

20 January 2023

Honourable Kyam Maher – Attorney General  
Minister for Industrial Relations and Public Sector  
GPO Box 464  
Adelaide SA. 5001  
AttorneyGeneral@sa.gov.au

**re: Submission – Work Health and Safety (Industrial Manslaughter) Amendment Bill 2022.**

Dear Minister

Thank you for the opportunity to provide comment on the draft Work Health and Safety (Industrial Manslaughter) Amendment Bill 2022.

Whilst an invite was sent to many individual trade associations, I make this collective response on behalf of the members of the Specialist Contractors SA (SCSA) which is an incorporated association that represents the majority of specialist trade contractors operating in the Building and Construction Industry in South Australia.

**Executive Summary**

The membership of the SCSA, which is an incorporated association that represents specialist trade contractors operating in the South Australian Building and Construction industry, consists of the following employer associations:

- National Electrical & Communications Association
- Master Plumbers Association
- Air Conditioning & Mechanical Contractors Association
- National Fire Industry Association
- Australian Subcontractors Association
- Refrigeration and Air Conditioning Contractors Association

Specialist Contractors SA Incorporated (SCSA) is pleased to provide a submission in response to the proposed changes to the Work Health and Safety Act 2012 as contained in the Work Health and Safety (Industrial Manslaughter) Amendment Bill

**Submission**

The SCSA supports workplace health and safety measures and assists its members in fulfilling their obligations through providing advice and encouraging businesses to proactively and responsibly, monitor workplace safety through implementing and regularly reviewing company procedures and policies.

Whilst the SCSA generally supports all aspects of the *Work Health and Safety Act 2012*, it does not support the introduction of the Amendment Bill introducing industrial manslaughter. It is our contention that *Work Health and Safety Act 2012* is currently operating sufficiently and there is no identified need for this amendment.

However, in the event, that the amendment is ultimately endorsed, the SCSA submits that there are imperative changes to the Bill that must occur first, which are consequently addressed in this submission.

To the extent that the key elements of the Bill refer to the offence applying where a person has been either “reckless or grossly negligent in conduct” which breaches a work health and safety duty under the *Work Health and Safety Act 2012 (WHS Act)* and which results in the death of an individual, the SCSA submits that it is crucial for s30A (1)(d) to be amended to have the word ‘reckless’ removed.

The SCSA submits that ‘grossly negligent’ is sufficient and defined in the amendment under the proposed subsection (4)(a) and (b). The SCSA is satisfied with the definition of ‘grossly negligent’ in the amendment and there is established precedence for what is considered to be, grossly negligent conduct. Recklessness has not been defined under subsection 4 of the amendment nor has precedence and appears to be intended as a lower threshold than being grossly negligent, It should not be included in the legislation. The use of the term ‘reckless’ is also concerningly ambiguous, leaving significant room for interpretation, as well as leaving a Person or an Officer unfairly exposed to being found guilty of such a serious offence with severe consequences.

If, however, the use of the word reckless is not to be removed, the SCSA submits that under s 30A (1)(d) “the person is reckless **or** grossly negligent as to the risk to an individual of death”, the word ‘or’ needs to be replaced with the word ‘and’.

Given the severe penalties, it is imperative for the SA Government to reconsider the use of ambiguous terms and to ensure that these are removed or replaced. In addition to this, a definition of the word reckless should be added to subsection 4 of the Bill, in accordance with the definition of reckless conduct under s31 (1)(b) of the *WHS Act*. A person should only be found guilty of an industrial manslaughter offence, if it meets the definition of both reckless and grossly negligent. Whilst the SCSA submits that the definition of reckless is possibly not sufficient to be guilty of manslaughter alone, if it is to be included it must be defined under the Bill to ensure that a person is clear of their obligations under the Act and this, combined with being grossly negligent will constitute whether a person may be guilty under s30A (1)(d).

To the extent that the key elements of the Bill provide for the inclusion of a gross negligence standard to reflect the recommendations of the *2018 Review of the model WHS laws*, this statutory definition of gross negligence makes the threshold for criminality as explicit as possible and assists in educating duty holders of their obligations. The SCSA refers to the point above in support of the need for a statutory definition of both gross negligence and reckless if it is to remain in the amendment, for the same reasoning highlighted by the *2018 Review* recommendations.

Regarding the key elements of the Bill referring to a maximum penalty being 20 years imprisonment for individuals and \$15 million for body corporates, the SCSA submits that the maximum penalty for imprisonment should be reduced to 10 years. Whilst the SCSA acknowledges that this may be inconsistent with maximum penalties available for industrial manslaughter in other jurisdictions, the SCSA suggests that industrial manslaughter offences are extremely unlikely to be intentional and therefore, should not carry the same imprisonment penalty as other criminal offences such as murder.

The key element of the Bill concerning the offence applying to both Persons Conducting a Business or Undertaking and Officers, as this recognises that responsibility for breaches of work health and safety duties can occur at many different levels of management, the SCSA foresees no issue with this part of the legislation, as this is already reflected in the current *WHS Act*.

To the extent that the key elements of the Bill refer to industrial manslaughter offences not being subject to a 2-year statute of limitations, and again to maintain consistency with other jurisdictions and supposedly to recognise the added complexity of investigating and prosecuting these offences, the SCSA submits that the 2-year period must be retained. The SCSA is concerned that the absence of the 2-year statute of limitations will create unfair exposure for a person and would question what the added complexity of investigating and prosecuting these offences would be and submits that two years should be more than sufficient for SafeWork SA to lay charges resulting from a workplace death. A 2-year statute of limitations is manifestly adequate for the purposes of the Act.

The SCSA is supportive of the availability of an alternative verdict of guilt for a Category 1, Category 2, or Category 3 offence if the trier of fact is not satisfied that a person is guilty of industrial manslaughter but is satisfied the person is guilty of a lower tier offence under the *WHS Act*.

The SCSA is supportive of the intention that industrial manslaughter will be investigated by SafeWork SA and tried in the South Australian Employment Court, consistent with existing offences under the current *WHS Act*. The SCSA would have grave concerns if the triers of fact in SAET on cases of Industrial manslaughter were not legally qualified to hear such matters.

Outside of the key elements of the Bill outlined by the SA Government, the SCSA submits an additional concern with the Bill, where s30A (1)(b) states that “the person engages in conduct that breaches that duty.”

The SCSA submits that this section needs to be amended to insert the words “**without reasonable excuse**” immediately after the word “person”. The SCSA contends that this would be consistent with other criminal legislation, to allow a person with a valid reason as to why they engaged in that conduct to have a potential defence heard by the Court. This is a reasonable inclusion to the legislation to provide a reasonable opportunity for protection.

The SCSA once again thanks the South Australian Government for the opportunity to provide a response to the proposed amendments to this legislation.

Yours sincerely



Larry Moore  
Secretary  
Specialist Contractors Association