

**Independent Review
of the
Federal Safety Commissioner**

Consultation Summary August 2023



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Introduction

I have been asked to review the Federal Safety Commissioner (FSC) within the parameters of the Terms of Reference which can be found at Appendix A of this consultation summary (the Review).

On 3 July 2023, I published a discussion paper on the Department of Employment and Workplace Relations (DEWR) website and called for written submissions over a four-week period to 31 July 2023. The discussion paper posed a series of questions around the key headings of:

- improving work health and safety (WHS) practices
- FSC powers and functions
- Federal Safety Officers (FSO) powers
- Work Health and Safety (WHS) Accreditation Scheme (Scheme) requirements
- current and recently acknowledged hazards
- cost recovery
- Commonwealth (CW) priorities
- expansion of the Scheme.

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

I met with the FSC, staff of the office of the FSC (OFSC), Federal Safety Officers (FSOs), industry and business associations and organisations, unions, accredited companies (small, medium and large), the Australian Small Business and Family Enterprise Ombudsman, WHS regulators, the Asbestos Safety and Eradication Agency, the National Heavy Vehicle Regulator, Safe Work Australia and with State, Territory and CW Government departments between May and August 2023 online and face to face in Adelaide, Melbourne, Sydney and Canberra. I attended an FSC Industry Forum and FSO Forum.

I was guided by an Advisory Panel (which met twice, in late June and mid-August) comprising of representatives from the CW Department of Finance, the FSC, the Electrical Trades Union, the Construction, Forestry, Maritime, Mining and Energy Union, Australian Workers' Union, Master Builders Australia, Civil Contractors Federation and Australian Constructors Association.

The public submission process was promoted across the building and construction industry:

- an email was circulated to all accredited entities alerting them to the discussion paper, the survey and the submission process
- the process was promoted on the DEWR website
- an email was circulated to everyone who participated in the preliminary consultation alerting them to the discussion paper, the survey and the submission process
- posts on LinkedIn were shared across various networks which linked to the Discussion Paper and review
- an email was sent to members of the Heads of Workplace Safety Authorities alerting them to the review and inviting their participation.

In total, more than 150 people across 49 stakeholder groups participated in the 57 face to face and online consultations.

I received twenty-one written submissions. Where permission was granted, submissions and comments were published on the [DEWR website](#). Of the submissions I received, five stakeholders asked that their submissions are not published, and these requests were respected. I was still able to draw on the information and experiences they offered. The survey received five comments, which are all publicly available on the DEWR website, with one being anonymous.

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

The intention of this summary is to report back on what I have heard to date and to clarify next steps. At this stage I have not analysed the feedback, made any judgements about it nor formed any firm views on findings or recommendations. I will be doing that prior to the completion of a draft report with recommendations which will be provided to DEWR at the end of November 2023.

Thank you to everyone who took the time to meet with me and to submit written submissions and survey responses. I appreciate that everyone is busy, and I highly value your commitment to this review process.

I would like to particularly thank the Advisory Panel for their feedback on the draft discussion paper and on this consultation summary. Thanks also to Ms Rachel Thomas, Ms Angela Wallbank and Ms Ilaisa Lafitani from DEWR who supported me throughout the public consultation phase of the review.

Next Steps

There may be issues raised in this consultation summary which you didn't consider in your original submission or conversation with me. If there are and you would like to respond to them, I encourage you to provide me with your feedback by 30 September 2023 directly to me at marie.boland@bigpond.com.au or to the DEWR consultation address WRconsultations@dewr.gov.au

I will be analysing all feedback and submissions, including responses to this summary, and formulating recommendations over the months of September and October 2023.

A final report with recommendations to Government will be finalised by December 2023.

Marie Boland

1. The Policy Objective

Top Issues Raised

1. Support for the policy objective.

An overwhelming majority of submissions support the policy objective of the FSC and the Scheme to leverage CW funding to increase safety standards across the building and construction industry.

The CW Department of Finance submitted:

given the high value and high-profile nature of Commonwealth projects, Scheme accreditation assists with establishing baseline expectations and management systems to support an atmosphere where safety is not a secondary consideration.

The Department of Defence was very supportive of the Scheme suggesting that it gave ‘an extra level of assurance, was easy to manage and was good policy’.

Parks Australia notes that ‘application of the scheme forms an integral part of the Parks Australia procuring and contract management process for relevant activities’. However, it also encourages the Review to consider ‘new approaches to achieving appropriate safety standards while minimizing adverse impact on engagement of contractors to deliver remote and regional works’.

A response to the survey from a state government department notes:

I believe the WHS Accreditation Scheme is providing some benefit. I believe there should be a benchmark to meet to be able to be awarded government projects.

State and territory jurisdictions have their own WHS procurement prerequisites for publicly funded building and construction work. Not all jurisdictions recognise Scheme accreditation as an appropriate WHS standard for their wholly state or territory government funded projects. In Victoria, for example, I have been told wholly state government funded projects do not recognise Scheme accreditation and have their own WHS procurement prerequisites.

Many participants in the Review, including the Australian Small Business and Family Enterprise Ombudsman asked:

can there be a national standard across the Commonwealth and states and territories? How many times do businesses have to prove their credentials? Scheme accreditation should be enough.

Most union submissions, whilst not supporting the continuation of the FSC and the Scheme, are supportive of the fundamental policy intention behind them. The Australian Council of Trade Unions (ACTU) submitted:

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

The Australian Manufacturing Workers Union (AMWU) and the Australian Workers Union (AWU) do not support a continuation of the FSC ‘in its current form’, with the AMWU, however, confirming ‘we support a principle that the Commonwealth Government should use its purchasing power to deliver safer workplaces’.

Feedback from accredited entities, business and industry associations and organisations in general indicates continued support for the policy objective of the Scheme. However, this support is accompanied by considerable frustration in relation to its current administration. Most conversations and submissions from business representatives and individual accredited entities focussed on these operational frustrations which are discussed in more detail throughout this consultation summary under the relevant headings and sub-headings. One accredited entity summed up a view widely held by entities operating in the Scheme:

In theory good ... in principle the policy is supported ... but execution is the challenge.

