

Hon. Kyam Maher MLC  
Attorney General  
Minister for Industrial Relations and Public Sector

17 November 2023

Dear Kyam,

The Civil Contractors Federation South Australia (CCF SA) advocates and educates for continued improvement to ensure safe work environments for everyone involved in the civil sector. In light of the Independent Review of SafeWork SA Law Reform Recommendations, CCF SA acknowledges the importance of providing its feedback on this matter.

After reviewing the Consultation Paper on Civil Dispute Resolution for breaches of WHS duties (Consultation Paper), the Independent Review of SafeWork SA authored by John Merritt dated 16 December 2022 (Independent Review), and the Preliminary Government response to the Independent Review (Government Response) released on 25 January 2023, CCF SA is confident this collaborative approach will identify the best action to take to achieve the best WHS results for South Australia.

In the Consultation Paper, the South Australian Government provided a detailed plan on how they intend to carry out Recommendation No.39 of Mr. Merritt's review. This recommendation suggests changes to the civil penalty provisions for breaches of workplace health and safety regulations. Furthermore, the paper outlines proposed alterations to the civil penalty provisions for abuse of Right of Entry rights by both workplace entry permit holders, and their employers.

The CCF SA firmly believes that safety is of paramount importance in the civil industry, and Work Health and Safety (WHS) laws should support workers and businesses to operate safely every day. To ensure effectiveness and fairness, the established systems and laws must not create any unnecessary bureaucratic processes or financial burdens while working towards safety goals. Any discrepancies can have a negative impact to the overall outcomes of the industry.

## CCF SA Position

Worker safety is essential in all industries; however the civil industry poses greater risks to workers compared to most other industries. It is vital, therefore, that safety practices and standards are given the utmost importance in all aspects of the sector, on a daily basis. The civil industry has made significant progress in improving safety measures over time, and currently it is one of the most regulated industries in the state. Furthermore, it is expected that the industry will continue to evolve and incorporate new safety standards and technologies which will increase the safety of workers.

CCF SA is dedicated to advocating for workplace safety across the industry. The organisation operates a Registered Training Organisation (RTO) which focuses on safe and quality training for the civil industry. Moreover, they have established a Group Training Organisation (GTO) which employs over 50 civil apprentices, ensuring a safe working environment for all its employees. CCF SA collaborates with the government and other stakeholders to promote safe practices throughout the sector.

The GTO also aims to attract young South Australians to pursue a career in the industry while maintaining a high level of attractiveness for current employees.

CCF SA is a staunch supporter of initiatives which prioritise workplace safety and backs the creation of a legal framework which enables workers and employee groups to hold negligent employers accountable for their disregard for safety. It is imperative, however, to ensure that the framework is not exploited to bring unwarranted legal action or claims against employers who prioritise safety.

CCF SA expresses concern over the possibility of the recommendations being misused, which may result in wrongful targeting of reputable businesses for reasons other than improving health and safety. It is crucial that these recommendations be utilised solely to improve safety standards within the industry.

The proposed model for implementing Recommendation No. 39 of Merritt's review, focuses on mediation and requires SAET to engage in conciliation before parties can file for civil penalties. CCF SA suggests that this model lacks adequate safeguards to prevent parties from pursuing civil claims against business even when mediation fails.

The "Dispute Settlement Pathways" model on page nine of the Consultation Paper states that parties must agree to mediation, and those who wish to file for civil claims have the option to refuse consent to mediate. CCF SA advises against the provision of a pathway for unions and workers to seek civil penalties via SAET. CCF SA suspects an overwhelming number of claims being directed at contractors, which could further burden an industry that is already facing immense pressure with potentially disastrous outcomes.

**CCF SA issues a strong plea to the SA government to reassess the suggested reforms by Merritt and scrutinise the probable inadvertent negative outcomes that may arise from them. Rather than pursuing these reforms, the government would be better served by directing resources towards SWSA to enhance the inspectorate's visibility, accountability, and overall quality throughout South Australia. CCF SA is committed to working with the government, stakeholders, and industry to identify the industry-specific resource requirements of SWSA. While CCF SA cannot endorse the proposed changes to the civil disputes pathway, their unwavering dedication to creating a safer work environment compels them to continue collaborating with the government.**

## Regulatory Impact Statement (RIS)

CCF SA takes this opportunity to suggest further that legislative changes should only be proposed if there is a demonstrated need for them.

