



**Australian Government**

**Department of Employment and Workplace Relations**

Office of the Federal Safety Commissioner



# Office of the Federal Safety Commissioner

Submission to the  
Review of the Federal Safety Commissioner  
August 2023

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## Statement from the Federal Safety Commissioner

The Federal Safety Commissioner (FSC) was first established in 2005. Supported by the Office of the Federal Safety Commissioner (OFSC), the FSC administers the Work Health and Safety Accreditation Scheme (the Scheme) which acts as a pre-qualification scheme for building and construction companies seeking to undertake building works as a head contractor on Government-funded projects. The Scheme, through the FSC's Audit Criteria, layers additional safety responsibilities on companies to the obligations owed under jurisdictional work health and safety (WHS) 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 signaling to building and construction companies that they must meet a higher safety standard to undertake Government-funded works.

In administering the Scheme, the FSC acts as the gatekeeper for companies working as head contractors on Government-funded building works. In this way, the FSC is a regulator responsible for regulating compliance with the *Federal Safety Commissioner Act 2022* and the Audit Criteria. The FSC is not a regulator of the WHS laws of the Commonwealth, States or Territories. The FSC can only refer potential breaches of WHS laws to Comcare and State and Territory WHS regulators as appropriate.

The FSC also oversees the development of educative resources and training in relation to the management of high-risk construction hazards as well as the publication of data and analysis of the safety performance of accredited companies.

I am the sixth Federal Safety Commissioner since the inception of the role. My predecessors and I have all shared a common mission – to ensure that every building and construction worker goes home safely every day. While that mission is not yet complete, I am proud of the part that the OFSC has, and continues, to play in improving the safety culture of the Australian building and construction industry.

As Commissioner, I have sought to lead the Office to implement three main priorities:

- Embedding a culture of continuous improvement.
- Adopting a risk-focused and data-informed operational footing.
- Building strong, collaborative relationships with stakeholders across the building and construction industry to optimise the Office's feedback loops and capacity to influence cultural change through a seat at many tables.

Delivery of these priorities will help position the OFSC to drive higher safety performance from accredited companies.

I look forward to working with Ms Marie Boland and building and construction industry stakeholders through this review to identify opportunities for the OFSC to continuously improve.

Federal Safety Commissioner David Denney, August 2023

## Response

### **Question 1 - What evidence is there to demonstrate the Scheme has improved safety practices within accredited companies or across the building and construction industry more broadly?**

The safety performance of the building and construction industry is driven by many factors. Safety is also constantly evolving with new ways of work and societal factors introducing new hazards to be eliminated or controlled. This makes improving the safety performance of the industry a complex and multi-faceted problem. The change necessary to drive improved safety performance will take time. It is therefore important to measure change and the effectiveness of the Office of the Federal Safety Commissioner (OFSC) as a trend over time rather than over-emphasising point in time data.

Safety incident data reported to the OFSC by accredited companies shows a clear and sustained trend in improved injury frequency rates between 2012-13 and 2021-22. When compared to Safe Work Australia (SWA) data on injury frequency rates<sup>1</sup> for the building and construction industry over the same time period, accredited companies significantly outperform the industry as a whole.

The improved safety performance of accredited companies is also reflected in the workers' compensation premiums they are charged. Average premiums for accredited companies decline the longer a company is accredited.

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. Furthermore, an annual anonymous census of accredited companies has consistently confirmed that accredited companies consider their businesses to be safer since gaining accreditation.

Given the size and budget of the OFSC, the harm reduction driven by the Scheme is an efficient and effective investment of Government funding.

#### The rate of injuries amongst accredited companies is significantly lower than the building industry average

There have been significant and sustained reductions in the rate of injury amongst accredited companies over recent years. From 2012-13 to 2021-22, accredited companies have:

- reduced their Total Reportable Injury Frequency Rate (TRIFR) by 54%.
- reduced their Lost Time Injury Frequency Rate (LTIFR) by 47%.
- reduced their Medically Treated Injury Frequency Rate (MTIFR) by 55%.<sup>2</sup>

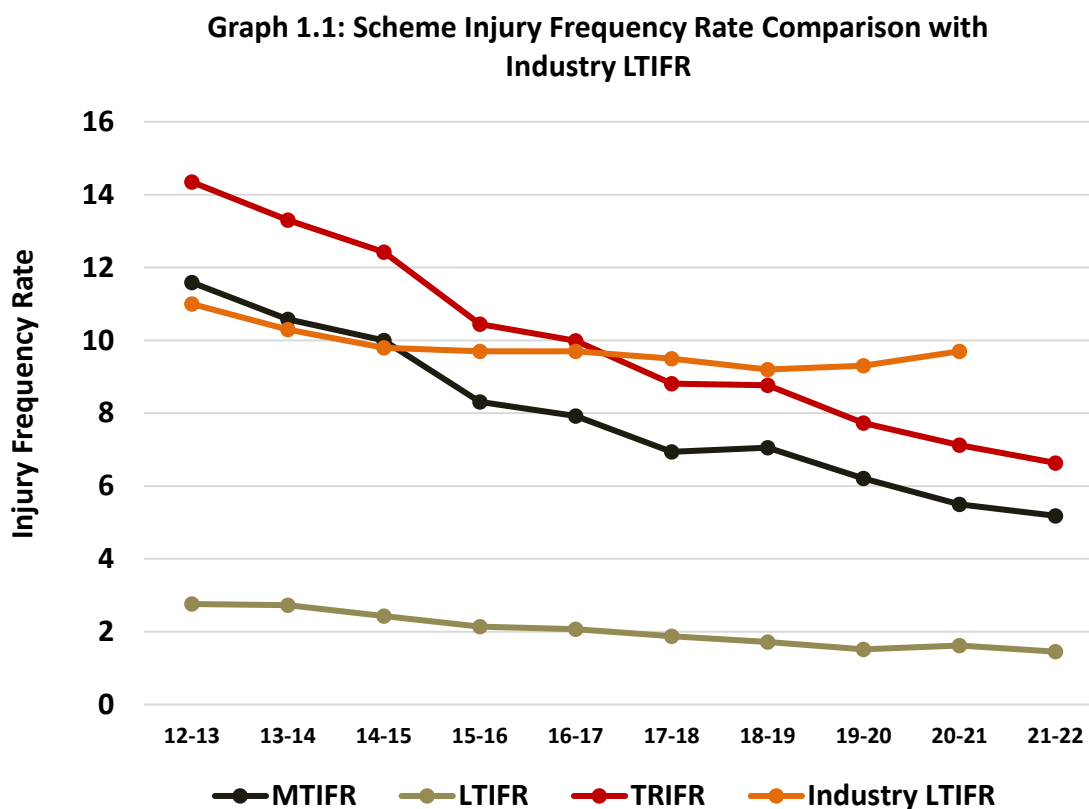
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<sup>1</sup> See glossary for how Injury Frequency Rates are calculated.

<sup>2</sup> Accredited company TRIFR, LTIFR, and MTIFR calculated based on self-reported incident data.

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<sup>3</sup>.

Comparing the average LTIFR of accredited companies to the building and construction industry average LTIFR shows that accredited companies significantly outperform their unaccredited counterparts.<sup>4</sup> The gap between accredited and unaccredited companies has also been widening over the past ten years as outlined in **Graph 1.1** below. The graph also shows that while industry LTIFR has been increasing since 2018-19, the LTIFR for accredited companies has continued to improve.



The improved safety of accredited companies as compared to unaccredited companies is further demonstrated by comparing the number of fatalities that have occurred in each part of the industry. Accredited companies account for approximately one-third of annual building and construction industry turnover, but have recorded 16% of fatalities since 2012, as shown in **Graph 1.2** below.<sup>5</sup>

<sup>3</sup> Calculated by comparing the number of accredited companies at the end of each calendar year.

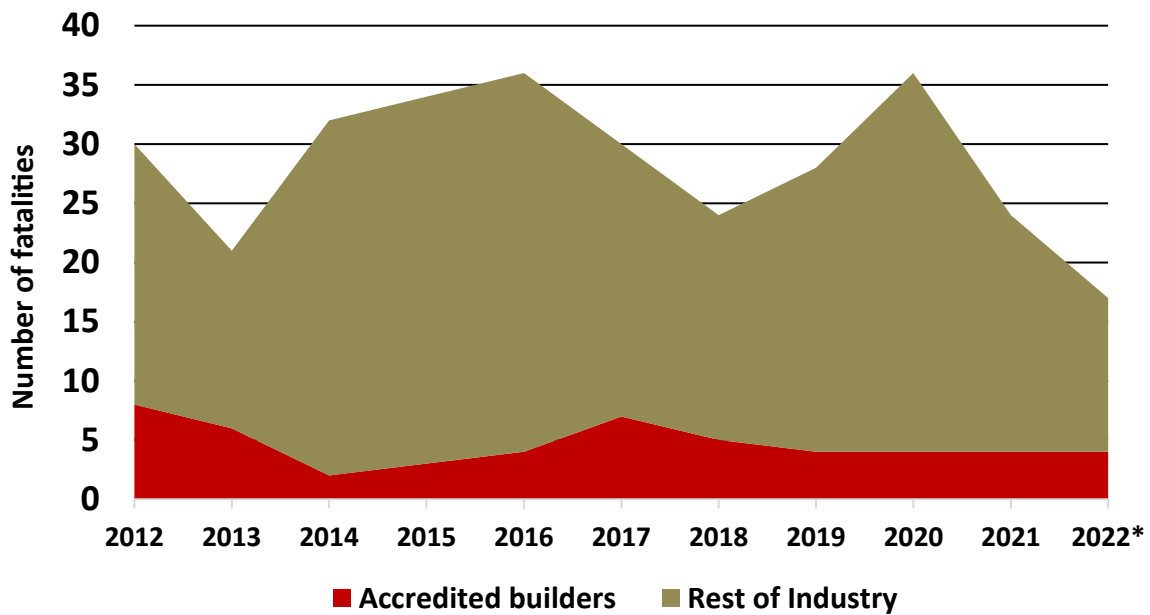
<sup>4</sup> Accredited company LTIFR calculated based on self-reported incident data and compared to industry averages reported by Safe Work Australia.

Safe Work Australia, [Lost time injury frequency rates \(LTIFR\)](#), accessed June 2023.

<sup>5</sup> Proportion estimated by calculating the value of OFSC projects over the last three years, then comparing this value with the Australian Bureau of Statistics construction industry estimates for the same period.

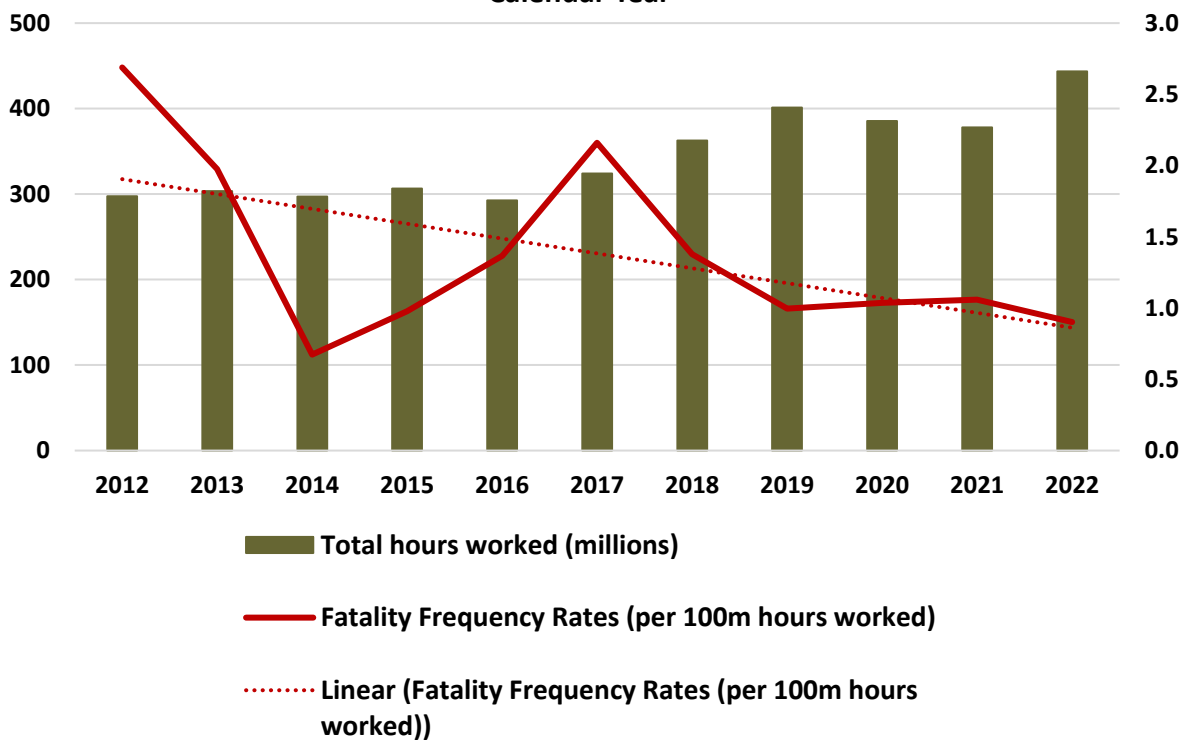
Australian Bureau of Statistics, [Construction Work Done - Australia](#), March 2023, accessed July 2023.