FSC Submission

The FSC explained in its submission, how it implements the policy objective:

The Scheme, through the FSC's Audit Criteria, layers additional safety responsibilities on companies to the obligations owed under jurisdictional WHS laws. Compliance with the Audit Criteria is a requirement to gain and maintain accreditation under the Scheme, with the OFSC¹ undertaking pre- and post-accreditation audits at a frequency determined by the OFSC's Risk Framework. In this way, the Government is signalling to building and construction companies that they must meet a higher safety standard to undertake Government funded works.

The current Commissioner identified his 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.

2. The Legislative and Operating Context

Top Issues Raised

1. The Scheme is operating in a changed WHS legislative and operational context.

Many contributions to the Review emphasised that the legislative and operational context has changed dramatically since the FSC was established and this merits a reconsideration of the role of the FSC and the Scheme. Some suggest that the changes result in the FSC and the Scheme no longer being required.

The Australian Constructors Association (ACA) wrote in its submission that it:

encourages the Review to give careful consideration to the changes in the WHS legislative environment within which FSC now operates, and the most appropriate role for the FSC within that contemporary regulatory context.

¹ I refer to the FSC throughout this summary to include the Commissioner and his office; the FSC submission refers separately in its written submission to the FSC as the Commissioner and the OFSC as his office. I have kept these acronyms where they are included as a direct quote from the FSC submission.

Civil Contractors Federation Queensland (CCF QLD) submitted that:

changes in the WHS sphere since 2011 have changed the role and relevance of the FSC with duplications of the powers and functions of the FSC since the introduction of the WHS legislation in 2011.

An accredited entity suggested:

The FSC would need to inwardly look and define what it is trying to achieve beyond the scope of audit and how it aligned to various support channels that exist and are available to workers such as Safe Work Australia, WHS regulators and other related support bodies.

Another suggested that the FSC was focussed on 'old fashioned approaches to managing WHS', referencing 'twenty-year-old thinking'.

Another called for 'more alignment with the model WHS laws, especially the model Codes of Practice, and with state and territory WHS regulators'.

The Australian Institute of Health and Safety (AIHS) noted in its submission:

The OHS environment and operating context of the building and construction industry has changed significantly in the past 20 years including:

- *demographic, cultural, ethno-and gender workforce factors;*
- *advancements in technology, via changes in information management through project software solutions, and changes to hardware used on building sites; and*
- *environmental and sustainability challenges, pressures and practices.*

We don't believe the FSC are well placed to lead the response to any of these changes.

Unions were consistent in their belief that the FSC and the Scheme are no longer fit for purpose. The Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) does not support the continued operation of the FSC or the Scheme. It submits that:

The significant changes in WHS legislation that have occurred since 2005, including increased penalty and industrial manslaughter provisions, have overtaken the need for the FSC.

The ETU stated that the FSC is not operating in a way that 'meets the spirit of the harmonisation of WHS laws'. It lists the objects of the model WHS Act in its written submission and suggests that:

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

Its conclusion:

Change is needed to embed a consultative and collaborative approach to worker safety that facilitates employers, workers, and unions working together and ensures entities strive for continual improvement with the common goal of improving work health and safety. The ETU is of the view that the FSC is neither up to this task nor necessary to achieving it. At best it appears the FSC's functions are simply a duplication of functions which would be better performed by other regulators and agencies, particularly if those regulators and agencies had the FSC budget redirected to them for those purposes.

FSC Submission

The FSC noted it is *'not a regulator of the WHS laws in the Commonwealth, States or Territories'*. The FSC's powers to enforce compliance with the Scheme are outlined at pages 18-19 of the FSC's submission.

The FSC also noted *'stronger engagement with worker representatives in the strategic governance of the OFSC'* would be welcome and suggested *'a tripartite Advisory Board could be established going forward to advise the FSC on the execution of their legislative functions'*.

3. Improving Safety in the Building and Construction Industry

Top Issues Raised

1. Debate about the FSC's impact on improving safety and safety culture.
2. Frustration with the FSC's emphasis on paperwork.

There are mixed opinions on whether the FSC and the Scheme have resulted in improved safety outcomes in the building and construction industry, and to what extent it is effecting change in safety culture across the industry. The ACA submits:

It is difficult to draw conclusions about the effectiveness of the FSC. While safety outcomes are improving across the construction industry at large, the data provided in the Discussion Paper does not speak to the FSC's role in this trend.²

The ACA also considers that *'the performance statistics relating to FSC accredited entities provided in Section 2.2 of the Discussion Paper are likely to be similar in comparable non-accredited entities'*.

The ETU has a similar view:

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

The CFMEU points to the fatalities statistics noting that as of 21 June 2023 *'43% of fatalities in the building and construction industry occurred on Scheme project worksites'*.

Many of those consulted suggested that a deep dive of the FSC statistics and the Safe Work Australia (SWA) statistics was required. CCF SA for example, noted in response to the FSC and SWA statistics provided in the Discussion Paper:

This data suggests that the Scheme may or may not be contributing as efficiently to a reduction in fatality or serious injury rates. Further review of Safe Work Australia Work Related Injuries and Fatalities Report 2022 supports the need for deep dive. The SWA Report shows a clear decline across all industries, this begs the question of whether the Scheme has contributed to the construction industry decline or if the decline is a result of general safety improvements across businesses and workplaces generally.

Small businesses which are accredited, and which participated in the Review were consistent in confirming the Scheme helped them to bring their WHS management system up to a higher standard

² For more views on the data presented in the Discussion Paper see the section on Reporting at page 20.

than they would have achieved without the Scheme. One noted *'accreditation provides another set of eyes – it keeps up our standards'*. Another indicated they *'have used the Scheme to tighten things up'*. Another found value in the FSC audit as *'a free check on their safety system'*.

Larger accredited businesses saw less value in the Scheme and questioned whether it was affecting safety outcomes. One suggested that *'there is little evidence available that connects the activities of the FSC to improvement in safety practice and performance'* and noted that *'as an industry participant there is little transparency or perceived advantage of having FSC accreditation other than just a pre-qualification ticket to play'*.

Some in the building and construction industry consider that you can distinguish an accredited site by the fact *'it has one WHS management system'*. Others consider there are *'minimal signs that can be observed on a worksite that would indicate that it is operated by an accredited company'*. FSOs suggest that accredited sites *'are more orderly ... more organised ... subcontractors know what is expected'*.

