

STAYING FOCUSED ON THE BIG PICTURE: SHOULD AUSTRALIA LEGISLATE FOR CORPORATE MANSLAUGHTER BASED ON THE UK MODEL?

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ABSTRACT

This paper examines the current position regarding corporate manslaughter primarily in the United Kingdom (with some comparison with the position in Australia), and aims to formulate answers to the following two questions: is the corporate manslaughter legislation enacted in the United Kingdom a success, and is the enactment of corporate manslaughter legislation in Australia warranted? Thereafter, taking into account the information discussed and conclusions reached as regards the initial two questions, the writers put forward their arguments as to what is the correct approach that should be taken generally in relation to corporate manslaughter and the enactment of appropriate legislation.

I. INTRODUCTION

Nearly every day we are informed, by the media and/or other sources, of the occurrence of disasters. Frequently such disasters are the result of floods, earthquakes, bushfires, violent storms and the like. Sometimes there might be no fatalities; on other occasions the human death toll might be in the thousands or even millions. In many instances, no blame can be attributed for the deaths. What has occurred is what is commonly termed an ‘act of God’, part of the life cycle and an occurrence that mankind has to live with. However not all disasters are like this - sometimes people are killed as a consequence of a disaster brought about by the grossly negligent and inexcusable conduct of another. That other party might be a human being or even a company, corporation or similar entity. This paper examines the latter, in other words, we are examining the area of the law commonly known as ‘corporate manslaughter’.

At an absolute minimum, for there to be corporate manslaughter, there needs to be a corporation, a death and the death must have been caused by some reprehensible grossly negligent conduct on the part of the corporation. Herein, the terms ‘corporation’ and ‘company’ are normally treated as being synonymous and a reference to ‘corporate manslaughter’ will encompass both manslaughter caused by corporations and manslaughter caused by companies.¹ In fact, as will be explained later, the term ‘corporate manslaughter’ has an even wider application. This is because the United Kingdom’s corporate manslaughter legislation also applies to ‘organisations’ (which is a very broad term).

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¹ Whilst herein the terms ‘corporation’ and ‘company’ are normally treated as being synonymous, it is acknowledged this is not invariably the case. However, an analysis and discussion of the distinction is beyond the scope of this paper.

II. UK POSITION PRIOR TO 6 APRIL 2008

A. Recognition of Corporate Manslaughter as a Crime

The UK's *Corporate Manslaughter and Corporate Homicide Act 2007* (CMCHA) came into effect on 6 April 2008. However, even prior to the enactment of this legislation, corporate manslaughter was recognised in the United Kingdom as being a criminal offence. This is confirmed in, for example, the judgment of Turner J in *R v P&O European Ferries (Dover) Ltd*.² The major problem has not been the existence of an offence of corporate manslaughter, but rather how such corporate criminal liability could be established. As regards this topic (corporate manslaughter), it should be kept in mind that only corporations (and the like)³ are prosecuted for 'corporate manslaughter' - individuals are prosecuted for 'gross negligence manslaughter'.⁴

In addition to a liability for the crime of corporate manslaughter, UK corporations also have legal obligations under the UK's *Health and Safety at Work Act 1974* (HSWA).⁵ The prosecution of a corporation for violation of the HSWA can be brought at the same time as, or as an alternative to, a prosecution for corporate manslaughter.⁶ Prosecutions of corporations under the HSWA have been more successful than prosecutions for corporate manslaughter. This is because liability under the HSWA is normally strict - the fact that the incident occurred and resulted in death is usually sufficient to create HSWA liability for the corporation. However, the attractiveness of going down the seemingly 'easier to establish' HSWA avenue, (rather than prosecuting for the more difficult to establish crime of corporate manslaughter), is diminished by the fact that many of the general public as well as even some corporate wrongdoers themselves seem to perceive a conviction for a breach of the HSWA as merely a slap on the wrist rather than a real criminal conviction. This perception is further enhanced by the fact that often, despite what could be imposed under the HSWA, the penalties actually imposed for HSWA infringements are not especially large, particularly for corporations with immense resources.⁷

B. The Pre-CMCHA Position

Before examining the UK's *Corporate Manslaughter and Corporate Homicide Act 2007* (CMCHA), it is useful to scrutinise the pre-CMCHA position (i.e. the UK's law concerning corporate manslaughter prior to the coming into effect of the CMCHA on 6 April 2008), in order to identify the problems that there were with this previous legal regime. As mentioned earlier, the problem has not been the existence of a criminal offence of corporate manslaughter but rather how and through whom it could be established. In the case of an individual, criminal liability for manslaughter is established by examining his or her *mens rea* (as well as the *actus reus* and whether or not there is a defence). Because this is not as

² *R v P&O European Ferries (Dover) Ltd* [1991] 93 Cr App R 72.

³ As mentioned, the term 'corporations' (and the like) as used herein also includes companies, similar entities and even organisations (the latter by virtue of the CMCHA).

⁴ A recent example is the conviction and imprisonment for 2 years of George Collier. See CPS Press Statement of 5 October 2012 available at:

http://www.cps.gov.uk/news/press_statements/builder_jailed_for_manslaughter_of_meg_burgess/ (viewed 24 November 2012).

⁵ As do individuals.

⁶ As regards responsible individuals, a prosecution for a breach of the HSWA can be brought at the same time as, or as an alternative to a prosecution for gross negligence manslaughter.

⁷ As regards this aspect generally, see Almond P, "Public Perceptions of Work-Related Fatality Cases" (2008) 48 *British Journal of Criminology* 448.

straightforward where a corporation is charged with corporate manslaughter, the courts formulated the ‘identification doctrine’.⁸ This meant that, under the UK’s common law (i.e. the law prior to the coming into force of the CMCHA), to be guilty of corporate manslaughter, a corporation not only had to be in gross breach of the duty of care it owed to the victim, it was also necessary for the prosecution to identify a single senior person in the corporation who was the ‘directing mind’ of the corporation (i.e. the single senior person in the corporation who, by his or her actions and decisions, could be said to embody the entire company).⁹ It was not possible to aggregate the conduct of several individuals.¹⁰ In addition, the individual (the directing mind) himself or herself also had to be personally guilty of the offence of gross negligence manslaughter. These requirements meant that it was extremely difficult to successfully prosecute a corporation for corporate manslaughter. Except for very small companies, invariably there was no single person who could be clearly identified as the directing mind of the corporation.