**Graph 1.2: Accredited builder fatalities vs rest of industry fatalities**



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. As shown in **Graph 1.3** below, accredited companies have improved their Fatality Frequency Rate from 2.69 in 2012 to 0.90 in 2022.

**Graph 1.3: Fatality Frequency Rates (per 100,000,000 hours) by Calendar Year**



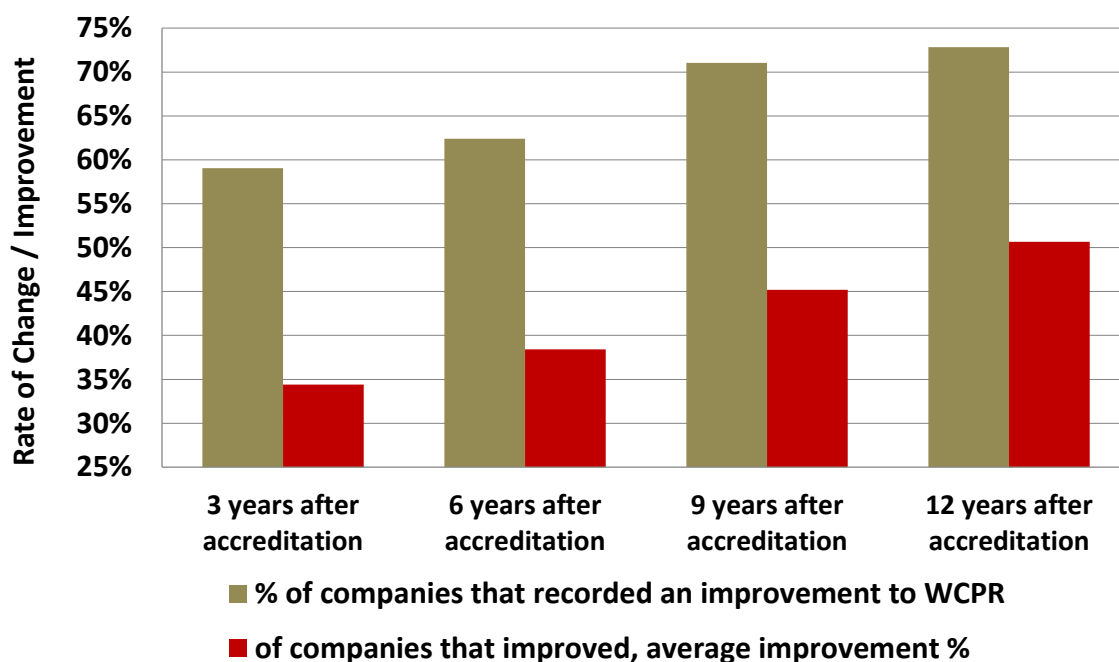
### Accredited companies have lower Workers' Compensation Premium Rates over time

While acknowledging that Workers' Compensation Premiums are determined by a range of factors, one significant factor is a company's incident and incident severity history. Accredited companies report their Workers' Compensation Premiums to the OFSC on a bi-annual basis. Analysis of this data shows that, on average, most companies see sizable reductions to their premiums after three years of accreditation. It also shows that the size of the reduction increases in proportion to the length of time the company is accredited.

After 6 years of accreditation (the 'standard' accreditation period provided for by the *Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019* (the Scheme Rules), more than 60% of companies reported a reduction in their workers' compensation premiums of 37%.

This is outlined in detail in **Graph 1.4** below.

**Graph 1.4: Accredited builder workers' compensation premium rates change over time**



When comparing the average premium rates recorded to the OFSC by accredited companies with the average for all construction companies, it is evident that accredited companies have lower average premium rates in all jurisdictions other than the Northern Territory.<sup>6</sup> See **Table 1.1** below for the average premium rates as a percentage of total company remuneration.

<sup>6</sup> Safe Work Australia, Workers' compensation premiums 24th, 2022, accessed July 2023.



**Table 1.1: Accredited company Workers' Compensation Premium Rates averages vs industry averages (by percentage of annual expenditure)**

State	Category	2016-17	2017-18	2018-19	2019-20	2020-21
ACT	OFSC	3.28%	3.40%	3.73%	3.32%	3.27%
	All of Industry	4.25%	4.14%	4.08%	4.05%	4.23%
NSW	OFSC	2.46%	2.50%	2.47%	2.58%	2.55%
	All of Industry	2.65%	2.65%	2.72%	2.83%	2.95%
NT	OFSC	2.29%	2.23%	2.51%	3.13%	2.50%
	All of Industry	1.70%	1.67%	2.15%	2.39%	2.47%
Tas	OFSC	2.02%	1.86%	2.16%	1.94%	1.84%
	All of Industry	2.46%	2.34%	2.39%	2.30%	2.36%
SA	OFSC	2.49%	2.22%	2.07%	1.84%	1.93%
	All of Industry	2.92%	2.59%	2.43%	2.43%	2.33%
Vic	OFSC	1.42%	1.38%	1.35%	1.27%	1.27%
	All of Industry	1.98%	2.03%	1.97%	1.97%	1.94%
Qld	OFSC	1.48%	1.53%	1.45%	1.38%	1.37%
	All of Industry	1.94%	1.84%	1.76%	1.74%	1.76%
WA	OFSC	1.34%	1.36%	1.44%	1.48%	1.50%
	All of Industry	1.31%	1.44%	1.71%	1.75%	1.64%
Aust	OFSC	<b>1.98%</b>	<b>1.97%</b>	<b>2.01%</b>	<b>1.98%</b>	<b>1.92%</b>
	All of Industry <sup>7</sup>	<b>2.11%</b>	<b>2.14%</b>	<b>2.17%</b>	<b>2.20%</b>	<b>2.21%</b>

Scheme accredited companies are highly engaged and supportive of the OFSC

Consistent feedback from accredited companies also supports the view that the Scheme is improving company and industry safety. The OFSC conducts an annual census of accredited companies to seek feedback on its performance and the utility of the Scheme. Responses to the census are voluntary and anonymous. The census is also constructed to prevent multiple responses from the one person or company.

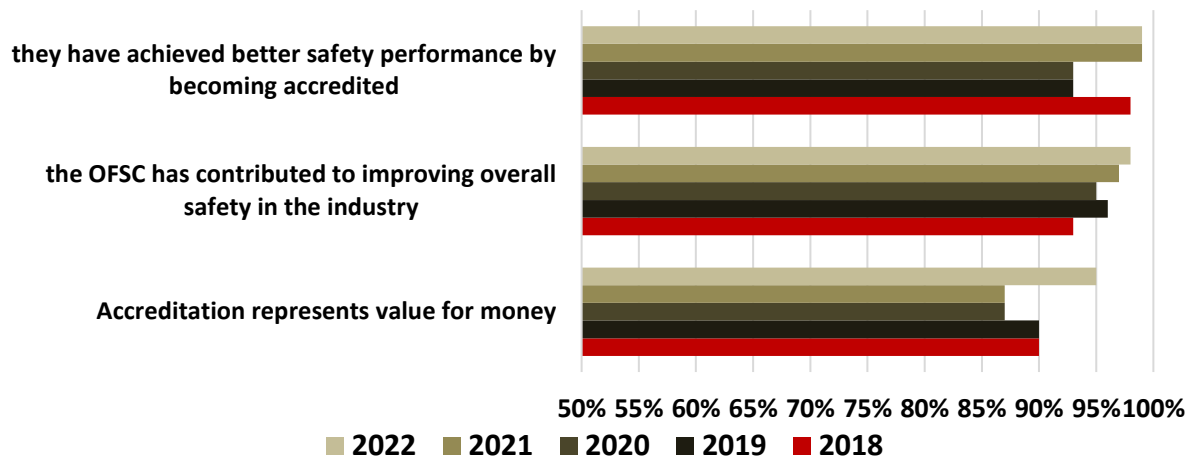
<sup>7</sup> Safe Work Australia make some minor adjustments to their figures for consistency across states.

From 2018 to 2022, an average of 58% of accredited companies have participated in the OFSC’s annual survey. Of these respondents, an average of:

- 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.
- 90% of accredited companies stated Scheme accreditation represents value for money.<sup>4</sup>

A breakdown of the annual responses to these three census questions is provided in **Graph 1.5** below.

**Graph 1.5: FSC Annual Census Response 2018-2022**



**Question 3 – What is the difference (if any) between the requirements of the Scheme and obligations under WHS and workers’ compensation (for those who are self-insured) legislation?**

In answering this question, the OFSC assumes that ‘requirements of the Scheme’ means the FSC’s Audit Criteria Guidelines (the Audit Criteria).<sup>8</sup> The Audit Criteria set the FSC’s expectations for what an accredited company’s safety systems and processes must include. The Audit Criteria is what a Federal Safety Officer (FSO) will assess a company against during an onsite audit. There are other ‘requirements’ for accredited companies, and companies seeking accreditation, which are not addressed in this response (e.g. accredited companies must comply with any conditions on their accreditation imposed by sections 15, 16 or 18 of the *Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019* (the Scheme Rules)).

<sup>8</sup> Office of the Federal Safety Commissioner, [FSC Audit Criteria Guidelines](https://www.fsc.gov.au), fsc.gov.au, accessed July 2023.

To be compliant with the Audit Criteria, a company must demonstrate via an on-site audit that:

- Its documented WHS systems and processes meet the requirements of the Audit Criteria; and
- The documented WHS systems and processes are being implemented by workers on live building works.

This two-step requirement to achieve compliance is the primary difference between the Audit Criteria and Commonwealth, State and Territory WHS laws. The two-step requirement seeks to ensure that the on-site practices of workers are driven by a documented, consistent and company-wide approach to identifying hazards and eliminating/controlling exposure to them.

This approach reflects the Scheme's philosophy that safety systems are the primary driver of a company's safety performance. It requires accredited companies to plan, document and record their approach to safety via a company-wide WHS system. Documented safety systems which clearly assign tasks and responsibilities to individuals within the company make repeat safety performance across the organisation more likely.

The Audit Criteria are divided into three categories:

- WHS Audit Criteria
- Focus Point Criteria
- Hazard Criteria

While the Hazard Criteria are based largely on model WHS Codes of Practice and relevant Australian Standards, the WHS Audit Criteria and Focus Point Criteria go beyond what is expressly required by State or Territory WHS laws. Examples include accredited companies being required to:

- Have a documented Hazard Identification Risk Assessment and Control (HIRAC) methodology and ensure the application of that methodology at a project level.
- Ensure senior managers participate in the company's HIRAC processes, regularly monitor performance against WHS objectives and targets, and regularly visit building sites to review WHS hazards and issues with workers.
- Regularly evaluate and review risk management and emergency processes rather than just implement them.
- Ensure that WHS performance is considered and evaluated when selecting subcontractors for projects.
- Undertake risk assessments as part of the design process to identify WHS buildability issues that may arise during construction.

Through a condition on their accreditation, all accredited companies must undergo post-accreditation audits.<sup>9</sup> These audits are generally on either an annual or bi-annual cycle

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<sup>9</sup> See section 15(1)(c) of the [Building and Construction Industry \(Improving Productivity\) \(Accreditation Scheme\) Rules 2019](#).

depending on the company's risk rating under the OFSC Company Risk Framework. The post-accreditation audits provide the OFSC with regular visibility of whether accredited companies are meeting their conditions of accreditation and operating in a manner compliant with the Audit Criteria.

#### **Question 4 – If the Scheme no longer existed, do you think the WHS performance standards of currently accredited companies would remain the same, reduce or improve?**

To be granted accreditation under the Scheme, companies are typically required to make extensive changes to their WHS systems and onsite processes. Since gaining accreditation, the safety performance of accredited companies has improved in comparison to industry averages. These improvements would be unlikely to have occurred if the Scheme had not existed.

To accredit a company, section 8 of the Scheme Rules requires, amongst other things, the FSC to be satisfied the applicant has, is implementing, and will implement, appropriate WHS policies, procedures and safe work practices. Having regard to the matters in subsections 8(3) and (4) of the Scheme Rules, this is determined in large part through a pre-accreditation audit which assesses the applicant against the Audit Criteria.

At present, it takes companies applying for accreditation an average of 2.71 audits to achieve accreditation over an average period of around 10.6 months.<sup>10</sup> This demonstrates that most unaccredited companies need to make substantial change to their WHS systems and on-site practices to meet the standard expected of accredited companies.