While supportive of the Scheme and acknowledging a likely improvement to safety in the building and construction industry because of its existence, the AIHS submitted:

The Scheme is based on the premise that by developing and maintaining a documented system of work, and by robustly auditing those systems, participants will be better placed to manage OHS risks. But OHS is more complex than this. This is because the mix of causal factors involved in health and safety incidents, and the conditions enabling illnesses and diseases to occur from exposure to hazards at work, are complex. We see health and safety outcomes as being emergent properties from complex socio-technical systems.

Further, correlation does not mean causation. Positive OHS outcomes among Scheme participants may be a result of complex interactions and combinations of many factors. These factors may be indirectly related to the Scheme itself, or not related at all.

Whilst most participants in the Review agree the focus of the FSC on ensuring that accredited entities have robust WHS management systems is a good one, most also consider that this has translated over the years into an excessive focus on paperwork.

One accredited entity referred to the accreditation framework as a *'pushing of paper exercise'*. Another suggested it was *'not adding value, it's just about words'*.

Feedback was more positive regarding the initial pre-accreditation process particularly from smaller entities who consistently said that while frustrating, it led them to improve their WHS management systems:

Was there a benefit ... yes ... were we frustrated with the process ... yes ... are we in a good place now ... yes.

I believe the detailed criteria set by FSC has been helpful and generally constructive in building up solid process in our systems.

The ETU submission also highlights initial positive outcomes:

Experience from ETU members and officials, which is reflected in the data in s2.2.4 of the Discussion Paper, is that improvements to WHS performance by new entrants to the Scheme generally improves and is initially strong, they tend to plateau within 2-3 years of

accreditation and subsequently flatline within 5-7 years with no subsequent trend improvement.

Those entities that have been participating in the Scheme for many years expressed a consistent view that the 'reams of paper' gave a 'false level of comfort' and that there should be more focus from the FSC, particularly in the post accreditation audits 'on the things that are killing people - high-risk activities on site and not paperwork'.

Most accredited entities which participated in this Review consider that 'post accreditation audits drive a lot of administration with no real safety outcomes'.

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

FSOs reinforced that 'the FSC's focus is a system audit and not an inspection' and 'perhaps this misunderstanding of its role is leading to frustration amongst accredited entities'.

There were mixed responses to the question of what might happen if the FSC and the Scheme no longer exists ranging from no impact to variable impact to significant impact. Responses touched on the sustainability of improvements without an auditing presence by the FSC and on the fact that the culture of the industry has not changed over the last twenty years.

An accredited entity considered the FSC has had 'no effect on safety culture ... it is a purely bureaucratic undertaking for the contractor and the Scheme'.

Another suggested that:

Given the onus on employers is to provide safe systems of work etc under existing WHS legislation, we feel that there would be minimal to no impact on the WHS performance of currently accredited entities. The FSC should not operate as a quasi-regulator as this creates more burden on employers rather than keeping the enforcement and compliance element to within the scope of Safe Work Australia and the relevant WHS regulators ... cross sector performance is likely to be improved if there were greater resources allocated into the WHS regulator space from an enforcement perspective as well as an educational one.

Other comments from accredited entities include:

The only benefit is constantly improving paperwork, but it doesn't translate into safety on site, it's not affecting culture.

[accreditation is a] small investment for a massive outcome. If left to self-regulation, systems would degrade over time.

The culture of construction is that it's price driven so if there was no Scheme, standards would drop.

The CFMEU submits that *'there is no evidence to demonstrate that the Scheme has improved safety practices across the building and construction industry since the establishment of the FSC back in 2005'* and, *'in our opinion removal of the Scheme would have no impact on the WHS performance standards of currently accredited entities'*.

It was acknowledged throughout the consultation that the FSC is operating in a narrow part of the building and construction industry and was not affecting the safety culture of the broader industry.

The ETU submits:

Whilst there is evidently an initial push for entities to develop better internal systems and processes in line with this aim which appears to correspond with initial accreditation, it is apparent that change is necessary to prevent complacency once processes are set in place and accreditation is granted. The Scheme is falling short in terms of promoting an approach that embeds continual communication, learning, and innovation to drive ongoing improvements in safety outcomes over the long-term and its current narrow remit both excludes important social partners from its work and prevents the agency from driving much deeper reform in the construction sector.

CCF QLD suggests:

the Scheme has created a two-speed application and compliance of safety between those who are accredited and non-accredited ... for best results the whole industry must be working together under a single system.

It was suggested by many participants in the Review that the *'real safety culture work is to be done at sub-contractor level'*. One noted that *'construction has the capacity to shift culture well because of the strong contractual links between parties'*.

Another suggested that *'there is no culture change because the FSC audits are only impacting the front end of the supply chain, it needs to have more impact on the sub-contractors, on the people doing the work'*.

FSC Submission

The FSC accepts that not all the safety improvements in the building and construction industry can be solely attributable to its administration of the Scheme. However, it noted that:

improving the safety performance of the industry is 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.

The FSC further noted:

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.

The FSC submission provides data at pages 5-10 to support several propositions.³ These propositions are:

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

Accredited companies have lower workers compensation premium rates over time.

Scheme accredited companies are highly engaged and supportive of the OFSC.

The FSC explains:

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 FSC suggests that:

If the Scheme had not prompted builders to change, this step-change would not have occurred (or would have occurred to a smaller extent).

4. Federal Safety Commissioner – Functions and Powers

Top Issues Raised

1. The collaborative approach to exercising FSC functions.
2. The negligible use of the FSC's compliance and enforcement powers.
3. The duplication of functions across the FSC and other WHS regulators and agencies.

The AWU summed up the challenges facing the FSC in the exercise of its functions:

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

³ For more discussion of the FSC data see page 20 of this summary.

The FSC has confirmed its preference for using a collaborative approach in exercising functions to keep 'people in the tent'. This approach is overwhelmingly supported by employer and business organisations and associations and accredited entities. The Review received significant positive comments about the support currently provided by the FSC and the OFSC. These include:

Good ideas are shared and communicated across all of industry.

