



Integrity of private building
surveyors and their role in
enforcement- A response to the
Building Confidence Report
Discussion Paper
2021

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Executive summary

In 2017, Building Ministers authorised an assessment of the effectiveness of compliance and enforcement systems for the building and construction industry across Australia. The resulting [Building Confidence Report](#) (BCR) made 24 recommendations for a best practice model for compliance and enforcement, to strengthen the effective implementation of the National Construction Code (NCC).

Building Ministers established the BCR National Framework Implementation Team (the Team) in the office of the Australian Building Codes Board (ABCB) to develop and publicly report on a national framework for the implementation of the BCR recommendations.

To ensure jurisdictions are afforded flexibility when implementing the BCR recommendations, the Team has been directed to deliver benchmarked minimum model guidance for a number of the BCR recommendations to enable states and territories to consider developing and drawing upon in their respective regulatory systems.

To varying degrees¹, all jurisdictions rely on private building surveyors as part of their building approvals process. During this process commercial relationships form between private building surveyors and those seeking their services. BCR recommendations 9 and 11 relate specifically to private building surveyors.

Recommendations 9 and 11 state:

Recommendation 9: That each jurisdiction establishes minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors.

Recommendation 11: That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.

The objectives of the recommendations are to:

1. mitigate conflicts of interest,

¹ There are broadly four private building certification models across the country.

2. increase transparency in engagement and statutory responsibilities; and
3. provide enhanced supervisory powers and require mandatory reporting.

The BCR identifies 11 minimum necessary statutory controls and supporting measures required in each jurisdictions' building approval process to fulfil recommendations 9 and 11. For the purposes of developing the benchmark minimum guidance these have been defined as 10² principles.

Model guidance, in the form of recommended key features of provisions that should be included in legislation (as appropriate), will be developed to underpin each principle.

This discussion paper has been developed to facilitate stakeholder input, through a public consultation process, into the content of the model guidance.

For each principle, context is first given and problem identification is discussed. Consideration of the current legislative position across Australia is outlined before options are proposed that contain key features of provisions to be included in legislation (as appropriate).

A recommended option has been identified for inclusion in the model guidance and respondents are invited to answer a number of consultation questions.

The 10 principles and associated proposed model guidance (taken as the recommended option from the discussion paper) is summarised in Table 1.

Feedback received through public consultation will inform the final model guidance for Board and Building Ministers consideration in mid-2021.

² For the purposes of this work, two matters identified in the BCR have being combined into one principle,

Table 1 Summary of proposed national principles underpinned by model guidance

Principle	Title	Description	Model guidance (recommended option from this discussion paper)
1	Appointment by owner or agent	A private building surveyor should be appointed by the owner of the land or their agent.	<ul style="list-style-type: none"> a. That only the owner may appoint a private building surveyor to carry out the functions allowed under the legislation; b. That the building surveyor's agreement must not be novated from the owner to the builder or other person involved in the project at any time during their appointment; c. That an owner can appoint an agent to act on their behalf in relation to their interactions with the building surveyor; d. An obligation on the building surveyor to confirm with the owner that they are aware of any application or request that is made by another person on their behalf (as is provided in the ACT Code of practice); e. That despite any agency arrangement, certain specified information must be given by the building surveyor directly to the owner (the information that should be given is in Principle 6).
2	Documented appointment	A private building surveyor's appointment should be documented.	<ul style="list-style-type: none"> a. The private building surveyor is to notify the local council within a specified time (e.g. 5 business days) after accepting an appointment to carry out statutory building surveying work; b. That the arrangement to carry out statutory building surveying work be in writing (Statutory Building Surveying Services Agreement (SBSSA)); c. That the SBSSA contain prescribed particulars. Those provided for in Part 5 of the Building and Development Certifiers Regulation 2020 (NSW) are a good example; d. An express prohibition against any terms in the SBSSA which would result in the private building surveyor providing services that are contrary to their obligations under the relevant legislation. <p>This option would require a written agreement which must, at a minimum, contain particulars described in legislation. Nothing in the written requirement can be contrary to the statutory obligations under legislation.</p>

Principle	Title	Description	Model guidance (recommended option from this discussion paper)
3	Controls on termination	There should be controls on the termination of a private building surveyor's appointment.	<p>Functions cannot be transferred without the consent of the government (who would develop policy and procedure on when it will consent), noting Principles 1 and 2 would also apply to the new appointment.</p> <p>Related provisions would make it an offence for a building surveyor, without reasonable excuse, to accept an appointment or carry out statutory building surveying work if another private building surveyor has been appointed.</p>
4A	Controls to mitigate conflicts of interest – Preparation of design	A private building surveyor should be prohibited from accepting an appointment or continuing to act if they are or have been involved in the preparation of design.	<p>To prohibit accepting an appointment or carrying out statutory building surveying work where the building surveyor has or does participate in design work, which is defined as (based on the NSW and Victorian provisions):</p> <ol style="list-style-type: none"> a. maintaining a high degree of separation and objectivity from the design process; b. not providing advice as to how to amend a plan or specification; c. not preparing or providing input into the preparation of any supporting documents for a Performance Solution, including choosing who undertakes that task, other than as a stakeholder consulted as part of performance-based design brief; and d. does not include providing: <ol style="list-style-type: none"> i. preliminary or routine advice; ii. advice on Deemed-to-Satisfy Solutions; or iii. discussing the concept of Performance Solutions and which Performance Requirements are relevant. <p>Also, to prohibit accepting an appointment or carrying out statutory building surveying work where the building surveyor has provided advisory building surveying services for the same owner, builder or designer within a prescribed period (for example the past 12 months).</p>

Principle	Title	Description	Model guidance (recommended option from this discussion paper)
4B	Controls to mitigate conflicts of interest – Pecuniary Interest	A private building surveyor should be prohibited from accepting an appointment or continuing to act when they have a pecuniary interest.	<p>To provide that a building surveyor must not accept an appointment or perform statutory building surveying work or continue to act if they have a direct or indirect pecuniary interest in:</p> <ol style="list-style-type: none"> a. the land on which the building work is being carried out; b. the building work that is being carried out; c. any contractor engaged to carry out the work including a builder or designer. <p>Also prohibiting the building surveyor from:</p> <ol style="list-style-type: none"> a. accepting any inducements or benefits, whether financial or otherwise, other than payment for statutory building surveying work; b. knowingly issuing a false or misleading document.
4C	Controls to mitigate conflicts of interest – Related persons	Controls to mitigate conflicts of interest should also apply when any related person of the private building surveyor has any of the conflicts prohibited.	<p>That conflict of interest and pecuniary interest provisions, set out in 4A and 4B, apply to the private building surveyor and any related person, to be defined to include:</p> <ol style="list-style-type: none"> a. if the private building surveyor is a member of a partnership, another partner in the partnership; b. if the private building surveyor is a body corporate, a director of the body corporate or any related body corporate; c. an employer of the private building surveyor; d. an employee of the private building surveyor; e. the spouse, domestic partner, sibling, aunty, uncle, grandparent, grandchild, parent or child of the private building surveyor; or f. a person with whom the private building surveyor has a contractual relationship with, that might reasonably be seen to give rise to a conflict of interest.

Principle	Title	Description	Model guidance (recommended option from this discussion paper)
5	Accepting certificates of compliance	Obligations on a private building surveyor for checking certificates of compliance before accepting them should be clear.	<p>That the building surveyor must satisfy themselves that:</p> <ol style="list-style-type: none"> a. the certificate of compliance is provided by a registered practitioner that has adequate experience relevant to the building and NCC Performance Requirement/s to which the certificate of compliance relates. In making this determination they: <ol style="list-style-type: none"> i. can rely on the practitioner register maintained by the relevant jurisdiction; ii. can consider registration or accreditation by another jurisdiction or industry body or other prescribed matters (where registration is not required in the relevant jurisdiction where the approval is being issued); iii. must document the checks they have made, for example confirming when registers were checked and that they have reviewed and considered the person's experience and its relevance to the project for which the certificate of compliance has been given, b. the certificate of compliance contains all of the prescribed information and is accompanied by documentation with adequate detail to demonstrate compliance with the NCC (such as evidence of suitability, reports or drawings in relation to declarations for design), or in the case of inspections compliance with the building approval.
6	Provision of information	Key information should be sent from the private building surveyor to the owner, builder and applicant throughout the process.	<p>That the following information be required to be provided:</p> <ol style="list-style-type: none"> a. an approved information sheet about the role of the building surveyor; b. information about the building surveyor's complaints management processes; c. all approved documents forming part of the building approvals process; d. any approved variations to documents or new design documents approved during the works; e. results of all mandatory inspections as they occur; f. any directions issued following mandatory inspections; g. any enforcement actions taken by the private building surveyor; h. any occupancy approval or final inspection certificate. <p>The above information should be sent directly to the owner, the builder and the applicant (if they are not the owner or the builder) regardless of any agency arrangement.</p>

Principle	Title	Description	Model guidance (recommended option from this discussion paper)
7	Rights to review	There should be a right to have decisions of the private building surveyor reviewed.	That all jurisdictions ensure that all decisions made by private building surveyors can be subject to review and that there is information for consumers about these rights, for example: <ul style="list-style-type: none"> a. in the approved information sheet provided to the owner at the time of appointment of the private building surveyor; or b. as prescribed information in the written document containing the decision that is made; or c. on government websites where consumers can readily access information.
8	Enhanced supervisory powers	A private building surveyor should have enforcement powers which allow them to regulate where they detect non-compliance.	To provide for private building surveyors to have as a minimum: <ul style="list-style-type: none"> a. a power to direct the builder to fix non-compliant building work with the features of the directions to fix power in the Victorian scheme including: <ul style="list-style-type: none"> (i) that where non-complaint building work is detected (at any time), the private building surveyor must direct the builder to fix; (ii) where the direction is given orally and the work is not rectified, within 7 days it must be followed up in writing; (iii) the written direction to fix must be sent to the owner and, if it is not complied with, a relevant government body; (iv) the timeframe for compliance and ability to extend that timeframe are at the discretion of the private building surveyor; (v) the builder is not entitled to receive payment for or in respect of any cost arising from complying with a direction to fix; b. a power to issue orders to stop work, which if not complied with can be referred to a government body for prosecution or court orders.

