

To: Marie Boland

From: Robert Mays – FSO – The Mays Solution Pty Ltd

27 July 2023

Re: Response to Questions posed in the “Independent Review of the Federal Safety Commissioner Discussion Paper 30 June 2023”

Question 1

What evidence is there to demonstrate the Scheme has improved safety practices within accredited entities or across the building and construction industry more broadly?

The subcontractors are more organised, their workers can demonstrate the use of their own and the principal’s systems including pre-start checks, SWMS, permits etc. Workers are more engaged with the safety systems and can respond with valid controls when questioned. e.g. Discuss the separation of workers on foot and mobile plant. Services locations etc.

Question 2

As a building industry participant observing a worksite, what are the signs, if any, that it is operated by an accredited entity?

Sites are organised and more orderly. The visual appearance of being in control of what goes where, vehicles segregated from pedestrians, equipment lay down areas, exclusion zones around operating areas, etc. Subcontractors know what is expected.

Question 3

What is the difference (if any) between the requirements of the Scheme and obligations under WHS and workers compensation (for those who are self-insured) legislation?

The scheme requires demonstration of implementation of systems focused on construction, and the ongoing maintenance of these systems over time.

WHS statutes do not require a demonstration of an implemented system.

Self-insured companies, limited to large organisations, also require demonstration of implementation of systems, and the ongoing maintenance of these over time, however, this is not focused on construction.

Question 4

If the Scheme no longer existed, do you think the WHS performance standards of currently accredited entities would remain the same, reduce or improve?

Some would stay the same, some would reduce. I would not foresee any improvement.

The FSO scheme drives organisations to have a construction focused WHS Management System.

Businesses are being driven to have systems in place with the Quality, Environment and Safety AS / ISO standards, state instrumentalities (e.g. Transport for NSW) having pre-qualification schemes requiring companies to have a level of WHS management system in place.

The state legislation / regulators have chosen not to mandate systems for WHS management for various reasons, though the best way to manage the statutory requirements is through systems.

As some background, in the early days of the OFSC AS 4801 was a prerequisite for seeking accreditation. This was later dropped as it was identified that AS 4801 did not drive systems that were adequate to manage construction WHS risks.

As a result of the FSC accreditation companies are driven to have a construction risk focused system. Tier 1 companies have the resources and drive to implement a construction focused system, Tier 2 and 3

companies, in general, do not. Without the FSC scheme, there is no driver for construction focused WHS systems.

This also links to Question 16 analysis where 88% of the \$ is covered by 134 companies, and 100% is covered by 478. The 134 companies would most likely keep their systems functioning if the scheme was dropped. The 344 (478-134) smaller companies most likely would not. As such the FSC scheme is driving 344 companies to have a construction focused WHS system that is operational.

Question 5

Do the functions of the FSC remain appropriate given the changes that have occurred in the WHS environment and operating context of the building and construction industry since its establishment?

Yes, they remain appropriate. I do not see sufficient changes in the WHS environment to offset the benefits of the OFSC functions.

Question 6

How can the FSC's audit functions support the model WHS Act's policy objective of ensuring genuine and effective consultation with workers?

The audit functions can moderate the current Covid encouraged trend to move many interaction platforms online, removing interactions between workers and the principal. Better engagement is apparent when:

- Discussions are held between the principal and subcontractors. e.g. Face to face planning and risk assessments with the principal and subcontractor management.
- Pre-start task discussions between workers and supervision are in person. White boards with a site map marked up based on the discussions, appear to be an effective medium to record pre-start discussions with workers able to recall these discussions readily.

Question 7

Should the FSC be increasing its education role and what would that look like in practice?

Yes. The sharing of best practices across the industry, but not duplicating what the regulators provide, and engaging the small businesses to learn from the larger players. The expansion of this to encourage subcontractor participation would be a challenge. The facilitation of formation of industry groups e.g. scaffolding may be an approach to this challenge.

Question 8

How can workers and their representatives be encouraged and supported to play an active role in the work of the FSC?

The current subcontracting model for construction does not result in effective involvement from workers. There is no incentive for a commitment as many subcontractors tend to come to the site, get the job done and leave.

