

Australian Constructors Association Independent Review of the Federal Safety Commissioner

July 2023

The Australian Constructors Association (ACA) welcomes the opportunity to make a submission to the Independent Review of the Federal Safety Commissioner (FSC).

About us

Established in 1994, ACA is a trusted voice for the construction industry. We are the only representative body covering the three key sectors of the industry—vertical, horizontal and services. Collectively, our members construct and service over 90 per cent of the value of major infrastructure projects built in Australia.

Has the FSC scheme been effective?

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.

We note the Discussion Paper draws comparisons between FSC accredited entities and the broader construction industry. However, a comparison cannot be reliably drawn between these groups as the FSC cohort is clearly not representative of the broader industry. The construction industry encompasses a very large number of businesses (approx. 450,000), which vary widely in scope and size. For example, 99 per cent of all construction firms are small businesses (0-19 employees), of which most are subcontractors.¹ By contrast, FSC accredited businesses number 569 head contractors, of which only 12 per cent are small businesses. It is therefore clear that the risk profile of the FSC accredited cohort is materially different to the industry at large.

Given the FSC's very narrow and minor footprint on the industry, any assessment of its effectiveness requires more rigorous analysis. This would entail comparing the performance of FSC accredited entities with a representative sample of non-accredited firms. It is also important to make these comparisons over time, as both FSC and non-FSC firms are likely to be experiencing improved safety outcomes. For example, ACA considers 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 firms.

ACA is of the view that such an 'apples for apples' comparison should form the basis of a robust regulatory impact assessment of the FSC and its future role. The FSC imposes a significant regulatory burden upon accredited firms, and it is reasonable to expect that this is justified by a strong evidence-based rationale. ACA considers it is feasible to

¹ ABS, cat no. 8165.0

determine the impact of the FSC on safety outcomes and recommends this analysis should underpin any final recommendations about the future role of the FSC. We note that such an analysis would also provide the Review with a clear answer to Question 4 in the Discussion Paper. This analysis should be undertaken in line with the *Australian Government Guide to Policy Impact Analysis*.

Powers and functions of the FSC

ACA notes the legislation provides the FSC with a wide scope of potential activities. This ranges from the more pro-active activities of promotion and industry capability building, to the more direct quasi-enforcement activities of auditing.

ACA notes that, to date, the FSC has directed its resources primarily to the auditing function. While it has recently launched an industry education and awareness program, this is of relatively minor importance in the scheme's overall activities. This is evidenced at section 1.6 of the Discussion Paper where it is reported that 90% of the FSC's supplier budget is allocated to engaging WHS professionals as FSOs to undertake audits.

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

In this context, ACA encourages the Review to give careful consideration to the changes in the WHS legislative environment within which FSC now operates, and the most appropriate role for the FSC within that contemporary regulatory context. ACA considers that, while the auditing function may have served the scheme well at inception, it may not be the best and highest use of the FSC's resources going forward. The WHS compliance and enforcement frameworks within each jurisdiction provide a sound and consistent framework of protections onto which the FSC may be able to add little extra value.

ACA is also concerned that the auditing scheme has drifted toward an overemphasis on validating documentation rather than actual safe practices. We believe this is a consequence of the structure of the scheme that relies upon outsourced FSOs who frequently bring their own prescriptions and preferences to bear rather than a principles-based approach consistent with the FSC Audit Criteria Guidelines. Without wishing to minimise the importance of appropriate procedures, ACA believes the emphasis of an audit should be predominantly on the actual practices of the firm on the site. This is rarely the focus of an audit. Instead, the audit process drives a 'box-ticking' approach that incentivises 'good paperwork' over 'good practice.'

The role of the FSC going forward

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, 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. ACA's view is that the maturity of industry's safety conduct is not materially advanced by the type of administrative audits currently practiced by the FSC.

ACA considers that FSC would make a greater impact on industry by allocating relatively more resources toward:

- **Genuine and effective consultation**—the current industry reference group is a very narrow group which does not meaningfully consult workers or delivery agencies on the issues and priorities relating to safety in construction.
- **Education and promotion**—the FSC should leverage its unique position in partnership with industry to promote best practice approaches to managing hazards, particularly among broader (and arguably higher risk) parts of the industry, including smaller subcontractors.
- **Collaboration and sharing**—the FSC should become more active and involved in the national (as opposed to Commonwealth) WHS framework, with an express focus on greater alignment with other WHS agencies and regulators.
- **Mental health**—psychosocial harm is arguably emerging as a more important source of harm for construction workers than the traditional physical hazards considered by the OFC.

Cost recovery of the FSC

ACA notes the suggestion that a cost recovery model be implemented whereby accredited entities pay an annual accreditation fee. We consider this is inappropriate in-principle because 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. We note this approach is not uncommon; for example, the Australian Government Security Vetting Agency charges government agencies for security clearances, rather than individual applicants.

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