

## EXPLANATORY STATEMENT

Issued by the authority of the Minister for Jobs and Industrial Relations

Subject – *Building and Construction Industry (Improving Productivity) Act 2016*

*Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019*

Subsection 120(1) of the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) provides that the Minister may, by legislative instrument, make rules 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.

Subsection 43(1) of the Act provides for the establishment of an accreditation scheme, to be known as the Work Health and Safety Accreditation Scheme, for persons who wish to carry out building work funded by the Commonwealth or a corporate Commonwealth entity (the Accreditation Scheme).

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

Prior to the commencement of these rules the Accreditation Scheme was provided for by the *Fair Work (Building Industry—Accreditation Scheme) Regulation 2016* (the 2016 Regulation). The 2016 Regulation was made under the *Fair Work (Building Industry) Act 2012* and was continued in force by item 11 of Schedule 2 to the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (the CTP Act) as if they were rules made by the Minister for the purposes of section 43 of the Act.

Item 11 of Schedule 2 to the CTP Act specifically provides that it does not prevent the repeal of the 2016 Regulation.

The *Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019* (the Rules) repeal and replace the 2016 Regulation.

The Rules replicate the 2016 Regulation by prescribing:

- 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 Accreditation Scheme does not apply.

The Rules also:

- confirm compliance with the National Construction Code performance requirements in relation to building materials is a consideration in assessing an application for accreditation and a condition that applies to all accreditations;

- clarify which members of joint ventures are required to give undertakings to the Federal Safety Commissioner (the FSC) prior to entering a contract for building work;
- prescribe additional types of building work to which the Accreditation Scheme does not apply;
- provide an additional ground upon which the FSC may revoke a person's accreditation;
- clarify the process for undertaking audits in relation to persons who are not constitutional corporations, the Commonwealth or a corporate Commonwealth entity; and
- update terminology and cross references to reflect those in the Act.

The National Construction Code (NCC) is a performance based code containing performance requirements that specify the minimum level of performance for buildings, plumbing and drainage installations. It is an initiative of the Council of Australian Governments and is produced and maintained by the Australian Building Codes Board (ABCB) on behalf of the Australian Government and each state and territory government. The NCC is available free of charge on the ABCB's website ([www.abcb.gov.au](http://www.abcb.gov.au)) once the user has created an account. The Rules require compliance with the NCC as in force immediately before the commencement of the Rules.

Details of the Rules are set out in Attachment A.

## **Consultation**

The Office of the Federal Safety Commissioner consulted with key stakeholders who have a working knowledge of the Accreditation Scheme including the FSC's Industry Reference Group and peak industry bodies, Master Builders Australia, Australian Constructors' Association and Civil Contractors Federation. No issues were raised by these stakeholders.

The Department of Defence was also consulted on the development of the mechanism to exempt sensitive Commonwealth funded building and construction projects from the application of the Accreditation Scheme on national security grounds.

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required as the changes are minor in nature (OBPR ID 25071 and 23794).

A Statement of Compatibility with Human Rights (the Statement) has been completed for the Rules in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Rules is compatible with human rights. A copy of the Statement is at Attachment B.

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Rules commence on the day after they are registered on the Federal Register of Legislation.

**Details of the *Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019***

**Part 1—Preliminary**

Section 1 – Name

Section 1 provides that the name of the instrument is the *Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019* (the Rules).

Section 2 – Commencement

Section 2 provides that the Rules commence on the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 specifies that the Rules are made under the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act).

Section 4 – Schedules

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

Section 5 – Definitions

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

**Part 2—Work Health and Safety Accreditation Scheme**

**Division 1—Work Health and Safety Accreditation Scheme**

Section 6 – Work Health and Safety Accreditation Scheme

Section 6 of the Rules provides that, for the purposes of subsection 43(1) of the Act, Part 2 of the Rules sets out the accreditation scheme for persons who wish to carry out Commonwealth funded building work (the Accreditation Scheme).

**Division 2—Accrediting authority**

Section 7 – Accrediting authority

Section 7 provides that the FSC is the accrediting authority for the Accreditation Scheme, as required by subsection 43(2) of the Act.

