 months</td>
<td>A minimum of 6 months</td>
</tr>
</tbody>
</table>

(1) Non-BAC drink driving offences include: DUI (driving under the influence of alcohol), refusing to provide a breath or blood sample, refusing to accompany a police officer.

(2) The existing ten-year rule applies in determining whether an offender is a single or repeat offender.

Table 13 provides two examples of the estimated cost of an alcohol ignition interlock to an offender as charged by two different service providers. Costs can increase for an offender if, for example, the offender has access to two family vehicles, as both would require an alcohol ignition interlock.

<table>
<thead>
<tr>
<th>Table 13: Cost of alcohol ignition interlock to offender147</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>RACV</strong></td>
</tr>
<tr>
<td><strong>Installation</strong></td>
</tr>
<tr>
<td><strong>Monthly Fee</strong></td>
</tr>
<tr>
<td><strong>Removal</strong></td>
</tr>
</tbody>
</table>

Alcohol interlock devices have also been introduced in South Australia, New South Wales, and Queensland.

The RACV Research Report states that the use of interlocks produced contrary opinions from service administrators and magistrates.148 On the one hand, service administrators were generally in favour of interlocks as a means of addressing drink driving. Some service administrators suggested that offenders qualifying for interlocks could be fast tracked through the disqualification period in order to commence the rehabilitation of the offender at an earlier stage. On the other hand, some magistrates expressed doubts about the effectiveness of interlocks and were concerned that the use of mandatory interlocks as a condition of re-licensing could increase the number of offenders driving without a licence. Some magistrates were also concerned about the heavy financial burden that interlocks place on lower socio-economic groups.148

5. The Drink Driving Problem

5.1 Introduction

Drink driving is a very complex social problem for which there are no simple solutions. During the 1980s and 1990s there was a decline in the proportion of drivers killed in road crashes who were over the limit. In 1981, 44 per cent of all drivers killed in road crashes in Australia had a BAC of 0.05 or more.149 By 1998, 26 per cent of all drivers killed had a BAC of 0.05 or more.150 However, despite this reduction, alcohol continues to be one of the main causes of road fatalities in Australia.151 Figure 1 shows that in the year 2000, alcohol was the leading recorded factor in fatal road crashes in Australia—being the major factor in 16 per cent of cases, and in an additional six per cent of cases in conjunction with drugs.

Recent data indicate that each year Victoria Police receives 5,000 blood samples taken from drivers who attend hospital after a vehicle accident. Of these samples, 35 per cent are positive for alcohol. Eight per cent are usually found to have a BAC over 0.250. Victoria Police state that this proportion has remained the same over a number of years.152

Between 1988 and 2000 the number of Victorian drivers who were charged with a drink driving offence (including Category B offences) increased from 9,898 to 11,865, peaking at 12,954 in 1997 (see Figure 2).

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146 VicRoads, Getting Tougher on Drink Drivers (pamphlet).
147 RACV, Alcohol Interlock Services (unpublished).
148 RACV (2005), above n 2, 37. For the review, 27 senior service administrators working in the field of drink driving, or who had extensive experience in associated areas were interviewed in July/August 2003. Twenty magistrates from six regions in Victoria also participated in an interview or focus group.
149 RACV (2005), above n 2, 37.
151 Ibid.
152 Ibid.
Repeat offenders

First Year

66 VicRoads, 65 VicRoads, 64 VicRoads, with more than one in four drink drivers having at least one prior offence since 1992 in Victoria, 1988–2000 (see Table 2 and Figure 3). Of those offenders with prior offences for drink driving, 67 per cent were from metropolitan Melbourne.

Table 2: Number and proportion of first and repeat drink drivers in Victoria, 1988–2000

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<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Number</td>
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<td>11283</td>
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<td>9749</td>
<td>9862</td>
<td>10612</td>
<td>12007</td>
<td>12954</td>
<td>11447</td>
<td>10352</td>
<td>11865</td>
</tr>
<tr>
<td>% Repeat</td>
<td>15.2</td>
<td>23.3</td>
<td>24.6</td>
<td>24.6</td>
<td>26.3</td>
<td>26.3</td>
<td>26.8</td>
<td>27.0</td>
<td>27.3</td>
<td>27.8</td>
<td>29.1</td>
<td>30.2</td>
<td>28.2</td>
</tr>
</tbody>
</table>

In Victoria between 1988 and 2000 the proportion of repeat drink drivers increased by nine per cent, with more than one in four drink drivers having at least one prior offence since 1992 (see Table 2 and Figure 3). Of those offenders with prior offences for drink driving, 67 per cent were from metropolitan Melbourne.

7.2 Alcohol Interlock Devices

The Road Safety (Alcohol Interlocks) Act 2001 (Vic) came into operation on 13 May 2002. These amendments were designed to combat drink driving (and particularly repeat offenders) by focussing on rehabilitation and harm prevention rather than punishment and deterrence.

Alcohol interlocks are breath analysis instruments that are connected to a vehicle’s ignition system. They measure the driver’s BAC and prevent the vehicle from starting if the BAC exceeds a pre-set limit. They are tamper-resistant and record usage including attempted and failed starts. This information is recorded and used in preparing assessments of the person’s condition and whether the person can be trusted to drive without an interlock. They can only be removed by a court order.

The power to impose an alcohol interlock condition arises when an application is made to the Magistrates’ Court by an offender to be re-licensed after having had his or her licence cancelled for a relevant drink driving offence. It is only if a court decides to restore an applicant’s licence under section 50(4) of the Road Safety Act 1986 (Vic) that consideration must then be given to whether that person’s licence should be subject to an alcohol interlock condition. In some cases a court must impose alcohol interlock conditions while in other cases it has a discretion.

Generally interlocks are—

- Mandatory for first time offenders who have been found guilty of serious drink driving offences.
- Discretionary for first time offenders who have been found guilty of drink driving offences.
- Mandatory for repeat offenders.

In the case of repeat offenders the court must impose an alcohol interlock condition—

- For a minimum of 6 months where the person’s BAC was below 0.15.
- For at least 3 years in other cases (for Category A offences where a person’s BAC is above 0.15, for Category B offences, or for a third time or subsequent offender).

For at least 3 years in other cases (for Category A offences where a person’s BAC is above 0.15, for Category B offences, or for a third time or subsequent offender).
There is some controversy over the most effective period of disqualification. The Report of the Western Australian Drink Driving Working Group suggests that 12 to 18 months is generally more effective in producing road safety benefits than short periods such as 3 to 6 months. However, the RACV Research Report pointed to concerns expressed by Magistrates as follows:

Another magistrate was concerned about long disqualification periods and suggested that ‘short and sharp’ may be more effective, with another magistrate stating ‘we are tougher in Victoria than other states’ in terms of disqualification. One magistrate stated that ‘penalties are far more punitive in nature now than they used to be’, while another suggested that ‘penalties are very uneven in the community’. Some magistrates stated that ‘we are putting people in the situation of driving unlicensed’.

The effectiveness of disqualification is dependent on whether it actually prevents drink drivers from driving. The inability of licence disqualification to prevent certain offenders from driving limits its capacity for specific deterrence. The RACV Research Report states that ‘offenders learn through disqualified driving that holding a driver’s licence is not essential in transportation so long as care is taken with the amount of driving, nature of driving and location’. The Report concludes that ‘consequently, unlicensed driving has the potential to damage any benefits that may be gained through the use of licence sanctions as a drink driving countermeasure’.

Even after the period of disqualification has elapsed, some offenders do not apply for a new licence, with a number of these offenders driving while unlicensed.

The RACV research report made several recommendations including to:

- ‘Undertake research to determine the extent of unlicensed driving among offenders who fail to apply for licence re-instatement’.
- ‘Introduce changes to legislation to require offenders (particularly “hard-core” recidivists) to complete a rehabilitation program as part of the penalty rather than as a requirement for re-licensing’.
- ‘Increase the deterrence of driving while suspended, disqualified or cancelled by increasing the perception of risk of apprehension by implementing compulsory licence checks for all traffic offences and random checks at a location close to RBT stations (i.e. Booze Buses)’.

Disqualification imposes hardship on offenders, particularly those who are unable to work or earn a living because of the loss of their licence. This can lead to loss of housing and severe financial hardship for offenders and their families. Western Australia, Queensland and the Australian Capital Territory allow drivers to apply for a restricted licence so that they can continue to drive for work.

The summary report commissioned by the RACV states—

Significant reductions in drink driving have been achieved in Victoria in recent years, but it remains a major economic, social and public health problem. In 2002, 31 per cent of all drivers and riders killed in Victoria had a BAC of 0.05 or more (VicRoads, 2002) and 2001 figures indicate that repeat drink driving offenders were responsible for 22 fatalities and 560 serious injuries. Such crashes cost the Victorian community approximately $81 million each year (VicRoads, 2002).

More recent data from Victoria Police examining the number of repeat drink driving offenders in 2003 show that 63 per cent of repeat offenders had one prior drink driving offence, 22 per cent had two prior offences and 15 per cent had at least three prior offences (see Figure 4).

---

The RACV research report points to evidence which indicates that disqualification can—

- Reduce recidivism.
- Have an ‘impact on alcohol-related incidences’.
- ‘[I]mprove overall road safety by reducing the general level of traffic violations and crashes’.

There is some controversy over the most effective period of disqualification. The Report of the Western Australian Drink Driving Working Group suggests that 12 to 18 months is generally more effective in producing road safety benefits than short periods such as 3 to 6 months. However, the RACV Research Report pointed to concerns expressed by Magistrates as follows:

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- ‘Undertake research to determine the extent of unlicensed driving among offenders who fail to apply for licence re-instatement’.
- ‘Introduce changes to legislation to require offenders (particularly “hard-core” recidivists) to complete a rehabilitation program as part of the penalty rather than as a requirement for re-licensing’.
- ‘Increase the deterrence of driving while suspended, disqualified or cancelled by increasing the perception of risk of apprehension by implementing compulsory licence checks for all traffic offences and random checks at a location close to RBT stations (i.e. Booze Buses)’.

Disqualification imposes hardship on offenders, particularly those who are unable to work or earn a living because of the loss of their licence. This can lead to loss of housing and severe financial hardship for offenders and their families. Western Australia, Queensland and the Australian Capital Territory allow drivers to apply for a restricted licence so that they can continue to drive for work.

---

**Figure 3: Proportion of drink drivers with prior offences, 1988-2000**

The summary report commissioned by the RACV states—

Significant reductions in drink driving have been achieved in Victoria in recent years, but it remains a major economic, social and public health problem. In 2002, 31 per cent of all drivers and riders killed in Victoria had a BAC of 0.05 or more (VicRoads, 2002) and 2001 figures indicate that repeat drink driving offenders were responsible for 22 fatalities and 560 serious injuries. Such crashes cost the Victorian community approximately $81 million each year (VicRoads, 2002).

More recent data from Victoria Police examining the number of repeat drink driving offenders in 2003 show that 63 per cent of repeat offenders had one prior drink driving offence, 22 per cent had two prior offences and 15 per cent had at least three prior offences (see Figure 4).

**Figure 4: Number of repeat drink drivers by number of prior drink driving offences, 2003**

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**Notes:**

127 RACV (2005), above n 2, 4. The Research Report states: ‘Numerous studies with a variety of methodologies have indicated that this sanction, at least in the short term, is more effective in preventing drink driving recidivism than other forms of punishment or remedial education programs unaccompanied by withdrawal of driving rights’.


129 RACV (2005), above n 2, 27.

130 Ibid 4.

131 Ibid 4.

132 Ibid Recommendation 17, 47.

133 Ibid Recommendation 18, 47.

134 Ibid Recommendation 19, 47.


136 Licensed Premises Identification System (LPIS), supplied by the Transport Alcohol Section (TAS), Victoria Police.
5.2 Profile of a Drink Driver

The overwhelming majority of drink driving offences in Victoria are committed by men (see Figure 5). In 2000 the proportion of first drink driving offences committed by men was over 80 per cent and the proportion of repeat drink driving offences committed by men was over 90 per cent.

![Figure 5: Proportion of male and female single and repeat drink drivers, 1988–2000]

Drink driving is a particular problem for drivers aged 21 to 29 years of age. Figure 6 shows the proportion of repeat drink drivers by their age group at the time of their last offence between 1988 and 2000. Over this period, almost 40 per cent of repeat drink drivers were aged between 21 and 29 years at the time of their most recent offence. This is also the peak age for culpable drivers. Between 1998/99 and 2003/04 the average age of persons sentenced for culpable driving causing death was 28 years. As shown earlier in Figure 1, alcohol is the most common major recorded factor in fatal road crashes. In 2004, nearly 42 per cent of all drivers killed were aged between 21 and 25 years old although this age group comprises only 8.5 per cent of the driving population.

Moffat et al, in the New South Wales Bureau of Crime Statistics and Research Crime and Justice Bulletin, point to research which suggests that licence disqualification has a deterrent effect on repeat offenders. Similarly, the Report of the Western Australian Drink Driving Working Group states—

A large body of research provides evidence that licence actions are a very effective road safety countermeasure and the only drink driving sanction which has been consistently associated with reduction in community-wide driving behaviour.

For refusing a blood or breath test or failing to stop or remain stopped at a preliminary breath testing station, the minimum period of disqualification in Victoria is two years for a first offence and four years for a subsequent offence.

Table 11: Minimum disqualification periods in Victoria for Category A offences

<table>
<thead>
<tr>
<th>Level/Concentration</th>
<th>Minimum Disqualification First Offence</th>
<th>Minimum Disqualification Repeat Offender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 0.07</td>
<td>6 months</td>
<td>12 months</td>
</tr>
<tr>
<td>0.07 or more but less than 0.08</td>
<td>6 months</td>
<td>14 months</td>
</tr>
<tr>
<td>0.08 or more but less than 0.09</td>
<td>6 months</td>
<td>16 months</td>
</tr>
<tr>
<td>0.09 or more but less than 0.10</td>
<td>6 months</td>
<td>18 months</td>
</tr>
<tr>
<td>0.10 or more but less than 0.11</td>
<td>10 months</td>
<td>20 months</td>
</tr>
<tr>
<td>0.11 or more but less than 0.12</td>
<td>11 months</td>
<td>22 months</td>
</tr>
<tr>
<td>0.12 or more but less than 0.13</td>
<td>12 months</td>
<td>24 months</td>
</tr>
<tr>
<td>0.13 or more but less than 0.14</td>
<td>13 months</td>
<td>26 months</td>
</tr>
<tr>
<td>0.14 or more but less than 0.15</td>
<td>14 months</td>
<td>28 months</td>
</tr>
<tr>
<td>0.15 or more but less than 0.16</td>
<td>15 months</td>
<td>30 months</td>
</tr>
<tr>
<td>0.16 or more but less than 0.17</td>
<td>16 months</td>
<td>32 months</td>
</tr>
<tr>
<td>0.17 or more but less than 0.18</td>
<td>17 months</td>
<td>34 months</td>
</tr>
<tr>
<td>0.18 or more but less than 0.19</td>
<td>18 months</td>
<td>36 months</td>
</tr>
<tr>
<td>0.19 or more but less than 0.20</td>
<td>19 months</td>
<td>38 months</td>
</tr>
<tr>
<td>0.20 or more but less than 0.21</td>
<td>20 months</td>
<td>40 months</td>
</tr>
<tr>
<td>0.21 or more but less than 0.22</td>
<td>21 months</td>
<td>42 months</td>
</tr>
<tr>
<td>0.22 or more but less than 0.23</td>
<td>22 months</td>
<td>44 months</td>
</tr>
<tr>
<td>0.23 or more but less than 0.24</td>
<td>23 months</td>
<td>46 months</td>
</tr>
<tr>
<td>0.24 or more</td>
<td>24 months</td>
<td>48 months</td>
</tr>
</tbody>
</table>

Not mentioned in Chapter 6, Victoria provides a higher minimum period of disqualification than any other Australian jurisdiction for a first or second offence and one of the highest for a third offence.