C. Examples of Pre-CMCHA Disasters

The following are some examples of serious disasters that occurred in the UK prior to the coming into force of the CMCHA in 2008. These and numerous other pre-CMCHA disasters and the subsequent corporate manslaughter prosecutions (or lack thereof) following the disasters are already well-documented.¹¹

1. Herald of Free Enterprise disaster

In 1987, 193 people died when the ‘Herald of Free Enterprise’ capsized after leaving port with its bow doors open. Despite there being sloppiness and negligence at every level,¹² the corporate manslaughter charges brought against P&O European Ferries (the owner of the ship) failed because it could not be established that the directors in charge of the company’s senior management were at fault.¹³

2. Southall rail disaster

In 1997, a train ploughed into another train near Southall in West London, killing seven people. Corporate Manslaughter and HSWA charges were subsequently brought against Great Western Trains Limited and gross negligence manslaughter and HSWA charges were brought against the driver, Larry Harrison. The corporate manslaughter charges against Great Western Trains Limited were dismissed as it could not be established that there was a directing mind. Great Western Trains Limited was however fined £1.5 million for breaching the HSWA. Larry Harrison was acquitted on all counts.¹⁴

⁸ See e.g. *Lennard’s Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* [1915] AC 705, *Bolton Engineering v TJ Graham & Sons* [1957] 1 QB 159 and *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

⁹ The ‘directing mind’ is also, at times, referred to as the ‘controlling mind and will’.

¹⁰ *Attorney General’s Reference (No 2 of 1999)* [2000] 2 Cr App Rep 207.

¹¹ See e.g. Forlin G and Smail L (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (2nd ed, Bloomsbury Professional, 2010).

¹² Department of Transport, *The Merchant Shipping Act 1894 - mv Herald of Free Enterprise*, Formal Investigation Report of Court No 8074 (1987).

¹³ The Herald of Free Enterprise disaster was followed in 1994 by a second ferry disaster in similar circumstances. This involved the ‘Estonia’, in which 850 people died. However, this later disaster was not within the jurisdiction of the countries being principally considered in the present analysis (United Kingdom and Australia).

¹⁴ See e.g. *The Southall Rail Accident Inquiry Report* (2000) by Professor John Uff QC available at: <http://www.railwaysarchive.co.uk/docsummary.php?docID=178> (viewed 24 November 2012).

3. Barrow Legionnaire's Disease outbreak

In 2002, an outbreak of Legionnaire's Disease at a council-run Arts Centre in Barrow killed seven people.¹⁵ The Barrow Borough Council was charged with corporate manslaughter and its design services manager, Gillian Beckingham, was charged with gross negligence manslaughter. Both were subsequently acquitted as the prosecution could not establish that Beckingham was the Council's controlling mind. However, the Council was fined £125,000 and Gillian Beckingham £15,000 for breaches of the HSWA.¹⁶

4. Lyme Bay disaster

This was the first and one of the very few successful prosecutions for corporate manslaughter.¹⁷ In 1993, four students at an outdoor activities centre at Lyme Regis in Dorset died during a canoeing trip across Lyme Bay. Peter Kite (Managing Director and owner of OLL Limited which operated the outdoors activities centre) was found guilty of gross negligence manslaughter and jailed for three years (later reduced). OLL Limited was found guilty of corporate manslaughter and fined £60,000. The company was a one-man company and the Court had no difficulty identifying Peter Kite as the directing mind and will of the company.

As is evident from the foregoing examples, the crime of corporate manslaughter arises from 'corporate-made' disasters (i.e. disasters which are not acts of God but which have occurred because of the grossly negligent conduct of a corporation and the like). Also, the grossly negligent conduct on the part of the corporation does not always have to involve positive actions: even inactions and omissions (such as a failure to maintain railway lines in the Hatfield rail disaster) will suffice.

D. An Assessment of the Pre-CMCHA Position

As stated above, the problem prior to the enactment of the CMCHA was not the existence of an offence of corporate manslaughter, but rather how and through whom liability for corporate manslaughter could be established. The requirements were extremely difficult to establish; so much so that the only successful prosecutions for corporate manslaughter prior to the enactment of the CMCHA were of a few small companies (like OLL Limited). There were no successful prosecutions of large corporations. Because of this, the United Kingdom's corporate manslaughter legal regime prior to 6 April 2008 was clearly unsatisfactory, inadequate and ineffective.

¹⁵ In addition to the seven deaths, another 180 people were infected.

¹⁶ See the Health and Safety Executive's site at: < <http://www.hse.gov.uk/legionnaires/barrow.htm> (viewed 24 November 2012).

¹⁷ *R v Kite and OLL Limited* (the 'Lyme Bay' case), Winchester Crown Court, 8 December 1994, unreported.

III. UK POSITION SINCE 6 APRIL 2008

A. CMCHA 2007

After years of discussions, consultations and reviews, the United Kingdom finally enacted the *Corporate Manslaughter and Corporate Homicide Act 2007* (CMCHA) which came into effect on 6 April 2008.¹⁸

1. The Statutory Offence

The CMCHA does not create any new duties for corporations. Rather, it changes the *basis* of the criminal offence of corporate manslaughter from the common law to statute and makes the offence less difficult to prove because the ‘identification doctrine’ no longer applies. As a result, the crime of corporate manslaughter is now committed where:

- (a) there is an *organisation* subject to the CMCHA;
- (b) the organisation owed a *relevant duty of care* to the deceased;
- (c) there was a *gross breach* of the relevant duty of care owed by the organisation;
- (d) this gross breach *caused* the deceased’s death;
- (e) the *way in which the organisation’s activities were managed or organised by its senior management* was a substantial element in the gross breach of the relevant duty of care.¹⁹

2. Organisations

The four types of entities considered to be an ‘organisation’ for the purposes of the CMCHA are:

- (a) a corporation;
- (b) a department or other body listed in Schedule 1 of the CMCHA;
- (c) a police force;
- (d) a partnership, or a trade union or employers’ association, that is an employer.²⁰

The types of entities which can be held liable for the statutory criminal offence of corporate manslaughter have thus been widened because of the inclusion of the above categories (b), (c) and (d). In fact, because of CMCHA s 21(1), there is scope for the term ‘organisation’ to be expanded even further.

3. Relevant duty of care owed to deceased

CMCHA s 2, after stating that a ‘relevant duty of care’ means any of the listed duties owed by the organisation under the law of negligence, lists the duties as those associated with:

- (a) employing or controlling workers and the like;
- (b) occupying premises;
- (c) supplying goods or services;
- (d) carrying on any construction or maintenance operations;
- (e) carrying on any activity on a commercial basis;
- (f) using or keeping any plant, vehicle or other thing;
- (g) detaining a person in custody.

¹⁸ The reason for the Act’s title is that, in England, Wales and Northern Ireland, the criminal offence is ‘corporate manslaughter’ whereas in Scotland the nomenclature used is ‘corporate homicide’. Herein, normally just the term ‘corporate manslaughter’ is used.

¹⁹ CMCHA s 1. Emphasis added.

²⁰ CMCHA s 1(2).

