

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

Subject – *Fair Work (Building Industry) Act 2012*

Fair Work (Building Industry—Accreditation Scheme) Regulation 2016

The *Fair Work (Building Industry) Act 2012* (the Act) provides a framework that aims to ensure cooperative, productive and harmonious workplace relations in the building industry.

Subsection 78(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 35 of the Act provides for the establishment of an accreditation scheme for persons who wish to carry out Commonwealth funded building work, with the Federal Safety Commissioner (the FSC) as the accrediting authority.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make regulations the power shall, unless the contrary intention appears, be construed as including a power to repeal, rescind, revoke, amend or vary the regulations.

The accreditation scheme (the Scheme) is currently provided for by the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005* (the 2005 Regulations). The 2005 Regulations are due to sunset on 1 April 2016 in accordance with Part 6 of the *Legislative Instruments Act 2003* (the Legislative Instruments Act).

The *Fair Work (Building Industry—Accreditation Scheme) Regulation 2016* (the Regulation) repeals and replaces the 2005 Regulations.

In replacing the 2005 Regulations, the Regulation:

- ensures that current operational practice in the administration of the Scheme is better reflected in the proposed Regulation;
- updates the terminology and structure of the 2005 Regulations in line with current drafting practices; and
- ensures a smooth transition to the proposed Regulation.

The Regulation prescribes:

- the criteria and process for obtaining, and maintaining, accreditation;
- the conditions that apply to all accredited persons;
- the circumstances in which accreditation may be made subject to further conditions, or may be suspended or revoked, and the rights of review available in such cases; and
- the building work to which the Scheme does not apply.

Details of the Regulation are set out in Attachment A.

A Statement of Compatibility with Human Rights (the Statement) has been completed for the Regulation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The

Statement's assessment is that the Regulation is compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Regulation is a legislative instrument for the purposes of the Legislative Instruments Act.

The Scheme was subject to a comprehensive review in 2014. The review was informed by an advisory panel of industry experts with representatives from key stakeholder groups including Master Builders Australia, Australian Constructors Association, the Civil Contractors Federation and the Australian Council of Trade Unions. The review included comprehensive consultation with relevant stakeholders and the wide distribution of a discussion paper. The review received 47 submissions from stakeholders. A number of workshops and bilateral discussions with stakeholders also informed the review.

The review of the Scheme resulted in a report to Government that included 25 recommendations aimed at modernising the Scheme without reducing safety standards in the industry. The Australian Government accepted all the recommendations of the review with two minor amendments. The recommendations are being progressively implemented throughout 2015. Changes to Scheme administration that required amendments to the 2005 Regulations commenced on 1 January 2015.

The Office of the Federal Safety Commissioner conducted further consultation on the draft Regulation in December 2015 with Master Builders Australia, Australian Constructors Association and the Australian Council of Trade Unions.

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required (OBPR ID 19589).

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Details of the *Fair Work (Building Industry—Accreditation Scheme) Regulation 2016*

Part 1—Preliminary

Section 1 – Name

Section 1 provides that the title of the Regulation is the *Fair Work (Building Industry—Accreditation Scheme) Regulation 2016* (the Regulation).

Section 2 – Commencement

Section 2 provides that the Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

Section 3 specifies that the Regulation is made under the *Fair Work (Building Industry) Act 2012* (the Act).

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 repeals the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005* (2005 Regulations), which are replaced by the Regulation.

Section 5 – Definitions

Section 5 sets out defined terms used in the Regulation. It notes that a number of terms used in the Regulation are defined in the Act.

Part 2—Accreditation scheme

Division 2.1—Accreditation scheme

Section 6 – Accreditation scheme

Subsection 35(1) of the Act allows regulations to be made that prescribe an accreditation scheme for persons who wish to carry out Commonwealth funded building work (the Scheme).

Section 6 of the Regulation provides that, for the purposes of the Act, Part 2 of the Regulation sets out the Scheme.

Division 2.2—Accrediting authority

Section 7 – Accrediting authority

Section 7 provides that the Federal Safety Commissioner (the FSC) is the accrediting authority for the Scheme, as required by subsection 35(2) of the Act.