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

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

Unions highlighted the lack of involvement of workers and their representatives in the collaborative approach:

A key criticism of ETU members and officials is that the FSC has never once engaged with them in the performance of any of its functions ... The FSC has manifestly failed to promote, facilitate or otherwise engage in ensuring ongoing cooperation between entities and worker representatives occurs in a way that improves site safety or meets the spirit of the harmonisation WHS laws.

The ACA:

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

It was noted by unions that the collaborative approach has resulted in the FSC not using its compliance and enforcement powers to suspend, place conditions on or revoke the accreditation of poor performers in the Scheme.

In its submission the ACTU wrote:

The ACTU and our affiliates' primary concerns with the FSC ... is that it ... continues to provide accreditation to builders who fail to meet satisfactory performance. Additionally, the FSC lacks any regulatory power to determine breaches of WHS duties and take action to ensure future compliance.

It was suggested by a participant in the review that 'one revocation in nearly twenty years of the Scheme in itself suggests that there is a problem with how it is operating'.

In addressing the lack of worker participation and the lack of sanctions imposed over the life of the Scheme to date, the CFMEU attached to its written submission Recommendations 29 and 33 of the Final Report of the Royal Commission into the Building and Construction Industry (Royal Commission) to emphasise that the functions of the FSC are not consistent with the recommendations of the Royal Commission.

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

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

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

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

When asked about how the FSC's functions and powers create a point of difference between it and other WHS agencies and regulators, responses included:

State regulators set the bones for a safety system and the FSC provides the meat.

WHS laws are not specific about systems – Federal Safety Officers audit the specific system.

The Scheme has a specialist construction focus, whereas WHS inspectors are generalist.

CCF SA suggested 'further investigation into the functions of the FSC to ensure relevance and effectiveness in the current legislative and WHS environment'... and 'its current form and any potential improvements needed to meet the evolving demands of the industry'. It highlighted an example in its submission relating to the challenges for the industry arising from the harmonised high risk licencing scheme:

It seems that the industry is still grappling with how to fully adapt to these changes, and the lack of a unified national approach has hindered further progress since the introduction of harmonisation in 2012. To address these challenges, the suggestion is made [for the FSC] to link with RTOs. By doing so, the FSC can provide better clarity and develop a system that can be rolled out nationally ...

Some suggested what the point of difference might look like:

The FSC should be able to look at WHS being used as a weapon in IR disputation and tactics.

The FSC is well placed to support small business as it's not a regulator.

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

FSC Submission

The FSC contrasts the role it plays to Commonwealth, state and territory WHS regulators at pages 21 and 31 of its submission.⁴

It suggested a specific function be included in the legislation to support data analysis, education and support, and a potential for 'naming and shaming' poor performers, as a motivator for behavioural change.

The FSC notes that it has 'sought to increase its educative role in recent years and intends to continue this focus into the future' including using lessons learned resources, toolbox talk resources, safety roundtables and CEO/Senior Executive forums.

⁴ A fuller discussion of the FSC's approach to the exercise of its functions and powers is at pages 8-11 of the Discussion Paper.

4.1 The National Construction Code

Top Issues Raised

1. The misalignment of the National Construction Code auditing function.

There was little support expressed for the FSC's function to audit compliance with the National Construction Code (NCC). The duplication of NCC compliance responsibilities with the states and territories and the lack of expertise and resources within the FSC to carry out the work were highlighted. Comments included:

The NCC shouldn't be enforced by the FSC.

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

However, there was a view that the FSC functions should include a role in monitoring sites for illegally imported products and for monitoring those products that link to WHS obligations. For example, it was suggested:

a more focused function around illegally imported products like asbestos may be worthwhile rather than the NCC function.

It was also noted:

There are still important linkages with the NCC through issues such as fire in high rises etc. These aspects of the NCC could be audited where relevant to WHS systems for example, in emergency management.

FSC Submission

The FSC notes that the NCC audit function was not an original function assigned to it and that it does not fit with the 'core WHS remit' of the agency. The submission provides details of how the FSC currently manages the administration of this function.⁵ It notes that FSOs are not qualified to identify and rectify non-conformance with NCC requirements and the FSC has no powers to enforce conformance. No additional funding has been provided to the FSC to administer the NCC auditing role.

5. The Scheme – Scope and Requirements

5.1 Financial Thresholds

Top Issues Raised

1. The level of financial thresholds.
2. The appropriateness of having financial thresholds.

There was considerable feedback about the current financial thresholds which bring CW funded projects into the Scheme and with them the entities tendering for those projects.

⁵ See pages 17-18 of the FSC submission.

For the most part, feedback on the financial thresholds related to a need to review them with a view to an increase. It was suggested that the increased cost of building materials and its impact on project costs was bringing more smaller businesses within the scope of the Scheme.

One CW Government department noted that the financial thresholds have not been raised in close to 10 years and in the period since the effects of CPI and the significant rise in the cost of building materials means that an increased number of projects are now captured by the Scheme. They suggested the financial threshold for directly funded building work could be raised to circa \$7.5 million (GST inclusive).

Parks Australia suggested *'raising the threshold to offset the impacts of carrying out projects in remote areas'* and referred to *'similar adjustments made to thresholds for notification of public works to the Parliamentary Standing Committee on Public Works'*. It also suggested lessening or indexing the cost impact of the remote nature of work by *'excluding transport charges, offsite fabrication and/or remote workforce accommodation and related matters from the determination of the project cost'*.

A small, accredited entity suggested that the threshold should be reduced as this would mean *'we would get more work'*. This entity had become accredited to participate in a tender process, had not won the tender but were investing in its safety system and saw value in remaining in the Scheme.

Some accredited entities considered that *'financial thresholds should be removed as the onus to keep people safe should apply regardless of project value'*. CCF QLD agreed and noted *'thresholds should be removed. Good safety practice should not be determined by project value'*. An accredited entity said:

There should be no difference in safety on a 3 million job to a 4 million job.

CCF SA suggested a risk-based threshold:

High risk projects should attract Scheme coverage irrelevant to project funding value ... hazards and risks which could be used to assess risk rating may include ... incident and near-miss data, nominated high-risk criteria occurring on a project, accredited entity under current enforceable undertaking or similar regulatory condition.

