



CDPP Submission to Independent Review of Domestic Commercial Vessel Safety Legislation, and Costs and Charging Arrangements

INTRODUCTION

The Commonwealth Director of Public Prosecutions (“CDPP”), as Australia’s federal prosecuting agency, works closely with the Australian Maritime Safety Authority (“AMSA”) in relation to the prosecution of Commonwealth offences contrary to legislation administered by AMSA, which includes the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (“the National Law”).

The CDPP’s core purpose is to prosecute alleged crimes against Commonwealth law through an independent prosecution service responsive to our law enforcement and regulatory partners, to effectively contribute to the safety of the Australian community, and to uphold and maintain the rule of law.

The CDPP prosecutes diverse and complex crimes, reflecting the evolving and expanding criminal law enforcement and regulatory environment in Australia. The CDPP has no investigative function and relies on investigative agencies to refer briefs of evidence for assessment in accordance with the Prosecution Policy of the Commonwealth. The Prosecution Policy applies to all prosecutions and provides guidelines for the making of decisions in the prosecution process. In order for a prosecution to be instituted or continued, there must be sufficient admissible evidence to establish a prima facie case and a reasonable prospect of a conviction, and the prosecution must be in the public interest.

The CDPP operates pursuant to a national practice group model based on categories of crimes enabling matters to be assigned to specialist lawyers. Our International Assistance and Specialist Agencies practice group is responsible for national liaison with AMSA, the provision of pre-brief advice, the assessment of AMSA referrals, including matters pursuant to the National Law, the carriage of resulting prosecutions and together with our Witness Assistance Service, liaison with victims and their families.

This submission focusses on the Review’s first Phase, namely whether Australia’s legal framework regulating the safety of domestic commercial vessels is fit for purpose and, in particular, whether the framework supports effective compliance in providing an effective and practical range of compliance powers and enforcement tools for AMSA. The relationship between the National Law and other federal legislation including Work Health and Safety law is discussed. The CDPP is also responsible for prosecutions pursuant to the Work Health and Safety Act 2011 (“the WHS Act”) and our comments are also made from our perspective prosecuting these offences. Overall, our comments are from our perspective as a prosecuting agency and from our experience in assessing referrals and prosecuting criminal matters in courts across Australia.

In particular, this submission focusses on the operation of the current criminal offences in the National Law and raises a number of legal and policy issues, including how the offences and their elements are currently framed and whether the powers and penalties available to Courts provide scope for proper punishment to address general and specific deterrence given the gravity of the risks involved, including the loss of life.

The current National Law offences differ very significantly from the offences in the WHS Act. As currently framed, the most serious ‘intent’ offences are not available except in the most unusual circumstances. There is an inadequate regime to address risks regarding serious injury and death.

Overall, the offences have much less significant penalties available by comparison to the WHS Act offences. In our view, an overall increase in the maximum penalties available for offences contrary to the National Law should be considered. The limited penalties available for the current National Law offences significantly constrain sentencing.

Indeed, even where a prosecution appeal has been brought, as in the matter discussed below, which resulted in the most significant penalty ever imposed, the sentence achieved was much less than the lowest penalties imposed in the WHS context. The stark contrast between the sentencing outcomes in WHS prosecutions and National Law prosecutions is discussed below and examples are provided.

We are mindful that the 'replacement' offences in the Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Act 2012 to align the National Law with the WHS Act on each of the States having in force State laws that the Minister is satisfied correspond substantially to Part 2 of the Work Health and Safety Act 2011 have not been proclaimed and hence are not in operation, given, as we understand it, that the current situation is that not all States have implemented the national Workplace Health and Safety law.

In our view this is a substantial impediment, as the offences in the Consequential Amendments would provide a much stronger framework for effective prosecution action. We do note however that the Consequential Amendments offences do not fully align with the offence provisions in the WHS Act, particularly in relation to the application of strict liability and this is discussed below.

Whilst National Law prosecutions have been instituted and convictions obtained as discussed below, the CDPP is of the view that there should be changes to the current offence framework to allow for the more effective prosecution of maritime safety breaches. In our view addressing these issues would strengthen the effectiveness of the National Law framework in ensuring compliance through deterrent prosecution action.

CONTEXT

Prosecuting AMSA referrals, including National Law referrals, is complex and challenging. Complex factual and legal issues arise. In general, determining the applicable requirements for individual vessels can be difficult to ascertain, for example crewing requirements. This process starts with referring not only to the National Law, but the Standards and then Marine Orders. Grandfathered provisions make this task even more difficult.

In considering charges, careful consideration has to be given to the potential applicability of various federal Acts in addition to the National Law, such as the Navigation Act, Protection of the Sea (Prevention of Pollution from Ships) Act 1983, Great Barrier Reef Marine Park Act 1975, as well as the possible application of State/Territory law.

Prosecutions are often dependent on highly technical and specialist expert evidence, including on occasion from overseas. This must be assessed and effectively presented to magistrates.

Prosecutions may involve corporate defendants, requiring careful assessment of the available evidence to establish corporate liability and the role of the corporation in the alleged offending. This can be very complex. Ownership of vessels may be in issue. Technical legal arguments may be raised.

Careful assessment of the available evidence must be made, including not only as to its sufficiency generally but as to its provenance and admissibility. Requisitions for additional evidence may be necessary.

It is apparent from the above, that there can be legal, factual and logistical issues in these prosecutions and these matters are complex. These arise in all safety offence regimes, noting that a number of legal issues in relation to the WHS Act are presently the subject of appellate consideration.

PROSECUTIONS PURSUANT TO THE NATIONAL LAW

Since 1 January 2010 the CDPP has received 136 referrals from AMSA. Referrals have involved alleged offences pursuant to the following legislation:

- the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) - 59 matters;
- the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) - 53 matters;
- the *Navigation Act 1912 and 2012* (Cth) - 18 matters;
- The *Commonwealth Criminal Code* (Cth) - 5 matters;
- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) - 1 matter; and
- *Statutory Declarations Act 1959* (Cth) - 1 matter.

AMSA matters have ranged in seriousness and complexity from the failure to pay infringement notices for minor regulatory offences, to those involving conduct that has resulted in death and/or grievous bodily harm.

The CDPP has prosecuted individuals, including the masters and crew members of vessels, Australian corporations, foreign individuals and foreign corporations.

Of the 59 referrals for offences contrary to the National Law, prosecutions were commenced in 46 matters.

9 matters remain on foot before courts.

To date, 30 of the National Law prosecutions commenced have resulted in successful outcomes, with a further nine matters still currently before the courts. 3 defendants have been acquitted.

Those prosecutions that have been finalised have resulted in penalties ranging from non-conviction orders pursuant to s19B *Crimes Act 1914* (Cth) to fines, ranging from \$500 to \$40,000.

The largest penalty to have ever been imposed in a National Law prosecution was a fine against a Corporation, following a successful Crown appeal, in the amount of \$40,000 - see *R v Panforta Pty Ltd*.

More detailed information about some National Law prosecutions and the sentences imposed is attached at **Annexure A**. Some examples are highlighted below.

EXAMPLES OF NATIONAL LAW PROSECUTIONS INVOLVING RISK OF SERIOUS INJURY OR DEATH

R v Panforta Pty Ltd

On 11 May 2016, the vessel *Spirit of 1770* caught fire in the Coral Sea, approximately 15 nautical miles from the township of Seventeen Seventy, off the coast of Queensland. The vessel was a 20.16 metre aluminium catamaran permitted to carry a total of 146 persons. On the day of the incident the vessel had 4 crew members and 42 paying passengers on board. The majority of people on board the vessel were from non-English speaking backgrounds. The passengers included children and retirees. The fire was unable to be contained and the vessel's four crew and 42 passengers were forced to abandon ship into life rafts in choppy seas. The passengers and crew were forced to jump from a height of approximately 3m and then swim to life rafts. A number of passengers could not speak English, could not swim, and were terrified to jump. The crew and passengers remained at sea on the life rafts for approximately 3.5 hours, when they were rescued and taken by a fishing trawler to the township of Seventeen Seventy. The majority of persons suffered sea sickness and were vomiting whilst on the life rafts. The vessel ultimately sank. AMSA conducted an investigation into the incident and the operations of Panforta Pty Ltd, the company that owned and operated the *Spirit of 1770*.

