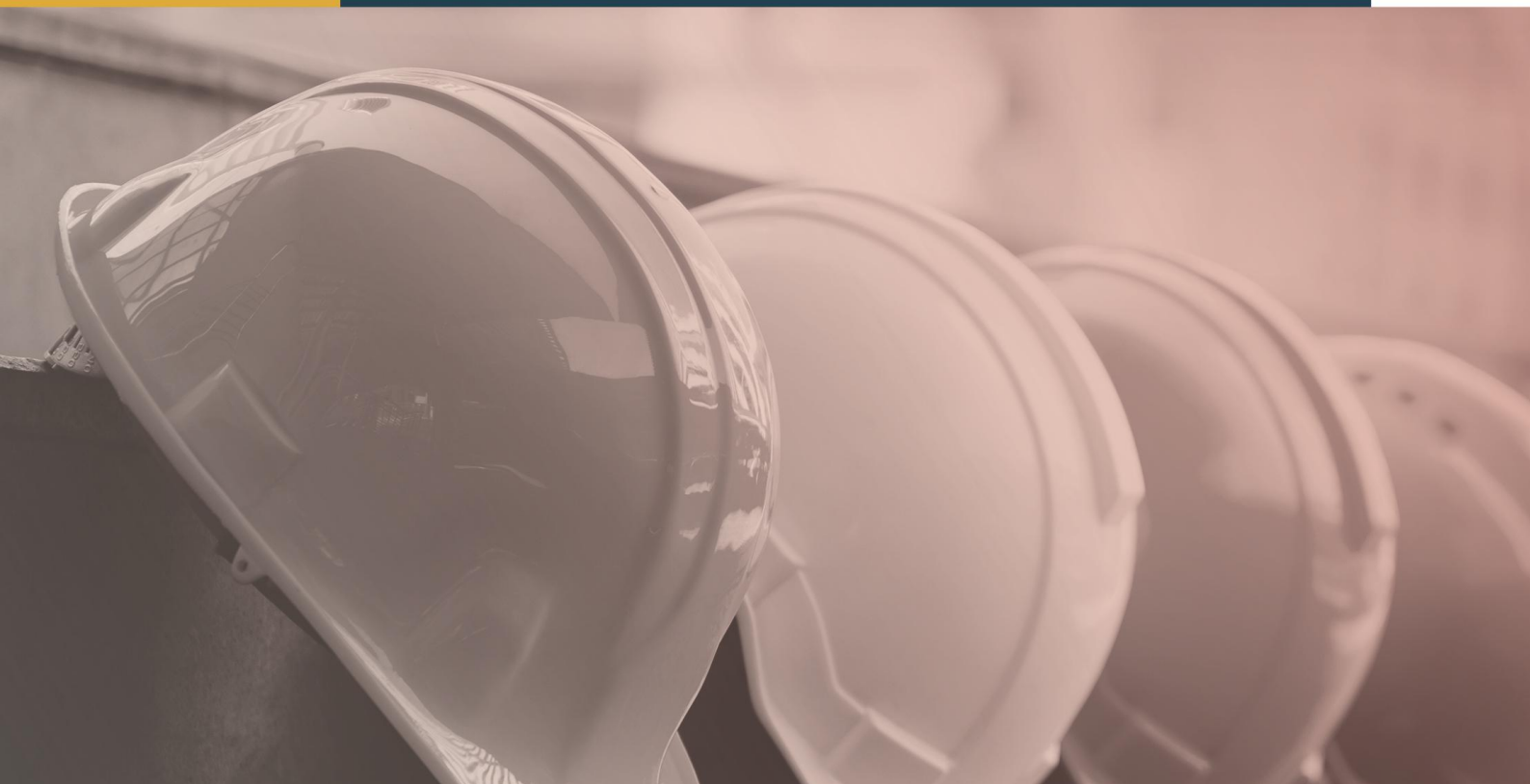


Independent Review of the Federal Safety Commissioner

Final Report 2023



Contents

Executive Summary	3
Recommendations	7
Immediate Recommendations 1-12 and 14-29.....	7
Medium-Term Recommendations 13 and 30-31	Error! Bookmark not defined.
Introduction	11
Chapter 2: The Work Health and Safety Legislative Context	20
Chapter 3: Improving Safety in the Building and Construction Industry	25
Chapter 4: Federal Safety Commissioner – Functions	30
Chapter 5: The Federal Safety Commissioner – Powers	38
Chapter 6: The Scheme – Scope and Requirements.....	49
6.1 Financial Thresholds.....	49
6.2 Audit Requirements.....	51
6.3 Reporting.....	59
Chapter 7: Cost Recovery	64
Chapter 8: Expansion.....	67
Chapter 9: A New Approach.....	72
Appendix A: Federal Safety Commissioner Review Terms of Reference.....	76
Appendix B: Submissions to the Review	78
Appendix C: Bibliography.....	79

Executive Summary

Over the last six months, I have consulted with the Federal Safety Commissioner (FSC), staff at the Office of the FSC (OFSC), Federal Safety Officers (FSOs), Work Health and Safety Accreditation Scheme for Commonwealth Building Work (the Scheme) accredited entities, unions, employer organisations, industry associations, work health and safety (WHS) practitioners, WHS regulators and Safe Work Australia (SWA) in undertaking the second review of the FSC and the first independent review since its establishment in 2003 (the Review).

Throughout the consultation process I have been guided by the Review's Terms of Reference and by an Advisory Panel consisting of the FSC, employer and business representatives, union representatives and Commonwealth (CW) Government department representatives.

I have paid particular attention to several threshold questions throughout the Review:

1. Are the FSC and the Scheme meeting the policy objective of using CW Government procurement as a lever to improve safety in the building and construction industry?
2. Are the FSC and the Scheme operating as originally intended to meet the policy objective?
3. Are the FSC and the Scheme maximising the potential within the legislative framework to improve safety in the building and construction industry?

The answers to these threshold questions inevitably assist with addressing other issues raised by the Review's Terms of Reference such as any changes that might be required to the functions and role of the FSC, potential expansion of the Scheme, Scheme support for other Government priorities and cost recovery options.

I have also been conscious while preparing the report for the Review that this last year has been an especially difficult one for the building and construction industry with high numbers of deaths on construction sites, particularly of young workers.

Throughout the consultation process and in considering the evidence presented to me relating to the work of the FSC and the Scheme, I often found myself perplexed. The feedback I received directly from individual health and safety practitioners and senior executives working in accredited entities for the most part did not reflect the positive feedback consistently received by the FSC through its annual surveys.

I received oral and written submissions with wide variations across and within different interest groups, some of which seemed, in the first instance, counterintuitive. For example, larger accredited entities tended to be less supportive of the Scheme, with smaller and medium-sized businesses tending to be most energised about the value of the Scheme in improving WHS practices in their businesses. For example, several small family businesses I spoke with are maintaining accreditation even though they are not tendering for Scheme work.

It has been difficult to source evidence to conclusively demonstrate that the Scheme is improving safety on building and construction worksites or indeed that it is not.

Whilst the FSC collects data which it provided to the Review to demonstrate the positive impact of the Scheme, most external stakeholders highlighted problems with that data. Several accredited entities were very open with me about how they can manipulate that data (Lost Injury Time data in particular) to make their performance look good when submitting biannual reports to the FSC.

However, I am persuaded that at least in the first instance, when entities work closely with the FSC to obtain their initial accreditation, they are achieving significant improvements in their documented WHS management systems. This is particularly the case for small and medium-sized businesses.

Business associations, industry groups and accredited entities are unanimous in their support for the current co-operative approach of the FSC, the focus on support and education and the ability to meet together in industry forums and reference groups to openly discuss safety issues in the industry, noting these industry forums and industry reference groups currently operate exclusively as 'persons conducting a business or undertaking' (PCBU) groups.

The legacy issues associated with the establishment of the FSC as part of the set of laws that emerged from the Cole Royal Commission into the Building and Construction Industry (2003) (the Royal Commission) remain. With unions and worker representatives not included in the same collaborative and supportive way as business and employer representatives (despite the acknowledged efforts by the current FSC and others), the OFSC remains open to criticism that it is delivering a service to business and leaves it vulnerable to claims of an actual or perceived regulatory capture of the organisation.

I have been particularly aware whilst undertaking this Review that the WHS legislative framework within which the FSC and the Scheme operates has changed dramatically since its establishment. It originated in the years before the development of the model WHS laws and was seen by the Royal Commission as providing a form of harmonisation for those entities receiving CW funding and operating across jurisdictions.

To support a national approach, the Royal Commission emphasised that the FSC should work closely with the key WHS regulators and policy agencies in operation at that time. This concept does not appear to have translated well across to the new model laws legislative and operating environment. I do note however, that collaboration across WHS regulators, the FSC and other WHS agencies is limited by legislative provisions dealing with amongst other issues, confidentiality.

In commencing this Review, I read again the Final Report of the Royal Commission and was struck by the narrative and recommendations which reinforced to me that it anticipated the FSC would be a strong regulator of the Scheme with serious consequences for poor performance including revocation of accreditation. The Royal Commission also anticipated benchmarking of accredited entities and random audits.

The current compliance approach which preferences collaboration and support sends a message that it will likely be a rare occurrence where poor performance leads to a suspension or cancellation of accreditation. Many of my recommendations seek to reinforce the role of the FSC in monitoring the Scheme and ensuring compliance with it.

The tensions between operating as an educator and a regulator are well known. I make recommendations to ensure the FSC can continue to provide support and collaboration where appropriate, particularly during the pre-accreditation process, and specifically to support small business, without diminishing the strength and impact of its compliance and enforcement role.

Many frustrations were raised by accredited entities about the post-accreditation audit process and I make several recommendations to ensure that the conduct of the audits is appropriate in the context of high-risk work, modern workplaces, supply chains and modern working arrangements.

I make 31 recommendations, with 28 intended for immediate implementation and 3 intended for medium-term implementation.

The immediate recommendations support a recalibration of the current approach to the administration of the Scheme with a renewed focus on the core business of promoting improved WHS practices through compliance with the Scheme's requirements. These recommendations can be grouped around a number of desired outcomes which are:

- enhancing the policy objective of using procurement as a lever to improve WHS;
- harmonisation of procurement prerequisites across jurisdictions and across industry sectors;
- strengthening the tripartite approach to implementing the policy objective;
- aligning the legislative provisions which support the administration and operation of the Scheme with the model WHS laws;
- strengthening the focus on monitoring and ensuring compliance with Scheme requirements;
- encouraging collaboration across the FSC, WHS agencies and regulators;
- developing a compliance and enforcement framework where the consequences of non-compliance are clearly articulated;
- streamlining reporting requirements;
- enhancing pre-accreditation support particularly for small business; and
- refocusing post-accreditation audits on high-risk work activities in the field.

Whilst in the short-term I am recommending how the work of the FSC and the Scheme might be improved, in the medium-term, given the range of activity occurring in the CW procurement space, I am recommending the consideration of a more holistic approach to achieving the policy objective of using procurement to improve WHS more broadly.

The medium-term recommendations are aimed at:

- improving the way fatalities and serious incidents are investigated on building and construction sites through a multi-jurisdictional investigation taskforce;
- providing for a new approach to achieving the procurement policy objective;
- ensuring that a framework is developed which applies to all recipients of CW funding beyond the building and construction industry;
- embedding tripartite oversight into the new framework;
- including a set of fundamental WHS principles which must be observed by those seeking to tender for CW funded work; and
- enabling the transfer of the knowledge, skills and experience acquired over the past twenty years by the FSC to the new approach.

I acknowledge that a proposal for a more holistic approach to CW procurement requires further extensive tripartite consultation. It may be that there are current consultation processes in place relative to other Government priorities where this conversation can progress. Otherwise, I am recommending that it commence with the establishment of a taskforce (recommendation 2) to coordinate the consideration and implementation of the medium-term recommendations, in close consultation with a Tripartite Advisory Body recommended as an outcome of this Review (recommendation 4). In the event of any expansion of the role of the FSC and Scheme beyond the building and construction industry, membership of the Tripartite Advisory Body would need to be extended as appropriate to cater for representatives of industry more broadly.

To complement the holistic approach, I am recommending the identification of core ‘fundamental WHS principles’ to act as a foundation for procurement prerequisites into the future. These should align with the model WHS Act, for example its object (section 3), and with those provisions which provide for the principles applying to duties, consultation, representation and participation, incident notification, and protection against discriminatory, coercive and misleading conduct.

I consider the recommendation to adopt a holistic approach to WHS procurement prerequisites across industries as a medium-term recommendation because it will require extensive consultation and will take time to be developed. Time will also be required to ensure that any new approach complements the work being done to support other Government priorities such as the Buy Australian Plan and Better Deal for Small Business.

A full list of recommendations is at pages 7-10.

Recommendations

Immediate Recommendations 1-12 and 14-29

Recommendation 1

Continue to use the distribution of Commonwealth funding as a policy lever to improve work health and safety practices in the building and construction industry.

Recommendation 2

Establish a taskforce to co-ordinate the consideration and implementation of the medium-term recommendations identified in this Review and undertake further consultation as appropriate.

Recommendation 3

Identify opportunities to progress the harmonisation of procurement prerequisites across jurisdictions.

Recommendation 4

Amend the Federal Safety Commissioner Act 2022 (Cth) (FSC Act) to ensure that the work of the FSC is supported by a Tripartite Advisory Body.

Recommendation 5

Amend section 3 of the FSC Act (Object) to make it clear that the purpose of the FSC Act is to promote a WHS Accreditation Scheme to improve WHS/Occupational Health and Safety (OHS) practices in the building and construction industry by:

- Securing compliance with the Scheme through effective and appropriate compliance and enforcement measures;
- Encouraging unions and employer organisations to take a constructive role in promoting the Scheme and improvements in WHS/OHS on building and construction worksites and assisting accredited entities and their workers to achieve a healthier and safer working environment; and
- Ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act.

Recommendation 6

Amend section 38 of the FSC Act to include a function which requires the FSC to monitor and enforce compliance with the FSC Act.

Recommendation 7

Encourage WHS jurisdictions to include the FSC Act as a 'corresponding WHS law' in their versions of the model WHS Act.

Recommendation 8

Amend the FSC Act to remove section 38(ca) which tasks the FSC to audit compliance with the National Construction Code (NCC) performance requirements in relation to building materials.

Recommendation 9

In consultation with accredited entities, business and employer representatives and associations and unions, develop a new compliance and enforcement framework which identifies the sanctions that will be applied dependent on the level of severity of breaches and a demerit points system for high-risk non-compliance.

Recommendation 10

In consultation with accredited entities, business and employer representatives and associations and unions, develop a positive points system which promotes innovation across the building and construction industry.

Recommendation 11

Amend the FSC Act to clarify that the power to promote the benefits of the Scheme and disseminate information about the Scheme (section 38(c)) includes the power to publicise non-compliance by accredited entities with their conditions of accreditation.

Recommendation 12

In consultation with accredited entities, business and employer representatives and associations and unions, develop a compliance and enforcement framework which will be triggered where there is a fatality on an accredited entity's worksite and where an accredited entity has been successfully prosecuted or has entered into an enforceable undertaking.

Recommendation 13 – see the medium-term recommendations.

Recommendation 14

Establish a framework that requires funding agencies to report annually to the FSC on compliance with the Scheme requirements.

Recommendation 15

Provide the FSC with the ability to publicly highlight agency non-compliance.

Recommendation 16

Maintain the financial thresholds triggering the requirement for Scheme accreditation at their current levels.

Recommendation 17

Establish a small business/remote and regional support team which will work in partnership with relevant Commonwealth agencies and small businesses to develop a framework that provides additional support and resources where access to accredited entities is identified as a problem.

Recommendation 18

Focus post-accreditation audits on the practical implementation of an entity's WHS Management System (WHSMS) with particular reference to high-risk work activities being carried out on the worksite at the time of audits.

Recommendation 19

Continue to engage FSOs as consultants to support the pre-accreditation audit processes while employing directly with the FSC a separate team of FSOs to monitor and ensure compliance with the Scheme through post-accreditation processes.

Recommendation 20

Review the audit criteria to ensure they remain relevant to modern construction work activities, current hazards, supply chains and modern working arrangements and that they are aligned with the requirements of the model WHS Act, Regulations and Codes of Practice.

Recommendation 21

Include 'demonstrated worker engagement and participation in the development and maintenance of the WHSMS' as a focus point to which the FSC must have regard in determining whether to accredit an entity.

Recommendation 22

Undertake random audits.

Recommendation 23

Provide information about audit results to the relevant Commonwealth Government funding entity.

Recommendation 24

Require accredited entities to report standardised information to the FSC across all of their building and construction projects, Scheme and non-Scheme, including where they are operating as a subcontractor.

Recommendation 25

Align FSC reporting requirements as closely as possible with WHS/OHS regulator reporting requirements.

Recommendation 26

Require accredited entities to report all notices issued by WHS/OHS regulators, all successful WHS prosecutions and all enforceable undertakings, to the OFSC across all of their building and construction projects, Scheme and non-Scheme, including where they are operating as a sub-contractor, within 48 hours of the notice being received.

Recommendation 27

Require reporting of lead indicators as developed by the FSC in consultation with the Tripartite Advisory Body.

Recommendation 28

Consider the collaborative model established as a result of the Respect@Work: Sexual Harassment National Inquiry Report to support data sharing amongst WHS/OHS regulators and agencies.

Recommendation 29

Maintain the current situation where the Government continues to meet FSC and Scheme costs, including for accreditation and compliance audits, with no charge to businesses.

Medium-Term Recommendations 13 and 30-31

Recommendation 13

Establish an investigation taskforce focused on investigating fatalities and serious incidents on building and construction worksites linked to a system of grants whereby Commonwealth funding is made available to State and Territory WHS regulators on condition that additional WHS investigators are committed to the investigation taskforce.

Recommendation 30

Task the Tripartite Advisory Body, supported by the taskforce (established per Recommendation 2) with driving the development of a holistic approach to implementing the policy objective of using Commonwealth Government funding to leverage improved safety outcomes beyond the building and construction industry.

Recommendation 31

Include a set of fundamental WHS principles into a broader CW Government procurement framework which aligns with the objects and principles of the model WHS Act.

Introduction

I undertook this Review of the FSC and the Scheme within the parameters of the Terms of Reference which can be found at Appendix A of this report.

The Review commenced with preliminary consultations with key stakeholders over May 2023. This informed a discussion paper which I published in July 2023 on the Department of Employment and Workplace Relations (DEWR) website. The Discussion Paper posed a series of questions about:

- whether the FSC and the Scheme had improved WHS practices;
- FSC powers and functions;
- Scheme requirements;
- current and recently acknowledged hazards;
- cost recovery;
- CW priorities; and
- expansion of the Scheme.

Written submissions were invited to respond to the questions raised in the discussion paper.

A short online survey invited views on the effectiveness of the FSC and the Scheme in improving WHS performance and invited feedback on whether changes to the functions and powers of the FSC or the Scheme's requirements were necessary.

On 24 August 2023, I published a consultation summary to the DEWR website summarising the issues raised by stakeholders in face-to-face consultations, written submissions, and survey responses. Supplementary submissions in response to the consultation summary were accepted until 30 September 2023.

I met with a range of stakeholders, both online and face-to-face, between May and October 2023 in Adelaide, Perth, Brisbane, Melbourne, Sydney and Canberra. These included the FSC, OFSC staff, FSOs, industry and business associations and organisations, unions, accredited companies (small, medium and large), the Australian Small Business and Family Enterprise Ombudsman, WHS regulators, the Asbestos Safety and Eradication Agency, the National Heavy Vehicle Regulator, SWA and state, territory and CW Government departments. I attended a FSO Forum and met with members of the FSC Industry Reference Group.

I was guided by an Advisory Panel which met in June, August and October 2023. The Advisory Panel comprised of representatives from the CW Department of Finance, the FSC, the Electrical Trades Union (ETU), the Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), the Australian Workers' Union (AWU), Master Builders Australia (MBA), Civil Contractors Federation (CCF) and Australian Constructors Association (ACA).

