



Australian Government

Attorney-General's Department

Office of the Federal Safety Commissioner



WHS Accreditation Scheme

Agency Compliance Policy



With the exception of the Commonwealth Coat of Arms, the Department's logo, any material protected by a trade mark and where otherwise noted all material presented in this document is provided under a [Creative Commons Attribution 3.0 Australia](http://creativecommons.org/licenses/by/3.0/au/) (<http://creativecommons.org/licenses/by/3.0/au/>) licence.

The details of the relevant licence conditions are available on the Creative Commons website (accessible using the links provided) as is the full legal code for the [CC BY 3.0 AU licence](http://creativecommons.org/licenses/by/3.0/au/legalcode) (<http://creativecommons.org/licenses/by/3.0/au/legalcode>).

Contents

Definition of terms.....	3
Background	4
Purpose	4
Commonwealth obligations.....	4
Meeting legislative obligations	5
Breaches of the BCIP Act.....	6
Contract splitting.....	6
OFSC considerations	7
OFSC actions.....	7
OFSC support	7

Definition of terms

Term	Definition
FSC	Federal Safety Commissioner
Funding entity	The Commonwealth or a corporate Commonwealth entity
OFSC	Office of the Federal Safety Commissioner
BCIP Act	The <i>Building and Construction Industry (Improving Productivity) Act 2016</i>
The Rules	The <i>Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019</i> .
The Scheme	The Work Health Safety Accreditation Scheme.

Background

The Work Health Safety (WHS) Accreditation Scheme (the Scheme) is established under the *Building and Construction Industry (Improving Productivity) Act 2016* (the BCIP Act) and the *Building and Construction Industry (Improving Productivity) (Accreditation Scheme) Rules 2019* (the Rules). The Federal Safety Commissioner is the accrediting authority for the Scheme, and the Scheme is administered by the Office of the Federal Safety Commissioner.

The Scheme seeks to leverage Commonwealth funding to increase safety standards across the building and construction industry, operating such that, subject to certain financial thresholds, only builders who are accredited under the Scheme can enter into head contracts for building work that is funded directly or indirectly by the Australian Government.

The Scheme promotes the benefits of investing in high quality WHS systems and practices.

The Scheme is applied consistently across the Commonwealth to ensure a level playing field. There are no individual exemptions for particular agencies, industry sectors, projects or regions.

Purpose

The BCIP Act imposes requirements on funding entities in relation to the use of accredited builders. It prohibits a funding entity from funding building work unless the head contractor for that work is accredited under the Scheme.

The OFSC monitors Commonwealth funding, tenders and contracts for building work as part of its business operations. The purpose of undertaking these activities is to be aware of new Commonwealth funded projects and ensure the legislative requirements of the BCIP Act are upheld. The OFSC also conducts audits of building projects as part of monitoring compliance with the Scheme.

Through these activities, the OFSC identifies potential non-compliance with the BCIP Act requirement by funding entities. This document sets out the framework of actions the OFSC will undertake where funding entity non-compliance is identified.

Commonwealth obligations

Section 43(4) of the BCIP Act includes the following provisions in relation to the funding of building work by the Commonwealth:

The Commonwealth or a corporate Commonwealth entity must not fund 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.

The Commonwealth has overarching responsibility for ensuring compliance with the legislation and cannot delegate this to downstream funding recipients. If the Commonwealth is providing funding to

third parties (i.e. indirect funding), it is the Commonwealth's responsibility to ensure that funding recipients are made aware of and adhere to the Scheme's requirements when they are issuing contracts involving building work. For example, Commonwealth departments providing funding to state and territory governments could be responsible for ensuring Scheme compliance.

Under the *Public Governance, Performance and Accountability Act 2013*, a corporate Commonwealth entity is defined as a Commonwealth entity that is a body corporate. Although they remain part of the Australian Government, corporate Commonwealth entities have a separate legal personality from the Commonwealth. Examples include the Australian Broadcasting Corporation and the National Library of Australia.

Meeting legislative obligations

Funding arrangements for Commonwealth building projects are often complex and the OFSC can advise agencies on the application of the Scheme, including the point at which Scheme requirements apply. Primary responsibility for compliance with the Scheme requirements, however, rests with Commonwealth funding entities. As such, each agency must have appropriate procedures and processes in place to ensure compliance with the Scheme's requirements.