The defendant was ultimately charged with one offence contrary to section 13(2) of the National Law. The prosecution case was that the defendant company operated the vessel, reckless as to whether its operation of the vessel created a risk to the safety of the vessel. Whilst the prosecution was unable to prove the cause of the fire as the vessel lies on the ocean floor, it was possible to particularise certain acts that the company had performed, which placed the safety of the vessel at risk, namely:

- operating the vessel knowing it suffered engine overheating problems; and
- operating the vessel such that it came into contact with a sandbar when passengers were disembarking, in circumstances where:
 - the vessel was not designed, constructed or modified for that purpose; and
 - no such procedure or appropriate maintenance requirements were included in the vessel's Safety Management System.

The matter was listed to commence as a summary hearing in the Brisbane Magistrates Court on 16 March 2020, but on 14 March 2020, Counsel representing the defendant company indicated to the Crown that the defendant would be willing to enter a plea of guilty to the offence alleged.

In sentencing, Magistrate Nunan took into account the need for general deterrence, noting that the safety of the industry depends on the vigilance of its operators. His Honour also considered that the period during which the defendant company exposed the vessel to risk was extensive, that there were three separate breaches of the law rolled into a single charge and that the defendant company had been issued an infringement notice in relation to a breach of their duty to ensure safety for another vessel during the same period.

The Magistrate classified the company's reckless actions as mid-level but only fined the company \$25,000 of a maximum of \$180,000. The prosecution brought an appeal against this sentence submitting that it was manifestly inadequate providing an opportunity for appellate law in relation to sentencing pursuant to the National Law.

On the successful appeal the fine was increased to \$40,000 by Judge Dann DCJ who remarked:

"The respondent ran a business taking paying passengers across the sea from the Australian mainland to Lady Musgrave Island. It was a business where the continuing seaworthiness of the vessels used to do so, its practices to maintain its vessels appropriately and to adopt safe operating procedures were of paramount importance to the safety of its paying passengers. It could – and did – accommodate large numbers of passengers on each trip with the vessel, thereby exposing large numbers of persons to risk if something were to go awry. It did so over a protracted period of 16 months. The fine imposed, of \$25,000, when measured against a maximum sentence of \$180,000, in all the circumstances of this offence, was manifestly inadequate."

Jamala Charters Pty Ltd

The next highest penalty to have been imposed in a National Law prosecution was in the amount of \$18,000. This involved a prosecution against a corporation that ran thrill type rides around the Port Stephens area. On the date of the incident, the master operated the vessel into two swells very close together, the second swell larger than the first. The master proceeded into the first swell with the throttle of the motor still under power in order generate sufficient power for the vessel to wave jump, however due to the sea conditions he came off the first wave then immediately launched off the second bigger swell still under power. This caused the vessel's bow to go high in the air, with the hull hitting the water with substantial force. A 37 year old female passenger suffered a fracture of the T11 vertebrae and nine separate fractures in her right foot.

The company was charged with an offence contrary to s13(3) of the National Law in relation to its failure to update its safety management system, despite having had numerous contacts with Roads and Maritime Services prior to the incident in relation to this. There had also been a history of passengers suffering injuries prior to the incident. Despite the seriousness of the offending, the company was only fined \$18,000.

AMSA v Jason HORN

Gold Coast Jet Boating Pty Ltd was an adventure vessel company offering jet boat rides on the Gold Coast Broadwater. On 14 December 2015 sixteen paying passengers boarded one of the company's vessels for a jet boat ride. Jason HORN was the master of the vessel at the time. During the ride, HORN went towards two channel markers that marked the entrance to a channel, one red and one green. The vessel narrowly missed the first red port hand marker by about an arm's length. HORN then turned the vessel to the right, intending to pass the green starboard hand marker. He, however, misjudged the distance of the green marker and collided with it. As a result, the wooden triangle headboard broke off the green marker and fell onto the vessel. It struck a 15 year-old male passenger on the head, resulting in a compound fracture of the frontal bone of his scalp. He required emergency surgery, which resulted in an extensive wound that zigzagged from the crown to the base of his skull. The wound required 17 staples to close. The child victim was on holidays with his family in Queensland from Singapore at the time.

On 11 June 2018 in the Southport Magistrates Court, HORN pleaded guilty to one offence contrary to s18(3) of the National Law. He was convicted and fined \$5,000.

AMSA v Bruno IANNACE

On 6 September 2020 the vessel, *Sturmvogel*, was returning to Darwin from a four-week commercial fishing trip in Western Australia. The master of the vessel, with 15 years experience, was Bruno IANNACE. The vessel was an 18 metre steel fishing vessel with a flat roof designed for stowing equipment such as life rafts, life rings and ropes. Rubbish was also stored on the roof. The roof was not a deck area and not designed for recreational purposes, being about 5 metres x 6 metres and about 3 metres above the sea, with no safety railing as such around the roof other than a small railing about 19cm high. The use of the roof as a recreational deck was prohibited except to get equipment.

At about sunset when the vessel was about 10 hours away from Darwin, four members of the crew including Christopher Rodgers went to the roof of the vessel to enjoy the sunset and began drinking full strength beer. The crew members spent at least 2.5 hours on the roof of the vessel. None of the crew members were wearing a life jacket when on the roof drinking beer.

About 2117 hours when it was dark, Rodgers knelt at the side of the railing on the port side of the vessel in an attempt to urinate. However he lost his balance as the boat rocked and fell overboard into the water. At the time the sea was a little rough in that the boat was moving and rocking. The crew then returned to the main

deck and alerted the defendant who had not been on the roof throughout the period that the crew was there drinking.

A rescue operation began and Rodgers was located in the water, partially submerged. After bringing Rodgers back on board the vessel in an unresponsive state and despite attempts to revive him, he died.

It was subsequently ascertained that the cause of death was drowning and that Rodgers had a blood alcohol reading of 0.07%. Cannabis was also present in his blood.

When spoken to by police the defendant said that there was alcohol on board the boat and that he allowed the crew a couple of beers after work, but they were not to get drunk. He also said he did not know that they were up on the roof and that it was not common at all to go up there. He said that at the relevant time the conditions were calm and that he was in the wheelhouse.

On 29 March 2022 in the Darwin Local Court, IANNACE pleaded guilty to one offence contrary to s18(3) of the National Law. He was convicted and fined \$8,000.

OFFENCES

The major offence provisions in the National Law are similarly structured. For example, section 12 establishes a duty for owners of domestic commercial vessels to, so far as reasonably practicable, ensure the safety of vessels, marine safety equipment and operations.

Section 13 sets out four offences for contravening the duty in section 12, namely:

- s13(1) doing an act or omitting to do an act contravening section 12 *intending that the act or omission to be a risk to the safety of a person or the domestic commercial vessel concerned.*

In our view this provision should be understood as meaning what it says, requiring an intention that the act or omission be a risk to the safety of a person or the domestic commercial vessel concerned – not that the act or omission is itself intentional.

The legislative approach taken has significantly limited the use of the most serious offences in the Act, which indeed only carry a penalty of imprisonment for 2 years. There is a significant issue in the framing of this offence provision and in the available penalty. The available monetary penalty is \$399,600.

It has been necessary to charge all but one matter with lesser offences – in section 13 these are:

- s13(2) doing an act or omitting to do an act contravening section 12, being reckless as to whether the act or omission is a risk to the safety of a person or the domestic commercial vessel concerned. This offence carries a penalty of 200 penalty units (a fine of \$44,400).
- s13(3) doing an act or omitting to do an act contravening section 12, being negligent as to whether the act or omission is a risk to the safety of a person or the domestic vessel concerned. This offence carries a penalty of 120 penalty units (a fine of \$26,640).
- s13(4) doing an act or omitting to do an act contravening section 12. This is a strict liability offence carrying a penalty of 60 penalty units (a fine of \$13,320).

These offences are very different to those in the Work Health and Safety Act 2011. Whilst for example, section 19 of that Act provides a primary duty of care in broadly similar terms to the National Law in relation to a person conducting a business or undertaking, the offences in sections 31-33 are differently structured with substantially greater penalties available.

Section 31 (1) provides that a person who, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness and the person is reckless as to the risk to an individual of death or serious illness.

Division 5—Offences and penalties

30 Health and safety duty

In this Division, *health and safety duty* means a duty imposed under Division 2, 3 or 4 of this Part.