Whether an organisation owes a duty of care to a particular individual is a question of law for the court to decide.²¹ In order to make such a determination, the court utilises the principles and precedents of the law of negligence.²²

4. Gross Breach, Causation, and Senior Management Failure

The next criteria is that there needs to have been a '*gross breach*' of the relevant duty of care owed by the organisation to the deceased. A breach of the duty of care by an organisation is a 'gross' breach if the conduct fell far below what can reasonably be expected of the organisation in the circumstances.²³ CMCHA s 8 lists the various factors that a jury must or may take into account when making a determination as to whether or not there has been a gross breach. The gross breach needs to have been 'a cause' of the individual's death. When determining whether or not this is the case, the 'but for' test is used.²⁴

Finally, it must be established that *the way in which the organisation's activities were managed or organised by its senior management* was a substantial element in the gross breach of the relevant duty of care owed by the organisation to the deceased.²⁵ According to CMCHA s 1(4)(c), the senior management of an organisation are the persons who play significant roles in:

- (a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
- (b) the actual managing or organising of the whole or a substantial part of its activities.

This last criteria means that liability for corporate manslaughter is now on the basis of a delinquent 'corporate culture' rather than a delinquent single 'directing mind'.

5. Penalties

Under the CMCHA, corporate manslaughter is punishable by an unlimited fine.²⁶ According to the (UK) Sentencing Guidelines Council's Definitive Guideline on Corporate Manslaughter & Health and Safety Offences Causing Death, fines for organisations found guilty of corporate manslaughter may be millions of pounds and should seldom be below £500,000.²⁷ In addition to the imposition of an unlimited fine, the CMCHA empowers the imposition of remedial orders²⁸ and/or publicity orders.²⁹ For HSWA offences that cause death, fines from £100,000 up to hundreds of thousands of pounds can be imposed on the delinquent corporation.

²¹ CMCHA s 2(5).

²² See Ministry of Justice, "A guide to the Corporate Manslaughter and Corporate Homicide Act 2007" (October 2007) available at: http://www.nio.gov.uk/guide_to_the_cmch_act_2007_web.pdf_oct_07-3.pdf (viewed 24 November 2012).

²³ CMCHA s 1(4)(b).

²⁴ See Ministry of Justice, n 22, at 14.

²⁵ CMCHA s 1(3).

²⁶ CMCHA s 1(6) and also the Sentencing Guidelines Council's Definitive Guideline on Corporate Manslaughter & Health and Safety Offences Causing Death (D. Level of fines) available at: http://sentencingcouncil.judiciary.gov.uk/docs/web_guideline_on_corporate_manslaughter_accessible.pdf (viewed 24 November 2012).

²⁷ See the Sentencing Guidelines Council's website at: http://sentencingcouncil.judiciary.gov.uk/docs/web_guideline_on_corporate_manslaughter_accessible.pdf (viewed 24 November 2012).

²⁸ CMCHA s 9.

²⁹ CMCHA s 10.

B. CMCHA Prosecutions to date

At the time of writing,³⁰ there have been three convictions under the CMCHA, the first being that of Cotswold Geotechnical Holdings Ltd (CGH) on 15 February 2011.³¹ This prosecution arose out of the death of Alex Wright in 2008. Wright, a geologist employed by CGH, was investigating soil conditions in a deep trench when it collapsed causing him to die from traumatic asphyxiation. CGH was a small company which employed only eight people. Peter Eaton, the company's sole director, was in total control of the way in which the company's affairs were managed and the way in which its work was organised.

The Crown's case was that the company should have enforced a strict prohibition on any employee entering a trial pit deeper than 1.2 metres, unless it was made safe by shoring or by any other alternative means available for the purpose. The defence countered that it was reasonable to approach the issue of the safety of trial pits by leaving it to Peter Eaton and Alex Wright, to form their own judgments about the safety of entering trial pits. If there was a breach of duty, the breach was not gross and, even if the breach was gross, the cause of death was the deceased's entering the pit contrary to the company's practice. The jury accepted the prosecution's contentions and convicted the company of corporate manslaughter. Following its conviction, CGH was fined £385,000 payable over 10 years at the rate of £38,500 per annum.

CGH's subsequent application for leave to appeal against its conviction and sentence was dismissed by the Court of Appeal which held that the company's defence to the corporate manslaughter charge had been placed before the jury and the jury's verdict was unsurprising. It also stated that the trial judge had taken into account the Definitive Guideline issued by the Sentencing Guidelines Council in relation to corporate manslaughter and it agreed with his sentence. Peter Eaton, the company director, was initially charged with gross negligence manslaughter as well as a breach of the HSWA, but subsequently it was ruled he was too unwell to stand trial and all charges were discontinued. The additional charges against CGH, for contravening s 33 of the HSWA, were also discontinued.

The second conviction for corporate manslaughter under the CMCHA has been that of JMW Farm Limited on 8 May 2012, following the death of an employee, Robert Wilson, on its pig farm in Northern Ireland in 2010.³² The company pleaded guilty to the offence. Wilson suffered fatal crush injuries whilst he was washing a metal bin raised up on the forks of a forklift truck operated by one of the company's directors. JMW Farm Limited was fined £187,500. Like CGH, JMW Farm Limited was only a small company. At the time of sentencing JMW Holdings Ltd, the Sentencing Guideline concerning corporate manslaughter was not also applicable in Northern Ireland.

The third and most recent conviction for corporate manslaughter under the CMCHA has been that of Lion Steel Limited, a manufacturer of metal shop fittings. On 3 July 2012, after a trial lasting several weeks, the company pleaded guilty to the offence of corporate manslaughter arising out of the death of its employee, Steven Berry, who died in 2008 when he fell through

³⁰ 24 November 2012.

³¹ *R v Cotswold Geotechnical Holdings Ltd* [2011] All ER (D) 100 (May) and (on appeal) *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337. See also the Crown Prosecution Service Press Release at: http://www.cps.gov.uk/news/press_releases/107_11/ (viewed 24 November 2012) which has been utilised herein for details.

³² *The Queen v JMW Farm Limited* [2012] NICC 17.

a fragile roof panel at the company's premises. It was alleged that, at the time of the incident, Berry had not received any formal health and safety training and was not properly equipped. Lion Steel was fined £480,000. In addition to the prosecution of Lion Steel for corporate manslaughter, separate charges had been simultaneously brought (a) against three directors of Lion Steel (Graham Coupe, Richard Williams and Kevin Pallier) for gross negligence manslaughter and (b) against Lion Steel and the three directors for infringements of the HSWA. At the close of the prosecution's case, the judge accepted the defence's argument that the gross negligence manslaughter charges against Williams and Coupe should not go to the jury. He also ruled that the separate charge against Williams under the HSWA should not go to the jury. The Crown Prosecution Service (CPS) then offered no evidence against Palliser for gross negligence manslaughter or against Coupe and Palliser in relation to the HSWA charges.