Principle	Title	Description	Model guidance (recommended option from this discussion paper)
9	Mandatory reporting obligations	It should be mandatory for a private building surveyor to report specified conduct to the government regulator.	<p>Where a building surveyor forms a reasonable belief that a “reportable matter” has occurred or is likely to occur, they must report it to their state or territory government regulator within 48 hours (or other specified time) after becoming aware of the reportable matter (i.e. a failure to do so would be an offence).</p> <p>‘Reportable matters’ are defined as:</p> <ol style="list-style-type: none"> a. where the building surveyor has received a document which they reasonably believe is fraudulent or misleading; b. where the building surveyor has become aware of a substantial non-compliance which includes building work that: <ol style="list-style-type: none"> i. is a significant departure from the approved plans; ii. has or could endanger the safety of the public or occupants. <p>This option would require guidance with examples on what constitutes a ‘significant departure’ or what would be considered to ‘endanger the safety of the public or occupants’.</p>
10	Co-regulatory support	There should be adequate co-regulatory support provided to private building surveyors by governments.	<p>That each jurisdiction will publish its strategy on how it will support and collaborate with private building surveyors to enable them to effectively exercise their enforcement functions and to act on referrals to resolve non-compliance.</p> <p>In addition, require any model guidance for continuing professional development (BCR recommendation 3) include compulsory training for private building surveyors on how to exercise their enforcement powers.</p>

Terminology and acronyms

Building regulation terminology used across different jurisdictions is varied. For the purposes of this paper the following definitions apply:

Advisory building surveying work means providing advice on the compliance requirements for proposed and completed developments and/or whether a proposed or existing building complies with the relevant Performance Requirements of the NCC.

Approval work means acting as the building approval authority to authorise construction or occupation of a building under building approval legislation.

Assessment means checking, verifying and peer-reviewing building proposals and inspecting and testing installation and construction work to determine whether it meets the Performance Requirements of the NCC.

Building approval means the final certification that is required before building activity can commence, where building activity includes construction of new buildings, alterations and additions to existing buildings, the relocation of buildings between sites and other structural work (other terms in common use include building permit and building consent).

Building approval authority means the legal entity that authorises construction or occupation of a building under building approval legislation of a state or territory.

Building approval process means the process for approval of building work.

Building surveyor means an individual registered in the discipline of building surveying (other terms in common use include building certifier).

Certificate of compliance means a certificate issued in relation to an element of design or an inspection of building work.

Certify or Certifying means forming an opinion that a design meets the Performance Requirements of the NCC and other relevant state or territory legislation or that building work complies with a building approval.

Independent third party review means an examination and assessment of a component of a building's design, reports and documents for compliance with the NCC, by an individual who is completely separate to the building designer.

Mandatory inspections means the independent assessment of building work, at the prescribed notification stages, to verify that the building work has been carried out in accordance with the approved building documentation and relevant building legislation.

Occupancy approval means the final certification that is required before a building can be occupied (other terms commonly used include occupancy permit, occupancy certificate and certificates of occupancy).

Private building surveyor means a building surveyor that provides statutory building surveying services whilst not employed by a local council or state government.

Registration means authorisation by a state or territory government to perform defined functions and exercise powers in that state or territory.³

Statutory building surveying work means approval work, assessment and certifying which building approval legislation requires to be done by a registered building surveyor.

Preferred Terms Publication

The BCR noted each jurisdiction has developed different ways of describing the same or similar terms and processes, and that this makes it difficult for governments to compare systems and share results, and for businesses and consumers operating across jurisdictions or at a national level. To address this, the BCR recommended development of preferred language for jurisdictions to adopt over time as they revise and amend their laws (BCR recommendation 22).

This discussion paper proposes terminology for 'building approval process', 'certificate of compliance' and 'private building surveyor' which, if agreed by the

³ The terms 'registration', 'licensing' or 'accreditation' are often used in relation to occupational licensing regimes. Whilst there are differences in the meaning of these terms, for simplicity, this report uses the term 'registration'.

ABCB and Building Ministers, will be consolidated into a Preferred Terms Publication for adoption into State and Territory laws. Current legislative terminology used across Australia has been considered when developing the proposed terminology. The agreed terminology used in the Preferred Terms Publication will not be legal definitions unless adopted by jurisdictions.

In addition, this discussion paper proposes terminology for 'certify or certifying' that differs from other ABCB discussion papers. Therefore feedback is also sought on this term.

Consultation questions

1. Do you agree with the terminology proposed for 'building approval process' 'certificate of compliance', 'certify or certifying' and 'private building surveyor'?
2. Do you have any comments on other defined terms and their use in the context of this discussion paper?

The following acronyms are used in this document:

ABCB means Australian Building Codes Board

BCR means Building Confidence Report

COR means the Construction Occupations Registrar (ACT)

NCC means National Construction Code

QBCC means Queensland Building and Construction Commission

SBSSA means Statutory Building Surveying Services Agreement

VBA means Victorian Building Authority.

Context

The building approval process

Recommendations 9 and 11 relate to the role of the private building surveyor when performing statutory building surveying work in connection with the building approvals process or the enforcement of building regulations.

The building approvals process is the process by which proposed design is assessed, building work is inspected and approval to occupy is given. These functions are undertaken by an independent person to ensure, as far as practicable based on the scope of their role, that when building work is carried out the design and construction complies with building laws, including the NCC. That person is a building surveyor. The building surveyor may also rely on other skilled practitioners to verify compliance of design or building work throughout the process.

There are 3 key stages of approval work as follows:

Stage 1: issuing the building approval after all consents have been obtained and design documentation has been assessed and reviewed.

Stage 2: the carrying out or arranging of mandatory inspections during the construction phase.

Stage 3: the final inspection and verification that the work is complete and suitable for occupation, which usually involves the issuing of an occupancy approval.

All jurisdictions require that the building approvals process is followed when carrying out building work.⁴ The building approvals process is intended to ensure the following that:

- plans and drawings are prepared demonstrating the nature of the proposed building work and that the work will be consistent with any statutory approvals (e.g. planning) and with the requirements of building laws, including the NCC;

⁴ Unless the building work is exempt. The types of building work that may be exempt vary across jurisdictions but are usually minor works such as repairs or small, simple structures. Building work does not include infrastructure work such as roads, bridges and civil works.