31 Reckless conduct—Category 1

- (1) A person commits a Category 1 offence if:
- (a) the person has a health and safety duty; and
 - (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
 - (c) the person is reckless as to the risk to an individual of death or serious injury or illness.

Penalty:

- (a) In the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)—\$300 000 or 5 years imprisonment or both.
 - (b) In the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—\$600 000 or 5 years imprisonment or both.
 - (c) In the case of an offence committed by a body corporate—\$3 000 000.
- (2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

32 Failure to comply with health and safety duty—Category 2

A person commits a Category 2 offence if:

- (a) the person has a health and safety duty; and
- (b) the person fails to comply with that duty; and
- (c) the failure exposes an individual to a risk of death or serious injury or illness.

Penalty:

- (a) In the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)—\$150 000.
- (b) In the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—\$300 000.
- (c) In the case of an offence committed by a body corporate—\$1 500 000.

33 Failure to comply with health and safety duty—Category 3

A person commits a Category 3 offence if:

- (a) the person has a health and safety duty; and
- (b) the person fails to comply with that duty.

Penalty:

- (a) In the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)—\$50 000.
- (b) In the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—\$100 000.
- (c) In the case of an offence committed by a body corporate—\$500 000.

34 Exceptions

- (1) A volunteer does not commit an offence under this Division for a failure to comply with a health and safety duty, except a duty under section 28 or 29.
- (2) An unincorporated association does not commit an offence under this Act, and is not liable for a civil penalty under this Act, for a failure to comply with a duty or obligation imposed on the unincorporated association under this Act.
- (3) However:
 - (a) an officer of an unincorporated association (other than a volunteer) may be liable for a failure to comply with a duty under section 27; and
 - (b) a member of an unincorporated association may be liable for failure to comply with a duty under section 28 or 29.

Unlike the National Law, the WHS Act provides in section 12F(2) that strict liability applies to each physical element of each offence under the Act, unless otherwise stated. Accordingly, even for the most serious offence, namely section 31, each element is strict liability apart from section 31(1)(c) which provides that recklessness must be established.

Division 4—Application of Act

12F Interaction with Commonwealth criminal law

- (1) Section 4AB of the *Crimes Act 1914* does not apply to the provisions of this Act.
- (2) Strict liability applies to each physical element of each offence under this Act, unless otherwise stated.
- (3) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against this Act.

This is particularly significant in proving criminal offences against corporations and in our view such a provision should be included in the National Law.

An extract from the Explanatory Memorandum for the WHS Act is attached at **Annexure B** in relation to the application of strict liability. These considerations apply also in the National Law context. This also discusses the basis for the penalties in the WHS Act.

In the WHS Act provisions, for the most serious offences carrying a penalty of imprisonment for 5 years, it is necessary to establish recklessness in relation to one of the physical elements, that is the offence element that the duty holder is reckless as to the degree of risk caused by the WHS failure. In addition, fully strict liability offences are available with not insignificant penalties, most notably in section 32 which addresses exposure of an individual to a risk of death or serious injury or illness.

We note Recommendation 1 of the Parliamentary Committee that amendments be made to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the National Law) in regards to the penalties imposed on an operator of a vessel for acting in a reckless or negligent manner, regardless of intent. In particular, the committee recommends that consideration should be given to situations where the operator of a vessel has been found to be acting in a negligent or reckless manner which has the potential to result in the loss of life.

We also note the recommendation of the Parliamentary Committee that general safety duties offences relating to domestic commercial vessels, contained within the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, be augmented by a more serious offence and subsequent penalty in cases where a breach of the general safety duties leads to a loss of life.

We note that in the Explanatory Memorandum for the National Law it is apparent that it was intended that there be:

- consistent national regulation of the domestic commercial vessel industry across Australia
- a focus on promoting continuous improvement
- ensuring effective identification and management of safety risks, and
- that there be an alignment with the National law and WHS duties and offences, once the WHS law has been implemented nationally.

It is apparent that there is considerable misalignment as the National Law is currently framed. It is necessary in our view for a similar offence structure and for strict liability to be employed in a similar way to the WHS Act and for penalties to be comparable.

Our experience in prosecuting pursuant to the WHS demonstrates a very different sentencing picture to that under the National Law.

A schedule of WHS Act sentences with details of the offences involved is attached at **Annexure C**. Fines imposed range from a minimum of \$75,000 to \$1 million.

THE MARINE SAFETY (DOMESTIC COMMERCIAL VESSEL) NATIONAL LAW (CONSEQUENTIAL AMENDMENTS) ACT 2012

We note that the enacted 'replacement' offences for the National Law to align it to the WHS Act have been enacted but not proclaimed. In our view the commencement of these provisions would be a very significant development and we would support their proclamation. We understand that whether this step is taken involves wider policy and practical considerations.

The Consequential Amendments address many of the issues discussed above and provide a deterrent sentencing framework.

In addition to proclamation of the Consequential Amendments we would support an amendment to the National Law to include the equivalent of section 12F(2) discussed above.

We would also support amendment to update penalties over time.

SPECIFIC ISSUES

- **Offence structure and application of strict liability** – this is discussed above, noting legislative amendment is required in our view to the National Law.
- **Penalties** - The Explanatory Memorandum for the National Law at p12 states that the penalties for offences in the Bill were intended to reinforce the deterrent effect of the Bill and allow courts greater capacity to respond meaningfully and proportionally to the worst breaches by duty holders. It was recognised that where death or serious injury results from a breach, the social and economic costs were likely to be far greater than even the maximum fines imposed by the Bill and that the overall objective of the Bill was to increase compliance with the National law and decrease the resort to prosecution to achieve that aim.

It was recognised that penalties and the possibility of imprisonment in the most serious cases was a key part of achieving and maintaining a credible level of deterrence to complement other types of enforcement action, such as the issuing of notices by a marine safety inspector. It stated that the maximum penalties provided in the Bill reflected the level of seriousness of the offences and were set at levels high enough to cover the worst examples of offence.

In our view the levels of penalties initially set that remain current have not achieved this objective. Given the available offences, prosecutions have been in summary courts and not been heard and determined on indictment in superior courts.

The available penalties themselves are a barrier to persuading courts of the seriousness of the conduct involved and the need to impose penalties to reflect this. Further, it is difficult to address expectations of victims and their families in circumstances where a defendant receives what might be regarded as a nominal fine.

- **Short limitation period** - all offences, except those for which intention is the fault element which carry a penalty of imprisonment discussed above, carry a 12-month limitation period. This short period provides a serious restriction on the ability of investigators to investigate, compile a brief of evidence, seek pre-brief advice, refer a brief to the CDPP, and for the CDPP to assess the evidence and the issues involved in the matter. The situation can arise where the CDPP has very little time to assess and frame charges, such as where an infringement notice process has been undertaken and this has not been accepted by the defendant and the matter referred. It should be borne in mind that prosecutions under the National Law are often complex and expert evidence essential, even for less serious offences.

Indeed, just the process of finding and engaging an expert can take considerable time. In some matters several experts are required. It may be necessary for evidence relating to the geographical location of the ship at a particular time to be obtained. The seizure of documentary or digital evidence may be required.

It is often the case that investigations may necessarily involve more than one agency, including state and territory agencies and the need for coordination and the sharing of information arises. It may be the case that evidence has been gathered without the prospect of

prosecution being adequately considered requiring additional steps to seek to obtain evidence.

Whilst a policy question, the CDPP is supportive of the Parliamentary Committee's recommendation to extend the limitation period to at least two years. We would see this step as being in conjunction with a wider range of offences carrying penalties of imprisonment for which there would be no limitation period.