Under section 50(1A) of the RSA, the period of disqualification is determined by the offender’s BAC and whether the offence is a first or subsequent offence. If a person is found guilty but the court does not record a conviction, the court is not required to cancel the driver’s licence or permit or disqualify the offender from obtaining one, if at the relevant time the concentration of alcohol in the blood or breath of the offender was less than 0.05 (where there are relevant priors) or less than 0.07 in any other case. There is also provision in Victoria for the immediate suspension of a person’s licence by a member of the police force or an officer of the Roads Corporation in specified circumstances.

| Mentioned in Chapter 6, Victoria provides a higher minimum period of disqualification than any other Australian jurisdiction for a first or second offence and one of the highest for a third offence. Under section 50(1A) of the RSA, the period of disqualification is determined by the offender’s BAC and whether the offence is a first or subsequent offence. If a person is found guilty but the court does not record a conviction, the court is not required to cancel the driver’s licence or permit or disqualify the offender from obtaining one, if at the relevant time the concentration of alcohol in the blood or breath of the offender was less than 0.05 (where there are relevant priors) or less than 0.07 in any other case. There is also provision in Victoria for the immediate suspension of a person’s licence by a member of the police force or an officer of the Roads Corporation in specified circumstances. |
|---|---|---|---|
### Table 10: Maximum penalty and minimum disqualification period for refusal to stop or remain stopped

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Penalty First Offence</th>
<th>Minimum Disqualification First Offence</th>
<th>Maximum Penalty Second Offence</th>
<th>Minimum Disqualification Second Offence</th>
<th>Maximum Penalty Third Offence</th>
<th>Minimum Disqualification Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units (PU) ($1,257.72)</td>
<td>2 years’ disqualification</td>
<td>25 PU ($2,620.25) or 3 months’ imprisonment</td>
<td>4 years’ disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ACT</td>
<td>20 PU ($2,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>10 PU ($1,100)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>200 PU ($22,000) or 12 months’ imprisonment</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>QLD</td>
<td>60 PU ($4,500) for private vehicle, 120 PU ($9,000) for another vehicle</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SA</td>
<td>$1,200</td>
<td>12 months’ disqualification (unless offence “trifling”)</td>
<td>$2,500</td>
<td>3 years’ disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAS</td>
<td>10 PU ($1,000) or imprisonment for 6 months</td>
<td>MAXIMUM 3 years’ disqualification</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>6 PU ($300)</td>
<td>12 PU ($600)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 7. Ancillary Sanctions in Victoria

In assessing the adequacy of the statutory maximum penalties provided for the relevant offences, it is important to note that offenders with relevant prior drink driving offences who re-offend are generally liable to multiple penalties. A fine or term of imprisonment is likely to be accompanied by licence cancellation and disqualification from obtaining a new licence for a fixed period of time. Other additional sanctions may include alcohol interlocks and education programs as conditions of the offender obtaining a new licence once the disqualification has expired. The adequacy of a statutory maximum penalty for an offence must be assessed in this context as these ancillary penalties frequently impose great hardship on offenders. Other Australian jurisdictions provide sanctions such as vehicle impoundment or forfeiture which are also briefly discussed below.

Various studies have been conducted on the effectiveness of ancillary sanctions targeted at drink drivers in terms of rehabilitation. Although it is not within the scope of this paper to provide a comprehensive review of drink driver rehabilitation in Victoria, the Council considers that a brief discussion of ancillary sanctions is warranted.

#### 7.1 Cancellation of Licence or Permit and Disqualification

The RSA provides for a comprehensive mandatory minimum licence disqualification scheme for offenders convicted or found guilty of Category A offences. Any driver’s licence or permit will be cancelled and the offender will be disqualified from obtaining one for such time as the court thinks fit, being at least the minimum period set out in Schedule 1 of the RSA (see Table 11 below). As

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Many offenders continue to drive after being disqualified from driving. A Western Australian study found that approximately seven per cent of repeat drink drivers admitted to driving at least once while disqualified. In Victoria in 2003 one in four (25.2 per cent) drink drivers who had previously committed a drink driving offence were driving without a valid licence at the time of the new offence (see Figure 7). There is also evidence that repeat offenders are more likely to have a high range (0.15 or more) BAC recorded. Figure 8 shows the proportion of repeat drink drivers by recorded BAC. With the

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71  VicRoads, Driver Licensing System.
72  Repeat Drink Driving Working Group (2003), above n 42, 15.
73  Ibid.
74  Licensed Premises Identification System (LPIS), supplied by the Transport Alcohol Section (TAS), Victoria Police.
75  Ibid.
exception of the ≤ 0.049 BAC range. Figure 8 illustrates that as the recorded BAC increases so does the proportion of repeat drink drivers present in the range. Approximately one in four drivers with a low range BAC (0.05 < 0.069) had prior drink driving offences whereas one in three drivers with readings between 0.10 and 0.149 and almost half of those in the highest range BAC (≥ 0.15) are repeat offenders.

Figure 8: Proportion of repeat drink drivers by recorded BAC (gm/100ml), 2003

Drivers with a higher BAC are at increased risk of being involved in a motor vehicle accident. Evidence in New South Wales indicates that while the crash risk associated with a BAC of 0.05 is twice that associated with a zero BAC, the crash risk associated with a BAC of 0.15 is 25 times that associated with a zero BAC.

Figure 9 shows a relatively consistent trend that between 1987 and 2004 approximately 60 per cent of drink drivers killed in Victoria were found to have a BAC of 0.15 or more.

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Table 9: Maximum penalty and minimum disqualification period for refusal to provide blood sample

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Penalty First Offence</th>
<th>Minimum Disqualification First Offence</th>
<th>Maximum Penalty Second Offence</th>
<th>Minimum Disqualification Second Offence</th>
<th>Maximum Penalty Third Offence</th>
<th>Minimum Disqualification Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units (£1,257.72)</td>
<td>2 years' disqualification</td>
<td>25 PU ($2,620.25) or 3 months' imprisonment</td>
<td>4 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ACT</td>
<td>30 penalty units ($3,300) and/or 6 months' imprisonment</td>
<td>6 months' disqualification</td>
<td>60 PU ($6,600) and/or 12 months' imprisonment</td>
<td>2 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>30 penalty units ($3,300) and/or 18 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>90 PU ($9,900) and/or 24 months' imprisonment</td>
<td>2 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>10 penalty units ($1,100) and/or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>20 penalty units ($2,200) and/or 24 months' imprisonment</td>
<td>2 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>QLD</td>
<td>28 PU ($2,100) or 9 months' imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
<td>60 PU ($4,500) or 18 months' imprisonment</td>
<td>DEFAULT disqualification of 9 or 12 months</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SA</td>
<td>$1,200</td>
<td>12 months' disqualification</td>
<td>$2,500</td>
<td>3 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAS</td>
<td>30 PU ($3,300) and/or 24 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>90 PU ($9,900) and/or 24 months' imprisonment</td>
<td>2 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>20 PU ($2,500)</td>
<td>6 months' disqualification</td>
<td>70 PU ($7,700) or 9 months' imprisonment</td>
<td>2 years' disqualification</td>
<td>100 PU ($10,000) or 18 months' imprisonment</td>
<td>Permanent disqualification</td>
</tr>
</tbody>
</table>

Table 10 sets out the statutory maximum penalties available across Australia for offences involving failing to stop or remain stopped at a preliminary breath testing station. Most jurisdictions do not distinguish between first and subsequent offenders for this offence and do not provide a term of imprisonment for this offence. Of the three jurisdictions that do impose a term of imprisonment for this offence, Victoria has the lowest statutory maximum term of imprisonment for a repeat offence.

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16. An explanation for the disproportionate representation of repeat offenders in the ≤ 0.05 blood alcohol concentration group is that there is an increased likelihood of a drink driver having a prescribed limit in this range, due to the zero blood alcohol concentration requirement for drivers re-licensed following a drink driving offence.

17. Licensed Premises Identification System (LPIS), supplied by the Transport Alcohol Section (TAS), Victoria Police.


19. ‘Drink drivers killed in Victoria’ refers to drivers with a known BAC of 0.05 or more who were killed on Victorian roads.
6.2 Category B Offences

Table 8 and Table 9 set out the statutory maximum penalties for offences involving failing to provide a breath or blood test for each jurisdiction. These demonstrate that the Victorian statutory maximum penalty for repeat offenders is low compared to those other jurisdictions that provide for imprisonment. The longest statutory maximum penalty of imprisonment available for offenders committing a second offence of failing to provide a breath or blood test is 24 months (New South Wales and Tasmania). Queensland provides mandatory imprisonment for a third or subsequent offence in some circumstances. South Australia does not provide for imprisonment for repeat offenders in this category.

Table 8: Maximum penalty and minimum disqualification period for refusal to provide a breath sample

<table>
<thead>
<tr>
<th>State</th>
<th>First Offence</th>
<th>Second Offence</th>
<th>Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units ($1,257.72)</td>
<td>25 PU ($2,500) or 3 months' imprisonment</td>
<td>4 years' imprisonment</td>
</tr>
<tr>
<td>ACT</td>
<td>30 PU ($3,000) and/or 6 months' imprisonment</td>
<td>30 PU ($3,000) and/or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
</tr>
<tr>
<td>NSW 1</td>
<td>10 PU ($1,100)</td>
<td>60 PU ($6,000) and/or 24 months' imprisonment</td>
<td>2 years' disqualification</td>
</tr>
<tr>
<td>NSW 2</td>
<td>30 PU ($3,300) and/or 18 months' imprisonment</td>
<td>60 PU ($6,500) and/or 24 months' imprisonment</td>
<td>2 years' disqualification</td>
</tr>
<tr>
<td>NT</td>
<td>10 PU ($1,100) or 12 months' imprisonment</td>
<td>20 PU ($2,000) or 12 months' imprisonment</td>
<td>18 months' disqualification</td>
</tr>
<tr>
<td>QLD 1</td>
<td>40 PU ($4,000) or 6 months' imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
<td>DEFAULT disqualification of 24 months</td>
</tr>
<tr>
<td>QLD 2</td>
<td>28 PU ($2,100) or 9 months' imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
<td>DEFAULT disqualification of 18 months</td>
</tr>
<tr>
<td>SA</td>
<td>$1,200</td>
<td>12 months' disqualification (1 month for offence 'trifling')</td>
<td>3 years' disqualification</td>
</tr>
<tr>
<td>TAS</td>
<td>30 PU ($3,300) and/or 12 months' imprisonment</td>
<td>60 PU ($6,000) and/or 24 months' imprisonment</td>
<td>24 months' disqualification</td>
</tr>
<tr>
<td>WA</td>
<td>30 PU ($3,200) or 6 months' imprisonment</td>
<td>90 PU ($9,000) or imprisonment for 9 months</td>
<td>2 years' disqualification</td>
</tr>
</tbody>
</table>

5.3 Sentencing Outcomes

A. Magistrates' Court

The relevant offences are overwhelmingly dealt with in the Magistrates’ Court. The Council examined Magistrates’ Court data between 2001/02 to 2004/05. In this period 44,874 relevant offences were proven in the Magistrates’ Court (See Figure 10 and Table 3). For these offences fines were the most common penalties imposed (75 per cent). The next most common penalty imposed was an adjourned undertaking (nine percent). In the same period the Magistrates’ Court dealt with 1,020 offences under section 49(1)(a) (driving under the influence). While fines were also the most common penalties for this offence, the proportion was much smaller (56 per cent). For section 49(1)(c) offences, one in four of the sentences imposed was an immediate or suspended term of imprisonment. As these data include first and repeat offences, the high proportion of fines for the relevant offences is explained in part by the fact that there is no provision for a term of imprisonment for a first offence.
Dismissed: Some offences that were not proven. As data limitations prevent separation of these two categories, none of the 'dismissed' offences has been included as proven offences.

The average length of community-based orders imposed during 2004/05 was 11.3 months.

Depending on type of priors.

Depending on type of priors.
As BAC levels increase so does the statutory maximum penalty available in most jurisdictions. As Table 6 shows, for BAC levels of 0.10, the Victorian statutory maximum penalty of three months’ imprisonment is low compared to those other jurisdictions that provide for imprisonment. The longest statutory maximum penalty of imprisonment available for offenders committing a second offence at this BAC level is 12 months (New South Wales, the Northern Territory and Tasmania). South Australia and Western Australia do not allow for a sentence of imprisonment for repeat offenders in this category.

Table 6: Maximum penalty and minimum disqualification period for Category A offences for BAC of 0.10

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Penalty First Offence</th>
<th>Minimum Disqualification First Offence</th>
<th>Maximum Penalty Second Offence</th>
<th>Minimum Disqualification Second Offence</th>
<th>Maximum Penalty Third Offence</th>
<th>Minimum Disqualification Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>14 penalty units [PU] ($1,257.72)</td>
<td>6 months’ disqualification</td>
<td>25 PU ($2,620.25) or 3 months’ imprisonment</td>
<td>10 months’ disqualification</td>
<td>25 PU ($2,620.25) or 3 months’ imprisonment</td>
<td>10 months’ disqualification</td>
</tr>
<tr>
<td>ACT</td>
<td>10 PU ($1,000) and/or 6 months’ imprisonment</td>
<td>3 months’ disqualification</td>
<td>10 PU ($1,000) and/or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>10 PU ($1,000) and/or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
</tr>
<tr>
<td>NSW</td>
<td>20 PU ($2,000) and/or 9 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>20 PU ($2,000) and/or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
<td>20 PU ($2,000) and/or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
</tr>
<tr>
<td>NT</td>
<td>1.5 PU ($825) or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>1.5 PU ($825) or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>1.5 PU ($825) or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
</tr>
<tr>
<td>QLD</td>
<td>14 PU ($1,050) or 3 months’ imprisonment</td>
<td>1 month’s disqualification102</td>
<td>20 PU ($1,050) or 6 months’ imprisonment103</td>
<td>3 months’ disqualification104</td>
<td>28 PU ($2,300) or 6 months’ imprisonment105</td>
<td>DEFAULT disqualification of 6 months106</td>
</tr>
<tr>
<td>SA</td>
<td>$900</td>
<td>6 months’ disqualification</td>
<td>$1,200</td>
<td>12 months’ disqualification</td>
<td>$1,200</td>
<td>24 months’ disqualification</td>
</tr>
<tr>
<td>TAS</td>
<td>20 PU ($2,000) and/or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>40 PU ($4,000) and/or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
<td>40 PU ($4,000) and/or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
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<tr>
<td>WA</td>
<td>30 PU ($1,500)</td>
<td>4 months’ disqualification</td>
<td>30 PU ($1,500)</td>
<td>6 months’ disqualification</td>
<td>30 PU ($1,500)</td>
<td>6 months’ disqualification</td>
</tr>
</tbody>
</table>

102 In specified circumstances (relating to the status of the offender’s licence) there is a minimum of 3 months’ disqualification (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2)(e)).
103 30 penalty units or imprisonment of 3 year in certain circumstances (s 79(2H)).
104 In specified circumstances (relating to the type of prior offences) there is default disqualification of 9 months (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2E)).
105 60 penalty units or 18 months’ imprisonment in certain circumstances (s 79(2I)).
106 In specified circumstances (relating to the type of prior offences) there is default disqualification of 12 months (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2F)).