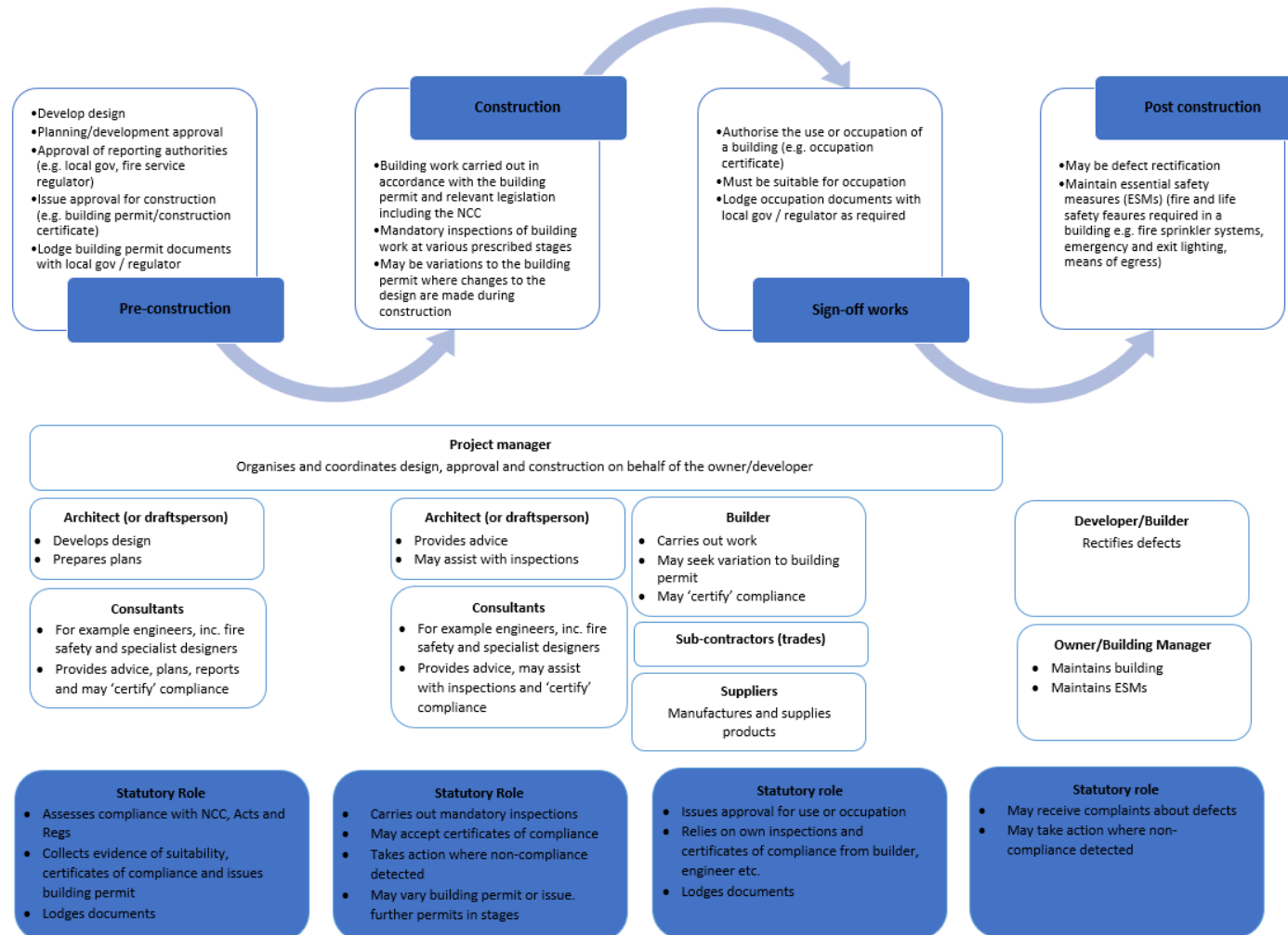
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- all authorities that need to be aware of or approve the proposed works are consulted and in some cases that adjoining owners are consulted about works which may affect their property;
- the documentation is checked and assessed for compliance and authority consents or comments are reviewed to ensure they have been adopted (as necessary) prior to the issuing of a building approval;
- the work under construction is subject to mandatory inspections to determine whether the work inspected complies with the approved documentation and that any necessary rectification work is performed or adjustments to the approved documents are made through a variation process (see discussion paper on BCR recommendations 13-16);
- the completed work is presented for inspection to confirm it is substantially complete, compliant and suitable for occupation;
- records of the building work and key maintenance requirements are lodged with government so that they can be accessed by government, owners or future owners of the building.

Lodgement of documents or notifications occur at various times during the process.

Figure 1 below is a diagram of the building approval process showing the relationship of key practitioners through the process.

Figure 1 Building approvals process and the relationships of key practitioners



Notes to figure:

1. This figure shows the typical process and roles at a high level. It does not include all statutory obligations, responsibilities, nor does it depict contractual relationships.
2. Further information on the proposed roles and responsibilities of all building practitioners identified in this figure can be found in the National Registration Framework, which is available from the [ABCB website](http://www.abcb.gov.au)

Fundamentals for integrity in the building approvals process

Having integrity in the building approvals process is essential to ensure building work is safe and complies with all relevant laws. This requires:

- independent decision making and mitigation against conflicts of interest;
- skills and competency; and
- transparency.

Independence and impartiality

Independence of the building surveyor from those designing and carrying out the building work is essential for impartial decision making. Conflicts of interest can compromise independence and impartiality. A building surveyor's first duty as part of the regulatory process is to protect the public interest.

Compromises to independence and impartiality can arise because of the complexity of the building regulations. Gaining approval to commence work and during construction is subject to the exercise of discretion and the assessment of technical requirements by the building surveyor. Decisions of the building surveyor can impact on time and cost. Designers or builders may be pressured to keep cost down, particularly where the owner or developer is building to sell or where the builder's price for the work is low and savings need to be found. For designers, they too may have priced their services low giving them less time to prepare detailed documentation and check the suitability of products specified for use in the building.

It is crucial for the building surveyor to make their assessment of the proposed design and building work impartially and in the interests of the public to ensure that the requirements and standards are strictly followed. If they are influenced to allow non-compliance; not properly check compliance; or favour an interpretation of requirements that will undermine broader safety and amenity objectives, this can lead to non-compliance or unsafe buildings.

Skills and competency

The building surveyor must have the skills and competency to undertake an assessment of documentation and building work and form an opinion about the extent to which compliance will be, or has been, achieved. A building surveyor is expected to have a deep knowledge and understanding of the building regulations, the NCC and relevant standards. However, on more complex buildings, elements of the design can be bespoke to each project and based on engineering principles or highly technical standards.

Some building surveyors will have limited expertise of specialist areas of design such as structural, fire safety, mechanical or hydraulic engineering, energy efficiency and accessibility requirements. Therefore, in all jurisdictions, there is provision for the building surveyor to rely on independent third-party review (refer to the discussion papers on BCR recommendations 13-16 and 17). The rules and requirements for this process and the extent to which it occurs in practice differs across jurisdictions. However, the common objective is that the building approvals process provides for a building surveyor to administer the process assisted by people with adequate skills and competency to design, inspect and confirm compliance of key aspects of building work.

Transparency

Transparency of decisions made, requests for changes, the identification of non-compliance and resolution of these issues is essential. An owner is entitled to be made aware of decisions which may affect the outcomes and their contractual rights with designers and builders. Regulators also need to be able to understand what has occurred to monitor conduct and compliance. Future owners and managers of buildings need to have access to clear and accurate documentation about what is built so that they can understand maintenance obligations and design assumptions so as to ensure the building remains safe to occupy post construction.

BCR Recommendations 9 and 11 go to the above fundamentals to give integrity to the building process and are discussed further below in relation to each principle.

Approach taken in this paper

BCR Recommendations 9 and 11 together state 11 matters that are considered as the minimum necessary statutory controls and supports required to:

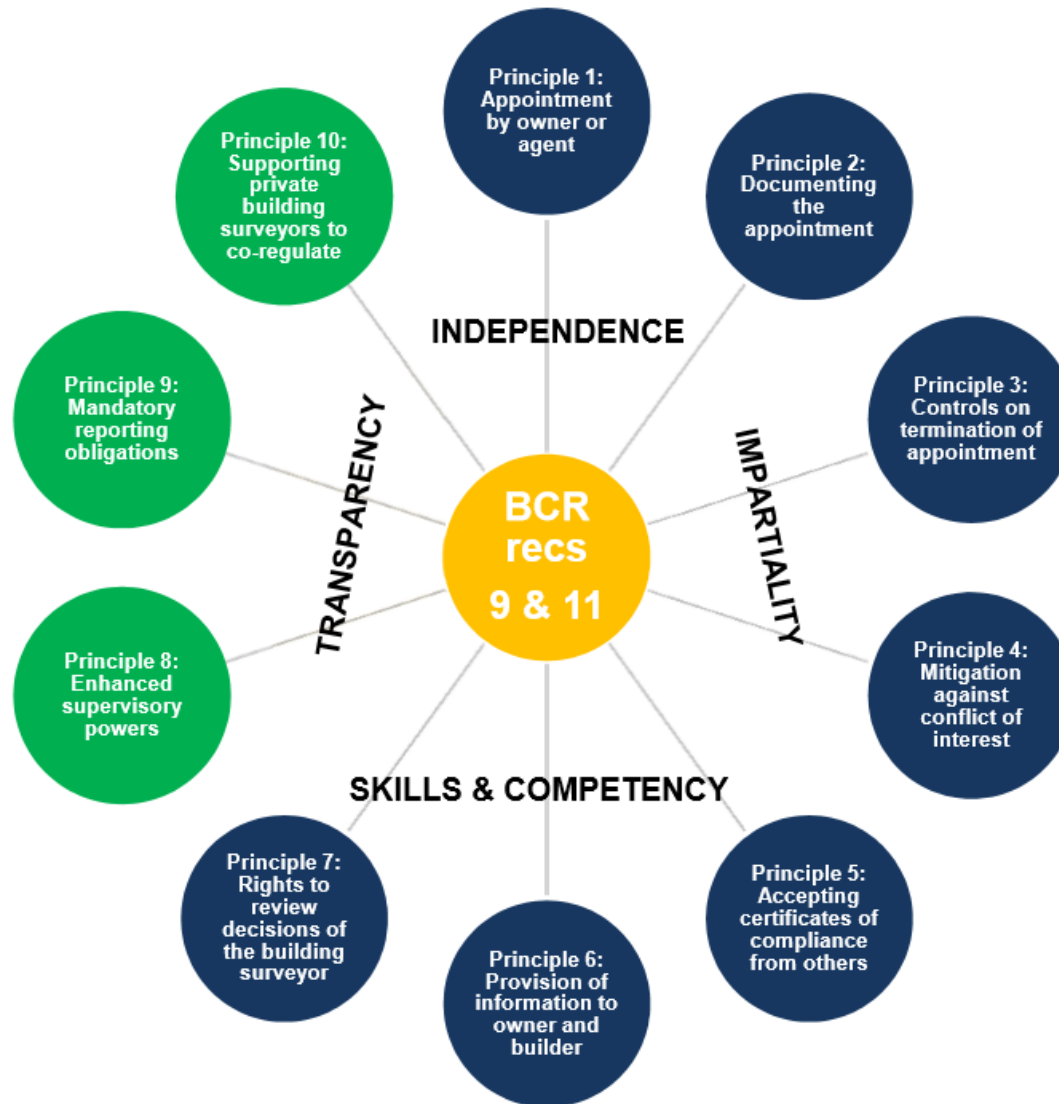
- mitigate conflicts of interest,
- increase transparency in the engagement and responsibilities of the private building surveyor; and
- provide private building surveyors with enhanced supervisory powers and mandatory reporting obligations.