Division 2.3—How persons are accredited under the accreditation scheme

Section 8 – Accreditation by the Federal Safety Commissioner

Section 8 prescribes the circumstances in which the FSC may accredit a person, and the matters that must be taken into account in making an accreditation decision.

Subsection 8(1) sets out the circumstances in which the FSC may accredit a person. These are:

- the person (the applicant) has applied for accreditation under section 9;
- the applicant has agreed to a pre-accreditation audit being conducted by a Federal Safety Officer (FSO) under section 12; and
- the FSC is satisfied that the applicant has appropriate Work Health and Safety (WHS) policies and procedures and safe work practices.

Subsection 8(2) provides that a period of accreditation must not exceed 6 years, and cannot be extended. The note under subsection 8(2) clarifies that this does not preclude a person making a new application for accreditation at the end of 6 years.

Subsection 8(3) sets out the following factors that the FSC must take into account when deciding whether to accredit a person:

- the applicant’s Work Health and Safety Management System (WHSMS);
- the applicant’s experience in dealing with construction hazards or high risk activities;
- the applicant’s record in relation to workplace safety; and
- the outcome of any pre-accreditation audit undertaken in relation to the applicant, noting that section 13 provides for instances where such an audit may not be required.

In addition, subsection 8(4) requires the FSC to have regard to the performance of the applicant in certain areas, including:

- demonstrated senior management commitment to WHS and effective subcontractor WHS management;
- integration of safe design principles into the risk management process;

- whole of project WHS consultation, communication and performance measurement; and
- WHS training requirements.

Section 9 – Application for accreditation

Section 9 provides for an application for accreditation to be made to the FSC. The application is required to be made in the form approved by the FSC, and include an indication that the applicant has agreed to a pre-accreditation audit being carried out under section 12.

Section 10 – Evidence to accompany application

Section 10 requires the following to accompany an application for accreditation:

- evidence of the applicant’s experience (if any) in dealing with construction hazards or high risk activities;
- evidence of the applicant’s senior management commitment to appropriate WHS policies and procedures and safe work practices;
- evidence of the applicant’s work practices in relation to their contractors and building sites;
- evidence that the applicant integrates safe design principles into the risk management process;
- evidence that the applicant has mechanisms for cross-project consultation and communication in relation to WHS issues;
- evidence of the applicant’s cross-project information gathering and reporting capability in relation to WHS performance;
- evidence that workers at all levels are suitably trained and competent to deal with WHS risks associated with the project.

It is not necessary for an applicant to actually provide the evidence required in subsection 10(1). An applicant is able to satisfy the obligation to provide evidence by identifying the relevant documents and their location, and indicating that they will be available for the purposes of the pre-accreditation audit.

The FSC can waive any of these evidentiary requirements in relation to an applicant who is accredited, or has previously been accredited, where the FSC is satisfied that information that the applicant has previously supplied is sufficient.

Section 11 – Further information

Under section 11, the FSC can request further information from an applicant for the purposes of enabling him or her to make a decision about accreditation. The information that can be sought under section 11 would typically be information of the type that an applicant is already required to provide in support an application for accreditation (under section 10).

Seeking further information where required enables the FSC to continue to consider an application for accreditation, rather than rejecting it, in cases where insufficient or incomplete information is provided with the initial application. Nothing in this provision is intended to abrogate the common law privilege against self-incrimination or legal professional privilege.

A request for further information must be made in writing, and specify the information sought and the timeframe for providing it.

If the applicant fails to provide information sought within the specified timeframe the application for accreditation is taken to have been withdrawn.

Division 2.4—Pre-accreditation audits

Section 12 – Pre-accreditation audit

An applicant for accreditation is required to agree to a pre-accreditation audit being conducted under section 12 for the purpose of the FSC determining whether the applicant has appropriate WHS policies and procedures and safe work practices. Under subsection 8(1) such agreement is a prerequisite for accreditation.

Subsections 12(2) and (3) set out the audit process that the applicant must agree to in order to be accredited.