The AMWU stated it did not support *'the use of artificial thresholds ... we support a principle that the Commonwealth Government should use its purchasing power to deliver safe workplaces'*.

Programmed Group suggested *'consideration should be made to establishing a multiple tier accreditation scheme that accommodates for contractors of various size'*. Another accredited entity suggested *'rather than a project value threshold ... the consideration of the accreditation level required in relation to the size of the participant measured in the number of personnel'*.

The Australian Small Business and Family Enterprise Ombudsman suggested *'perhaps look at different thresholds and different approaches depending on whether it's a small or big business'*.

FSC Submission

The FSC noted that *'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'*. It also suggested 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'. The FSC notes both positive and negative impacts of increasing the thresholds at page 26 of its submission.

5.2 The Post-Accreditation Audit

Top Issues Raised

1. Consistency and subjectivity.
2. Audit focus and criteria.
3. Lack of worker participation.

Accredited entities participating in the Review, irrespective of business size or location, consistently expressed frustrations about the post-accreditation audits. These frustrations related primarily to the consistency of auditors, the content and use of Corrective Action Reports (CARs) and the focus on paperwork. For unions, key issues are the lack of transparency and worker involvement in audits.

Whilst it was generally acknowledged by accredited entities that improvements in consistency had been made over the years, issues remain and are reflected in the following comments:

Inconsistency of auditors is a problem and frustrating – one year we got no CARs and the next we got 10 – mainly about wording in documents – but we hadn't changed anything.

Different FSOs have different interpretations and it's very frustrating.

The audit should be on the actual practices of the firm on site ... instead the audit process drives a 'box-ticking' approach that incentivises 'good paperwork' over 'good practice'.

The changes we make following a CAR are not value adding, not improving safety. They are just someone's opinion about wording.

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

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

The ACA raised concerns that the auditing scheme has drifted toward an overemphasis on validating documentation rather than actual safe practices:

We believe this is a consequence of the structure of the scheme that relies upon outsourced FSOs who frequently bring their own prescriptions and preferences to bear rather than a principles-based approach consistent with the FSC Audit Criteria Guidelines.

An accredited entity noted the audit process was 'creating vast documented systems which were not navigable by the end user' while another considered the audit provides a focus internally which 'must have a downstream benefit'.

Most accredited entities consulted agreed that there was too much focus on paperwork and not enough on the high-risk activities being undertaken on site. The proportion was variously described as between 20-30 per cent on-site focus to 70-80 per cent paperwork:

High risk work is more important than paperwork – the audit should focus on the work done on site – be accountable for the things you do not the things you write that you will do.

Our last audit was ten minutes on site.

It puts good paperwork ahead of good practice.

It was suggested by an accredited entity that the focus on paperwork was appropriate for pre-accreditation audits but once an entity was in the Scheme for several years the focus should shift to:

a performance risk-based approach ... spend more time out on the project driving compliance through actual observation ... talking to workers etc. Our last 2-day audit had 3 hours approximately in the field. There was a lot of document chasing. We have been audited for 10 years on the document process. On our last audit there were at least 10 opportunities to test high risk work happening on site, for example, to see if our safety processes were consistent across mobile plant.

Many accredited entities asked why reaching the ISO standard for work health and safety management systems with third party accreditation wasn't enough to satisfy the FSC audits.

An anonymous survey response on the audit process said:

While I support audits, I don't believe this should be the only means to assess capability in safety practices and safety performance. I think the scheme should also extend to some form of competency assessment for senior leadership and safety practitioners. More emphasis should be directed to Safety in Design practices (safe by design), the application of high-risk controls (critical controls) and competency of senior leadership in WHS obligations relevant to their work. Such as who in the Board/ Executive is competent?

Many participants in the Review supported random audits:

because audits are booked in advance at the convenience of the accredited company every player 'games' the system – they 'stage' audit sites – bring in a team before the audit and sanitise the sites.

Unions and accredited entities raised the lack of worker participation and Health and Safety Representative involvement in audits. The CFMEU noted:

There is no transparency with the Scheme and workers are left in the dark on any Corrective Action Reports that the FSC has issued, or any sanctions imposed on builders.

The ETU suggested:

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

An accredited entity also suggested that auditors should talk to workers and health and safety representatives as part of the audit:

that is the only way to get a sense of the culture on site – they need to ask 'what is the performance story'.

The AIHS suggests:

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

Other suggestions linked to the updating and/or amending of the audit criteria include:

There needs to be more focus on industrial hygiene.

In the advent of renewable energy, electrical safety should be looked at.

We still need to focus on falls from heights, asbestos, scaffolding – all the current high-risk work.

Silica, psychosocial health and AI are my top three emerging and continuing hazard criteria.

FSC Submission

Pages 10-12 of the FSC Submission provides an account of its approach to auditing, including examples of where the audit criteria ‘go beyond what is expressly required by State and Territory WHS laws’.⁶ In summary:

To be compliant with the Audit Criteria, a company must demonstrate via an onsite 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.*

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 FSC outlined how the audits address consultation with workers at pages 14-15 of its submission.

The FSC highlighted:

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 ... the OFSC is trialling audits of ‘on hold’ companies in a subcontractor capacity ... 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.

⁶ See page 11 of the FSC submission for these examples.

5.3 Reporting

Top Issues Raised

1. Inappropriateness of LTIs as a measure of safety performance.
2. Complexity and duplication of reporting to the FSC, WHS regulators and clients.

There was overwhelming agreement that the use of lost time injury (LTI) data was inappropriate for measuring the safety performance of accredited companies. A response to the survey summed up the strength of feeling on this topic:

Please stop the emphasis on Lost Time Injuries as valid performance measures in safety. The OFSC should, by now, understand that LTI is not a valid measure of safety risk or injury. It makes industry progress in this space harder to achieve when government contracts and accreditation schemes are linked to this. I would suggest more harm-based measures that provide a true indication of the impact of injury to quality of life.

The AIHS noted that *'for more than a decade the OHS profession has grappled with the value, veracity and statistical validity of lost time injuries (LTIs) and their derivative LTIFRs (Lost Time Injury Frequency Rates)'*.