For the purposes of this work, these have been combined into 10 principles that are shown in Figure 2.

For each principle further context is given and problem identification is discussed. Consideration of the current legislative position across Australia is given before options are proposed containing key features of provisions that should be included in legislation (as appropriate).

A recommended option has been identified for inclusion in model guidance.

Figure 2 Principles taken from BCR recommendations 9 (blue) and 11 (green)



Current models for private building surveying

In Australia, until the mid-1990s the building approvals process was administered and enforced by local council building departments or territory governments. All 3 of the key stages were undertaken by public officers and the applicant could only seek approval from the local council where the works were being carried out.

For more complex building work, the building owner may have sought advice from a privately appointed building surveying consultant to advise on the development of design and in some cases certify that building approval documentation demonstrated compliance with the building laws including the NCC⁵.

Local council would generally regard certified applications more favourably expediting the application process. Where the local council did not have the required expertise to assess and approve an aspect of a design, they would require a third-party review by a person they selected to perform that task.

Since the mid-1990s, 6 jurisdictions have amended their building legislation to provide that statutory building surveying work could be performed by private building surveyors. The role of the private building surveyor in the building approval process differs across jurisdictions.

Whilst each jurisdiction has unique models for the role of private building surveyors when they are looked at in detail, there are broadly four private building certification models across the country.

Model 1: The most common model, used in Victoria, NSW, Queensland and the Northern Territory, is where the private building surveyor performs functions for all 3 key stages of the building approval process.

Model 2: In the ACT, the private building surveyor performs the functions of issuing building approvals and inspecting building work. They then carry out final inspections of the work but the ACT government authorises occupation.

⁵ Prior to 2011, the NCC was the Building Code of Australia, Volumes One and Two.

Model 3: In WA and SA, local government retains the statutory building surveying function across all 3 stages, however, private building surveyors may review and certify building approval documentation before it is lodged with local government for approval.

Model 4: Tasmania has a model which varies for different types of building work. For some types of work there is a separate role for councils as distinct from private or council employed building surveyors.

Table 2 details the differences between the four models currently operating across Australia.

Table 2: Current models for private building certification

Model	Juris.	Private/ gov	Stage 1: Pre-Construction		Stage 2: Construction				Stage 3: Sign off		
			Assess compliance	Issue Building Approval ⁶	Approval to commence	Mandatory inspections	Vary permit	Take action on non-compliance ⁷	Assess suitability for occ.	Issue completion certificate ⁸	Issue OC/other final certificate
1	Vic	Private	✓		✓	✓	✓	✓	✓	N/A	✓
		Local gov	✓		✓	✓	✓	✓	✓		✓
	NSW	Private	✓	✓	N/A ⁹	✓	✓	✓	✓	N/A ¹⁰	✓
		Local gov	✓	✓		✓	✓	✓	✓		✓
	Qld	Private	✓		✓	✓	✓	✓	✓	N/A	✓
		Local gov	✓		✓	✓	✓	✓	✓		✓
	NT	Private	✓		✓	✓	✓	✓	✓	N/A ¹¹	✓
		Territory gov	x		x	x	x	✓	x		x

⁶ In some jurisdictions the issuing of building approval allows commencement of work. In others a separate action is required to approve the commencement of work.

⁷ The action that can be taken by a private building surveyor in different jurisdictions varies from referral to local council to the issuing of directions, notices or orders themselves.

⁸ In some jurisdictions, the process is completed when either an occupancy permit or a certificate of final inspection is issued. In others, the certificate of completion (or similar document) and occupation certificate are two separate actions that are required.

⁹ Person carrying out the work or having the benefit of a consent must notify their intention to commence (EPAA s6.6(2)).

¹⁰ From July 2021 for Class 2 buildings or buildings containing Class 2 parts, the builder will be required to issue a declaration prior to the occupation certificate being issued.

¹¹ Builder is to issue a declaration prior to the issue of an occupancy permit (BA s69).

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Model	Juris.	Private/ gov	Stage 1: Pre-Construction		Stage 2: Construction				Stage 3: Sign off			
			Assess compliance	Issue Building Approval ⁶	Approval to commence	Mandatory inspections	Vary permit	Take action on non-compliance ⁷	Assess suitability for occ.	Issue completion certificate ⁸	Issue OC/other final certificate	
2	ACT	Private	✓	✓	✓	✓	✓	✓	✓	✓	×	
		Territory gov	×	×	×	×	×	✓	×	×	✓	
3	WA	Private	✓		×	×	×	×	✓	N/A ¹²	×	
		Local gov	✓		✓	✓	✓	✓	✓		✓	
	SA	Private	✓	✓	×	×	✓	×	✓	×	✓	
		Local gov	✓	✓	✓	✓	✓	✓	✓	✓	×	✓
4	Tas - permit work ¹⁶	Private	✓	×	✓	✓	✓	✓	✓	×	✓	
		Gov employed BS	✓	×	✓	✓	✓	✓	✓	×	✓	
	Tas – notifiable work	Private	✓	N/A	✓	✓	✓	✓	✓	✓	✓	✓
		Gov employed BS	✓		✓	✓	✓	✓	✓	✓	✓	✓

¹² The 'responsible person' (i.e. builder) issues a notice of completion to the permit authority (usually council).

¹³ A private or council employed building surveyor issues a Building Rules Consent before council does a consistency check and issues the final development approval.

¹⁴ A private building surveyor may undertake mandatory inspections, but only where appointed as an authorised officer by the Council.

¹⁵ Statement of compliance is to be issued prior to issue of occupancy certificate (PDI Regs 104). The statement of compliance is generally signed by the builder and the owner. A building certifier may sign the statement of compliance where there is no main builder (e.g. for an owner builder).

¹⁶ Permit Authority (usually council) issues the Building Permit and Certificate of Completion before or after building surveyor (government employed or private) issues Occupancy Permit.

Key to table:

- ✓ Statute provides for a private surveyor or government employed surveyor (local/state or territory) to undertake this role
- × Statute does not provide for a private surveyor or government employed surveyor to undertake this role. However, in some cases where government has the role, a private surveyor may provide consultancy services related to that role which are relied on by government.

Related BCR recommendations

Most of the BCR's 24 recommendations go to improving the integrity and competency of the building approvals process in some way. However, there are specific recommendations that address concerns raised by the Building Ministers about the integrity of private building certification. These include:

- recommendations 1-3 relating to the consistent registration of building practitioners and compulsory continuing professional development;
- recommendation 4 relating to career paths for building surveyors;
- recommendation 9 relating to the role of the private building surveyor in the building approvals process;
- recommendation 10 for a code of conduct for building surveyors; and
- recommendation 11 relating to the powers and functions of private building surveyors during the building approvals process.

Recommendation 10 has been finalised with a National Model Code of Conduct that is available from the [ABCB website](#).

Recommendations 13 to 19 and 21 are also related to aspects of the building approvals process and strengthening the integrity of that process. These recommendations are the subject of the following discussion papers:

- Building Design Acceptance, a response to the BCR, which addresses BCR recommendations 13 – 16;
- Independent Third Party Review, which addresses BCR recommendation 17; and
- Mandatory Inspections, which addresses BCR recommendation 18.

Recommendations 9 and 11 are the focus of this discussion paper. Alignment to the content of the discussion papers outlined above has been undertaken where applicable.

Application of recommendations 9 and 11

The provision for private building surveyors to perform statutory building surveying work has an inherent potential for conflict of interest. For private building surveyors, their commercial viability depends on repeat business. Repeat business is likely to come from builders, designers and developers, all of whom are in the business of

working on multiple projects that are required to have a building approval. The ability for the private building surveyor to remain independent and make decisions without fear or favour is necessarily subject to actual or perceived compromise. The perceptions of conflict and compromised decision making by private building surveyors has continued to raise concerns about the integrity of the building approvals process since the 1990s.

Whilst recommendations 9 and 11 are directed at private building surveyors, in most states where a private building surveyor may issue the building approval (NSW, Qld and Victoria), an owner may also apply to their local council for a building approval.¹⁷ These models provide for the building approval process to be equivalent whether the local council or a private building surveyor is engaged to issue a building approval.

For this reason, as each jurisdiction considers adoption of the principles and associated model guidance they should consider:

- whether their model for private certification requires the recommended provision to be enacted; and
- whether each provision needs to also apply to the local council or its building department officers so as to ensure an equivalent process regardless of whether a private building surveyor or local council is appointed to issue the building approval.

Table 3 contains suggestions for which principles might apply to each of the four broad models of private certification operating in Australia and to local council building surveyors.

It should also be noted that in all jurisdictions' governments necessarily co-regulate with private surveyors as well as regulate their conduct to ensure they meet professional standards and competence. This is a delicate balance. If governments do not effectively regulate private building surveyors, the playing field can become unfair and a race to the bottom prevails.