The Review was promoted across the building and construction industry:

- emails were circulated to all Scheme accredited entities advising them of the Review, the discussion paper and survey, and the consultation summary;
- the Review was promoted on the DEWR website;

- an email was circulated to those who participated in the preliminary consultations advising them of the release of the discussion paper, the survey and the submission process;
- an email was circulated to those consulted and/or who provided a written submission or survey response advising them of the consultation summary;
- posts on LinkedIn were shared across various networks which linked to the discussion paper and Review; and
- an email was sent to members of the Heads of Workplace Safety Authorities advising them of the Review and inviting their participation.

In total, more than 170 people across 54 stakeholders (individuals, organisations or forums) participated in the 68 face-to-face and online consultations.

I received 24 written submissions of which two are supplementary. Of the submissions received, five stakeholders requested that their submission not be published, however, I was still able to draw on the information and experiences they offered. All other submissions have been published to the DEWR website and are also listed at Appendix B. The survey received five comments, which are publicly available on the DEWR website, with one remaining anonymous.

Where submissions have been published, I have referred to them in this report with the name of the organisation/individual. Where I refer to comments made to me in conversations with individuals and companies, I have not named the individual or the company but merely referred to them by their role and interest in the Scheme.

I would like to thank everyone who participated and informed the Review process for your valuable time, insights and expertise. Thank you in particular to the members of the Advisory Panel for your feedback on the discussion paper, consultation summary and proposals for change.

I am particularly grateful for the co-operation of the Federal Safety Commissioner, Mr David Denney, and staff at the OFSC who answered my questions and provided me with information and data throughout the Review.

Finally, thank you to Ms Angela Wallbank, Ms Rachel Thomas and Ms Ilaisa Lafitani from DEWR who supported me throughout the Review process.

Marie Boland

Chapter 1: The Policy Objective

Chapter 1 examines the policy objective of using procurement prerequisites to improve WHS practices on building and construction sites. It begins with a brief outline of the Royal Commission's recommendations relating to the use of procurement policy as a lever for WHS improvements. It outlines the current context within which the FSC and the Scheme operate and provides a summary of stakeholder positions on the policy objective. The chapter concludes with a discussion of relevant issues and recommendations.

Royal Commission into the Building and Construction Industry (2003)

In his final report, Commissioner Cole highlighted the role government procurement could play in improving WHS performance on building and construction sites:

I have concluded that

- (a) *the effect that the fiercely competitive nature of the industry can, and often does, have on occupational health and safety,*
- (b) *the part that clients, including governments, can, and again often do, have in introducing these forces to the contractual chain, particularly at the tendering stage of a project,*
- (c) *the powerful driver for change that could be generated by the risk of losing the opportunity to obtain work*

point to the need to harness these aspects of the industry to work for, and not against, occupational health and safety in the building and construction industry. Governments are well placed to do this by means of pre-tender qualification on occupational health and safety grounds. The Commonwealth should introduce such a scheme, and take the lead in developing and promoting the concept.¹

As a result, recommendation 29 of Commissioner Cole's Final Report was to introduce a CW pre-tender WHS qualification scheme with attributes including:

that the Commonwealth will only deal, whether directly on those projects for which it or its departments or agencies is the client, or indirectly in relation to those projects for which it provides or contributes funds or other assistance, with relevant contractors if they attain and maintain a current pre-tender occupational health and safety qualification, and

State and Territory Governments should be encouraged to recognise and adopt the pre-tender occupational health and safety qualification scheme, and in order to promote this the details of the scheme should be designed with a view to complementing so far as possible existing State and Territory schemes of pre-qualification.²

¹ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 77, February 2003.

² Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, Recommendation 29(a), p 77; Recommendation 29(h(i)), p 79, February 2003.

Current Arrangements

Procurement as a policy lever

The FSC administers the Scheme in accordance with the FSC Act, the *Federal Safety Commissioner (Accreditation Scheme) Rules 2023* (the Rules) and internal operational policies.

Section 43(4) of the FSC Act provides that the CW or a corporate CW entity must not fund building work unless:

- a) contracts for the building work will be entered into with builders who are accredited persons; and
- b) at the time of the funding, the CW or corporate CW entity takes appropriate steps to ensure that builders will be accredited persons when they carry out the building work.

The Scheme aims to use the CW's influence as a major construction client and provider of capital to improve the WHS performance of the building and construction industry. Scheme accreditation aims to ensure builders have rigorous WHS management systems in place and can demonstrate that they are being implemented on-site.

The FSC must have regard to the following matters when deciding whether to grant accreditation to an applicant entity:

1. the applicant's WHSMS;
2. the applicant's experience (if any) in dealing with construction hazards or high-risk activities;
3. the applicant's record in relation to workplace safety;
4. findings of any pre-accreditation audit; and
5. the performance of the applicant in relation to:
 - a. demonstrated senior management commitment to WHS;
 - b. demonstrated effective subcontractor WHS management;
 - c. integration of safe design principles into the risk management process;
 - d. whole of project WHS consultation and communication;
 - e. whole of project WHS performance measurement; and
 - f. WHS training requirements.³

Once granted, the following conditions apply to all accreditations:

1. the accredited entity must at all times have and implement appropriate WHS policies and procedures, and safe work practices;
2. the accredited entity must comply with the performance requirements of the NCC that relate to building materials;
3. the accredited entity must agree to post-accreditation audits being carried out;
4. the accredited entity must take all reasonable steps to facilitate the post-accreditation audits; and

³ *Federal Safety Commissioner (Accreditation Scheme) Rules 2023*, Rule 8, sections 3 and 4.

5. the accredited entity must comply with the reporting requirements notified to the entity in writing by the FSC from time to time.⁴

Subject to certain financial thresholds, only principal/head contractors who are accredited under the Scheme can enter into contracts for building work that are funded directly or indirectly by the CW.⁵

The Commonwealth as a model client

The FSC has published a suite of guidance material and model clauses to assist CW agencies and corporate CW entities meet their legislative obligations.⁶ This material outlines how Government funding entities can support improved WHS practices on projects through the stages of project planning, design and procurement, construction and completion. The model clauses are designed to be included in funding agreements, tender documentation, and contracts.

Other national procurement schemes

Austrroads' National Prequalification System for Civil (Road and Bridge) Construction (Austrroads System) aims to deliver a harmonised framework for roadworks and bridgeworks construction contracts. Companies wishing to submit tenders to participating Australian road agencies must be prequalified under the Austrroads System. Accreditation under the Scheme is deemed to satisfy the WHS requirement for prequalification under the Austrroads System.⁷

The Australasian Procurement and Construction Council has established a National Prequalification System for non-residential building, allowing mutual recognition of contractor pre-qualifications across jurisdictions for contracts where the construction cost estimate is \$50 million and above. With the exception of the Northern Territory, all states, territories and the CW are participating jurisdictions. Accreditation under the Scheme is deemed to satisfy the OHS management system requirements.⁸

Most non-government clients expect construction and building entities to comply with the International Organization for Standardization (ISO) 45001:2018 – Occupational health and safety management systems (ISO 45001:2018), an internationally recognised standard that specifies requirements for occupational health and safety management systems, regardless of the entity's size, type and activities.

State and territory procurement rules

Most state and territory governments implement specific WHS procurement rules. State and territory WHS procurement rules are independent of the Scheme. However, based on publicly available information, it appears the Scheme satisfies some or all of the jurisdictions' WHS procurement requirements in WA, Victoria, Qld, NSW and ACT (see Table A).

⁴ *Federal Safety Commissioner (Accreditation Scheme) Rules 2023*, Rule 15.

⁵ The financial thresholds are discussed at page 49.

⁶ Office of the Federal Safety Commissioner, Department of Employment and Workplace Relations, *Model Clauses, Applying the Work Health and Safety Accreditation Scheme*, July 2019.

⁷ Austrroads, *National Prequalification System for Civil (Road and Bridge) Construction*, Edition 2.2, 15 September 2022.

⁸ Australasian Procurement and Construction Council, *National Prequalification System for Non-residential Building (NPS) Guidelines*, November 2012; and *National Prequalification System for Non-residential Building (NPS) Application Form & Referee Report*, October 2019, p 23.

The interaction of the Scheme with other Government priorities such as the Buy Australian Plan, Better Deal for Small Business and the Secure Jobs Code is discussed further in Chapter 9.

Table A: Jurisdictional recognition of the Scheme

Jurisdiction	Evidence of Recognition ⁹	Details
Australian Capital Territory (ACT)	Yes	Accreditation under the Scheme is deemed to satisfy the OHS management system requirements for ACT Government Prequalification at all levels. ¹⁰
New South Wales (NSW)	Yes	Section 2 of the <i>NSW Procurement Policy Framework</i> requires suppliers to demonstrate they can prepare and implement an acceptable WHS Management Plan (WHSMP). The <i>NSW WHS Management Guidelines</i> outlines an acceptable WHSMP as one compliant with ISO 45001:2018. Accreditation under the Scheme is deemed to comply with these requirements. ¹¹
Northern Territory (NT)	No	The <i>NT Conditions of Contract</i> and <i>NT Conditions of Tendering</i> note Scheme requirements may apply to some projects, but there is no explicit recognition of the Scheme in satisfying NT WHS procurement obligations. ¹²
Queensland (QLD)	Yes	Clause 26 of the <i>QLD Procurement Policy 2023</i> requires the application of Best Practice Principles, including on WHS systems and standards, in accordance with the <i>Best Practice Principles: Quality, safe workplaces</i> guidance for projects of \$100 million or more. Accreditation under the Scheme is listed as an indicator of best practice in relation to the principle: 'Best practice workplace health and safety systems and standards'. ¹³
South Australia (SA)	No	The SA Government notes Scheme requirements may apply to some projects, however there is no explicit recognition of the Scheme in satisfying SA procurement obligations. ¹⁴
Tasmania (TAS)	No	The Tasmanian Government <i>Procurement Better Practice Guidelines (Principles and Policies)</i> note Scheme requirements, but there is no explicit recognition of the Scheme in satisfying

⁹ Best endeavours have been made to check the accuracy of this information with each jurisdiction.

¹⁰ Major Projects Canberra, ACT Government, *ACT Government Prequalification Scheme for Construction Industry Contractors*, version 39, October 2020, p 10.

¹¹ New South Wales Government, *NSW Government Procurement Policy Framework*, August 2021, p 69; and *Work Health & Safety management guidelines for construction procurement*, December 2019, p 4.

¹² Northern Territory Government, *Conditions of contract NPWC NT edition*, August 2023; and *Conditions of tendering for NPWC NT edition*, August 2023.

¹³ Queensland Office of Industrial Relations, Queensland Government, *Queensland Procurement Policy 2023*, February 2023, p 10; and *Best practice principles: Quality, safe workplaces*, April 2023, p 26.

¹⁴ Department for Infrastructure and Transport, South Australia Government, '*Federal Safety Commission Work Health and Safety Accreditation Scheme*' website, accessed October 2023.

Jurisdiction	Evidence of Recognition ⁹	Details
		Tasmanian WHS procurement obligations. ¹⁵
Victoria (Vic)	Yes	As part of tendering for Victorian Government public construction work, a supplier of works must demonstrate their policies and processes to manage WHS risks. Criteria 1-10 of these requirements can be demonstrated by certification under the WHS Accreditation Scheme (an ‘approved assurance system’ as per section 3.7.5(d) of the Direction 3.7 on evaluation criteria). ¹⁶
Western Australia (WA)	Yes	The WA Government’s Department of Finance’s non-residential Builders Prequalification Scheme applies to most building contracts valued at greater than \$500,000 and less than \$50 million. Accredited builders must demonstrate a commitment to WHS management. Measures considered when determining the level of commitment includes accreditation under the Scheme. ¹⁷

Stakeholder Responses

Significant support was expressed in the Review’s face-to-face meetings for the policy objective of using procurement as a lever to improve safety in the building and construction industry.

In its written submission to the Review, the FSC summarises the current approach to achieving the policy outcomes:

*The Scheme, through the FSC’s Audit Criteria, layers additional safety responsibilities on companies to the obligations owed under jurisdictional work health and safety laws. Compliance with the Audit Criteria is a requirement to gain and maintain accreditation under the Scheme, with the OFSC undertaking onsite pre- and post-accreditation audits at a frequency determined by the OFSC’s Risk Framework. In this way, the Government is signalling to building and construction companies that they must meet a higher safety standard to undertake Government-funded works.*¹⁸

MBA notes it ‘actively encourages its members to become accredited under the Scheme’ and submits:

*the Scheme administered by the OFSC both meets and exceeds its stated policy intent, and its operation has delivered real, tangible and ongoing improvements in safety outcomes for accredited participants and the building and construction industry more broadly.*¹⁹

¹⁵ Department of Treasury and Finance, Tasmanian Government, *Procurement Better Practice Guidelines* (Principles and Policies), September 2023, p 24.

¹⁶ Department of Treasury and Finance, Victorian Government, *Occupational health and safety (OHS) management criteria for suppliers of Works* website, criteria 1-10; and *Evaluation criteria (Direction 3.7) website*, section 3.7.5(d).

¹⁷ Department of Finance, Government of Western Australia, *Builders Prequalification Scheme*, March 2023, pp 17-21.

¹⁸ Office of the Federal Safety Commissioner, Submission to the Review of the Federal Safety Commissioner, August 2023, p 4.

¹⁹ Master Builders Australia, *Submission* to the Review of the Federal Safety Commissioner, August 2023, p 1.

Most union submissions, whilst not supporting the continuation of the FSC and the Scheme in its current form, are supportive of using procurement policy as a means of improving WHS practices.

The Australian Council of Trade Unions (ACTU) submits:

...we do believe that the Commonwealth Government should use its procurement power to ensure the health and safety of workers in its supply chain, both in the building and construction sectors and more broadly.²⁰

The Australian Manufacturing Workers Union (AMWU) confirms:

We do support the principle of the Commonwealth Government using its purchasing power to deliver safer workplaces, as such this should be built into all Commonwealth procurement practices.²¹

Discussion and Recommendations

It is clear from the conversations I held and the submissions I received that the policy objective of using the distribution of CW funding as a lever to improve WHS practices on building and construction sites is substantially supported. Indeed, there is support, particularly in union submissions, for the lever to be used beyond the construction industry, wherever CW funding is being distributed.

All states and territories use procurement pre-qualification criteria to support workplace safety in some form. However, recognition and adoption of the Scheme across jurisdictions is mixed. Table A demonstrates that pre-qualification regimes remain complex with a variety of approaches being taken across jurisdictions and within specific building and construction industry contracts (for example, civil construction).

I note that several inquiries have taken place since the Royal Commission which reinforced the importance of using procurement as a tool within the WHS context. For example, the 2018 Senate inquiry into workplace deaths recommended that corporations that repeatedly breach WHS obligations and cause death or serious injury should not be awarded CW, state or territory government contracts.²²

I am recommending the CW Government continue to use the distribution of funding as a policy lever to improve WHS practices in the building and construction industry.

However, to sustain and enhance the policy objective both across the construction and building industry and across worksites generally, I will be making two sets of recommendations which are grouped into immediate and medium-term proposals.

The immediate recommendations are linked to the current FSC legislative and operational frameworks. They pick up on the key issues identified through this Review around how the current

²⁰ Australian Council of Trade Unions, Submission to the Review of the Federal Safety Commissioner, August 2023, p 1.

²¹ Australian Manufacturing Workers' Union, Submission to the Review of the Federal Safety Commissioner, August 2023, p 13.

²² Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, p 21.

Scheme is administered and focus specifically on the building and construction industry. They aim to ensure that the current Scheme operates effectively until such time as the medium-term recommendations can be implemented.

The medium-term recommendations anticipate a new approach to achieving the policy objective by incorporating the current Scheme's principles into a framework that includes additional principles, complements broader CW and jurisdictional procurement policies and operates across other industries which receive CW funding.

There is currently significant work being done nationally in the context of CW procurement policy. This offers a unique opportunity to make a fresh start in the building and construction industry and elsewhere, with a remodelling of the procurement policy as it relates to WHS to enhance a tripartite approach, support the harmonisation of jurisdictional procurement policies thereby reducing complexity, and ensure mandated WHS procurement prerequisites remain relevant to modern workplaces and contemporary employment arrangements.

My reason for separating some recommendations into a medium-term timeline is to ensure that in-depth discussions and participation can take place amongst those stakeholders who have not been involved in this Review and who will have an interest in procurement policy beyond the building and construction industry. A new approach will take time. To support an extensive consultation and participation process, I am also recommending a taskforce is established which will help facilitate the implementation of the medium-term recommendations.

Throughout this report I will identify the immediate recommendations in blue and the medium-term recommendations in orange. A full list of recommendations is available at pages 7-10.

Recommendation 1

Continue to use the distribution of Commonwealth funding as a policy lever to improve work health and safety practices in the building and construction industry.

Recommendation 2

Establish a taskforce to co-ordinate the consideration and implementation of the medium-term recommendations identified in this Review and undertake further consultation as appropriate.

Chapter 2: The Work Health and Safety Legislative Context

Chapter 2 provides a brief consideration of the legislative context within which the FSC was originally established. It considers the model WHS laws and Victoria's OHS laws and stakeholder positions on the relevance of those laws to the operation of the FSC and the Scheme. The chapter concludes with discussion and recommendations.

Royal Commission into the Building and Construction Industry (2003)

Commissioner Cole highlighted the complexity of WHS legislation across Australia at the time of his inquiries:

Whilst workplace health and safety is primarily a matter within the jurisdiction of the states, it is not easy to understand why a worker in one state should be exposed to a lesser or different safety regime to a worker in another state. The aim must be to have a regime of the highest possible standard applicable uniformly throughout Australia.²³

Commissioner Cole suggested the establishment of uniform hazard-specific standards across the jurisdictions would assist in improving uniformity:

In my view, therefore, there should be in every jurisdiction standards that stipulate clear and objective requirements in relation to the hazards that are critical to the building and construction industry... Any standard of this kind should apply uniformly to the building and construction industry in every jurisdiction in Australia. This is a practical way to achieve at least a measure of the uniformity that I consider to be so desirable.²⁴

Current Arrangements

Model WHS laws and Victoria's OHS laws

The model WHS laws were developed to harmonise the regulation of WHS across each Australian jurisdiction. They are composed of the model WHS Act, the model WHS Regulations and model Codes of Practice. They have been implemented in all jurisdictions except Victoria. The main object of the model WHS Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. It does this by:

- protecting workers and other persons from harm by requiring duty holders to eliminate or minimise risk;
- providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to WHS;
- encouraging unions and employer organisations to take a constructive role in promoting
- improvements in WHS practices, and assisting PCBUs and workers to achieve a healthier and
- safer working environment;
- promoting the provision of advice, information, education and training in relation to WHS;
- securing compliance with the model WHS Act through effective and appropriate compliance and enforcement measures;

²³ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 5, February 2003

²⁴ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 26, February 2003.

- ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under the Act;
- providing a framework for continuous improvement and progressively higher standards of WHS; and
- maintaining and strengthening the national harmonisation of laws relating to WHS and to facilitate a consistent national approach to WHS.²⁵

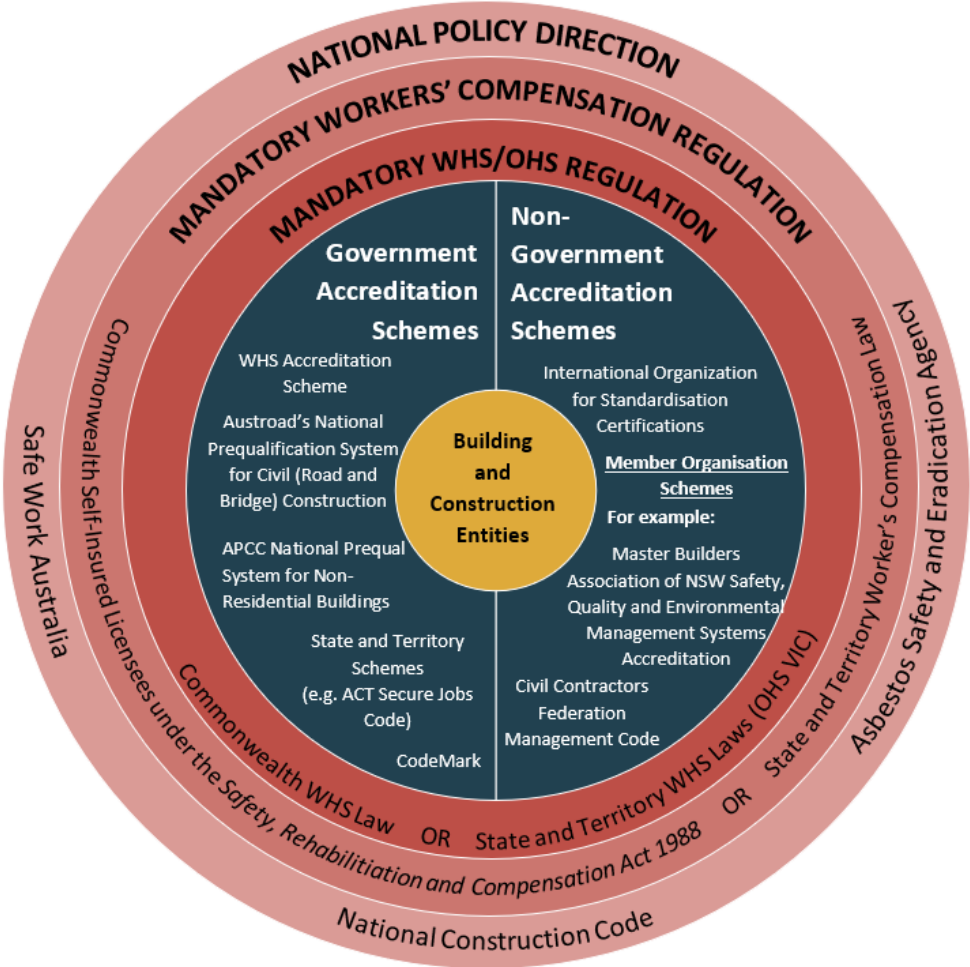
The *Occupational Health and Safety Act 2004 (Vic)* (OHS Act) is the main workplace health and safety law in Victoria. It sets out key OHS principles, duties and rights. Its objects and principles are similar to those contained in the model WHS laws.

Accredited entities under the Scheme are also subject to either CW or state and territory workers' compensation laws. SWA develops national policy relating to both WHS and workers' compensation.

Graph A provides a guide to the regulatory environment relevant to the building and construction industry within which procurement policies operate.

²⁵ Safe Work Australia, Model Work Health and Safety Act, 14 August 2023.

Graph A: Regulatory Environment in the Building and Construction Industry



Stakeholder Responses

Many stakeholders raised the importance of the broader WHS environment when assessing the work of the FSC, particularly Scheme audits. The ACA submitted:

It is important to note that the FSC's focus on auditing is a product of the environment in which the legislation originated. Today's environment is very different. Since the FSC's establishment, the national WHS regime has improved dramatically. All jurisdictions except Victoria have implemented model WHS laws with the objective of providing 'for a balanced and nationally consistent framework to secure the health and safety of workplaces'. These laws provide a robust and nationally consistent framework for driving better safety outcomes. They have also been accompanied by a much-improved focus on safety across the industry, particularly among the larger head contractors. In this context, ACA encourages the Review to give careful consideration to the changes in the WHS legislative environment

within which FSC now operates, and the most appropriate role for the FSC within that contemporary regulatory context.²⁶

Western Australian attendees at a consultation forum noted:

In WA there has been significant change with the introduction of the model act in 2020 and the model regulations in 2022. We question whether the FSC is aligned to the new legislation – for example the definitions in the model laws don't match the definitions the FSC uses, there is increased prescription ... have the audit criteria been mapped against the new laws?

The ETU suggested there is a mismatch between the operations of the FSC and the objectives of the model WHS laws:

The FSC has manifestly failed to promote, facilitate or otherwise engage in ensuring ongoing cooperation between entities and worker representatives occurs in a way that improves site safety or meets the spirit of the harmonisation WHS laws. If we turn to some of the fundamental objects of the harmonised law, including:

- *protecting workers and other persons from harm by requiring duty holders to eliminate or minimise risk*
- *providing for fair and effective representation, consultation and cooperation*
- *encouraging unions and employer organisations to take a constructive role in promoting improvements in WHS practices*
- *promoting the provision of advice, information, education and training for WHS*
- *securing compliance with the Act through effective and appropriate compliance and enforcement measures*
- *ensuring appropriate scrutiny and review of actions taken by persons with powers or functions under the Act*
- *providing a framework for continuous improvement*

It is apparent that the FSC plays no role in several of these objects and only a cursory role in the remaining few.²⁷

A CEO of an accredited company summed up the view of many of those consulted when he suggested that the use of CW funding as a lever should also be a '*leverage for better harmonisation*'.

²⁶ Australian Constructors Association, Submission to the Review of the Federal Safety Commissioner, August 2023, p 2.

²⁷ Electrical Trades Union, Submission to the Review of the Federal Safety Commissioner, August 2023, p 4.

Discussion and Recommendations

In his final report, Commissioner Cole suggested:

From the perspective of the building and construction industry, there could be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating occupational health and safety throughout Australia.²⁸

In the absence of a single national scheme, he focussed his attention on what the CW Government could do to drive improved safety standards by creating a harmonised approach outside of a national system of WHS regulation, including by using the procurement lever.

The ‘salutary reform’ has to a large extent been achieved and I agree with stakeholders who highlighted that the harmonisation of WHS laws should be taken into consideration when formulating recommendations from this Review.

One stakeholder asked: ‘*how does the FSC add to the WHS framework, what does it do to add to it?*’, and that is a question I have also asked. In an attempt to answer that question, I will refer to the model laws at various points throughout this report, particularly in the context of recommendations.

In the first instance, however, I consider the changed legislative environment since the inception of the FSC is particularly important in the context of harmonising procurement prerequisites across jurisdictions. Given that most jurisdictions are operating under the same harmonised WHS laws, and that the Scheme is monitoring the safety performance of accredited entities whose safety management systems for the most part operate within the context of complying with those harmonised laws across jurisdictions, I suggest it is appropriate that Scheme accreditation is recognised for the purposes of all state and territory government procurement schemes. Harmonisation would also assist in resolving issues raised about compliance with the Scheme when CW funding is indirectly distributed via state and territory managed projects.²⁹

I acknowledge any recommendations that impact on other jurisdictions are outside the scope of this Review. However, consistent with the original recommendation of the Royal Commission, I am recommending that the CW continue to identify opportunities to progress the harmonisation of procurement prerequisites across jurisdictions.

Recommendation 3

Identify opportunities to progress the harmonisation of procurement prerequisites across jurisdictions.

²⁸ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 15, February 2003.

²⁹ For a discussion of compliance issues, see page 47.

Chapter 3: Improving Safety in the Building and Construction Industry

Chapter 3 examines a fundamental question raised in the Terms of Reference for this Review – whether the FSC and the Scheme have improved WHS practices in the building and construction industry. It considers the available data on Scheme specific WHS performance, anecdotal evidence relating to the role played by the FSC and the Scheme in improving safety in the building and construction industry and stakeholder views.

Current Arrangements

The FSC currently collects the following data:

- fatality data on any project where the accredited entity is the head contractor;
- all lost time injuries (LTI) on a Scheme or non-Scheme project where the accredited entity is the head contractor where the project value is \$4 million or more;³⁰
- all medically treated injuries (MTI) on Scheme projects where the accredited entity is the head contractor;
- all Dangerous Occurrences on Scheme projects where the accredited entity is the head contractor; and
- all notifiable incidents on Scheme projects that are required to be notified under relevant WHS or OHS legislation.³¹

Data Evidence

Throughout this Review, I have relied on data provided to me by the FSC and SWA. This data can be found in the following documents:

- Review of the Federal Safety Commissioner, Discussion Paper, pages 12-17;
- Office of the Federal Safety Commissioner, Submission to the Review of the Federal Safety Commissioner, August 2023, pages 5-10;
- Office of the Federal Safety Commissioner, Supplementary Submission to the Review of the Federal Safety Commissioner, pages 3-4.

In summary, the FSC data identifies that:

From 2012-13 to 2021-22, accredited companies have:

- *reduced their Total Reportable Injury Frequency Rate by 54%;*
- *reduced their Lost Time Injury Frequency Rate by 47%;*
- *reduced their Medically Treated Injury Frequency Rate by 55%.*

³⁰ Definitions of LTI, MTI and dangerous occurrence for the purpose of the Scheme requirements can be found in: Office of the Federal Safety Commissioner, *FSC Online WHS Report Guide*, February 2020, p 42.

³¹ For a further discussion of data reported to the FSC, see Chapter 6.3

...Further, while the amount of work accredited companies undertake has increased significantly since 2012, the Fatality Frequency Rate (per 100,000,000 hours worked) continues to trend down.

...After 6 years of accreditation ... more than 60% of companies reported a reduction in their workers' compensation premiums of 37%... accredited companies have lower average premium rates in all jurisdictions other than the Northern Territory.³²

Since the completion of the Discussion Paper for this Review, SWA has released updated statistics. These show that there were 27 fatalities in the construction industry in 2022 (the discussion paper used the 2021 statistics which identified 24 fatalities in the construction industry). The number of worker fatalities per 100,000 workers in the construction industry has also risen from 2.1 in 2021 to 2.2 in 2022.³³

Stakeholder Responses – Data Evidence

In its written submission the FSC notes the Scheme data and states:

There have been significant and sustained reductions in the rate of injury amongst accredited companies over recent years.³⁴

It suggests 'This improvement in average injury frequency rates for accredited companies is particularly noteworthy given the number of accredited companies has grown approximately 40% from 2012 to 2022'.³⁵

The FSC's submission also provides data to suggest that:

- *accredited companies account for approximately one-third of annual building and construction industry turnover, but have recorded 16% of fatalities since 2012;*
- *96% of accredited companies stated their safety performance has been improved by becoming accredited;*
- *96% of accredited companies have stated that the OFSC has contributed to improving overall safety in the building and construction industry.³⁶*

The FSC submission notes:

While the OFSC accepts that not all of the safety improvements outlined here can be solely attributable to its administration of the Scheme, the data shows clear and sustained trend in the incident data and workers compensation premiums payable by accredited companies in comparison to the building and construction industry average.³⁷

³² Office of the Federal Safety Commissioner Submission, pp 5, 7 and 8. I note the issues raised by stakeholders relating to the FSC data. These issues are highlighted at pp 28-29 of this report and discussed further at pp 60-61.

³³ Safe Work Australia, *Key Work Health and Safety Statistics Australia 2023*, p 6; *Key Work Health and Safety Statistics Australia 2022*, p 5.

³⁴ Office of the Federal Safety Commissioner Submission, p 5. For further discussion about how data is collected by the FSC see page 57.

³⁵ Office of the Federal Safety Commissioner Submission, p 6.

³⁶ Office of the Federal Safety Commissioner Submission, pp 6-10. The relevant graphs supporting the OFSC's data are available at pages 6-10 of their submission.

³⁷ Office of the Federal Safety Commissioner Submission, p 5.

Some stakeholders refer to the FSC's data as evidence that the Scheme is driving positive change. The MBA submits:

[OFSC data] objectively evidences that the safety performance rates and outcomes for those accredited by the Scheme far exceed those who are not.³⁸

An accredited entity noted:

All data sets are on the same trajectory whether it is scheme or non-scheme data – there is a period of doing well but then it plateaus.

A majority of those who participated in the Review, from employer representatives, accredited entities, unions, to WHS regulators and practitioners, questioned the value of the data used to measure the effectiveness of the FSC and the Scheme, particularly LTI data.

The Australian Institute of Health & Safety (AIHS) highlighted:

For more than a decade the OHS profession has grappled with the value, veracity, and statistical validity of lost time injuries and their derivative LTIFRs... Key issues with LTIs and LTIFRs are that 1) they do not reflect the impact or severity of injuries or illnesses on workers, 2) they can be “managed” by having injured workers return to work to ensure incidents are categorised favourable, and 3) they do not reflect the effectiveness of how OHS risks are managed in a workplace.³⁹

Accredited entities offered a consistent response to the validity of LTI data as a measure of safety:

Whilst the LTIFR Scheme statistics are demonstrably better than Safe Work Australia's data, Programmed does not believe that these are a true reflection of the facts.⁴⁰

Everyone knows LTI reporting is manipulated – it's a redundant, antiquated approach and statistically invalid.

Good LTI rates just means you have a good person in charge of industry management, it's not about safety.

The ACA submitted:

It is difficult to draw conclusions about the effectiveness of the FSC. While safety outcomes are improving across the construction industry at large, the data provided in the Discussion Paper does not speak to the FSC's role in this trend.⁴¹

The Civil Contractors Federation South Australia (CCF SA) submitted:

The Safe Work Australia Report shows a clear decline [in injuries and fatalities] across all industries, this begs the question of whether the Scheme has contributed to the construction

³⁸ Master Builders Australia Submission, p 3.

³⁹ Australian Institute of Health & Safety, Submission to the Review of the Federal Safety Commissioner, p 6.

⁴⁰ Programmed Group, Submission to the Review of the Federal Safety Commissioner, p 1.

⁴¹ Australian Constructors Association Submission, p 1.

*industry decline or if the decline is a result of general safety improvements across businesses and workplaces generally.*⁴²

The ETU states:

*Whilst some of the data appears to indicate that WHS Accredited entities perform better on safety statistically than the broader construction industry there is no evidence that this result can be attributed to the scheme itself.*⁴³

The CFMEU highlighted:

*Data from Safe Work Australia shows that there were 647 fatalities in the construction industry over the period 2023 to 2021 ... The only conclusion that can be reached is that there is no evidence to demonstrate that the Scheme has improved safety practices across the building and construction industry since the establishment of the FSC back in 2005.*⁴⁴

Anecdotal Evidence

A significant amount of anecdotal evidence was provided as part of the Review. Given the concerns raised about the data, I consider it is important to include and consider this anecdotal evidence.

Stakeholder Responses

MBA noted *'direct feedback from members about the Scheme is overwhelmingly positive and that it plays a significant role in continually driving improved safety practices and systems'*.⁴⁵ This positive feedback highlighted:

- *Routine audits conducted by FSOs, the frequency of which are dependent upon a company's risk rating, provide not only an incentive for continual improvement, but create an additional layer of advice and support;*
- *OFSC plays an important part in educating and providing practical assistance that goes to improving a company's safety management systems and outcomes; and*
- *the OFSC's educative approach, when compared to that of State/Territory Regulators, is viewed very positively.*⁴⁶

Those small businesses who took part in the Review were consistent in confirming that the Scheme helped them to bring their WHS management system up to a higher standard than they would have achieved without the Scheme. One noted *'accreditation provides another set of eyes – it keeps up our standards'*. Another indicated they have *'used the Scheme to tighten things up'*.

Larger accredited businesses however, saw less value in the Scheme and questioned whether it was affecting safety outcomes. One suggested *'there is little evidence available that connects the activities of the FSC to improvement in safety practice and performance'*. Other comments from accredited entities included:

⁴² Civil Contractors Federation South Australia, Submission to the Review of the Federal Safety Commissioner, p 4.

⁴³ Electrical Trades Union Submission p 3.

⁴⁴ Construction Forestry Mining and Energy Union, Submission to the Review of the Federal Safety Commissioner, pp 4-5.

⁴⁵ Master Builders Australia Submission, p 4.

⁴⁶ Master Builders Australia Submission, p 4.

It is operating in a very narrow part of the industry. It is not affecting the broader industry.

Are we better off safety wise for having the FSC? ... No.

If it wasn't there, it would make no difference to the worker.

The ETU submitted that its experience on projects run by accredited entities *'is not one of consistency. Despite accreditation requiring minimum safe systems that should include systems for addressing duty holder and consultation obligations under the law, the actual implementation, or lack thereof, of these systems is left entirely up to the company. This results in a situation where two separate projects of a similar nature, both being run by accredited entities, have entirely different safety cultures and performance outcomes'*.⁴⁷

The AMWU considered:

*Any benefit of the current scheme is realised only at the point of accreditation, it does not continue over the period of accreditation. Our members do not see evidence of Work Health and Safety Management Systems put into practice.*⁴⁸

All accredited entities who participated in the Review were critical of key elements of the Scheme's application. A significant number of stakeholders were also critical of the lack of consequences for poor safety practices on accredited sites. These criticisms are discussed in Chapter 4.

Discussion and Recommendations

On face value, the data provided by the FSC suggests that it and the Scheme are improving WHS outcomes on accredited entities' worksites. It is difficult however to compare accredited entities' safety performance with non-accredited entities' safety performance due to variations in the data collected by the FSC and SWA. For example, it was highlighted by a participant in the Review that the Scheme incorporates predominantly larger businesses, does not include residential housing data and is not necessarily reflective of the industry as a whole. However, even with these variations, all data sets relating to the construction industry appear to be on the same trajectory with the improvements over the last ten years beginning to plateau.

Initially I was persuaded by the FSC data to conclude that the FSC and the Scheme is having a significant positive impact on safety practices in the building and construction industry. However, as the Review went on and I spoke to more and more accredited entities and considered submissions from a wide range of stakeholders I became more cautious in my response to the data. This caution arises from the evidence I received from accredited entities about the manipulation of some data (predominantly LTI data) and the many concerns raised by WHS practitioners about the validity of LTI data when measuring safety improvements. I am further inclined to caution for the reasons identified in the AIHS submission, including the risk that *'LTIs provide the illusion of 'benchmarking' between entities'* ...⁴⁹

Ultimately, however, there is nothing to suggest that the FSC and the Scheme has not improved safety practices across accredited entities and there is significant data and anecdotal evidence to

⁴⁷ Electrical Trades Union Submission, p 5

⁴⁸ Australian Manufacturing Workers Union Submission, p 6.

⁴⁹ Australian Institute of Health & Safety Submission, p 6.

suggest that in the initial accreditation application phase, improvements to WHS safety systems are being made. Within this context I note the ETU submission which highlighted:

Experience from ETU members and officials, which is reflected in the data at s2.2.4 of the Discussion Paper, is that improvements to WHS performance by new entrants to the Scheme generally improves and [is] initially strong, they tend to plateau within 2-3 years of accreditation and then subsequently flatline within 5-7 years with no subsequent trend improvement.⁵⁰

Many accredited entities were quite open with me during this Review about how they reported 'good' LTI figures to the FSC. Others were concerned about the different interpretations of LTIs used across accredited entities which they suggested enabled underreporting of incidents and injuries.

When I questioned accredited entities about why the feedback to me differed so dramatically from the feedback contained in the FSC's annual surveys, they suggested that no entity was going to provide negative feedback to an agency that had the capacity to make decisions about its accreditation status. I agree with this proposition and with the CFMEU's suggestion that *'The results of the OFSC's annual anonymous consensus are hardly surprising as companies are very unlikely to say that their business is less safe since gaining accreditation'*.⁵¹

My recommendations relating to the future measurement of the Scheme's impact are linked to my consideration of reporting requirements. This can be found at pages 59-63.

⁵⁰ Electrical Trades Union Submission, p 3.

⁵¹ Construction Forestry Mining and Energy Union Submission in Response to the Independent Review of the Federal Safety Commissioner Consultation Summary (supplementary submission), p 2.

Chapter 4: Federal Safety Commissioner – Functions

Chapter 4 examines the functions of the FSC and whether they are adequate and appropriate to drive safety improvements within the building and construction industry.

It considers:

- The recommended functions of the FSC identified in the Royal Commission;
- The continued appropriateness of the legislated functions; and
- Gaps in the legislated functions.

It presents stakeholders' views on the functions and concludes with discussion and recommendations.

