



Australian Government

Department of Employment and Workplace Relations
Office of the Federal Safety Commissioner



29 September 2023

Ms Marie Boland
C/o the Department of Employment and Workplace Relations
GPO Box 9828
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Dear Ms Boland

Supplementary Submission to the Review of the Federal Safety Commissioner

I refer to your invitation at the August 2023 Review Advisory Panel meeting to provide you with supplementary submissions to the initial responses of stakeholders to your Review Discussion Paper.

Please find attached the supplementary submission of the Office of the Federal Safety Commissioner. For ease of review, the supplementary submission has been prepared to align with the sections presented in your Consultation Summary.

I continue to look forward to working with you and industry stakeholders throughout this Review.

Yours sincerely

David Denney
Federal Safety Commissioner

29 September 2023

Supplementary Submission to the Review of the Federal Safety Commissioner September 2023

Section 3 – Improving Safety in the Building and Construction Industry

The FSC's impact on industry safety

Some stakeholders have suggested there is a tenuous link between the improved safety performance of accredited companies and the work of the FSC or the Scheme. The FSC proposes that a key difference between accredited companies and their unaccredited counterparts is the need for accredited companies to maintain comprehensive documented Safety Management Systems (SMS). As outlined in this section, there is significant academic evidence connecting the use of documented SMS with improved safety outcomes.¹

The Scheme seeks to drive higher health and safety standards within the building and construction industry by ensuring accredited companies have documented SMS, that those systems are championed by senior management, and that the systems are implemented across sites consistently. This emphasis on documented SMS is one of the primary distinctions between the Scheme and jurisdictional WHS laws (which do not explicitly require a person conducting a business or undertaking to develop a documented SMS).

The value of using a documented systems-based approach to address work health and safety is well recognised and has been explored in detail by WHS academics over the past two decades.² The value of a documented safety approach in combination with robust auditing was recognised early by Australian academics, with Gallagher et al observing the effective link between audits, Occupational Health and Safety (OHS) documentation and policy consistency,³ and Else and Beaumont noting the relationship between improved documentation and auditing to conclude that:

...OHSMS [Occupational Health and Safety Management Systems] must be capable of measuring the indicators that unambiguously reflect its performance in achieving its primary objective, that is, delivering internal control and systematic management of OHS.⁴

The existence of a documented system that can be used by an accredited company to deliver systematic management to their sites is a core tenet of the Scheme auditing framework. In their comprehensive report to the National Occupational Health and Safety Commission, Gallagher et al further supported this view when they observed that:

¹ M Boland, Independent Review of the Federal Safety Commissioner - Consultation Summary August 2023, dewr.gov.au, pp8-9

² F Goerlandt, J Li and G Reniers, 'The landscape of safety management systems research: A scientometric analysis', *Journal of Safety Science and Resilience*, 2022, 3(3):189-208

³ C Gallagher, E Underhill and M Rimmer, 'Occupational safety and health management systems in Australia: barriers to success', *Policy and practice in health and safety*, 2003, 1(2):67-81

⁴ D Else and P Beaumont, 'Expect the Worst, Achieve the Best - What is the role of OHSMS in helping to secure healthy and safe workplaces?', *Occupational health & safety management systems: proceedings of the first national conference*, 2001, 33-40

*The audit of OHSMS ... promotes documentation of processes. This facilitates consistency, communication of knowledge, and the learning from past mistakes through formal acknowledgment and control of hazards.*⁵

Australian research continues to identify the value of well documented safety systems, with an increased focus on the importance of management commitment.⁶ This aligns with the approach of the Scheme, which requires senior management to set the safety tone of organisations through active involvement in Hazard Identification Risk Assessment and Control (HIRAC) processes, regular review of safety performance against defined objectives, and regular engagement with workers onsite about safety issues.⁷

This connection between documented safety systems and improved safety performance is also recognised internationally. Researchers from The Hong Kong Polytechnic University's Department of Building and Real Estate have completed numerous studies evaluating the effectiveness of Safety Management Systems (SMS) in construction. Yiu et al link SMS with accident reduction and hazard elimination, safer working conditions, and reduced harm to workers⁸, while also supporting Australian studies through the identification that 'strong senior management commitment on Occupational Safety and Health is vital for executing SMS and present in the construction projects with outstanding safety performance'.⁹ Further, a study of WHS on twelve Norwegian construction projects by Winge et al supported the importance of robust documented systems and the commitment of senior management, concluding that the presence of an advanced safety management system was necessary for high safety performance.¹⁰