Once accredited, the safety performance of companies improves in comparison to the industry average. As shown in Graph 1.1 above, the industry average LTIFR per year is 5 times greater than that of accredited companies.

The above illustrates that to obtain accreditation, builders must make a step-change in their approach to safety. Once accredited, their safety performance improves with a marked drop in the average LTIFR of these companies. If the Scheme had not prompted builders to change, this step-change would not have occurred (or would have occurred to a smaller extent).

#### **Question 5 - Do the functions of the FSC remain appropriate given the changes that have occurred in the WHS environment and operating context of the building and construction industry since its establishment?**

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<sup>10</sup> Based on average number of audits and length of time from application to accreditation for all applicant companies granted accreditation between 2020 and 2023.

The OFSC offers the following observations in relation to the functions of the FSC:

Paragraph 38(ca) of the FSC Act – auditing compliance with the National Construction Code (NCC) performance requirements in relation to building materials

Auditing compliance with the NCC is not an original function of the FSC. It was added in 2016 and expanded the FSC's role from the safety of people into the safety of building products. As an isolated function that stands in contrast to the FSC's core WHS remit, implementation of this function has proven difficult. Not all building companies accredited under the Scheme are covered by the NCC (particularly civil constructors) and the powers of both the FSC and FSOs to administer this function are not fit for purpose.

Noting the substantial change in regulatory arrangements adopted by State and Territory building regulators in response to the 2018 *Building Confidence Report*, there may be merit in considering the ongoing utility of the FSC retaining responsibility for NCC enforcement.<sup>11</sup> Further detail is provided in response to question 9.

Paragraph 38(d) of the FSC Act - referring matters to other relevant agencies and bodies

The FSC refers issues of immediate safety concern to relevant Commonwealth, State or Territory WHS regulators. Issues of immediate safety concern relate to work observed by FSOs at onsite audits which is being performed in a manner that is unsafe and risks injury to a person.

Subject to the comments made in response to question 24 regarding barriers to information sharing between the FSC and jurisdictional WHS regulators, 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 the WHS of companies accredited under the WHS Accreditation Scheme

The FSC invests considerable time and resources into collecting and analysing information about the safety of accredited companies. Some of this is published through the annual WHS Accreditation Scheme Data Report. The FSC also uses analysis of audit and safety incident data to inform the operational focus of the OFSC.

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.

Enforcing compliance with the Act and Scheme Rules and penalising non-compliance

The FSC Act includes a small number of civil penalty provisions relating to identity cards for FSOs (section 69), failing to answer questions asked by or produce records required by an FSO (sections 76 and 77) and hindering or obstructing an FSO (subsection 78). While no action to seek a civil penalty has been taken to date, the FSC Act is not explicit on whether enforcement of these provisions is a role for the FSC, an FSO or some other person.

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<sup>11</sup> Peter Shergold and Bronwyn Weir, Building Confidence - Improving the effectiveness of compliance and enforcement systems for building and construction across Australia, report to the Building Minister's Forum, 2018.

Noting the responses to questions 10, 13 and 14, there may be some merit in considering conferring a function on the FSC to raise awareness of non-compliance by accredited companies and Commonwealth entities.

'Name and shame' arrangements have proven effective motivators of behavioural change in areas where entities compete closely for work. The building and construction industry is particularly competitive as a result of most work being subject to tender processes. Specific provisions, such as those contained within subsection 22(1) of the *Payment Times Reporting Act 2020* or section 108 of the former *Building and Construction Industry (Improving Productivity) Act 2016*, could better empower the FSC to respond to non-compliance.

#### Educating and raising awareness of building and construction industry hazards

Education is one significant way to drive improved safety performance across the building and construction industry. 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.

More detail about this work is provided in response to question 7.

### **Question 6 - How can the FSC's audit functions support the model WHS Act's policy objective of ensuring genuine and effective consultation with workers?**

The FSC is not a WHS regulator with responsibility for enforcing the model WHS laws or the WHS laws of the Commonwealth, States or Territories. That said, aspects of the FSC's audits touch on consultation with workers.

Audit Criteria FP3 – Whole of Project Consultation – focusses on the establishment and ongoing management of WHS consultative arrangements with workers and their representatives.

The criteria require the company to have a documented process for the establishment of WHS consultation, cooperation and coordination arrangements including:

- Agreement on the establishment of consultation arrangements with workers on site;
- Consultation arrangements with workers or their representatives when WHS issues arise;
- A program to ensure regular meeting with minutes of the meeting available to all workers;
- Training for health and safety representatives/WHS committee members where requested/required;
- A documented process for WHS issue resolution that is communicated to all workers on site; and
- A documented process to ensure workers, or their health and safety representatives, are involved in the development of site safety procedures relevant to the work they are undertaking.

In assessing these Audit Criteria onsite, FSOs first confirm that the company's documented system meets the requirements outlined above. They would then seek evidence to confirm that the documented system is being implemented at the site being audited – this would involve reviewing consultation meeting minutes, sample auditing the company's WHS issues register (or similar document), confirming notification to all workers about how to raise a WHS issue and sample audit documents to show consultation with workers about the design of safe working systems relevant to their job. FSOs may also interview workers on site to confirm aspects of the criteria. For example, they may ask workers how to raise a safety issue to confirm that information has been passed on by the accredited company.

There are other criteria which include a requirement for communication with workers relating to specific aspects of the WHS Management System. These include:

- FP1.4 requiring senior management to visit sites and discuss WHS issues with workers;
- FP4.5 requiring subcontractor participation in WHS inspections; and
- FP6.3 requiring workers to be inducted into relevant site safety procedures.

### **Question 7 - Should the FSC be increasing its education role and what would that look like in practice?**

Under the FSC Act, the FSC's functions include promoting work health and safety in relation to building work undertaken by a constitutional corporation, the Commonwealth or a corporate Commonwealth entity (paragraph 38(a)) and promoting the benefits of the WHS Accreditation Scheme and disseminating information about the WHS Accreditation Scheme (paragraph 38(c)).

In 2020, the OFSC launched its safety webinar series in response to consistent feedback from accredited companies via the OFSC Annual Census that more practical guidance on managing high risk work hazards and understanding the Audit Criteria was needed. The webinars capitalised on the mainstreaming of large-scale videoconferencing triggered by the COVID-19 pandemic. Each webinar generally highlights a high-performing accredited company explaining how their safety system is designed to meet Audit Criteria requirements. Industry experts have also participated to raise awareness of key industry hazards (e.g. WHS academics, the Crane Industry Council of Australia and the Traffic Management Association of Australia).

The webinars were an immediate success with live audiences quickly growing from around 200 to over 500 participants per webinar. Webinars are also recorded and posted online with some now having been viewed more than 1000 times.<sup>12</sup> Given the ability for webinars to reach large target audiences at minimal cost and a reasonable investment of time, and the overwhelmingly positive feedback on the format, the webinars are now a standard business offering of the OFSC.

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<sup>12</sup> Office of the Federal Safety Commissioner, [WHS Webinars](https://www.fsc.gov.au), fsc.gov.au, accessed July 2023.

In developing educative materials for employees and employers in the building and construction industry, tailoring the material to suit the needs of the OFSC's audience is now front of mind. In recent years, the OFSC has moved away from traditional mediums such as fact sheets to embrace technology and visual mediums. There is a focus on keeping messages engaging, clear and concise. This has spurred a growth in products like safety checklists and one-page infographics.<sup>13</sup>

The OFSC has also sought to collaborate with recognised industry experts in developing educative resources. This has given the OFSC access to broader safety skill sets, enabled cost sharing and brought together broad perspectives on difficult topics. Collaboration between the OFSC and industry has improved the quality of educational products the OFSC can offer. A great example of this is the Scaffolding Compliance Training developed for site managers in partnerships with Ventia Pty Limited.<sup>14</sup>

The OFSC has sought to increase its educative role in recent years and intends to continue this focus into the future. While no firm decisions have been taken on what specific additional resources would be made available under an 'increased' educative role, early consideration has been given to:

- Producing lessons learned resources after significant safety incidents to more broadly disseminate the causes, as well as the actions taken in response to these events.
- Toolbox talk resources aimed at providing short, highly-visual videos or infographics that can stimulate safety discussions with workers ahead of high-risk construction work being undertaken.
- Safety roundtables aimed at drawing together key stakeholders and accredited companies relevant to the industries more intractable issues (e.g. work at heights) to better understand what causes these issues and identify practical solutions to preventing them.
- CEO or Senior Executive Forums aimed at providing an opportunity for non-safety senior leaders of accredited companies to come together around key safety issues.

## **Question 8 - How can workers and their representatives be encouraged and supported to play an active role in the work of the FSC?**

The FSC would welcome stronger engagement with worker representatives in the strategic governance of the OFSC.

During previous reviews of the FSC, the Commissioner has convened informal Advisory Boards to guide the review process and develop broadly-supported and practical solutions for issues associated with administration of the Scheme. These Boards were not legislated

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<sup>13</sup> Examples available at [fsc.gov.au](https://www.fsc.gov.au) - [Mobile Crane - Ground Conditions Infograph](#) and [Scaffold Checklist](#).

<sup>14</sup> Office of the Federal Safety Commissioner, [Scaffolding Educational Materials and Resources](#), [fsc.gov.au](https://www.fsc.gov.au), accessed July 2023.



and their purpose and remit were established through agreement with the Board's members.

A similar tripartite Advisory Board could be established going forward to advise the FSC on the execution of their legislative functions. Such a Board could be established either via legislative means (as part of the FSC Act) or administratively by the FSC. While a legislative Board would provide greater formality and longevity to such an arrangement, an administrative board provides greater flexibility in all aspects of the arrangement.

### **Question 9 - Is auditing compliance with National Construction Code performance requirements in relation to building materials an appropriate function for the FSC?**

As foreshadowed in response to Question 5, the OFSC is of the view that section 38(ca) of the FSC Act, auditing compliance with the National Construction Code (NCC), does not align with the core role of the FSC.

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. Enforcement of the NCC continues to be a responsibility of the States and Territories through their various building Acts and Regulations.

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.

Enforcement of the NCC was the subject of the Shergold and Weir Building Confidence Report 2018 (Shergold Weir Report).<sup>15</sup> The Shergold Weir Report made wide-ranging recommendations that remain subject to ongoing action by the Building Ministers Forum and its subcommittees. A subsequent review<sup>16</sup> of the former *Building and Construction Industry (Improving Productivity) Act 2016* (since renamed the *Federal Safety Commissioner Act 2022*) recommended that the NCC function be repealed from the FSC's purview, pending satisfactory action from the states and territories to improve the regulation of Australia's built environment. In recent years, there has been significant advancement by the States and Territories in this area of regulation.

The FSC has elected to administer this legislative function in a way that avoids duplication with State and Territory Building regulators. The FSC's current approach requires that:

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<sup>15</sup> Peter Shergold and Bronwyn Weir, [Building Confidence - Improving the effectiveness of compliance and enforcement systems for building and construction across Australia](#), report to the Building Minister's Forum, 2018.

<sup>16</sup> Rex Deighton-Smith, [Review of the Building and Construction \(Improving Productivity\) Act 2016](#), report to the Department of Jobs and Small Business, Jaguar Consulting Pty Ltd, 2018.

- the FSC may only accredit a company if the FSC is satisfied that the applicant is complying, and will comply, with the performance requirements of the NCC that relate to building materials (s. 8(1)(d) of the Scheme Rules);
- Scheme applicants must make a written declaration (to accompany an application for accreditation) that the applicant is complying and will comply with performance requirements of the NCC that relate to building materials (s. 10(1)(h) of the Scheme Rules);
- As a condition applying to accreditation, the accredited company comply with the performance requirements of the NCC that relate to building materials (s. 15(1)(b) of the Rules).

These requirements apply to all companies accredited, and seeking accreditation, under the Scheme even though a large proportion are not required to comply with the NCC. The NCC only applies to the construction of buildings and plumbing works. It does not apply to civil construction works, the primary work activity of about half of all companies accredited.

The powers of the FSC and FSOs are not suited to identify and rectify any non-conformance with NCC requirements. The powers of the FSC and FSOs under Chapter 7 of the FSC Act are general in nature and not designed specifically for evaluating the appropriate use of building materials (particularly those materials that are hidden from plain sight). Further, there are no powers for the FSC or FSOs to direct an accredited company to cease using a non-compliant building product or to remedy works that have been completed using non-compliant building products.

Existing FSOs are not experts in the requirements of the NCC or the suitability of building materials. Rather FSOs have been appointed for their expertise in the work health and safety of people on building and construction sites. Were the FSC to undertake more direct auditing of NCC compliance than is currently the case, it would be necessary to appoint additional FSOs from a building certifier or engineering background.