Royal Commission into the Building and Construction Industry (2003)

Commissioner Cole recommended:

The primary object of the Commissioner for Health and Safety is to promote and enhance occupational health and safety in the building and construction industry. Every other consideration, including the cost of building and construction work, is subordinate to this purpose.⁵²

Recommendation 33 identified the following key functions of the proposed Commissioner, including:

- *Administering the Scheme;*
- *Supervising contracts to ensure the Scheme applies, where relevant;*
- *Consulting widely with participants in the industry including builders, employer representatives, employee representatives, and OHS experts to establish the list of hazards against which the health and safety performance of applicants for pre-tender qualification will be audited;*
- *Determining the categories of available qualification, including a consideration of extending the Scheme to smaller builders and sub-contractors;*
- *Promoting the Scheme so as to encourage all State and Territory Governments and private clients to adopt it, with insurers to secure incentives for accreditation, and accreditation as a badge of honour in the industry;*
- *Adjudicating upon the performance of accredited entities during the life of and after the completion of projects with a view to monitoring their OHS performance, imposing such sanctions as may be appropriate and monitoring the performance of the Scheme generally;*
- *Supervising the Scheme for increased inspections on CW projects which will involve requiring the Commissioner to consult with employee representatives, the site safety committee, representatives of the head contractor and such of the sub-contractors as the Commissioner deems appropriate having regard to the size of the project, as to the proposed detail of a scheme of regular inspections by WHS inspectors, to be negotiated by the Commissioner with the relevant State or Territory OHS regulatory authority;*

⁵² Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 86, February 2003.

- *Reporting to the Minister on the operation of the Scheme and the scheme for increasing inspections on CW projects;*
- *Educating about the Scheme and promoting OHS safety in the industry; and*
- *Promoting, monitoring and reporting on compliance with the OHS aspects of the National Code of Practice for the Construction Industry and the Implementation Guidelines.*⁵³

Current Arrangements

Section 3 of the FSC Act states:

The object of this Act is to promote work health and safety in relation to building work undertaken by a constitutional corporation, the Commonwealth or a corporate Commonwealth entity.

Section 38 of the FSC Act provides the FSC with the following functions:

- (aa) promoting the object of this Act;*
- (a) promoting work health and safety in relation to building work undertaken by a constitutional corporation, the Commonwealth or a corporate Commonwealth entity;*
- (b) performing functions as the accreditation authority for the purposes of the WHS Accreditation Scheme;*
- (c) promoting the benefits of the WHS Accreditation Scheme and disseminating information about the WHS Accreditation Scheme;*
- (ca) auditing compliance with National Construction Code performance requirements in relation to building materials;*
- (d) referring matters to other relevant agencies and bodies;*
- (e) any other functions conferred on the Federal Safety Commissioner by this Act or by another Act.*

Stakeholder Responses

The FSC highlighted several functions it considered required particular attention in this Review [emphasis added]:

- ***Auditing compliance with the NCC performance requirements in relation to building materials ... there may be merit in considering the ongoing utility of the FSC retaining responsibility for NCC enforcement;***
- ***Referring matters to other relevant agencies and bodies ... the expansion of this function to contemplate the promotion and coordination of information sharing with other relevant agencies may be appropriate;***
- ***Collecting, analysing and publishing statistics relating to WHS of companies accredited under the Scheme ... There is currently no function of the FSC which facilitates this work. Noting that the Best Practice Principles for Regulators includes an expectation that regulators are risk based and data driven, it may be worth considering a function to cover this work;***

⁵³ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, pp 87-89, February 2003.

- **Enforcing compliance with the Act and Scheme Rules and penalising non-compliance ...** there may be some merit in considering conferring a function on the FSC to raise awareness of non-compliance by accredited companies and CW entities.
- **Educating and raising awareness of building and construction industry hazards ...** Despite there being no express function on the FSC to educate industry, the FSC devotes time to developing resources that highlight common hazards and ways to eliminate or control them. A function to this effect would help to justify the expansion of the FSC's educative resource offerings.⁵⁴

MBA cautioned against 'any expansion or amendment to the functions of the FSC to the extent that it may dilute or detract from its existing primary focus and function; this being, to ensure high safety performance of accredited companies within the building and construction industry'.⁵⁵ It also 'strongly supports the OFSC playing an ongoing and enhanced educative role and continuing to partner with companies to model innovative Management Systems with a view to improving WHS outcomes across the entire building and construction industry'.⁵⁶

The majority of employer representatives and accredited companies commended the FSC on its collaborative approach to the exercise of its functions:

The more co-operative it is, the better it is.

We find the current FSC and staff at the OFSC very approachable and very open.

There's been a proactive shift in the FSC, with hazard campaigns based on the highest Corrective Action Report criteria, sharing of information through webinars, and companies leading in innovation sharing knowledge with other companies. This should continue.

Others raised concerns:

The Scheme is falling short in terms of promoting an approach that embeds continual communication, learning, and innovation to drive ongoing improvements in safety outcomes over the long-term and its current narrow remit both excludes important social partners from its work and prevents the agency from driving much deeper reform in the construction sector...A key criticism of ETU members and officials is that the FSC has never once engaged with them in the performance of any of its functions.⁵⁷

The ACA:

considers that the FSC would make a greater impact on industry by allocating relatively more resources toward 'Genuine and effective consultation' - the current industry reference group is a very narrow group which does not meaningfully consult workers or delivery agencies on the issues and priorities relating to safety in construction.⁵⁸

⁵⁴ Office of the Federal Safety Commissioner Submission, pp 13-14.

⁵⁵ Master Builders Australia Submission, p 5.

⁵⁶ Master Builders Australia Submission, p 6.

⁵⁷ Electrical Trades Union Submission, p 4.

⁵⁸ 5 Australian Constructors Association Submission, p 3.

Most participants in the Review raised concerns about the interaction between and duplication of functions across the various WHS agencies and regulators. These concerns are reflected in the following comments from accredited entities:

Comcare and the FSC operate in parallel universes with little sharing of intel or information.

Scheme criteria should be reviewed to determine how well aligned they are to SWA and state regulators.

There should be more collaboration with regulators – sharing of information and concerns.

There was little support expressed for the FSC's function to audit compliance with the NCC. The duplication of NCC compliance responsibilities with the state and territory building regulators and the lack of expertise and resources within the FSC to carry out the work were highlighted. Comments included:

The NCC shouldn't be enforced by the FSC.

FSC auditors don't have the skills and other agencies deal with the NCC.

Discussion and Recommendations

I found that the legacy of the FSC and the Scheme's genesis continues to impact on the operation of the FSC and its relationship with building and construction industry stakeholders.

I acknowledge that the FSC has made attempts to engage with worker representatives. I also note that participants in the FSC's Industry Reference Group value a forum that is exclusively comprised of employer/business representatives:

...one of the key reasons why the FSC IRG operates so effectively is that its conventional composition fosters an environment in which senior, experienced, sector-specific safety professionals can discuss worksite WHS for building and construction in a frank, collaborative and positive environment. This is a rare and valued opportunity for all conventional participants.⁵⁹

These exclusive forums however, coupled with the collaborative approach to enforcing the requirements of the Scheme, leaves the FSC open to the criticisms of 'capture' which were made during this Review. Relying on relationship building and networking to ensure the work of the FSC is supported by everyone in the building and construction industry has not been successful. I am therefore recommending that the FSC Act is amended to ensure that the FSC is supported by a Tripartite Advisory Body.

Recommendation 4

Amend the FSC Act to ensure that the work of the FSC is supported by a Tripartite Advisory Body.

⁵⁹ Master Builders Australia Submission, pp 7-8.

I note the FSC's submission that I consider recommending the inclusion of a new legislated function to support its increased focus on providing education and support to the industry. However, I have not been persuaded that this is a necessary change.

I consider that increasing the focus on education and the production of education resources risks duplicating functions that appropriately sit with other agencies such as SWA and the education arms of WHS and OHS regulators. I consider that my decision not to recommend an increased education function does not prevent the FSC using the current legislative functions to promote the Scheme and WHS in relation to building work to improve WHS/OHS practices across the industry as it currently does.

While the FSC rightly states in its submission that it is not a regulator of compliance with WHS laws, and at times throughout the Review some stakeholders referred to it as a 'quasi-regulator', my view is that it is primarily a regulator and its functional emphasis appropriately lies with regulating the Scheme and ensuring compliance with it.⁶⁰

To reinforce the functional role of the FSC as a regulator of the Scheme I am recommending that section 3 of the FSC Act (Object) is amended to clearly articulate the purpose of the FSC is not just to promote the Scheme but also to monitor and ensure compliance with it.

The intention of my recommendation is to ensure that the operational focus of the FSC is primarily directed at ensuring compliance with the Scheme and improving WHS/OHS practices across the building and construction industry as a result of that compliance.

I am also recommending that section 3 of the FSC Act reference key functions including the promotion of the Scheme and improvement of safety practices through a tripartite approach. I have provided wording in my recommendation that reflects the wording in section 3 of the model WHS Act. I acknowledge that if my recommendation is accepted, drafting instructions will be developed as appropriate.

Recommendation 5

Amend section 3 of the FSC Act (Object) to make it clear that the purpose of the FSC Act is to promote a WHS Accreditation Scheme to improve WHS/OHS practices in the building and construction industry by:

- Securing compliance with the Scheme through effective and appropriate compliance and enforcement measures;
- Encouraging unions and employer organisations to take a constructive role in promoting the Scheme and improvements in WHS/OHS on building and construction worksites and assisting accredited entities and their workers to achieve a healthier and safer working environment; and
- Ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act.

⁶⁰ Further discussion of compliance and enforcement issues is at page 39.

The FSC collects significant amounts of data which it publishes in its regular snapshots and statistical reports. It raises concerns in its submission that this statistical collection and analysis is not identified as a core function under the FSC Act. Data collection is important to monitor the impact of the Scheme, to measure improvement and to identify where the compliance and enforcement functions of the FSC should be directed. The type of data being collected is being addressed in other parts of the report.

I also note that the word ‘compliance’ does not appear in section 38 of the FSC Act except in relation to the NCC. The compliance function is currently embedded in section 38(b) which requires the FSC to perform ‘functions as the accreditation authority for the purposes of the Scheme’.

To avoid doubt about the ability of the FSC to collect data, and to reinforce the compliance functions of the FSC I recommend that section 38 of the FSC Act is amended to require the FSC to ‘monitor and enforce compliance with the Act’.

Recommendation 6

Amend section 38 of the FSC Act to include a function which requires the FSC to monitor and enforce compliance with the FSC Act.

Throughout the Review, questions were asked about where the FSC fits in the model WHS legislative environment which has emerged since its establishment. These included questions about the point of difference between the FSC and WHS regulators, whether the FSC requires higher standards than WHS regulators and duplication of functions. One WHS regulator noted the FSC and it ‘operate in different lanes’ and suggested greater collaboration would be beneficial, including joint site visits. SWA suggested that the FSC currently operated as an ‘outlier’.

The FSC noted that it refers issues of immediate safety concern to relevant CW, state or territory WHS regulators. It also notes whilst it has broad powers to share information, CW, state and territory WHS regulators are prevented from sharing information with the FSC:

Sharing of confidential information with a person or ‘corresponding regulator’ is only authorised for the purposes outlined in section 271A of the Model WHS Act. As the FSC is not a Commonwealth WHS regulator, it is not captured as a ‘corresponding regulator’ nor is information sharing for the purpose of administration of the FSC Act contemplated by subsection 271A(3).⁶¹

I note the jurisdictional note in the model WHS Act which states:

Each jurisdiction will specify the Acts that are to be corresponding Acts and may include a power to prescribe corresponding Acts by regulation.

A jurisdiction may extend the operation of a provision that applies to a corresponding WHS law to specified laws of the jurisdiction. This should be dealt with separately in the provision or regulations under the provision.⁶²

⁶¹ Office of the Federal Safety Commissioner Submission, p 32

⁶² Safe Work Australia, Model Work Health and Safety Act, 14 August 2023, Appendix, Jurisdictional Notes, section 4, p 224.

To support greater co-operation between the FSC and WHS regulators, I am recommending that the CW encourage jurisdictions to include the FSC Act as a ‘corresponding WHS law’ in their versions of the model WHS Act. Other opportunities for collaboration are discussed in the sections dealing with the FSC’s powers and Scheme requirements.

Recommendation 7

Encourage WHS jurisdictions to include the FSC Act as a ‘corresponding WHS law’ in their versions of the model WHS Act.

There was little support for the FSC auditing the NCC’s performance requirements in relation to building materials with most participants identifying it as a non-core function which detracts from the WHS focus of the FSC and the Scheme. As the FSC noted in its submission:

Auditing NCC compliance is not an original function of the FSC. Section 38(ca) was introduced in 2016, largely in response to the widespread use of flammable cladding that was a contributing factor in several incidents in Australia and internationally... Auditing companies for compliance with the NCC does not align with the FSC’s WHS remit. The FSC was designed around a need to improve the safety of workers within the building and construction industry, while the NCC sets technical design and construction standards for the safe use of building products.⁶³

The FSC also noted it has neither the skills, resources nor broader legislative framework to ‘*identify and rectify any non-conformance with NCC requirements*’.⁶⁴ Currently it relies on accredited entities making a declaration that they will continue to comply with the NCC.

I agree with stakeholders who considered the function duplicates other agencies’ responsibilities.

I am therefore recommending section 38(ca) of the FSC Act is removed. This will further allow the FSC to concentrate on its core business of improving WHS practices by promoting and ensuring compliance with the Scheme.

Recommendation 8

Amend the FSC Act to remove section 38(ca) which tasks the FSC to audit compliance with the National Construction Code performance requirements in relation to building materials.

⁶³ Office of the Federal Safety Commissioner Submission, p 17

⁶⁴ Office of the Federal Safety Commissioner Submission, p 18.

Chapter 5: The Federal Safety Commissioner – Powers

Chapter 5 examines the powers of the FSC and whether they are adequate and appropriate to drive safety improvements within the building and construction industry.

It considers:

- The recommended powers of the FSC identified in the Royal Commission; and
- The use of the legislated powers.

It presents stakeholders' views on the FSC's powers and concludes with discussion and recommendations.

Royal Commission into the Building and Construction Industry (2003)

Commissioner Cole recommended:

The Commissioner for Health and Safety should at the end of a Commonwealth project, and otherwise at reasonable intervals...have the authority to implement a range of sanctions...including but not limited to:

- i *a notice to show cause to the Commissioner for Health and Safety requiring an explanation regarding any aspect of a contractor's occupational health and safety performance;*
- ii *the imposition of special conditions for future tenders;*
- iii *the imposition of a period of probation to enable the contractor to implement specific occupational health and safety measures identified by the Commissioner for Health and Safety;*
- iv *the imposition of limitations on projects for which the contractor will be considered for tender;*
- v *suspension from tender lists for all or some classes of Commonwealth projects for a specified period of time; and*
- vi *the cancellation of the contractor's pre-tender occupational health and safety qualification.*⁶⁵

He further recommended:

*Pre-tender occupational health and safety qualifications for Commonwealth projects should be a matter of public record. Such qualifications are intended to be of such a standard that they will indicate to the world at large the attainment and maintenance of a level of excellence in occupational health and safety ...*⁶⁶

⁶⁵ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 80, February 2003.

⁶⁶ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 79, February 2003.

Current Arrangements

Accredited entities' compliance

Where an accredited entity doesn't comply with the requirements of the Scheme and the conditions of its accreditation, the Rules provide as follows:

- Rule 16 allows the FSC to impose further conditions on an accredited entity during the period of accreditation.
- Rule 18 provides that where there has been a breach of an accreditation condition, the FSC may impose a further condition of accreditation, suspend the accreditation and/or revoke the accreditation.

The FSC's Company Compliance Policy confirms the '*preference is to work collaboratively with companies to ensure compliance with Scheme requirements and conditions of accreditation*'. It states:

Generally, the FSC will seek to resolve compliance issues with a company through administrative compliance measures. However, the type of compliance measure to be applied will be determined by the FSC taking into account the circumstances of the company's non-compliance.⁶⁷

The Company Compliance Policy identifies the factors that can be taken into account by the FSC when determining whether compliance action is appropriate:

- Whether there is a demonstrable failure of the accredited company's WHSMS;
- Whether the company's actions have posed an immediate threat to life;
- Whether the accredited company's overall WHS performance is below the standard required for an accredited person;
- Whether the company fails to comply with reporting obligations; and
- The willingness of the accredited company to cooperate with the FSC to remedy the breach.⁶⁸

The FSC may take compliance action following a WHS incident onsite, with the OFSC typically learning of an incident through the following two main channels:

- Accredited entities are required to notify the OFSC within 48 hours of any 'notifiable incidents' reportable to their relevant WHS regulator. A 'notifiable incident' is one resulting in the death of a person, a serious injury or illness of a person, or a near miss event/dangerous occurrence, as determined by the relevant jurisdiction.⁶⁹
- In the event a WHS regulator takes action against an accredited entity, including the issuance of an improvement, prohibition, infringement or other notice on Scheme projects and non-Scheme projects with a value of \$4 million or more, the accredited entity is required to report this to the OFSC as part of regular biannual reporting.⁷⁰ However, depending on when the notice falls within

⁶⁷ Office of the Federal Safety Commissioner, Department of Employment and Workplace Relations, *WHS Accreditation Scheme Company Compliance Policy*, p 8.

⁶⁸ Office of the Federal Safety Commissioner, Department of Employment and Workplace Relations, *WHS Accreditation Scheme Company Compliance Policy*, pp 8-9.

⁶⁹ Office of the Federal Safety Commissioner, *FSC Online WHS Report Guide*, February 2020, p 29.

⁷⁰ Office of the Federal Safety Commissioner, *FSC Online WHS Report Guide*, February 2020, pp 20 and 22.

the FSC reporting cycle, this information may be up to six months old by the time the OFSC receives it. Notices by WHS regulators are considered by the OFSC whenever the entity is risk assessed.

I understand out of 4,630 non-fatal incidents reported to the OFSC since 2019, around 500 risk assessments were initiated as a result. Due to data limitations, it is not possible to easily identify any subsequent compliance action taken by the FSC.

The most commonly applied Rule 18 further condition requires a company to undergo a conditional audit and achieve specified results (for example closure of Corrective Action Reports (CARs) and minimal new CARs raised). Other conditions imposed include meetings with CEOs who must demonstrate compliance with specific criteria and/or collaborate with the FSC to produce educational materials. Rule 16 conditions are broadly similar, the main difference being that the FSC does not need to find a company in breach of its conditions of accreditation to impose them.

The FSC's Risk Framework, for internal OFSC use only, classifies companies into three levels of compliance risk – low, medium or high. Accredited companies undergo a risk assessment after each audit to determine their risk rating (the rating is also reassessed when a company reports safety incidents or a high number of notices issued by jurisdictional regulators). The risk rating is used for internal operational purposes to determine the frequency of audits and whether any additional requirements or conditions should be imposed on an accredited entity. Accredited entities are informed of their own risk rating, however entities' ratings are not shared publicly.

If there is a fatality on a project where an accredited entity is the head contractor, the Company Compliance Policy states:

...legislative compliance measures will be immediately imposed on the company's accreditation. These include the application of further conditions of accreditation under section 16 of the Rules and increasing the company's risk level to high.

As a minimum, the further conditions on accreditation will require:

- a. A meeting between the accredited company's CEO/Managing Director (or equivalent senior manager) and the FSC;*
- b. The accredited company must provide the FSC with details of the incident and an overview of the actions it will take to prevent similar events in future;*
- c. The company to undergo one or more conditional audits to confirm that acceptable actions in response to the fatality have been implemented and that the company's WHS management system continues to meet the Scheme requirements.⁷¹*

Stakeholder Responses

The FSC through its written submissions and in conversations held as part of this Review, confirmed its preference for using a collaborative approach in exercising its powers to 'keep people in the tent'.

⁷¹ Office of the Federal Safety Commissioner, Department of Employment and Workplace Relations, *WHS Accreditation Scheme Company Compliance Policy*, p 12.