The Scheme's emphasis on documented safety management systems also aligns with the approach to safety championed by peak bodies such as the International Labour Organization (ILO).¹¹ The ILO defines an Occupational Safety and Health (OSH) management system as 'a set of interrelated or interacting elements to establish OSH policy and objectives, and to achieve those objectives', 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. The Audit Criteria requires:

- documented systems to manage onsite safety and high risk construction hazards which are developed in consultation with workers (akin to the ILO's policy step),

⁵ C Gallagher, E Underhill and M Rimmer, 'Occupational Health and Safety Management Systems: A Review of their Effectiveness in Securing Healthy and Safe Workplaces', report to the National Occupational Health and Safety Commission, 2001

⁶ P Pirzadeh, H Lingard, A Benson and J Alderuccio, 'Measuring and managing health and safety performance on major rail infrastructure construction projects', Digital Transformation of Health and Safety in Construction, 2023, 349-358

⁷ Office of the Federal Safety Commissioner, 'FSC Audit Criteria Guidelines', fsc.gov.au, accessed September 2023

⁸ N Yiu, D Chan, M Shan and N.N. Sze 'Implementation of safety management system in managing construction projects: Benefits and obstacles', Safety Science, 2019, 117:23-32

⁹ N Yiu, D Chan, 'A taxonomic review of the application of safety management systems in construction', Journal of International Scientific Publications, 2016, 10:394-408

N Yiu, N.N. Sze and D Chan, 'Implementation of safety management systems in Hong Kong construction industry – A safety practitioner's perspective', Journal of Safety Research, 2018, 64:1-9

¹⁰ S Winge, E Albrechtsen and J Arnesen, 'A comparative analysis of safety management and safety performance in twelve construction projects', Journal of Safety Research, 2019, 71:139-152

¹¹ International Labour Organization, 'Occupational Safety and Health Management Systems', ILO website, n.d., accessed 12 September 2023

- the documented system to clearly assign responsibility for articulated safety activities to individuals who are trained or qualified (akin to the ILO's organizing step),
- the documented process to be implemented onsite (akin to the ILO's planning and implementation step),
- accredited companies to monitor and review WHS performance at the project level, to undertake routine audits of site safety and investigate safety incidents that occur to determine whether controls in place are effective (akin to the ILO's evaluation step), and
- to continually review and improve safety approaches through a HIRAC methodology (akin to the ILO's action for improvement step).¹²

The ILO recognises that the increasing complexity and fast changing nature of the world of work called for a systems' approach to managing and maintaining a safe and healthy working environment. It further notes that OSH management systems '...have demonstrated their key role to successfully improve the implementation of OSH in the workplace by ensuring integration into business planning and development processes'.¹³

Fatalities on accredited companies' worksites

Some stakeholders have noted that the 2023 fatalities data for accredited companies indicates that 43 per cent of the building industry's total fatalities for the period 1 January 2023 to 5 July 2023 occurred on worksites of accredited companies.¹⁴ While this data is accurate, the FSC suggests that drawing conclusions from a narrow time period can be misleading. As noted in the FSC's submission,¹⁵ given the multifaceted nature of safety performance, measuring the effectiveness of the OFSC and the Scheme should be done as a trend over time rather than over-emphasising point-in-time data. Looking at the fatality frequency rate for accredited companies as a trend over time, it is clear that accredited companies have significantly reduced the fatality rate on their worksites between 2012 and 2022.¹⁶ Data to calculate the fatality rate for accredited companies for the first half of 2023 is not yet available, however it can be provided to the Review before its reporting date.

A further comparison between the fatality rate of accredited companies and all companies operating in the building and construction industry is provided in **Graph 1** below.¹⁷ Noting that accredited companies are also part of the whole of industry data set, the data supports that Scheme accredited companies are less likely to have a fatality on their worksites.