- **Grandfathering** – It is very difficult indeed to ascertain what the position as to the applicable requirements for particular vessels is given that this may be impacted by the grandfathering previous standards. The CDPP is heavily reliant on assistance from AMSA in this area. This involves policy questions, but from the prosecution perspective prosecution would be much easier without grandfathered requirements.
- **Definition of Owner** – the CDPP does not propose amendment to this definition, although we would be interested in views about this.
- **WHS provisions regarding duties** - We note that there are no equivalent for sections 14-16 of WHS Act in the National Law. These sections provide useful clarification that a duty cannot be transferred to another person and that a person may concurrently have more than 1 duty.
- **Role of ATSB** - The CDPP cannot comment on whether or not an expanded role of the ATSB would impact safety outcomes, but can comment from a prosecution perspective. As we understand it, the role of the ATSB involves very much the context of needing to identify the cause of incidents and accordingly has the power to compel witnesses to attend and answer questions. Such powers are inconsistent with an accused person's right to silence and the privilege against self-incrimination. Any answers or evidence given in such an enquiry are not admissible in criminal proceedings against an accused and the position of the CDPP is that such material should not even be viewed by any CDPP staff involved in the contemplation of a prosecution. There are also issues surrounding the use that can be made of such evidence by investigators in the course of their investigation of criminal offences.
- **Recreational use of domestic commercial vessels is complex** - determining whether a vessel is a recreational vessel or being used as a recreational vessel and therefore exempt is complex and we raise for consideration amendments to clarify this. The CDPP has seen an increase in referrals involving claims made by operators to the effect that the use of the vessel at the relevant time was solely recreational.

In relation to the definition of DCV, we note the explanatory memorandum to the Marine Safety (Domestic Commercial Vessel) National Law Bill 2012, which states at page 24 (when discussing the definition of 'domestic commercial vessel'):

"The aim of the definition is to capture any commercial activity, but not recreational activity."

We also note the exemption, namely AMSA EX04 Marine Safety (Recreational use) Exemption 2020 (No.2), which provides that when a domestic commercial vessel is used solely for recreational purposes, there is an exemption in relation to crewing requirements and operational area limitation. The exemption is subject to conditions, including that the vessel

must be used solely for recreational use and not in connection with a commercial, governmental or research activity. It is also subject to a condition that any operation for recreational purposes be recorded in the vessel's logbook. This is an as of right exemption and does not need to be applied for (AMSA does also have statutory exemptions, but this is not one).

It is unclear as to whether the exemption still applies when the conditions of the exemption have been breached. For example, when an alleged defendant has not recorded the operation, the subject of the charge, in the vessel's logbook.

In this regard, we note that there is an offence pursuant to s.145 of the National Law in relation to a breach of a condition of an exemption. It is unclear whether this relates to only statutory exemptions, as of rights exemptions or both.

- ***Impact of subjective knowledge in context of determining what is reasonably practicable to ensure safety in the context of a strict liability offence*** - Section 27 of the National Law provides the meaning of what is "reasonably practicable":

"27 Determining what is reasonably practicable to ensure safety

In this Law, reasonably practicable, in relation to a duty imposed upon a person to ensure safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring safety, taking into account and weighing up all relevant matters, including:

- (a) the likelihood of the hazard or risk concerned eventuating; and*
- (b) the degree of harm that might result from the hazard or risk concerned eventuating; and*
- (c) what the person concerned knows, or ought reasonably to know, about:
 - (i) the hazard or the risk concerned; and*
 - (ii) ways of eliminating or minimising the hazard or risk concerned; and**
- (d) the availability and suitability of ways to eliminate or minimise the hazard or risk concerned; and*
- (e) after assessing the extent of the hazard or risk concerned and the available ways of eliminating or minimising the hazard or risk concerned, the cost associated with available ways of eliminating or minimising the hazard or risk concerned, including whether the cost is grossly disproportionate to the hazard or risk concerned."*

It can be seen that sub-paragraph (c)(i) incorporates into the meaning of reasonably practicable what the person concerned knows, or ought reasonably to know, about the hazard or risk concerned. The application of this sub-paragraph to the strict liability offence contained in subsection 13(4) of the National Law is problematic since it appears to import questions of subjective knowledge of an offender into consideration where the strict liability offence has no fault elements.

We note that this section does align with s18 of the model WHS Law.

- **WHS provision regarding multiple contraventions not included in National Law** - Section 233 of WHS Act addresses technical issues regarding the charging of matters that would be of assistance in prosecuting.
- **Possible amendment of sections 21 and 23 of the National Law** - There is a lack of clarity as to whether passengers are subject to the duty in section 23 of the National Law, noting section 21.
- **Further Amendment to the National law** to include the equivalent of section 12F(2) of the WHS Act.
- Amendment to update penalties as their value erodes over time.

We trust that this submission is of assistance to the Review Panel.

Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth) – Breach of Duty

MATTER DETAILS	CHARGES	FACTS AND REMARKS	SENTENCE
<p>Name: Jason Paul ANSPACH</p> <p>Court: Elizabeth Magistrates Court</p> <p>Coram: Basheer J</p> <p>Date: 24 November 2015</p>	<p>Charges: 1 x s18(3) National Law – negligence</p> <p>1 x s66(1) National Law - Perform duties or functions without a certificate of competency</p> <p>Plea: Guilty x 2</p>	<p>FACTS On the evening of 4 March 2014 a number of parties were conducting fishing operations in St Vincent Gulf, South Australia. The weather was clear with no moon and the seas were choppy with a swell between one and one and a half metres. At approximately 11pm a vessel with a high revving outboard engine approached one of the vessels, passing at a short distance. It then turned and travelled around the vessel washing water onto the deck. The approaching vessel reduced its speed and positioned a few metres away and words were exchanged. A short time later the vessel approached a second of the fishing vessels passing down the starboard side at a very close distance, creating a close quarter's situation. Words were again exchanged.</p>	<p>SENTENCE s18(3) - s20(1)(a) Crimes Act, recog \$1,000, gb 12 months</p> <p>s66(1) – s20(1)(a) Crimes Act, recog \$1,000, gb 12 months</p> <p>Court Costs of \$295.75 Disbursement Costs of \$168.80</p>
<p>Name: Terrence Peter PEARCE</p> <p>Court: Southport Magistrates Court</p> <p>Coram: Ms Kahlert</p> <p>Date: 19 September 2016</p>	<p>Charges: 1 x s18(2) National Law – recklessness</p> <p>1 x s54(1) National Law - Operate a vessel without a certificate of operation</p> <p>Plea: Guilty x 2</p>	<p>FACTS On 17 April 2015, the domestic commercial vessel MV Voyager departed her berth at Marina Mirage at 5.30pm, under the command of the defendant. The voyage was intended to be a 5-hour wedding reception dinner cruise. A total of 96 people were on board – 82 passengers, 10 function staff and 4 crew members. The cruise was undertaken within the smooth water limits of the Broadwater, on the Gold Coast. At approximately 7pm the Voyager was heading north inside the marked channel when it crossed the channel and continued in a straight line until it ran aground on the shallow bank adjacent to Sovereign Island. Attempts to free the vessel from the bottom failed. An announcement was made that the vessel was aground and lifejackets were handed out to passengers. Shortly thereafter, the vessel slipped and tilted slightly, resulting in one male passenger stumbling and almost falling over. As the tide receded, the situation worsened until abandonment of the vessel was necessary at approximately 8.40pm.</p>	<p>SENTENCE s18(2) - Convicted and fined \$2,500</p> <p>s54(1) - Convicted and fined \$500</p>

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		<p>REMARKS</p> <p>Factors considered relevant to offending:</p> <ol style="list-style-type: none"> 1. Could have caused injury to 96 passengers on board 2. Potential environmental damage 3. Serious matter 4. Offender seemed disorientated when spoken to by investigators 5. Period of inattention was 5-6 minutes 6. No plan of voyage submitted. <p>But for mitigation the Magistrate stated she would have imposed a total penalty of \$5,000.</p>	
<p>Name: Russell John BYRNES</p> <p>Jamala Charters Pty Ltd</p> <p>Court: Newcastle Local Court</p> <p>Coram: Mr Cheetham</p> <p>Date: 30 October 2017</p>	<p>Charges: BYRNES - 1 x s18(3) National Law - negligence</p> <p>JAMALA CHARTERS PTY LTD - 1 x s13(3) National Law - negligence</p> <p>Plea: BYRNES - Guilty</p> <p>JAMALA CHARTERS PTY LTD - Guilty</p>	<p>FACTS</p> <p>On 28 December 2015 Jamala Charters Pty Ltd was using a high speed tour vessel to provide thrill type rides around the Port Stephens area. On this occasion the vessel was operated by Russell Byrnes. Mr Byrnes encountered two swells very close together, the second swell larger than the first. Mr Byrnes proceeded into the first swell with the throttle of the motor still under power to generate sufficient power for the vessel to wave jump, however due to the conditions he came off the first wave then immediately launched off the second bigger swell still under power. This caused the vessel's bow to go high in the air, with the hull hitting the water with substantial force. A 37 year old female passenger suffered a fracture of the T11 vertebrae and nine separate fractures in her right foot.</p> <p>Jamala Charters Pty Ltd failed to update its Safety Management System, despite numerous contact with Roads and Maritime Services (RMS) in relation to it and a number of injuries on board the vessel prior to 28 December 2015.</p> <p>REMARKS</p> <p>His Honour noted the facts of the matter. In particular, he stated that the persons taking part in the 'thrill ride' do not accept that they are subject to unreasonable risks. He said</p>	<p>SENTENCE</p> <p>BYRNES - Convicted and fined \$8,000</p> <p>JAMALA CHARTERS PTY LTD - Convicted and fined \$18,000</p>