If the applicant is a constitutional corporation an FSO is to carry out an audit exercising his or her powers under section 63 of the Act (subsection 12(2)). Under section 63 of the Act an FSO can, among other things, inspect any work, interview any person and inspect and make copies of documents for the purpose of ascertaining whether the applicant meets accreditation requirements.

If the applicant is not a constitutional corporation, an FSO is to carry out the audit as if he or she was exercising powers under section 63 of the Act in relation to premises controlled by the applicant or to premises that the occupier has agreed the FSO can enter for the purposes of carrying out the audit (subsection 12(3)).

The reason for the different wording of the requirements for constitutional corporations and applicants that are not constitutional corporations relates to the constitutional power that underpins an FSO's role in each case.

The corporations power in clause 51(xx) of the Constitution supports the exercise of an FSO's power to enter premises, inspect documents and interview witnesses in relation to constitutional corporations. In the case of applicants that are not constitutional corporations this constitutional power is not available, and paragraph 8(1)(b) therefore requires an applicant to agree to an FSO conducting an audit exercising powers equivalent to the powers in section 63 of the Act in accordance with subsection 12(3). This ensures that all applicants are subject to the same pre-accreditation processes.

Section 13 – Pre-accreditation audit unnecessary in certain circumstances

Section 13 provides an exception to the general requirement that a pre-accreditation audit be conducted as a prerequisite to accreditation being granted.

Under this section, the FSC can accredit an applicant without a pre-accreditation audit being carried out if:

- an applicant is accredited, or has previously been accredited;
- a post-accreditation audit of the WHS practices and procedures, and work practices, of the applicant has been carried out; and
- the FSC considers it appropriate to accredit the person without a pre-accreditation audit, having regard to the findings of that post-accreditation audit, and any other matters that he or she considers relevant.

The FSC can also accredit an applicant without a pre-accreditation audit in circumstances where:

- another accredited person has been subject to a pre-accreditation audit or post-accreditation audit;
- the WHSMS that applies to that other already accredited person is the same as the WHSMS that applies to the applicant at the time the application was made (i.e. the WHSMS's of both persons are identical at the relevant time); and
- the FSC considers it appropriate to accredit the person without a pre-accreditation audit having regard to the findings of the earlier audit of the WHSMS as it applies to that other, already accredited, person, and any other matters that he or she considers relevant.

The capacity for the FSC to accredit an applicant in the circumstances set out in this section is intended to reduce unnecessary red tape for applicants who have already been subject to appropriate FSC auditing processes, or who operate under a WHSMS that has already been appropriately tested, without compromising safety standards.

Importantly, the ability to accredit an applicant without a pre-accreditation audit being conducted is at the discretion of the FSC. This section does not obviate the need for an applicant to agree to a pre-accreditation audit, or limit the ability of the FSC to conduct such an audit.

Division 2.5—Notice of decision

Section 14 – Notice of decision

Section 14 requires the FSC to notify an applicant for accreditation of a decision about accreditation as soon as practicable after making the decision (subsections 14(1) and (2)).

If the FSC decides to accredit the applicant, the notice must specify:

- the date from which the applicant is accredited;
- the period of accreditation;
- the standard conditions that apply under section 15 to all accredited persons;
- any additional conditions that are being imposed under section 16 and the reasons for those additional conditions.

If the FSC decides not to accredit the applicant, to accredit the applicant for less than the maximum 6 year period, or to impose additional conditions of accreditation under section 16, the notice must include information about the applicant's rights of review under Division 2.9 in respect of such decisions.

Division 2.6—Conditions of accreditation

Section 15 – Conditions that apply to all accreditations

Section 15 sets out the conditions that apply to all accredited persons. These are that the accredited person must:

- at all times have appropriate WHS policies and procedures, and safe work practices;
- agree to post-accreditation audits being carried out under section 17, and take all reasonable steps to facilitate such audits; and
- comply with reporting obligations notified by the FSC under subsection 15(2) from time to time.