### **Division 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;
- the FSC is satisfied that the applicant has, and is implementing and will continue to implement, appropriate Work Health and Safety (WHS) policies and procedures and safe work practices; and
- the FSC is satisfied that the applicant is complying, and will comply with the National Construction Code (NCC) performance requirements in relation to building materials.

Subsection 8(2) provides that a period of accreditation must not exceed 6 years and cannot be extended. The note 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 (if any) in dealing with construction hazards or high risk activities;
- the applicant's record in relation to workplace safety; and
- the outcome of a pre-accreditation audit undertaken in relation to the applicant, subject to section 13 which provides that pre-accreditation audits are unnecessary in certain circumstances.

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

Subsection 10(1) 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 commitment of the applicant’s senior management to having and implementing 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 effective consultation and communication in relation to WHS issues across and entire project;
- evidence of the applicant’s information gathering, analysis and reporting capability in relation to WHS performance across an entire project;
- evidence that the applicant ensures that workers at all levels are suitably trained and competent to deal with WHS risks associated with the project; and
- a written declaration that the applicant is complying and will comply with NCC performance requirements in relation to building materials.

However, subsection 10(2) provides that an applicant need not provide evidence of a matter contained in s 10(1) if the application identifies the relevant documents and their location, and indicates that they will be available for the purposes of the pre-accreditation audit.

This is not an exhaustive list of the evidence that may be examined and taken into account for the purposes of the pre-accreditation audit.

Subsection 10(3) provides that the FSC may waive any of the evidentiary requirements in subsection 10(1) if the applicant is an accredited person or has previously been an accredited

person and the FSC is satisfied that the applicant has previously supplied is sufficient information on that matter.

### Section 11 – Further information

Under section 11, the FSC can request further information from an applicant for the purposes of enabling them to make a decision about accreditation.

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 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, and is implementing and will continue to implement, appropriate WHS policies and procedures and safe work practices. Under subsection 8(1) such agreement is a prerequisite for accreditation.

Paragraph 12(1)(b) provides that if the applicant is neither a constitutional corporation, the Commonwealth nor a corporate Commonwealth entity, the applicant must agree with the FSC on the way in which the pre-accreditation audit will be carried out.

If the applicant is a constitutional corporation, the Commonwealth or a corporate Commonwealth entity, an FSO is to carry out an audit exercising his or her powers under Division 3 of Part 3 of Chapter 7 of the Act (subsection 12(2)). Under this Division 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.

Subsection 12(3) provides that if the applicant is neither a constitutional corporation, the Commonwealth nor a corporate Commonwealth entity, a FSO is to carry out the pre-accreditation audit in accordance with the agreement between the person and the FSC as mentioned in paragraph 12(1)(b). Further, in relation to such applicants, if an activity involved in the audit is to occur at particular premises, it must be carried out only with the consent of the occupier of the premises.

The different audit process for applicants who are not constitutional corporations, the Commonwealth or a corporate Commonwealth entity reflects the limitation on the powers of FSOs in Division 3 of Part 3 of Chapter 7 of the Act.

### Section 13 – Pre-accreditation audit unnecessary in certain circumstances

Section 13 provides an exception to the general requirement that a pre-accreditation audit of the applicant be conducted, and that the FSC must have regard to the findings of that audit, 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:

- the applicant is accredited, or has previously been accredited; and
- a post-accreditation audit 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 the FSC 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 section 13 is intended to reduce unnecessary administrative burden 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 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 day on which the accreditation begins;
- the period of accreditation;
- the standard conditions that apply under section 15 to all accredited persons; and
- 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 9 in respect of such decisions.