As shown in Figure 11, most defendants appearing in the Magistrates’ Court for the relevant offences were sentenced for a single relevant offence (although they may have also been sentenced for other offences such as driving while disqualified). While most defendants charged with an offence against section 49(1)(f) are also charged with an offence against section 49(1)(b), the latter charge is generally struck out once the offence against section 49(1)(f) is proven.

Figure 11: Number of defendants and offences proven in the Magistrates’ Court for relevant offences, 2001/02 to 2004/05

Figure 12 shows that the median terms of imprisonment handed down for the relevant offences in the Magistrates’ Court in 2004/05 ranged from two months to 3.5 months (mean range: three months to four months). The maximum imprisonment terms attached to the relevant offences exceed the statutory maximum penalty allowable for the offence because of the use of aggregate sentences. Fifty-two per cent of imprisonment terms and 44 per cent of fines handed down for the relevant offences were aggregate sentences.

102 Court Statistical Services, Department of Justice (unpublished).
103 The Sentencing Act 1991 (Vic) sets out the power to hand down an aggregate sentence of imprisonment (s 9) and an aggregate fine (s 51).
As discussed above, data limitations prevent the explicit differentiation of repeat and first time drink driving offenders. However, as imprisonment is only a sentencing option for repeat offenders, one means of identifying these offenders in the data is through focusing on the sample of the relevant offences for which a non-aggregate term of imprisonment was handed down. For this sentence to be handed down, an offender must have been found guilty of committing a repeat drink driving offence.  

Figure 13 illustrates that in 2004/05 the median non-aggregate imprisonment term for the relevant offences was two months, which is two-thirds of the statutory maximum.

Table 5 shows the statutory maximum penalties across Australia for a first, second or third offence, together with the minimum period of disqualification where the BAC is 0.05. For a second offence involving a BAC of 0.05 the Victorian maximum penalty of three months’ imprisonment falls between the lowest and highest maximum penalty in other jurisdictions. The highest maximum imprisonment term for offenders committing a second offence at this BAC level is six months (Queensland, the Northern Territory and Tasmania). In Queensland the statutory maximum penalty is higher again for a third offence (nine months). The Australian Capital Territory, New South Wales, South Australia and Western Australia do not allow for a sentence of imprisonment for repeat offenders in this category.

Table 5:  Maximum penalty and minimum disqualification period for Category A offences with BAC of 0.05

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<tr>
<th>State</th>
<th>Maximum Penalty First Offence</th>
<th>Minimum Disqualification First Offence</th>
<th>Maximum Penalty Second Offence</th>
<th>Minimum Disqualification Second Offence</th>
<th>Maximum Penalty Third Offence</th>
<th>Minimum Disqualification Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units ($429) 892.25</td>
<td>6 months disqualification</td>
<td>20 PU ($2,620.25) 982.00</td>
<td>12 months disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ACT</td>
<td>5 PU ($500)</td>
<td>2 months disqualification</td>
<td>10 PU ($1,000)</td>
<td>3 months disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>10 PU ($1,100)</td>
<td>3 months disqualification</td>
<td>20 PU ($2,200)</td>
<td>6 months disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>5 PU ($550) or 3 months' imprisonment</td>
<td>1 month’s disqualification 99</td>
<td>7.5 PU ($825) or 6 months' imprisonment</td>
<td>3 months disqualification 99</td>
<td>28 PU ($2,100) or 9 months’ imprisonment</td>
<td>3 months disqualification 99</td>
</tr>
<tr>
<td>QLD</td>
<td>14 PU ($1,200) or 3 months' imprisonment</td>
<td>1 month’s disqualification 98</td>
<td>20 PU ($1,500) or 6 months' imprisonment</td>
<td>3 months disqualification 98</td>
<td>28 PU ($2,200) or 9 months’ imprisonment</td>
<td>3 months disqualification 98</td>
</tr>
<tr>
<td>SA</td>
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<td>$100</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
</tr>
<tr>
<td>TAS</td>
<td>10 PU ($1,000) or/and 3 months’ imprisonment</td>
<td>3 months disqualification 101</td>
<td>20 PU ($2,000) or/and 6 months' imprisonment</td>
<td>6 months disqualification 101</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>4 PU ($200)</td>
<td>10 PU ($500)</td>
<td>3 months disqualification</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Where there is separate provision for a second or subsequent offence in terms of penalty.

Where there is separate provision for a third or subsequent offence in terms of penalty.

Some jurisdictions, for example, South Australia, have separate provisions for a fourth offence.

The value of a penalty unit (PU) in Victoria as fixed by the Treasurer in accordance with s 111(1)(b) of the Monetary Units Act 2004 (Vic) for the financial year commencing 1 July 2005 is $104.81: Victorian Government Gazette, 14 April 2005, 722. Therefore the maximum fine is $1257.72. Other Jurisdictions have different values for penalty units.

In specified circumstances (relating to the status of the offender’s licence) there is a minimum of 3 months’ disqualification (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2)(e)).

30 penalty units or imprisonment of 1 year in certain circumstances (s 79(2H)).

In specified circumstances (relating to the type of prior offences) there is default disqualification of 9 months (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(8)).

In specified circumstances (relating to the type of prior offences) there is default disqualification of 12 months (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2F)).

Minimum disqualification of 12 months for a fourth or subsequent offence.
Table 4: Maximum statutory terms of imprisonment (months) in Australia for an offender with one prior offence committing a Category A offence by BAC level

<table>
<thead>
<tr>
<th>BAC</th>
<th>VIC</th>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
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<td>0</td>
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<td>0.15</td>
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<td>12</td>
<td>24</td>
<td>12</td>
<td>18</td>
<td>0</td>
<td>24</td>
<td>9</td>
</tr>
</tbody>
</table>

Figure 18: Maximum terms of imprisonment (months) in Australia for an offender with one prior offence committing a Category A offence by BAC level

However, Figure 14 illustrates that only one in four imprisonment terms involved an immediate custodial term. One in four imprisonment terms were ordered to be served by way of an intensive correction order, while almost 50 per cent of imprisonment terms were fully suspended. Non-aggregate sentences were more likely to be wholly suspended than were aggregate sentences.

Figure 14: The proportion of imprisonment types imposed in the Magistrates’ Court, 2004/05

With the exception of the ‘below 0.05 group’, there is a positive relationship between the mean term of imprisonment handed down, and the BAC reading recorded. In 2004/05, driving with a high range BAC (0.15 or above) resulted in an average imprisonment term of more than two-thirds of the statutory maximum penalty (Figure 15).

Figure 15: The average length of non-aggregate imprisonment terms for Category A offences by BAC reading, 2004/05

Consistent with the higher statutory maximum penalty that can be imposed for driving under the influence (section 49(1)(a)), the median value of fines handed down for this offence was higher than for the other drink-driving offences (Figure 16). The median non-aggregate fines imposed for the relevant offences ranged from $450 to $500, indicating minimal variation between offences. This is well below the statutory maximum of $1,257.72 for a first offence and $2,620.25 for a subsequent offence.
During 2004/05, almost 90 per cent of orders against motor vehicle licences were combined cancellation and disqualification orders, and most of the remaining orders were disqualifications, indicating the person was unlicensed at the time of the offence. Figure 17 shows that the term of motor vehicle licence disqualification was greater for Category B offences than for Category A offences where a BAC reading was available. This is consistent with the higher minimum period of disqualification for Category B offences (see Chapter 7.1 below).

Between 2001/02 and 2004/05, 229 relevant offences were heard in the Children’s Court. Eighty-two per cent of these offences were under section 49(1)(f) and 10 per cent were under section 49(1)(e). The most common sentence handed down was a fine (40 per cent), followed by a good behaviour bond (28 per cent), a probation order (22 per cent) and a youth supervision order (8 per cent).

B. Higher Courts

Although the relevant offences are summary offences, 34 defendants were sentenced for these offences in the Victorian higher courts from 2002/03 to 2003/04 because of related serious offending. At least 26 of the 34 defendants were charged with offences relating to motor vehicle accidents, including 12 'culpable driving causing death' offences, and nine involving ‘causing serious injury’. For the relevant drink driving offences, 11 offenders were imprisoned for an average of 1.5 months and 13 offenders received a fine (average of $389).

6. Comparison of Statutory Maximum Penalties for Repeat Offenders in Australia

Each Australian jurisdiction has legislation regulating drink driving. Most jurisdictions provide a maximum fine and/or term of imprisonment for the relevant offences. Each jurisdiction also provides ancillary penalties such as cancellation of an offender’s driver’s licence or permit and disqualification from obtaining a new one. In addition some jurisdictions have introduced education programs, alcohol interlock programs and impoundment or forfeiture of vehicles. Comparisons between jurisdictions are made problematic because of the use of different terminology, different categories of drink driving offences and different prescribed penalties. There is also variation as to how ‘repeat’ offenders are classified.

The legislation in most Australian jurisdictions provides a term of imprisonment as the maximum penalty for offenders with prior convictions committing the relevant offences. However, there is marked disparity across Australia in the level of that maximum imprisonment term. Each jurisdiction also provides a mandatory minimum period of disqualification from driving for most of the relevant offences. As Tables 5 to 10 demonstrate, Victoria has the highest minimum period of disqualification from driving for a first or second offence against the relevant provisions. For a third offence against the relevant provisions the minimum disqualification periods provided in Victoria are among the highest in Australia. This should be borne in mind when contrasting the statutory maxima.

6.1 Category A Offences

The Victorian provisions governing the maximum statutory penalty of imprisonment for Category A (reach or exceed prescribed BAC) offences do not distinguish between offenders on the basis of BAC, although that is clearly a factor that the sentencing judge can take into account as part of the circumstances of the offence. Figure 15 (above) illustrates that BAC levels do in fact have an impact on sentence severity. By comparison, the legislation in all other jurisdictions in Australia provides an ascending hierarchy of statutory maximum penalties on the basis of the offender’s BAC level.

Although the maximum available fine in Victoria is comparable with other Australian jurisdictions, it is interesting to compare the Victorian statutory maximum imprisonment term for repeat offenders with the statutory maximum penalties provided for similar offences in other jurisdictions. For the purposes of comparison the statutory maximum penalties are contrasted for offenders at three BAC levels—0.05, 0.10 and 0.15, for a second offence (see Table 4 and Figure 18).

---

91 The circumstances were not available for five of the defendants.
During 2004/05, almost 90 per cent of orders against motor vehicle licences were combined cancellation and disqualification orders, and most of the remaining orders were disqualifications, indicating the person was unlicensed at the time of the offence. Figure 17 shows that the term of motor vehicle licence disqualification was greater for Category B offences than for Category A offences where a BAC reading was available. This is consistent with the higher minimum period of disqualification for Category B offences (see Chapter 7.1 below).

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<tr>
<th>BAC</th>
<th>VIC</th>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>WA</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.05</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>24</td>
<td>12</td>
<td>18</td>
<td>0</td>
<td>24</td>
<td>9</td>
</tr>
</tbody>
</table>

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Figure 13 illustrates that in 2004/05 the median non-aggregate imprisonment term for the relevant driving offence.

As discussed above, data limitations prevent the explicit differentiation of repeat and first time drink driving offenders. However, as imprisonment is only a sentencing option for repeat offenders, one means of identifying these offenders in the data is through focusing on the sample of the relevant offences for which a non-aggregate term of imprisonment was handed down. For this sentence to be handed down, an offender must have been found guilty of committing a repeat drink driving offence.

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<tr>
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<tr>
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<td>20 PU ($2,620.25) or 3 months’ imprisonment</td>
<td>12 months disqualification</td>
<td>28 PU ($2,100) or 6 months’ imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
</tr>
<tr>
<td>ACT</td>
<td>5 PU ($500) or 3 months’ imprisonment</td>
<td>2 months disqualification</td>
<td>10 PU ($1,000)</td>
<td>3 months disqualification</td>
<td>18 PU ($1,257.72) or 6 months’ imprisonment</td>
<td>3 months disqualification</td>
</tr>
<tr>
<td>NSW</td>
<td>10 PU ($1,100)</td>
<td>3 months disqualification</td>
<td>20 PU ($2,000)</td>
<td>6 months disqualification</td>
<td>25 PU ($2,200)</td>
<td>6 months disqualification</td>
</tr>
<tr>
<td>NT</td>
<td>5 PU ($500)</td>
<td>1 month’s disqualification</td>
<td>7.5 PU ($720) or 6 months’ imprisonment</td>
<td>3 months disqualification</td>
<td>14 PU ($1,500)</td>
<td>6 months’ disqualification</td>
</tr>
<tr>
<td>QLD</td>
<td>14 PU ($1,500) or 3 months’ imprisonment</td>
<td>1 month’s disqualification</td>
<td>20 PU ($1,500) or 6 months’ imprisonment</td>
<td>3 months disqualification</td>
<td>28 PU ($2,200) or 9 months’ imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
</tr>
<tr>
<td>SA</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
<td>6 months disqualification</td>
</tr>
<tr>
<td>TAS</td>
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<td>3 months disqualification</td>
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<td></td>
</tr>
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<td>WA</td>
<td>4 PU ($200)</td>
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<td></td>
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</tr>
</tbody>
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60 penalty units or 18 months’ imprisonment in certain circumstances (s 79(2I)).

In specified circumstances (relating to the type of prior offences) there is default disqualification of 12 months (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2F)).

Minimum disqualification of 12 months for a fourth or subsequent offence.

Charges relating to section 49(1)(a) exclude those offences that relate to driving under the influence of drugs.

The median was used to measure central tendency as the data were not normally distributed.

Driving under the influence of alcohol (s 49(1)(a)) does carry an imprisonment term as a maximum penalty for a first offence (one month) and thus will include first and subsequent drink driving offenders.
As BAC levels increase so does the statutory maximum penalty available in most jurisdictions. As Table 6 shows, for BAC levels of 0.10, the Victorian statutory maximum penalty of three months’ imprisonment is low compared to those other jurisdictions that provide for imprisonment. The longest statutory maximum penalty of imprisonment available for offenders committing a second offence at this BAC level is 12 months (New South Wales, the Northern Territory and Tasmania). South Australia and Western Australia do not allow for a sentence of imprisonment for repeat offenders in this category.