C. An Assessment of the UK's CMCHA to date

As is evident from the foregoing, there have, to date, been only three convictions in the United Kingdom for corporate manslaughter under the CMCHA, that of CGH (a small soil testing company), JMW Farm Limited (a small farming company) and Lion Steel (a larger, but not huge, metal shop fittings manufacturer). The largest fine imposed to date has been that on Lion Steel (£480,000). The discrepancy of £20,000 between the Sentencing Guideline amount of £500,000 and the actually imposed fine of £480,000 is due to the fact that a discount of 20% was given because of the company's guilty plea.

At the time of writing,³³ a fourth company, PS & JE Ward Ltd, has been charged with corporate manslaughter (and a breach of the HSWA) arising out of the death of its employee, Grzegorz Pieton, on 15 July 2010 when the trailer he was towing touched an overhead power line. However, these proceedings are only at an early stage.³⁴ Earlier, on 20 July 2012, the CPS announced its decision to launch a corporate manslaughter (and HSWA) prosecution against Austin and McLean Limited in relation to the death of Juan Antonio Quintanilla Romero who died on 30 August 2008 whilst working on a fuel tanker at the Oil Refinery in Fawley.³⁵ It seems the CPS is also conducting on-going reviews of other files to determine whether or not corporate manslaughter prosecutions should be launched.³⁶

If there were, at this point of time, a significant number of convictions for corporate manslaughter and a comprehensive body of caselaw providing in-depth judicial guidance as to how the courts intend interpreting and applying the CMCHA, a definitive assessment of the effectiveness of the UK's CMCHA to date could be made. Nevertheless, because at the present time there have been three convictions with rulings and observations by the courts particularly the Court of Appeal, there is another corporate manslaughter prosecution underway, and there are others under consideration, even at this early stage, some arguably valid observations about the CMCHA to date can be made. The prosecution and conviction of CGH, JMW Farm Limited and Lion Steel show that the CPS will take action where it believes there has been corporate manslaughter and, also, that it can be successful both at first

³³ 24 November 2012.

³⁴ The company made its first court appearance on 23 November 2012.

³⁵ See the CPS Press Statement available at:

http://www.cps.gov.uk/news/press_statements/austin_and_mclean_and_esso_charged_in_relation_to_the_death_of_juan_antonio_quintanilla_romero/index.html (viewed 24 November 2012).

³⁶ See the CPS Press Statements available at: http://www.cps.gov.uk/news/press_statements/ (viewed 24 November 2012).

instance and even if there is an appeal. The proceedings against the further two companies (JMW Farm Limited and Lion Steel) and the launch of new proceedings against PS & JE Ward Ltd and Austin and McLean show that the CPS is going to be proactive, i.e. it is not going to sit back and wait, after achieving its first success in the CGH case. Even though it might be argued that the first two convictions under the CMCHA are merely akin to the OLL Limited conviction under the pre-CMCHA regime (convictions of small ‘Mum and Dad’ companies), the third successful prosecution and conviction of a larger company (Lion Steel) shows that the bigger companies will be targeted if they transgress.

Thus, at the present time, it is strongly arguable, from what has happened to date, that the CMCHA is going to be effective and as more time passes and even more prosecutions have been launched and convictions obtained this will be shown to be the case. Some might say that because the CMCHA came into effect on 6 April 2008, by now there should have been more prosecutions, but it has never been intended that there would be a tremendous amount of prosecutions for corporate manslaughter under the CMCHA and also, thankfully, there have not been, at least within the UK’s jurisdiction, further major disasters like the examples mentioned earlier. As Eversheds has pointed out:

Corporate Manslaughter investigations take a long time. They require an investigation of all areas of the organisation involved to establish the culture of health and safety at the business and to try to make links between senior management and the incident that caused the death.³⁷

Also, if there have been breaches of the HSWA, both the organisation and the individuals involved in the management of the organisation can be prosecuted for breaches of the HSWA - and, for HSWA convictions, as well as substantial fines being imposed on both the organisation and the individuals, the individuals can be sentenced to terms up to and including life imprisonment.

Arguably, an assessment of the UK’s CMCHA to date equates with formulating an answer to the following question: has the enactment of the CMCHA provided a satisfactory solution to the problems previously associated with corporate manslaughter prosecutions? The writers contend that it has, at least to a substantial degree.³⁸ The criteria for a conviction of corporate manslaughter have been changed to ones arguably easier to establish and the catchment has been increased, beyond companies and corporations, to ‘organisations’. Further, prosecutions for corporate manslaughter under the CMCHA can be brought for a wide range of incidents causing death, not just those arising in the HSW/OHS arena. Also, whilst the legislation only relates to organisations and individuals cannot be prosecuted under the CMCHA, at least where the incident causing death occurred in an environment covered by the HSWA, the courts can, if justified, imprison the individuals involved in the management of the delinquent companies (such as company directors). The shortcoming in this respect is of course that the breach must be something that has occurred in the arena covered by the HSWA.

A further endorsement in favour of the argument that the enactment of the CMCHA has been worthwhile can be seen from the magnitude of the fine imposed on Lion Steel (£480,000). As Rob Castledine, Associate Director Of Workplace Law in the United Kingdom, has commented (when speaking of the Lion Steel fine):

³⁷ See Eversheds Local Government Briefing Note 12/2012 available at: http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en%5CLocal_government%5Clocal_briefing_note12_2012 (viewed 24 November 2012).

³⁸ The authors are of the view the CMCHA should also provide for individual, as well as organisational, liability.

It is also worth noting that a successful prosecution under the HSWA 1974 would not be nearly as much as half a million, as a typical fine would run to around a fifth of that, which sends a message out that the authorities' preferred punishment route should be that of Corporate Manslaughter.³⁹

IV. THE POSITION IN AUSTRALIA REGARDING CORPORATE MANSLAUGHTER

The Esso Longford explosion which occurred in Victoria in 1998 is just one example showing that corporate manslaughter incidents akin to those that have occurred in the UK can also occur in Australia.⁴⁰ The position, in Australia, regarding corporate manslaughter remains similar to the UK's pre-CMCHA position (except as regards the ACT).⁴¹ In other words, the crime of corporate manslaughter is recognised in the Australian State and Territory jurisdictions but it is extremely difficult to successfully prosecute corporations due to the frequently insurmountable difficulties associated with identifying a senior individual in the corporation who is or was both the 'directing mind' of the corporation and someone also personally guilty of the crime of gross negligence manslaughter.⁴²