The FSC has never been funded to undertake NCC auditing. If this review was to recommend the OFSC assume a greater role in ensuring compliance with the NCC by accredited companies, additional funding, resourcing, and legislative amendments would be required.

### **Question 10 - Do the powers of the FSC remain appropriate to achieve the objectives of the Scheme? Are any other powers required?**

The FSC's current powers are provided for in the FSC Act and the Scheme Rules.

Under the FSC Act, the FSC has the power to:

- Appoint certain persons as FSOs (section 68(1)-(2) of the FSC Act).
- Exercise any power conferred upon an FSO, noting that the FSC is also an FSO (sections 5 and 68(3)). These include:

- Exercising compliance powers to ascertain whether an applicant for accreditation meets the accreditation requirements; and whether an accredited person has complied with, or is complying, with conditions of the accreditation (section 70(2)).
- Entering premises in specified circumstances (section 72).
- While on those premises, inspecting any work, process or object; interviewing any person; requiring a person to disclose who has custody of, or access to a record or document; requiring that person to produce the record or document to the FSO either while on the premises, or within a specified period; inspect and make copies of any record or document on the premises or that is accessible from a computer on the premises; and take samples of any goods or substances in accordance with prescribed procedures (section 74(1)).
- Requiring a person to tell the FSO the person's name and address if the FSO reasonably believes that the person has contravened a civil remedy provision (section 76(1)).
- Requiring a person, by notice, to produce records or documents to an FSO (section 77(1)).
- Keeping records or documents produced to an FSO in certain circumstances (section 79(1)).
- Commence proceedings in a Court for contraventions of relevant civil remedy provisions (section 81).
- Disclose information where that disclosure is necessary or appropriate for the performance of the FSC's functions or exercise of powers, or is likely to assist administration or enforcement of a law of the Commonwealth, State or Territory (section 105).<sup>17</sup>

Under the Rules, the FSC has the power to:

- Accredit a person with or without a pre-accreditation audit (sections 8, 12 and 13 of the Rules).
- Impose further conditions of accreditation on an accredited person (section 16).
- Take compliance action (imposing further conditions of accreditation, suspension or revocation of accreditation) in relation to breaches of conditions of accreditation (section 18).
- Vary or cancel accreditation upon request (sections 20-21).<sup>18</sup>

Under current arrangements, the FSC can struggle to gather sufficient information about fatalities reported by accredited companies to ensure the FSC is operating within their jurisdiction and to understand the circumstances of the death.

The FSC's post-fatality processes (described in detail in response to questions 11 and 12) are limited to work-related fatalities. Therefore, confirming cause of death is necessary to ensure the FSC is not operating outside their jurisdiction and investigating other deaths, for example deaths due to natural causes. For deaths that are work-related, it is also necessary for the FSC to understand the circumstances leading up to the death to inform views on the appropriateness of the company's proposed response.

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<sup>17</sup> Federal Safety Commissioner Act 2022

<sup>18</sup> Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019

Under existing arrangements, the FSC cannot require the production of coronial documents from a Coroners Court. Nor can the FSC require police to produce reports relating to the death and any witness statements. Without these documents, the FSC cannot confirm cause of death and therefore be entirely satisfied as to their jurisdiction. Similarly, a lack of access to police or witness statements leave the FSC entirely reliant on the accredited company for an explanation of the circumstances of the death.

In practice, the FSC can sometimes access police and witness statements, autopsy reports, and findings regarding cause of death under information sharing exceptions in State or Territory coronial legislation. However, not all jurisdictions have such information sharing provisions and the FSC is sometimes refused access.

The FSC currently has no explicit powers to publicise non-compliance by an accredited company with their conditions of accreditation. Under the FSC Act, the FSC has functions which may go towards making public announcements about compliance action taken against an accredited person (for example, section 38(c) provides that the FSC may promote the benefits of the Scheme and disseminate information about the Scheme). However, this mechanism is not without doubt. Including a power to this effect would ensure this mechanism is clearly available to the FSC. Additionally, publicising non-compliance and subsequent compliance action taken by the FSC, particularly action to suspend or revoke an accreditation under section 18 of the Scheme Rules, would have significant deterrent value amongst other accredited companies. This is particularly the case in the building and construction industry where competition amongst companies is high and the need to maintain a good reputation is important to winning the next tender for work.

### **Question 11 - What are the appropriate steps that should be taken by the FSC when a fatality occurs on an accredited company's worksite?**

Under section 15 of the Scheme Rules, accredited companies are subject to a range of 'standard' conditions of accreditation. One of these standard conditions requires companies to '...at all times have and implement appropriate WHS policies and procedures, and safe work practices' (see paragraph 15(1)(a)). A workplace fatality at a site operated by an accredited company obviously calls into question whether the company is meeting this condition of accreditation.

The OFSC's post-fatality process is outlined in the OFSC's Company Compliance Policy, a public document available on the OFSC website.<sup>19</sup> The process, applied to all work-related fatalities reported to the OFSC by accredited companies, is directed at determining whether the company is in breach of its conditions of accreditation and remains appropriate to hold accreditation. The process focuses on the reasonableness and suitability of the company's response to the fatality and consideration of whether the company is complying with Audit Criteria relevant to the incident.

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<sup>19</sup> Office of the Federal Safety Commissioner, [Company Compliance Policy](https://www.fsc.gov.au), fsc.gov.au, accessed July 2023.

This is a different focus to the investigations undertaken by Commonwealth, State and Territory WHS regulators. Those regulators are investigating the fatality to determine whether a breach of a WHS duty by a duty holder has occurred with a view to prosecution. This is a broader inquiry and one the FSC endeavours not to replicate.

The FSC tailors each post-fatality process to the individual circumstances of the case. However, in general terms, the process incorporates the following steps:

- Notification – Accredited companies are required to notify the OFSC of any onsite fatalities within 48 hours. Key information about the fatality is required to be provided.
- Confirmation – the FSC writes to the relevant Coroner seeking a copy of the autopsy report and any Coronial findings in relation to the death. Copies of police reports and any witness statements are also requested. Unless circumstances of the death suggest it was not work-related, the OFSC’s post-fatality process continues while a response from the Coroner is pending.
- Immediate response – The FSC escalates the accredited company’s risk rating to high and imposes further conditions on the accreditation under section 16 of the Scheme Rules. These conditions require:
  - The company to produce a range of specified documents and evidence to the FSC related to the fatality.
  - The company’s CEO to meet with the FSC to explain the documents/evidence produced, the company’s understanding of the incident and its causes, and any actions the company has taken/plans to take in response to the fatality.
  - Subject to the FSC being satisfied with the company’s proposed response to the incident, the company must undergo an onsite audit to evaluate the effectiveness of its response, and to confirm compliance with Audit Criteria relevant to the fatality.
- Meeting with CEO – These meetings are to satisfy the FSC that the company has thoroughly investigated the fatality, understands its likely causes and is taking reasonable steps to eliminate or control the causes of the fatality.
- Verification – The OFSC undertakes an onsite audit at a location as similar as possible to where the fatality occurred. The audit is to confirm implementation of the response to the fatality and the reasonableness of that response in a live construction environment. The audit also assesses the company’s compliance with Audit Criteria relevant to the fatality.
- Final FSC decision - Following the audit, the FSC must decide whether the company has met the further conditions imposed at the ‘immediate response’ stage above. If the FSC is not satisfied, they may impose compliance action under section 18 of the Scheme Rules, including suspending or revoking the accreditation.

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.

### **Question 12 - What are the appropriate steps that should be taken by the FSC if an accredited company is prosecuted and found guilty of a breach of WHS legislation?**

Accredited companies are required to report to the OFSC all prosecutions against them under Commonwealth, State and Territory WHS laws. This information is taken into account when formulating the company's risk rating under the OFSC Company Risk Framework.<sup>20</sup>

As outlined in the response to Question 11, the OFSC's post-fatality process focuses on the reasonableness and suitability of the company's response to the fatality and consideration of whether the company is complying with Audit Criteria relevant to the incident. Companies invariably change their WHS systems and practices through the post-fatality process to prevent similar incidents occurring again in future. A post-fatality process will typically be completed with a company within 12 months finding either that the company can retain its accreditation (potentially with further conditions), or the accreditation needs to be suspended/revoked.

A prosecution under Commonwealth, State or Territory WHS laws is focused on whether a breach of a WHS duty has occurred based on the systems and processes in place at the time of the incident/fatality. 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. By the time the prosecution is finalised, the OFSC's post-fatality process will be complete. 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).

### **Question 13 - How can the FSC improve Commonwealth funding entities' compliance with the Act?**

### **Question 14 - What powers should the FSC have to deal with compliance failures by CW, State and Territory procurement agencies?**

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<sup>20</sup> Office of the Federal Safety Commissioner, [Risk Framework](https://www.fsc.gov.au), fsc.gov.au, accessed July 2023.

The Commonwealth and corporate Commonwealth entities are prohibited from funding building work under subsection 43(4) of the FSC Act unless the contract for those works is entered into with an accredited person or, at the time of funding, the Commonwealth/entity takes appropriate steps to ensure an accredited person will undertake the works.

The Commonwealth and corporate Commonwealth entities fund building works in many different ways. In some cases, the Commonwealth engages a builder directly to perform building work (e.g. a contract to build a new Army barracks). In other cases, funding is provided to a State or Territory government via a National Partnership Payment for the State or Territory to contribute to the cost of achieving a stated outcome (e.g. funding for a road or rail upgrade). The Commonwealth also funds building work under other financial arrangements including through loan facilities, equity funding and pre-commitment leases with associated projects being captured under the Scheme due to the operation of subsection 43(5) of the FSC Act.

The FSC Act provides the FSC with no powers to enforce compliance with subsection 43(4). 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 FSC Act specifically preserves the validity of any contract entered into in breach of the obligations under subsection 43(4) - see subsection 43(7).

Given the low priority afforded by the legislation to the enforcement of section 43(4), the FSC has not resourced a dedicated detection and investigation function. Despite this, the OFSC has identified and followed up 13 potential breaches by Commonwealth agencies since 2018. The OFSC was notified of these breaches by third parties or became aware of them via media reports.

Where potential non-compliance is identified, the OFSC takes appropriate action via its Agency Compliance Policy.<sup>21</sup> The Policy sets out the OFSC's intention to work cooperatively with the agency to identify potential remedies and improve their internal processes and management. However, where an appropriate remedy cannot be established, or there are concerns around repeated non-compliance, the Agency Compliance Policy empowers the FSC to write directly to the agencies involved to highlight the non-compliance and need for action.

To address non-compliance at its roots, the OFSC has focused its efforts on the development of a range of resources, including tools and guidance material for how funding entities can adopt best practices throughout the various stages of their construction procurement and project delivery. This approach is underpinned by the OFSC's Model Client Framework, a series of booklets identifying the key management actions required to successfully integrate safety initiatives throughout a project lifecycle.<sup>22</sup> Further, 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.

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<sup>21</sup> Office of the Federal Safety Commissioner, [OFSC Agency Compliance Policy](https://www.fsc.gov.au/agency-compliance-policy), fsc.gov.au, accessed July 2023.

<sup>22</sup> Office of the Federal Safety Commissioner, [Model Client Framework](https://www.fsc.gov.au/model-client-framework), fsc.gov.au, accessed July 2023.

Agencies can use the model clauses in funding agreements, tenders, contracts or any other similar documents.<sup>23</sup>

The OFSC meets with different agencies to promote use of the model clauses and foster a stronger understanding of the Scheme's requirements. The OFSC also chairs the Australian Government Agency Reference Group (AGARG). AGARG is intended to ensure the Scheme continues to add value and set the benchmark for best practice approaches to safety in the construction industry.

If increased Commonwealth compliance with s43(4) was deemed a priority for the OFSC, options could include:

- The establishment of a dedicated non-compliance detection and enforcement team. This would require additional resourcing to prevent the diversion of resources from current work.
- Establishment of a framework that requires funding agencies to report annually to the FSC on their compliance with legislated Scheme requirements. This could be extended to involve the Australian National Audit Office or other program of audit.
- The power to publicly highlight agency non-compliance, noting that, as explored in the response to question 5, 'name and shame' arrangements can be powerful motivators for change.

### **Question 15 - Do the powers of the FSOs remain appropriate to achieve the objectives of the Scheme? Are any other powers required?**

As summarised in the Discussion Paper, FSOs are granted the power to enter and inspect premises where building work is occurring and to undertake certain activities while on that premises (e.g. interview persons, require production of documents and take samples of goods or substances etc). These powers are exercisable for the purpose of determining whether a person meets the requirements for accreditation or whether an accredited person is complying with their conditions of accreditation (see section 70 of the FSC Act).