Each jurisdiction should develop its own strategy for effective regulation of private building surveyors having regard to their model and which of the integrity controls

¹⁷ Some local council no longer issue building approvals or only issue them in narrow circumstances.

identified by recommendations 9 and 11 apply. Regulatory effectiveness was addressed primarily in recommendations 5, 6 and 7 of the BCR.

Consultation question

3. Should specific principles of recommendations 9 and 11 apply to council employed building surveyors? If you answered 'yes', please outline which parts of recommendation 9 and 11 should apply and to what extent.

Current legislation related to recommendations 9 and 11

As part of the research for this paper, a comparison of each jurisdiction's current legislation against each of the principles that recommendations 9 and 11 is aiming to achieve, has been undertaken. The table in Appendix A provides a summary of that research. It should be noted that some jurisdictions have amended their legislation to incorporate some of the principles of recommendations 9 and 11 since the BCR was published.

Table 3: Principles which could be applied to private building certification models and local government building surveyors

Principles of recommendations 9 and 11	Application to 4 current models for private certification				Application to local council/ territory government building surveyor
	Model 1 ¹⁸	Model 2 ¹⁹	Model 3 ²⁰	Model 4 ²¹	
1. Appointment by the owner or agent	✓	✓	✓	✓	✓
2. Documenting the appointment	✓	✓	✓	✓	✓ (although terms may differ to meet government service contract requirements)
3. Controls on termination of an appointment	✓	✓	✓	✓	✓
4. Controls to mitigate conflict of interest	✓	✓	✓	✓	✓ (although these may align to general government integrity controls)
5. Making checks when accepting certificates from others	✓	✓	✓	✓	✓
6. The provision of information to the owner and builder including:					
○ An approved information sheet about the role of the building surveyor	✓	✓	✓	✓	✓ (at discretion of council or territory government)
○ Information about the building surveyor's complaints management processes	✓	✓	✓	✓	✓ (likely to have government complaints processes apply)

¹⁸ Victoria, Queensland, NSW and Northern Territory

¹⁹ ACT

²⁰ SA and WA

²¹ Tasmania

Principles of recommendations 9 and 11	Application to 4 current models for private certification				Application to local council/ territory government building surveyor
	Model 1 ¹⁸	Model 2 ¹⁹	Model 3 ²⁰	Model 4 ²¹	
○ All approved documents forming part of the building approvals process	✓	✓	✓	✓	✓
○ Any approved variations to documents or new design documents approved during the works	✓	✓	✓ (SA) X (WA)	✓	✓
○ Results of all mandatory inspections as they occur	✓	✓	X	✓	✓
○ Any directions issued following mandatory inspections	✓	✓	X	✓	✓
○ Any enforcement actions taken by the private building surveyor	✓	✓	X	✓	✓
○ Any occupancy approval or final inspection certificate	✓	X	✓ (SA) X (WA)	✓	✓
7. Rights to have decisions of the private building surveyor reviewed,	✓	✓	✓	✓	✓
8. Enhanced supervisory powers	✓	✓	X	✓	✓ (likely to already have broad enforcement powers)
9. Mandatory reporting obligations,	✓	✓	✓	✓	✓
10. Supporting private building surveyors to co-regulate	✓	✓	X	✓	✓

Principle 1: Appointment by the owner or agent

The appointment of the private building surveyor usually occurs at the commencement of the building approval process.²² The appointment triggers the building surveyor to have statutory power and functions in relation to specified building work on defined land. The appointment also creates an agreement for the provision of services by the private building surveyor. The agreement governs the payment of fees for services and can also cover matters such as the scope of services, service delivery obligations, insurance, and rights to terminate.

Context and problem definition

The BCR states that an owner should appoint the building surveyor personally or through an agent.

The building approval is issued for building work on land. The decisions made in the building approvals process affect the rights of the owner. Ultimately the building work is for the present and any future owner of the land and the building approval applies to and runs with the land.²³ For these reasons, the owner should appoint the private building surveyor and have a direct contractual relationship with the building surveyor for the performance of their services. Having said this, there are many different ownership arrangements that affect land, including Crown Land, ownership rights held by purchasers and multi owner arrangements such as for buildings that have strata titles. This means that any legislation would need to define the term 'owner' having regard to these complexities.

If the building surveyor is appointed by another person, they may agree on contractual rights and obligations which the owner is unaware of and which may affect the owner's rights. They may also share information and decisions may be made which the owner is unaware of. For these reasons, the appointment of the

²² Appointment may need to occur during the process where the original building surveyor's appointment is discontinued.

²³ An occupancy permit may impose ongoing obligations on the owner for example, to maintain fire safety features in a building in accordance with maintenance standards.

building surveyor by any person that is not the owner can compromise the integrity of the building approvals process and the interests of the owner.

It may be argued that the engagement of the private building surveyor by an owner can also compromise the building surveyor's independence. This may be true, particularly where the owner is a developer with a short term goal to build and sell as cheaply as possible. Ultimately the role of the building surveyor is to act impartially and in the interests of the public. There has been an effort to reinforce this role in codes of conduct for building surveyors issued since the BCR was published. However, someone has to engage the private building surveyor in order for them to be able to act as the building approval authority.

Some jurisdictions have consulted on proposed models where the private building surveyor would be appointed by government via a 'cab rank' or 'chocolate wheel' model. To date, no jurisdiction has gone down this path and for present purposes, under all models, the private building surveyor is appointed by an owner or other participant in the project.

Often the owner will want the designer or builder to arrange for all necessary approvals, including the building approval. This is a practical approach. The law of agency allows one person (in this case the owner) to give another person (often the contracted designer or builder) permission to act on their behalf. The person receiving instructions from the agent (the building surveyor) can do so in good faith and assuming the agent is acting on authority. However, if the agent is not acting on authority, decisions can be made without the owner's knowledge or consent.

Requiring the building surveyor to be appointed by the owner gives them contractual rights directly with the building surveyor. Although the owner may allow an agent to act on their behalf, the owner can exercise rights and the building surveyor could still engage with the owner if they had any concerns that the agent was not acting with the authority of the owner or not passing on information.

In recognition of this potential for conflict of interest or compromised communication between the owner and building surveyor, statutory protection is required to ensure that agency does not operate to prevent the owner from being informed about key decisions and matters that affect their rights.

Another common practice which undermines the integrity of the building approvals process is in design and construct procurement where the building surveyor's agreement with the owner is novated to the builder. This means the owner no longer has an agreement with the building surveyor and for all of the reasons set out above, the integrity of building approvals process and the interests of the owner or future owners may be compromised by novation. Novation of the building surveyor can also result in the building surveyor being treated the same as design consultants and expected to be part of the design team.

The above issues lead to a conclusion that controls should be in place to ensure that all key decisions made during the building approvals process are transparent to both the owner, and the builder. If this were to occur, it is arguable that the owner would not need to engage the building surveyor.

Current requirements across jurisdictions

Six jurisdictions provide for an application for a building approval to be made by an owner.²⁴ None of those six prohibit the owner from using an agent.

In Victoria, for domestic building work, the builder is prohibited from appointing a private building surveyor. However, once the appointment is made, the builder can act as agent of the owner thereafter.

In the ACT, the building surveyor's code of practice has general obligations on the building surveyor to:

- inform their client of any matters or changes that may affect the rights or authority of the building surveyor to carry out their statutory functions; and
- where an application for an exemption assessment, building approval or appointment is not made by the owner, the building surveyor must confirm that the owner is aware of the application.

There are no provisions about the appointment of private building surveyors in WA.

Queensland allows any person to apply for a building approval and that person is referred to in their legislation as the applicant or client. However, Queensland does

²⁴ Victoria, NSW, ACT, Tasmania, NT. South Australia provides for an owner to apply or another person with the consent of the owner.

have requirements for certain information to be given directly to owners when they are not the 'client' that has appointed the building surveyor.

South Australian also permits a person other than the owner to engage the building surveyor, provided the owner gives written consent.

Further details of jurisdictional requirements is provided at Appendix A.

Options

Option 1

For legislation to expressly provide:

- a. that only the owner may appoint a private building surveyor to carry out the functions allowed under the legislation;
- b. that the building surveyor's agreement must not be novated from the owner to the builder or other person involved in the project at any time during their appointment;
- c. that an owner can appoint an agent to act on their behalf in relation to their interactions with the building surveyor;
- d. an obligation on the building surveyor to confirm with the owner that they are aware of any application or request that is made by another person on their behalf (as is provided in the ACT Code of practice);
- e. that despite any agency arrangement, certain specified information must be given by the building surveyor directly to the owner (the information that should be given is in Principle 6).

Option 2

For legislation to provide that any person may appoint a private building surveyor to carry out the functions allowed under the legislation but also expressly provide that:

- a. the owner must give written consent to the appointment;
- b. the owner's contact details must be given to the private building surveyor;
- c. the owner must be given a copy of the appointment agreement;
- d. the appointment agreement must not prevent the building surveyor from meeting their obligation to confirm the owner's consent to any application or request made by a person other than the owner (as is provided in the ACT Code of practice) ;

- e. certain specified information must be given by the building surveyor directly to the owner (the information that should be given is in Principle 6).