At various times there have been, at both the Federal and State levels, attempts to have a form of corporate or industrial manslaughter legislation enacted. However, to date, all (with the exception of the ACT) have been unsuccessful. For example, in 2004, the Greens at the Federal level and the independent Nick Xenophon at a State level (South Australia) tried unsuccessfully to introduce industrial manslaughter legislation by way of private members' bills and, in New South Wales, the *Crimes Amendment (Corporate Manslaughter) Bill 2005* (NSW) was introduced into Parliament but never enacted. More recently, in 2010, the Greens attempted to have a motion passed in the Australian Senate to the effect that the Senate accepted the need for strong national industrial manslaughter laws but this also was unsuccessful. The only success to date has been in the ACT which has inserted an offence of industrial manslaughter into its *Crimes Act 1900* (ACT). This can be found in Part 2A of the legislation, the relevant sections being ss 49A-49E.⁴³ There can be both corporate and individual liability for the deaths of workers, but not for the deaths of members of the public. The prime sections are s 49C (which prohibits an industrial manslaughter offence by an employer) and s 49D (which prohibits an industrial manslaughter offence by a senior officer of the employer). When the ACT's industrial manslaughter legislation applies, both an employer (who can be either an organisation or an individual) and a senior officer of the employer (where the employer is an organisation) can be liable for the employer's reckless or negligent conduct when its conduct causes serious harm to or the death of a worker or to any other worker of the employer. The penalties under the legislation are, for corporate offenders, a fine of up to \$1.25 million and, for natural persons, a fine up to \$200,000 or imprisonment up to 20 years (or both).

³⁹ See Workplace Law site at: <http://www.workplacelaw.net/content/42900> (viewed 24 November 2012).

⁴⁰ See Hopkins A, *Lessons from Longford: The Trial* (CCH, 2002).

⁴¹ See Forlin and Smail, n 11, at 478-505.

⁴² See e.g. *Criminal Code* (Qld) s 303; *Crimes Act 1900* (NSW) s 18(1)(b) and *Nydam v The Queen* [1977] VR 430. There is no federal offence of corporate manslaughter. The High Court of Australia confirmed in *Hamilton v Whitehead* (1988) 166 CLR 121 that the identification theory applies in Australia.

⁴³ For commentary on the ACT legislation see e.g. Sarre R, "Penalising corporate 'culture': the key to safer corporate liability?" in Gobert J and Pascal AM (eds), *European Developments in Corporate Criminal Liability* (Routledge, 2011) 84.

The industrial manslaughter provisions in the ACT's *Crimes Act 1900* are coupled with the principles of corporate criminal responsibility set out in Part 2.5 of the ACT's *Criminal Code 2002* (ss 49-54) which allow for 'aggregation' and 'corporate culture' to be taken into account when determining corporate criminal responsibility. The naissance of these principles lies in the *Criminal Code Act 1995* (Cth). The position regarding this foundation stone⁴⁴ has been very well stated in the following comments:

In sum, then, the Code introduces new bases for liability, including attribution, aggregation and 'corporate culture'. Under the Code, and similarly under the UK *Corporate Manslaughter and Corporate Homicide Act (UK) 2007*, both the mental and physical elements of manslaughter can be attributed to corporations *as entities*. While under the UK legislation prosecutions of corporate executives for complicity in their company's offence are specifically excluded and the jury in a corporate manslaughter prosecution is only invited to 'consider' the extent to which the evidence shows that there were 'attitudes, policies, systems or accepted practices' that were likely to have encouraged a company's violation of a *health and safety* law leading to the offence, the Australian Code goes much further. Corporate principles can be prosecuted and punished both individually and collectively by their association with the corporation *if the culture over which they preside* is one that encourages, tolerates or leads to non-compliance with the law. Furthermore, a company with a poor 'corporate culture' will be considered as culpable for its intentional or reckless conduct as individual directors (or 'high managerial agents') were under the common law. Importantly, prosecutors can aggregate the requisite carelessness or 'risk denial', even though this may have the potential to scapegoat 'high managerial agents' regardless of their degree of involvement in the company's offence.⁴⁵

Thus there are already precedents in Australian law for making companies liable because of their corporate culture and for making individuals liable along with the company by reason of their being part of the company's senior level management. However, it is immediately necessary to acknowledge that, despite this, there are problems with this legislation, namely:

- (a) the *Criminal Code Act 1995* (Cth) only applies to Commonwealth offences, manslaughter is not a Commonwealth offence (it is within the realm of the legal regimes of the States and Territories);
- (b) the effectiveness of the ACT's industrial manslaughter legislation has been largely negated by subsequent Commonwealth legislation which has prevented the ACT legislation from having any application to matters in the federal arena.⁴⁶ Additional to this is the fact that the ACT's industrial and commercial sector is extremely small and that, to date, there do not appear to have been any prosecutions under the ACT's industrial manslaughter legislation.

Thus, overall, in Australia at the present time with the exception of the ACT, the holding of corporations accountable for corporate manslaughter remains an unsatisfactory, ineffectual situation due especially to the continuing requirement of the identification doctrine. Admittedly, in Australia, as in the UK, there are in force the various occupational, health and safety laws⁴⁷ but here again, by themselves, they are only a remedy for OHS offences and do

⁴⁴ i.e. the *Criminal Code 1995* (Cth).

⁴⁵ Sarre, n 43, at 88.

⁴⁶ The Commonwealth Government did this by amending the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth).

⁴⁷ Australia's occupational, health and safety laws are broadly equivalent to the United Kingdom's HSWA. At the time of writing (24 November 2012) there is a move to harmonize Australia's OH&S laws.

not assist to overcome the more broader problem of corporate manslaughter. The problem is essentially that there is no one general consensus as to which way to proceed and that this is so can be seen from, for example, the First Report of the OHS Review Panel to the Workplace Relations Ministers' Council concerning the National Review of Model OHS Laws.⁴⁸

Before concluding this examination of the position in Australia regarding corporate manslaughter, it is also necessary to consider two further aspects, namely:

- (a) the above being the present legal position, is corporate manslaughter still an issue for Australia; and, if so,
- (b) whether the main arguments against expanding corporate manslaughter can be rebutted.

As regards the first aspect (whether corporate manslaughter is still an issue for Australia), the writers' argument is that yes it is. Whilst deaths are occurring as a result of the grossly negligent conduct of corporations (and the like) and there is no effective legislative regime punishing such conduct, corporate manslaughter will remain an issue which needs a solution – and, the writers contend, a solution is the enactment of an effective legislative regime like the UK's CMCHA. Admittedly, in Australia, there is already a sophisticated and developed OHS legislative regime in Australia (which is now in the process of being harmonised at least to a large extent throughout Australia). However, as is argued in this paper, corporate manslaughter is something which is much larger than just deaths in the workplace ('industrial manslaughter'). In Australia, there is frequently the failure to recognise that 'corporate manslaughter' and 'industrial manslaughter' are not the same. When this confusion is eliminated, many of the present opponents will, hopefully, realize there is a bigger issue than just deaths in the workplace and that this bigger issue requires the enactment in Australia of effective corporate manslaughter legislation like what the UK now has in the form of the CMCHA.