Subsection 15(2) requires the FSC to notify an accredited person in writing of the reporting requirements that are to be complied with. These requirements might include, for example, providing reports in relation to:

- on-site safety incidents including fatalities, 'lost time' injuries, 'medically treated' injuries and dangerous occurrences;
- safety performance over a particular period or in relation to a particular Scheme project; and
- new contracts entered into for building work covered by the Scheme.

The reporting requirements notified to an accredited person by the FSC under this section are administrative in character and support the effective operation of the Scheme.

Section 16 – Federal Safety Commissioner may impose further conditions

Under this section the FSC can impose further conditions on an accredited person, either at the time of accreditation or subsequently.

Further conditions might be imposed on accreditation, for example, where the WHSMS of the accredited person has adequately addressed the Scheme's criteria on a particular audited project but there remains a level of concern about its implementation on other projects.

Further conditions might also be imposed subsequently, for example, where persistent failure to meet Scheme criteria necessitates the imposition of a condition that additional audits be conducted.

If a condition is imposed during a person's period of accreditation, the FSC is required to give notice to the accredited person setting out the condition, the reasons for the condition being imposed and advising of the accredited person's review rights under Division 2.9 in relation to the decision. Section 14 imposes an equivalent notification requirement where additional conditions are imposed under section 16 at the time of accreditation.

Section 17 – Post-accreditation audit

Under section 15, all accredited persons are required to agree to post-accreditation audits being carried out under section 17, and to take all reasonable steps to facilitate such audits. These audits will enable the FSC to be satisfied that the accredited person has complied, and is complying, with the conditions that apply to their accreditation.

Section 17 sets out the post-accreditation audit process to which an accredited person must agree.

If the accredited person is a constitutional corporation an FSO is to carry out an audit exercising his or her powers under section 63 of the Act (subsection 17(2)). Under section 63 of the Act an FSO can, among other things, inspect any work, interview any person and inspect and make copies of documents for the purpose of ascertaining whether the accredited person has complied, and is complying, with conditions of accreditation.

If the accredited person is not a constitutional corporation, an FSO is to carry out an audit:

- exercising his or her powers under section 63 of the Act – in respect of building work in a Territory or Commonwealth place; or
- as if he or she was exercising powers under section 63 of the Act in relation to premises controlled by the accredited person or premises that the occupier has agreed the FSO can enter for the purposes of carrying out the audit – in all other cases (subsection 17(3)).

As with pre-accreditation audits under section 12, the reason for the different requirements for constitutional corporations and non-constitutional corporations relates to the Constitutional power that underpins the FSO's role in each case.

Division 2.7—Breach of conditions of accreditation

Section 18 – Breach of conditions

Section 18 lists the action the FSC can take if he or she is satisfied that an accredited person has breached a condition of accreditation.

There is an escalating series of actions that the FSC can take: imposing further conditions of accreditation, suspending accreditation or revoking accreditation.

Suspension of accreditation would prevent a person from tendering for building work to which the Scheme applies for a period of time specified by the FSC.

Subsection 18(2) allows the FSC to revoke a person's accreditation if satisfied that the person's WHS policies and procedures, or failure to comply with those policies and procedures, constitute a risk to safety, or where the person's work practices are unsafe, irrespective of whether an additional condition or period of suspension has already been imposed.

If a person's accreditation is revoked they will need to reapply for accreditation in order to contract for building work to which the Scheme applies.

In determining whether he or she is satisfied that there has been a breach of a condition of accreditation, or whether there are grounds to justify revocation of an accreditation, subsection 18(4) enables the FSC to consider and rely on any post-accreditation audit of the WHSMS under which the accredited person operates. This means that the FSC is not limited to considering only audits conducted of the accredited person's worksites. Rather, where the FSC considers it appropriate to do so, he or she is able to consider an audit of another accredited person's worksite provided that both accredited persons operate under the same WHSMS.

Subsection (4) does not limit the range of matters that the FSC may have regard to in making a decision under this section.

Section 19 – Notices under this Division

Section 19 sets out the notice requirements that apply where action is taken under section 18. Notices under this section are required to be in writing.

If an accreditation is made subject to an additional condition, the FSC is required to notify the person of this fact (subsection 19(1)).