Table 6: Maximum penalty and minimum disqualification period for Category A offences for BAC of 0.10

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Penalty First Offence</th>
<th>Minimum Disqualification First Offence</th>
<th>Maximum Penalty Second Offence</th>
<th>Minimum Disqualification Second Offence</th>
<th>Maximum Penalty Third Offence</th>
<th>Minimum Disqualification Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units (PU) ($1,257.72) or 3 months’ imprisonment</td>
<td>2 months’ disqualification</td>
<td>25 PU ($2,620.25) or 3 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>30 PU ($3,300) or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
</tr>
<tr>
<td>ACT</td>
<td>10 PU ($1,000) and/or 6 months’ imprisonment</td>
<td>3 months’ disqualification</td>
<td>10 PU ($1,000) and/or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>20 PU ($2,200) and/or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
</tr>
<tr>
<td>NSW</td>
<td>20 PU ($2,200) and/or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>30 PU ($3,300) and/or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
<td>40 PU ($4,200) and/or 18 months’ imprisonment</td>
<td>24 months’ disqualification</td>
</tr>
<tr>
<td>NT</td>
<td>1.5 PU ($825) or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>20 PU ($2,200) or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
<td>DEFAULT disqualification of 6 months</td>
<td></td>
</tr>
<tr>
<td>QLD</td>
<td>14 PU ($1,050) or 3 months’ imprisonment</td>
<td>1 month’s disqualification</td>
<td>20 PU ($1,050) or 6 months’ imprisonment</td>
<td>9 months’ disqualification</td>
<td>28 PU ($2,100) or 12 months’ imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
</tr>
<tr>
<td>SA</td>
<td>$900</td>
<td>6 months’ disqualification</td>
<td>$1,200</td>
<td>12 months’ disqualification</td>
<td>$1,800</td>
<td>24 months’ disqualification</td>
</tr>
<tr>
<td>TAS</td>
<td>20 PU ($2,000) and/or 6 months’ imprisonment</td>
<td>6 months’ disqualification</td>
<td>40 PU ($4,000) and/or 12 months’ imprisonment</td>
<td>12 months’ disqualification</td>
<td>DEFAULT disqualification of 12 months</td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>30 PU ($1,500)</td>
<td>4 months’ disqualification</td>
<td>30 PU ($1,500)</td>
<td>6 months’ disqualification</td>
<td>30 PU ($1,500)</td>
<td>8 months’ disqualification</td>
</tr>
</tbody>
</table>

102 In specified circumstances (relating to the status of the offender’s licence) there is a minimum of 3 months’ disqualification (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2)(i)).
103 In specified circumstances (relating to the type of prior offences) there is default disqualification of 9 months (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2E)).
104 In specified circumstances (relating to the type of prior offences) there is default disqualification of 12 months (Transport Operations (Road Use Management) Act 1995 (Qld) s 86(2F)).

As shown in Figure 11, most defendants appearing in the Magistrates’ Court for the relevant offences were sentenced for a single relevant offence (although they may have also been sentenced for other offences such as driving while disqualified). While most defendants charged with an offence against section 49(1)(f) are also charged with an offence against section 49(1)(b), the latter charge is generally struck out once the offence against section 49(1)(f) is proven.

Figure 11: Number of defendants and offences proven in the Magistrates’ Court for relevant offences, 2001/02 to 2004/05

![Figure 11: Number of defendants and offences proven in the Magistrates’ Court for relevant offences, 2001/02 to 2004/05](image)

Figure 12 shows that the median terms of imprisonment handed down for the relevant offences in the Magistrates’ Court in 2004/05 ranged from two months to 3.5 months (mean range: three months to four months). The maximum imprisonment terms attached to the relevant offences exceed the statutory maximum penalty allowable for the offence because of the use of aggregate sentences. Fifty-two per cent of imprisonment terms and 44 per cent of fines handed down for the relevant offences were aggregate sentences.

Figure 12: Median terms of imprisonment handed down for the relevant offences in the Magistrates’ Court in 2004/05

![Figure 12: Median terms of imprisonment handed down for the relevant offences in the Magistrates’ Court in 2004/05](image)

105 Court Statistical Services, Department of Justice (unpublished).
106 The Sentencing Act 1991 (Vic) sets out the power to hand down an aggregate sentence of imprisonment (s 9) and an aggregate fine (s 51).
Figure 10: Proportion of sentencing outcomes for section 49(1) offences proven in the Magistrates’ Court, 2001/02 to 2004/05

Table 3: Sentencing outcomes for section 49(1) offences proven in the Magistrates’ Court, 2001/02 to 2004/05

Table 7: Maximum penalty and minimum disqualification period for Category A offences for BAC of 0.15

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* 'Other' sentencing outcomes include—conviction and discharge, combined custody and treatment orders, adjournment for diversion and youth training centre orders.

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108 Depending on type of priors.
109 Depending on type of priors.
107 In Queensland and Western Australia a driver with a BAC of 0.15 or more is deemed to be driving under the influence.
106 Traffic Act 1996 (NT) s 39.
105 Depending on type of priors.
104 There is mandatory imprisonment in certain circumstances, depending on the type of prior offences (Transport Operations (Road Use Management) Act 1995 (Qld) s 79(1C)).
103 Depending on type of priors.
6.2 Category B Offences

Table 8 and Table 9 set out the statutory maximum penalties for offences involving failing to provide a breath or blood test for each jurisdiction. These demonstrate that the Victorian statutory maximum penalty for repeat offenders is low compared to those other jurisdictions that provide for imprisonment. The longest statutory maximum penalty of imprisonment available for offenders committing a second offence of failing to provide a breath or blood test is 24 months (New South Wales and Tasmania). Queensland provides mandatory imprisonment for a third or subsequent offence in some circumstances. South Australia does not provide for imprisonment for repeat offenders in this category.

### Table 8: Maximum penalty and minimum disqualification period for refusal to provide a breath sample

<table>
<thead>
<tr>
<th>State</th>
<th>First Offence</th>
<th>Minimum Disqualification</th>
<th>Second Offence</th>
<th>Minimum Disqualification</th>
<th>Third Offence</th>
<th>Minimum Disqualification</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units ($1,257.72)</td>
<td>5 years' disqualification</td>
<td>25 PU ($2,520.25) or 3 months' imprisonment</td>
<td>4 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ACT</td>
<td>30 PU ($3,000) and/or 6 months' imprisonment</td>
<td>6 months' disqualification</td>
<td>30 PU ($3,000) and/or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW 1</td>
<td>10 PU ($1,105)</td>
<td>12 months' disqualification</td>
<td>60 PU ($6,000) and/or 24 months' imprisonment</td>
<td>2 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW 2</td>
<td>30 PU ($3,300) and/or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>20 PU ($2,000) or 12 months' imprisonment</td>
<td>18 months' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>10 PU ($1,105) or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>20 PU ($2,000) or 12 months' imprisonment</td>
<td>18 months' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>QLD 1</td>
<td>40 PU ($4,000) or 6 months' imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
<td>60 PU ($4,500) or 18 months' imprisonment</td>
<td>DEFAULT disqualification of 9 or 12 months</td>
<td></td>
<td></td>
</tr>
<tr>
<td>QLD 2</td>
<td>28 PU ($2,520) or 9 months' imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
<td>DEFAULT disqualification of 9 or 12 months</td>
<td>DEFAULT disqualification of 12 or 24 months</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SA</td>
<td>$1,200</td>
<td>12 months' disqualification (1 month if offence ‘trifling’)</td>
<td>$2,500</td>
<td>3 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAS</td>
<td>30 PU ($3,000) and/or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>60 PU ($6,000) and/or 24 months' imprisonment</td>
<td>24 months' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>50 PU ($2,500)</td>
<td>6 months' disqualification</td>
<td>70 PU ($3,500) or imprisonment for 9 months</td>
<td>2 years' disqualification</td>
<td>70 PU ($3,500) or imprisonment for 18 months</td>
<td>Permanent disqualification</td>
</tr>
</tbody>
</table>

5.3 Sentencing Outcomes

### A. Magistrates’ Court

The relevant offences are overwhelmingly dealt with in the Magistrates’ Court. The Council examined Magistrates’ Court data between 2001/02 to 2004/05. In this period 44,874 relevant offences were proven in the Magistrates’ Court (See Figure 10 and Table 3). For these offences fines were the most common penalties imposed (75 per cent). The next most common penalty imposed was an adjourned undertaking (nine percent). In the same period the Magistrates’ Court dealt with 1,020 offences under section 49(1)(a) (driving under the influence). While fines were also the most common penalties for this offence, the proportion was much smaller (56 per cent). For section 49(1)(a) offences, one in four of the sentences imposed was an immediate or suspended term of imprisonment. As these data include first and repeat offences, the high proportion of fines for the relevant offences is explained in part by the fact that there is no provision for a term of imprisonment for a first offence.

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112 NSW 1 contains the penalties for failing to provide a breath sample at a random breath test.
113 NSW 2 contains the penalties for failing to provide a breath sample after being arrested.
114 QLD 1 contains the penalties provided in Queensland for failing to provide a breath sample at a preliminary breath test.
115 QLD 2 contains the penalties provided in Queensland for refusing to provide a breath, blood or urine sample after detention.
116 Depending on type of priors.
117 There is mandatory imprisonment in certain circumstances, depending on the type of prior offences (Transport Operations (Road Use Management) Act 1995 (Qld) s 79(1C)).
118 Depending on type of priors.

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Court Statistics Services, Department of Justice (unpublished). Proportions include proven offences in the Magistrates’ Court. Data exclude the last two weeks of the 2004/05 financial year. Where more than one sentence is attached to an offence, the most severe penalty is recorded. Unfortunately a distinction cannot be made between penalty outcomes for first time offenders and those for repeat offenders. This is because of the way the data are recorded for sentencing outcomes in the Magistrates’ Court.
exception of the $\leq 0.049$ BAC range.$^{76}$ Figure 8 illustrates that as the recorded BAC increases so does the proportion of repeat drink drivers present in the range. Approximately one in four drivers with a low range BAC ($0.05 < 0.069$) had prior drink driving offences whereas one in three drivers with readings between $0.10$ and $0.149$ and almost half of those in the highest range BAC ($\geq 0.15$) are repeat offenders.

Figure 8: Proportion of repeat drink drivers by recorded BAC (gm/100ml), 2003.$^{77}$

Drivers with a higher BAC are at increased risk of being involved in a motor vehicle accident. Evidence in New South Wales indicates that while the crash risk associated with a BAC of $0.05$ is twice that associated with a zero BAC, the crash risk associated with a BAC of $0.15$ is $25$ times that associated with a zero BAC.$^{78}$

Figure 9 shows a relatively consistent trend that between 1987 and 2004 approximately $60$ per cent of drink drivers killed in Victoria$^{79}$ were found to have a BAC of $0.15$ or more.

![Graph showing proportion of repeat drink drivers by recorded BAC (gm/100ml), 2003.]

Table 9: Maximum penalty and minimum disqualification period for refusal to provide blood sample

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Penalty First Offence</th>
<th>Minimum Disqualification First Offence</th>
<th>Maximum Penalty Second Offence</th>
<th>Minimum Disqualification Second Offence</th>
<th>Maximum Penalty Third Offence</th>
<th>Minimum Disqualification Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units ($1,257.72)</td>
<td>2 years' disqualification</td>
<td>25 PU ($2,820.25) or 3 months' imprisonment</td>
<td>4 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ACT</td>
<td>30 penalty units ($3,000) and/or 6 months' imprisonment</td>
<td>6 months' disqualification</td>
<td>30 PU ($3,000) and/or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>30 penalty units ($3,300) and/or 18 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>30 PU ($3,500) and/or 24 months' imprisonment</td>
<td>2 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>10 penalty units ($1,500) or 12 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>20 penalty units ($2,200) or 12 months' imprisonment</td>
<td>18 months' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>QLD</td>
<td>28 PU ($2,100) or 9 months' imprisonment</td>
<td>DEFAULT disqualification of 6 months</td>
<td>60 PU ($4,500) or 18 months' imprisonment</td>
<td>DEFAULT disqualification of 6 or 12 months</td>
<td>60 PU ($4,500) or 18 months' imprisonment</td>
<td>DEFAULT disqualification of 12 or 24 months</td>
</tr>
<tr>
<td>SA</td>
<td>$1,200</td>
<td>12 months' disqualification (1 month if offence 'trifling')</td>
<td>$2,500</td>
<td>3 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAS</td>
<td>30 PU ($3,000) and/or 24 months' imprisonment</td>
<td>12 months' disqualification</td>
<td>30 PU ($6,000) and/or 24 months' imprisonment</td>
<td>24 months' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>60 PU ($18,500) or 9 months' imprisonment</td>
<td>6 months' disqualification</td>
<td>70 PU ($18,500) or 9 months' imprisonment</td>
<td>2 years</td>
<td>100 PU ($5,000) or 18 months' imprisonment</td>
<td>Permanent disqualification</td>
</tr>
</tbody>
</table>

Table 10 sets out the statutory maximum penalties available across Australia for offences involving failing to stop or remain stopped at a preliminary breath testing station. Most jurisdictions do not distinguish between first and subsequent offenders for this offence and do not provide a term of imprisonment for this offence. Of the three jurisdictions that do impose a term of imprisonment for this offence, Victoria has the lowest statutory maximum term of imprisonment for a repeat offence.

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76 An explanation for the disproportionate representation of repeat offenders in the $\leq 0.05$ blood alcohol concentration group is that there is an increased likelihood of a drink driver having a prescribed limit in this range, due to the zero blood alcohol concentration requirement for drivers re-licensed following a drink driving offence.
77 Licensed Premises Identification System (LPIS), supplied by the Transport Alcohol Section (TAS), Victoria Police.
79 ‘Drink drivers killed in Victoria’ refers to drivers with a known BAC of $0.05$ or more who were killed on Victorian roads.

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119 Depending on type of priors.
120 There is mandatory imprisonment in certain circumstances, depending on the type of prior offences (Transport Operations (Road Use Management) Act 1995 (Qld) s 79(1C)).
121 Depending on type of priors.
Table 10: Maximum penalty and minimum disqualification period for refusal to stop or remain stopped

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Penalty First Offence</th>
<th>Minimum Disqualification First Offence</th>
<th>Maximum Penalty Second Offence</th>
<th>Minimum Disqualification Second Offence</th>
<th>Maximum Penalty Third Offence</th>
<th>Minimum Disqualification Third Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIC</td>
<td>12 penalty units ($1,257.72)</td>
<td>2 years' disqualification</td>
<td>25 penalty units ($2,620.25) or 3 months' imprisonment</td>
<td>4 years' disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ACT</td>
<td>20 PU ($2,000)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NSW</td>
<td>10 PU ($1,100)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>200 PU ($22,000) or 12 months' imprisonment</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>QLD</td>
<td>60 PU ($4,500) for private vehicle, 120 PU ($9,000) for another vehicle</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SA</td>
<td>$1,200 12 months’ disqualification (unless offence ‘trifling’)</td>
<td>$2,500 3 years’ disqualification</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TAS</td>
<td>10 PU ($1,000) or imprisonment for 6 months MAXIMUM 3 years’ disqualification</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>6 PU ($300) 12 PU ($600)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

7. Ancillary Sanctions in Victoria

In assessing the adequacy of the statutory maximum penalties provided for the relevant offences, it is important to note that offenders with relevant prior drink driving offences who re-offend are generally liable to multiple penalties. A fine or term of imprisonment is likely to be accompanied by licence cancellation and disqualification from obtaining a new licence for a fixed period of time. Other additional sanctions may include alcohol interlocks and education programs as conditions of the offender obtaining a new licence once the disqualification has expired. The adequacy of a statutory maximum penalty for an offence must be assessed in this context as these ancillary penalties frequently impose great hardship on offenders. Other Australian jurisdictions provide sanctions such as vehicle impoundment or forfeiture which are also briefly discussed below.

Various studies have been conducted on the effectiveness of ancillary sanctions targeted at drink drivers in terms of rehabilitation. Although it is not within the scope of this paper to provide a comprehensive review of drink driver rehabilitation in Victoria, the Council considers that a brief discussion of ancillary sanctions is warranted.