As regards the second aspect (whether the main arguments against expanding corporate manslaughter can be rebutted), the writers' argument is that yes they can. There are three main arguments that are made against expanding corporate manslaughter from the common law position and these are:

1. The current available fines under Australian law are sufficient;
2. It is difficult to imagine any circumstances in which it would be appropriate to impose imprisonment on a director⁴⁹ (assuming manslaughter against that director on the current basis of liability for manslaughter cannot be established);
3. There is disagreement about the ways in which corporations should be made liable.

Each of these arguments will now be considered and addressed.

Argument 1 - The current available fines under Australian law are sufficient

As is evident from what has been mentioned herein previously, corporate manslaughter prosecutions may be brought when any person is killed in an activity carried out by a corporation. This reiterates the important fundamental point that, unlike industrial manslaughter, the crime of corporate manslaughter is not confined just to workplace incidents.

⁴⁸ Available at <http://www.nationalohsreview.gov.au/ohs/Reports/> (viewed 24 November 2012).

⁴⁹ This can also include senior managers of the corporation.

This paper is considering whether Australia should legislate for corporate manslaughter based on the UK model (the CMCHA). Therefore, if this first argument is applied to the present context, it is saying there is no need for CMCHA legislation because the fines presently available under Australian law are sufficient when a corporation is convicted of wrongfully bringing about the death of a person or persons. Under Australian law, the fines currently available that can be imposed on a corporation which, due to its negligence, has caused the death of persons, can arise in three different scenarios, namely:

- (a) there is a conviction for corporate manslaughter and the applicable legal regime is the criminal law of a State or Territory, other than the ACT, i.e. the conviction is under the general law or a State Code;
- (b) there is a conviction of a corporation for causing death in a workplace environment and the applicable legal regime is the relevant OHS legislation;
- (c) there is a conviction of a corporation for industrial manslaughter and the applicable legal regime is that of the ACT.

In all three scenarios, a fine can be imposed on the corporation. For example, in *Denbo*,⁵⁰ the company was fined \$80,000 and, in *AAA Auscart's Imports Pty Ltd*,⁵¹ the company was fined \$1.4 million. As regards the third scenario, the ACT legislation also provides for the imprisonment of a senior officer of the corporation⁵² (in addition to fines). We will leave that aspect (the imprisonment of directors and other senior officers⁵³ of a corporation found guilty of industrial manslaughter) aside for the moment and just focus on the fines that can currently be imposed in Australia (under the general law or a state criminal code) and now in the UK (under the CMCHA) when a corporation is convicted of wrongfully causing the death of a person or persons. In a nutshell, the quantum of the fines is not the issue. The purpose of the CMCHA legislation is not to increase the fines that can be imposed when a corporation is found guilty of corporate manslaughter - its purpose is to make the prosecution of corporations for corporate manslaughter easier and more likely to be successful than what has been the case in the past in the UK, and what is presently the situation in Australia. Therefore, as regards Argument 1 that 'the current available fines under Australian law are sufficient', this is not disputed but, for the reasons just mentioned, it is not a valid argument for not adopting CMCHA legislation because adopting CMCHA legislation is not about bringing in greater fines. As regards the possible imprisonment of a director when a corporation is convicted of industrial manslaughter (as is provided for in the ACT legislation), this is not an issue at the present time because this paper is only considering whether or not Australia should also adopt CMCHA legislation like that of the UK - and the UK's CMCHA does not provide for individual liability, only the imposing on a corporation upon conviction of a fine (and other penalties such as publicity orders). The issue of whether or not directors should be imprisoned is a problematical area and, over the years, there have been strong views expressed both for and against. This aspect is discussed, in the comments regarding Argument 2.

⁵⁰ *R v Denbo Pty Ltd* (1994) 6 VIR 157.

⁵¹ Unreported. For details of this prosecution, see e.g. the Channel 9 News Report of 12 May 2009 available at: <http://news.ninemsn.com.au/national/812760/1-4m-fine-for-death-of-go-kart-patron> (viewed 24 November 2012).

⁵² *Crimes Act 1900* (ACT), s 49D.

⁵³ For present purposes, the terms 'directors' and 'senior officer' (and the like) are treated as being synonymous.

Argument 2 - It is difficult to imagine any circumstances in which it would be appropriate to impose imprisonment on a director⁵⁴ (assuming manslaughter against that director on the current basis of liability for manslaughter cannot be established)

It has been mentioned earlier that the CMCHA does not create a new offence nor does it impose liability on individuals - it is only corporations (and the like) that can be convicted of corporate manslaughter under the CMCHA. Hence, if Australia follows the UK's CMCHA model, this second argument is not relevant. It is only relevant if the Australian legislation goes further than the CMCHA and endeavours also to make directors (and other senior managers) of the corporation also liable if the corporation of which they are a part is convicted of corporate manslaughter. This could be, for example, by emulating the ACT's legislation. The ACT legislation has been discussed earlier in this paper. Ultimately, the responsibility for the policies and management structures of a company reside in the company's command centre and that is the company's board of directors.⁵⁵ This (being a member of the company's board of directors) would be what makes a director liable (along with the company) for the inept corporate management practices that have led to the corporation being convicted of the crime of corporate manslaughter.

As Rick Sarre has stated in his paper 'Sentencing those convicted of industrial manslaughter' delivered at the Sentencing Conference 2010 (held in Canberra, Australia):

[T]here is good reason to believe that occupational health and safety law is, on its own, an inadequate deterrent against workplace harm. There is thus growing support for the view that deterrence could be bolstered if directors and managers of companies were to be personally (and criminally) liable in circumstances where the potential harm is great, the risk obvious and the precautionary work poor, that is, where conduct conspicuously fails to observe the standards laid down by law. There are some who believe, in addition, that the deterrent factor would be enhanced if the penalties prescribed for the above conduct were to include terms of imprisonment for senior managers *even in the absence of their direct culpability*.⁵⁶

That this should be the approach is also a view shared by Karen Wheelwright who has stated:

The need to promote safety and corporate operations might well be met by making the directors liable as well as (or instead of) the company, in appropriate circumstances. The company's policies, safety culture and operations are determined largely by those individuals who direct and manage it. It seems logical to bring responsibility home to those individuals, where they have contributed to corporate operations causing avoidable deaths. Focusing on officers may have advantages in respect of corporate compliance, given the evidence that individual directors and managers are effectively deterred by the possibility of criminal prosecutions and of imprisonment. Holding human individuals rather than an artificial person responsible in

⁵⁴ As mentioned previously, for present purposes, the terms 'directors' and 'senior officer' (and the like) are treated as being synonymous.

⁵⁵ On this point, see e.g. Griffin S, "Corporate Manslaughter: A Radical Reform?" (2007) 71 *The Journal of Criminal Law* 151 at 163.