## **Division 6—Conditions of accreditation**

### Section 15 – Conditions that apply to all accreditations

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

- at all times have and implement appropriate WHS policies and procedures, and safe work practices;
- comply with the performance requirements of the NCC that relate to building materials;
- agree to post-accreditation audits being carried out under section 17;
- take all reasonable steps to facilitate post-accreditation audits; and
- comply with reporting obligations notified to the person 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 they are to comply with. These requirements could include 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 Accreditation Scheme project; and
- new contracts entered into for building work covered by the Accreditation 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 Accreditation 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. For example, the FSC may impose further conditions:

- at the time of accreditation if the WHSMS of the accredited person has adequately addressed the Accreditation Scheme’s criteria on a particular audited project but there remains a level of concern about its implementation on other projects; or
- during the period of accreditation where persistent failure to meet Accreditation 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 9 in relation to the decision. The note to subsection 16(2) highlights that 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 these audits. The purpose of post-accreditation audits is to enable the FSC to determine if they are satisfied that the accredited person has complied with, 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.

Subsection 17(2) provides that if the accredited person is a constitutional corporation, the Commonwealth or a corporate Commonwealth entity, an FSO is to carry out an audit exercising their powers under Division 3 of Part 3 of Chapter 7 of the Act. Under that Division 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, the Commonwealth or a corporate Commonwealth entity, the audit is to be carried out in accordance with an agreement between the accredited person and the FSC. Further, in relation to such accredited persons, if an activity involved in the audit is to occur at particular premises, it must be carried out only with the consent of the occupier of the premises.

As with pre-accreditation audits under section 12, the different audit process for applicants who are not constitutional corporations, the Commonwealth or a corporate Commonwealth

entity reflects the limitation on the powers of FSOs in Division 3 of Part 3 of Chapter 7 of the Act.

## **Division 7—Breach of conditions etc.**

### Section 18 – Breach of conditions

Section 18 lists the action the FSC may take if they are satisfied that an accredited person has breached a condition of accreditation. These are:

- imposing a further condition of accreditation;
- suspending the person’s accreditation; or
- revoking the person’s accreditation.

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

The FSC may only revoke a person’s accreditation if satisfied that:

- the person has failed at two or more times while accredited to have or implement appropriate WHS policies and procedures or safe work practices;
- the person’s WHS policies and procedures constitute a risk to safety;
- The person’s WHS policies and procedures are not being complied with, in a way that constitutes a risk to safety; or
- the person’s work practices are not safe.

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

Subsection 18(2) provides that if the FSC imposes a further condition of accreditation or suspends a person’s accreditation under paragraph 18(1)(a) or (b), and later becomes satisfied that there are grounds to revoke that person’s accreditation under paragraph 18(1)(c), the FSC may revoke the person’s accreditation even if the period for complying with any condition or the period of any suspension has not ended.

In determining whether they are satisfied that there has been a breach of a condition of accreditation, or whether there are grounds to justify revocation of a person’s accreditation, subsection 18(4) enables the FSC to consider and rely on a post-accreditation audit of another accredited person that, at the time of the relevant audit, used the same WHSMS as the first accredited person. This means that the FSC is not limited to considering only audits of the accredited person’s own worksites. Rather, where the FSC considers it appropriate to do so, they are 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.

In all cases, the notice issued by the FSC must be in writing, set out the reason for the decision and contain information about review rights available to the person under Division 9 in respect of such decisions.

#### **Division 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 Accreditation Scheme.

#### Section 20 – Variation of accreditation for change of name

Section 20 enables the FSC to vary a person's accreditation 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 9—Review of decisions**

#### Section 22 – Reviewable decisions

Section 22 provides that the following decisions made by the FSC are reviewable decisions (Reviewable Decisions):

- 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 an accreditation;
- a decision to revoke an accreditation; and
- a decision to refuse to cancel an accreditation on request.

### Section 23 – Internal review of decisions

Section 23 enables a person whose interests are affected by a Reviewable Decision to request a reconsideration of the decision. A request must be made in writing, setting out the reasons for the request, within 28 days after the person received the notice of the Reviewable Decision.

After receiving a written application for a review of a decision, the FSC must cause the decision to be reviewed by someone who was not involved in making the original decision.

Subsection 23(5) provides that the reviewer of the decision may 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 the reviewer considers appropriate. For example, a reviewer could decide to set aside an initial decision to suspend an accreditation and instead impose a further condition on the person's accreditation.

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

Subsection 23(7) provides that if the reviewer does not make a decision under subsection 23(5) within 90 days after the request was received, the original decision is taken to have been affirmed.