7.1 Cancellation of Licence or Permit and Disqualification

The RSA provides for a comprehensive mandatory minimum licence disqualification scheme for offenders convicted or found guilty of Category A offences. Any driver’s licence or permit will be cancelled and the offender will be disqualified from obtaining one for such time as the court thinks fit, being at least the minimum period set out in Schedule 1 of the RSA (see Table 11 below). As

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71 VicRoads, Driver Licensing System.
72 Repeat Drink Driving Working Group (2003), above n 42, 15.
73 Ibid.
74 Licensed Premises Identification System (LPIS), supplied by the Transport Alcohol Section (TAS), Victoria Police.
75 Ibid.
5.2 Profile of a Drink Driver

The overwhelming majority of drink driving offences in Victoria are committed by men (see Figure 5). In 2000 the proportion of first drink driving offences committed by men was over 80 per cent and the proportion of repeat drink driving offences committed by men was over 90 per cent.

Figure 5: Proportion of male and female single and repeat drink drivers, 1988–2000

Drink driving is a particular problem for drivers aged 21 to 29 years of age. Figure 6 shows the proportion of repeat drink drivers by their age group at the time of their last offence between 1988 and 2000. Over this period, almost 40 per cent of repeat drink drivers were aged between 21 and 29 years at the time of their most recent offence. This is also the peak age for culpable drivers. Between 1998/99 and 2003/04 the average age of persons sentenced for culpable driving causing death was 28 years. As shown earlier in Figure 1, alcohol is the most common major recorded factor in fatal road crashes. In 2004, nearly 42 per cent of all drivers killed were aged between 21 and 25 years old although this age group comprises only 8.5 per cent of the driving population.

For refusing a blood or breath test or failing to stop or remain stopped at a preliminary breath testing station, the minimum period of disqualification in Victoria is two years for a first offence and four years for a subsequent offence.

Moffatt et al, in the New South Wales Bureau of Crime Statistics and Research Crime and Justice Bulletin, point to research which suggests that licence disqualification has a deterrent effect on repeat offenders. Similarly, the Report of the Western Australian Drink Driving Working Group states—

A large body of research provides evidence that licence actions are a very effective road safety countermeasure and the only drink driving sanction which has been consistently associated with reduction in community-wide driving behaviour.

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70 Road Safety Priorities Program (Victoria), July to December 2005.
71 Repeat Drink Driving Working Group (2003), above n 42, 25.
72 Road Safety Act 1986 (Vic) s 50(14B).
73 Road Safety Act 1986 (Vic) s 51.
74 Road Safety Act 1986 (Vic) sch 1.
75 Moffatt (2004), above n 49, 10.
The RACV research report points to evidence which indicates that disqualification can—
- Reduce recidivism,\textsuperscript{127}
- Have an ‘impact on alcohol-related incidences’\textsuperscript{128}
- ‘[i]mprove overall road safety by reducing the general level of traffic violations and crashes’\textsuperscript{129}

There is some controversy over the most effective period of disqualification. The Report of the Western Australian Drink Driving Working Group suggests that 12 to 18 months is generally more effective in producing road safety benefits than short periods such as 3 to 6 months.\textsuperscript{130} However, the RACV Research Report pointed to concerns expressed by Magistrates as follows—

Another magistrate was concerned about long disqualification periods and suggested that ‘short and sharp’ may be more effective, with another magistrate stating ‘we are tougher in Victoria than other states’ in terms of disqualification. One magistrate stated that ‘penalties are far more punitive in nature now than they used to be’, while another suggested that ‘penalties are very uneven in the community’. Some magistrates stated that ‘we are putting people in the situation of driving unlicensed’.\textsuperscript{131}

The effectiveness of disqualification is dependent on whether it actually prevents drink drivers from driving. The inability of licence disqualification to prevent certain offenders from driving limits its capacity for specific deterrence.\textsuperscript{132} The RACV Research Report states that ‘offenders learn through disqualified driving that holding a driver’s licence is not essential in transportation so long as care is taken with the amount of driving, nature of driving and location’.\textsuperscript{133} The Report concludes that ‘consequently, unlicensed driving has the potential to damage any benefits that may be gained through the use of licence sanctions as a drink driving countermeasure’.\textsuperscript{134}

Even after the period of disqualification has elapsed, some offenders do not apply for a new licence, with a number of these offenders driving while unlicensed.

The RACV research report made several recommendations including to—
- ‘Undertake research to determine the extent of unlicensed driving among offenders who fail to apply for licence re-instatement’.\textsuperscript{135}
- ‘Introduce changes to legislation to require offenders (particularly ‘hard-core’ recidivists) to complete a rehabilitation program as part of the penalty rather than as a requirement for re-licensing.’\textsuperscript{136}
- ‘Increase the deterrence of driving while suspended, disqualified or cancelled by increasing the perception of risk of apprehension by implementing compulsory licence checks for all traffic offences and random checks at a location close to RBT stations (i.e. Booze Buses)’.\textsuperscript{137}

Disqualification imposes hardship on offenders, particularly those who are unable to work or earn a living because of the loss of their licence. This can lead to loss of housing and severe financial hardship for offenders and their families. Western Australia, Queensland and the Australian Capital Territory allow drivers to apply for a restricted licence so that they can continue to drive for work

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure3.png}
\caption{Proportion of drink drivers with prior offences, 1988-2000}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure4.png}
\caption{Number of repeat drink drivers by number of prior drink driving offences, 2003\textsuperscript{138}}
\end{figure}

\textsuperscript{127} RACV (2005), above n 2, 4. The Research Report states: ‘Numerous studies with a variety of methodologies have indicated that this sanction, at least in the short term, is more effective in preventing drink driving recidivism than other forms of punishment or remedial education programs unaccompanied by withdrawal of driving rights’.

\textsuperscript{128} RACV (2005), above n 2, 4. The Report, citing Siskind (1996), states: ‘A study conducted in Queensland indicated that the use of license suspension was associated with a two-thirds reduction in both crashes and drink driving recidivism’.

\textsuperscript{129} RACV (2005), above n 2, 4. Repeat Drink Driving Working Group (2003), above n 42, 26.

\textsuperscript{130} RACV (2005), above n 2, 27.

\textsuperscript{131} Ibid 4.

\textsuperscript{132} Ibid 4.

\textsuperscript{133} Ibid Recommendation 17, 47.

\textsuperscript{134} Ibid Recommendation 18, 47.

\textsuperscript{135} Ibid Recommendation 19, 47.

\textsuperscript{136} RACV, Drink Driver Rehabilitation and Education in Victoria Summary Report (2005) 1.

\textsuperscript{137} Licensed Premises Identification System (LPIS), supplied by the Transport Alcohol Section (TAS), Victoria Police.
In Victoria between 1988 and 2000 the proportion of repeat drink drivers increased by nine per cent, with more than one in four drink drivers having at least one prior offence since 1992 (see Table 2 and Figure 3). Of those offenders with prior offences for drink driving, 67 per cent were from metropolitan Melbourne.

Table 2: Number and proportion of first and repeat drink drivers in Victoria, 1988–2000

<table>
<thead>
<tr>
<th>Year</th>
<th>First offenders</th>
<th>Repeat offenders</th>
<th>Total</th>
<th>% Repeat</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>7999</td>
<td>1299</td>
<td>9298</td>
<td>13.9%</td>
</tr>
<tr>
<td>1989</td>
<td>8121</td>
<td>1327</td>
<td>9448</td>
<td>14.2%</td>
</tr>
<tr>
<td>1990</td>
<td>8678</td>
<td>1337</td>
<td>9315</td>
<td>14.4%</td>
</tr>
<tr>
<td>1991</td>
<td>8515</td>
<td>1279</td>
<td>9794</td>
<td>13.2%</td>
</tr>
<tr>
<td>1992</td>
<td>7536</td>
<td>1251</td>
<td>8787</td>
<td>14.4%</td>
</tr>
<tr>
<td>1993</td>
<td>7188</td>
<td>1317</td>
<td>8515</td>
<td>15.4%</td>
</tr>
<tr>
<td>1994</td>
<td>7219</td>
<td>1288</td>
<td>8507</td>
<td>15.4%</td>
</tr>
<tr>
<td>1995</td>
<td>7745</td>
<td>1350</td>
<td>9095</td>
<td>15.0%</td>
</tr>
<tr>
<td>1996</td>
<td>8728</td>
<td>1397</td>
<td>10125</td>
<td>13.7%</td>
</tr>
<tr>
<td>1997</td>
<td>9379</td>
<td>1371</td>
<td>10750</td>
<td>13.0%</td>
</tr>
<tr>
<td>1998</td>
<td>8114</td>
<td>1522</td>
<td>9636</td>
<td>16.0%</td>
</tr>
<tr>
<td>1999</td>
<td>7222</td>
<td>1400</td>
<td>8622</td>
<td>16.3%</td>
</tr>
<tr>
<td>2000</td>
<td>8522</td>
<td>1650</td>
<td>10172</td>
<td>16.2%</td>
</tr>
</tbody>
</table>

purposes. There is no such provision in Victoria. A recent Queensland report found that the most common cause of unlicensed driving was the need to drive for work related reasons. Restricted licences have been criticised for undermining the deterrent effect of disqualification as offenders do not experience the full effect of the punishment and it creates a general impression of a less severe punishment.

Even once a period of disqualification from obtaining a new licence or permit has expired, there are additional requirements placed on most offenders before they can become re-licensed.

### 7.2 Alcohol Interlock Devices

The Road Safety (Alcohol Interlocks) Act 2001 (Vic) came into operation on 13 May 2002. These amendments were designed to combat drink driving (and particularly repeat offenders) by focussing on rehabilitation and harm prevention rather than punishment and deterrence.

Alcohol interlocks are breath analysis instruments that are connected to a vehicle’s ignition system. They measure the driver’s BAC and prevent the vehicle from starting if the BAC exceeds a pre-set limit. They are tamper-resistant and record usage including attempted and failed starts. This information is recorded and used in preparing assessments of the person’s condition and whether the person can be trusted to drive without an interlock. They can only be removed by a court order.

The power to impose an alcohol interlock condition arises when an application is made to the Magistrates’ Court by an offender to be re-licensed after having had his or her licence cancelled for a relevant drink driving offence. It is only if a court decides to restore an applicant’s licence under section 50(4) of the Road Safety Act 1986 (Vic) that consideration must then be given to whether that person’s licence should be subject to an alcohol interlock condition. In some cases a court must impose alcohol interlock conditions while in other cases it has a discretion.

Generally interlocks are—

- Discretionary for first time offenders who have been found guilty of serious drink driving offences.
- Mandatory for repeat offenders.

In the case of repeat offenders the court must impose an alcohol interlock condition—

- For a minimum of 6 months where the person’s BAC was below 0.15.
- For at least 3 years in other cases (for Category A offences where a person’s BAC is above 0.15, for Category B offences, or for a third time or subsequent offender).

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141 Road Safety Act 1986 (Vic), ss 50A(4) and 50AA(1). The rules governing the removal of an alcohol interlock condition are contained in section 50AAB of the Road Safety Act 1986 (Vic) and section 89B of the Sentencing Act 1991 (Vic). The provisions governing breach of an alcohol interlock condition are contained in section 50AAD of the Road Safety Act 1986 (Vic) and section 89D of the Sentencing Act 1991 (Vic). The penalty for breach is a maximum fine of $3,000 or imprisonment for a maximum of four months.

142 In the case of first time offenders the court has a discretionary power to impose an alcohol interlock condition for a minimum period of 6 months where that person was found guilty of a category A offence with a BAC of 0.15 or more or a category B offence (Road Safety Act 1986 (Vic), ss 50AAB(2)).

143 Road Safety Act 1986 (Vic) s 50AAB(3).

144 Road Safety Act 1986 (Vic) s 50AAB(3)(a).

145 Road Safety Act 1986 (Vic) s 50AAB(3)(b).

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Table 12 includes the offences for which an alcohol interlock device will be imposed, the length of disqualification and the length of time that the interlock condition will be on a person’s licence.

<table>
<thead>
<tr>
<th>Offenders</th>
<th>Offence</th>
<th>何 long the license will be cancelled</th>
<th>How long the interlock condition will be on the licence</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Offenders</td>
<td>One only offence, which was a BAC of at least 0.15, or a non-BAC offence (1)</td>
<td>A minimum of 15 months</td>
<td>If court imposes condition, it will be for a minimum of 6 months</td>
</tr>
<tr>
<td>Repeat Offenders</td>
<td>Group A: Three or more offences or Two offences where the most recent offence was a BAC of at least 0.15, or a non-BAC offence (1)</td>
<td>A minimum of 30 months</td>
<td>A minimum of 3 years</td>
</tr>
<tr>
<td></td>
<td>Group B: Two offences, where the most recent offence was a BAC of less than 0.15</td>
<td>A minimum of 12 months</td>
<td>A minimum of 6 months</td>
</tr>
</tbody>
</table>

(1) Non-BAC drink driving offences include: boil (driving under the influence of alcohol), refusing to provide a breath or blood sample, refusing to accompany a police officer.
(2) The existing ten-year rule applies in determining whether an offender is a single or repeat offender.

Table 13 provides two examples of the estimated cost of an alcohol ignition interlock to an offender as charged by two different service providers. Costs can increase for an offender if, for example, the offender has access to two family vehicles, as both would require an alcohol ignition interlock.

<table>
<thead>
<tr>
<th>Offenders</th>
<th>Alcohol Interlock Services</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>RACV</td>
</tr>
<tr>
<td></td>
<td>Full Price</td>
</tr>
<tr>
<td>Installation</td>
<td>$120.00</td>
</tr>
<tr>
<td>Monthly Fee</td>
<td>$130.00</td>
</tr>
<tr>
<td>Removal</td>
<td>$120.00</td>
</tr>
</tbody>
</table>

Alcohol interlock devices have also been introduced in South Australia, New South Wales, and Queensland.

The RACV Research Report states that the use of interlocks produced contrary opinions from service administrators and magistrates. On the one hand, service administrators were generally in favour of interlocks as a means of addressing drink driving. Some service administrators suggested that offenders qualifying for interlocks could be fast tracked through the disqualification period in order to commence the rehabilitation of the offender at an earlier stage. On the other hand, some magistrates expressed doubts about the effectiveness of interlocks and were concerned that the use of mandatory interlocks as a condition of re-licensing could increase the number of offenders driving without a licence. Some magistrates were also concerned about the heavy financial burden that interlocks place on lower socio-economic groups.

5. The Drink Driving Problem

5.1 Introduction

Drink driving is a very complex social problem for which there are no simple solutions. During the 1980s and 1990s there was a decline in the proportion of drivers killed in road crashes who were over the limit. In 1981, 44 per cent of all drivers killed in road crashes in Australia had a BAC of 0.05 or more. By 1998, 26 per cent of all drivers killed had a BAC of 0.05 or more. However, despite this reduction, alcohol continues to be one of the main causes of road fatalities in Australia.

Figure 1 shows that in the year 2000, alcohol was the leading recorded factor in fatal road crashes in Australia—being the major factor in 16 per cent of cases, and in an additional six per cent of cases in conjunction with drugs.

Recent data indicate that each year Victoria Police receives 5,000 blood samples taken from drivers who attend hospital after a vehicle accident. Of these samples, 35 per cent are positive for alcohol. Eight per cent are usually found to have a BAC over 0.250. Victoria Police state that this proportion has remained the same over a number of years.