Recommended option

Option 1 is recommended as it ensures the owner has contractual rights with the building surveyor and also provides controls to ensure that the owner obtains key information, even where they have appointed an agent.

Option 2 provides greater flexibility in the contractual relationship but does risk the builder's agreement with the building surveyor leading to a compromise of independence and perception of conflict of interest. To balance that risk, Option 2 makes provision for transparency about the contractual relationship with the private building surveyor.

Consultation questions

4. Do you agree with the recommended option for Principle 1?
5. Should legislation expressly provide for the appointment of an agent?
6. Should the requirement for who can appoint the building surveyor vary based on building type, complexity or procurement arrangement? If you answered 'yes' to any of the above, please explain how this could be achieved.

Principle 2: Appointment to be documented

Context and problem definition

The BCR states the engagement of the private building surveyor should be documented.

When the private building surveyor is appointed this triggers their ability to perform statutory building surveying work in relation to the building or building work for which they have been appointed. It is important to define the appointment via a clear process so that there is as much certainty as possible of when their responsibility to exercise statutory functions commences.

A key requirement in the building approval process is that building work does not commence until all necessary checks and approvals are obtained and the building approval is issued. If the appointment of the private building surveyor is not clearly defined and documented or government is not notified of the appointment, when an issue arises at the site, it may be unclear whether there is a privately appointed building surveyor in place that can or should act on the issue.

The appointment should be in writing. This ensures the arrangement is clear and understood. It provides an opportunity for the owner to be made aware of the statutory role and responsibilities of the building surveyor so that expectations are managed.

There have been suggestions that the private building surveyor's services agreement be in a prescribed form. This would prevent the owner or builder from requiring (or pressuring) the surveyor to sign up to common forms of consultancy agreements which are inconsistent with the statutory role of the building surveyor. As noted above, this can occur in the context of the design and construct procurement practices and where there is novation to the builder.

Legislation in some jurisdictions enables the building surveyor to charge upfront fees or gives them a statutory right to payment even if they refuse an application for building approval. These provisions support the private building surveyor to make decisions without fear of not being paid. They are also akin to the payment of an

application fee upfront. The BCR did not refer to the issue of payment of building surveyors. However, as it is referred to in a number of jurisdiction's schemes, it seems that it has been considered by many to be an important feature of integrity controls. Therefore, arguably a statutory right to payment upfront should be strengthened and applied across all jurisdictions.

However, payment up front does result in building surveyors holding money in advance of providing services, particularly for undertaking inspections. This could present a risk if the building surveyor were to go into liquidation or misuse money that is effectively held on trust. As the issue of payment up front was not referred to in the BCR recommendations it has not been proposed for inclusion in the model guidance.

Consultation questions

7. Should the model guidance include a requirement for owners to pay private building surveyors up front for their services?
8. Do you have any other comments in relation to the fees charged by building surveyors for their services and whether this should be regulated?

Current requirements across jurisdictions

NSW and Queensland require the private building surveyor's services agreement to be in writing. Other jurisdictions do not expressly require the building surveyor's services agreement to be in writing.

With the exception of NSW, no jurisdiction provides for prescribed information that must be in the building surveyor's service agreement. NSW has regulations which prescribe particulars including the name, registration details, contact information, insurance details, certification work to be carried out, information about the development, fees information, and an approved information sheet. The agreement must be signed by the building surveyor and the owner must make a declaration they have read and understood the agreement and information sheet.

As noted above in 5 jurisdictions, legislation refers to the fees for private building surveyors. In some cases the building surveyor may require payment of fees up front (ACT, NSW, Victoria). In Queensland, the building surveyor must be paid the agreed

fee for work even if the application is refused. In Tasmania, the building surveyor must not accept an engagement unless a schedule of fees is provided and accepted.

Five jurisdictions (ACT, NSW, Victoria, SA²⁵ and Queensland) require the building surveyor to notify the local council within a specified time after their appointment.

Whereas in the other three jurisdictions the first the local council will know of the private building surveyor's appointment is when the application is lodged (WA) or the building approval is issued (Tasmania and NT).

Further details of jurisdictional requirements is provided at Appendix A.

Options

Option 1

For legislation to expressly provide for:

- a. The private building surveyor to notify the local council/government within a specified time (e.g. 5 business days) after accepting an appointment to carry out statutory building surveying work;
- b. That the arrangement to carry out statutory building surveying work be in writing (Statutory Building Surveying Services Agreement (SBSSA));
- c. That the SBSSA contain prescribed particulars. Those provided for in Part 5 of the *Building and Development Certifiers Regulation 2020 (NSW)* are a good example;
- d. An express prohibition against any terms in the SBSSA which would result in the private building surveyor providing services that are contrary to their obligations under the relevant legislation.

This option would require a written agreement which must, at a minimum, contain particulars described in legislation. Nothing in the written requirement can be contrary to the statutory obligations under legislation.

Option 2

For legislation to expressly provide for:

²⁵ Pending amendments in SA provide for the certifier to notify of their appointment via the ePlanning portal.

- a. The private building surveyor to notify the local council/government within a specified time (e.g. 5 business days) after accepting an appointment to carry out statutory building surveying work;
- b. That the arrangement to carry out statutory building surveying work be in writing using a prescribed form of agreement.

In Option 2 the prescribed agreement (also known as a standard-form contract) could be:

- A. Developed at a national level, for example a National Model Agreement for Statutory Building Surveying Services; or
- B. approved by each state or territory government; or
- C. based on an agreement prepared by Standards Australia, relevant industry associations or a like body.

This option would be analogous to a template that must be used for every project.

Recommended option

The recommended option is Option 1, as it provides flexibility to support the varying range of complexity required for agreements spanning the building and construction industry, whilst ensuring that key legislative requirements are not overridden or diminished.

Consultation questions

9. Do you agree with the recommended option for Principle 2?
10. If notification of appointment is to occur after a specified time, what should that timeframe be?
11. When should the timeframe be calculated from?
12. For Option 2, should a national agreement be developed or an agreement developed by each jurisdiction?
13. For Option 2, should there be more than one version of the prescribed agreement to cater for different types of projects?

Principle 3: Controls on termination of appointment

Context and problem definition

The BCR recommends that termination of the private building surveyor's services must not occur without the approval of the government or unless a mandatory process is followed.

As discussed above, one of the key principals for the integrity of the building approvals process is for the private building surveyor to be an independent, impartial decision maker. The need for impartiality is addressed in the draft Model Code of Conduct developed in response to BCR recommendation 10 and in several codes of conduct applying in different jurisdictions.

A number of jurisdictions provide that once appointed, the building surveyor's services can only be terminated in special circumstances or with the approval of a government body. This is intended to prevent 'shopping around' for another building surveyor when an applicant or owner is unhappy with the decisions of the building surveyor. The objective is to support the private building surveyor to make decisions impartially without fear or favour.

Some may argue that the impact of controls on termination of appointment is limited, because although these controls may mean that a developer or builder is 'stuck' with the building surveyor and their decisions for a single project, the building surveyor will get a reputation for being strict and this will affect their ability to get repeat business from that builder or developer or from others.

In addition, there are a variety of reasons that a building surveyor may need to be terminated and a new one appointed for a project. For example, how should a transfer of functions occur where the appointment is of an individual and that person moves from one building surveying company to another; or when a building surveyor becomes ill or dies? The legislative scheme in each jurisdiction should enable the transfer of functions without imposing unnecessary administrative burden in these circumstances.

The intent of this principle is to primarily ensure that a building surveyor's services cannot be terminated due to the owner or builder not liking their decisions, or where there is an irreconcilable breakdown in the relationship.

It follows, that where a transfer of functions is allowed or consented to, notification to government of the change should be required so that there is clarity around which person at any point in time is the appointed building surveyor with the power and responsibility to exercise statutory functions.

Principle 1 and Principle 2 are also intended to apply so that the owner retains a contractual relationship with the new building surveyor and the transfer of functions from one building surveyor to another would necessitate documentation of the new arrangement and communication to relevant parties, including government.

Current requirements across jurisdictions

There is a large variation across jurisdictions in relation to this issue.

In Queensland and WA there are no provisions which prevent the replacement of the appointed private building surveyor, meaning that an owner can terminate an appointment at any time and change surveyors if they are unhappy with their decisions.

In the ACT, the owner can revoke an appointment but if the building surveyor wants to resign, they must have written approval from the COR.²⁶

In Victoria, NSW and Tasmania, if the current building surveyor, proposed building surveyor and owner agree, the functions can be transferred, otherwise consent from government is required. Although expressed differently in NT the controls are effectively the same as NSW, Victoria and Tasmania as the certifier can arrange for another certifier to take over but if an owner wants to remove an engagement, they must seek consent from the NT government.

South Australia requires consent from the Minister, the proposed building surveyor and the person undertaking the development to change building surveyor.

²⁶ Building Act 2004 (ACT) s19D.

Further details of jurisdictional requirements is provided at Appendix A.

Options

Option 1

If the current building surveyor, proposed building surveyor and owner agree, the functions can be transferred, otherwise consent from the government is required, noting Principles 1 and 2 would also apply to the new appointment.

Related provisions would make it an offence for a building surveyor, without reasonable excuse, to accept an appointment or carry out statutory building surveying work if another private building surveyor has been appointed.

Option 2

Functions cannot be transferred without the consent of the government (who would develop policy and procedure on when it will consent), noting Principles 1 and 2 would also apply to the new appointment.