### Section 24 – Notice of decision on review

Subsection 24(1) requires the person conducting a review under section 23 to provide written notice of the outcome to a person whose interests are affected by the decision on review. The notice must be provided within 28 days of the decision on review being made and must contain advice of further review rights available under section 25.

Subsection 24(2) clarifies that a failure to comply with subsection (1) does not affect the validity of the decision on review.

### Section 25 – AAT review

Section 25 enables an application for review of a decision under section 23(5) to be made to the Administrative Appeals Tribunal.

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

## **Part 3—Prescribed building work**

### Section 26 – Prescribed building work

Subsection 43(4) of the Act prohibits the Commonwealth or a corporate Commonwealth entity from funding building work unless:

- a) Contracts for the building work will be entered into with builders who are accredited persons; and

- b) At the time of the funding the Commonwealth or corporate Commonwealth entity takes appropriate steps to ensure that builders will be accredited persons when they carry out the building work.

However, it further provides that this subsection does not apply to building work prescribed by the rules.

Section 26 prescribes the building work to which subsection 43(4) of the Act does not apply.

Generally, the Accreditation Scheme applies to building work that is carried out in Australia where the work includes direct or indirect Commonwealth funding above certain financial thresholds (set out in paragraphs 26(b) to (d)). This includes building projects undertaken by State or local governments, or the private sector, which involve Commonwealth funding above those financial thresholds.

However, there are a number of circumstances in which the Accreditation Scheme does not apply to particular building work even where it meets those requirements.

Paragraph 26(e) provides that the Accreditation Scheme does not apply to building work which forms part of a project to support the operations of an intelligence or security agency where the Minister responsible for the intelligence or security agency has determined in writing that disclosing the connection of the Commonwealth with the work or the project would prejudice security.

The purpose of paragraph 26(e) is to ensure that compliance by the Commonwealth and corporate Commonwealth entities with subsection 43(4) of the Act does not prejudice Australia's national security by identifying the Commonwealth's interest in certain sensitive building and construction projects.

A written determination by the Minister responsible for the intelligence or security agency that disclosing the connection of the Commonwealth with the work or project would prejudice security will not be a legislative instrument.

Determinations will not be required to be made publicly available or subject to merits review, as this would reveal the Commonwealth's interest in the project and defeat the purpose of the amendment, which is to protect the Commonwealth's national security interests by ensuring certain sensitive building works are not identifiable as being Commonwealth funded. However, the Inspector General of Intelligence and Security has the power to inquire into compliance by an intelligence or security agency with Commonwealth laws, including the Act.

Paragraph 26(f) prescribes building work carried out by subcontractors, although subcontractors performing building work on projects to which the Accreditation Scheme applies will be required to work under the WHSMS of the accredited person on the project (e.g. a head contractor).

Paragraph 26(g) prescribes 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 purpose of this provision is to ensure the Commonwealth and corporate Commonwealth entities are not prevented from funding building work which forms part of a project undertaken by a joint venture where one, but not all, members of the joint venture are accredited persons and the building work is to be carried out, in whole or in part, by an unaccredited builder that is a member of that joint venture.

Paragraph 26(h) prescribes any work which is part of a project for the construction, repair or restoration of a single-dwelling house, or any building, structure of work associated with a single-dwelling house, or the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension. This reflects that the Accreditation Scheme does not generally apply to the domestic housing sector, although in some cases multi-dwelling developments are covered.

Paragraph 26(i) prescribes the off-site prefabrication of made-to-order components to form part of any building, structure or works unless that work is performed on an auxiliary or holding site that is separate from the primary construction site or sites.

Paragraph 26(j) prescribes building work described in paragraph 6(1)(e) of the Act, being the transportation of supply of goods to be used in building work covered in any of paragraphs (6)(1)(a) to (d) of the Act directly to building sites where that work is being or may be performed.

#### **Part 4—Application, savings and transitional provisions**

##### Section 27 – Transitional—things done under repealed instruments

Section 27 ensures that the operation of the Accreditation Scheme is not disrupted by the repeal of the 2016 Regulations and their replacement by the Rules. It ensures, for example, that an application for accreditation made under the 2016 Regulations remains on foot and can be considered under the Rules. It also ensures that an accreditation granted before the commencement of the Rules continues and can be treated as if it was granted under the Rules.