¹² Office of the Federal Safety Commissioner, [FSC Audit Criteria Guidelines](https://www.fsc.gov.au), fsc.gov.au, accessed September 2023

¹³ International Labour Organization, [Occupational Safety and Health Management Systems](https://www.ilo.org), ILO website, n.d., accessed 12 September 2023

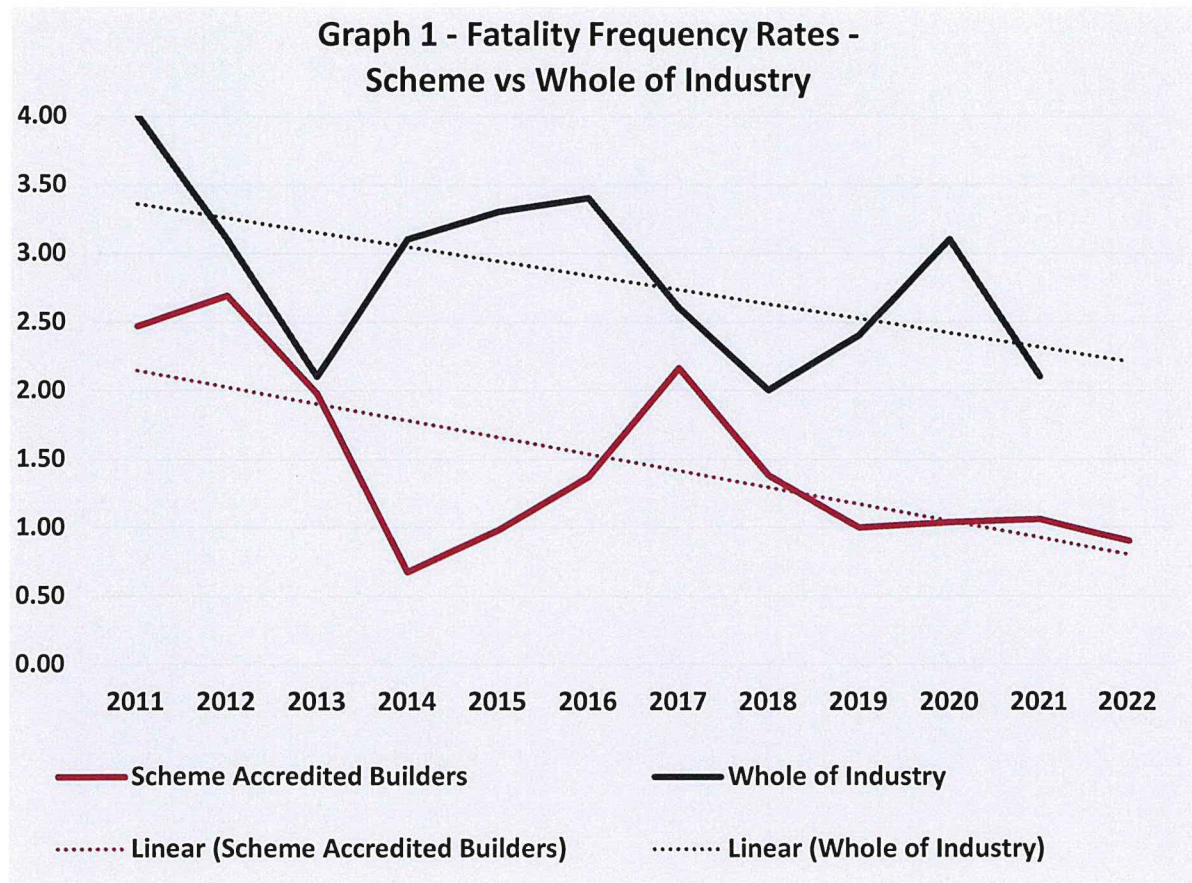
¹⁴ Australian Manufacturing Workers' Union, [Submission to the Review of the Federal Safety Commissioner](https://www.dewr.gov.au), dewr.gov.au, p2; and CFMEU Construction, [Submission to the Independent Review of the Federal Safety Commissioner](https://www.dewr.gov.au), dewr.gov.au, p4.