MATTER DETAILS	CHARGES	FACTS AND REMARKS	SENTENCE
		he didn't accept the 'victim blaming' of both defendants in saying that the passenger's injuries were due to her.	
<p>Name: Jason Robert HORN</p> <p>Court: Southport Magistrates Court</p> <p>Coram: Mr Howden</p> <p>Date: 11 June 2018</p>	<p>Charges: 1 x s18(3) National Law - negligence</p> <p>Plea: Guilty</p>	<p>FACTS Gold Coast Jet Boating Pty Ltd was an adventure vessel company offering jet boat rides on the Gold Coast Broadwater. On 14 December 2015 sixteen paying passengers boarded one of the company's vessels for a jet boat ride. Jason Horn was the master of the vessel at the time. During the ride, Mr Horn went towards two channel markers that marked the entrance to a channel. The vessel missed the first red port hand marker by about an arm's length. Mr Horn then turned the vessel to the right, intending to pass the green starboard hand marker on a southerly heading however he misjudged the distance of the green marker and contacted with the marker pole with the midship on the right side. As a result, the wooden triangle headboard broke off the green marker and fell onto the vessel. It struck a 15 year old male passenger on the head, resulting in a compound fracture of the frontal bone of his scalp. He required emergency surgery, which resulted in an extensive wound that zigzagged from the crown to the base of his skull. The wound required 17 staples to close.</p> <p>REMARKS His Honour took into account the defendant's plea of guilty, the facts, the maximum penalty available (\$21,600). His Honour took into account the sentencing principles in the Crimes Act 1914 including the nature and circumstances of the offence, the victim's injury, the need for general deterrence and the defendant's dated criminal history and financial circumstances. His Honour was of the view that a fine was appropriate in this case.</p>	<p>SENTENCE Convicted and fined \$5,000</p>
<p>Name: Jeremy Kane PIGGOTT</p> <p>Court:</p>	<p>Charges: 1 x s18(2) National Law - recklessness</p>	<p>FACTS The vessel Crystal Blue is a 2006, 23.9-meter fiberglass evolution monohull yacht. It is a Domestic Commercial Vessel.</p> <p>On 3 March 2018, the defendant was employed on a permanent part time basis with</p>	<p>SENTENCE s18(2) - convicted and fined \$4,000. s18(2) - s20(1)(a) Crimes Act 1914, recog \$2,000, gb 2 years, 12 months</p>

MATTER DETAILS	CHARGES	FACTS AND REMARKS	SENTENCE
<p>Southport Magistrates Court</p> <p>Coram: Mr Costanzo</p> <p>Date: 14 August 2019</p>	<p>1 x s18(2) National Law - recklessness</p> <p>Plea: Guilty</p>	<p>Crystal Blue Yacht Charters PTY LTD, as a vessel Master and Engineer for the DCV Crystal Blue. Ms Cheya Handley was also employed on a permanent part time basis with the company, and she performed a range of tasks including general hospitality services and deckhand duties. About 1948 hrs 3 March 2018, and following a private charter on the Brisbane River, the defendant and Ms Cheya Handley, were tasked with the duty of returning the vessel from Rivergate Marina to its homeport at Sea World Drive, Main Beach. The return voyage between these locations is a distance of about 86 km, with the vessel having to be navigated through the channel and inlet systems on the western sides of north Stradbroke Island and south Stradbroke Island. For the purpose of this voyage, the defendant was the vessel Master and Engineer, and Ms Handley was performing general deck hand duties.</p> <p>About 2322 hrs that same day, at a location just north of Logan River the DCV collided with a lit navigational beacon. The DCV's portside bow collided with the beacon. Approximately 2346 hrs that same day, at a speed well above six knots (the speed limit in the area), the DCV entered the Rudy Maas Marina small mooring area and collided with the sailing yacht Sheltie, a 10 meter single mast sailing yacht. The Sheltie was stationary and tied up on its mooring at the time of impact. No persons were injured; however, the vessel Sheltie sustained significant damage to its mast, and as a result of the impact was knocked adrift into the channel.</p> <p>Following the impact the DCV continued to speed through the small craft mooring area. The vessel passed several other vessels (in very close proximity) also at excessive speeds. The DCV slowed down more than a minute after the collision at 2347 hrs. The Defendant never returned to the collision location.</p> <p>The Crystal Blue was found to be in a seriously damaged condition and had received gouging damage either side of its hull. Damage was reported along the starboard side aft of the vessel. This damage was low on the hull and consisted of a large gouge to the lower ribbing strip. There was further damage port side of the vessel with numerous sections</p>	<p>probation and must attend counselling for impulsivity and must attend and complete a Queensland traffic offenders program.</p>

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		<p>of damage including the porthole surrounds, gun whale and shipside.</p> <p>REMARKS</p> <ul style="list-style-type: none"> • His Honour stated that it was a complex exercise • HH placed great weight on the plea of guilty which demonstrated the defendant is taking responsibility for the offending • HH took into account the facts which were outlined in three ways • Of significance, the defendant’s conduct involved a number of acts or omissions in failing to have a proper look out or regard for the other people using the passage. The conduct involved several collisions. There was no injury to any person. • The fact that the defendant was not looking out gravely raises the risk of injury to other persons. • Estimated damage was \$140,000, HH noted that no compensation was sought • It is relevant that the defendant engaged in an encounter with the deckhand, and he should not have been controlling the vessel by remote control • It is also relevant that the defendant consumed alcohol and had a history of drink driving (contained within his traffic history) • HH concluded that in his assessment, the issue was not just impulsivity, the defendant had an issue with his attitude to the use or abuse of alcohol • HH was prepared to concede/conclude that the alcohol would have affected his judgment on this occasion • The objectives of the Act are relevant for the integrity and the promotion of marine safety. The laws and regulations are in effect for good reason to protect the defendant and others • HH agreed with the prosecutions submission that the acts and omissions put other people at risk • HH noted that property damage was caused • HH had regard to the maximum penalty for the offence (\$42,000), which informs the court of the potential seriousness of the offence 	

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		<ul style="list-style-type: none"> • HH had regard to the comparatives relied upon however noted that they were a guide only • HH concluded that this matter was not on all fours with any of those decisions and noted that they only act as a guide to establish range. HH concluded that not one of those decisions is on all fours with the facts and circumstances in this matter • HH referred to the decision in PEARCE. It can be distinguished in that the inattention period was short (5-6 minutes), but not momentary. No injury was caused in PEARCE and only potential of environmental damage. There was a risk to a lot of people in PEARCE. • HH referred to the decision of BYRNES and noted that a person suffered physical injury. HH however noted that it was not known to the court why the injury was sustained and to what extent it was contributed to by other facts. HH noted the charge was under a different subsection - 18(3) - negligence. HH noted recklessness carries the heavier penalty • HH referred to the decision of HORNE and noted that the victim was injured and required emergency surgery • HH had regard to the report of Dr Bowden and noted that the defendant was subject to a degree of bullying in school, had some previous issues with substance use and hypertension. HH noted that the report stated the defendant had decreased his alcohol intake as a consequence. HH noted that there was no condition that can be attributed to the offences • This was the third time the defendant had been before the court for an offence involving alcohol. HH noted that whilst it was not an element of the charge, the facts clearly established it. • HH stated the defendant was a mature person, and was old and mature enough to understand the consequences of his actions. • HH noted that we all make mistakes, sometimes minor mistakes can lead to grave consequences and vice versa. • HH noted that the defendant had proved that he can learn from his mistakes, in running a business himself. 	