The Independent Review and the Independent Commissioner Against Corruption South Australia, Evaluation of the Practices, Policies & Procedures of the Regulatory Arm of SafeWork SA (ICAC Report) has detailed the shortcomings in the performance of SafeWork SA as South Australia's safety regulator, as well as the perception and relationships with stakeholders. However, it seems like the proposed changes have not been thoroughly investigated, including their impact on SafeWork SA and its ability to meet the necessary requirements.

When it comes to regulatory reform, it is important to base any approach on objective research and evidence which may include incident and prosecution data, where appropriate. The main goal is to ensure that the regulatory objectives are achieved while minimising the impact on housing affordability. Before any further changes are proposed, measures to evaluate any proposed reforms should include an RIS, which involves a cost-benefit analysis and an investigation of alternative approaches. Additionally, comprehensive consultation and targeted engagement with stakeholders and industry representatives is necessary.

Proposed changes to Work Health and Safety (WHS) laws in South Australia will cause industry concern, as they differ from the current harmonised legislation. CCF SA seeks to understand why these changes are necessary, as it is not clear how the conditions impacting industry safety in SA would be any different to that of the rest of Australia.

CCF SA suggests that if any new legislation is proposed, it should be made available for consultation before implementation. It is important to consider the potential impacts on the civil industry, and if implemented transitional arrangements should be established to allow the industry to understand, implement and comply with any new or amended requirements.

## RECOMMENDATIONS

Earlier this year the Government publicly released the independent review of SafeWork SA, conducted by Merritt. That review made several recommendations for amendments to the *Work Health and Safety Act 2012 (WHS Act)*. CCF SA offers the following feedback on the proposed recommendations:

### Recommendation No.19

*“The WHS Act should be amended to provide for disputes under section 82 (concerning health and safety disputes) and section 89 (concerning the right to cease unsafe work) to be capable of being referred to the South Australian Employment Tribunal if the dispute remains unresolved 48 hours after SafeWork SA inspector is requested to assist with resolving the dispute.”*

CCF SA understands the notion that SAET could have a role in dispute resolution in the future, however it is apprehensive that the current proposal could be taken advantage of within our industry. The 48-

hour timeframe allotted for unresolved disputes to be directed towards SAET, could be problematic leading to job delays and applying industrial and economic pressure on businesses.

Temporary closure of a major civil site, even for a brief period, can result in considerable expenses for clients, principal contractors, subcontractors, and suppliers, sometimes amounting to hundreds of thousands of dollars. The majority of projects entail considerable costs related to labour, equipment, and machinery that continue to accumulate expenses despite downtime, and often, they cannot be easily and effectively mobilized elsewhere.

### **Recommendation No.21**

*“The WHS Act should be amended to align the right of entry regime with the model work health and safety laws, by removing current requirements under section 117 for a WHS entry permit holder to notify SafeWork SA about proposed entries to workplaces and to furnish reports after entry.”*

CCF SA disagrees with the recommendation as it believes that it would not enhance workplace safety nor is it a vital component in implementing the proposed civil penalty framework.

Removing the requirement for WHS entry permit holders to notify SWSA about site visits does not necessarily equate to the ability for employee groups to pursue civil health and safety claims against employers. CCF SA strongly opposes this recommendation as it conveys an inappropriate message and eliminates record-keeping of site visits, which could be crucial for SAET in determining if an organisation has a significant history of breaching the WHS Act. It is not a cumbersome task for permit holders to notify SWSA beforehand and is not detrimental to achieving the intended outcomes of the proposed model.

Ultimately, maintaining the notification requirement contributes to accountability by ensuring that permit holders take their responsibility seriously and do not misuse their authority.

### **Recommendation No.23**

*“The WHS Act should be amended to allow WHS entry permit holders to take photographs, video, voice recordings, measurements and tests relevant to their investigations in terms similar to section 89(ba) of the Occupational Health and Safety Act 2004 (Victoria).”*

Although CCF SA acknowledges the need for entry permit holders to play a greater role in documenting potential health and safety breaches under the proposed model in the consultation paper, the organisation is opposed to this model and the accompanying recommendation. Instead, CCF SA believes that SWSA should be provided with additional resources and maintain its responsibility for documenting and prosecuting WHS Act violations.