If a person's accreditation is suspended, the FSC is required to notify the person of the suspension, the date upon which the suspension commences and the period of the suspension (subsection 19(2)).

If a person's accreditation is revoked, the FSC is required to notify the person of the revocation and the date from which revocation takes effect (subsection 19(3)).

In all cases, the notice issued by the FSC is required to set out the reason for the decision that has been made and contain information about rights of review that are available under Division 2.9 in respect of such decisions.

Division 2.8—Variation and cancellation of accreditation

This Division enables the FSC to vary or cancel a person's accreditation in a specific and limited range of circumstances. The powers in this Division are machinery in nature and are intended to facilitate the smooth operation of the Scheme.

Section 20 – Variation of accreditation for change of name

Section 20 enables the FSC to vary a person's accreditation in circumstances to reflect a change of the legal name of the person. This section only applies in cases where a name is varied without changing the legal status of the person. It does not enable the FSC to confer accreditation on a new legal entity without proper accreditation procedures being followed.

Section 21 – Cancellation of accreditation on request

Section 21 enables the FSC to cancel a person's accreditation on request.

Division 2.9—Review of decisions

Section 22 – Reviewable decisions

Section 22 provides that the following decisions made by the FSC under the Scheme are reviewable:

- a decision to refuse accreditation;
- a decision to grant accreditation for a period of less than the maximum 6 year period available;
- a decision to impose a condition on an accreditation, either at the time accreditation is granted or at a later time;
- a decision to suspend accreditation;
- a decision to revoke accreditation; and
- a decision to refuse to cancel accreditation on request.

Section 23 – Internal review of decisions

Section 23 enables a person whose interests are affected by a reviewable decision to make a request to the FSC for review of a decision (subsection 23(1)). A request for review must be made in writing and within 28 days after the person received notification of the original decision (subsection 23(2)).

After receiving a written application for a review of a decision, the FSC must provide for the decision to be reviewed by someone who was not involved in making the original decision (subsections 23(3) and (4)).

The reviewer of the decision can affirm, vary or set aside the initial decision and, in the event that the reviewer sets aside the decision, the reviewer may make another decision (subsection 23(5)). For example, a reviewer could decide to set aside an initial decision to suspend accreditation and instead impose a further condition on the person's accreditation.

Subsection 23(6) details when the reviewer's decision would take effect.

If the reviewer does not make a decision within 90 days after his or her request has been received the original decision is taken to have been affirmed (subsection 23(7)).

Section 24 – Notice of decision on review

Section 24 requires the person conducting a review to provide written notice of the outcome to a person whose interests are affected by the decision on review. Notice must be provided within 28 days of the decision on review being made and must contain advice of the further review rights available under section 25.

Section 25 – AAT review

Section 25 enables an application for further review of a decision to be made to the Administrative Appeals Tribunal.

The rules and procedures governing the hearing of such a review are set out in the *Administrative Appeals Tribunal Act 1975*.

Part 3—Prescribed building work

Section 26 – Prescribed building work

This section prescribes the 'building work' that is not subject to the Scheme.

The Scheme applies to building work that is carried out in Australia where the work includes direct or indirect Commonwealth funding above certain financial thresholds. This includes building projects undertaken by State or local governments, or the private sector, which include Commonwealth funding above those financial thresholds.

However, the Scheme does not apply to:

- the construction, renovation or alteration of single dwelling residences;
- building work carried out by subcontractors (although subcontractors performing work on Scheme projects must work under the accredited person's WHSMS); or
- building work carried out by unaccredited persons that enter into a joint-venture arrangement with an accredited person, provided that certain undertakings are given in writing to the FSC prior to entering into a contract for the building work.