¹⁵ Office of the Federal Safety Commissioner, [Submission to the Review of the Federal Safety Commissioner](https://www.dewr.gov.au), dewr.gov.au, p5

¹⁶ Office of the Federal Safety Commissioner, [Submission to the Review of the Federal Safety Commissioner](https://www.dewr.gov.au), dewr.gov.au, p7

¹⁷ Safe Work Australia, [Construction \(Interactive Data Dashboard\)](https://www.swa.gov.au), SWA website, accessed September 2023

Fatality Frequency Rates are calculated per 100 million hours. All Whole of Industry data is obtained from Safe Work Australia.



Comparing accredited companies to the construction industry as a whole

Some stakeholders have expressed concern regarding the comparison of safety data between accredited companies and the construction industry as a whole given the differing size profile of the companies in each group.¹⁸

The FSC considers the comparison valid as accredited companies report safety incidents for subcontractors on their sites to the OFSC, not just those incidents involving employees of accredited companies.¹⁹ As such, the data included in the Independent Review of the Federal Safety Commissioner Discussion Paper and the FSC’s Submission shows the safety performance of a cross-section of the industry. This makes it directly comparable to the whole of industry data.

FSC audits focus too much on paperwork

The Consultation Summary observes that many stakeholders consider FSC audits are too focused on paperwork to the exclusion of onsite safety.²⁰

FSC audits are not exclusively about documentation. As outlined in the FSC’s Submission,²¹ 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 Federal Safety Officer (FSO) will observe works relevant to the

¹⁸ Australian Constructors Association, Submission to the Review of the Federal Safety Commissioner, dewr.gov.au, p1; and Australian Workers’ Union, Submission to the Review of the Federal Safety Commissioner, dewr.gov.au, p2.

¹⁹ Office of the Federal Safety Commissioner, Submission to the Review of the Federal Safety Commissioner, dewr.gov.au, p29

²⁰ M Boland, Independent Review of the Federal Safety Commissioner - Consultation Summary August 2023, dewr.gov.au, pp10-11

²¹ Office of the Federal Safety Commissioner, Submission to the Review of the Federal Safety Commissioner, dewr.gov.au, p11

Audit Criteria being reviewed, speak with workers about how they are working safely and make general observations about the safe working arrangements on site.

In fact, by looking at documentary evidence, and not just onsite activities at the time of an audit, the FSC extends its view of an accredited company's compliance with its documented safety systems and overall approach to safety. By reviewing documented evidence, the FSC is able to inspect how companies have approached high risk work that was completed before the day of the audit. While acknowledging that some accredited companies have expressed concern regarding this approach,²² 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.

Section 4 – Federal Safety Commissioner – Functions and Powers

Use of FSC compliance powers

The Consultation Summary states that, 'It was noted by unions that the collaborative approach [of the FSC] has resulted in the FSC not using its compliance and enforcement powers to suspend, place conditions on, or revoke the accreditation of poor performers in the Scheme'.²³ This is not accurate.

A summary of the compliance and enforcement actions taken by the FSC from 2018 to 2023 was provided in the Discussion Paper.²⁴ This summary clearly shows that there have been over 300 instances in which the FSC has taken compliance action against accredited companies in the last 5 years.

Compliance actions are taken in line with the OFSC's Company Compliance Policy. The compliance policy is a public document that provides transparent guidance to companies and stakeholders on when the OFSC will take action.²⁵ As is noted by the Company Compliance Policy, 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.

The OFSC has not historically publicised non-compliance with Scheme requirements as the *Federal Safety Commissioner Act 2022* grants the FSC no powers to this effect.²⁶ This is highlighted in greater detail in the FSC's Submission, along with suggestions for reform.²⁷

Section 5 – The Scheme – Scope and Requirements

Consistency of FSOs

The Consultation Summary notes that, 'Accredited entities participating in the Review, irrespective of business size or location, consistently expressed frustrations about the post-accreditation audits. These frustrations related primarily to the consistency of auditors...'.²⁸

²² M Boland, [Independent Review of the Federal Safety Commissioner - Consultation Summary August 2023](#), dewr.gov.au, p10

²³ M Boland, [Independent Review of the Federal Safety Commissioner - Consultation Summary August 2023](#), dewr.gov.au, p15

²⁴ M Boland, [Independent Review of the Federal Safety Commissioner - Discussion Paper 30 June 2023](#), dewr.gov.au, p10

²⁵ Office of the Federal Safety Commissioner, [Company Compliance Policy](#), fsc.gov.au, accessed September 2023

²⁶ [Federal Safety Commissioner Act 2022](#)

²⁷ Office of the Federal Safety Commissioner, [Submission to the Review of the Federal Safety Commissioner](#), dewr.gov.au, p20

²⁸ M Boland, [Independent Review of the Federal Safety Commissioner – Discussion Paper 30 June 2023](#), dewr.gov.au, p19.