This approach was overwhelmingly supported by employer and business organisations and associations and accredited entities. The Review received significant positive comments about the support currently provided to accredited entities by the FSC. In its supplementary submission the FSC confirmed:

...the FSC's preference is to work collaboratively with accredited companies to ensure compliance with Scheme requirements, but compliance action will be taken where the collaborative approach does not result in the expected compliance.⁷²

The AWU summed up what it considers are the challenges facing the FSC in the exercise of its functions and powers:

An important aspect to consider is the dual role played by the FSC as both the accreditor and regulator of the Scheme ... Being the accreditor, the FSC must maintain a certain level of impartiality to objectively assess an entity's compliance with health and safety standards. As a regulator of the Scheme, however, it must enforce these standards ... 97% of accredited entities express approval of the service provided by the FSC. However, ... the purpose of the FSC and the Scheme is not primarily to gain the approval of the industry or the accredited entities within it, but to ensure health and safety standards are upheld. The question then arises, does this high approval rating indicate a good-natured relationship at the expense of enforcement? The AWU believes there is, at a minimum, a perceived conflict in this space.⁷³

The CFMEU considers '*...the history of the FSC shows that it has been very reluctant to use the limited powers that it does have and is therefore seen by many as a "toothless tiger"*'.⁷⁴

The compliance approach following a fatality on an accredited entity's worksite drew many comments from stakeholders. The ACTU submitted:

The ACTU and our affiliates' primary concerns with the FSC ... is that it ... continues to provide accreditation to builders who fail to meet satisfactory performance... the ACTU is not aware of any FSC accreditation that has been withdrawn from a company that has killed, maimed or psychologically injured a worker.⁷⁵

MBA submitted:

The requirements as expressed under the [Company Compliance] Policy are appropriate and should be maintained, as they do not interfere with relevant powers of the State/Territory WHS Regulators.⁷⁶

CCF SA submitted:

The State-based Safe Work Regulator shall investigate the incident as well {sic} the entity as per Scheme and legislative requirements. FSC should step back during this time in order that

⁷² Office of the Federal Safety Commissioner, Supplementary Submission to the Review of the Federal Safety Commissioner, p 5.

⁷³ Australian Workers' Union Submission to the Review of the Federal Safety Commissioner, p 3.

⁷⁴ Construction Forestry Mining and Energy Union Submission, p 6.

⁷⁵ Australian Council of Trade Unions Submission, p 1.

⁷⁶ Master Builders Australia Submission, p 9.

*all energy and effort is directed to support the investigations. FSC's actions arising should be guided by the outcomes of the investigation or prosecution.*⁷⁷

Discussion and Recommendations

In its supplementary submission to the Review and in response to criticisms of its compliance approach by some stakeholders, the FSC reinforced that '*...there have been over 300 instances in which the FSC has taken compliance action against accredited companies in the last 5 years*'.⁷⁸

I note that over half of the reported compliance actions over the last five years sit within the 'Administrative Compliance Action' category. I also note that over the last five years there have been two suspensions of accreditation and no revocations. I have been advised that on at least three occasions, an accredited entity has withdrawn from the Scheme following a 'show cause' notice from the FSC asking why their accreditation should not be suspended.

I have not found a reference within the FSC legislative framework to the use of 'administrative compliance action'. I acknowledge that the operational approach to 'minor non-compliance' supports the collaboration and partnership development favoured by the FSC to encourage WHS improvements.

However, the assessment of what is considered 'minor' is subjective and some might argue that the examples of minor non-conformance provided in the Company Compliance Policy are in fact major; for example, 'not making reasonable efforts to facilitate an audit' which is a core component of the Scheme's requirements.

Many of the administrative compliance actions it appears to me are in effect conditions being imposed on accredited entities, for example, a requirement to develop an action plan or be subject to evidence reviews. I think the framing of these conditions as 'administrative compliance actions' for 'minor' non-conformances has the potential to lessen their deterrent impact and also feeds into the perception that the FSC is reluctant to use its legislative enforcement powers. It also removes the requirement for the FSC to provide a notice in writing of the imposition of a condition and the accredited entity's review rights under Division 9 of the Rules.

As the AWU notes there is a tension between the FSC as the accreditor and the FSC as the regulator of the Scheme. I agree it is appropriate that collaboration and partnership is strong during the pre-accreditation process but once accreditation is achieved, the expectation should be that accredited entities will continue to meet the Scheme requirements, particularly if they have been in the Scheme for a significant number of years. It is a reasonable expectation that the standards established to gain accreditation (with the associated investment of time and resources by both the FSC and the accredited entity) will be sustained and the Scheme requirements will be met and if they are not, that there will be consequences. Compliance action where the requirements are not being met is only fair for those accredited entities which are facilitating audits, reporting on time, maintaining and implementing their WHSMS.

Currently, a significant outcome of the assessment of non-conformance with the Scheme is the risk rating (low, medium or high risk) being applied through the FSC's risk framework. The risk rating is

⁷⁷ Civil Contractors Federation South Australia Submission to the Review of the Federal Safety Commissioner, p 9.

⁷⁸ Office of the Federal Safety Commissioner Supplementary Submission, p 5.

known only to the relevant accredited entity and to the FSC. I posed the question whether this risk rating should be made public and there was a mixed response to that proposal – some accredited entities agreed it should be public and that a low rating could be used as a ‘badge of honour’ as originally contemplated by the Royal Commissioner. Others considered the current approach to maintaining the confidentiality of the risk ratings was appropriate.

The FSC noted:

*The FSC currently has no explicit powers to publicise non-compliance by an accredited company with their conditions of accreditation ... publicising non-compliance and subsequent compliance action taken by the FSC, particularly action to suspend or revoke an accreditation ... would have significant deterrent value amongst other accredited companies.*⁷⁹

Whilst in the short-term, the risk framework remains useful as an internal operational tool for the FSC to prioritise audit frequency, I have given a lot of thought to a compliance and enforcement framework that considers all non-compliance with Scheme requirements to be significant while at the same time, noting some non-compliance will be more serious than others in terms of its immediate impact on safety.

I note that MBA stated it ‘...would not oppose the concept that accredited entities could undergo a comparative assessment of their safety record and capacity...’ but within certain parameters, including that any ‘assessment measure’ ‘contains no subjective element and is applied objectively and consistently’.⁸⁰ I agree that objectivity and consistency is critical within any contemplation of benchmarking.

I have considered the issue of benchmarking within the context of the broader issues around the FSC’s approach to compliance and enforcement and am recommending that in consultation with accredited entities, business and employer representatives and associations and unions, a compliance and enforcement framework is developed which includes a demerit points system which will support the objective and consistent assessment of non-compliance and the use of the FSC’s legislative sanctions.

Several stakeholders suggested a demerit points system, including some accredited entities. I am aware that other jurisdictions have elements of ‘WHS scoring’ within their procurement frameworks and, for example, the ACT Secure Jobs Codes has an infringement points system which may offer some guidance. Within this context, one participant also suggested there is scope for the assignment of ‘positive points’ being awarded for innovation and continuous improvement.

I am also recommending that the FSC is given the power to publicise non-compliance by accredited entities with their conditions of accreditation. I note in this context that the Royal Commissioner considered ‘the qualification held by each contractor should be a matter of public record’.⁸¹

It will be important that the compliance and enforcement framework is clear about what sanctions will be applied when there is a fatality on an accredited entity’s worksite and where there has been a successful prosecution of an accredited entity. I appreciate that investigations and subsequent

⁷⁹ Office of the Federal Safety Commissioner Submission, p 20.

⁸⁰ Master Builders Australia Submission, pp 12-13.

⁸¹

prosecutions take time. But if following a fatality, an immediate audit highlights breaches of Scheme conditions, even if there is no causation to the fatality, I suggest strong action should be taken by the FSC.

To understand how the OFSC responds to serious injuries and near-misses on accredited entities' sites, I looked at the specifics of a small sample of incidents in the last few years.

In one case, it appears a high-profile electrical burns incident on Melbourne's train network, and subsequent prosecution, was not reported to the FSC, making it challenging for the FSC to impose consequences on the accredited entity.

In a serious near-miss incident resulting in no injuries, an accredited entity was not required to report the incident to the FSC because it occurred on a non-Scheme project.

In another two cases, serious incidents were reported to the OFSC resulting in audits targeting specific hazards relevant to the event (e.g. work at heights), one of which was at the site of the incident. In these two cases, I am advised the audit identified no significant problems in the management systems relevant to the incident.

In considering the FSC's knowledge of and response to WHS incidents, the information flow from accredited entities on serious injuries and dangerous occurrences can be inconsistent and incomplete. Complicated reporting requirements combined with accredited entities sometimes failing to report as required has resulted in a patchwork of information on an entity's WHS record. This makes compliance and enforcement of accreditation requirements difficult, particularly consideration of an applicant's record in relation to workplace safety (section 8(3)(c) of the Rules).

I note concerns that any refocus of the FSC on its compliance and enforcement framework may undermine its capacity to collaborate with accredited entities to gain compliance. However, the responsive regulatory pyramid which is used by most regulators, and which I recommend should be included in the new framework, provides for the use of information provision, support and education at the lowest level of non-compliance with sanctions such as suspension and revocation at the top.⁸²

Recommendation 9

In consultation with accredited entities, business and employer representatives and associations and unions, develop a new compliance and enforcement framework which identifies the sanctions that will be applied dependent on the level of severity of breaches and a demerit points system for high-risk non-compliance.

Recommendation 10

In consultation with accredited entities, business and employer representatives and associations and unions, develop a positive points system which promotes innovation across the building and construction industry.

⁸²An example of the pyramid can be found at page 6 of Safe Work Australia, *National Compliance and Enforcement Policy*, accessed on 17/10/2023.

Recommendation 11

Amend the FSC Act to clarify that the power to promote the benefits of the Scheme and disseminate information about the Scheme (section 38(c)) includes the power to publicise non-compliance by accredited entities with their conditions of accreditation.

With regard to the FSC's compliance approach when there is a fatality it notes in its submission:

The OFSC is aware of calls to immediately suspend the accreditation of companies that experience a work-related fatality onsite. However, such action may not be appropriate in all cases. Suspension of accreditation potentially places an accredited company in breach of contracts it may hold with Government clients. This can have serious financial consequences for companies. While that may be appropriate in cases where a fatality is ultimately found to have occurred due to a failing of the accredited company's safety systems, it would not be appropriate in cases where the death was due to natural causes. This is why the OFSC currently investigates fatalities via its post-fatality process before making a decision about appropriate compliance action.⁸³

I consider this approach might have merit if upon a successful prosecution for a fatality (or indeed any successful prosecution) the FSC then suspended or revoked an entity's accreditation. However, the FSC submits:

A final outcome of a prosecution usually takes a number of years. There are difficult policy and practical considerations in applying a further sanction to an accredited company that has undergone the OFSC's post fatality process and is subsequently prosecuted under Commonwealth, State or Territory WHS laws. Assuming the company remains accredited, it is unlikely it will have the same safety systems and processes in place as at the time of the incident/fatality. As such, taking action against the company based on the prosecution (which focused on systems and processes no longer in place) penalises companies for something they have already changed and for which they have already been subject to penalty (under State or Territory laws).⁸⁴

Whilst I appreciate the reasons for the current approach by the FSC, I am not persuaded that it supports the policy objective of the Scheme. My initial response is that accreditation should be suspended until it is determined that the fatality is a result of natural causes. However, I know that investigations into workplace fatalities can take a long time. It is likely however, that there will be situations where a death by natural causes will be identified relatively quickly.

If there is a successful prosecution, even if it is some time since the incident, I consider there must be a consequence. There are numerous examples of situations where successful prosecutions have led to further compliance by professional and other agencies.

⁸³ Office of the Federal Safety Commissioner Submission, p 21-22.

⁸⁴ Office of the Federal Safety Commissioner Submission, p 22.

I recommend that the compliance and enforcement approach to fatalities, successful prosecutions and enforceable undertakings be considered as part of the recommended new framework including a determination of what sanctions are triggered and when.

I have been advised that in the past the FSC had a serious incident investigation process similar to its current post-fatality process. I am advised the process was never able to be consistently implemented across all accredited companies due to staffing/budgetary limits.

The lack of investigation resources continues to be an issue.

I note the Royal Commissioner considered the need for increased inspectorate activities on construction sites and recommended *'The Commonwealth consider the introduction of a system of tied grants whereby additional funding is made available to the States and Territories on condition that the funding is applied so as to provide additional occupational health and safety inspectors in the building and construction industry'*.⁸⁵

I revisited that suggestion but instead of inspectors, I am recommending that additional resources be directed towards investigators.

There have been numerous coroners' reports and inquiries over the years which have identified the lack of investigative skills, particularly in the first few weeks following a fatality as being critical to poor investigation outcomes and lengthy timeframes before prosecution decisions are made.

The first weeks following a fatality are critical to the collection of evidence to support regulators' compliance action where appropriate.

I am recommending that Commissioner Cole's recommendation about tied grants is revisited in the context of creating an investigation taskforce which would be activated when there is a fatality on a construction worksite. I consider this would help address issues identified by the FSC and others which act as a blockage to leveraging the procurement tool for maximum deterrent impact. I acknowledge that the concept of an investigation taskforce would need the co-operation of the states and territories and perhaps other agencies. Due to these complexities, and because this idea sits outside the operation of the Scheme, I am making this a medium-term recommendation.

Recommendation 12

In consultation with accredited entities, business and employer representatives and associations and unions, develop a compliance and enforcement framework which will be triggered where there is a fatality on an accredited entity's worksite and where an accredited entity has been successfully prosecuted or has entered into an enforceable undertaking.

⁸⁵ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 83, February 2003.

Recommendation 13

Establish an investigation taskforce focused on investigating fatalities and serious incidents on building and construction worksites linked to a system of grants whereby CW funding is made available to State and Territory WHS regulators on condition that additional WHS investigators are committed to the investigation taskforce.

Current Arrangements

Agency compliance

Primary responsibility for compliance with Scheme requirements rests with the CW.

Section 43(4) of the FSC Act includes the following provisions in relation to the funding of building work by the CW:

The Commonwealth or a corporate Commonwealth entity must not fund building work unless:

- a) contracts for the building work will be entered into with builders who are accredited persons; and*
- b) at the time of the funding, the Commonwealth or corporate Commonwealth entity takes appropriate steps to ensure that builders will be accredited persons when they carry out the building work.*

The FSC's Agency Compliance Policy identifies how CW funding entities are to comply with the FSC Act's requirements including incorporating information about the Scheme's requirements into funding program guidelines and contracts, including relevant model clauses which have been developed by the FSC and management of funding recipients.⁸⁶

Stakeholder Responses

Concerns were raised by stakeholders that the Scheme is undermined by compliance failures by CW, state and territory funding entities, particularly in regional and remote areas.

However, a common response from those CW departments which are managing the distribution of funding for building projects in remote and regional parts of Australia is that compliance with the Scheme requirements can be difficult due to the lack of available accredited entities.⁸⁷

Several stakeholders asked who checks if state and territory agencies in particular are complying with the Scheme requirements, passed on to them through contractual obligations with the CW.

The FSC highlighted:

There is no compliance provision under which the FSC could sanction a Commonwealth agency that fails to engage an accredited company to undertake building work. Further, the

⁸⁶ Office of the Federal Safety Commissioner, *WHS Accreditation Scheme Agency Compliance Policy*, p 5

⁸⁷ See page 48 for further discussion of this issue.

FSC Act specifically preserves the validity of any contract entered into in breach of the obligations under subsection 43(4).⁸⁸

It confirmed:

To address non-compliance at its roots, the OFSC has focused its efforts on the development of a range of resources ... underpinned by the OFSC's Model Client Framework ... the OFSC's Model Clauses have been developed to assist agencies to meet their legislative obligations by providing specific wording for their procurement processes that are designed to facilitate Scheme compliance.⁸⁹

In the event of non-compliance by the CW, the AMWU suggests:

Where there is a failure by the Commonwealth, advice of such failings in the first instance should be tabled at the next relevant Senate Estimates hearing. Should this failure be repeated then that part of the Commonwealth should lose the ability to directly (their emphasis) procure and manage building and construction work.⁹⁰

Discussion and recommendations

I was advised that it is difficult for the FSC to become aware of non-compliance particularly in the context of those projects which receive indirect CW funding. Typically, the FSC becomes aware of breaches through third parties or media reports.

Where the CW is indirectly funding projects such as through National Partnership Agreements (NPA) with states and territories, I was advised that, in the NPA on Land Transport Infrastructure Projects for example, the agreement includes confirmation that states and territories have agreed to ensure principal contractors on projects receiving sufficient CW funding will be accredited. In this agreement, this obligation is further confirmed through Project Proposal Reports which are sent by jurisdictions to the relevant CW department outlining how the jurisdiction will meet their obligations including Scheme requirements.

Given the importance of agency compliance to the success of the Scheme, and the expectation that non-compliance should have consequences, I am recommending as suggested in the FSC's submission the establishment of a framework that requires funding agencies to report annually to the FSC on compliance with legislated Scheme requirements and the ability for the FSC to highlight agency non-compliance.

Recommendation 14

Establish a framework that requires funding agencies to report annually to the FSC on compliance with the Scheme requirements.

Recommendation 15

Provide the FSC with the ability to publicly highlight agency non-compliance.

⁸⁸ Office of the Federal Safety Commissioner Submission, p 23.

⁸⁹ Office of the Federal Safety Commissioner Submission, p 23.

⁹⁰ Australian Manufacturing Workers' Union Submission, p 9.

Chapter 6: The Scheme – Scope and Requirements

Chapter 6 examines the scope and requirements of the Scheme, including the financial thresholds, reporting requirements and audit requirements to gain and maintain accreditation. It provides stakeholder views and a discussion of the issues raised with recommendations.

6.1 Financial Thresholds

Royal Commission into the Building and Construction Industry (2003)

In his final report, Commissioner Cole recommended:

A scheme be implemented to apply on all projects where the contract value of the works exceeds \$3 million, where the Commonwealth is the client or in relation to which the Commonwealth has provided or contributed funds or other assistance...⁹¹

The current threshold amounts were recommended in the 2014 Review of the FSC.⁹²

Current Arrangements

Rule 26 identifies building work that is excluded by the FSC Act including building work undertaken by a subcontractor and building work valued below the thresholds for application of the Scheme. Building work is defined at section 6 of the FSC Act.

The current thresholds are:

- for building work funded directly by the CW - \$4 million project value or more;
- for building work funded indirectly by the CW- \$6 million project value or more when CW funding represents at least 50% of the total, or if the CW contribution is over \$10 million regardless of what proportion this represents.⁹³

Stakeholder Responses

Many stakeholders considered that the financial thresholds should be increased, with most citing increased costs of materials, transport and other building work costs.

CCF SA submitted:

Thresholds should be increased given cost escalation over time and since the commencement of the scheme, current thresholds appear too low ...⁹⁴

CW funding entities operating in remote and regional areas highlighted the challenges of finding local accredited entities, which often resulted in increased project costs. Most CW funding entities supported an increase to the financial thresholds. Parks Australia noted:

⁹¹ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 84, February 2003.

⁹² Office of the Federal Safety Commissioner, Department of Employment, *A Review to Modernise the Office of the Federal Safety Commissioner and the Australian Government Building and Construction OHS Accreditation Scheme*, June 2014, pp 18-19.

⁹³ *Federal Safety Commissioner (Accreditation Scheme) Rules 2023*, Rule 26.

⁹⁴ Civil Contractors Federation South Australia Submission, p 9.

*In some instances, this (Scheme requirements) has complicated Parks Australia's ability to attract and engage suitable contractors for work in remote locations, by precluding participation by SMEs/local contractors capable of performing the work ... this has resulted in failed procurement processes because of the shallow pool of tenderers in remote locations.*⁹⁵

Other stakeholders considered there should be no increase and/or no financial thresholds at all. MBA recommended no change but suggested an indexation mechanism could be considered for future changes.⁹⁶ Civil Contractors Federation Queensland (CCF QLD) suggested *'thresholds should be removed. Good safety practices should not be determined by project value'*.⁹⁷

The AMWU did not support *'...the use of artificial thresholds. We support a principle that the Commonwealth Government should use its purchasing power to deliver safer workplaces'*.⁹⁸

A number of other suggestions were made by participants in face-to-face meetings, including:

excluding transport charges, offsite fabrication and/or remote workforce accommodation and related matters from the determination of the project cost;

an indexation mechanism tied to an industry specific measure to ensure the thresholds automatically keep pace with the changing price of building work; and

perhaps look at different thresholds and different approaches depending on whether it's a small or big business.