Part 4—Application, savings and transitional provisions

Section 27 – Application of provisions reflecting amendments made by the *Fair Work (Building Industry—Accreditation Scheme) Amendment Regulation 2014*

Section 27 ensures that the application provisions for certain amendments to the Scheme, which commenced on 1 January 2015, continue to apply prospectively as intended. That is:

- a change that was made to the general conditions of accreditation (a requirement that an accredited person to take all reasonable steps to facilitate post-accreditation audits) applies only to accreditations granted after the change was made; and
- changes to the building work that is prescribed for the purposes of subsection 35(4) of the Act (i.e. building work to which the Scheme does not apply) only apply to building work carried out under contracts entered into on or after the commencement of those changes.

Section 28 – Transitional—repeal of the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005*

Section 28 ensures that the operation of the Scheme is not disrupted by the repeal of the 2005 Regulations and their replacement by the Regulation. It ensures, for example, that an application for accreditation made under the 2005 Regulations remains on foot and can be considered under the Regulation. It also ensures that an accreditation granted before the commencement of the Regulation continues.

Schedule 1—Repeals

Fair Work (Building Industry—Accreditation Scheme) Regulation 2005

Item 1 – The whole of the Regulations

Schedule 1 of the Regulation repeals the 2005 Regulations, which are due to sunset on 1 April 2016 in accordance with Part 6 of the *Legislative Instruments Act 2003*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work (Building Industry—Accreditation Scheme) Regulation 2016

The *Fair Work (Building Industry—Accreditation Scheme) Regulation 2016* (the Regulation) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

Section 35 of the *Fair Work (Building Industry) Act 2012* (the Act) provides for the establishment of the Australian Government Building and Construction Work, Health and Safety (WHS) Accreditation Scheme (the Scheme) with the Federal Safety Commissioner (the FSC) as the accrediting authority under the Scheme.

Under section 35(4) of the Act, the Commonwealth or a Commonwealth authority is prohibited from funding building work carried out by non-accredited persons. This prohibition does not apply to ‘prescribed building work’. In this way, the Scheme seeks to raise safety standards in the building and construction industry by using the Commonwealth’s purchasing power to promote best practice.

The Regulation repeals and replaces the *Fair Work (Building Industry—Accreditation Scheme) Regulations 2005* (the 2005 Regulations) which will sunset on 1 April 2016.

In replacing the 2005 Regulations, the Regulation:

- ensures that current operational practice in the administration of the Scheme is better reflected in the Regulation;
- updates the terminology and structure of the 2005 Regulations in line with current drafting practices; and
- ensures a smooth transition to the Regulation, including by preserving existing accreditations and allowing for ongoing processes to continue.

The Regulation:

- establishes an accreditation scheme and the processes by which the FSC, an office created by the Act, is to be satisfied that building industry participants meet and maintain appropriate work health and safety policies, procedures and safe work practices (Divisions 2.3 to 2.6);
- provides for the auditing of work, health and safety management systems (WHSMS) (sections 12 and 17) and enables the FSC to take action in cases of a breach of accreditation conditions, including suspension or revocation of accreditation (section 18);

- provides for the review of decisions of the FSC about accreditation – by way of internal review, followed by access to the Administrative Appeals Tribunal (sections 22 to 25); and
- prescribes the ‘building work’ that is not subject to the Scheme (section 26). The Scheme applies to building work that is carried out in Australia where the work includes direct or indirect Commonwealth funding above certain financial thresholds. This includes building projects undertaken by State or local governments, or the private sector, which include Commonwealth funding above those financial thresholds. However, the Scheme does not apply to:
 - the construction, renovation or alteration of single dwelling residences;
 - building work carried out by subcontractors (although subcontractors performing work on Scheme projects must work under the accredited person’s WHSMS); and
 - building work carried out by unaccredited persons that enter into a joint-venture arrangement with an accredited person, provided that certain undertakings are given in writing to the FSC prior to entering into a contract for the building work.

The Regulation contains some changes that reflect operational experience, including:

- allowing the streamlined accreditation of multiple entities that operate under the same work, health and safety arrangements; and
- clarifying the circumstances in which the FSC may revoke accreditation.

Human rights implications

The Regulation engages the following rights:

- the right to just and favourable conditions of work under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the right to safe and healthy working conditions; and
- the right to work under Article 6 of the ICESCR.