Between 1988 and 2000 the number of Victorian drivers who were charged with a drink driving offence (including Category B offences) increased from 9,898 to 11,865, peaking at 12,954 in 1997 (see Figure 2).
In 1965 the Phillips Royal Commission of Enquiry into the Liquor Industry concluded that a majority of road accidents resulted from the consumption of alcohol—

On the basis of much research, it is a well-founded conclusion that a majority of road accidents occur because the driver or drivers involved are suffering impairment of necessary driving skills due to the consumption of alcoholic liquor. There appears to be a threshold value of blood alcohol concentration up to which no increased risk of accident can be measured. For the population as a whole, that value appears to be about .05. Consequently the Victorian government introduced 0.05 as the legal limit of alcohol consumption for drivers of motor vehicles. This led to an immediate decline in the road toll. However as time progressed the number of road deaths once again began to increase. Over the next twenty years various measures were introduced to endeavour to improve road safety.

On 5 December 1986 the government passed the Road Safety Act 1986 (Vic) (RSA), superseding the Motor Car Act 1958 (Vic). Amongst other things the Act expanded offences relating to alcohol and other drugs and increased penalties for various driving offences. The provisions in the RSA relating to drink driving offences were designed to—

... reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; reduce the number of drivers whose driving is impaired by alcohol or other drugs; and provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol.

The second reading debate for the RSA reveals that the changes introduced by the Bill to the drink driving laws were viewed by some as "harsh and draconian" and "incredibly severe". Despite several amendments to the RSA the maximum penalty for repeat offenders committing the relevant offences has not been increased although there has been a slight increase in the value of a penalty unit.

The Road Safety (Further Amendment) Act 1991 (Vic) included, among other things, clarification that a person released on a bond for a first drink driving offence would be treated as a second time offender if he or she re-offended. The Road Safety Amendment Act 1994 (Vic) removed the requirement that convicted drink drivers, who previously held full driver licences, go back to probationary licences. Instead convicted drink drivers are required to comply with a zero BAC limit. Another major change provided that drink driving offences committed 10 years earlier would no longer count as a prior offence in certain circumstances.

Other changes to the RSA include the commencement of the Victorian Drink Driver Program (VDDP) in 1990 and the introduction of alcohol interlocks in 2003. See below at Chapter 7 for discussion of these and other ancillary penalties.

The RACV found that—

The current interlock program relies on "high" risk offenders wanting to get re-licensed after serving their suspension period, and may in fact be a disincentive for re-licensing. With no current monitoring of offenders through the suspension period, effectiveness of the program is difficult to determine, as are the re-licensing rates.

The RACV research report states that: "[I]f test research seems to indicate that interlocks work best when they are combined with probation or treatment such as counselling or medical monitoring." Interlock programs have been widely evaluated and there is an accumulating body of evidence to show that interlocks have a beneficial impact on recidivism rates, at least as long as the device is installed. It has been suggested that the fact that re-arrest rates increase after the interlock is removed should not discredit or discount the significant beneficial effects of interlock programs.

Interlocks are not intended to replace existing sanctions, but to provide additional options for preventing drink driving behaviour and as an adjunct to education and treatment. Increasingly, researchers are concluding that improved results will be obtained from interlock programs when they are supported by legislation and integrated with remedial programs that include assessment, drink driving education and treatment for alcohol and other problems.

7.3 Education and Treatment

The Victorian Drink Driver Program (VDDP) commenced in 1990 and is aimed at reducing repeat driving offences. Programs are provided by agencies accredited by the Department of Human Services. Offenders are required to pay for the VDDP.

The RACV research report stated—

The current Victorian drink driving program largely focuses on measures that offenders need to undertake as part of the re-licensing process. Accredited drink driving agencies provide an 8 hour education program that some offenders are required to attend prior to re-licensing. Recidivists and those convicted with high BAC levels are also required to attend one or more assessments to determine the nature of their alcohol problems prior to attending the education program, and many are also required to have an alcohol interlock fitted to their vehicles as a condition of re-licensing.

It identified a number of shortcomings in the structure and content of the VDDP including—

- A lack of integrated programs targeting recidivist and high BAC offenders.
- A failure to focus on the rehabilitation of high risk offenders.
- The current system is not the most effective way to encourage offenders to seek treatment and could, in fact, operate as a disincentive to offenders seeking to be re-licenced.
- A lack of communication between agencies involved in the VDDP.
- Deficiencies in the type and mix of programs.
Recommendations of the research report include—

- That a ‘more integrated and coordinated approach to managing offenders through the process from court attendance to re-licensing should be established’. 156
- To [(i)] introduce a two tier system requiring (a) all first offenders with BAC less than 0.15 to attend the existing drink driver course, and (b) all recidivists/high BAC first offenders to attend a combination program (including education, psychotherapy/counselling and follow-up contact/probation). 157
- That [(i)] the availability of interpreter services and resources for non-English speaking offenders... should be systematically examined and if necessary improved. 158

The Report of the Western Australian Drink Driving Working Group states that there is evidence that education programs can reduce the likelihood of repeat offending amongst first time offenders and those assessed as non-problem drinkers and that the programs have been shown generally to have positive results. However the report points to literature which ‘identifies repeat drink drivers as those most resistant to change and the least responsive to legislative changes, harsher penalties and education strategies for remediation’. 159

The RACV research report also refers to the limitations of the current system in providing rehabilitation for repeat offenders serving a prison sentence. The Report states—

People in prison, who are often the most serious offenders, remain a group that are not specifically targeted by the current rehabilitation programs... Prison programs for drink driving offenders are almost uniformly unsuccessful. This may in part reflect the fact that successful rehabilitation requires practice in life skills and lifestyle change and this is not available to a prison population. Hence, further research is required into the likely effectiveness of targeting serious drink driving offenders who are in prison, including the option of special post-release programs. 160

7.4 Vehicle Immobilisation, Impoundment and Forfeiture

Vehicle immobilisation (at the offender’s residence) and impoundment prevent a driver from driving his or her vehicle. Vehicle immobilisation and impoundment are harsh penalties that have the potential to impact adversely the families of offenders. There are several additional problems associated with vehicle impoundment including the provision of storage facilities and associated costs. The Northern Territory has enacted laws enabling vehicle impoundment. The review of Victorian drink driving measures commissioned by the RACV included interviewing ‘service administrators’ who were working in the field of drink driving prevention and rehabilitation or had extensive experience in either of these areas. All service administrators rejected impounding vehicles as a penalty.

Vehicle forfeiture is an option used by a number of jurisdictions in the United States and is available in the Northern Territory. It is difficult and costly to administer and appears to be used rarely.

Table 1: Drink driving laws in Victoria

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>Introduce 0.05 as legal BAC limit for drivers of motor vehicles.</td>
</tr>
<tr>
<td>1974</td>
<td>Compulsory blood alcohol analysis for crash victims taken to hospital.</td>
</tr>
<tr>
<td>1983</td>
<td>Electronic preliminary breath testing device introduced.</td>
</tr>
<tr>
<td>1984</td>
<td>Zero BAC for certain classes of offences.</td>
</tr>
<tr>
<td>1986</td>
<td>Road Safety Act 1986—increased penalties, increased disqualification periods, increased time for taking breath tests from 2 hours to 3 hours, introduced immediate licence suspension for certain offences.</td>
</tr>
<tr>
<td>1990</td>
<td>Introduction of purpose built booze buses and improved drink driving advertising.</td>
</tr>
<tr>
<td>1992</td>
<td>Zero BAC introduced for heavy vehicle drivers.</td>
</tr>
<tr>
<td>1994</td>
<td>Electronic evidential breath testing devices introduced.</td>
</tr>
<tr>
<td>2001</td>
<td>Offences in s 49(1)(b), (f) and (g) altered from having a BAC of ‘more than the prescribed concentration of alcohol’ to a BAC of ‘the prescribed concentration of alcohol or more than the prescribed concentration of alcohol’.</td>
</tr>
<tr>
<td>2002</td>
<td>Alcohol interlocks introduced for repeat drink drivers and high range BAC offenders.</td>
</tr>
</tbody>
</table>

However, the study identified factors that might have had an effect on the impact of the legislation, as follows—

[(i)] The impact of the 1998 legislation could have been greater if licence disqualifications were more systematically applied for drink-driving offences... While the legislative amendments had the effect of increasing the average licence disqualification for drink-driving offences across the State, 20 per cent of guilty offenders still escaped licence disqualification on being found guilty of a drink-driving offence (via a s 10 dismissal) despite the existence of these mandatory minima. Ensuring that almost all offenders are recipients of a licence disqualification once found guilty for a drink-driving offence could have increased the potential returns on investment that are reported here. 49

The study continued—

Further, there is some suggestion that RBT may have less of a deterrent effect in regional or country areas than it does in major urban centres. Fewer police are available to target drink-driving in country and regional locations and those that are available have to cover a much larger region than their city counterparts. These factors would reduce the perceived certainty of apprehension as people come to believe that they can evade RBT by avoiding major roads and arterials and thus diminishing the deterrent efficacy of RBT. The superior effect of raising statutory penalties found for offenders residing in non-Sydney metropolitan locations is, therefore, an important outcome in terms of addressing drink-driving and related issues in country and regional areas. 51

4. Evolution of Drink Driving Laws in Victoria

Drink driving has been identified as one of the most common causes of road crashes. Over the last thirty years, laws and penalties aimed at combating drink driving in Victoria have been constantly evolving, reflecting the severity of the problem and changing community attitudes to drink driving. This development is summarised in the following table:

"
the community about drink driving sanctions may deter some drink drivers. Some researchers argue that drink driving behaviour may be modified where the penalty is certain, swiftly applied and severe.43

In September 1998 the New South Wales government increased statutory penalties for drink driving offences. Increases included doubling the maximum term of imprisonment for mid range BAC (0.08 to less than 0.15) and high range BAC (0.15 and more) drink driving offences, doubling the maximum licence disqualification periods and the maximum monetary fines for all drink driving offences.44 One of the aims of the amendments was ‘to enhance the deterrent effect of our road penalties and...help improve road safety’.45

The New South Wales Bureau of Crime Statistics and Research undertook a study to determine whether the increased penalties had any impact on the rates of repeat drink driving. The study first identified and ruled out five ways in which the intended deterrent effects of the legislation could have potentially been undermined—(1) a reduction in drink driving charges brought before the courts, (2) an increase in court delay, (3) a reduction in guilty pleas, (4) a reduction in proven offences or (5) no subsequent change to the severity of drink driving penalties imposed by the courts. The study examined these issues by comparing all drink driving offences prosecuted in the New South Wales Local Courts in 1997 with those in 1999 (after the changes were in force). The study found that—

...the 1998 legislation resulted in a significant increase in the average penalties imposed for drink-driving offences without having any negative impact on the prosecution of drink-driving offences. The only setback in terms of the deterrence aims of the legislation was a statistically significant, but small, decrease in the proportion of offenders being disqualified from driving.46

The study found that there was some evidence of a beneficial impact of the sentencing policy on repeat offending—

Non-Sydney drink-drivers sentenced before the statutory penalties were increased, had higher odds of reappearing for a new offence, and reoffended sooner, than non-Sydney drink-drivers sentenced after the penalties were raised. But this effect was not apparent for Sydney drink-drivers.47

The study noted—

The present findings lend support to one of the central tenets of deterrence theory, that is increasing the formal costs associated with an offence will reduce the rate of offending. However, when considering the importance of these findings it needs to be noted that the overall effect of the increased penalties on recidivism rates was relatively small, with the probability of a drink-driver reoffending increased by just three percentage points in non-Sydney locations. Given such small gains in risk of apprehension, such as RBT (random breath testing), have had substantial and enduring influences on offending rates... Focusing efforts on maintaining a high level of enforcement of


Briscoe (2004), above n 44, 3.

Ibid 7.

8. Does the Maximum Penalty Serve its Function?

8.1 Principle of Legality

As discussed above, it is a function of the maximum statutory penalty to place a known and legally defined limit on judicial discretion in imposing punishment for an offence. This should be high enough to enable a sentencer to deal adequately with the worst type of case falling within the prohibition, but not so high as to provide no guidance at all to the sentencer as to its relative seriousness.164

Current sentencing practices for the relevant offences suggest that, in most cases, sentencing magistrates are imposing sentences well within the statutory upper limit.

Table 3 demonstrates that in relation to first and repeat offences under the relevant provisions during 2001/02 to 2004/05, 75 per cent of the 44, 874 penalties given were fines. However, as Table 3 does not distinguish between first and repeat offenders, a large proportion of the 44, 874 offences evaluated would be first offences for which the maximum penalty that can be imposed is a fine of 12 penalty units.

Figure 13 demonstrates that the median non-aggregate imprisonment term for the relevant offences was two months, which is two-thirds of the statutory maximum. Figure 14 shows however, that only one in four imprisonment terms involves an immediate custodial term to be fully served and one in four is served by way of an intensive correction order. Almost 50 per cent of the imprisonment terms are fully suspended with non-aggregate sentences more likely to be wholly suspended than aggregate sentences. With the exception of the ‘below 0.05 group’, there is a positive relationship between the mean term of imprisonment handed down and the BAC reading recorded. Driving with a high range BAC (0.15 or above) results in an average imprisonment term of more than two-thirds of the maximum penalty (Figure 15).

There is currently a ‘de facto’ method of addressing the most serious repeat offenders despite the three month statutory maximum penalty. Serious repeat offenders frequently attend court charged with multiple offences. The relevant offence may be accompanied by a charge of unlicensed driving or driving while disqualified. There may also be a charge of dangerous driving. In serious cases where there is more than one charge, magistrates are better equipped to address adequately the offending behaviour through providing an aggregate sentence of imprisonment that is longer than the three month statutory maximum for the single relevant offence. However this is an indirect means of avoiding the current limitations of the statutory maximum penalty which creates the potential for inconsistencies in addressing the problem of serious repeat offenders. Figure 12 illustrates that the median terms of imprisonment handed down for the relevant offences in the Magistrates’ Court in 2004/05 ranged from two months to 3.5 months (mean range: three months to four months). The maximum imprisonment terms attached to the relevant offences exceeded the statutory maximum penalty allowable for the offence due to the use of aggregate sentences.165 Fifty-two per cent of imprisonment terms handed down for the relevant offences were aggregate sentences.

The RACV report states in relation to the current maximum statutory penalty that ‘in terms of recidivists, magistrates are concerned about the maximum penalty being too short... with one magistrate commenting that this is “a joke”, while another said that it is “ridiculous”’. The report stated that the ‘penalties for high BAC offenders were suggested by many [magistrates] to be inadequate, although one magistrate suggested that “if you combine the fine plus disqualification, then it is a severe penalty”’. The report also stated that ‘placing a recidivist in jail was thought by

164 Feilberg (2002), above n 9, 55.

165 The Sentencing Act 1993 (Vic) sets out the power to hand down an aggregate sentence of imprisonment (s 9) and an aggregate fine (s 51).
the majority of magistrates to be ‘the last resort’ however some magistrates were concerned that they need to keep the offender from potentially harming the community.166

The Council is of the view that the current maximum penalty does not provide sufficient scope for sentences to set appropriate sentences for the worst types of cases coming before the courts. For serious repeat offenders with high BAC readings who show scant regard for the law, and from whom the community requires protection, the current statutory maximum penalty is insufficient. The Council believes that sentencing judges and magistrates should be empowered to sentence repeat offenders at the most serious end of the scale to longer than three months’ imprisonment.