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.

FSOs are appointed by the FSC for their detailed knowledge of construction industry safety and their experience as auditors. All FSOs are required to hold professional auditing certification to at least the ‘lead auditor’ level. This ensures they have the skills to audit safety systems appropriately and consistently. New FSOs are required to undergo induction training on interpreting the criteria and a series of observed audits (observers are experienced FSOs and OFSC senior staff) to confirm their understanding and consistent application of the Audit Criteria. Only after successfully completing both are new FSOs able to audit accredited companies independently.

After an FSO completes an audit, they prepare a draft audit report which is submitted to the OFSC for confirmation before being sent to the accredited company. The confirmation process involves OFSC staff reviewing the draft report to detect and correct any inconsistent interpretation of the Audit Criteria (among other things).

The OFSC has an internal review process available to accredited companies that disagree with a CAR raised by an FSO. These reviews, undertaken on request from an accredited company, are completed by senior OFSC staff, or the FSC where audits involve compliance action.

As part of its commitment to continuous improvement, in 2022 the FSC launched annual deep dives into audit consistency which drive the regular training agenda for FSOs. The annual deep dive is a sample analysis of audit reports from all FSOs for a rotating selection of Audit Criteria to confirm interpretation consistency and correct CAR classification level. A different FSO conducts the deep dive each year with the sample anonymised for the purposes of analysis (OFSC staff can see the results attributed to individual FSOs for the purpose of performance management). The two deep dives completed to date have found greater than 87 per cent consistency in the interpretation of the selected audit criteria.

Where the annual deep dive identifies that FSOs are inconsistently applying an Audit Criteria in more than 10 per cent of audits, that Audit Criteria is a focus for re-training of the whole FSO cohort. FSOs and OFSC staff meet quarterly to re-train on the interpretation of problematic Audit Criteria. These training sessions serve as a forum to resolve different approaches by individual FSOs, with updated guidance on Audit Criteria interpretation issued to all FSOs after each training session.

Approach to FSO conflicts of interest

The Consultation Summary notes concerns raised by some stakeholders around the capacity for FSOs to provide WHS professional services to the construction and building industry while engaged by the FSC, and that this represents a perceived conflict of interest at a minimum.²⁹ The FSC is alive to the potential conflict of interest held by FSOs and takes steps to manage this situation.

Section 13 of the *Building and Construction Industry (Improving Productivity) (Federal Safety Officers) General Directions 2017* (the Directions) requires an FSO to immediately notify the FSC of any ‘*interest, fact or thing*’ that could cause, or create a reasonable belief, that the Federal Safety

²⁹ M Boland, *Independent Review of the Federal Safety Commissioner - Consultation Summary August 2023*, dewr.gov.au, p17

Officer might fail to properly exercise a power or perform a function.³⁰ Section 13 also provides examples of possible conflicts of interest, which is further expanded upon by the OFSC's FSO Conflict of Interest Policy.

The FSC has received hundreds of notifications from FSOs in relation to conflicts of interest arising from current or previous professional WHS services rendered to accredited companies or companies seeking accreditation. Where an FSO notifies of such a conflict of interest, that FSO and any other FSO from the same employer are precluded from auditing the company under the Scheme. The OFSC maintains a register of all notified conflicts of interest from FSOs which is checked prior to every audit. FSOs are asked to re-confirm the absence of a conflict of interest with the company they are auditing when accepting a work order for an audit.

A failure to disclose a conflict of interest is grounds for termination of an FSO's engagement under the commercial arrangements between the FSC and the FSO.

³⁰ *Building and Construction Industry (Improving Productivity) (Federal Safety Officers) General Directions 2017*