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		<ul style="list-style-type: none"> • HH had regard to the fact the defendant had no marine history, just a traffic record and a dated criminal record. • HH was satisfied that the appropriate penalty was a fine in relation to the first charge and a bond and probation in relation to the second charge. 	
<p>Name: Paul ANGOVE</p> <p>Court: Parramatta Local Court</p> <p>Coram: Mr Feather</p> <p>Date: 13 November 2020</p>	<p>Charges: 2 x s18(4) National Law – strict liability</p> <p>Plea: Guilty</p>	<p>FACTS The defendant operated the DCV, Defiant, with three deficiencies – an unserviced fire extinguisher, a buoyant appliance with no buoyant line attached and two inflatable lifejackets in very poor condition. An infringement notice was issued, but the deft failed to pay it. The deft placed the safety of himself and others at risk.</p> <p>REMARKS Deft wrote to the court, noting that he was on DSP, a full-time carer and was suffering with deteriorating health (asbestosis). He was unfit to attend court and provided a medical certificate to that effect. His Honour fined the deft, noting parlous financial circumstances.</p>	<p>SENTENCE Convicted and fined \$1,000</p>
<p>Name: Paul Arthur TITZE</p> <p>Court: Downing Centre Local Court</p> <p>Coram: Mr Elks</p> <p>Date: 22 February 2021</p>	<p>Charges: 1 x s18(4) National Law – strict liability</p> <p>Plea: Guilty</p>	<p>FACTS The defendant was a casual master of the vessel, Lady Rose. He operated the vessel whilst numerous deficiencies were present. The deficiencies were such that the vessel should not have been operated at all. By operating the vessel, the defendant placed the safety of others at risk. The investigation arose following the death of a paying passenger on board the vessel.</p> <p>REMARKS His Honour took into account the maximum penalty (\$12,600 fine), the plea of guilty, lack of any criminal history, character references tendered on deft’s behalf and the need for general deterrence. He also noted the possible impact that a conviction would have on his employment (a maritime teacher at TAFE and future AMSA accredited surveyor – he</p>	<p>SENTENCE Convicted and fined \$2,000</p>

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		<p>had done the course recently), but found that the deft's conduct had constituted a serious breach of his duties. He commented that checklists are provided in order to save lives, and that had he properly completed the checklist, he would have detected the deficiencies. His Honour declined to impose an order pursuant to s.19B Crimes Act.</p>	
<p>Name: Noah James JOHNSON</p> <p>Court: Brisbane Magistrates Court</p> <p>Coram: Ms Coates</p> <p>Date: 20 August 2021</p>	<p>Charges: 1 x s18(4) National Law – strict liability</p> <p>Plea: Ex parte</p>	<p>FACTS On 12 April 2020, the defendant was the designated master, and in sole control of, a dory operating near Oldies Reef, Princess Charlotte Bay in North Queensland. The victim was fishing/diving for lobsters near the vessel. Safe operation of vessels requires that, when retrieving divers from the water, the outboard motor must at all times remain in neutral or be switched off. The defendant had previously received training to that effect but failed to ensure that practice was followed on this occasion. When the victim attempted to board the dory, the outboard motor engaged, swung towards the diver, and accelerated the dory, before the victim had a chance to re-enter the vessel. The victim fell back into the water, was struck by the dory's propeller blades on his left leg and thigh, causing severe lacerations, a cracked patella and fractured hip. The defendant immediately sought medical assistance for the victim, who was conveyed to a hospital in Cairns by the Royal Flying Doctor Service for emergency treatment. The defendant declined the opportunity to participate in a record of interview on legal advice. He was issued an infringement notice of \$2,520, organised a repayment plan, but only paid \$160. This sum was refunded to the defendant before the matter was referred for prosecution.</p> <p>REMARKS The Magistrate took into account the fact that "human error" had in this case resulted in serious injuries to a victim who was a long way from assistance. Her Honour noted that the defendant had no criminal history and considered that, in all the circumstances, a fine of \$3,000 was appropriate.</p>	<p>SENTENCE Convicted and fined \$3,000</p>

<p>Name: Bruno IANNACE</p> <p>Court: Darwin Local Court</p> <p>Coram: Mr Wallace</p> <p>Date: 29 March 2022</p>	<p>Charges: 1 x s18(3) National Law – strict liability</p> <p>Plea: Guilty</p>	<p>FACTS</p> <p>On 6 September 2020 the vessel, Sturmvogel, was returning to Darwin from a four-week commercial fishing trip in Western Australia. The master of the vessel, with 15 years experience, was Bruno IANNACE. The vessel was an 18 metre steel fishing vessel with a flat roof designed for stowing equipment such as life rafts, life rings and ropes. Rubbish was also stored on the roof. The roof was not a deck area and not designed for recreational purposes, being about 5 metres x 6 metres and about 3 metres above the sea, with no safety railing as such around the roof other than a small railing about 19cm high. The use of the roof as a recreational deck was prohibited except to get equipment.</p> <p>At about sunset when the vessel was about 10 hours away from Darwin, four members of the crew including Christopher Rodgers went to the roof of the vessel to enjoy the sunset and began drinking full strength beer. The crew members spent at least 2.5 hours on the roof of the vessel. None of the crew members were wearing a life jacket when on the roof drinking beer.</p> <p>About 2117 hours when it was dark, Rodgers knelt at the side of the railing on the port side of the vessel in an attempt to urinate. However he lost his balance as the boat rocked and fell overboard into the water. At the time the sea was a little rough in that the boat was moving and rocking. The crew then returned to the main deck and alerted the defendant who had not been on the roof throughout the period that the crew was there drinking.</p> <p>A rescue operation began and Rodgers was located in the water, partially submerged. After bringing Rodgers back on board the vessel in an unresponsive state and despite attempts to revive him, he died.</p> <p>It was subsequently ascertained that the cause of death was drowning and that Rodgers had a blood alcohol reading of 0.07%. Cannabis was also present in his blood.</p>	<p>SENTENCE</p> <p>Convicted and fined \$8,000</p>
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When spoken to by police the defendant said that there was alcohol on board the boat and that he allowed the crew a couple of beers after work, but they were not to get drunk. He also said he did not know that they were up on the roof and that it was not common at all to go up there. He said that at the relevant time the conditions were calm and that he was in the wheelhouse.

REMARKS

His Honour's remarks:

- This is a rare charge involving an obscure but sensible/necessary law of the Commonwealth.
- The incident occurred when the vessel was on its way back to port after spending an extended period of time fishing. It appeared as though everybody onboard had their guard down, as they were preparing to go home.
- The alcohol in the deceased's blood was not enough to be certain that the alcohol played any significant part in what eventuated.
- What occurred could not have been a worse outcome. It was a very sad and unnecessary death.
- Had regard to the character references from the defendant's employer. Accepted that the defendant is very upset by the death and the fact that he let his crew down in failing his responsibilities as the skipper.
- Took into account his plea of guilty.
- The degree of negligence involved went on for a long time.
- The risk was apparent - rules were in place to not go onto the vessel roof. It was up to the defendant to stop that behaviour from occurring.
- If not for the plea of guilty, His Honour would have imposed a fine between \$12,000 and \$15,000.
- The period of time which the crew spent on the roof of the vessel was a lengthy period.

EXTRACTS FROM EXPLANATORY MEMORANDUM – WORK HEALTH AND SAFETY BILL 2011 - PAGES 6 – 7

Offences in the Bill

With the exception of Part 7 and Division 3 of Part 6, breaches of the Bill are criminal offences. The offences, like all other provisions in the model Bill, have been drafted in non-jurisdictional specific terms and do not reflect the Commonwealth's general drafting practice of including each physical element of the offence in a separate paragraph.

In considering the recommendations of the National OHS review WRMC agreed that breaches of the duty of care in the model Bill should not require proof of fault in order to make out the offence.

Clause 12F(2) of the Bill provides that, unless otherwise specified, offences in the Bill are strict liability offences.

This means that for the majority of offences in the Bill, the prosecution will have to prove only the conduct of the accused. However, where the accused produced evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts which, if true, would have made that conduct innocent, it will be incumbent on the prosecution to establish that there was not an honest and reasonable mistake of fact.

The application of strict liability to the element of an offence in the Bill has been carefully considered during the drafting of the Bill. The strict liability offences arise in a regulatory context where for reasons such as public safety, and the public interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified. The offences also arise in a context where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, and the mental, or fault, element can justifiably be excluded. The rationale is that people who owe work safety duties such as employers, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public.