⁵⁶ Rick Sarre, 'Sentencing those convicted of industrial manslaughter' paper presented to the Sentencing Conference 2010 held in Canberra, ACT, Australia on 6 & 7 February 2010, at 7, available at <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2010/Sentencing%202010/Papers/SARRE.pdf> (viewed 24 November 2012). Original emphasis expanded.

appropriate circumstances can also better provide a sense of justice for the victims of corporate negligence.⁵⁷

If directors and other senior level managers are not also held liable (by imprisonment and disqualification from holding the office of company director), the problem remains that, not only do they themselves escape appropriate sanctioning, they are left free to put the delinquent company into liquidation (normally before, but sometimes after, the fine is paid) and then later emerge as the senior level managers of a corporation which is clearly just a reincarnation of the delinquent company under a different name.⁵⁸ On the other hand, there is evidence that the threat of prosecution and imprisonment keeps a manager's mind firmly on safety,⁵⁹ has a deterrent effect,⁶⁰ and sends a strong message to the community that culpable conduct will not be tolerated, even if it means targeting individuals who may have been but one of a number of guilty parties'.⁶¹ Hence the writers contend that, as regards Argument 2, there are indeed circumstances in which it would be appropriate to impose imprisonment on a director even when manslaughter against that director on the current basis of liability for manslaughter cannot be established.

Argument 3 - There is disagreement about the ways in which corporations should be made liable.

It is not disputed that 'there are many critics of the whole thrust of industrial manslaughter laws who suggest that they are not the best response to cases involving corporate killing'.⁶² However it is not conceded that therefore legislation like the CMCHA should not be enacted in Australia. Opposition to any sort of corporate manslaughter legislation seems to come mainly from business and industry groups and support predominantly from trade unions, academics and other experts in the area. An example of this can be seen from the discussion that took place at the Open University in the UK in 2005 between Janet Asherson (Head of Health and Safety at the Confederation of British Industry), Professor Gary Slapper of the UK's Open University (who has a particular interest in this area of the law) and Gordon Bebb QC (one of the prosecuting barristers in the Hatfield Rail Disaster trial mentioned earlier).⁶³ However, there is no denying the present legal regime in Australia concerning corporate manslaughter is - and the pre-CMCHA legal regime in the UK was - deficient. Companies have escaped prosecution or failed to be successfully prosecuted because of the standard required for a conviction (an individual directing mind) has, almost always, been unattainable. For all the pros and cons, it is strongly arguable that this difficulty can be overcome by the adoption of CMCHA legislation and that this is so is evidenced by the fact that all three prosecutions brought to date in the UK since the enactment of the CMCHA have been successful and there are further prosecutions presently underway or being considered.

⁵⁷ Karen Wheelwright, 'Corporate Operations Causing Death - the legal response now and in the future?' (2011) 102 *Precedent* 28 at 29.

⁵⁸ See Sarre, n 56.

⁵⁹ Hopkins A, *Lessons from Gretley: Mindful Leadership and the Law* (CCH, Sydney, 2007) at 134.

⁶⁰ See Thornton, D., Cunningham, N and Kagan, R. "General Deterrence and Corporate Environmental Behavior" (2005)27(2) *Law and Policy* 262.

⁶¹ Sarre, n 56, at 7.

⁶² Sarre, n 56, at 9.

⁶³ The audio podcast is available at: <https://itunes.apple.com/au/itunes-u/rules-rights-justice-introduction/id380227648> (accessed 24 November 2012). See also e.g. (UK) House of Commons Library Research Paper 06/46.

V. CORPORATE MANSLAUGHTER - THE BIG PICTURE

When reflecting on the problem of corporate manslaughter, it is always necessary to look at the ‘big picture’ and from that it will be seen that deaths can occur, because of the grossly negligent conduct of organisations, in many ways and in many different scenarios. Admittedly, a significant number of deaths occur in the ‘industrial’ or ‘workplace’ arena but these are of workers and the like and there is already in place a comprehensive HSW/OHS legislative regime which provides for the prosecution of organisations and management which have, by virtue of their grossly negligent conduct, brought about the death of workers. However, corporate manslaughter is not just about these types of incidents. It is important not to take too narrow a view of the scope of corporate manslaughter – we must not think of it as being just a workplace problem. This is, arguably, a (and probably the) major difficulty in Australia in getting effective corporate manslaughter legislation enacted. In Australia reference is constantly made to ‘industrial manslaughter’ rather than ‘corporate manslaughter’ and this confuses the nature of the problem. The CGH, JMW Farm Limited and Lion Steel incidents were clearly all “workplace” deaths – and most times such matters will be able to be dealt with quite adequately by prosecutions under the HSWA which have the significant benefits of strict liability, lower costs, being more expeditious and punishments of significant fines and terms of imprisonment.⁶⁴ The availability of the CMCHA for prosecution, in addition or as an alternative to the HSWA, is a very good back-up mechanism to have available. It does not mean that an organisation always has to be prosecuted under the CMCHA - A HSWA prosecution may be sufficient. However, in some instances, where for some reason it is not possible to launch a prosecution under the HSWA, it is helpful to have available legislation like the CMCHA if the conduct in question is so grossly negligent that it is vital that the organisation be punished for what it has done. But, as stated, corporate manslaughter is something much greater than just deaths occurring in the workplace.

Many of the examples given earlier (pre-CMCHA disasters) are the types of disasters for which the CMCHA legislation is needed – big ‘man-made’⁶⁵ disasters involving significant loss of life which have been caused by grossly negligent conduct on the part of an organisation. The Herald of Free Enterprise disaster is one such example. It was a major shipping disaster which should never have occurred - and it is right that such a company, whose management systems allowed (or, stated another way, failed to prevent) the ship doors to remain open when putting to sea, should be punished for the deaths that its grossly negligent conduct caused. Likewise, in the rail disasters such as the Southall rail disaster and Hatfield rail disaster, again it is right that the companies involved should be punished for the deaths that they have brought by their gross negligence. These are the types of incidents that show what corporate manslaughter is all about and for which there needs to be corporate manslaughter legislation like the CMCHA. When speaking of corporate manslaughter, (normally) we are not dealing with the usual workplace disasters like people falling off cranes or being entombed in trenches. Legislation like the HSWA is generally the suitable and adequate legislative regime to govern and punish shortcomings on the part of organisations for those sorts of incidents.

⁶⁴ A consideration of the totally separate issue as to whether or not there is, at the present time, sufficient funding of the HSE to enable it to properly carry out its tasks and prosecutions under the HSWA is something which is beyond the scope of this article.

⁶⁵ This term also includes ‘organisation-made’ disasters.