The FSC noted that *'increasing the financial thresholds would likely see many smaller companies exit the Scheme...'*⁹⁹

Discussion and Recommendations

When considering the feedback on the financial thresholds I found myself revisiting Commissioner Cole's view that every other consideration, including cost, should be subordinate to the policy objective of improved safety. I note also that the FSC highlighted in its submission that *'having fewer companies accredited under the Scheme runs counter to the objective of the FSC Act...'*¹⁰⁰

I am persuaded by those who suggest that the onus to keep people safe should apply regardless of project value. I appreciate the impact lower financial thresholds have on bringing smaller businesses into the Scheme. Many accredited entities emphasised that the financial thresholds do not consider risk profiles and that *'just because the project is valued lower doesn't mean the risk is lower'*. I am persuaded by those entities who were concerned that having put in the commitment and resources to gain accreditation, raising the thresholds would allow other entities who had not made that commitment to tender against them. I am therefore recommending that the financial thresholds remain at their current levels.

⁹⁵ Parks Australia, Submission to the Review of the Federal Safety Commissioner, p 1.

⁹⁶ Master Builders Australia Submission, p 10.

⁹⁷ Civil Contractors Federation Queensland, Submission to the Review of the Federal Safety Commissioner, p 6.

⁹⁸ Australian Manufacturing Workers Union Submission, p 9.

⁹⁹ Office of the Federal Safety Commissioner Submission, p 25.

¹⁰⁰ Office of the Federal Safety Commissioner Submission, p 26.

Rather than looking at ways to keep building and construction entities out of the Scheme, I consider that the FSC should place greater emphasis on supporting small business particularly in regional and remote areas to join the Scheme.

To encourage small businesses to join the Scheme, I recommend the FSC establish a small business/remote and regional support team which will work in partnership with CW funding entities such as Parks Australia and the National Housing Finance and Investment Corporation and small businesses to develop a framework that provides additional support and resources where access to accredited entities is identified as a problem. This team could in the first instance explore issues raised by agencies in this Review such as whether pre-accreditation processes can be fast-tracked to take into account specific projects, without lowering the bar on required WHS safety standards.

Recommendation 16

Maintain the financial thresholds triggering the requirement for Scheme accreditation at their current levels.

Recommendation 17

Establish a small business/remote and regional support team which will work in partnership with relevant Commonwealth agencies and small businesses to develop a framework that provides additional support and resources where access to accredited entities is identified as a problem.

6.2 Audit Requirements

Royal Commission into the Building and Construction Industry (2003)

Commissioner Cole noted in his final report:

There is a good deal of evidence that the real effect of risk management initiatives in the building and construction industry has often been to produce documents describing safety management systems and safety plans rather than actually achieving any real change ... I therefore propose to include testing against performance, as well as against paper systems, in my recommendations.¹⁰¹

He suggested:

...A contractor's opportunity to tender for any Commonwealth project should depend on the contractor attaining and maintaining its qualification. The tests and standards that are applied should be practical and rigorous...Once qualified, and a tender for a Commonwealth project is accepted, a contractor should continue to be audited throughout the project, both as to the adequacy of the contractor's safety management system for the project, and the contractor's actual performance during the project.¹⁰²

He recommended:

¹⁰¹ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 75, February 2003.

¹⁰² Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 76, February 2003.

The audits are to be external to both the Commissioner for Health and Safety and the contractor...The audits must be more than an audit of paper systems. There must be a significant element of effective on-site random physical inspections of the existence, application and effectiveness of controls in place to guard against the selected range of identifiable hazards.¹⁰³

Current Arrangements

Building and construction entities wishing to attain or maintain Scheme accreditation are required to undergo a range of audits. Audits are undertaken by FSOs (appointed under section 68 of the FSC Act). FSOs are engaged by the FSC to assess an entity's documented systems and on-site implementation of those systems against the Scheme's audit criteria.¹⁰⁴ Audits are almost always held at a project site where the entity is the principal contractor.

Pre-accreditation audits are undertaken against a sample of the audit criteria from the FSC Audit Criteria Guidelines determined by the OFSC to be most relevant to the entity's hazard profile. An applicant will typically undergo a desktop review of its WHS systems with an FSO to determine the extent of compliance with the audit criteria ahead of an on-site inspection where both the documentation and its implementation is assessed.

Post-accreditation audits are undertaken to determine the ongoing compliance of the accredited entity with the audit criteria. The frequency of audits is determined by the FSC's risk framework which seeks to target the FSC's resources towards the entities at highest risk of non-compliance.

Other audits may be undertaken following a fatality or serious incident as determined by the FSC or as part of the administrative or legislative sanctions currently applied by the FSC.

The Scheme's audit criteria are summarised below.¹⁰⁵

WHS Audit Criteria

- Legal requirement
- Hazard identification, risk assessment and control (HIRAC)
- Emergency preparedness and response
- Health surveillance and exposure monitoring
- Incident investigation and corrective action
- Health & safety management system audit

Focus Point Criteria

- Senior management commitment
- Integration of design issues into the risk management process
- Whole of project consultation
- Management of subcontractor WHS
- Project performance measurement

¹⁰³ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 79, February 2003.

¹⁰⁴ Office of the Federal Safety Commissioner, *FSC Audit Criteria Guidelines: The FSC Audit Criteria Explained*, January 2018.

¹⁰⁵ Office of the Federal Safety Commissioner, *FSC Audit Criteria Guidelines: The FSC Audit Criteria Explained*, January 2018, pp 6-95.

- Training arrangements

Hazard Audit Criteria

- Working at heights
- Telecommunication towers
- Demolition
- Asbestos
- Structural alterations/temporary support structures
- Confined space
- Excavation
- Tunnels
- Explosives
- Pressurised gas
- Chemical, fuel or refrigerant lines
- Electrical
- Contaminated/flammable atmosphere
- Tilt-up/precast concrete
- Traffic
- Mobile plant
- Artificial extremes of temperature
- Diving
- Construction work in, over or adjacent to water/liquids where risk of drowning

During an audit an FSO may issue a CAR.

The OFSC arranges the time and location of audits with relevant entities and does not conduct any random audits.

Stakeholder Responses

Significant frustrations were expressed throughout this Review by accredited entities about the conduct of audits. The common issues raised were the:

- Focus on paperwork;
- Inconsistency of FSOs; and
- Continued relevance of the audit criteria.

Comments from accredited entities which reflect majority views provided to the Review are:

Inconsistency of auditors is a problem and frustrating – one year we got no CARS and the next we got 10 – mainly about wording in documents – but we hadn't changed anything. The changes we make following a CAR are not value adding, they are not improving safety. They are just someone's opinion about wording.

We had a full day's audit last week with 45 minutes on site and the rest in the office checking wording on paperwork.

Have we really got better or just better at paperwork?

Post-accreditation audits should be risk based or task specific as driven by project activity.

So much focus on paperwork shifts the focus away from controlling the hazards on site. Audits have no effect on safety culture – they are a purely bureaucratic exercise for the contractor and the Scheme.

It's the practice in the field that's killing people.

The ACA reflected these views in its written submission:

ACA is also concerned that the auditing scheme has drifted toward an overemphasis on validating documentation rather than actual safe practices. We believe this is a consequence of the structure of the scheme that relies upon outsourced FSOs who frequently bring their own prescriptions and preferences to bear rather than a principles-based approach consistent with the FSC Audit Criteria Guidelines ... ACA believes the emphasis of an audit should be predominantly on the actual practices of the firm on the site. This is rarely the focus of an audit. Instead, the audit process drives a 'box-ticking' approach that incentivises 'good paperwork' over 'good practice'... ACA's view is that the maturity of industry's safety conduct is not materially advanced by the type of administrative audits currently practiced by the FSC.¹⁰⁶

Some suggested that consistency would be improved if FSOs were employed directly by the FSC and not engaged as consultants. It was also suggested in this context that it is inappropriate to engage WHS consultants as FSOs given the scope for potential conflicts of interest. The AMWU noted:

Whilst engaged by the FSC these same contracted Federal Safety Officers are engaged, either directly or via their employers, by the construction and building industry providing WHS professional services, we submit at a minimum this is a perceived conflict of interest.¹⁰⁷

MBA suggested '*...there is merit to considering a broader range of factors as considerations in determining relevant assessment criteria for post-accreditation audits. These factors should include time spent accredited under the Scheme*'.¹⁰⁸

Others suggested that ISO 45001:2018 and other accreditations should be considered as relevant when assessing performance under the Scheme. The AIHS suggested '*...the FSC could explore options to select a mix of hazard criteria (or to substitute certain hazard criteria in for others), especially if the implementation of that criteria at the project being audited is not applicable or limited*'.¹⁰⁹ It also noted the significant changes facing industries and the FSC:

The world of work, and our world more broadly, are becoming increasingly complex. For example:

- *Workforces are becoming more demographically, culturally diverse.*

¹⁰⁶ Australian Constructors Association Submission, pp 2-3.

¹⁰⁷ 107 Australian Manufacturing Workers' Union Submission, p 3.

¹⁰⁸ 108 Master Builders Australia Submission, p 11.

¹⁰⁹ 109 Australian Institute of Health & and Safety Submission, p 11.

- *Psychological health and psychosocial risk factors are becoming more visible/diagnosed, varied, intersecting and compounding.*
- *Our natural environment, climate, and ecosystems are facing greater strain, with weather events becoming more intense, frequent, and extreme.*
- *Technology is amplifying the flow and speed of information.*
- *Supply chains are becoming more multi-faceted, dynamic, and brittle.*

All of these megatrends mean the gap between documented work as imagined and work as performed are growing. Whilst the FSC does have internal scanning and review processes to maintain currency, we caution the agency that the rapid changes in workplaces may render the Scheme's fundamental approach redundant in the near future.¹¹⁰

Union submissions raised concerns about the lack of worker involvement in FSC audits and gaps in the audit criteria relating to worker consultation and participation.

The ETU suggested to address these gaps:

...a more holistic approach to site safety that brings everyone together more consistently and platforms workers' voices would both significantly improve outcomes for all parties while also fostering a culture that better enables continual learning and improvement.¹¹¹

The AIHS suggests:

The criteria could be amended to include a requirement for the FSC auditors to meet with health and safety representatives (HSRs) (where elected) or worker representatives of WHS Committees (if established) so that formal discussions with these personnel occur as part of the audit.¹¹²

The AWU submitted:

The Scheme's focus on documentation and processes detracts from the more practical aspects of on-the-ground safety improvements. Real-world health and safety in the construction industry ... involves a host of factors including workers being a part of the decision-making process, workers understanding their rights and how to enforce them, how work is managed on site by local management, workplace culture, training, and the physical conditions on site. The Scheme's emphasis on procedural compliance has overshadowed these critical, practical elements of workplace safety'.¹¹³

There was overwhelming support from stakeholders for a review of the audit criteria.

There was also significant support for random audits.

The AMWU submitted:

¹¹⁰ Australian Institute of Health & and Safety Submission, p 5.

¹¹¹ Electrical Trades Union Submission, p 5.

¹¹² Australian Institute of Health & and Safety Submission, p 9.

¹¹³ Australian Workers' Union Submission, p 2.

*The FSC will liaise with the company and the Federal Safety Officer to set an agreed audit date and site ... This provides companies an unprecedented opportunity to present health and safety management systems ... never implemented in the normal operation of the entity, whilst also staging a site for the audit.*¹¹⁴

The AIHS agreed, noting:

*The FSC should implement unannounced or spontaneous audits on Scheme participants. This eliminates the risk of audit sites being overly 'prepared' for Scheme audits ahead of auditors' arrival on site.*¹¹⁵

In its supplementary submission to the Review, the FSC highlighted research into the 'connection between documented safety systems and improved safety performance' and the alignment of an 'emphasis on documented safety management systems ... with the approach to safety championed by peak bodies such as the International Labour Organization (ILO) ... and that 'the system should contain the main elements of policy, organizing, planning and implementation, evaluation and action for improvement'. This marries with the safety processes required by the Scheme Audit Criteria'.¹¹⁶ It then outlines step by step this alignment with the current audit criteria.

The FSC also reinforced:

*FSC audits are not exclusively about documentation. As outlined in the FSC's Submission, audits adopt a two-step process. Step one is to confirm the documented safety system meets the Audit Criteria. Step two is to ascertain through evidence (both documents and observation of onsite activity) that the documented safety system is being followed. To this end, all FSC audits include a site safety walk during which the FSO will observe works relevant to the Audit Criteria being reviewed, speak with workers about how they are working safely and make general observations about the safe working arrangements on site... While acknowledging that some accredited companies have expressed concern regarding this approach, the FSC considers this an effective way to hold accredited companies to account for the implementation of their documented safety systems while the regulator is not onsite.*¹¹⁷

On the question of consistency, the FSC explained:

*The OFSC devotes a considerable effort to ensuring audit criteria are interpreted as consistently as possible. There are four aspects to this effort – FSO selection and training, ongoing review of draft audit reports, CAR review processes and annual audit consistency deep dives and re-training.*¹¹⁸

The FSC noted that it intends to conduct a review of the audit criteria in 2024.

Some FSOs suggested they were 'not looking at the right things' and all who participated in the Review supported modernising the audit criteria.

¹¹⁴ Australian Manufacturing Workers' Union Submission, p 3.

¹¹⁵ Australian Institute of Health & and Safety Submission, p 10.

¹¹⁶ Office of the Federal Safety Commissioner Supplementary Submission, p 2.

¹¹⁷ Office of the Federal Safety Commissioner Supplementary Submission, pp 4-5.

¹¹⁸ Office of the Federal Safety Commissioner Supplementary Submission, p 6.

FSOs who participated in the Review noted they generally had eight hours on site and so their audit was not a 'deep dive'.

Many FSOs suggested there was too much focus on paperwork and that the same things are '*rehashed over and over*'. It was proposed by several that once an entity was accredited there could be a different focus of the audits to '*high-risk work in the field*'. One FSO suggested '*flipping*' the current approach to the post-accreditation audit and '*working backwards starting with high-risk activity audits in the field and ending with checking paperwork*'.

There was substantial support for random audits and some support for joint audits with state and territory inspectors.

Feedback from government departments included that '*the results of audits are not clear to the Government client – we request that this information is made available to funding entities*'.

Discussion and Recommendations

I agree with the FSC about the importance of documented WHSMSs. This emphasis is reflected not just by the ILO but also by WHS regulators and workers' compensation agencies who audit self-insured entities against similar audit criteria. The FSC Act also reinforces that in making a decision about accreditation, the FSC must have regard to the applicant's WHSMS.

Along with most stakeholders, I support the emphasis on the WHSMS in the pre-accreditation audit. It is in the post-accreditation audits, particularly those that are undertaken on worksites managed by accredited entities which have been in the Scheme for a significant number of years, where the focus on paperwork becomes problematic. I am persuaded by the submissions from accredited entities, business representatives, unions and several FSOs that the longer the entity is in the Scheme the more the post-accreditation audits should focus on the implementation of the WHSMS in the field, particularly as it relates to high-risk work actually being undertaken at the time of the audit.

I acknowledge feedback from FSOs that if the documented system is not continuously audited, standards will drop, particularly if personnel have changed at the entity. However, if an entity is accredited, the expectation should be that its leadership will ensure that the system is maintained and updated as appropriate. This is surely critical to section 8(4)(b) of the FSC Act – '*demonstrated senior management commitment to WHS*'. If following an audit of relevant work activities, an FSO finds that the WHSMS has not kept up to the pre-accreditation standard then the consequences should be made clear within the compliance and enforcement framework I have recommended at page 44.

Recommendation 18

Focus post-accreditation audits on the practical implementation of an entity's WHSMS with particular reference to high-risk work activities being carried out on the worksite at the time of audits.

Given the importance of establishing the WHSMS prior to accreditation I consider that this is the time for significant collaboration and partnership with those entities seeking accreditation, particularly if they are small businesses operating in remote and regional areas.¹¹⁹ I consider that the current arrangement of engaging FSOs with WHSMS skills relevant to the construction industry remains a valid approach for the pre-accreditation processes.

However, I am recommending that a separate team of post-accreditation FSOs are employed directly by the FSC. I consider this approach will assist in addressing the consistency and perceived conflicts of interest issues raised by participants in this Review. I consider this split of activities will also help address the questions raised by those concerned about the dual role of the FSC as both the accreditor and the regulator of the Scheme.¹²⁰

Recommendation 19

Continue to engage FSOs as consultants to support the pre-accreditation audit processes while employing directly with the FSC a separate team of FSOs to monitor and ensure compliance with the Scheme through post-accreditation processes.

Given the consistent calls for a review of the audit criteria, that is a recommendation I am making. The issues identified by the AIHS regarding the changes facing the construction workforce are particularly relevant to this review as are the requirements of the model WHS laws.

Recommendation 20

Review the audit criteria to ensure they remain relevant to modern construction work activities, current hazards, supply chains and modern working arrangements and that they are aligned with the requirements of the model WHS Act, Regulations and Codes of Practice.

I also consider that it is timely within the context of an audit criteria review to reconsider the provision of the Rules which provides the focus points to which the FSC must have regard in determining whether to accredit an entity. Currently the focus points are:

- (a) demonstrated senior management commitment to WHS;
- (b) demonstrated effective subcontractor WHS management;
- (c) integration of safe design principles into the risk management process;
- (d) whole of project WHS consultation and communication;
- (e) whole of project WHS performance measurement; and
- (f) WHS training requirements.¹²¹

Given concerns raised about worker participation, I am recommending a new focus point is included which emphasises worker engagement and participation in the development and maintenance of a WHSMS.

¹¹⁹ This recommendation links with recommendation 17.

¹²⁰ See for example the Australian Workers' Union Submission.

¹²¹ *Federal Safety Commissioner (Accreditation Scheme) Rules 2023*, Rule 8, section 4.

Recommendation 21

Include 'demonstrated worker engagement and participation in the development and maintenance of the WHSMS' as a focus point to which the FSC must have regard in determining whether to accredit an entity.

Accredited entities confirmed during the Review that they often spent weeks preparing for audits. FSOs expressed frustration at knowing accredited entities have plenty of time before an audit to prepare the worksite. I am therefore reinforcing the original recommendation of the Royal Commission that the FSC undertake random audits of accredited entities' worksites.

Recommendation 22

Undertake random audits

I note the comments from government clients about audit information being made available to them. I consider this is a valuable proposal and may also assist with promoting funding entities' compliance.

Recommendation 23

Provide information about audit results to the relevant CW Government funding entity.

6.3 Reporting

Current Arrangements

Accredited entities must comply with reporting requirements as a condition of accreditation. The required reporting includes:

- A contract declaration when an agreement is reached on a tender or a contract is signed for a building project which meets the Scheme financial thresholds;¹²²
- Biannual reports on all current building and construction projects, containing information on:
 - whether workers' compensation premiums are paid on a state/territory basis, whether the accredited entity is self-insured, or has other workers' compensation arrangements;
 - the total number of individuals, who are directly employed by the accredited entity that have worked on building or civil construction projects (irrelevant of project value) for the accredited entity for any length of time during the reporting period. This does not include subcontractors;
 - the number of workers' compensation claims that were actioned for employees that originated from building or civil construction work performed during the reporting period;
 - the average cost per workers' compensation claims for all projects during the reporting period;
 - the number of pending or completed prosecution action(s) taken against the accredited entity by a State or Territory;
 - information on any peer or industry recognition for WHS performance; and

¹²² Office of the Federal Safety Commissioner, *FSC Online WHS Report Guide*, February 2020, pp 4 & 8.