Related provisions would make it an offence for a building surveyor, without reasonable excuse, to accept an appointment or carry out statutory building surveying work if another private building surveyor has been appointed.

Recommended option

Under option 1 the original building surveyor may be too willing (or pressured) to agree to a transfer of functions when the relationship becomes strained.

Option 2 is recommended as it provides the strictest controls, however it may result in a high administrative burden on government to be involved in all transfers.

Consultation questions

14. Do you agree with the recommended option for Principle 3?

15. If transfers of functions can occur by consent, could the building surveyor find themselves under pressure from the builder or developer to consent to the transfer? If you answered 'yes', please explain how this could be mitigated.

16. Should it be an offence for an owner to appoint multiple building surveyors for one project?

17. Are there other matters relating to the appointment or termination of appointment of the private building surveyor that should be included in the model guidance?

This question relates to all options and discussion on the appointment of the private building surveyor.

Principle 4: Conflict of interest controls

Context and problem definition

The BCR referred to concerns over the independence of private building surveyors given the potential for mutual relationships to develop over time between them and the builders, developers and designers they commonly work with.

Recommendations for controls to mitigate conflicts of interest were made in recommendations 9 and 10. It may be argued it is not necessary to include conflict of interest obligations in a code of conduct as well as in legislation. However, provided there is a consistency on these obligations, having them stated in the code of conduct (breaches of which can give rise to disciplinary action) and as offences in legislation provides multiple enforcement options to the regulator and reinforces their importance.

BCR Recommendation 9 states legislation should provide that the acceptance of an appointment by a building surveyor and the carrying out of any function should be prohibited where:

- the building surveyor participated in the design of the building; or
- there is a direct or indirect pecuniary interest in the designer or builder or work; or
- the building surveyor is related to a person with any of the above interests.

In addition to the above, it is common for building legislation to also make it an offence for a building surveyor to accept inducements or provide false information.

In relation to participation in design, conflicts of interest can also arise where a building surveyor provides advisory building surveying services to a designer, developer or builder for a project whilst at the same time acting as the statutory building surveyor for the same client on another project. Both Victoria and Tasmania prohibit the building surveyor from accepting an appointment if they have been engaged or employed by the person who prepared the design in the past 12 months. The Victorian code of conduct also states a building surveyor should not accept an appointment or act for a developer or builder when they are already doing advisory building surveying work for them.

There is no dispute that conflict of interest controls should apply to private building surveyors when performing statutory building surveying work. The issue is more of how these should be defined and who they should apply to.

As we note below, in 3 jurisdictions the conflict of interest controls expressly extend to persons related to the building surveyor.

Consultation questions

18. The matters below were not recommended in the BCR. Should either of these matters be included in the model guidance?

- Preventing the building surveyor from doing advisory building surveying work and statutory building surveying work for designers, builders or developers at the same time on different projects.
- Prohibiting the building surveyor from accepting inducements or benefits, or prohibiting them from providing false information.

19. Should the model guidance include conflict of interest controls for persons providing certificates of compliance to the private building surveyor?

Current requirements across jurisdictions

All jurisdictions have conflict of interest requirements for building surveyors to varying levels of detail. In 5 jurisdictions, offences are committed if these prohibitions are breached. The penalty ranges vary from 100 penalty units to 1665 penalty units.²⁷

The following sections summarise the current requirements across jurisdictions. Further details of jurisdictional requirements is provided at Appendix A.

Involvement in preparation in design

The prohibition against participation in design exists in six jurisdictions. WA does not prohibit the private building surveyor from participating in design. In the NT, although

²⁷ The value of a penalty unit varies in each jurisdiction between \$110 and \$175.

there is a general obligation to avoid conflict of interest, preparation of design is not expressly identified as a conflict of interest.

For the other six jurisdictions the prohibition against participation in design is described in various ways. NSW and Victoria are more descriptive than the ACT, Queensland, Tasmania and SA.

NSW is descriptive about what participating in design means both in their legislation and in the recently issued Practice Standard for Registered Certifiers.²⁸ Specific examples are given which include:

- not providing advice on how to amend a plan or specification (unless it is advice on how the plan or specification could be amended to comply with deemed to satisfy provisions); and
- not proposing Performance Solutions (but they can indicate a Performance Solution is required, identify relevant Performance Requirements and participate in a fire engineering brief for the purpose only of determining the scope of work for a fire engineering analysis and the basis for that analysis).

In Victoria, the legislation makes it an offence for a private building surveyor to carry out a statutory function where they prepared the design; were engaged by a designer (on any project) in the past 12 months; or have a pecuniary interest in the body that prepared the design.

Victoria's new Code of Conduct refers to maintaining a high degree of separation and objectivity from the design process and not suggesting design or Performance Solutions. The following Note is provided:

Note: If you have been or are likely to be appointed the relevant building surveyor you can provide advice on requirements in the Building Act, the Regulations or the NCC only, leaving the design team to make decisions about how their design will achieve compliance. Advice on deemed to satisfy solutions can be given and the concept of Performance Solutions can be discussed but the actual preparation of a Performance Solution

²⁸ The Practice Standard for Registered Certifiers applies only in relation to new residential apartment buildings.

and any supporting documents, including choosing who undertakes that task, must be independent of the relevant building surveyor. ²⁹

In the ACT, a building surveyor must not prepare or intend to prepare drawings but they can sketch a required design as part of a direction to rectify non-compliant work.³⁰

In Queensland, conflict of interest is defined to include carrying out building work which is the subject of the building certifying function. Building work is defined to include the preparation of design.³¹

In Tasmania, a building surveyor must not accept an engagement if they have provided technical advice or prepared or reviewed the design or a Performance Solution that is proposed; was employed in past 12 months by a designer of the work; or has a pecuniary interest in the designer.³²

In SA, the building surveyor must not exercise any functions if they have been involved in any aspect of planning or design other than through the provision of preliminary advice of a routine or general nature.³³

The current NCC envisages that the building surveyor (referred to as the Appropriate Authority) will be a relevant stakeholder consulted as part of the development of performance-based designs.³⁴ The NSW Practice Standards for Registered Certifiers reflect this role when referring to the prohibition against participation in design.

Pecuniary interest

Prohibitions against a building surveyor having a pecuniary interest in the land or building work exist in all jurisdictions except NT. Whilst expressed slightly differently the prohibition is generally against having a direct or indirect pecuniary interest in the

²⁹ Victorian Code of Conduct for Building Surveyors paragraph 4.2.

³⁰ Building Act 2004 (ACT) s23.

³¹ Building Act (Qld) s137.

³² Building Act 2016 (Tas) s28 and 33.

³³ Planning, Development and Infrastructure Act 2016 s235.

³⁴ See Schedule 7 of NCC 2019 Volume One Amendment 1, clause 1.3.1.2.

land, building work and in some cases, in the builder or other entity involved in the work.

In addition, most jurisdictions have a prohibition on accepting benefits or inducements other than payment for services.

In NSW, in addition to the offence on accepting benefits, there is also an offence for issuing false or misleading certificates. Both of these offences are punishable by up to 10,000 penalty units (over \$1 million) or up to 2 years imprisonment.

Related persons

In three jurisdictions (ACT, NSW and Victoria) the legislation expressly states that conflict of interest controls apply to the building surveyor or a related person. That term is described in different ways in the 3 jurisdictions but generally captures business, family or employment relationships. Whilst not expressly referred to in other jurisdictions, it is possible that conflicts of interest involving related persons that would benefit the building surveyor are implicitly captured by the prohibition or general obligation to avoid conflicts of interest or act in the public interest.

Options

Preparation of design

Option 1

To prohibit accepting an appointment or carrying out statutory building surveying work where the building surveyor has or does participate in design work, which is defined as (based on the NSW and Victorian provisions):

- a. maintaining a high degree of separation and objectivity from the design process;
- b. not providing advice as to how to amend a plan or specification;
- c. not preparing or providing input into the preparation of any supporting documents for a Performance Solution, including choosing who undertakes that task, other than as a stakeholder consulted as part of the development of a performance-based design brief; and
- d. does not include providing:
 - ii. preliminary or routine advice;

- iii. advice on Deemed-to-Satisfy Solutions; or
- iv. discussing the concept of Performance Solutions and which Performance Requirements are relevant.

Option 2

To have Option 1 but also to prohibit accepting an appointment or carrying out statutory building surveying work where the building surveyor has provided advisory building surveying services for the same owner, builder or designer within a prescribed period (for example the past 12 months).

Recommended option

Option 2 is recommended because it addresses the conflict that can arise where the building surveyor is providing advisory and statutory services to the same client on different projects.

Consultation questions

- 20. Do you agree with the recommended option for Principle 4 'Preparation of design'?
- 21. For Option 1 of Principle 4 'Preparation of design', are there aspects of subparagraphs a to d that should be changed or removed from the definition of 'participate in design work'?
- 22. For Option 2 of Principle 4 'Preparation of design', what would be a suitable 'prescribed period'?
- 23. Would Option 2 of Principle 4 'Preparation of design' create practical problems in rural areas or smaller jurisdictions where there are fewer practitioners?
- 24. Would Option 2 of Principle 4 'Preparation of design' have a significant impact on project cost or timing in smaller jurisdictions or rural areas?
- 25. Should the requirement from the NSW scheme outlined below, or a version of it, be included in the definition of 'participate in design work'?