It highlighted:

Key issues with LTIs and LTIFRs are that they do not reflect the impact or severity of injuries or illnesses on workers, they can be 'managed' by having injured workers return to work to ensure injuries are categorised favourably and they do not reflect the effectiveness of how OHS risks are managed in a workplace ... they provide the illusion of comparative benchmarking between entities.

It also urged *'the FSC to continue to strive to identify and develop more meaningful and valid metrics to measure and report on Scheme performance and outcomes'*.

One participant suggested that *'Notifiable incidents (under the WHS legislation) are a more reliable indication of site safety over LTIs with LTIs open to under reporting'*. Accredited companies were open about the potential for LTI data to be manipulated.

Many cautioned that *'organisations will define and interpret indicators differently which is highly likely to occur to limit their exposure'*.

It was also noted that the data collected by the FSC is not an indicative sample of the industry and is therefore not a reliable indicator of improvement generated by the Scheme. One participant noted that all data sets are on the same trajectory with a plateauing of improvement and that *'this year has been a dire year for injuries and fatalities in the construction industry'*.

Many participants in the Review considered that the information requested by the FSC via its biannual reporting processes was not meaningful with several suggesting that the only reliable data available to assess the safety performance of accredited entities is their own *'internal metrics ... the FSC needs to ask what is being reported internally'*.

Other issues raised about reporting include complexity and duplication with accredited entities reporting injuries and incidents (often defined differently) to WHS regulators, their clients and the FSC. Some CW and state government departments confirmed that they also require specific WHS data from accredited entities (separate to the data required by the FSC and WHS regulators) and that they undertake their own site inspections. A consistent reporting tool across jurisdictions and WHS agencies was suggested which would provide the capacity for government project delivery partners to leverage that standardised reporting to get a clearer picture of safety performance.

The fact that accredited entities are required to report certain data only from their Scheme projects was highlighted as problematic.

CCF SA suggested in the context of collaboration and sharing of information between the FSC, other WHS agencies and regulators that *'it would be beneficial to execute the Royal Commission proposals in tandem with industry focused workshops'*.

There were many suggestions about the need to collect lead indicators and what they might look like. Suggestions include the numbers of HSRs, training, regularity of atmospheric monitoring and health monitoring, investment in WHS technology, innovative approaches to managing WHS, cultural surveys and due diligence indices.

FSC Submission

The FSC acknowledged in its submission that it does not *'have a complete picture of each accredited company's safety incidents'*. It also highlighted that *'the range of incidents required to be notified to the OFSC by accredited companies is generally 'broader' than the 'notifiable incidents' required to be reported to a CW, State or Territory WHS Regulator'*. It suggested that aligning the reporting requirements with WHS regulators would *'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 (one aspect of the OFSC's Company Risk Framework)'*.

The FSC noted:

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.

On the issue of collaboration with WHS regulators and other agencies, the FSC noted the confidentiality provision of the model WHS laws which prevent regulators sharing confidential information with it.

5.4 Risk Ratings

Top Issues Raised

1. The relevance of risk ratings to safety on-site
2. The pathways between high, medium and low risk
3. The consequences of being rated high risk

There was much discussion by participants in the Review, particularly accredited entities, about the risk ratings used by the FSC to determine the frequency of audits. It was confirmed by an FSO that the ratings of low, medium and high risk referred to *'the risk of non-conformance with Scheme requirements'* rather than the risk to workers on site. This understanding of the risk rating is reflected in a comment made by an accredited entity:

Low risk companies are companies that are good at passing audits.

Those accredited entities whose risk rating was currently high (generally because there had been a fatality on one of their Scheme projects) questioned the transparency and clarity of the process of moving between risk ratings.

we were told we would move back to low following four good audits ... but what does a good audit look like ... what is the definition of a good audit ... we don't know ...

It was implied by the auditor that there is a threshold of CARs which mean you have had a bad audit, but we weren't told what that number is.

We are high risk, so we have audits every six months ... our life is dominated by audits and we are drowning in paperwork – our system hasn't changed in years – the constant audits make it hard to evolve the system.

Many accredited entities highlighted that apart from increased audits the risk ratings *'are in effect meaningless ... low, medium or high, you still have accreditation and can still tender for government projects'*.

There were mixed responses to the question whether risk ratings should be publicly available.

Some entities (who are currently low risk) considered a transparent risk ratings system would add value to their efforts and investment in safety:

accreditation is a badge of honour. We are low risk and would be ok with public ratings. We could use this low-risk rating as a marketing edge. Companies should be chucked out for poor performance.

CCF QLD considered *'the increase of transparency would be beneficial to increase collaboration and allow everyone to be on the same playing field'*. Others considered that *'risk ratings should be provided to project delivery authorities ... this would also put a focus on those delivery authorities and what they are doing to ensure compliance with the Scheme'*.

CCF SA suggested:

The increase in transparency would be beneficial ... if ratings are to be transparent to drive procurement decisions ... then the assessment and weighting of the ratings during procurement by State authorities should be mandated and transparent to ensure the ratings are used in a consistent and transparent way.

Most accredited entities opposed making their risk ratings public. This conversation also raised issues around the discretion resting with the FSC to decide on ratings, transparency surrounding the criteria for determining ratings and the necessity for robust processes to appeal risk rating decisions.

The issue of risk ratings was also raised in the context of the FSC's powers to sanction accredited entities by suspending, revoking or placing conditions on their accreditation. In this context, it was suggested that if WHS regulators were operating on accredited sites that information should be shared with the FSC and form part of their consideration about risk ratings and the imposition of sanctions.

The AIHS noted:

It is understood that the FSC essentially fulfills a role of 'critical examiner' and intentionally does not attempt to 'investigate' the incident (as this is seen as the company and relevant regulator's role). It is understood that the company involved essentially must demonstrate its post-incident response steps taken and measures to prevent a recurrence (and that this is subject to a detailed and focused FSC follow up audit).

It concluded 'given that the local jurisdictional regulator undertakes their own investigation with outcomes that may extend to enforcement actions including prosecutions, the above appears appropriate.

This approach concerns many participants in the Review particularly unions representing building and construction workers.

The AMWU submitted:

There is required a legislative duty for companies to provide internal company investigation records to any party who have a statutory right to obtain such records upon request and a suspension of an accreditation (including all work on any taxpayer funded project) until such time as the request has been complied with.