##### Section 28 – Application of provisions reflecting amendments made by the *Fair Work (Building Industry—Accreditation Scheme) Amendment Regulation 2014*

Subsection 28(1) provides that the condition outlined in paragraph 15(1)(c) (that accredited persons agree to post-accreditation audits being carried out) does not apply to accredited persons in relation to a period of accreditation that commenced before 1 January 2015.

Subsection 28(2) ensures that the application provisions for certain amendments to the Accreditation 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 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 43(4) of the Act (i.e. building work to which the Accreditation Scheme does not apply) only apply to building work carried out under contracts entered into on or after the commencement of those changes.

#### **Schedule 1—Repeals**

##### ***Fair Work (Building Industry—Accreditation Scheme) Regulation 2016***

##### Item 1 – The whole of the Regulations

Schedule 1 of the Rules repeals the 2016 Regulations.

## **Statement of Compatibility with Human Rights**

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

### ***Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019***

The *Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019* (the Rules) 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**

The Rules are made under subsection 43(1) of the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act), which provides for the establishment of an accreditation scheme, to be known as the Work Health and Safety Accreditation Scheme, for persons who wish to carry out building work funded by the Commonwealth or a corporate Commonwealth entity (the Accreditation Scheme).

Under section 43(4) of the Act, the Commonwealth or a Commonwealth authority is prohibited from funding building work unless:

- a) contracts for the building work will be entered into with builders who are accredited persons; and
- b) at the time of the funding the Commonwealth or corporate Commonwealth entity takes appropriate steps to ensure that builders will be accredited persons when they carry out the building work.

These prohibitions do not apply to prescribed building work.

In this way, the Accreditation Scheme seeks to improve safety standards in the building and construction industry by using the Commonwealth's purchasing power to promote best practice.

The Rules repeal and replace the *Fair Work (Building Industry—Accreditation Scheme) Regulation 2016* (the 2016 Regulation). The 2016 Regulation was made under the *Fair Work (Building Industry) Act 2012* (FWBI Act) and was continued in force by item 11 of Schedule 2 to the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* as if they were rules made by the Minister for the purposes of section 43 of the Act.

The Rules:

- establish the Accreditation Scheme and the processes by which the Federal Safety Commissioner (FSC), who is the accrediting authority under the Accreditation Scheme, is to be satisfied that building industry participants have and implement appropriate work health and safety policies, procedures and safe work practices;



- provide for pre-accreditation and post-accreditation audits of applicants and accredited persons and enable the FSC to take action against accredited persons if they breach the conditions of accreditation, including suspension or revocation of accreditation;
- provide for the review of decisions of the FSC about accreditation – by way of internal review, followed by access to the Administrative Appeals Tribunal; and
- prescribe the building work that is not subject to the Accreditation Scheme.

In replacing the 2016 Regulation, the Rules make a small number of amendments to the Accreditation scheme. These are detailed below.

First, the Rules confirm compliance with the National Construction Code (NCC) performance requirements in relation to building materials is a consideration in assessing an application for accreditation and a condition of accreditation that applies to all accreditations (paragraphs 8(1)(d) and 15(1)(b)).

Compliance with NCC performance requirements is already required of builders by state and territory legislation. These changes facilitate the performance of the FSC's function in relation to auditing compliance with NCC performance requirements in relation to building materials, and ensure that action can be taken by the FSC, including by suspending a person's accreditation, if they are found not to be complying with those requirements.

Second, the Rules prescribe new types of building work to which the Accreditation Scheme does not apply (paragraphs 26(e), (i) and (j)).

Paragraph 26 (e) provides that the Accreditation Scheme does not apply to building work which forms part of a project to support the operations of an intelligence or security agency where the Minister responsible for the intelligence or security agency has determined in writing that disclosing the connection of the Commonwealth with the work or the project would prejudice security.