8.2 Offence Seriousness

The statutory maximum penalty should serve as an expression of the gravity with which which the community views the offence and should provide guidance to the judiciary as to the seriousness of the offence relative to other offences.167 In assessing the seriousness of criminal conduct it is necessary to have regard to the concepts of harm and culpability as well as to current sentencing practice. Culpability is enhanced if the offender has previously been convicted of, and sentenced for, like criminal acts.

The Council is persuaded that the current statutory maximum penalty for repeat offenders does not accord with the community’s view of the seriousness of repeat drink driving offences. The current statutory maximum does not adequately reflect the risk of harm posed by repeat drink drivers to the lives and physical integrity of members of the community; nor does it sufficiently reflect the culpability of offenders who have previously been dealt with for drink driving offences.

Current sentencing practices suggest that, for most cases, sentencing magistrates have sufficient scope to address offending behaviour. However, the Council is of the view that empowering the courts to impose longer sentences of imprisonment for serious repeat offenders would address much of the apparent community concern and send a clear message that the relevant offences are viewed as serious offences.

8.3 Deterrence

The maximum penalty is also intended to function as a general deterrent by ‘warning potential offenders of the maximum punitive “price” they will pay for the commission of such an offence’.168

The ability of a statutory maximum to achieve deterrence is limited to the extent that it is ‘not known how many potential offenders are accurately aware of the statutory maximum, or are in a position to draw a distinction between it and the level of penalties being imposed by the courts, but in publicity given by government to the consequences of non compliance with the law the maximum statutory penalty is always given prominence as the deterrent’.169

As discussed above at 3.4, the New South Wales study on increased statutory penalties for repeat drink driving found that ‘the overall effect of the increased penalties on recidivism rates was relatively small170 and that “[f]ocusing efforts on maintaining a high level of enforcement of drink driving offences may therefore be a better use of resources when targeting offending of this nature’.171

In relation to crimes, such as drink driving, that risk injury von Hirsch and Jareborg state—

Many crimes only create a threat or risk to a given interest. Their harm-rating should depend not only on the importance of the interest but the degree to which it is risked. The more remote the risk, the lower that rating, ie, the greater should be the discount.172

An assessment of culpability, or blameworthiness, involves gauging the extent to which the offender should be held accountable for his or her actions by assessing the offender’s awareness, motivation and intention in committing the crime. The level of culpability increases if the offender has previously been found guilty of, and sentenced for, similar criminal acts.173

Current judicial sentencing practices are also significant in assessing the seriousness of criminal conduct.174

3.4 Deterrence

The statutory maximum penalty is also intended to function as a general deterrent by warning potential offenders of the maximum punishment they are liable to receive if they commit an offence.175 There are, however, difficulties in quantifying the extent to which the level of a maximum penalty may actually deter potential offenders from committing offences.176 Von Hirsch states—

...the principle of proportionality does not rest on factual claims that making punishment commensurate to the gravity of crimes enhances their general preventative usefulness. Suppose we were to discover evidence that proportionate punishments were no better determents, and perhaps not as successful, as disproportionate ones. Suppose, furthermore, that new psychological evidence suggested that formal penal sanctions, whether proportionate or not, contributed little to the development of people’s sense of moral self-restraint. Would such evidence mean that we could properly ignore constraints of proportionality? Certainly not. As long as the state continues to respond to criminal conduct through the criminal sanction, it is necessarily treating those whom it punishes as wrongdoers, and condemning them for their conduct. If it condemns, then justice requires that the severity of that condemnation comport with the degree of blameworthiness—that is, the gravity—of their conduct.177

In its report the Sentencing Task Force stated—

It has also been contended that the legislative statement of the maximum penalty, as well as the judicially imposed one, can function as a general deterrent by warning potential offenders of the maximum punitive “price” they will pay for the commission of such an offence. The doubts cast upon the effectiveness of court imposed sentences in achieving effects of general deterrence would suggest that statutory statements regarding maxima would be of even more dubious value in deterring from crime. It is not known how many potential offenders are accurately aware of the statutory maximum, or are in a position to draw a distinction between it and the level of penalties being imposed by the courts, but in publicity given by government to the consequences of non-compliance with the law the maximum statutory penalty is always given prominence as the deterrent.178

The Report of the Western Australian Drink Driving Working Group suggests that legal sanctions can reduce the incidence of drink driving by deterring drivers from re-offending.179 Increased knowledge in

166 RACV (2005), above n 2, 27.
167 Freiberg (2002), above n 9, 55.
169 Briscoe (2004), above n 44, 8.
170 Ibid 9.
171 170 Briscoe (2004), above n 2, 27.
173 166 RACV (2005), above n 2, 27.
174 166 RACV (2005), above n 2, 27.
3.3 Offence Seriousness

The statutory maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance to the judiciary as to the seriousness of the offence relative to other offences.27

The function of a statutory maximum penalty as a benchmark of offence seriousness stems from the theory of ‘just deserts’.28 Von Hirsch states—

The fundamental principle of desert in punishing convicted persons is that the severity of the punishment should be commensurate with the seriousness of the offender’s criminal conduct. The focus of the commensurate-deserts principle is on the gravity of past conduct, not on the likelihood of future behaviour; this retrospective orientation distinguishes desert from the crime-control goals of deterrence, incapacitation, and rehabilitation. The criterion for judging whether a penalty is deserved, whether it fairly reflects the gravity of the criminal conduct of which the defendant has been convicted, rather than its effectiveness in preventing future crimes by the defendant or other potential offenders.

The rationale of the principle may be stated as follows. Punishment involves blame; it is a defining characteristic of punishment that is not merely unpleasant (so are many other kinds of state intervention) but also characterizes the person punished as a wrongdoer who is being censured or reproved for his or her criminal act. The severity of the punishment connotes the amount of blame: the sterner the punishment, the greater the implicit censure. The amount of punishment therefore ought to comport, as a matter of justice, with the degree of blameworthiness of the offender’s criminal conduct.29

There are a number of difficulties in ranking the relative seriousness of criminal conduct. The report of the Sentencing Task Force states—

Social problems do not tend themselves to simple or elegant mathematical solutions. There is ‘no strict denominator of social problems and no scale for comparing different problems’.30 Despite an individual’s confidence in the merits of his or her intuitive sense of offence seriousness, the concept does convey different things to different people. Offences vary widely in the way they are carried out and in the harm they cause or the interests they engage. Yet despite the difficulties, ‘the seriousness of criminal acts represents a conceptual dimension of criminality that is indispensable in common everyday discourse, in legal theory and practice, and in sociological work’.31

The seriousness of criminal conduct can be assessed according to the degree of harm caused or risking the culpability of the offender.32

Harm comprises the ‘degree of injury done or risked by the act’.33 The offences that are the subject of this review would primarily be classified as criminal acts risking injury. Harm inflicted or risked may affect the interests of individuals and the state.34

3.4 The Council’s View

As discussed above, this paper does not review the effectiveness of the statutory maximum penalty and ancillary penalties in rehabilitating drink drivers. Rather it is confined to the narrower question of whether the current statutory maximum penalty is adequate to serve the purposes of a statutory maximum. The Council acknowledges that, in the absence of such an evaluation, increasing the statutory maximum penalty may have limited deterrent effect. However, the importance of the maximum penalty reflecting the expectations of the community in censuring the relevant offences and accommodating ‘worst cases’ of offending against the relevant provisions justifies an increase in the statutory maximum penalty.

The Council believes that the current maximum penalty for repeat drink drivers does not adequately serve its intended functions. It does not provide sufficient scope for sentencing judges to accommodate the worst type of case falling within its prohibition. Nor does it provide an adequate guide as to the seriousness with which the community views the offence. To the extent that a maximum penalty does function as a general deterrent, the current maximum is also inadequate to constitute realistic deterrence.

Although it is beyond the scope of this review, the challenge remains throughout Australia of how to combat repeat drink driving. While repeat offenders need to be deterred from engaging in drink driving offences and punishment needs to be imposed, additional strategies also need to be put in place which are aimed at achieving behavioural changes. Research shows that legal sanctions in isolation are often ineffective in dealing with repeat drink driving behaviour. It is recommended that other measures such as drink driver specific assessment, treatment and education programs should be investigated and implemented to address the problem of drink driving. A comprehensive program would be more beneficial for Victoria because it would provide an opportunity to make some long term changes to the conduct of repeat drink driving offenders. As the program would also include increased statutory maximum terms of imprisonment, public perceptions about the inadequacy of the current statutory maximum would also be addressed, sentences would be equipped to deal adequately with the worst cases and a message would be sent to the community that these offences are viewed seriously.

Imprisonment, regarded as the most severe of drink driving penalties, is a component of many deterrence based strategies targeted at the potential and convicted drink driver. It has been suggested that prison sanctions provide a general deterrent and produce a gradual long term effect, whereby the community comes to understand that drink driving is a serious offence demonstrated by the serious penalties imposed.34 However, there is little evidence that imprisonment has an impact on the level of recidivism of convicted drink drivers and there is some evidence that long periods of incarceration increase, rather than decrease, the rate of recidivism amongst multiple offenders.35

The effectiveness of imprisonment as a drink driving deterrent has been questioned by a number of researchers indicating that there is little support for this sanction. The majority have concluded that policies based on increasing the certainty and swiftness of punishment have a greater deterrent value than policies based on increasing the severity of punishment.36

Nevertheless, regardless of the deterrent effects of incarceration, there are cases where very strict measures are necessary and public safety needs to be protected and the availability of a custodial sanctions [sic] remains an important option for the courts.37

The Report of the Western Australian Drink Driving Working Group states—
9. Recommendations

9.1 Number of Prior Offences and BAC

As discussed above, research shows that almost half of drink drivers with a high level BAC (0.15 or more) are repeat offenders. Evidence in New South Wales indicates that while the crash risk associated with a BAC of 0.05 is twice that associated with a zero BAC, the crash risk associated with a BAC of 0.15 is twenty-five times that associated with a zero BAC.178 The Council is of the view that repeat offenders with a high level BAC constitute a more serious category of offender and that the maximum term of imprisonment provided for by the legislation should reflect this.

The RACV report described a trend in other jurisdictions towards identifying ‘hard-core offenders’— that the maximum term of imprisonment provided for by the legislation should reflect this.

The Council has been mindful of the need to ensure that the revised penalties are consistent with the statutory maximum penalty of imprisonment available for repeat offenders should reflect both the number of prior offences that offenders have committed and, for Category A offences, offenders’ BAC.

As discussed above, recent data from Victoria Police examining the number of repeat drink driving offenders in 2003 shows that 63 per cent of repeat offenders had one prior drink driving offence, 22 per cent had two prior offences and 15 per cent had at least three prior offences (see Figure 4 above). The Council is of the opinion that the statutory maximum penalty should be increased for offenders with one prior offence (which according to the 2003 data would apply to just under two-thirds of repeat drink drivers) and that the statutory maximum penalty should be further increased for offenders with two or more prior offences (which would apply to the remaining one-third of repeat offenders).

9.2 Category A Offences

For the reasons discussed above, the Council believes that it is appropriate to increase the maximum term of imprisonment for offenders with one or more prior drink driving offences who are found guilty of an offence against section 49(1)(b), (f) or (g).

The Council has been mindful of the need to ensure that the revised penalties are consistent with the statutory maximum penalty for a Category A offence with a BAC of 0.15 or more and one prior offence (or a BAC below 0.15 and two or more priors) will be the same as the statutory maximum penalty of imprisonment for driving under the influence179 with one or more prior offences (12 months’ imprisonment). The Council is of the view that, if the recommendation regarding the penalty for the relevant offences is implemented, the statutory maximum penalty for a repeat offence of driving under the influence should be reviewed and increased.

As part of the exercise of setting the statutory maximum penalty it is also appropriate to consider current sentencing practices and, where possible, informed public opinion.

3.2 Principle of Legality

The statutory maximum penalty provides a finite upper boundary on a sentencer’s power and discretion to punish and / or rehabilitate offenders.19 As well as setting the upper limit of judicial discretion when sentencing offenders, it represents symbolic recognition that the State’s power to deal with offenders must be subject to lawful restraint.

A statutory maximum penalty should be sufficiently limited to provide indication of the relative gravity of the offence and penalty as compared with other offences and yet be broad enough to allow the sentencer sufficient scope to accommodate the worst examples of the offence that are likely to be encountered.20

In addition to factors such as the nature and gravity of the offence, the offender’s degree of responsibility for the offence, the previous character of the offender (including prior offences), and any aggravating or mitigating circumstances, the sentencer must have regard to current sentencing practices and the statutory maximum penalty when determining an offender’s sentence.21

The Victorian Court of Appeal recently discussed the function of the maximum penalty as follows—

There is no gainsaying the importance of the maximum penalty prescribed by Parliament for an offence. It provides authoritative guidance by the legislature as to the relative seriousness of the offence, in the abstract, by comparison with other crimes in the calendar...22

It must always be remembered, however, that a maximum penalty is prescribed for the worst class, or one of a number of worst classes, of the offence in question.23 On some occasions, when Parliament increases the maximum penalty, that suggests that more severe penalties should be imposed not just for offences falling within the worst class but over a range (not necessarily the whole range) of cases. On other occasions, an increase in the maximum penalty means only that Parliament has thought of a worst class of case for which the previous maximum was inadequate...24

It is because the maximum penalty is important that s.5(2)(a) of the Sentencing Act lists it first among the matters to which a court sentencing an offender must have regard and, if the judge mistakes the maximum, that re-opens the discretion unless the Court of Appeal is satisfied that the mistake could not have materially affected the sentence...25

It is sometimes said that a judge, in obedience to s.5(2)(a), ‘steers by the maximum’. It is a helpful metaphor, but two things should be said of it. One is that there is a difference between steering by the maximum and aiming at the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid. The other is that steering by the maximum may decrease the sentence that might otherwise be imposed as well as increase it, as in Nash v Whittle.26

176 Roads and Traffic Authority (2000), above n 8, 2.
178 RACV (2005), above n 2, 41; citing R Voas and D Fisher, ‘Court Procedures for Handling Intoxicated Drivers’ (2001) 25(1) Alcohol Research and Health 32.
179 RACV (2005), above n 2, 41.
180 Under the Road Safety Act 1986 (Vic) s 49(1)(a).
182 Freiberg (2002), above n 9, 56.
183 Sentencing Act 1991 (Vic) s 5(2).
184 DPP v Aydin & Kirsch [2005] VSCA 229, [15]–[21], Callaway JA and [39], Buchanan JA.
186 R v DPP (1996), above n 13, 11.
offence]. Such offences include an offence against any one of the paragraphs of section 49(1). For purposes including licence cancellation and disqualification and provisions relating to alcohol interlocks, the current offence is to be regarded as a first offence where the prior conviction or finding of guilt was made 10 years or more before the commission of the current offence. The definition of a repeat offender varies among Australian jurisdictions.

2.1 Category A Offences

These offences consist of—

- Driving or being in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in the blood or breath (section 49(1)(b) RSA).
- Within three hours of driving or being in charge of a motor vehicle having the prescribed concentration of alcohol or more than the prescribed concentration of alcohol shown on a breath analysing instrument which is not due solely to consuming alcohol after driving or being in charge of the motor vehicle (section 49(1)(f) RSA).
- Within three hours of driving or being in charge of a motor vehicle having the prescribed concentration of alcohol or more than the prescribed concentration of alcohol present in a blood sample which is not due solely to consuming alcohol after driving or being in charge of the motor vehicle (section 49(1)(g) RSA).