A range of actions may be taken by agencies to achieve this, such as:

- Incorporating appropriate due diligence assessments into agency funding and procurement processes, including for third parties.
- Incorporating information about the Scheme's application in funding program guidelines, contracts or equivalent documents.
- Including relevant [model clauses](#) in procurement/tender documentation, funding agreements, and contracts.
- Reviewing evidence of Scheme compliance prior to contracts which include building work being signed (e.g. FSC accreditation certificate, FSC accreditation register).
- Including milestone payments in contractual documentation requiring evidence of ongoing Scheme accreditation before payments are released.
- Regular auditing/management of funding recipients.
- Advising the OFSC of a funding recipient's contact details so the OFSC can directly liaise with recipients procuring building work.

Breaches of the BCIP Act

The OFSC seeks to work collaboratively with funding entities to improve awareness of the Scheme and enhance understanding of responsibilities. This approach aims to strengthen the internal processes of agencies which influence effective application of the Scheme.

When a potential breach of the legislation has been identified, the OFSC contacts the funding entity and works collaboratively with them to collect information, verify if there is non-compliance with the BCIP Act, and identify the issues contributing to the non-compliance.

If a breach of the BCIP Act is confirmed, the FSC will determine an appropriate response dependent on the severity and the nature of the breach.

The most common breaches identified by the OFSC relate to agencies entering into contracts for building work with unaccredited builders for Scheme projects, and unaccredited builders (who are not operating as subcontractors to an accredited builder) undertaking building work on a Scheme project. These are significant breaches because they contravene the core requirements of the legislation.

Section 26(g) joint ventures

Section 26(g) of the Rules allows for an unaccredited builder to sign a contract for a Scheme project as part of a joint venture with an accredited builder. Breaches related to this regulation occur when the administrative arrangements to enact this provision have not been completed prior to the building work contract being signed.

Contract splitting

The practice of contract splitting refers to situations where a funding entity arbitrarily separates or splits a contract into multiple smaller contracts to deliberately circumvent the Scheme's requirement to contract with an accredited builder.

Although contract splitting is not a legislative breach, it is behaviour intended to avoid legislative requirements where they would ordinarily apply. The FSC would consider this conduct to be of major concern and would act accordingly. There are also requirements in the *Public Governance, Performance and Accountability Act 2013* that prohibit this type of action.

OFSC considerations

Where a breach is identified, the OFSC will consider the factors associated with the specific case when determining the appropriate action to be taken in response. These may include but are not limited to:

- the funding entity's historical compliance with the Scheme;
- current due diligence processes;
- any contributory circumstances;
- the funding entity's responsiveness to identify and address issues;
- the value of the procurement to which the breach relates;
- any evidence of deliberate avoidance of requirements (e.g. contract splitting); and
- whether the procurement contains matters of special interest.

OFSC actions

As the accrediting authority, the FSC has a responsibility to maintain the integrity of the Scheme. Non-compliance with Government policy and legislation is a serious issue and the FSC will respond in a manner appropriate to the non-compliance.

In all cases, communication between the OFSC and relevant agency is the first step to identify reasons for the breach, potential remedies, and appropriate actions to avoid recurrence. Specific action taken by the FSC in response to a breach will generally only occur where an appropriate response to the breach cannot be agreed between the OFSC and the agency, or there are ongoing concerns about the agency's compliance with the legislation. In these cases, the FSC will determine an appropriate course of action which may include but is not limited to the following:

- The OFSC working cooperatively with the agency to identify potential remedies and improve their internal processes and management.
- The OFSC seeking a formal response on proposed remedies to the breach and prevention of future breaches.
- The OFSC seeking a formal response from the relevant departmental secretary or agency equivalent to draw their attention to the breach. The formal response should confirm what steps the agency will take to address the identified compliance concerns and how they will prevent future breaches.
- The FSC, Attorney, or Minister writing to the funding entity's minister.

OFSC support

The OFSC can provide general and targeted information sessions to funding entities to ensure obligations under the Scheme are met. Questions related to procurement of Commonwealth funded building work and potential breaches can be emailed to OFSC@jobs.gov.au. Further information is also available on the [Government agencies](#) page of the FSC website.

Early identification, collaboration and rectification of issues is the emphasis of the OFSC Agency Compliance Policy. Agencies and funding entities are encouraged to engage with the OFSC in a transparent and collaborative manner to resolve any issues.