The purpose of paragraph 26(e) is to ensure that compliance with the Scheme does not prejudice Australia's national security by identifying the Commonwealth's interest in certain sensitive building and construction projects.

Determinations will not be required to be made publicly available or subject to merits review, as this would reveal the Commonwealth's interest in the project and defeat the purpose of the amendment, which is to protect the Commonwealth's national security interests by ensuring sensitive building works are not identifiable as being Commonwealth funded. However, the Inspector General of Intelligence and Security has the power to inquire into compliance by an intelligence or security agency with Commonwealth laws, including the Act.

Paragraph 26(i) prescribes building work involving the off-site prefabrication of made-to-order components to form part of any building, structure or works unless that work is performed on an auxiliary or holding site that is separate from the primary construction site or sites. Paragraph 26(j) prescribes the transportation or supply of goods to be used in building work (as defined in paragraphs 6(1)(a)-(d) of the Act) directly to building sites. The Act expanded the definition of building work that had previously been contained in the

FWBI Act to include these types of building work. However, the nature of these kinds of activities make them unsuitable for inclusion in the Accreditation Scheme.

Finally, the Rules provide an additional ground upon which the FSC may revoke a person's accreditation. Specifically, a person's accreditation may be revoked if the FSC is satisfied that the accredited person has, at two or more times while accredited, failed to have or implement appropriate work health and safety policies and procedures or safe work practices. This will enable the FSC to revoke the accreditation of a person that consistently fails to meet the requisite safety standard determined by the FSC without needing to demonstrate there is a clear and present risk to safety or that a safety incident has occurred, which is consistent with the objectives of the Accreditation Scheme.

### **Human rights implications**

The Rules engage 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 Rules supplement 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 high numbers and rates of injuries and/or fatalities relative to other industries.<sup>1</sup> 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.<sup>2</sup>

In a 2014 review,<sup>3</sup> 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:

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<sup>1</sup> Australian Work Health and Safety Strategy 2012-2022, p. 17

<sup>2</sup> Chapter 2 – Improving occupational health and safety in the building and construction industry

<sup>3</sup> *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) p4

- more than 80 per cent of accredited companies think that the Scheme has increased their safety standards beyond the level they would otherwise have been, with 94 per cent of small companies having this view;
- 78 per cent of accredited companies believe accreditation has helped their company achieve a ‘whole of organisation’ improvement in safety culture, both onsite and in head office;
- 70 per cent 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 per cent; and
- 60 per cent of three time accredited companies have lowered their workers’ compensation premium rates (by the time of their reaccreditation). For those companies, the average reduction in premiums was 44%, with the workers’ compensation premium rates of accredited companies generally more than 20% lower than the industry average.

The Scheme continues to be effective in improving safety outcomes. In a 2017 survey of accredited companies<sup>4</sup>:

- 81 per cent of respondents from newly accredited companies stated their workplace safety practices improved as a result of accreditation
- 75 per cent of respondents from newly accredited companies stated accreditation helped achieve a ‘whole of organisation’ improvement to safety culture
- 96 per cent of respondents found the Office of the Federal Safety Commissioner contributed to improving overall safety in the building and construction industry.

These outcomes illustrate that the effective continuation of the Accreditation Scheme by making the Rules 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 Rules potentially imposes an indirect limit on a person’s right to work in their chosen industry by limiting access to building work funded by the Commonwealth and corporate Commonwealth entities to accredited persons.

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.

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<sup>4</sup> *Survey of Accredited Companies Quantitative Results Summary* (Department of Jobs and Small Business)

A very limited number of applicants are individuals. Decisions about accreditation in this case could directly limit access of such persons to building work funded by the Commonwealth and corporate Commonwealth entities. 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 Accreditation Scheme.

In both cases, it is important to note that the mere fact of accreditation does not guarantee access to building work funded by the Commonwealth and corporate Commonwealth entities, 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. This means that in most cases, sanctions such as suspension and revocation of accreditation will only be imposed where the consultative approach has not been successful. In this way, the FSC 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 Accreditation 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 Accreditation 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 Rules are 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.

**The Hon Kelly O'Dwyer MP, Minister for Jobs and Industrial Relations**