The prescribed concentration of alcohol for most drivers is 0.05. However, some drivers (for example, drivers of large vehicles, taxi drivers, learner drivers and probationary drivers) are required to have a zero BAC.

2.2 Category B Offences

These offences consist of—

- Refusing to agree to a preliminary breath test when required to do so (section 49(1)(c) RSA).
- Refusing or failing to obey a request or signal to stop a motor vehicle, and remain stopped at a preliminary breath testing station (section 49(1)(d) RSA).
- Refusing to agree to a breath test or a blood test under section 55 (section 49(1)(e) RSA).

3. Role of the Statutory Maximum Penalty

3.1 Introduction

In setting or reviewing a statutory maximum penalty it is necessary to take into account the functions that a statutory maximum penalty should serve, including:

- Placing a legally defined ‘ceiling’ on the lawful action permitted by the State against an individual who commits an offence. This ceiling should be sufficiently low to provide meaningful guidance to sentencers as to the relative gravity of the offence and yet sufficiently high to provide for the worst examples of the crime that the sentencer may face.
- Reflecting the perceptions of the community about the gravity of the offence and providing an indication to sentencers as to how to weigh up the seriousness of the offence.
- Serving as a general deterrent to potential offenders by declaring the highest punishment that they will face if they commit the offence.

9.3 Category B Offences

Similarly, the Council believes that the statutory maximum penalty for repeat offenders committing the offences of refusing a breath or blood test and failing to stop or remain stopped at a preliminary breath testing station should also be increased. The Council considers that any increase should be consistent with increases for Category A offences with a BAC of 0.15 or more, both to reflect the objective offence seriousness, and to ensure that there is no penalty incentive for offenders trying to avoid the operation of drink driving laws.

9.4 Recommendations

<table>
<thead>
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<th>RECOMMENDATIONS</th>
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<tr>
<td>1. The statutory maximum penalty of imprisonment for repeat offenders committing a relevant offence should be dependant on the blood alcohol concentration of the offender and the number of prior offences that the offender has committed.</td>
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<td>2. The statutory maximum penalty of imprisonment for offenders committing a relevant offence should be increased as follows—</td>
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<td>Relevant offence with no drink driving priors</td>
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<td>Relevant offence with one prior drink-driving offence</td>
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<td>Relevant offence with two or more prior drink driving offences</td>
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3. If Recommendation 2 is implemented, the statutory maximum fine for a repeat offence under the relevant provisions should be increased to be consistent with the increased statutory maximum terms of imprisonment.

4. If Recommendation 2 is implemented, the statutory maximum penalty for repeat offences of driving under the influence under section 49(1)(a) should be reviewed to achieve consistency with the statutory maximum penalties for the relevant offences. The Council recommends that the penalty for driving under the influence should be consistent with that for committing a Category A offence with a BAC of 0.15 or above or a Category B offence.
Figures 19 and 20 illustrate the existing and proposed Victorian statutory maximum for offenders with one prior offence (Figure 19) and two prior offences (Figure 20) committing a new Category A offence with BAC readings of 0.05, 0.10 and 0.15 as against the existing statutory maximum penalties in other Australian jurisdictions.

**Figure 19: Current and proposed statutory maximum term of imprisonment for offenders with one prior offence committing a new Category A offence with BAC readings of 0.05, 0.10 and 0.15 compared with statutory maximum penalties in other Australian jurisdictions**

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<thead>
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<th>Jurisdiction</th>
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**Figure 20: Current and proposed statutory maximum term of imprisonment for offenders with two prior offences committing a new Category A offence with BAC readings of 0.05, 0.10 and 0.15 compared with statutory maximum penalties in other Australian jurisdictions**

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<th>Jurisdiction</th>
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<th>0.15</th>
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The functions of a statutory maximum penalty include—
- Defining the boundary of lawful action against an offender, including providing for the worst examples of the offence that sentencers are likely to encounter.
- Reflecting community views about the seriousness of the offence and providing sentencers with a legislative indication of the gravity of the offence relative to other offences.
- Acting as a general deterrent by warning potential offenders of the maximum punitive ‘price’ they are liable to pay if they commit the offence.

The Council has reviewed the maximum term of imprisonment available for repeat drink drivers and is of the opinion that it is inadequate to accommodate sufficiently the worst types of cases, that it does not reflect the seriousness with which the community views repeat drink driving and that it is not sufficiently high to act as a general deterrent to potential offenders. The Council is therefore of the view that the statutory maximum penalty is insufficient.

For Category A offences, the Council is of the view that repeat offenders with a high level BAC (0.15+) are a more serious category of offender and that the maximum term of imprisonment provided for by the legislation should reflect this.

For Category B offences, the Council is of the view that the maximum statutory penalty available should be in line with the maximum penalty available for high level BAC Category A offences. This would reflect the gravity of these offences and ensure that there is no incentive in offenders trying to avoid the operation of drink driving penalties by failing to comply with requirements such as preliminary breath tests.

The Council is also of the opinion that the statutory maximum penalty of imprisonment available for repeat offenders should be dependent on the number of previous offences that the offender has committed.

### 2. Offences under Review

Section 49(1) of the RSA sets out various driving offences involving alcohol and other drugs. As discussed above, the relevant offences can be grouped into two categories—[A] reaching or exceeding the prescribed concentration of alcohol, and [B] refusing a blood or breath test or failing to stop or remain stopped. The statutory maximum penalty for these offences is contained in section 49(3) of the RSA. For a first offence a person found guilty is liable to a maximum fine of 12 penalty units ($1,257.72)\(^\text{11}\) and for a subsequent offence to a maximum fine of 25 penalty units ($2,620.25)\(^\text{12}\) or a maximum term of imprisonment of three months.\(^\text{13}\)

In addition to these statutory maximum penalties in Victoria, there is a comprehensive scheme of mandatory ancillary penalties for drink drivers in Victoria. These place a significant additional burden on offenders over and above the ‘primary’ penalty that they receive. Ancillary sanctions include cancellation of the person’s driver’s licence or permit and disqualification from obtaining a new one.\(^\text{14}\) These are discussed in Chapter 7 (below).

In Victoria, a person is classified as a ‘repeat’ offender where they have previously been found guilty or convicted of an offence specified in section 48(2) of the RSA (‘a prior drink driving

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\(^{12}\) See Appendix 1.

\(^{13}\) Road Safety Act 1986 (Vic) s 49(3)(a).

\(^{14}\) Road Safety Act 1986 (Vic) s 49(3)(b).

\(^{15}\) For the purposes of this paper, where an offender’s driver’s licence or permit has been cancelled and the offender has been disqualified from obtaining one for a specified time under section 50 of the Road Safety Act 1986 (Vic), the offender will be referred to as being ‘disqualified from driving’. Where an offender is charged with driving during a period of disqualification from obtaining a licence or permit the offender will be referred to as ‘driving while disqualified’.
Victorian drink driver program to ‘determine what best practice drink drive rehabilitation is and compare this to what is currently delivered in Victoria’. The research report outlined a number of shortcomings of the Victorian system and provided recommendations for improving drink driver rehabilitation in Victoria. Some of these recommendations are referred to in this paper.

The issue of repeat drink drivers has recently received considerable media attention with a number of well publicised arrests for drink driving offences—

- On 27 June 2005 a truck driver was pulled over by police for erratic driving and was found to have a BAC of 0.179. The truck driver thought that he was in Benalla when in fact he was in Berwick.
- On 23 June 2005 a motorist, with his two children in the back seat of his car, was arrested in Werribee for speeding and was found to have a BAC of 0.22. The motorist had been disqualified from driving, had eight previous convictions for drink driving and 16 for driving while disqualified.
- On 17 June 2005 a NSW motorist was involved in a collision in Highett, Victoria. He had a BAC of 0.311. His three children were in the car.
- Early in June a serial drink driver, who was unlicensed and more than four times over the limit, crashed into a car killing two people. He received a minimum ten year jail term.

One senior magistrate was reported as commenting—

As things stand, a driver can come before us on their fifth drink-driving offence, or their 15th, or their 50th, with a reading of 0.20, and they can’t be sentenced on that charge alone to any more than three months.

Community groups have also expressed serious concern with the penalties imposed on repeat drink drivers. Mr Steve Medcraft, spokesperson for People Against Lenient Sentences, suggested that the penalty for first offenders could be three months, 12 months for a second offence and five years for a third offence—

Obviously these people have a drinking problem but they could undergo counselling and compulsory treatment while in a prison farm to get them off the grog and keep the community safe.

Mr Bruce McKenzie, the Victorian Police Association secretary, criticised the inadequacy of the current penalty for repeat drink drivers—

Our members are out there day and night, trying to dissuade people from drink driving, and the magistrates need to be supported by appropriate penalties.

In Victoria between 1988 and 2000 the proportion of repeat drink drivers increased by nine per cent, with more than one in four drivers having at least one prior offence since 1992. Of those offenders with prior offences for drink driving, 67 per cent were from metropolitan Melbourne. A repeat drink driver is more likely to be male (over 90 per cent), aged 21 to 29 years (almost 40 per cent), and have a high level BAC (0.15 or more). There is a one in four chance that a repeat offender will be driving without a valid licence.

Research shows that almost half the drink drivers with a high level BAC (0.15 or more) are repeat offenders. Evidence in New South Wales indicates that while the crash risk associated with a BAC of 0.05 is twice that associated with a zero BAC, the crash risk associated with a BAC of 0.15 is 25 times that associated with a zero BAC.

References

Australian Transport Safety Bureau, Alcohol and Road Fatalities (2001) Monograph 5


Lander, H., ‘Road Trauma and Drink Driving: A Deadly Double’ (1987) 7 Law Institute Journal 678


RACV, Drink Driver Rehabilitation and Education in Victoria 05/01 (2005) Research Report

RACV, Drink Driver Rehabilitation and Education in Victoria Summary Report 05/01 (2005) Report Summary


VicRoads, Getting Tougher on Drink Drivers Publication Number 01047


Von Hirsch, Andrew, Censure and Sanctions (1993)
1. Introduction

This project arose from concerns expressed by Victorian magistrates and police about the statutory maximum penalty of three months’ imprisonment currently available for repeat drink drivers. These groups, and others, have called for increases in the statutory maximum penalties for repeat drink driving offences.

The offences under review are contained in section 49(1)(b), (c), (d), (e), (f) and (g) of the Road Safety Act 1986 (Vic) (RSA). For the purposes of this paper, these sub-sections will be referred to as the ‘relevant provisions’ and the offences therein as the ‘relevant offences’. The relevant offences can be divided into two categories—

Category A – Driving or being in charge of a motor vehicle with a blood alcohol concentration (BAC) present in the blood or breath which reaches or exceeds the prescribed concentration of alcohol (PCA); or within three hours of driving or being in charge of a motor vehicle having a BAC shown on a breath analysing instrument or present in a blood sample which equals or is more than the PCA and is not due solely to alcohol consumed after driving or being in charge of the motor vehicle.

Category B – Refusing to agree to a preliminary breath test (PBT); refusing or failing to obey a request or signal to stop a motor vehicle at a PBT station; or refusing to agree to a breath test or a blood test.

The current statutory maximum penalty for someone found guilty of a first offence against the relevant provisions is a fine of 12 penalty units ($1,257.72). This penalty is not under review. The current statutory maximum penalty for someone found guilty of a repeat offence against the relevant provisions is a fine of 25 penalty units ($2,620.25) or a maximum term of imprisonment of three months. This paper examines whether the maximum three months’ imprisonment is sufficient.

This paper does not review the statutory maximum penalty for the offence of driving under the influence (section 49(1)(a) of the RSA). This more serious offence arises when a person drives or is in charge of a motor vehicle whilst under the influence of intoxicating liquor or any drug to such an extent as to be incapable of having proper control of the motor vehicle. A first time offender found guilty of this offence is liable to a maximum fine of 25 penalty units ($2,620.25) or up to 3 months’ imprisonment. Subsequent offences attract a maximum term of imprisonment of 12 months.¹

This paper addresses the specific issue of the adequacy of the current statutory maximum sentence of imprisonment for repeat drink drivers who commit one of the offences under review. In addressing this issue, this paper sets out the functions of a statutory maximum penalty and considers whether these functions are fulfilled. In approaching this task the Council is cognisant of the fact that such a review is only one part of a broader strategy to combat drink driving and will not, in itself, address the fundamental problems related to repeat drink driving.

The Council recognises that drink driving is a highly complex social, economic and public health issue. Drink drivers, and particularly repeat offenders, frequently face a range of socio-economic and health problems. The Council also recognises that the effective management and rehabilitation of drink driving offenders is of paramount importance and, despite the comprehensive approach of the Victorian system, there are areas in which the current sentencing options and ancillary penalties could be improved.

The rehabilitation and education of drink drivers in Victoria has recently been reviewed in a research report commissioned by the Royal Automobile Club of Victoria Ltd (RACV). The RACV commissioned the Centre for Accident Research and Road Safety—Queensland (CARRS-Q) to review the current

¹ Road Safety Act 1986 (Vic) s 49(2).
Appendix 1—Section 49(1)–(3) Road Safety Act 1986 (Vic)

Section 49(1) provides:

1. A person is guilty of an offence if he or she—
   (a) drives a motor vehicle or is in charge of a motor vehicle while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor vehicle; or
   (b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath; or
   (c) refuses to undergo a preliminary breath test in accordance with section 53 when required under that section to do so; or
   (d) refuses or fails to comply with a request or signal to stop a motor vehicle, and remain stopped, given under section 54(3); or
   (e) refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A); or
   (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
      (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
      (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; or
   (g) has had a sample of blood taken from him or her in accordance with section 55, 55B, 55E or 56 within 3 hours after driving or being in charge of a motor vehicle and—
      (i) the sample has been analysed within 12 months after it was taken by a properly qualified analyst within the meaning of section 57 and the analyst has found that at the time of analysis the prescribed concentration of alcohol or more than the prescribed concentration of alcohol was present in that sample; and
      (ii) the concentration of alcohol found by the analyst to be present in that sample was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle.

2. A person who is guilty of an offence under paragraph (a) of sub-section (1), other than an accompanying driver offence, is liable—
   (a) in the case of a first offence, to a fine of not more than 25 penalty units or to imprisonment for a term of not more than 3 months; and
   (b) in the case of a subsequent offence, to imprisonment for a term of not more than 12 months.

3. A person who is guilty of an offence under paragraph (b), (ba), (c), (ca), (d), (e), (ea), (f) or (g) of sub-section (1), other than an accompanying driver offence, is liable—
   (a) in the case of a first offence, to a fine of not more than 12 penalty units; and
   (b) in the case of a subsequent offence, to a fine of not more than 25 penalty units or to imprisonment for a term of not more than 3 months.
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## Appendix 2—Relevant Legislation in Other Australian Jurisdictions

The primary legislation containing drink driving offences for each jurisdiction other than Victoria is as follows.

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<tbody>
<tr>
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<td>• Road Transport (Safety and Traffic Management) Regulation Act 2000 (ACT)</td>
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<td>South Australia</td>
<td>• Road Traffic Act 1961 (SA)</td>
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<td>• Motor Vehicles Act 1959 (SA)</td>
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<tr>
<td>Tasmania</td>
<td>• Road Safety (Alcohol and Drugs) Act 1970 (Tas)</td>
</tr>
<tr>
<td>Western Australia</td>
<td>• Road Traffic Act 1964 (WA)</td>
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Maximum Penalties for Repeat Drink Driving

Report

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