The United Kingdom has been lucky in that there have been, since the enactment of the CMCHA, no disasters in its jurisdiction on the scale of the Herald of Free Enterprise, Southall rail and Hatfield rail disasters – but there are major disasters still occurring, a recent outstanding example being that of the sinking of the cruise ship ‘Costa Concordia’ off the coast of Italy on 13 January 2012 which resulted in the deaths of 30 passengers and crew.⁶⁶ In the pre-CMCHA period, there was the sinking of the ‘Estonia’ with a large loss of life due to gross negligence including management failure. This was not mentioned in the examples of pre-CMCHA disasters because it took place outside the jurisdiction of the UK (as did the Concorde disaster). However it is a further example of what corporate manslaughter is all about. Other examples are the BP Texas City Refinery explosion on 23 March 2005 (15 deaths) and the Piper Alpha oil rig disaster in the North Sea on 6 July 1988 (167 deaths). The official report into the BP Texas City Refinery explosion stated, in part:

The Texas City Disaster was caused by organizational and safety deficiencies at all levels of the BP Corporation. Warning signs of a possible disaster were present in several years, but company officials did not intervene effectively to prevent it.⁶⁷

and, in his report concerning the Piper Alpha oil rig disaster, Lord Cullen found that Occidental Petroleum had ‘significant flaws in the quality of [its] management of safety’.⁶⁸

There will always be the argument raised by some parties that legislation like the CMCHA will drive away business (and hence should not be enacted) - companies will operate elsewhere and the result will be that a country loses all the benefits associated with these businesses such as taxes, employment of locals and infrastructure development. However, this ignores the true nature of corporate manslaughter. Legislation like the CMCHA is all about preventing major disasters or, if they occur, properly punishing the grossly negligent conduct of the delinquent organisation. In fact, whether or not businesses will operate in a particular country depends on many factors, including:

1. Is the investment itself worthwhile?⁶⁹
2. Is the tax regime attractive?
3. Is there an effective legal regime with legal certainty, judges who will act impartially and a bureaucratic system free of corruption?
4. If needed, is the expertise of the local workforce and the degree of local infrastructure development sufficient?

Whether or not an organisation does business in a particular country does not depend solely on the fact that, if they act in a grossly negligent manner and cause deaths, they will not be held liable (i.e. there is an absence of corporate manslaughter legislation). In fact, it should be very rare for a large reputable organisation to be wanting to act in a grossly negligent manner in its business activities. Also, they will not be wanting to operate in an environment where other organisations act, as a matter of routine, in a grossly negligent manner. Organisations will do business where it best suits them not just because there are no or minimal restraints on the way they operate. If there is money to be made from a particular resource (e.g. the extraction of oil, gas or mineral reserves) or infrastructure development or operation (e.g. railways, highways, hospitals, prisons or energy generation), organisations will want to be involved. The concern for them will then be more a matter of their being able to operate in an environment where there is legal certainty and they know what are the ground rules and the law and tax rules that will apply and they can plan accordingly. Good operators want to

⁶⁶ <http://www.bbc.co.uk/news/world-europe-17484227>, (viewed 24 November 2012).

⁶⁷ US Chemical Safety and Hazards Investigation Board, *Refinery Explosion and Fire Investigation Report No. 2005-04-1-TX* (March 2007).

⁶⁸ The Hon Lord WD Cullen, *The Public Inquiry into the Piper Alpha Disaster* (Cm 1310, 1990).

⁶⁹ Normally this means: will it be profitable?

compete on a level playing field. They will not want to have to – and most will not - lower their operational and safety standards just to match shonky operators.

There is another reason why corporate manslaughter should always be dealt with by looking at the ‘big picture’ - the parameters of the crime of corporate manslaughter are extensive. Above were mentioned examples of serious disasters involving ferries, railways and outbreaks of diseases at council-run facilities. This is only a small section of the numerous possible situations where an organisation might engage in very reprehensible grossly negligent conduct resulting in fatalities and where it is clear that legislation like the CMCHA is needed in order to adequately deter or punish such an organization. Incidents other than the aforementioned examples include:

- (a) mining disasters;
- (b) environmental disasters (of which there are all types);⁷⁰
- (c) situations where corporations have allowed toxic substances like asbestosis to be used in the construction and renovation of buildings; and
- (d) situations involving the making available of defective products which cause death (e.g. defective motor vehicles, breast implants and pharmaceuticals).

The UK’s CMCHA now covers deaths in custody. That these can occur even in Australia is shown by the incident involving the aboriginal elder Mr Ward who died in January 2008 from heatstroke whilst being transported by Western Australian custodial staff.⁷¹

Thus it is just not realistic to assume that there is never going to be a situation out of which the crime of corporate manslaughter could arise. Despite all the publicity aimed at deterrence that there might be and the pressures of corporate social responsibility, there will always be some organisations that will want to operate in a wholly unacceptable manner. All this reinforces the argument for the enactment of legislation like the CMCHA in Australia.

VI. CONCLUSION

This paper has examined the current position regarding corporate manslaughter primarily in the United Kingdom (but with some mention of the position in Australia) with the initial aim of then being able to formulate answers to the following two questions:

1. Is the corporate manslaughter legislation enacted in the United Kingdom a success; and
2. Is the enactment of corporate manslaughter legislation in Australia warranted.

As regards the first question, the writers contend that, even though it is only early days, it appears the CMCHA is (and will be) a success and, as regards the second question, that the enactment of corporate manslaughter legislation in Australia is still an issue and warranted. The writers’ have made the point that, when considering corporate manslaughter, it is always necessary to look at the ‘big picture’. Because the parameters of corporate manslaughter are so wide, there will never be a situation where it is completely unlikely that corporate manslaughter will not occur. Hence the necessity to have in place legislation like the CMCHA. The only further step that the writers feel should be taken is the expansion of the CMCHA so that it also criminalises the culpable conduct of senior management of an organisation which, by its grossly negligent conduct, has caused deaths. Individuals involved

⁷⁰ E.g. allowing toxic substances like pesticides to enter waterways and the food chain.

⁷¹ For details of this Australian incident, see e.g. <http://www.watoday.com.au/wa-news/contractor-fined-285000-over-mr-ward-death-20110812-1iqnc.html> and <http://www.abc.net.au/news/2011-05-05/wa-government-pleads-guilty-in-mr-ward-death/2706240> (viewed 24 November 2012).

in management failure can be prosecuted under the HSWA and imprisoned, but any prosecution pursuant to that legislation requires a workplace death element. As Griffin has suggested when talking of an expansion of the CMCHA:

The [additional] offence could have been incorporated into CMCHA as one of strict liability and expressed in the following manner:

Where an organisation is convicted of the offence of corporate manslaughter, any senior manager of the organisation whose neglect is established as a substantial element in the commission of the offence, shall be liable to imprisonment for a maximum period of five years and further shall be disqualified from holding office ... for a minimum period of two years'.⁷²

The CMCHA would then be fully effective in the best possible way.

⁷² Griffin, n 55, at 86.