The CFMEU noted:

Under the Scheme the only penalty provision is either a sanction or removal of the accreditation, however this does not stop a builder working on CW funded projects as they can be a sub-contractor for another entity that has accreditation. Further, it appears that not all Government Departments insist on using accredited entities and the history of the FSC shows that it has been very reluctant to use the limited powers that it does have and is therefore seen by many as a "toothless tiger" ... The Scheme that it [the FSC] administers is not fit for purpose in preventing builders, with unsatisfactory work health and safety

records or performance, from benefitting from Commonwealth funded building and construction work.

The issue of CW, state and territory government departments ensuring they are engaging accredited entities when appropriate is an issue for many. For example, CCF SA said:

State and Territory agencies are not playing their role – they're not 'buying in' to safety. This needs to happen.

The AMWU suggested:

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

Those CW and State government departments which participated in the Review were keen to receive information from the FSC about poor performing entities to enable them to consider this information when they were inviting tenders for building and construction projects. State government departments also raised questions about how they could report back to the FSC when they observed poor safety performance by accredited entities on local Scheme projects. One observed 'we know some local companies which have accreditation but are not good on safety'.

FSC Submission

The FSC suggests 'it is atypical for Commonwealth regulators to publish risk ratings associated with the entities they regulate'. The FSC submission explained that its risk framework was 'developed as an internal resource to help target operational activities' and confirmed that the risk ratings 'are not a strict measure of WHS performance ... 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 level for a good audit'.

It noted:

the FSC has no explicit powers to publicise non-compliance by an accredited company with their conditions of accreditation ... including a power to this effect would ensure the 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 ... would have significant deterrent value.

It acknowledged:

...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 is 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.⁷

And

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).

In the context of Government departments' compliance with the Scheme, the FSC reports:

There is no compliance provision under which the FSC could sanction a CW 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 Where potential non-compliance is identified, the OFSC's ... intention is to work cooperatively with the agency to identify potential remedies and improve their internal processes and management.

The FSC also highlighted the Model Client Framework it has developed to facilitate Scheme compliance and suggested options for enhancing compliance activities including potential involvement of the Australian National Audit Office.

6. Cost recovery

Top Issues Raised

1. Undesirability of charging a fee
2. Need for more detailed fee/levy models

There was very little support for Scheme fees or levies from accredited entities. The ACA expressed a commonly held view in its written submission:

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

An FSO suggested the lack of a fee 'gives the FSC audits and its auditors credibility and independence'. An accredited company suggested 'industry costs are already significant when you take into account multiple ISO and AS certifications which already require annual audits to maintain'. There was also concern that a fee would pose a barrier for small businesses to enter the Scheme and

⁷ A summary of the FSC's post-fatality process can be found at pages 20-22 of its submission.

that *'it would be difficult to implement a charge fairly, due to differing levels of service that would have to be provided by the FSC/FSOs for an entity to achieve accreditation'*.

There was some support by accredited entities for a project levy, but it was agreed by most participants, including the AMWU that there would be *'benefit from having a number of models proposed to better understand what might be considered'*.

Some suggested there could be a fee charged if an entity has not reached the required standard for accreditation after a certain number of audits. The ETU suggested:

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

FSC Submission

The FSC notes that *'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 was considered appropriate to charge companies, the FSC observed that current legislative arrangements only allow an application fee to be charged to companies seeking accreditation (not a fee to maintain accreditation). It noted that *'there must be a discernible relationship between the amount of the fee and the cost of delivering the service'* and that *'consideration should be given to whether any charge should be scaled or reduced in certain circumstances'*. The FSC further observed that it is unlikely companies will simply absorb the cost and will likely pass any cost on to Government through increased tender prices for building work.

7. Expansion

Top Issues Raised

1. Benefits of a bespoke Scheme.
2. Expansion within the building and construction industry.

There was negligible support from participants in the Review for the expansion of the Scheme in its current form to other industries.

Accredited entities, business and industry representatives highlighted the 'bespoke' nature of the FSC and the Scheme as being one its key advantages.

The CFMEU, on the other hand:

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

Other union submissions whilst not supporting the expansion of FSC authority over other industries, considered the question of expansion in the context of expanding the reach of CW procurement as a lever for effecting improved safety practices more generally. The AMWU said *'we do not see any benefit of expanding the authority of the FSC. We do support the principle of the Commonwealth Government using its purchasing power to deliver safer workplaces, as such it should be built into all CW procurement practices'*. The ACTU stated:

As submitted by the ETU, an option for recasting the Scheme could be to apply it to all CW Funded Capital Works, regardless of industry.

The AIHS submitted:

We support increased auditing for other high risk industries experiencing poor OHS outcomes. However, we caution against copying the Scheme for use in other contexts. Other industries such as agriculture, logistics, manufacturing ... would require a Scheme that meets their needs and context.

There was a mixed response to whether the Scheme should be expanded to include sub-contractors as originally anticipated by the Royal Commission. CCF QLD answered the question about expansion to sub-contractors with *'yes, most definitely. It's still a government funded project. All stakeholders have a part to play and a scheme which sets people in camps for other reasons apart from WHS outcomes must be avoided'*. The AMWU consider the Scheme is not bedded down enough to implement the Royal Commission's vision noting that *'there is a need to recognise that it is the **principals** (accredited entities) (AMWU emphasis) which hold most control on building and construction sites, they need to be held accountable for the conduct of their contractors'*.

Whilst some participants suggested expansion within the building and construction industry to include sub-contractors and residential housing before moving into other industries, there were concerns that this type of expansion would capture a significantly increased number of entities with increased pressure on the resources and sustainability of the FSC and Scheme in its current form.

FSC Submission

In relation to the expansion of the Scheme to sub-contractors the FSC submission states:

A potential challenge ... 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.

The FSC notes it is trialling post-accreditation audits of accredited companies in a subcontractor role where the company has not been working as a head contractor for an extended period.

An analysis to assist in identifying the significant areas of CW procurement expenditure is provided in the FSC submission at pages 41-45. The FSC concludes (while noting any expansion would require legislative and operational change and extensive stakeholder consultation)⁸:

In addition to the construction industry, the CW also spends heavily in other industries with poor safety records – namely health care, administrative services, and manufacturing. If the

⁸ The FSC outlines some of the changes it considers would be required to facilitate expansion to other industries at page 46 of its submission.

