



FEDERAL SAFETY COMMISSIONER REVIEW

JULY, 2023

About the ETU

The Electrical Trades Union of Australia ('the ETU')¹ is the principal union for electrical and electrotechnology tradespeople and apprentices in Australia, representing well over sixty-thousand workers around the country.

Acknowledgement

In the spirit of reconciliation, the ETU acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples today.

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¹ Being a division of the CEPU, a trade union registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Effectiveness of the Scheme

Continual Improvement

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. Other contributing factors to higher safety performance such as the correlation of project location to the resource location of regulatory agencies, the levels of worker unionisation, the maturity of site sub-contractors and the presence of union officials on the job can all play a significant role in the safety performance of a construction site. While accredited entities generally appear to report disproportionately lower Lost Time Injury Frequency Rates (LTIFR) when compared to the broader construction industry, nothing in either the Federal Safety Commission (FSC) or Safe Work Australia (SWA) data interrogates these results. Experience from ETU members and officials, which is reflected in the data in s2.2.4 of the Discussion Paper, is that improvements to Work Health and Safety (WHS) performance by new entrants to the WHS Accreditation Scheme (the Scheme) generally improves and initially strong, they tend to plateau within 2-3 years of accreditation and then subsequently flatline within 5-7 years with no subsequent trend improvement.

It is also worth noting at this point that the chance of a worker being killed on an accredited entities site is currently statistically higher than being killed on a non-accredited site.

The performance could as easily be attributed to the entity receiving accreditation as it could to the entity moving from a sub sector of the construction industry that has experienced a significantly lower level of regulatory oversight to one with increased regulatory oversight. A study by Michael Zoorob² of Harvard University, explored the effects of having a union presence in the construction sector in Canada on workplace fatalities. Zoorob found that “a one per cent decline in union coverage sees a five per cent increase in the rate of occupational fatalities.”

A further study from Canada in 2015³ found that workers in unionised companies reported 23 per cent fewer injuries requiring time off work than those with non-union employers. Unionised workers were also 17 per cent less likely to experience injuries that affect mobility, and almost 30 per cent less likely to suffer critical injuries that put their lives at risk. The study analysed data from more than 40,000 construction companies.

In contrast, there are no independent studies which demonstrate any causation between improved safety performance and the implementation of the FSC accreditation regime. In addition, the data clearly demonstrates that after accreditation, and a brief period of unattributable performance improvement, the entities simply plateau and none of the functions, powers or annual reports of the FSC indicate that the agency either plays a role, or is in fact interested in the cause of this performance stagnation or what might be done to drive further improvement. At best, the FSC appears to attempt to set a ‘floor’ for performance that it could be argued is being set as much by the agency as it is by several external factors.

² Zoorob M. *Occup Environ Med*, June 2018

³ Institute for Work and Health, Canada, 2015

The Scheme and the FSC should have clear functions, powers and strategies to make accredited companies rethink how they approach workplace health and safety, away from simply meeting minimum legal compliance standards and instead drive a proactive approach to continuous improvement, managing risks and improving safety outcomes. 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.

Coordination and Communication

The FSC has manifestly failed to promote, facilitate or otherwise engage in ensuring ongoing cooperation between entities and worker representatives occurs in a way that improves site safety or meets the spirit of the harmonisation WHS laws. If we turn to some of the fundamental objects⁴ of the harmonised law, including:

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

It is apparent that the FSC plays no role in several of these objects and only a cursory role in the remaining few. Requiring an entity to have 'systems' in place to comply with the law but never actually testing those systems or critically assessing if they are consistently and methodically implemented is an obvious flaw. As is failing to assess if those systems were developed in consultation with workers and their representatives or in fact ever reviewed with worker input, particularly following WHS incidents. 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.

In fact when the ETU engaged with our State Branches on this review, there wasn't a single Health & Safety Representative, delegate or organiser who had ever met, or otherwise had any contact with any person from the Federal Safety Commission in the past decade.

⁴ <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws>

The issue of sitewide consultation and coordination are particularly common on sites with workers, who are represented by numerous unions, and are employed by several PCBUs where competing schedules, roles, and interests make coordination challenging. Whilst the ETU accepts such situations present greater challenges and more complexity for determining how to deliver a fully cooperative and consultative workplace, 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.

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

Improving the way that accredited entities work with subcontractors and other entities to disseminate best practice and manage site safety would also serve to improve the efficacy of the scheme in lifting broader industry-wide standards. Whilst injuries and fatalities have generally trended downwards in the broader construction industry, there remains a significant gulf between Scheme accredited entities and the rest of the industry.