- information on any key WHS initiatives implemented by the accredited entity during the period.¹²³
- Incident reports where the accredited entity is the head contractor categorised into:
 - fatalities on Scheme and non-Scheme projects, to be reported to the OFSC within 48 hours of the incident;
 - LTIs on Scheme and non-Scheme projects where the project value is \$4 million or more, to be reported to the OFSC within 48 hours if it is a 'notifiable incident', otherwise within three weeks; and
 - MTIs or Dangerous Occurrences on Scheme projects only, to be reported to the OFSC within 48 hours if it is a 'notifiable incident', otherwise within three weeks.¹²⁴

The OFSC submitted the following information outlining the current incident reporting requirements.¹²⁵

Table B: Current incident reporting requirements

Incident Type	Timeframe		Project Type	
	Notifiable	Non-Notifiable	Scheme	Non-Scheme
Fatality	48 hours	n/a	Y	Y
Lost Time Injury (LTI)	2 weeks	2 weeks	Y	Y
Medically Treat Injury (MTI)	2 weeks	2 weeks	Y	N
Dangerous Occurrence	2 weeks	n/a	Y	N

Stakeholder Responses

Chapter 3 presented concerns raised by stakeholders about the appropriateness of the data being collected by the FSC, particularly LTI data.

As well as the criticisms identified in Chapter 3, many stakeholders suggested the need for the FSC and the industry as a whole to shift from lag to lead safety indicators. The AMWU recommended a list of lead indicators including the numbers of HSRs elected and trained per site, number of atmospheric monitoring and health monitoring conducted and investment in WHS technology.¹²⁶ The AIHS suggested cultural surveys.¹²⁷

Many participants in the Review also raised issues relating to the complexity and duplication of reporting requirements and highlighted the many WHS agencies which required data of them. Improved sharing of information and streamlining of notifications to the FSC and other WHS regulators and agencies were common requests.

An accredited entity noted:

¹²³ Office of the Federal Safety Commissioner, *FSC Online WHS Report Guide*, February 2020, pp 16-17.

¹²⁴ Office of the Federal Safety Commissioner, *FSC Online WHS Report Guide*, February 2020, pp 4, 28 & 48. A notifiable incident is an incident that is required to be notified under the relevant WHS legislation in the jurisdiction in which the project is being undertaken.

¹²⁵ Office of the Federal Safety Commissioner Submission, p 29.

¹²⁶ Australian Manufacturing Workers' Union Submission, p 10.

¹²⁷ Australian Institute of Health & Safety Submission, p 12.

The current reporting process is onerous and administrative and especially complicated for entities who perform work beyond just FSC accredited scope, such as maintenance services and particularly when working across multiple jurisdictions.

MBA submitted:

...better information sharing could also facilitate and streamline reporting requirements, minimising duplication, when an incident occurs on an accredited site.¹²⁸

The National Heavy Vehicle Regulator highlighted the challenges:

...associated with such activities, including privacy, legal and data quality concerns. Incident reporting and information sharing between government entities can be difficult given the nature of confidentiality and privacy obligations on regulators and inconsistencies in incident reporting requirements between jurisdictions.¹²⁹

WHS regulators and SWA echoed these comments citing the confidentiality provisions of the model WHS Act.

The FSC in its submission confirmed:

there is goodwill between the FSC, the Commonwealth, State and Territory regulators to work together, where possible, to improve safety within the building and construction industry. However, under current laws, information sharing can only flow from the FSC to the WHS regulators.¹³⁰

Discussion and Recommendations

The issue of how best to measure WHS performance and what data to collect is one that WHS practitioners have grappled with for a long time.

As identified in Chapter 3, most commentators consider LTI data is not a valid and reliable measure of WHS performance.¹³¹ SWA's 2017 Research Report on measuring and reporting WHS Information identifies *'the KPIs available in immature organisations tend to focus on injury outcomes, primarily lost time injury (LTI) events'*.¹³²

I note that the FSC collects other data as well as LTI statistics. Some of this data relates to Scheme projects, some to non-Scheme projects and some to projects above a certain monetary value. Given that the intention is to improve WHS practices across the industry, I consider these differences in reporting to be confusing and a barrier to identifying the full picture of WHS performance across accredited entities' activities. I am therefore recommending that accredited entities are required to report required data across all of their activities.

¹²⁸ Master Builders Australia Submission, p 9.

¹²⁹ National Heavy Vehicle Regulator, Submission to the Review of the Federal Safety Commissioner, p 4.

¹³⁰ Office of the Federal Safety Commissioner Submission, p 31

¹³¹ See for example the discussion in SafeWork New South Wales, *Measuring and Reporting WHS Information*.

¹³² Safe Work Australia, *Measuring and Reporting on Work Health & Safety*, March 2017, p 12.

Recommendation 24

Require accredited entities to report standardised information to the FSC across all of their building and construction projects, Scheme and non-Scheme, including where they are operating as a subcontractor.

During the Review it became clear to me that accredited entities are reporting different WHS data to different WHS regulators and agencies based on different definitions and different operational and legislative requirements.

This data is then analysed by different agencies within different parameters, making comparative analyses across the industry unachievable.

I am recommending that the FSC align its reporting requirements as far as possible with the reporting requirements of WHS regulators to enable streamlining of reporting and comparative analyses.

I note that this proposed alignment is also relevant to the compliance and enforcement framework which includes a demerit points system I have recommended (Recommendation 9). I suggest the linking of demerit points to an accredited entity's receipt of infringement, improvement and prohibition notices might be an appropriate consideration. However, I note the confidentiality provisions of the various WHS laws preclude regulators sharing that information. Whether that information is linked to a demerit points system or not, I consider it is important for the purposes of ensuring compliance with Scheme requirements that the FSC is aware of notices being issued to accredited entities by WHS regulators in real time. I am therefore recommending that accredited entities are required to report to the FSC all WHS regulator notices issued across all of their building and construction projects, including where they are not operating as the head contractor.

However, I am also recommending one point of difference in reporting to the FSC in the context of lead indicators. Lead indicator reporting such as numbers of staff consulted, number of corrective actions completed, number of sites inspected and some of the other suggestions by stakeholders, coupled with a more standardised reporting of incidents across the industry could help identify improved WHS performance and the source of it amongst accredited entities.

Recommendation 25

Align FSC reporting requirements as closely as possible with WHS/OHS regulator reporting requirements.

Recommendation 26

Require accredited entities to report all notices issued by WHS/OHS regulators, all successful prosecutions and all enforceable undertakings to the OFSC across all of their building and construction projects, Scheme and non-Scheme, including where they are operating as a subcontractor, within 48 hours of the notice being received.

Recommendation 27

Require reporting of lead indicators as developed by the FSC in consultation with the Tripartite Advisory Body.

A key issue raised by business stakeholders in the Review was the ability to report once to satisfy all relevant WHS/OHS reporting requirements across all relevant jurisdictions. Linked to this are the challenges I encountered in this Review when trying to compare the Scheme data to non-Scheme building and construction work data to enable comparisons to be made. I note the difficulty in achieving like for like comparisons when so many different jurisdictions are involved.

However, I also note the work that has been done in the context of the recommendations of the Respect@Work: Sexual Harassment National Inquiry Report as they relate to collaboration around data collection. Recommendation 3 of that report states:

Recommendation 3: *Agencies that handle workplace sexual harassment matters work with the Workplace Sexual Harassment Council (Recommendation 14) to:*

- a. *collect an agreed de-identified data set relating to workplace sexual harassment enquiries, complaints, claims and settlement outcomes to contribute to a coordinated system of annual reporting on workplace sexual harassment metrics;*
- b. *establish formal arrangements for information sharing and data exchange on enquiries, complaints and claims relating to workplace sexual harassment matters.*¹³³

My understanding is that substantial progress has been made to implement this recommendation. There may be value in the FSC considering if this work offers a model to help increase collaboration around data sharing within the WHS context.

Recommendation 28

Consider the collaborative model established as a result of the Respect@Work: Sexual Harassment National Inquiry Report to support data sharing amongst WHS/OHS regulators and agencies.

¹³³ Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report (2020)*, March 2020, pp 120-122.

Chapter 7: Cost Recovery

Chapter 7 considers the question of cost recovery which is raised in the Review's Terms of Reference. It provides a summary of:

- how the Royal Commission dealt with the issue of cost recovery;
- the current approach; and
- potential models of cost recovery.

It presents stakeholders' views on the issue of cost recovery and concludes with discussion and recommendations.

Royal Commission into the Building and Construction Industry (2003)

The Royal Commission recommended:

The costs associated with an application for pre-tender occupational health and safety qualification should be borne by the applicant.

and:

The cost of the post award of tender audit of the contractor's project safety management system and of the periodic audits during the life of a project should be absorbed by the Commonwealth on Commonwealth projects.¹³⁴

Current Arrangements

At present, there are no initial or ongoing direct costs to be accredited or maintain accreditation under the Scheme. However, section 43(3) of the FSC Act allows for 'fees for applications' to be made.

The CW Government's Cost Recovery Guidelines outlines the main types of government charges; including, most relevantly in this context, cost recovery fees and cost recovery levies.¹³⁵ Cost recovery fees can be charged when a good, service or regulation (in certain circumstances) is provided directly to a specific individual or organisation.

For example, the National Heavy Vehicle Accreditation Scheme charges fees to companies depending on the relevant stream of accreditation and the number of vehicles registered.¹³⁶

Cost recovery levies can be imposed when goods and services, but primarily regulation, are provided to a group of individuals or organisations (e.g. an industry sector) rather than to a specific individual or organisation.

A relevant example outside the CW is Western Australia's Mines Safety Inspection Levy which funds the delivery of improved services for mines safety regulation. The levy amount is calculated

¹³⁴ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, pp 79-80, February 2003.

¹³⁵ Department of Finance, *Australian Government Cost Recovery Guidelines – Resource Management Guide No. 304*, Third edition, July 2014, p 51.

¹³⁶ 136 National Heavy Vehicle Regulator, 'National Heavy Vehicle Accreditation Scheme' website, accessed 8 November 2023.

by dividing the forecast cost to be recovered to fund regulatory activities by the forecast industry hours worked.¹³⁷

Stakeholder Responses

There was very little support from stakeholders for the idea of charging fees or levies from accredited entities.

The ACA expressed a widely held view:

...entities already bear a significant administrative burden in complying with the Scheme. We also consider that a cost recovery model would be practically inefficient because contractors will simply pass the cost back to the Government via the delivery agency. Should the FSC itself wish to recover its costs, it would be more efficient to charge delivery agencies directly perhaps on a project-by-project basis.¹³⁸

The AIHS noted:

Our view is that entities should not be charged ... We suspect ...the current costs of the Scheme and audit costs are a modest investment of public resources when compared with the potentially much larger individual, financial and wider public health costs associated with increased fatalities and serious incidents.¹³⁹

Others, including FSOs, suggested implementing a fee would compromise the independence of the Scheme.

CCF QLD and CCF SA expressed concern that a fee may act as a barrier against small and medium-sized businesses participating in the Scheme. Within this context, the FSC submitted:

Accredited companies vary greatly in size, annual turnover and total number of hours worked. As such, they have differing capacity to pay a charge ...Consideration should be given to whether any charge is should be scaled or reduced in certain circumstances. Noting the focus on both small and Indigenous businesses in the Government's Buy Australian Plan, these may be an appropriate starting point for consideration.¹⁴⁰

The ETU supported cost recovery following the initial accreditation:

While it may be counterproductive to impose costs for an initial accreditation, surely administering charges for failed applications and for the cost of regulatory action once accredited would be a necessary change to maintain the sustainability of the FSC and Scheme as well as provide an additional ongoing incentive for entities to pursue best practice safety procedures proactively. Any financial burden ... would also be mediated ... through improvements in workers compensation premium rates.¹⁴¹

¹³⁷ Western Australia Department of Mines, Industry Regulation and Safety, 'Mines Safety Inspection Levy' website, accessed 8 November 2023.

¹³⁸ Australian Constructors Association Submission, p 3.

¹³⁹ Australian Institute of Health & Safety Submission, pp 13-14.

¹⁴⁰ Office of the Federal Safety Commissioner Submission, p 35.

¹⁴¹ Electrical Trades Union Submission, p 7.

The FSC suggested legislative change would be required if fees were contemplated in certain circumstances:

The [legislative] provision contemplates a 'fee for service' arrangement ... this means the fee would need to relate to the cost of undertaking the work associated with assessing the application for accreditation. It could not extend to subsidising the cost of post-accreditation audits or other OFSC activities.¹⁴²

Discussion and Recommendations

While there was some support for a project levy to be applied to enable the FSC to recoup costs, it was generally agreed that any fee imposed by the FSC would be included in tender prices for Government work by accredited entities. The FSC raised this point in its written submission:

Regardless of the kind of charge levied, it is unlikely companies will simply absorb the cost. One of the main reasons companies seek accreditation is to undertake work on government-funded sites. Given Government is both the client and the entity imposing the charge for accreditation, it is likely companies will pass any cost on to Government through increased tender prices for building work.¹⁴³

I am persuaded by this suggestion and am therefore recommending that no charge or fee be applied to entities seeking to gain or renew Scheme accreditation.

Recommendation 29

Maintain the current situation where the Government continues to meet FSC and Scheme costs, including for accreditation and compliance audits, with no charge to businesses.

¹⁴² Office of the Federal Safety Commissioner Submission, p 35.

¹⁴³ Office of the Federal Safety Commissioner Submission, p 35.

Chapter 8: Expansion

Chapter 8 examines whether the safety performance of other industries which the CW Government funds warrants expansion of the Scheme. As identified in the Terms of Reference for the Review, other industries which might be considered for expansion include professional services; commercial, military and private vehicles; engineering, research and technology-based services; information technology, broadcasting and telecommunications hardware; defence and law enforcement equipment; and healthcare services.

In the first instance, this chapter considers whether the Scheme should be expanded across the building and construction industry itself. It also considers stakeholders' positions on expansion and concludes with discussion and recommendations.

Royal Commission into the Building and Construction Industry (2003)

Commissioner Cole anticipated the Scheme would include both contractors and subcontractors:

*The Commissioner for Health and Safety should in relation to each Commonwealth project determine the contractors or class thereof to which the pre-tender occupational health and safety qualification scheme should apply, provided that in relation to each project the scheme must apply to the head contractor and any subcontractors that will perform work that in the opinion of the Commissioner for Health and Safety may involve a particular or unusual risk to health and safety.*¹⁴⁴

And that it would incrementally apply across the building and construction industry:

*Once the scheme is bedded down it might be extended to smaller builders and major subcontractors and so on. The evolution of the Scheme will in turn take account of the particular hazards which the consultation process ... will identify. Thus, the scheme might be extended at an early time to subcontractors whose work exposes them to those particular hazards.*¹⁴⁵

Current Arrangements

Rule 26 prescribes building work that is exempt from Scheme coverage, including, but not limited to:

- building work carried out below the financial thresholds;
- building work for or associated with the construction, repair or restoration of a single-dwelling house;
- transportation or supply of goods, to be used in building work, directly to building sites;
- prefabrication of made-to-order components for buildings, structures, or works at locations other than the main building site or its auxiliary or holding sites; and
- building work carried out by a subcontractor.

¹⁴⁴ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 80.

¹⁴⁵ Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, p 88.

Stakeholder Responses

The AMWU submitted:

*...there is a need to recognise that it is the **principals** (accredited entities) (AMWU emphasis) which hold most control on building and construction sites, they need to be held accountable for the conduct of their contractors.¹⁴⁶*

CCF QLD supported the expansion of the Scheme to subcontractors noting *'It's still a government funded project. All stakeholders have a part to play and a scheme which sets people in camps for other reasons apart from WH&S outcomes must be avoided'*.¹⁴⁷

Whilst union submissions did not support the expansion of the FSC and the Scheme in its current form to other industries, they generally supported the principle of the CW using its purchasing power to improve safety practices more broadly across a range of sectors.

The ETU submitted:

A thorough and comprehensive procurement framework encompassing a broad range of best-practice considerations operating with a similar accreditation structure, like the Secure Australian Jobs Code proposed by the current Prime Minister in 2021, could house current requirements of the WHS Accreditation Scheme within a more holistic framework.¹⁴⁸

The AIHS suggested that expansion to other industries *'would require a Scheme that meets their needs and context'*.¹⁴⁹ MBA was concerned about any changes to the Scheme that may *'dilute or detract from its existing primary focus and function...'*.¹⁵⁰ It expressed a commonly held view amongst accredited companies and other business and industry representatives:

The industry-specific focus of the Scheme and FSC has been central to its success in improving safety outcomes for accredited companies.¹⁵¹

The CFMEU indicated:

The CFMEU does not support the continued operation of a Government agency that seeks to regulate and specifically target one industry or a part of it.¹⁵²

The FSC highlighted:

In addition to the construction industry, the CW also spends heavily in other industries with poor safety records – namely health care, administrative services, and manufacturing. If the reviewer is inclined to consider the possibility of expanding the Scheme to other industries, the OFSC is of the view that this intersect between Government procurement and safety outcomes is a valuable pathway to explore. Consideration of the principles of the Buy

¹⁴⁶ Australian Manufacturing Workers' Union Submission, p 13.

¹⁴⁷ Civil Constructors Federation Queensland Submission, p 9.

¹⁴⁸ Electrical Trades Union Submission, p 8.

¹⁴⁹ Australian Institute of Health & Safety Submission, p 15.

¹⁵⁰ Master Builders Australia Submission, p 5.

¹⁵¹ Master Builders Australia Submission, p 5.

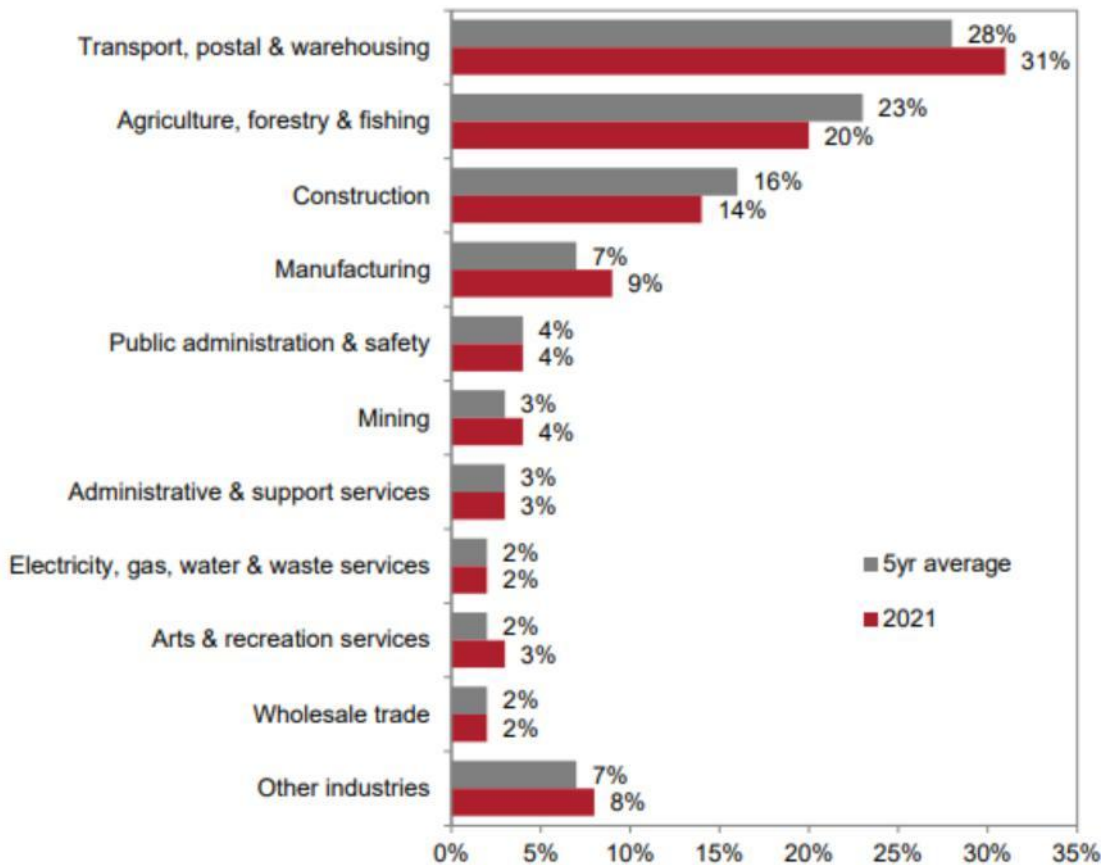
¹⁵² Construction Forestry, Mining and Energy Union Submission, p 3.