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 current Government priorities.

8. Other Government Priorities

Top Issues Raised

1. Better Deal for Small Business.
2. Secure Jobs Code.

There was limited response from participants in the Review to the questions raised relating to the Government's priorities and where the work of the FSC and the Scheme might fit within them.

It was noted that the consideration of a fee for accreditation could impact on the policy objective of a better deal for small business with CCF QLD for example noting '*to support local industry, changes would be needed that would break down barriers of participation*'.

The AMWU suggested that the object and functions of the FSC will need to be reviewed if it is to play a role in priorities such as the Buy Australian Plan and the Secure Jobs Code. It also suggested an additional function to report to the National Construction Industry Forum and highlighted areas where women's participation in the industry could be supported, including requiring accredited entities to establish a minimum number of women apprentices per tender (based on the value of the tender), FSC funded women's liaison officers and an FSC Industry Standard for women's health and safety in construction.

The ETU submitted that:

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

It also suggested:

With its existing bureaucratic infrastructure, staff knowledge and experience, and relationships with many of the employers that would also fall under a Secure Australian Jobs Code, consideration could be given to how to better allocate these [FSC] resources to achieve Government priorities.

FSC Submission

The FSC states that it '*is aware of and committed to supporting the Government's priorities*', noting that its direct involvement may require additional resourcing. It notes the work done by the OFSC to support small businesses to meet and maintain accreditation.

9. The Future of the FSC and the Scheme

Top Issues Raised

1. Retain the FSC and the Scheme with some changes to its powers, functions and requirements.
2. Abolish the FSC and the Scheme.
3. Implement a new approach to delivering the FSC and Scheme policy intention.

Most participants to the Review offered suggestions about how to deliver the policy intention of the FSC and the Scheme into the future. These suggestions ranged from abolition of the FSC and the Scheme to retainment with changes to the focus, powers and functions of the FSC and the requirements of the Scheme to implementing a completely fresh approach without losing the substance of the FSC and Scheme's policy intention.

The CFMEU advocated abolition as did several accredited entities which considered that administrative burdens would be reduced by disbanding the FSC and *'provide extra funding for CW Safe Work Australia and State based WorkSafe functions'*.

Most accredited entities recommended a shift from auditing with more emphasis on education and support to the industry. The ACA submitted:

ACA recommends the FSC can have its greatest impact by pivoting to a more proactive stance that emphasises consultation and capacity building at all levels of the industry. The auditing scheme should be operationally de-emphasised, and the Audit Criteria Guidelines replaced with a much simpler, more direct and more outcomes-oriented framework that focusses less on validating documented processes than on actual safety performance. ACA considers there is significant maturity in the safety procedures and systems of larger construction firms. The state and territory regimes offer ample protections to maintain these standards and drive continuous improvement.

The AMWU proposed a set of principles which it considered should be implemented either via a recalibrated FSC/Scheme or through a separate Commonwealth procurement policy. These principles include strategic and systemic consultation and participation of workers and their representatives who have been democratically elected *'without adverse interference by employers'*, establishment of WHS committees, reporting across all activities and not just CW funded activities and sanctions for not reporting or *'dissuading others'* from not reporting notifiable matters, and an agency to administer and regulate the scheme supported by *'a tripartite advisory body and be fully equipped to carry out its statutory core functions and exercise any powers without reliance on external (contracted) services'*.

The ACTU supported the principles provided by the AMWU suggesting they could form the basis of a *'Commonwealth Capital Works Best Practice Procurement Framework'*.⁹ Its view is that *'reform within its [FSC/Scheme] current structure is not possible ... it is time for a better approach'*. It suggested the Review's Advisory Panel could play a role in commencing these discussions with a view to also including a broader range of stakeholders.

⁹ For details of the proposed principles see the ACTU submission pages 2-3.

CCF SA proposed an *‘innovative collaboration with the CCF to revolutionise competency assessment in the civil construction industry’*. The purpose of the proposal is stated as being *‘to shift the focus from an audit to a competency assessment’* which in turn would shift the focus from *‘checking for compliance and adherence to the established rules and regulations’* to *‘identifying individual and team gaps in skills and knowledge and determining areas for improvement’*.

CCF SA suggests:

By shifting the focus from traditional audits to competency assessments, the FSC can gain deeper insights into the industry’s skill landscape and concentrate its resources on meaningful and impactful areas.¹⁰

¹⁰ For more details on this proposal see CCF SA’s submission pages 16 and 17.

Appendix A

Federal Safety Commissioner Review Terms of Reference

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

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

The development and implementation of the Australian Government's Buy Australian Plan presents a timely opportunity to review the FSC and the Scheme in light of the dual policy objectives of improving building and construction industry safety through government procurement and supporting local industry to take advantage of government purchasing opportunities. Noting that building construction and maintenance services was the 4th largest area of government procurement from 2018-19 to 2021-22, [OBJ] the review would consider the appropriateness of expanding the remit of the FSC and the Scheme, with particular regard to whether this could improve safety in other significant procurement areas.

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

The review would examine whether:

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

- Whether the safety performance of other industries which Government funds¹¹ warrants expanding the FSC and the Scheme, taking into consideration factors such as cost, resources and existing regulation. If expansion to other industries is proposed, the review should outline how implementation should occur.

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

¹¹ Other significant areas of government procurement include the purchase of management and business professional services; commercial, military and private vehicles; engineering, research and technology-based services; information technology, broadcasting and telecommunications hardware; defence and law enforcement equipment; and healthcare services.

Appendix B

Key Terms

Term	Definition
Act	<i>Federal Safety Commissioner Act 2022 (Cth)</i>
CAR	Corrective Action Report
CW	Commonwealth
FSC	Federal Safety Commissioner
FSO	Federal Safety Officer
LTI	Lost Time Injury
MTI	Medically Treated Injury
NCC	National Construction Code
OFSC	Office of the Federal Safety Commissioner
Royal Commission	Final Report of the Royal Commission into the Building and Construction Industry
Rules	<i>Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019</i>
Scheme	Work Health and Safety Accreditation Scheme
SWA	Safe Work Australia
WHS	Work Health and Safety