In reality, FSOs are rarely required to exercise these legislative powers. This is because of the way audits are conducted by FSOs (that is, on a voluntary or agreed basis). FSOs are usually invited on to premises by a building and construction company to undertake an audit at an agreed time. In this respect, the FSO is acting as a visitor to site. Similarly, to the extent that interviews and production of documents are concerned, these are almost always voluntarily facilitated or provided. However, the powers remain a useful fall-back, particularly in circumstances where compliance action is being considered against a company that is accredited.

From time-to-time, FSOs come across issues of immediate safety concern when onsite. This is often a situation in which work is being performed in a manner that is unsafe and risks injury to a person. FSOs are under instruction to highlight any such issues to the company immediately and to raise Corrective Action Reports (CARs) for these matters in their audit

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<sup>23</sup> Office of the Federal Safety Commissioner, [Model Clauses](#), fsc.gov.au, accessed July 2023.



report. Typically, companies respond by immediately stopping the work and directing relevant workers on how to re-commence it in a safe manner. However, FSOs (including the FSC) have no power under the FSC Act to direct the stoppage of unsafe work or to be involved in the re-commencement of it in a safer manner.

Currently, the most an FSO can do is stop an audit until such time that the unsafe practice has been appropriately addressed.

### **Question 16 - Are the current financial thresholds appropriate to trigger Scheme requirements? If not, what should the threshold be?**

The obligations on the Commonwealth in subsection 43(4) of the FSC Act do not apply to all building work. The building work must be valued at more than the 'financial thresholds' outlined in paragraphs 26(b)-(d) of the Scheme Rules for the Commonwealth to be obliged to engage an accredited company.

The financial thresholds were last updated in 2015. The current thresholds are set out below:

- For building work funded directly by the Commonwealth or a corporate Commonwealth entity – an accredited company must be engaged as the principal contractor if the work is valued at \$4 million or more.
- For building work indirectly funded by the Commonwealth or a corporate Commonwealth entity – an accredited company must be engaged as the principal contractor if:
  - the project includes building work of \$4 million or more; and
  - the value of the Commonwealth contribution to the project is at least \$6 million and represents at least 50 per cent of the total funding; or
  - the project includes building work of \$4 million or more; and the contribution made to the funding of the project by the Commonwealth or a corporate Commonwealth entity is at least \$10 million.

The Scheme thresholds are complex, particularly for indirect funding arrangements. Streamlining of the thresholds would assist by making the Scheme more transparent and easier to understand.

The analysis of different threshold options at page 23 of the Discussion Paper shows that substantial upwards changes to the thresholds would make a considerable difference to the number of companies requiring accreditation to undertake Government-funded building work. However, it would not alter the number of reportable incidents dramatically. This suggests that the largest volume of safety concerns is occurring on the larger, more expensive building projects. This analysis does not make any assessment of the severity of those incidents.

Increasing the financial thresholds would likely see many smaller companies exit the Scheme as Scheme accreditation would no longer be required for the work they are seeking to win. This has positives and negatives associated with it.

On the positive side, it would remove from the OFSC’s regulatory remit those companies that are not responsible for the vast bulk of the safety incidents reportable to the OFSC. What remains unknown is whether the most severe incidents would still be captured under the options outlined. Leaving that matter aside for now, fewer companies would enable the OFSC to undertake additional auditing of the remaining companies and would provide greater oversight of their safety practices.

On the negative side, having fewer companies accredited under the Scheme runs counter to the objective of the FSC Act to promote work health and safety in relation to building work undertaken by, or on behalf of, Government. By increasing financial thresholds, there will be fewer Government-funded building projects undertaken by head contractors that are accredited under the Scheme.

Noting the length of time since the last review of the financial thresholds, it may be appropriate to introduce an indexation mechanism tied to an industry specific measure to ensure the thresholds automatically keep pace with the changing price of building work.

In the time between the quarter ending March 2015 and the quarter ending March 2023, the Australian Bureau of Statistics’ Construction Producer Price Index (CPPI) for construction output has had a percentage change of 33.74%.<sup>24</sup> The rises in recent times have been due to an increase in the cost of materials, primarily driven by high energy and transport costs. That said, the rise in prices has eased from its record high in 2022 as the supply of building materials has improved due to increased domestic production and imports. However, materials are still in high demand due to the volume of work already underway.

In the same period (end of quarter March 2015 to end of quarter March 2023) the Consumer Price Index has a percentage change of 23.67%.<sup>25</sup>

**Table 16.1** identifies what the current thresholds would be if raised to keep pace with CPI or the CPPI.

**Table 16.1: Scheme thresholds by CPI and CCPI<sup>26</sup>**

	CPI	CCPI
Direct threshold	\$4.9 million	\$5.4 million
Indirect threshold (lower)	\$7.4 million	\$8.0 million
Indirect threshold (upper)	\$12.4 million	\$13.3 million

<sup>24</sup> Australian Bureau of Statistics, [Producer Price Indexes - Construction](#), accessed July 2023.

<sup>25</sup> Australian Bureau of Statistics, [Consumer Price Index Australia](#), accessed July 2023.

<sup>26</sup> All numbers rounded for ease of use.

## **Question 17 – Are there situations where the Scheme requirements are not fit for purpose? How can they be repurposed?**

Under current arrangements, the OFSC can struggle to maintain regular oversight (via an onsite audit) of the extent to which companies that only occasionally act as a head contractor meet the Audit Criteria. The OFSC uses annual or bi-annual post-accreditation audits to verify that companies' safety systems comply with the Audit Criteria. An audit requires an accredited company to have a project underway on which they are the head contractor.<sup>27</sup> This is to ensure the system audited is solely that of the accredited company and not another company onsite.

Where a post-accreditation audit cannot be scheduled due to the lack of a site on which the accredited company is the head contractor, the audit is placed 'on hold' pending a suitable site becoming available. During this time, the company continues to hold accreditation.

At present, 28 audits have been 'on hold' for 6 months or more due to the accredited company not having any work as a head contractor available for audit by the OFSC.

The inability of the OFSC to verify accredited company compliance with the Audit Criteria on a regular basis risks companies holding accreditation where it is not appropriate. In recognition of this, the OFSC is trialling audits of 'on hold' companies in a subcontractor capacity. The 12-month trial recognises that even as subcontractors, accredited companies will be responsible for aspects of onsite safety. The trial audits will therefore seek to evaluate compliance with those Audit Criteria that remain applicable in a subcontracting capacity.<sup>28</sup>

Suggestions from the reviewer on how else the OFSC can maintain suitable oversight of all accredited companies, irrespective of their position in the contracting chain, would be welcome.

## **Question 18 - Should there be a limit to how many FSO audits are available to achieve accreditation?**

Under Section 8(3)(d) of the Scheme Rules, in making a decision to accredit an applicant, the FSC must have regard to the findings of a pre-accreditation audit of an applicant. The FSC must be satisfied that the applicant has appropriate WHS policies, procedures, and safe work practices in place that meet the Scheme criteria.

The OFSC currently completes a System Validation Audit (SVA) as a first step once an application is submitted. This is a desk-top assessment of a company's safety systems against the FSC Audit Criteria. It provides a gap-analysis of the difference between the company's currently documented system and the Audit Criteria. This process ensures a

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<sup>27</sup> The project does not need to be government-funded building work.

<sup>28</sup> Further detail about the trial of subcontractor audits is provided in response to question 36.

company is ready for an onsite audit where both the documented system, and implementation of that system on a live construction site, will be verified.

A second SVA may be required if significant gaps are identified in the company's system against the Scheme criteria. If there is little progress by the company to make required improvements between a first and second SVA, the FSC would be briefed on potentially rejecting the accreditation application.

Once the SVA process concludes a company's safety system is broadly consistent with the Audit Criteria, an onsite audit is undertaken by an FSO to formally assess the system and onsite work practices against the Criteria. Typically, a company applying for accreditation is expected to achieve accreditation within two pre-accreditation audits. Unless there were extenuating circumstances, the FSC would be briefed on refusing accreditation to an applicant company if this was not achieved.

**Question 19 - Does the approach to post-accreditation audits remain appropriate? For example, should the nature of the audits or the criteria chosen for assessment change depending on factors such as time spent accredited under the Scheme?**

Under sections 15(1)(c) and 17(1) of the Scheme Rules, accredited companies must agree to a post-accreditation audit being undertaken. These audits ensure accredited companies meet their conditions of accreditation and comply with the Audit Criteria on an ongoing basis. As outlined in the Discussion Paper, the timing of post-accreditation audits is determined by the company's risk level under the OFSC Company Risk Framework (the Risk Framework). The Risk Framework is a holistic assessment of the relative safety of accredited companies.

Low-risk companies are generally audited annually. Medium risk companies are audited bi-annually, and high-risk companies are audited based on the Further Condition requirements. An accredited company's risk rating is reviewed after every audit and after the reporting of a serious safety incident. These events can trigger an immediate follow-up audit and/or a revision to the company's risk rating and ongoing audit cycle frequency.

An annual or bi-annual post-accreditation audit will review one WHS audit criterion, one Focus Point audit criterion and two hazard audit criteria. Any open non-conformances from previous audits will also be reviewed with an expectation that they be closed. The audit criteria selection is rotated at each audit to ensure ongoing compliance checks. The audit criteria selected is also informed by any identifiable safety incident trends in particular forms of work, any trend in Penalty Infringement Notices issued to the company and the types of high-risk construction work being undertaken at the company's work sites at the time of audit.

Where a post-accreditation audit detects non-compliance with accreditation conditions, or the Audit Criteria at unacceptable levels, compliance action is taken against the company as outlined in the OFSC Company Compliance Framework. A summary of compliance actions taken by the OFSC in recent years is provided on page 10 of the Discussion Paper.

**Question 20 – How best could entities report WHS incidents, injuries and fatalities consistently across all of their activities (Scheme and non-Scheme)?**

**Question 21 - Should WHS incident reporting be streamlined to cater for all government agency and regulatory reporting requirements? If yes, how?**

**Question 22 - Could the FSC draw on existing data sources instead of requiring its own data?**

As outlined on page 25 of the Discussion Paper, accredited companies are required to report fatalities, lost time injuries (LTIs), medically treated injuries (MTIs) and Dangerous Occurrences to the OFSC within timeframes notified by the FSC. This is a condition of each accredited company’s accreditation under section 15(1)(e) of the Scheme Rules. From 1 August 2023, the timeframes for reporting were changed to minimise compliance burden and provide a more consistent reporting framework. This change was notified to all accredited companies on 30 June 2023 and will be enforced from 1 September 2023.<sup>29</sup> Both the previous and current reporting requirements and their associated timeframes are summarised in **Table 22.1** and **22.2** below.

**Table 22.1: Current reporting requirements (effective as of 1 August 2023)**

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

**Table 22.2: Previous reporting requirements**

Incident Type	Timeframe		Project Type	
	Notifiable	Non-Notifiable	Scheme	Non-Scheme
Fatality	48 hours	n/a	Y	Y
Lost Time Injury (LTI)	48 hours	3 weeks	Y	Y
Medically Treat Injury (MTI)	48 hours	3 weeks	Y	N
Dangerous Occurrence	48 hours	n/a	Y	N

<sup>29</sup> Office of the Federal Safety Commissioner, [WHS Accreditation Scheme safety incident Reporting Requirements Streamlined – Changes take effect 1 August 2023](#) [media release], Department of Employment and Workplace Relations, 3 July 2023.

The range of incidents required to be reported to the OFSC by accredited companies is generally broader than the 'notifiable incidents' required to be reported to a Commonwealth, State or Territory WHS regulator.

The OFSC does not, however, have a complete picture of each accredited company's safety incidents. In particular:

- The OFSC is not notified of safety incidents (except fatalities) that occur when an accredited company is acting in a subcontracted capacity. This approach is adopted because of an assumption that the head contractor's safety system is in place on the project and not the system of the accredited company itself.
- The OFSC is not notified of LTIs that occur on a project of an accredited company valued at less than \$4 million. This aligns with the financial thresholds for the application of the Scheme.
- The OFSC is not notified of MTIs and Dangerous Occurrences on projects of an accredited company that are privately funded.

If the OFSC adopted a reporting framework akin to Commonwealth, State and Territory WHS regulators, this would decrease the regulatory burden on companies accredited. However, it would also reduce the OFSC's visibility of incidents occurring at accredited companies which will in turn impact the OFSC's ability to target its operational focus to companies experiencing incident trends (this is one aspect of the OFSC's Company Risk Framework).

There are no currently available data sources that match the range of incidents for which the OFSC requires reporting. If the OFSC was to change its reporting requirement to align with the model WHS Act, Commonwealth, State and Territory WHS regulators could be a source of safety incident information for the OFSC, however legislative change from all jurisdictions would be required to enable the sharing of that information.<sup>30</sup>

### **Question 23 - Are there any lead indicators that could be reported to the FSC?**

Measuring the safety integrity and effectiveness of safety systems is a difficult task. Most academics now accept that this requires a combination of valid lead and lag indicators that analyse the system and its outputs from multiple perspectives.