Australian Plan and Secure Australian Jobs Code would also be recommended to ensure that any expansion aligns with current Government priorities.¹⁵³

Discussion and Recommendations

To assist with considering the Term of Reference relevant to the potential expansion of the Scheme, the following data is relevant:

Graph B: Worker fatalities: proportion by select industry of employer, 2021 and 5 year average (2017 to 2021) (sorted by 5 year average proportion)¹⁵⁴



Note: industries with a 5 year average proportion of 1% or lower have been included in 'other industries'.

¹⁵³ Office of the Federal Safety Commissioner Submission, p 45.

¹⁵⁴ Safe Work Australia, *Work-related Traumatic Injury Fatalities, Australia, 2021*, p 11.

Table C: Serious claims by industry, 2020-21 (2021 preliminary data)¹⁵⁵

Serious claims by industry, 2020-21p*

Industry	Number of serious claims	Frequency rate (serious claims per million hours worked)	Incidence rate (serious claims per thousand employees)
Agriculture, forestry and fishing	4,159	11.1	20.2
Health care and social assistance	26,239	10.2	14.6
Manufacturing	14,663	9.6	17.6
Construction	16,088	8.8	16.9
Transport, postal and warehousing	9,122	8.8	15.8
Wholesale trade	5,352	8.0	14.7
Administrative and support services	5,364	7.9	12.1
Arts and recreation services	2,195	7.6	9.7
Public administration and safety	10,481	7.1	11.8
Accommodation and food services	6,890	7.0	8.2
Other services	3,648	5.5	8.9
Mining	2,806	5.2	11.2
Retail trade	8,986	5.1	7.0
Education and training	8,212	4.7	7.1
Electricity, gas, water and waste services	1,313	4.5	8.8
Rental, hiring and real estate services	1,128	3.2	5.7
Information media and telecommunications	574	1.8	3.1
Professional, scientific and technical services	2,290	1.2	2.1
Financial and insurance services	614	0.7	1.3
Total**	130,195	6.5	10.5

*preliminary data subject to revision in future years as further claims are finalised.

**for some claims information about age, sex, industry and occupation is not available. Stated totals may therefore differ from the sums of rows or columns.

¹⁵⁵ Safe Work Australia, *Work-related injury fatalities – Key WHS statistics Australia 2022*, 17 January 2023, p 15.

Table D: Top 10 Commonwealth Government Procurement categories in 2022-2023¹⁵⁶

Category	Value	Value %
Computer services	\$4,857.71M	9.9%
Building construction and support and maintenance and repair services	\$4,650.04M	9.48%
Lease and rental of property or building	\$4,017.97M	8.19%
Employment services	\$3,366.18M	6.86%
Management advisory services	\$3,082.06M	6.28%
Military rotary wing aircraft	\$2,953.73M	6.02%
Aerospace systems and components and equipment	\$2,810.99M	5.73%
Military watercraft	\$2,553.0M	5.20%
Professional engineering services	\$2,383.95M	4.86%
Temporary personnel services	\$2,341.63M	4.77%

Making decisions about expansion is clearly complex and as the FSC noted in its submission, any expansion would require legislative change and extensive stakeholder consultation. It is important to acknowledge that I have not consulted beyond certain parts of the construction and building industry. Resourcing an expanded Scheme is also clearly an issue for consideration and any expansion might require a reconsideration of the cost recovery question.

Whilst contemplating Scheme expansion I found myself repeatedly coming back to the fundamental policy objective of using CW Government funding to leverage improved WHS outcomes. It also brought me back to a consideration of current exclusions from the Scheme, financial thresholds and the Scheme's current focus on a specific part of a specific industry. Ultimately, I concluded if we agree that the policy objective is sound and we agree that the fundamental principles of the Scheme assist in obtaining improved WHS outcomes, that policy objective and those fundamental principles should be applied wherever CW funding is being distributed.

I provide more details of a recommended approach in Chapter 9 as well as commentary on how that approach might complement other Government priorities.

¹⁵⁶ AusTender website, 'What the Government Buys – Top 20 Procurement Categories 2022-2023' website.

Chapter 9: A New Approach

Chapter 9 examines the Review's Term of Reference on whether '*changes to the functions of the FSC or the requirements and implementation of the Scheme are necessary to support implementation of the Government's priorities such as the Buy Australian Plan and a Better Deal for Small Business*'.

It recommends a set of fundamental WHS principles to guide a new approach to implementing the policy objective of using CW Government funding to leverage improved WHS outcomes beyond building and construction projects, taking into account the Government's priorities including complementing a Secure Australian Jobs Code.

Current Arrangements

Buy Australian Plan

The Future Made in Australia Office has been established to support delivery of the Buy Australian Plan and actively support local industry take advantage of government purchasing opportunities. The Buy Australian Plan has the following objectives:

- maximise opportunities for Australian businesses in major infrastructure projects;
- open the door to more government work for more small and medium-sized businesses by decoding and simplifying procurement processes;
- establish a Secure Australian Jobs Code to prioritise secure work in government contracts and ensure that government purchasing power is being used to support businesses that engage in fair, equitable, ethical and sustainable practices;
- provide more opportunities for First Nations businesses with a view to maximise skills transfer to get more First Nations workers into long-term skilled work;
- level the playing field by bringing in a Fair Go Procurement Framework requiring those that gain government contracts to pay their fair share of tax;
- support industry sectors through the government's purchasing power;
- use government spending power to take action on climate change and support energy projects;
- strengthen Defence industries and capability; and
- make National Partnerships work to maximise the use of local workers and businesses.¹⁵⁷

Better Deal for Small Businesses

The Better Deal for Small Business election commitment sets out that a Labor Government would:

- consider the specific needs of small businesses in times of crisis giving the confidence and certainty to grow and plan for the future;
- ensure small businesses are paid on time to sustain growth across the economy with a mechanism to ensure payment within 30 days;
- drive a genuine collaboration with small businesses and government to reduce the time small businesses spend doing taxes;
- draw on Labor's history of working with unions, workers and industry to deliver better outcomes with settings that are simpler, more accessible, and fair; and

¹⁵⁷ Department of Finance, 'Buy Australian Plan' website, accessed 14/11/2023.

- reduce small business transaction costs at the point of payment with a clear timeline for implementing least cost routing.¹⁵⁸

Stakeholder Responses

MBA submitted it ‘would be opposed to making any substantive changes to the Scheme that would distract from its primary objective, being to work with industry and government stakeholders towards achieving the highest possible workplace health and safety standards on Australian building and construction projects’.¹⁵⁹

CCF QLD reinforced that the FSC’s primary focus should remain on WHS and not be distracted by other policy issues.¹⁶⁰

The FSC stated:

*The OFSC is aware of and committed to supporting the Government’s priorities regarding implementation of the Secure Australian Jobs Code (Code), which forms part of the Buy Australian Plan. At this stage, the Code is still under development. Accordingly, it is unclear how OFSC arrangements should be modified, if at all, to support this important work.*¹⁶¹

The ETU suggests ‘A thorough and comprehensive procurement framework encompassing a broad range of best practice considerations operating with a similar accreditation structure, like the Secure Australian Jobs Code ... could house current requirements of the WHS Accreditation Scheme within a more holistic framework’.¹⁶²

The ACTU noted:

*As submitted by the ETU, an option for recasting the scheme could be to apply it to all Commonwealth Funded Capital Works, regardless of industry. Given the Commonwealth Government has announced several major spending initiatives over the past 12 months in sectors such as manufacturing, housing, infrastructure and energy, it could become a thorough and comprehensive procurement framework encompassing a broad range of best-practice considerations, including modern slavery.*¹⁶³

Discussion and Recommendations

With regard to other CW Government policy priorities, I have been very aware throughout this Review of the work being done to strengthen the CW’s procurement framework through the initiatives identified above. I was also very aware of considering how my recommendations might support these initiatives and policy objectives.

Priorities such as the establishment of a Future Made in Australia Office, backed by laws that will lock in key elements of CW Procurement Rules (CPRs), simplification of procurement processes to support

¹⁵⁸ Richard Marles MP, ‘Labor’s Better Deal for Small Business’ website, 5 April 2022, accessed 14/11/2023.

¹⁵⁹ Master Builders Australia Submission, p 14.

¹⁶⁰ Civil Contractors Federation Queensland Submission, p 8.

¹⁶¹ Office of the Federal Safety Commissioner Submission, p 36.

¹⁶² Electrical Trades Union Submission, p 8.

¹⁶³ Australian Council of Trade Unions Submission, p 1.

small business, the establishment of a Secure Australian Jobs Code and the provision of opportunities for First Nations businesses all potentially touch on the current work of the FSC and the Scheme.

In the short-term I have recommended how the work of the FSC and the Scheme might be improved. In the medium-term, given the range of activity occurring in the CW procurement space, I am persuaded that there is a need to consider a more holistic approach to achieving the policy objective of using procurement to improve WHS more broadly. Within this context I agree with the AMWU submission which suggests ‘...the principle of the Commonwealth Government using its purchasing power to deliver safer workplaces... should be built into all Commonwealth procurement practices’.¹⁶⁴

I acknowledge that a proposal for a more holistic approach requires further extensive tripartite consultation. There may be current relevant consultation processes in place where this conversation can progress; otherwise, I recommend that it commence with the Tripartite Advisory Body recommended as part of this Review. The Tripartite Advisory Body would be supported by the taskforce (recommendation 2). Membership of the Tripartite Advisory Body will need to be extended as appropriate to cater for representatives of industry more broadly.

I note union submissions which recommended the principles which should be included in a broader CW Procurement Framework.¹⁶⁵

I see merit in identifying core ‘fundamental WHS principles’ to act as a foundation for procurement prerequisites. As a starting point, I suggest the principles could align with the model WHS Act, for example the object (section 3) and provisions around the principles applying to duties, consultation, representation and participation, incident notification, discriminatory, coercive and misleading conduct.

The ETU noted:

*The FSC has a capacity to carry out administration and enforcement functions for procurement accreditations under the Scheme. With its existing bureaucratic infrastructure, staff knowledge and experience, and relationships with many of the employers that would also fall under a Secure Australian Jobs Code, consideration could be given to how to better allocate these resources to achieve Government priorities.*¹⁶⁶

I agree there is significant corporate knowledge, commitment and skills available within the FSC that could assist in developing, administering and enforcing a broader Scheme. With the implementation of the immediate recommendations including an operational framework to support businesses and a strong compliance and enforcement framework, a substantial foundation will have been laid upon which to build a more holistic approach to achieving the CW Government’s procurement policy objective.

Recommendation 30

Task the Tripartite Advisory Body, supported by the taskforce (established per Recommendation 2), with driving the development of a holistic approach to implementing the policy objective of

¹⁶⁴ Australian Manufacturing Workers’ Union Submission, p 13.

¹⁶⁵ See in particular Australian Manufacturing Workers’ Union Submission, p 4.

¹⁶⁶ Electrical Trades Union Submission, p 8.

using Commonwealth Government funding to leverage improved safety outcomes beyond the building and construction industry.

Recommendation 31

Include a set of fundamental WHS principles into a broader Commonwealth Government procurement framework which aligns with the objects and principles of the model WHS Act.

Appendix A: Federal Safety Commissioner Review Terms of Reference

The Federal Safety Commissioner (FSC) was established in 2005 to improve the safety culture of the building and construction industry. The FSC is responsible for enhancing and monitoring safety in the industry through the development, administration and promotion of the Work Health and Safety Accreditation Scheme (the Scheme).

The Scheme uses the Australian Government's position as a major funder of building and construction work to insist on higher safety standards within the industry. To be a head contractor on a government-funded project, a building and construction entity must be accredited under the Scheme. The Scheme obliges builders to meet work health and safety requirements in addition to those required under State and Territory laws.

The development and implementation of the Australian Government's Buy Australian Plan presents a timely opportunity to review the FSC and the Scheme in light of 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. Noting that building construction and maintenance services was the 4th largest area of government procurement from 2018-19 to 2021-22, the review would consider the appropriateness of expanding the remit of the FSC and the Scheme, with particular regard to whether this could improve safety in other significant procurement areas.

Given the importance of continuing to support safety in the building and construction industry, this review will consider the impact of the FSC and the Scheme on building industry safety by adopting a tripartite approach to stakeholder consultations. This includes consultation through an advisory panel made up of stakeholders from key industry associations, unions and other Government agencies, as well as through consultation with the National Construction Industry Forum (NCIF) which is expected to be established from 1 July 2023.

The review would examine whether:

- the FSC and the Scheme have improved work health and safety practices in the building and construction industry.
- the powers and functions of the FSC, as well as the Scheme's requirements, are adequate and appropriate to drive safety improvements within the building and construction industry.
- the FSC and the Scheme sufficiently address currently understood hazards within the building and construction industry, including more recently acknowledged hazards.
- it is appropriate to charge entities seeking accreditation in accordance with the Australian Government Cost Recovery Guidelines and, if so, what impact this may have on the industry and how could such charging be levied fairly noting the varying size of accredited entities.
- changes to the functions of the FSC or the requirements and implementation of the Scheme are necessary to support implementation of the Government's priorities such as the Buy Australia Plan and a Better Deal for Small Business.

- whether the safety performance of other industries which Government funds¹⁶⁷ warrants expanding the FSC and the Scheme, taking into consideration factors such as cost, resources and existing regulation. If expansion to other industries is proposed, the review should outline how implementation should occur.

The review should report to the Minister for Workplace Relations in late 2023.

¹⁶⁷ Other significant areas of government procurement include the purchase of management and business professional services; commercial, military and private vehicles; engineering, research and technology-based services; information technology, broadcasting and telecommunications hardware; defence and law enforcement equipment; and healthcare services.

Appendix B: Submissions to the Review

Of the 24 submissions and five survey responses received, permission was granted to publish the following 19 submissions and all five survey responses.

Submissions

[Australian Constructors Association](#)

[Australian Council of Trade Unions](#)

[Australian Institute of Health & Safety](#)

[Australian Manufacturing Workers' Union](#)

[Australian Workers' Union](#)

[CC Pines](#)

[Construction, Forestry, Maritime, Mining and Energy Union](#)

[Civil Contractors Federation Queensland](#)

[Civil Contractors Federation South Australia](#)

[Department of Agriculture, Fisheries and Forestry](#)

[Electrical Trades Union](#)

[FSO Robert Mays](#)

[Master Builders Australia](#)

[National Heavy Vehicle Regulator](#)

[Office of the Federal Safety Commissioner](#)

[Parks Australia](#)

[Programmed Facility Management](#)

Supplementary submissions

[Office of the Federal Safety Commissioner – Supplementary submission](#)

[Construction, Forestry, Maritime, Mining and Energy Union – Supplementary submission](#)

Survey Responses

[Anonymous](#)

[Codesafe Solutions](#)

[East Arm Civil Pty Ltd](#)

[HSEQ Pty Ltd](#)

[Stephen Scotney](#)

Appendix C: Bibliography

Legislation

Federal Safety Commissioner Act 2022 (Cth)

Federal Safety Commissioner (Accreditation Scheme) Rules 2023 (Cth)

Occupational Health and Safety Act 2004 (Vic)

Work Health and Safety Act 2011 (ACT)

Publications

Australasian Procurement and Construction Council, *National Prequalification System for Non-residential Building (NPS) Application Form & Referee Report*, October 2019.

Australasian Procurement and Construction Council, *National Prequalification System for Non-residential Building (NPS) Guidelines*, November 2012.

Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report (2020)*, March 2020.

Austrroads, *National Prequalification System for Civil (Road and Bridge) Construction*, Edition 2.2, 15 September 2022.

Department of Finance, *Australian Government Cost Recovery Guidelines – Resource Management Guide No. 304*, Third edition, July 2014.

Department of Finance, Government of Western Australia, *Builders Prequalification Scheme*, March 2023.

Department of Treasury and Finance, Tasmanian Government, *Procurement Better Practice Guidelines (Principles and Policies)*, September 2023.

Major Projects Canberra, ACT Government, *ACT Government Prequalification Scheme for Construction Industry Contractors*, Version 39, October 2020.

New South Wales Government, *NSW Government Procurement Policy Framework*, August 2021.

New South Wales Government, *Work Health & Safety management guidelines for construction procurement*, December 2019.

Northern Territory Government, *Conditions of contract NPWC NT edition*, August 2023.

Northern Territory Government, *Conditions of tendering for NPWC NT edition*, August 2023.

Office of the Federal Safety Commissioner, Department of Employment, *A Review to Modernise the Office of the Federal Safety Commissioner and the Australian Government Building and Construction OHS Accreditation Scheme*, June 2014.

Office of the Federal Safety Commissioner, *FSC Audit Criteria Guidelines: The FSC Audit Criteria Explained*, January 2018.

Office of the Federal Safety Commissioner, Department of Employment and Workplace Relations, *Model Clauses, Applying the Work Health and Safety Accreditation Scheme*, July 2019.

Office of the Federal Safety Commissioner, *FSC Online WHS Report Guide*, February 2020.

Office of the Federal Safety Commissioner, Department of Employment and Workplace Relations, *WHS Accreditation Scheme Company Compliance Policy*.

Office of the Federal Safety Commissioner, Department of Employment and Workplace Relations, *WHS Accreditation Scheme Agency Compliance Policy*.

Queensland Office of Industrial Relations, Queensland Government, *Queensland Procurement Policy 2023*, February 2023.

Queensland Office of Industrial Relations, Queensland Government, *Best practice principles: Quality, safe workplaces*, April 2023.

Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety*, Volume Six, February 2003.

Safe Work Australia, *Measuring and Reporting on Work Health & Safety*, March 2017.

Safe Work Australia, *Model Work Health and Safety Bill*, Published by the Parliamentary Counsel's Committee, as at 1 August 2023.

Safe Work Australia, *Key Work Health and Safety Statistics Australia 2023*, 28 September 2023.

Safe Work Australia, *Work-related traumatic injury fatalities Australia 2021*, 14 November 2022.

Safe Work Australia, *National Compliance and Enforcement Policy*, 19 March 2020.

Safe Work Australia, *Work-related injury fatalities – Key WHS statistics Australia 2022*, 17 January 2023.

SafeWork New South Wales, *Measuring and Reporting WHS Information*.

Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018.

Websites

AusTender, 'What Government Buys', <<https://help.tenders.gov.au/getting-started-with-austender/information-made-easy/what-the-government-buys/>>, accessed 15/11/2023.

Department for Infrastructure and Transport, South Australia Government, 'Federal Safety Commission Work Health and Safety Accreditation Scheme', <https://www.dit.sa.gov.au/contractor_documents/the_federal_safety_commission_fsc_work_health_and_safety_accreditation_scheme>, accessed 15/11/2023.

Department of Finance, Australian Government, 'Buy Australian Plan', <<https://www.finance.gov.au/business/buyaustralianplan>>, accessed 15/11/2023.

Department of Treasury and Finance, Victorian Government, 'Occupational health and safety (OHS) management criteria for suppliers of Works', <<https://www.dtf.vic.gov.au/ministerial-directions-and-instructions-public-construction-procurement/mandatory-evaluation-criteria-occupational-health-and-safety-management-attachment-1-instruction-37>>, accessed 15/11/2023.

Department of Treasury and Finance, Victorian Government, 'Evaluation criteria (Direction 3.7)', <<https://www.dtf.vic.gov.au/ministerial-directions-and-instructions-public-construction-procurement/evaluation-criteria-direction-and-instruction-37>>, accessed 15/11/2023.

National Heavy Vehicle Regulator, 'National Heavy Vehicle Accreditation Scheme', <<https://www.nhvr.gov.au/safety-accreditation-compliance/national-heavy-vehicle-accreditation-scheme>>, accessed 15/11/2023.

Richard Marles MP, 'Labor's Better Deal for Small Business', <<https://richardmarles.com.au/news/labors-better-deal-for-small-business-2022-04-05>>, accessed 15/11/2023.

Department of Mines, Industry Regulation and Safety, Government of Western Australia, 'Mines safety inspection levy', <https://www.commerce.wa.gov.au/worksafe/mines-safety-inspection-levy>, accessed 15/11/2023.