Most offences will be subject to other qualifiers such as reasonable practicability, due diligence or reasonable care.

Penalties

The National OHS review noted that there was considerable disparity in the maximum fines and periods of imprisonment that can be imposed under the various Australian OHS Acts for breaches of duty of care.

The penalties for offences in the Bill are based on the recommendations of the National review into OHS and agreed to by WRMC. They are intended to reinforce the deterrent effect of the model Bill and allow courts greater capacity to respond meaningfully and proportionally to the worst breaches by duty holders. In making their recommendations the National OHS review noted that in a case where death or serious injury results from a breach, the social and economic costs are likely to be far greater than even the maximum fines imposed by the model Bill.

The overall objective of the penalties in the Bill is to increase compliance with the Act and decrease the resort to prosecution to achieve that aim.

COMPARATIVE SENTENCING SCHEDULE

s 32 Work, Health and Safety Act 2011 (Cth) - Fail to comply with a work, health and safety duty

Penalty: Fine of \$1,500,000

No	CASE NAME	PLEA	OFFENCE	DETAILS OF OFFENCE	PENALTY
1	<p><i>Handy v Commonwealth of Australia</i></p> <p>Northern Territory Local Court</p> <p><i>1 September 2021</i></p>	G	1 x s 32 of the WHS Act	<p>On 10 May 2017, Private Challis was a participant in a live fire urban range activity at the Mount Bunday Training Area in the Northern Territory.</p> <p>Part of the exercise involved fire teams entering a mock village, moving through buildings, and engaging enemy targets within those buildings. During the exercise, Pte Challis became separated from his brick. The brick members engaged the first target inside the building. Pte Challis, who could not be seen by firing members, was on the other side of the wall behind the target. He was killed by a gunshot wound to the head.</p> <p>The Defendant failed to provide and maintain a safe system of work, namely, an assurance mechanism to ensure that the Defendant's safety policies and doctrine were followed.</p> <p>It was reasonably practicable for the following safety measures to have been part of a checklist:</p> <ul style="list-style-type: none"> • An adequate and approved risk assessment; • A training needs analysis to ensure participants and safety staff had adequate experience and training to participate in the relevant live fire exercise; • The identification of dangerous spaces (on both sides of a structure), including marking the area immediately behind a target; • Progressive training, including a dry rehearsal of the exercise without ammunition and then a rehearsal with blank ammunition; and • An adequate briefing to participants and safety staff prior to the exercise, which identified hazards, risks, control measures, the need to clear dangerous space before firing, the need to ensure all participants are 	Fine - \$1 million

No	CASE NAME	PLEA	OFFENCE	DETAILS OF OFFENCE	PENALTY
				<p>accounted for when in a stack formation, and reminders that dangerous spaces would be identified.</p> <p>The sentencing judge considered the breach fell within the worst category for this type of offending. The risk was not only foreseeable it was foreseen.</p> <p>The Defendant consented to a reparation order to compensate the victim's family for financial losses and pain and suffering.</p> <p>Taking into account the strength of the prosecution case, a 33% discount was given for the Defendant's plea, contrition, cooperation and reparation.</p>	
2	<p><i>Williams v Commonwealth of Australia</i></p> <p>Magistrates' Court of Queensland</p> <p>15 March 2021</p>	G	1 x s 32 of the WHS Act 2011 (Cth)	<p>On 16 August 2017 at the Royal Australian Air Force ('RAAF') Base in Townsville, an RAAF member was injured while conducting maintenance work on RAAF equipment.</p> <p>The member, Corporal James Dwyer, suffered serious injuries to his legs when an aircraft arresting unit was pulled from the rear of a truck onto the runway, colliding with Corporal Dwyer, and resulting in the amputation of his lower right leg. His left foot also sustained serious damage and required several surgeries.</p> <p>The Commonwealth of Australia failed to comply with its duty to ensure the health and safety of workers, as far as reasonably practicable, by failing to provide and implement a safe system of work that included two measures (appropriate marking towards the end of arrestor tape and ensuring units were anchored) that would have minimised or eliminated a risk to the health and safety of its workers.</p> <p>Sentencing magistrate found:</p> <ul style="list-style-type: none"> • Offence in mid-range of objective seriousness • Not an example of the "neglect of simple well-known precautions to deal with an evident and great risk of injury" as referred to in 'Madgwick factors'. But the safe system of work could easily have been provided and maintained. • Early guilty plea 	Fine - \$350,000

No	CASE NAME	PLEA	OFFENCE	DETAILS OF OFFENCE	PENALTY
				<ul style="list-style-type: none"> • Contrition • Not as serious as <i>Docker</i>, which involved a child, but this was a further offence 	
3	<p><i>Docker v Commonwealth of Australia</i></p> <p>Downing Centre Local Court</p> <p>9 March 2020</p>	G	1 x s 32 of the WHS Act 2011 (Cth)	<p>The Commonwealth of Australia, through the Department of Defence, operated the Australian Army Cadets.</p> <p>On 19 September 2016, during Newington College’s Annual Army Cadet Camp held at Somerset Education Outdoor Centre, a 14 year old Australian Army Cadet went missing whilst participating in an activity. He was subsequently located, after an hour of searching, unconscious in the bush terrain surrounding the activity area. He suffered a brain injury, depressed skull fracture, spinal fracture, broke wrists, nerve damage and amnesia. His injuries were consistent with a fall.</p> <p>Charge: Failure to provide and maintain safe systems of work by failing to ensure supervisors were instructed that adequate supervision was required and failing to complete a specific risk assessment.</p> <p>Sentencing magistrate found:</p> <ul style="list-style-type: none"> • No finding made as to objective seriousness • there were clear, present and obvious dangers during the camp and “gravamen’ of offending was that no risk assessment was undertaken • the defendant could not be treated as a first offender • substantial harm caused to the cadet and his parents • the defendant demonstrated remorse as well as post-incident improvements, cooperated with the investigation • late plea of guilty – about 15% discount (\$350,000 reduced to \$300,000). 	Fine - \$300,000
4	<p><i>Montana v Kuredale Pty Ltd</i></p> <p>Perth Magistrates Court</p>	G	2 x s 32 of the WHS Act 2011 (Cth)	<p>Lendlease were contracted by the Department of Defence to conduct the overall redevelopment project at the Campbell Barracks, Perth. The defendant company, Kuredale Pty Ltd, was subcontracted by Lendlease to install steel at the</p>	Fine - \$75,000 (global penalty)

No	CASE NAME	PLEA	OFFENCE	DETAILS OF OFFENCE	PENALTY
	22 October 2019			<p>redevelopment site. Lendlease is charged separately for failures relating to this incident.</p> <p>On 7 June 2017, a bricklayer was injured by a piece of steel which was knocked off the side of a concrete wall by a crane (operated by Kuredale) lifting a steel truss. The steel fell onto the bricklayer's toes, resulting in the amputation of the worker's second toe. The exclusion zone in the area did not extend around the crane and the bricklayers working in the vicinity. While a Kuredale steel worker told the bricklayers to move out of the area shortly before the incident, some of them returned and continued bricklaying; there was no clear exclusion zone set up keeping them out. There was also no effective Kuredale spotter to look out for workers beneath the area in which the crane was lifting steel.</p> <p>Charge 1: Fail to provide and maintain a safe system of work, which required an exclusion zone to be in place while the load was suspended to control the risk of materials falling on workers (s 19(3)(c) failure); and</p> <p>Charge 2: Fail to provide information, training, instruction and supervision which required an exclusion zone to be in place while the load was suspended to control the risk of materials falling on workers (s 19(3)(f) failure).</p> <p>Sentencing magistrate found:</p> <ul style="list-style-type: none"> • offence was in mid-range of objective seriousness and not in "very low range" as submitted by defendant • not a case of momentary inadvertence. Defendant should have turned its mind to system that ought to have been in place at the time work was done • Guilty plea at earliest opportunity • Cooperation with prosecution • Good record over a long period of time prior to incident • Defendant did extensive work after incident to improve systems 	