Question 9

Is auditing compliance with National Construction Code performance requirements in relation to building materials an appropriate function for the FSC?

With the current model, this does not appear to be a good fit. The FSC is auditing the end of the chain, activity based functions. Materials compliance is more about following the document trail from manufacture to supply, not necessarily involving the principal contractors. With the current model, the OFSC would only be checking the paper trail at the end of the line, not the whole trail.

Question 10

Do the powers of the FSC remain appropriate to achieve the objectives of the Scheme? Are any other powers required?

Yes, they appear to. No additional requirements come to mind.

Question 11

What are the appropriate steps that should be taken by the FSC when a fatality occurs on an accredited entity's worksite?

The current process of reviewing the diligence of the principal's investigation, and confirming systematic corrective actions are implemented fills a gap in the state regulators processes.

How to communicate these to the wider industry so they can implement preventative actions would enhance the value. The challenge however, is not to compromise the legal / prosecution processes. A model similar to the civil aviation industry should be considered where there is an open investigation and communication of findings. The mining industry in NSW where findings from investigations are published shortly after an incident.

Question 12

What are the appropriate steps that should be taken by the FSC if an accredited entity is prosecuted and found guilty of a breach of WHS legislation?

This would have to be on a case by case basis based on the details of the case, and what had occurred in response to Q11.

Question 13

How can the FSC improve Commonwealth funding entities' compliance with the Act?

No comment.

Question 14

What powers should the FSC have to deal with compliance failures by CW, State and Territory funding entities?

No comment.

Question 15

Do the powers of the FSOs remain appropriate to achieve the objectives of the Scheme? Are any other powers required?

No comment.

Question 16

Are the current financial thresholds appropriate for Scheme coverage? If not, what should the threshold be?

No comment.

Question 17

Are there situations where the Scheme requirements are not fit for purpose? How can they be repurposed?

Yes. Some bespoke companies are required to comply when it is not appropriate. e.g. Maintenance of the ground lighting at Sydney Airport. The company is required to comply with the hazard criteria when the requirements exceed the level of risk. The Commissioner could accredit the companies, however, some of the criteria requirements could be excluded.

Question 18

Should there be a limit to how many FSO audits are available to achieve accreditation?

Yes, or over a limit, say three, then the service attracts a fee to be met by the company.

Question 19

Does the approach to post-accreditation audits remain appropriate? For example, should the nature of the audits or the criteria chosen for assessment change depending on factors such as time spent accredited under the Scheme?

The current risk based model appears to achieve this aim. Criteria audited is changed for each audit, re-accreditation audits are scheduled based on risk. The history of the contractor's performance drives the criteria.

Question 20

How best could entities report WHS incidents, injuries and fatalities consistently across all of their activities (scheme and non-scheme)?

No comment.

Question 21

Should WHS incident reporting be streamlined to cater for all government agency and regulatory reporting requirements? If yes, how?

Yes, a single reporting portal may be the answer. The triggering criteria are so similar across the regulators that it should be achievable.

Question 22

Could the FSC draw on existing data sources instead of requiring its own data?

Yes, if possible. However, this requires each regulator to be transparent with consistent data and formats.

Question 23

Are there any lead indicators that could be reported to the FSC?

No other regulator that I know of has achieved this and developed meaningful results. There is no consistency between businesses, therefore having meaningful benefits is not likely.

Question 24

How can we ensure greater collaboration and sharing of information between the FSC and other WHS agencies and regulators?

No comment.

Question 25

Should the risk ratings of accredited entities be transparent to allow for a comparative assessment of their safety record and capacity as part of the procurement requirements for CW funded projects?

No comment.

Question 26

Do the audit criteria remain relevant to building and construction workplaces in 2023? If not, are there any new criteria you would suggest be included?

The criteria are still relevant. Further guidance on how it is applied to new technologies would be relevant. e.g. Hydrogen, lithium batteries, etc.

Looking at what other regulators are implementing, the attached paper covering a process being implemented by NOPSEMA to regulate the oil and gas industry may provide some insights.