CCF SA expresses concern that permit holders may gather video, voice recordings, or photographs that are not directly relevant to an investigation, and that they may do so with the primary motive of sharing it on social media.

### **Recommendation No.35**

*“The WHS Act should be amended to allow SafeWork SA to seek an extension of time from a court to bring a prosecution for a criminal offence in limited circumstances.”*

The CCF SA believes that the prosecution of workplace health and safety violations on worksites must remain a top priority, without being hindered by time constraints faced by regulatory authorities. It is recommended that the government define "limited circumstances" prior to any changes being made to the WHS Act.

Proper communication of these changes to the building and construction industry is crucial in order to improve safety outcomes. To aid in this communication, the government must clearly define any changes and their intended purpose.

### **Recommendation No.39**

*“The WHS Act should be amended to extend the existing civil penalty provisions to cover the primary duty of care in section 19 and related criminal offences, and standing for bringing civil penalty applications should be extended to workers, families of injured workers, and employee associations.”*

CCF SA strongly opposes any proposals that would allow persons other than the State to prosecute for breaches of the WHS laws, including civil penalty claims.

## **GENERAL FEEDBACK**

### **Right of Entry changes**

CCF SA fully supports the proposal presented in the Consultation Paper that aims to empower SAET with greater authority to penalise violations of Right of Entry powers. Specifically, these changes are intended to deter repeat offenses where these powers have been misused. By enforcing these measures, all parties involved will be encouraged to proactively address workplace health and safety concerns, and thus promote a safer work environment. CCF SA strongly advises that the government clearly defines the scope of the term "significant history" with respect to organisations and individuals who frequently breach Right of Entry powers. Furthermore, we recommend that the "significant history" clause be triggered when an organisation is found to have violated these powers on three occasions within a two-year period, and that the same "three strikes" rule be applied to individual worksite entry permit holders.

Consideration may be extended to capture Right of Entry abuse separately.

### **Penalties for frivolous or vexatious civil claims**

CCF SA expresses grave concerns that the civil disputes pathway proposed by the government may be exploited for ulterior motives other than improving safety. To avoid such possibilities, CCF SA strongly recommends the government not to proceed with the proposal. However, if the government chooses to go against our recommendation, we urge it to empower the SAET to declare a civil health and safety claim as "vexatious or frivolous" and penalise accordingly.

We suggest that the penalties for such claims should be equivalent to those proposed for civil breaches of health and safety regulations. The SAET should have the discretionary power to make such a ruling and impose appropriate penalties. It should be noted that CCF SA is not advocating for employers or employee groups to have the authority to pursue claims against workers and unions that make frivolous or vexatious claims.

## **IN SUMMARY**

South Australia's civil sector is heavily regulated, extremely high risk, and the majority of businesses in the industry take safety seriously. CCF SA is concerned that the proposed changes could be misused for reasons other than improving safety and/or posing a significant risk.

CCF SA does not support the proposed changes to the WHS Act which would give unions the power to pursue civil claims against businesses.

CCF SA suggests that rather than implementing the suggested modifications, it would be more beneficial to allocate additional resources towards the regulatory body, SWSA. CCF SA advocates for a more substantial SWSA involvement in the industry, and will continue to work collaboratively with a better-funded SWSA to enforce safety regulations. CCF SA is eager to ensure that companies that neglect safety protocols and commit significant breaches of the WHS Act are held accountable.

Businesses that prioritise cost-cutting measures over safety protocols are putting the entire industry at risk of preventable incidents, thereby compromising the industry's reputation. CCF SA is eager to participate in the formation of an industry safety forum dedicated to identifying and addressing the specific resource gaps and needs that are most impactful to our industry.

CCF SA urges the government to carefully consider the recommendations and feedback provided in this report.

Proposed recommendations are not aimed at protecting negligent or substandard businesses that compromise on safety. CCF SA acknowledges that safety practices must continually improve and adapt to changing environments and technologies. We believe that better safety outcomes can be achieved without making changes that risk compromising good contractors, and ultimately harming the productivity of the sector and the broader South Australian economy.

It is crucial to prioritise safety without hampering the growth and success of our industry or our amazing state of South Australia.

Sincerely

Bec Pickering

**Chief Executive Officer  
Civil Contractors Federation South Australia**