Right to just and favourable conditions of work, including the right to safe and healthy working conditions

Article 7 of the ICESCR provides that the right to just and favourable conditions of work includes the right to safe and healthy working conditions.

The right to safe and health working conditions is primarily underpinned in Australia by work health and safety legislation at the Commonwealth, State and Territory levels. The Regulation supplements this framework by prescribing an accreditation scheme that seeks to improve health and safety arrangements for workers in the building and construction industry by using the Commonwealth Government’s purchasing power to promote best practice.

The building and construction industry is a notoriously dangerous industry. It is one of the industry groups identified as a ‘priority industry’ by Safe Work Australia due to its hazardous nature and relatively high numbers and rates of injuries and/or fatalities.¹ The existing Scheme was introduced in response to findings by the Cole Royal Commission that safety standards in the industry were unacceptable. The Royal Commission recommended that the Commonwealth use its influence as a client and provider of capital to foster improved performance.²

In a recent review,³ it was found that the existing Scheme sets the highest standards for safety in the industry in Australia, and that it operates to improve safety at both the individual company level and for the industry more broadly. Among the key findings were that:

- more than 80% of accredited companies think that the Scheme has increased their safety standards beyond the level they would otherwise have been, with 94% of small companies having this view. This is reflected in the injury and workers’ compensation premium rates of accredited companies;
- 78% of accredited companies believe accreditation has helped their company achieve a ‘whole of organisation’ improvement to safety culture both onsite and in head office;
- 70% of three time accredited companies have lowered their Lost Time Injury Frequency Rates (by the time of their second re-accreditation, i.e. after 6 years, compared with prior to accreditation). For those companies, the average amount of decrease is 69%; and
- 60% of three time accredited companies have lowered their workers’ compensation premium rates (by the time of their second re-accreditation). For those companies, the average reduction in premiums is 44%, with the workers’ compensation premium rates of Scheme companies generally more than 20% lower than the industry average.

These outcomes illustrate that the effective continuation of the Scheme through the making of the Regulation promotes the right to safe and healthy working conditions in Article 7 of the ICESCR.

Right to work

Article 6 of the ICESCR protects the right to work, which includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts.

The Regulation potentially imposes an indirect limit on a person’s right to work in their chosen industry by limiting access to Commonwealth funded building work to accredited persons.

¹ Australian Work Health and Safety Strategy 2012-2022, p. 17

² Chapter 2 – Improving occupational health and safety in the building and construction industry

³ *Review to Modernise the Office of the Federal Safety Commissioner and the Australian Government Building And Construction OHS Accreditation Scheme* (Department Of Employment; June 2014)

As the vast majority of persons seeking accreditation are corporations, any impact on an individual's right to work would be an indirect effect of decisions about the WHSMS of their employer.

A very limited number of applicants are individuals. Decisions about accreditation in this case could directly limit access of such persons to Commonwealth funded building work. However it should be noted that in practical terms the financial thresholds that apply to the Scheme mean that individuals are unlikely to be in a position to undertake work covered by the Scheme.

In both cases, it is important to note that the mere fact of accreditation does not guarantee access to Commonwealth funded building work, rather it is a prerequisite to being awarded such work.

Where at first an applicant does not meet the criteria to become an accredited person, the Office of the Federal Safety Commissioner takes a consultative approach by working with the applicant to assist them to implement the safety standards that are required for accreditation. A similar approach is taken in cases where an audit of safety policies and procedures identifies issues that need to be addressed. In this way, the Office of the Federal Safety Commissioner actively promotes improved safety standards in the building and construction industry and minimises the potential limitation on the right to work.

To the extent that it might be said that the Scheme has the potential to impact on some individuals' right to work, that impact is justified by the enhancements to safety standards that flow from the Scheme. The Government considers improving workplace health and safety in this industry to be an important objective, and that any limited impact on some individuals' right to work is reasonable, necessary and proportionate to achieve this objective.

Conclusion

The Regulation is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that it may limit human rights and freedoms, those limitations are reasonable, necessary and proportionate in the pursuit of legitimate objectives.

Senator the Hon Michaelia Cash, Minister for Employment