No	CASE NAME	PLEA	OFFENCE	DETAILS OF OFFENCE	PENALTY
				<ul style="list-style-type: none"> Specific deterrence less important 	
5	<p><i>Zadro v Linfox Australia Pty Ltd</i></p> <p>Brisbane Magistrates Court</p> <p>11 October 2018</p>	G	<p>1 x s 32 of the WHS Act 2011 (Cth) (and 1 x s 32 WHS Act offence taken into account on a Form 1 under s 16BA Crimes Act 1914 (Cth))</p>	<p>Offender was contracted with the Department of Defence for the logistical management of various equipment.</p> <p>One of the pieces included a Bushmaster, a large military vehicle used for troop transportation.</p> <p>As a part of the job, a Bushmaster was being moved into position to be transported to another facility for repair and maintenance.</p> <p>Due to damage, the Bushmaster needed to be towed and operated without brakes. The Bushmaster was towed with a chain, rather than a rigid tow coupling and without the use of wheel chocks.</p> <p>As a result of a failure to implement a safe system and to provide necessary information, training and instruction, there was a risk to health and safety to a worker of another company of being crushed between the tow vehicle and the Bushmaster. That risk manifested and resulted in serious injuries to the victim.</p> <p>Sentencing magistrate found:</p> <ul style="list-style-type: none"> offence was objectively serious; risk was foreseeable; the extent of the risk was “medium to high” use of particular equipment was common in industry and would have been easily available the likelihood of an event such as this occurring was likely early guilty plea for which offender was entitled to “credit”; no prior criminal record 	Fine - \$200,000
6	<i>Hanel v John Holland Pty Ltd</i>	G	<p>3 x s 32 of the WHS Act 2011 (Cth)</p>	<p>Offender was part of a joint venture for a major civil infrastructure program.</p> <p>As part of the construction of an elevated roadway, the Offender used a site for the purposes of constructing large sections of the roadway.</p>	Fine - \$281,250 (global penalty)

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	<p>Adelaide Magistrates Court</p> <p>29 May 2017</p>			<p>On the site were large 'portal cranes' used for the purposes of loading the sections of the roadway onto trucks to be delivered to the construction site.</p> <p>On the day of the incident, a worker was in an elevated work platform (often referred to as a 'cherry picker') when the portal crane struck and crushed it.</p> <p>The worker suffered injuries to his legs and remained unfit for work for a period of four years.</p> <p>Charge 1: Related to a failure of the Offender to implement and maintain a system of work relating to communication measures, namely two-way radios, when operating the portal crane.</p> <p>Charge 2: Related to a failure of the Offender to implement isolation measures to minimise a risk to health and safety from collision of the portal crane and an elevated work platform.</p> <p>Charge 3: Related to a failure of the Offender to implement proper information, training, instructions and supervision concerning the use of two-way radios on the worksite.</p> <p>Sentencing judge found:</p> <ul style="list-style-type: none"> • serious breach of duty even if the breach was not deliberate and the defendant had safety systems in place • no previous criminal convictions but four prior civil penalties imposed – not relevant as not sufficiently similar offences to put defendant on notice of risk • a prior Comcare investigation should have alerted defendant to risks • cooperation with authorities; various safety measures implemented after incident • early guilty pleas for which 25% discount given: starting point was \$375,000 	<p><i>NB.</i></p> <p><i>Jurisdictional limit of \$150,000 for each offence.</i></p>

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7	<i>R v Cleanaway Operations Pty Ltd</i> Adelaide District Court 19 April 2017	G	1 x s 32 of the WHS Act 2011 (Cth)	<p>Offender was a company that collected, treated, recycled and disposed of liquid waste and prescribed wastes generated by industry.</p> <p>During a process being undertaken, where a solvent was being distilled from a new chemical waste product, a fire emerged from a distillation still causing injury to an employee.</p> <p>Offender was charged with one count arising from its failure to provide a documented work instruction to workers responsible for operating a still to conduct the trial distillation.</p> <p>Sentencing judge found:</p> <ul style="list-style-type: none"> • significant departure from the statutory duty • defendant was a well-resourced company where the risks in relation to dropping stills were well-known. Previously, it had experienced a similar workplace situation • all of the technical information was available to properly assess the risks and implement a safe work environment • risk of serious injury but no serious injury was sustained due to protective clothing worn • antecedents included 3 prior contraventions leading to civil penalties • significant credit given for guilty plea; contrition • good prospects of rehabilitation if there is strict compliance with regulations 	Fine - \$650,000
8	<i>Handy v John Holland Pty Ltd</i> Adelaide Magistrates Court 8 June 2016	G	2 x s 32 of the WHS Act 2011 (Cth)	<p>Offender was part of a joint venture for a major civil infrastructure program.</p> <p>As part of the construction of an elevated roadway, work was sub-contracted to a party to construct the piers which support the elevated roadway. This included the installation of stormwater drainage pipes.</p> <p>On the day of the incident, employees and sub-contractors were installing a stormwater pipe for one of the piers. The pipe had been inserted through a hole</p>	<p>Fine - \$130,000 (global penalty)</p> <p>N.B. Jurisdictional limit of</p>

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				<p>some 20-30 mm wider than it and the workers were maneuvering it to connect with a T-junction. The part of the pipe protruding through the hole was extended between 1.5 m and 2 m over a major roadway, which was approximately 14.5 m below.</p> <p>A portion of the pipe broke off, falling 14.5 m and striking two vehicles stationary at the traffic lights. The window of one of the vehicles was broken. No one was injured.</p> <p>The Offender's failures related to ensuring, so far as reasonably practicable, the safety of other persons was not put at risk through the construction and installation of the pipes.</p> <p>Charge 1: Related to the failure to ensure that the sub-contractors produced a Task Risk Assessment/Safe Work Method Statement for installing the pipe.</p> <p>Charge 2: Related to an ongoing failure of audit procedures to identify the failure.</p>	\$150,000 for each offence.
9	<i>R v K & S Freighters</i> [2022] SADC (9 February 2022)	G	1 x s 32 of the WHS Act 2011 (Cth)	<p>The offending arises out of an incident that took place on 25 November 2018 at the Gepps Cross depot of Bianco Reinforcing.</p> <p>The offender is a multi-modal transport and logistic provider, operating across Australia and New Zealand. It owns and operates a fleet of trucks and trailers with hinged sides, known as 'flipper gates', which were designed and fabricated by the offender. They were designed to meet the needs of the offender's business.</p> <p>Paul Banks, an employee of the offender, drove a truck containing steel coils from Victoria to the Bianco depot. He suffered a crush injury to his leg when an interconnected flipper gate panel (estimated weight 686kgs) on his trailer fell on to him. Peter Smith, a fellow K&S driver, suffered a torn shoulder after trying to lift the flipper gate off Mr Bank's leg.</p>	Fine \$300,000

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				<p>The use of 'flipper gates' on trailers was a workplace hazard. The offender failed to take reasonably practicable measures to minimise the risk arising from the hazard, namely:</p> <ul style="list-style-type: none"> • Ensuring the maintenance of a personnel exclusion zone off the trailer deck and away from the flipper gates during the lifting and lowering of flipper gates on trailers; and • Ensuring the use of mechanical means for the lifting and lowering of the flipper gates on trailers. <p>Sentencing judge found:</p> <ul style="list-style-type: none"> • Whilst I accept that the employee Mr B did not follow any of the three relevant operating procedures, I do not consider that failure, in the circumstances of this case, mitigates the defendant's failures. The failures of the defendant occurred irrespective of what Mr B did or did not do on that particular day. The reality is that a risk which was foreseeable was not adequately dealt with by the company's policies or actions. It is the defendant's failure to act which created the risk; • There is evidence of the defendant's commitment to the safety of its workers. The defendant's breach was not a flagrant breach, in the sense the practice was widely known within the company and yet the company simply ignored the risk. The prosecution accept that whilst this was a relatively serious departure, the failures of the defendant were not in the worst category; • The defendant is clearly a large company, with extensive operations and many staff. Whilst I accept the defence submission that it is difficult to monitor everything which occurs, the more hazardous the environment in which a business is conducted, the greater are the responsibilities and obligations on that company to ensure the safety of its workers. • The legislation requires constant vigilance and particularly so when the employer conducts a large enterprise which involves inherent risks to safety; 	

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				<ul style="list-style-type: none"> • The duty to act may be an onerous one, but that is what is required when the safety and wellbeing of the employees is concerned; • 25% discount for guilty plea. 	