Using the data already available to it about accredited companies, the OFSC has sought to adopt this approach in its Company Risk Framework. The Risk Framework uses a combination of lead and lag indicators to provide a holistic assessment of the relative safety of accredited companies. Lead indicators include a company's audit results and any Penalty Infringement Notices issued under Commonwealth, State and Territory WHS laws. Lag indicators are the safety incidents notified to the OFSC.

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<sup>30</sup> Further detail on the legislative change needed to facilitate greater information sharing between jurisdictional WHS regulators and the FSC is provided in response to question 24.

The OFSC is keen to enhance its Risk Framework so it is a more accurate predictor of the relative safety of accredited companies. Enhancements could include classifying injuries according to the severity of their impact on the individual rather than organisational productivity as well as the reporting of positive (leading) safety performance indicators by accredited companies.

This review is an opportunity to obtain stakeholder feedback on what lead indicators would be appropriate to report to the OFSC for the purpose of informing the Company Risk Framework. The OFSC would welcome any findings made by the reviewer with respect to appropriate lead safety indicators that could be reported to the FSC.

### **Question 24 - How can we ensure greater sharing of information between the FSC and other WHS agencies and regulators?**

The FSC and Commonwealth, State and Territory WHS regulators have some overlapping jurisdiction with respect to safety in the building and construction industry, however they are different regulatory entities. The FSC is established, primarily, to administer the WHS Accreditation Scheme which acts as a pre-qualification scheme for companies wishing to be engaged as a head contractor on Government-funded building work. In contrast, Commonwealth, State and Territory WHS regulators are responsible for administration and enforcement of their respective WHS Acts and the prosecution of those persons who breach their WHS duties. Their responsibilities extend to all workplaces, not just those in the building and construction industry.

As the FSC is not a recognised Commonwealth, State or Territory WHS regulator, it is not a member of some of the established frameworks for collaboration between WHS regulators. For example:

- The FSC is not a member of the Heads of Workplace Safety Authorities (HWSA). HWSA is a framework established by a Memorandum of Understanding between Commonwealth, State and Territory safety regulators and Comcare to facilitate cooperation and sharing of cross-jurisdictional matters. Despite this, the FSC does sit on construction-related sub-committees of HWSA – the Major Construction Projects Community of Practice and the Construction Interventions Community of Practice.
- The FSC is not a member of the board of Safe Work Australia. However, the FSC is represented by the Commonwealth member and consulted to inform the Commonwealth's position on construction-related matters being considered by SWA. The FSC and SWA also engage informally to exchange information about construction industry hazards.

There is goodwill between the FSC and Commonwealth, State and Territory WHS 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.

Under the FSC Act, the FSC has broad powers to share information. Under section 105(2) of the FSC Act, the FSC may disclose, or authorise the disclosure of, information acquired in the course of performing his functions or exercising his powers if the FSC reasonably believes that:

- It is necessary or appropriate to do so for the purposes of the performance of the FSC's functions or the exercise of the FSC's powers; or
- the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, State or a Territory.

However, Commonwealth, State and Territory regulators are prevented from sharing information with the FSC. Under the Model WHS Laws and corresponding jurisdictional WHS laws, information collected under a power or function of those laws is confidential (see section 271 of the Model WHS Act). 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).

### **Question 25 - Should the risk ratings of accredited companies be transparent to allow for a comparative assessment of their safety record and capacity as part of the procurement requirements for CW funded projects?**

It is atypical for Commonwealth regulators to publish risk ratings that they assign to the entities that they regulate. Doing so publicises where the regulator is directing their compliance activities, even though these activities may not yet be completed. This could unfairly prejudice companies that are ultimately found to be compliant and would alert companies to compliance and enforcement activities being undertaken without their involvement.

While the OFSC's Company Risk Framework seeks to compare the relative safety of accredited companies, it was developed as an internal resource to help target operational activities. This risk ratings arrived at using the Risk Framework are not a strict measure of WHS performance with the rating considerations extending beyond performance to consideration of other factors. For example, newly accredited companies, even those with very good WHS records, are assigned a medium risk level until such time as they have a post-accreditation audit with results that meet the FSC's tolerance levels for a good audit.

The review may wish to consider the merits of the FSC or the Scheme reporting on the safety performance metrics of accredited companies. Given information currently held by the OFSC, this could include the number of open Corrective Action Reports for each company and/or the company's Lost Time Injury Frequency Rate. While neither of these are perfect measures of an organisation's relative safety, they would enable procurers to compare the reported performance of entities and may lead to further improvements in WHS performance on construction sites.



**Question 26 - Do the audit criteria remain relevant to building and construction workplaces in 2023? If not, are there any new criteria you would suggest be included?**

**Question 27 - Should the hazard criteria highlight the management of risks to a worker's health (for example risks of contracting occupational diseases and psychosocial risks) as well as the hazards to physical safety? If yes, what criteria do you suggest be included?**

The OFSC intends to conduct a review of its FSC Audit Criteria in 2024. That will serve as an opportunity to take onboard any recommendations from this review in relation to the Audit Criteria.

In considering the relevance of the Audit Criteria, it is worth reflecting on the types of work being undertaken by workers that have been killed on accredited company sites. A breakdown is provided in **Table 27.1** for the period 1 January 2018 to 30 June 2023:

**Table 27.1: Fatalities by work category**

Work category	Number of fatalities
Machinery and Fixed Plant	9
Mobile Plant and Transport	8
Non-powered Equipment and Tools	1
Material and Substances	3
Other	3

Most fatalities reported to the OFSC have occurred while workers were undertaking work recognised as high risk by the Audit Criteria. However, it is noteworthy that three occurred while a worker was loading or unloading materials or equipment. While this is regulated by the Audit Criteria in part (relating to mobile plant) it is not otherwise addressed. These involved the unloading a piece of mobile plant for one incident, and two incidents related to unloading construction products.

Tower cranes are not regulated by the Audit Criteria other than as part of Audit Criteria H5 – temporary structures. Given the unique hazards posed by tower cranes, consideration to expanding the Audit Criteria into this area may be warranted.

Worker health issues are addressed in part by the Audit Criteria. The hazards posed by occupational diseases (including the risks associated with Respirable Crystalline Silica) are covered by Audit Criteria WH14 – Health Surveillance and Exposure Monitoring. The WH14 criteria require accredited companies to, among other things:

- Identify site-specific health hazards including biological, physical and chemical or atmospheric hazards.

- Ensure that personal exposure to those health hazards is measured and evaluated to prevent Workplace Exposure Standards being exceeded.
- Where there is a risk of exposure, a process for health surveillance/monitoring by a medical practitioner is established.

The WH14 criteria are necessarily general given the wide range of hazards that could lead to occupational disease within the building and construction industry. However, the Audit Criteria requires companies to identify and eliminate or mitigate these hazards specifically at the site-level. Providing more specific criteria for particular occupational diseases would substantially expand the Audit Criteria.

Psychosocial hazards are also not specifically regulated by the Audit Criteria. If the regulation of psychosocial hazards was recommended, this would likely require specific Audit Criteria to be developed.

**Question 28 - Given the costs associated with administering a growing Scheme, the substantial auditing service being provided to companies and the Charging Policy, is it reasonable and appropriate to charge companies seeking accreditation?**

**Question 29 - What would be the impact of charging for accreditation and how could any charge be implemented fairly?**

As the number of accredited companies continues to grow, so too does the number of pre- and post-accreditation audits that need to be undertaken. This drives considerable additional cost to the OFSC.

Between 2018 and 2022, the average annual growth in new accreditations (new companies minus those that leave Scheme) has been 32. New accreditations are audit intensive as, on average, they require 2.6 pre-accreditation audits to demonstrate compliance with the requirements for accreditation under the Scheme Rules. Newly accredited companies are also required to undergo their first post-accreditation audit within 6 months of obtaining accreditation. This alone pre-supposes the OFSC will undertake an additional 115 audits per year (assuming that all accreditation applications and first post-accreditation audits are completed within 12 months).

Charging companies to apply for, or maintain, accreditation under the Scheme could assist Government in offsetting the cost of OFSC audits as any costs recovered would count as a direct offset for the Department of Employment and Workplace Relations (in which the OFSC is located).

If it is considered appropriate to charge companies, the OFSC makes the following observations:

- First, under the current legislative arrangements, subsection 43(3) of the FSC Act only enables fees to be charged for companies seeking accreditation. The provision contemplates a ‘fee for service’ arrangement (as distinct from a tax). In view of this, there must be a discernible relationship between the amount of the fee and the cost of delivering the service.<sup>31</sup> In practice, 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.
- Second, legislative change would be needed to support either an application fee that does not have a discernible relationship to the cost of processing the application or an annual fee for maintaining accreditation. Such arrangements would likely be considered a tax and would therefore need to be enacted consistent with section 55 of the Constitution (that is, any imposition of a tax must be in a separate, standalone piece of legislation).
- Third, accredited companies vary greatly in size, annual turnover and total number of hours worked. As such, they have differing capacity to pay a charge levied for accreditation. Consideration should be given to whether any charge 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.
- Fourth, 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.

**Question 30 - Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the dual policy objectives of improving building and construction industry safety through government procurement and supporting local industry to take advantage of government purchasing opportunities?**

**Question 31 - Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support implementation of the Secure Jobs Code? If yes, what are those changes?**

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<sup>31</sup> *Air Caledonie international v The Commonwealth* (1988) 165 CLR 462, 467 (*Air Caledonie*); *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133, [133], [509] (*Airservices*).

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. The OFSC will continue its engagement with relevant Commonwealth Government agencies, including the Department of Finance, which has responsibility for the Buy Australian Plan.

**Question 32 - Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support a culture across the building and construction industry which removes barriers to women's participation and enables a safe working environment for women? If yes, what is that role?**

The Office for Women, in collaboration with the Workplace Gender Equality Agency (WGEA), are spearheading the important work of improving women's participation in the building and construction industry. As well as developing the broader National Strategy to Achieve Gender Equality, the Office for Women provides funding to a range of local programs including *Women in Work Boots* (advice and assistance to women in Tasmania interested in pursuing careers in traditionally male-dominated sectors including construction) and *See what you can be* (increasing the recruitment and retention of women in male-dominated industries including construction in regional Victoria).

The WGEA requires all employers with 100 or more employees (including the construction industry) to report annually against several gender equality indicators. These include: gender composition of its workforce and board; equal remuneration; availability of flexible working arrangements and supporting employees with family and carer responsibilities; consultation with employees on gender equality in the workplace; and sexual harassment and discrimination in its workforce. Various tools have also been developed by the WGEA to assist employers with gender equality matters.

Removing barriers to women's participation with accredited companies, or on building work funded by the Government, is not currently a function of the FSC. Because of this, the OFSC does not currently undertake any work in this area. Similarly, the Audit Criteria does not specifically oblige accredited companies to take action to improve gender diversity. If the FSC is to have additional functions related to improving women's participation, further resourcing would be required to ensure the OFSC can facilitate this without detracting from its existing WHS responsibilities.

**Question 33 - Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support implementation of the Better Deal for Small Business policy? If yes, what are those changes?**

Small (fewer than 20 employees) to medium (20-199 employees) sized construction companies are an important part of the Scheme, with three quarters of Scheme accredited companies being classified as small or medium in size.

The Scheme was designed to be small business friendly. There are no application fees or ongoing fees to maintain accreditation. The Audit Criteria have been drafted in a way that is scalable to the size and systems-maturity of the business. The criteria do not dictate how outcomes are to be achieved.

The OFSC has introduced a range of measures to support small and regional business in meeting and maintaining the required level of health and safety to become accredited. These include:

- small builder case studies;
- representation on the OFSC's Industry Reference Group;
- introducing a range of streamlining measures following the 2014 Scheme review (enhanced guidance, removal of pre-requisite requirements, criteria review to ensure scalability);
- provision of a mechanism for unaccredited companies to partner with experienced accredited companies on Commonwealth funded building work projects; and
- a survey of small/regional builders to identify any perceived or actual barriers to achieving accreditation.

### **Question 34 - Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the work of the National Construction Industry Forum? If yes, what are those changes?**

The OFSC notes the National Construction Industry Forum (NCIF) has been established under the *Fair Work Act 2009* (Fair Work Act), with its provisions commencing on 1 July 2023. The NCIF will advise the Government on tackling key challenges in the building and construction industry by encouraging tripartite collaboration on a range of matters – with a focus on safety, productivity, skills and training, workplace relations, industry culture, diversity and gender equity.