Question 27

Should the hazard criteria highlight the management of risks to a worker's health (for example risks of contracting occupational diseases and psychosocial risks) as well as the hazards to physical safety? If yes, what criteria do you suggest be included?

FSC Criteria WH15.1 already addresses health hazards.

This could be further enhanced to address psychosocial hazards, however, the controls for psychosocial hazards are specific to each company, including each subcontract company. Auditing the principal, as the FSC scheme does, would only sample a small proportion of the workforce, with the principal's workforce typically comprising management, engineers, etc.

There are a number of companies, mainly tier 3 that have an in-house workforce, so technically the FSC scheme could drive them to implement psychosocial hazard management.

Assessing the effectiveness of the controls would be challenging on a subject that is very personal, with auditors, unknown to the personnel, unlikely to elicit a truthful response, also the small sample size of personnel engaged with during an audit, limits the validity of the results. Most systems involve confidential reporting / EPA schemes, as assessing the effectiveness of these controls would be a challenge.

Question 28

Given the costs associated with administering a growing Scheme, the substantial auditing service being provided to entities and the Charging Policy, is it reasonable and appropriate to charge entities seeking accreditation?

No, I do not believe so.

The no fee structure gives the FSC audits and its auditors credibility and independence.

This aligns with the reason why auditors cannot accept inducements such as meals, etc. from the auditees, If the auditee is the one paying for the service, there may be an implicit expectation of favourable results, and poor outcomes could be seen as an attempt to generate additional revenue through the need for further audits.

An example of this is the decline in the perceived and actual effectiveness of the ISO schemes with principals shopping around for favourable auditors. A similar issue arises with private certifiers for buildings, as seen in the NSW building problems.

One possible approach is for the CW departments / clients commissioning the construction works to pay a fee to the OFSC. At the end of the day, any accreditation fees borne by construction companies would eventually make it back to the CW department / clients commissioning the works in the tender price. This option maintains independence as there is no link between the fee and the construction company, and the user pays.

Question 29

What would be the impact of charging for accreditation and how could any charge be implemented fairly?

Fees are paid by the CW clients based on the value of the project.

Question 30

Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the dual policy objectives of improving building and construction industry safety through government procurement and supporting local industry to take advantage of government purchasing opportunities?

If the scheme coverage were reduced to 88% of the value of the scheme, it would be the small local industries that would be impacted. The larger companies are more and more being run by overseas businesses, with the profits going to them. Local business is now small to medium business, as such they should not be excluded from the scheme.

Question 31

Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the implementation of the Secure Jobs Code? If yes, what are those changes?

No comment.

Question 32

Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support a culture across the building and construction industry that removes barriers to women's participation and enables a safe working environment for women? If yes, what is that role?

Unable to comment.

Question 33

Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the implementation of the Better Deal for Small Business policy? If yes, what are those changes?

As per Q30 response.

Question 34

Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the work of the National Construction Industry Forum? If yes, what are those changes?

No comment.

Question 35

Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the regulatory stewardship approach to regulation? If yes, what are those changes?

No comment.

Question 36

Should the Scheme be expanded to cover sub-contractors as contemplated by the Royal Commission?

I do not have the details of the Royal Commission findings.

With the current structure of targeting the principal, subcontractors are drawn into compliance as part of the system. The systems subcontractors have to implement to work on the principal's site, in part rub off onto the other, non FSC, aspects of their business.

As such I do not consider it necessary. Also, a number of subcontractors to the Tier 1 companies are accredited in their own right.

Question 37

Does the safety performance of other industries (including emerging industries) which receive CW funding warrant expanding the Scheme? If yes, which industries and why?

No comment.

Question 38 What, if any, changes to the FSC's operations would be required by the expansion of the Scheme to other industries?

No comment.

Other comments:

The practice of fixed price, fixed time contracts drives the industry to cut corners, safety being one of those. When a job starts to go bad, for whatever reason, principals still have to deliver, with management's focus and practices changing; some deliberately, some unconsciously. Moving away from this practice would be advantageous for safety.

Thank you for the opportunity to comment on the questions posed.

Regards

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