Companies are only incentivised to pay as much care and attention to workplace health and safety as is necessary to protect their bottom lines. Whilst the Scheme raises the stakes by placing eligibility for Government contracts on the line, it is evident that once processes are implemented and complacency allowed to set in, worker health and wellbeing quickly returns to being little more than a number on a spreadsheet. 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 that 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.

Case Study – A Case of Two Projects

Currently in Queensland there are two projects being completed on military bases, one at Enoggera and one at Shoalwater Bay.

Enoggera

The Enoggera project at Gallipoli Barracks involves a range of construction activities associated with the building of barracks, sheds and vehicle workshops. The project involves multiple sub-contracting firms who contract to the FSC Accredited PCBU Lendlease.

This project is reasonably well run with site wide safety committees and consultation, and an open and transparent relationship with relevant unions. Site safety walks are conducted with worker representatives from each contractor and the safety meetings include all elected health and safety representatives irrespective of the company they work for and share relevant safety information across the entire project.

Union officials can attend site without any hindrance or obstruction.

Shoalwater Bay

The Shoalwater Bay Training Facility project involves a range of construction activities associated with the building of barracks, sheds and vehicle workshops. The project involves multiple sub-contracting firms who contract to the FSC Accredited PCBU Lang O'Rourke.

This project is the exact opposite of the Enoggera project. The project is best described as poorly run with little sitewide communication or cooperation. There is no site safety coordination, nor is there a sitewide safety committee functioning as required by the act. Site HSR's and Union Delegates are discouraged.

Union officials trying to attend site regularly face hostility and unnecessary barriers to entry.

Avenues for Change

Whilst the ETU is of the view that it would be prudent for the Government to simply terminate the Federal Safety Commission, for the reasons outlined above, we provide for the following suggestions in the event Government determines to retain the FSC.

User Pay Cost Recovery

It is a fairly remarkable arrangement that the Federal Safety Commissioner provides a guarantee to applicants that they will receive accreditation at zero cost. Even after failing multiple times, entities can continue to apply for accreditation without cost or penalty. This arrangement sits in stark contrast to a user-pays model on a cost recovery in line with the Australian Government Cost Recovery Policy administered by the Department of Finance. 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 of recovering the cost of regulatory action on Scheme covered entities would also be mediated over the medium-term through improvements in workers compensation premium rates (WCPRs). This provides a dual financial incentive for pursuing improved outcomes, both reducing FSC contributions and WCPRs.

Powers and Functions

Stronger requirements for direct engagement with worker representatives when developing health and safety management systems, identifying hazards, assessing risks, and deciding on measures to eliminate or minimise those risks would need to be embedded into the functions of the FSC. This would also need to be reflected in the audit requirements which currently make no assessment of the implementation of the above in accredited entities.

Federal Safety Officers should be required to engage directly with union representatives when conducting audits to make a more comprehensive judgement on the adequacy of systems and processes in place. Inclusion of relevant unions, including the ETU, in industry forums and educational events facilitated by the FSC should be mandatory. Whilst ongoing dialogue between accredited entities and the FSC is important and necessary, successfully protecting workers requires a tripartite effort, one that has never existed during the operation of the FSC.

The FSC should be accountable to a tri-partite governance arrangement, ensuring its functions, powers and priorities are genuinely informed by representatives of industry. The current model gives rise to serious concerns that the Commissioner is at best captured by industry, and at worst, simply prosecuting an agenda chosen by the entities it is supposedly regulating.

Supporting Government Priorities

The Commonwealth Government has announced several major spending initiatives over the past 12 months in sectors such as manufacturing, housing, infrastructure, and energy and is making an effort to strengthen its procurement frameworks through the Buy Australian Plan and Australian Skills Guarantee to ensure these initiatives support priorities like domestic industry development, domestic employment and training, tax compliance, and First Nations opportunities.

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 2021⁵, could house current requirements of the WHS Accreditation Scheme within a more holistic framework.

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

Scheme Expansion

Rather than considering on an industry-by-industry basis, the merits of inclusion under the Scheme, modifying the language around eligibility to a generalised term such as *Commonwealth Funded Capital Works* could serve to ensure the Scheme keeps up with Commonwealth spending priorities and protects workers on a wider range of projects.

Accreditation could also extend beyond the accredited entity to require those entities to demonstrate that subcontractors they engage also have fully implemented safety management systems.

⁵ <https://anthonyalbanese.com.au/media-centre/secure-australian-jobs-plan>