The OFSC notes that the Fair Work Act allows for the Chair of the NCIF to invite a person, body, or organisation to participate in a meeting without becoming a member, after consultation with members of the Forum. While not an appointed member, the FSC will monitor the NCIF's forward work priorities for opportunities to contribute expertise, data and learnings to safety related discussions. This includes insights about how the Commonwealth can better leverage its spending power to improve the safety culture of the building and construction industry.

### **Question 35 - Are changes to the functions of the FSC or to the requirements of the Scheme necessary to support the regulatory stewardship approach to regulation? If yes, what are those changes?**

The OFSC is aware that the Government is asking the Parliament of Australia to enshrine the responsibility of stewardship in the *Public Service Act 1999* and that the Department of Finance is developing a framework to implement a stewardship approach to managing

Australian Government regulatory systems. At this time, the OFSC has not identified any changes will be required to the FSC's functions or the Scheme arising from this important body of work.

Being a micro-regulator, stewardship and better practice regulatory approaches are both encouraged and supported through structured approaches within the OFSC. For example:

- the OFSC has a structured approach to capturing, assessing, prioritising and implementing ideas for improvement, which are described in its Continuous Improvement Framework document;
- the OFSC is upgrading its systems, to enable quicker utilisation of data and the application of more advanced analytic techniques to isolate key data themes. Better data and analytics can be used to better target the OFSC's operational focus to areas of highest risk via its Company Risk Framework. It can also be used to make more informed decisions about selecting the most appropriate intervention to address emerging issues (e.g. education vs compliance action);
- the systems enhancements will also streamline the digital experience of accredited companies and FSO's engagement with the OFSC and support data sharing with other regulators;
- the OFSC has a demonstrated record of collaboration with accredited companies and industry stakeholders to co-design educational material and attempt to problem-solve for some of the industry's more intractable safety issues; and
- the OFSC's collaborative efforts have also been aimed at improving feedback loops on the OFSC's performance. This is particularly evidenced through initiatives such as the OFSC's annual census and its post-audit feedback surveys. The OFSC has also been building its own internal performance metrics to better measure and benchmark its own performance.

### **Question 36 - Should the Scheme be expanded to cover sub-contractors as contemplated by the Royal Commission?**

Under paragraph 26(f) of the Scheme Rules, building work undertaken by a subcontractor is exempt from the requirement in subsection 43(4) that the Commonwealth only fund building work if the work is undertaken by an accredited company. This paragraph of the Scheme Rules would need to be repealed to facilitate subcontractor coverage by the Scheme.

Such a change would not prevent the Commonwealth from funding building work if a subcontractor for those works was unaccredited. However, it would require the Commonwealth to, at the time of funding, take appropriate steps to ensure that builders (including subcontractors) will be accredited when they carry out building works (as per paragraph 43(4)(b) of the FSC Act).

A potential challenge to expanding the Scheme to subcontractors is the size of those subcontracted entities, the maturity of their safety systems and capacity to establish and maintain systems required by the Audit Criteria. While the Audit Criteria are designed to be scalable to businesses of differing sizes, the initial safety systems uplift required to meet the Audit Criteria is considerable. Some smaller subcontractors, particularly sole traders or owner operators are unlikely to have the time, resources or technical expertise to meet the Audit Criteria. This would, in effect, lock those subcontractors out of projects that include Government funding.

As outlined in response to question 17, the OFSC is trialling post-accreditation audits of accredited companies in a subcontractor role where the company is not working in a head contractor role for an extended period. This trial is intended to test whether the OFSC can maintain appropriate oversight of accredited companies that only occasionally work as a head contractor by auditing their safety system, and its implementation, in a more limited subcontractor application.

Not all Audit Criteria will be applicable to a company acting in a subcontractor capacity given its more limited control over the site and work methodologies. However, the subcontractor audits will select Audit Criteria that remain applicable regardless of the company's status. This will generally include elements of the following Audit Criteria:

- WH12 – Hazard Identification Risk Assessment and Control
- WH13 – Emergency preparedness and response
- WH15 – Incident investigation and corrective action
- WH17 – Health and safety management systems audit
- FP1 – Senior management commitment
- FP4 – Management of subcontractors (to the extent a subcontractor further subcontracts any works)
- FP5 – Project performance measurement.

The subcontractor audits also select hazard Audit Criteria relevant to the scope of works being undertaken by the company.

If successful, the trial will enable the OFSC to maintain more regular oversight of companies that work primarily as a subcontractor or that maintain accreditation for its safety benefits (rather than the capacity to undertake Government-funded building works). The trial is running for 12-months with an evaluation of results currently planned for July 2024.

### **Question 37 - Does the safety performance of other industries (including emerging industries) which receive CW funding warrant expanding the Scheme? If yes, which industries and why?**

To the extent that the Commonwealth is procuring goods and services within Australia, the safety of the workers associated with procurements will be covered by applicable Commonwealth, State and Territory WHS laws. However, as with the building and construction industry, there may be circumstances in which the further regulation of aspects of those other industries from which the Commonwealth procures may be beneficial

(while noting that it would also be an additional regulatory impost on business). These industries (or sectors within industries) would likely have the following characteristics:

- Safety concerns – to justify additional regulation beyond that of jurisdictional WHS laws, new industries regulated by the OFSC should have higher levels of safety incidents.
- Australian-based workforces – While Australian workers can generally be regulated by the Commonwealth, there are legal and practical difficulties in imposing additional safety obligations on companies that operate in other countries. Careful consideration would need to be given to any offshore extension of the OFSC to ensure it did not breach trade agreements or other laws.
- Regulatory gaps – Some industries already have regulators beyond Commonwealth, State and Territory WHS regulators that look to improve safety. To minimise regulatory overlap and unnecessary increased regulatory burden on business, expansion of the OFSC should only be considered for areas where there is a gap in the ‘regulatory market’.

The Commonwealth purchases good and services directly. These purchases are publicly reportable on AusTender and are classified according to the United Nations Standard Product and Services Code (UNSPSC).<sup>32</sup> The Commonwealth also funds State and Territory governments for outcomes under Federation Funding Agreements (FFA). FFA funding is reported through the Federal Financial Relations (FFR) website.<sup>33</sup> The analysis below seeks to assist in identifying some of the significant areas of Commonwealth procurement expenditure.

#### Commonwealth direct purchasing

**Table 37.1** and **Graph 37.1** below summarises the largest areas of Commonwealth direct procurement over the period 2018-19FY to 2022-23FY.

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<sup>32</sup> AusTender, [What the Government buys](#), AusTender website, 2023.

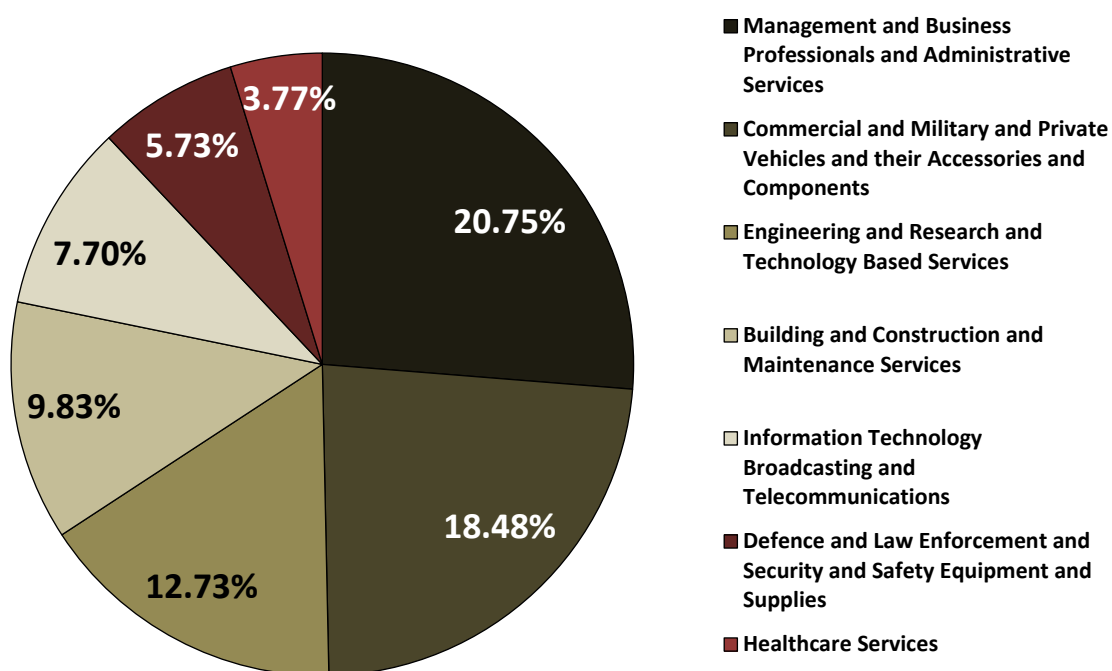
<sup>33</sup> Commonwealth of Australia, [Federal Financial Relations](#) [website], n.d., accessed July 2023.



**Table 37.1: AusTender – Australian Government Procurement – FY2018-19 to FY2022-23**

Categories	Total expenditure	Proportion of all expenditure
Management and Business Professionals and Administrative Services	\$69,873M	20.75%
Commercial and Military and Private Vehicles and their Accessories and Components	\$62,228M	18.48%
Engineering and Research and Technology Based Services	\$42,863M	12.73%
Building and Construction and Maintenance Services	\$33,099M	9.83%
Information Technology Broadcasting and Telecommunications	\$25,914M	7.70%
Defence and Law Enforcement and Security and Safety Equipment and Supplies	\$19,302M	5.73%
Healthcare Services	\$12,690M	3.77%

**Graph 37.1 - Australian Government Procurement – FY2018-19 to FY2022-23**



Further analysis of the reported sub-categories for each area could be used to assist in identifying where the majority of this expenditure is invested. This is shown in **Table 37.2** below.

**Table 37.2: AusTender – Detailed Spends FY2018-19 to FY2022-23**

Parent Categories	Child Categories	Total Cost
Management and Business Professionals and Administrative Services	Lease and rental of property or building	\$15,102M
	Management advisory services	\$12,030M
	Temporary personnel services	\$10,043M
Commercial and Military and Private Vehicles and their Accessories and Components	Military watercraft	\$9,180M
	War vehicles	\$9,047M
	Military rotary wing aircraft	\$8,669M
Engineering and Research and Technology Based Services	Computer services	\$19,320M
	Professional engineering services	\$11,908M
	Software maintenance and support	\$2,463M
Building and Construction and Maintenance Services	Building construction and support and maintenance and repair services	\$30,059M
	General building construction	\$1,950M
Information Technology Broadcasting and Telecommunications	Components for information technology or broadcasting or telecommunications	\$9,798M
	Software	\$5,408M
Defence and Law Enforcement and Security and Safety Equipment and Supplies	Conventional war weapons	\$3,494M
	Missiles	\$3,440M
	Surveillance and detection equipment	\$3,269M
Healthcare Services	Comprehensive health services	\$6,077M
	Disease prevention and control	\$4,642M

Further information on the AusTender categories, including descriptions and all sub-categories, can be found at the AusTender Customised UNSPSC Codeset.<sup>34</sup>

In addition to the direct Commonwealth procurement detailed above, the Scheme is further supported by indirect funding arrangements such as the Federation Funding Agreements<sup>35</sup>, National Partnership payments, and other Commonwealth-State funding agreements.

The Customised UNSPSC Codeset does not make it immediately apparent what industry sector purchasing relates to, or whether the purchasing is tied to an Australian industry at all. Further analysis would be required to draw out these connections.

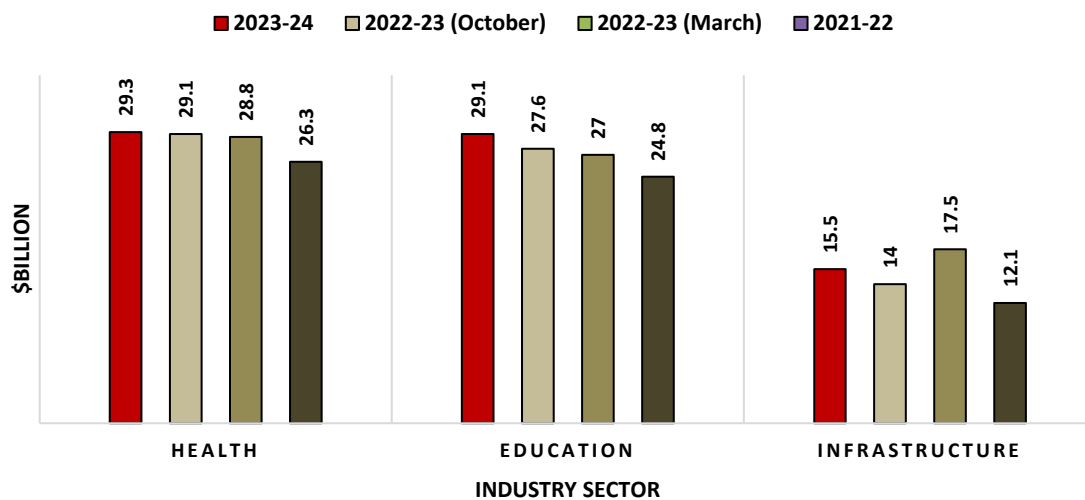
<sup>34</sup> AusTender, [AusTender Customised UNSPSC Codeset 1 July 2023](#) [data set], data.gov.au, 2023.

<sup>35</sup> Federation Funding Agreements were introduced on 28 August 2020 and consolidated a range of Commonwealth funding agreements, including all existing National Partnership Agreements.

### Commonwealth indirect purchasing

As per the 2023-24 Budget,<sup>36</sup> the Australian Government will provide states with \$87.4 billion in payments for specific purposes this financial year, including an expected \$26.1 billion in National Partnership payments. **Graph 37.2** and **37.3** below outline specific purpose payments to the states by sector, as reported since the 2021-22 Budget<sup>37</sup>:

**GRAPH 37.2:  
PAYMENTS FOR SPECIFIC PURPOSES, BY SECTOR (MAJOR)**



<sup>36</sup> Commonwealth of Australia, [Budget Paper No. 3: Federal Financial Relations](https://budget.gov.au), budget.gov.au, 2023.

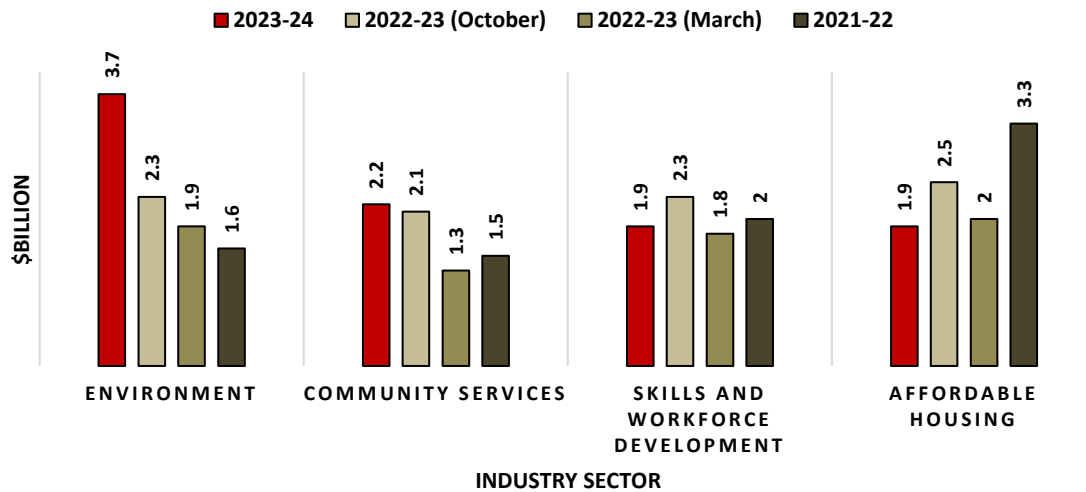
<sup>37</sup> Chart based on Commonwealth of Australia data from each respective Budget.

Commonwealth of Australia, [Budget Paper No. 3: Federal Financial Relations](https://budget.gov.au), budget.gov.au, 2022.

Commonwealth of Australia, [Budget Paper No. 3: Federal Financial Relations](https://budget.gov.au), budget.gov.au, 2023.

Commonwealth of Australia, [Budget Paper No. 3: Federal Financial Relations](https://budget.gov.au), budget.gov.au, 2023.

**GRAPH 37.3:  
PAYMENTS FOR SPECIFIC PURPOSES, BY SECTOR (MINOR)**



38

Australian industries with high levels of serious injuries

**Table 37.3** and **Graph 37.4** below is extracted from Safe Work Australia’s serious injury by industry data.<sup>39</sup> It shows the Australian industries with the highest rate of serious injuries per million hours worked in 2020-21.<sup>40</sup>

**Table 37.3: Safe Work Australia – Serious Claims by Industry – 2020-21**

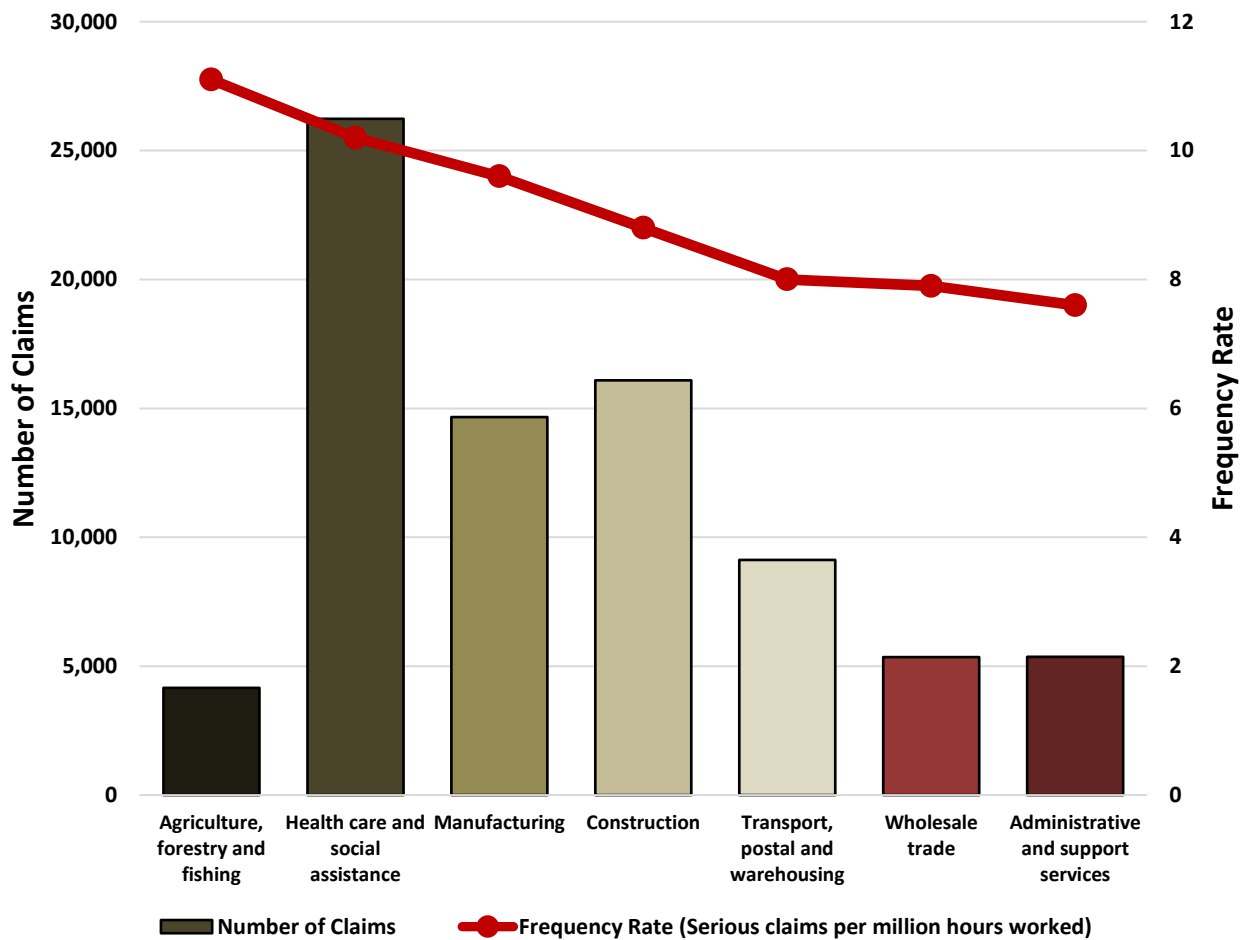
Industry	Number of Claims	Frequency Rate (Serious claims per million hours worked)
Agriculture, forestry and fishing	4,159	11.1
Health care and social assistance	26,239	10.2
Manufacturing	14,663	9.6
Construction	16,088	8.8
Transport, postal and warehousing	9,122	8.0
Wholesale trade	5,352	7.9
Administrative and support services	5,364	7.6

<sup>38</sup> The ‘Environment’ sector was expanded in the 2023-24 Budget to ‘Environment, energy and water’. The significant funding increase this Budget can be partially attributed to a \$1.1 billion investment in Energy Bill Relief.

<sup>39</sup> Safe Work Australia, Key work health and safety statistics Australia 2022, SWA, Australian Government, 2023.

<sup>40</sup> The 2020-21 dataset remains the most recent information available as of July 2023.

**Graph 37.4: SWA – Serious Claims by Industry – 2020-21**



In addition to the construction industry, the Commonwealth 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 Australian Plan and Secure Australian Jobs Code would also be recommended to ensure that any expansion aligns with concurrent Government priorities.

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

Expansion of the OFSC into industries other than building and construction would require significant change to the OFSC and the legislation underpinning the Scheme. The necessary

changes are achievable, but would require sufficient lead time to enact. The list below outlines some of the general changes that could be expected to expand the FSC's remit to new industries. However, the precise changes required would depend on the new industries proposed.

- **Enabling legislation:** The FSC Act would require amendment to confer power on the FSC in relation to other industries. Understanding the way in which the Government engages and funds entities within these industries, the location of the entities that make up the industry and legal status of those entities will be critical to ensure the regulatory mechanisms proposed are constitutionally valid and as effective as possible.
- **Strategic plan:** The OFSC's existing building and construction industry focused strategic plan would need to be reconceptualised if new industries were to be regulated. This requires a detailed understanding of the new industries to be regulated, the priorities of stakeholders (particularly any existing regulators within those sectors) and the motivators for change of the entities to be regulated.
- **Stakeholders:** The OFSC would also need to build relationships with the key stakeholders in any newly regulated sectors to understand the safety issues, design appropriate auditing arrangements, pilot new operational arrangements and adapt those arrangements based on feedback.
- **Audit Criteria:** The Audit Criteria are currently designed to address the safety issues and known hazards of the building and construction industry. New Audit Criteria would need to be developed to regulate new industries based on an assessment of the safety issues and hazards specific to those new industries. Adapting the existing Audit Criteria to make it industry-neutral would significantly water down the obligations on accredited companies and would risk losing the safety gains made by the Scheme to date.
- **Federal Safety Officers:** The currently appointed FSOs have been appointed by the FSC predominantly for their experience as safety professionals within the building and construction industry. Extending the FSC's remit to other industries would require the engagement of new FSOs with safety expertise relevant to those new industries.

Any expansion of the FSC's role to other industries would need to be accompanied by additional funding and staff resources. Without this, the OFSC's focus on the building and construction industry would be diminished to resource the expansion.

Any expansion would also need to consider the additional demand on the FSC's time. It may be appropriate to consider establishing Deputy FSC roles within the FSC Act who could take responsibility for implementing aspects of the FSC's functions.

## Glossary

**Dangerous occurrence** - An incident where no person is injured, but could have been injured, resulting in serious personal injury, incapacity or death. Also commonly called a “near miss”.

**Incident Frequency Rate** - Frequency rates are calculated by the number of incidents divided by hours worked, multiplied by 1,000,000.

- **LTIFR** (Lost Time Injury Frequency Rate) - The number of occurrences of lost time injury that result in a permanent disability or time lost from work of one day shift or more in the period.
- **MTIFR** (Medically Treated Injury Frequency Rate) - The number of occurrences of treatment by, or under the order of, a qualified medical practitioner, or any injury that could be considered as being one that would normally be treated by a medical practitioner.
- **TRIFR** (Total Recorded Injury Frequency Rate) – The total number of Medically Treated Injuries, Lost Time Injuries and Fatalities. Fatalities are excluded from the calculation as they have a negligible effect on the frequency rates.

**Fatality Frequency Rate** – calculated by the number of incidents divided by hours worked, multiplied by 100,000,000 hours.

**Incident** - An incident resulting in an injury that is required to be notified by the WHS legislative requirement for notifiable incidents in the jurisdiction in which the project is being undertaken.

### **Corrective Action Reports – Major and Minor**

A Corrective Action Report (CAR) is a formal finding made by Federal Safety Officers (FSOs) during the auditing process to identify where companies need to take further action. An FSO raises a CAR when they determine that a certain aspect of the system being audited does not conform to the OFSC audit criteria. This assessment is based on their review of documentary evidence and observation of onsite activities. There are two levels of CARs that can be raised as a result of OFSC audits, major and minor non-conformances:

- A **major non-conformance** is where there is the absence of a documented process, and/or the absence of implementation of a process where the opportunity for implementation has occurred in relation to a specific criterion.
- A **minor non-conformance** is where there is a partially documented and implemented process where the opportunity for implementation has occurred in relation to a specific criterion.