The NSW scheme says that a building surveyor should not participate in a fire engineering brief other than for the purpose only of determining the scope of work for a fire engineering analysis and the basis for that analysis.

26. Should the requirement from the ACT scheme outlined below, or a version of it, be included in the definition of ‘participate in design work’?

The ACT scheme says the building surveyor can sketch a required design as part of a direction to rectify non-compliant work.

Pecuniary interest

Option 1

To provide that a building surveyor must not accept an appointment or perform statutory building surveying work or continue to act if they have a direct or indirect pecuniary interest in:

- a. the land on which the building work is being carried out;
- b. the building work that is being carried out;
- c. any contractor engaged to carry out the work including a builder or designer.

Option 2

To have Option 1 but also prohibiting the building surveyor from:

- a. accepting any inducements or benefits, whether financial or otherwise, other than payment for statutory building surveying work; and
- b. knowingly issuing a false or misleading document.

Recommended option

Option 2 is recommended because it covers a broader range of situations that go to the integrity of the building surveyor and also reflects prohibitions which already exist in several jurisdictions.

Consultation questions

27. Do you agree with the recommended option for Principle 4 ‘Pecuniary interest’?

28. For Option 1 of Principle 4 ‘Pecuniary interest’, are there aspects of sub-paragraphs a to c that should be changed or removed?

29. Would Option 1 or Option 2 of Principle 4 'Pecuniary interest' create practical problems in rural areas or smaller jurisdictions where there are fewer practitioners?

30. Would Option 1 or Option 2 of Principle 4 'Pecuniary interest' have a significant impact on project cost or timing in smaller jurisdictions or rural areas?

31. Does the term 'pecuniary interest' need to be defined?

Related persons

Option 1

That conflict of interest and pecuniary interest provisions, set out above, apply to the private building surveyor and any related person, to be defined to include:

- a. if the private building surveyor is a member of a partnership, another partner in the partnership;
- b. if the private building surveyor is a body corporate, a director of the body corporate or any related body corporate;
- c. an employer of the private building surveyor;
- d. an employee of the private building surveyor;
- e. the spouse, domestic partner, sibling, aunty, uncle, grandparent, grandchild, parent or child of the private building surveyor; or
- f. a person with whom the private building surveyor has a contractual relationship with, that might reasonably be seen to give rise to a conflict of interest.

Recommended option

Only one option is proposed.

Consultation questions

32. Are there aspects of sub-paragraphs a to f that should be changed or removed from the definition of 'related person'?

33. Would Option 1 of Principle 4 'Related persons' create practical problems in rural areas or smaller jurisdictions where there are fewer practitioners?

34. Would Option 1 of Principle 4 'Related persons' have a significant impact on project cost or timing in smaller jurisdictions or rural areas?

35. Should the model guidance also suggest the above conflict of interest controls be offences?

36. If the conflict of interest controls were suggested as offences in the model guidance, what penalty should apply?

37. Are there other options or matters that should be considered in relation to conflicts of interest?

Principle 5: Accepting certificates of compliance from others

Context and problem definition

As noted above, a key principle for the integrity of the building approvals process is for persons with adequate skills and experience to perform the required assessments of compliance throughout the process.

Some building surveyors will have limited expertise of specialist areas of design such as structural, fire safety, mechanical or hydraulic engineering, energy efficiency, and accessibility requirements. In all jurisdictions the building approvals process provides for a building surveyor to accept certificates from others with adequate skills and competency in key aspects of building work.

During the construction phase, inspections of work at mandatory notification stages or other times are undertaken directly by, or at the direction of, the building surveyor. They may arrange for others to undertake those inspections and rely on reports or certificates of inspection.

Related BCR Implementation Team Discussion Papers also consider the issuing of certificates of compliance for designs and for inspections of building work. They also provide proposals on who should issue them, when and what should be included in those certificates.

For the purposes of this paper, BCR recommendation 9 states that when the private building surveyor accepts certificates of compliance any obligations on them to make checks should be clearly stated.

The key matters for checking are summarised as follows:

- checking the competency of the person providing the certificate of compliance
- ensuring the certificate of compliance is correctly completed and accompanied by adequate documentation (as required).

Consultation question

38. Are there any other key matters for checking or other issues to consider in developing the model guidance relating to the reliance on certificates of compliance by building surveyors?

Competency checks

An assessment of competency ensures that, where the building surveyor is not making an assessment, an appropriate person is doing so. It might be argued that where legislation prescribes who can issue a certificate, and provided the person meets that prescription, the building surveyor should not be expected to look beyond that. The problem with this is that a person may be registered or meet the prescribed requirements but they may not have relevant experience for the task. Or the person may not be registered or licensed because there is no requirement for licensing of that person in that jurisdiction (for example at present only 4 jurisdictions register engineers).

On one view, it should be up to the person that issues the certificate to act within their expertise and the building surveyor should not have to second guess that. This might be reasonable where a comprehensive registration framework is in place covering all persons who can issue certificates and imposing professional obligations on those registered as proposed under the BCR National Registration Framework. A more conservative view is that because this is an important task which goes to compliance and safety, any person issuing a certificate should have their competency assessed. This latter approach recognises the building surveyor as sitting over all decisions made in the process. However, it may also expose them to liability, but only if they do not do the required checks properly.

Checking certificates of compliance

In relation to the process of accepting certificates of compliance from others, prescribed forms will go some way to ensuring the right information is included. However, the building surveyor should review and check that the certificate has been properly completed, looks, on its face to be accurate, and includes any relevant documentation.

Current requirements across jurisdictions

As noted, each jurisdiction provides for the building surveyor to accept certificates from others in certain circumstances. In some cases this is mandatory or it may be at the discretion of the building surveyor to ask for a certificate. The persons who may issue certificates of compliance are generally prescribed but not always required to be registered or licensed.

In terms of whether the building surveyor can rely on a certificate and what checks they must make, there are 4 approaches taken. Queensland is the most comprehensive.

In Queensland, a building certifier may decide that a person is competent to certify design or help inspect any aspect of a stage of building work. The Building Regulations 2006 (Qld) provides for how the certifier must decide on whether a person is competent. Queensland has published guidelines to assist those making an assessment of competence and requires the surveyor to keep a record of how they made that decision.³⁵ In making the decision, the certifier must ensure the person is:

- appropriately licensed or registered (if required); and
- is competent to be able to certify the design or conduct the mandatory inspection having regard to their qualifications and skills.

Provided that the certifier has properly determined the persons' competence they can rely on their certification without further checking.

In Victoria, a building surveyor may rely on a certificate of compliance (design or inspection) issued by a prescribed person for a prescribed matter and provided that certificate is accepted in 'good faith' they have immunity from liability for the matters certified.³⁶

A similar provision is found in SA.³⁷ Judicial consideration of the term 'good faith' in the Victorian legislation says that the building surveyor must have regard to the

³⁵ Building Regulations 2006 (Qld) Part 5.

³⁶ Building Act 1993 (Vic) s128.

³⁷ Planning, Development and Infrastructure Act 2016 (SA) s235

competency of the person providing the certificate (beyond them holding the prescribed registration) and must be satisfied that the certification has been done correctly (for example the form is completed and refers to the correct NCC provisions relevant to the certification).³⁸

In NSW, NT and Tasmania the building surveyor can rely (without statutory qualification) on a certificate issued by another person in accordance with the Act.³⁹ Similarly, in WA it is expressly provided that there is no duty on the building surveyor to check an opinion in a certificate issued by a specialist (as prescribed).⁴⁰

In the ACT, the certifier can require a certificate from a 'professional engineer' but there is no express statutory immunity given to the certifier in relation to their reliance on that certificate.⁴¹

In relation to conflict of interest controls for the person issuing the certificate of compliance, the positions on this vary across jurisdictions. For example, in Victoria there are none. The building surveyor has a discretion to require a third party review of design, but they may choose to accept a certificate of design by the person who prepared the design.⁴² By comparison, in SA a person must not provide a certificate of compliance in relation to design if they have been involved in the planning or design or have a direct or indirect pecuniary interest with any aspect of the development.⁴³ In relation to inspections, Queensland provides that a certificate cannot be from a person that carried out the work being inspected.⁴⁴

Options

Option 1

That the building surveyor must satisfy themselves that:

³⁸ Tommey v Scolaro's Concrete Constructions Pty Ltd and Ors [2002] VSC 28.

³⁹ Environmental Planning and Assessment Act 1979 (NSW) s6.30; Building Act 1993 (NT) s 40; Building Act 2016 (Tas) s321

⁴⁰ Building Act 2011 (WA) s144.

⁴¹ Building Act (ACT) s47.

⁴² A Ministerial Guideline says that where an engineering design is complex the building surveyor *may* require a certificate from someone that did not prepare the design.

⁴³ Planning, Development and Infrastructure Act (SA) 2016 s235 (5).

⁴⁴ Building Regulation 2006 (Qld), regulation 22.

- a. the certificate of compliance is provided by a registered practitioner who has adequate experience relevant to the building and NCC Performance Requirement/s to which the certificate of compliance relates. In making this determination they:
 - (i) can rely on the practitioner register maintained by the relevant jurisdiction;
 - (ii) can consider registration or accreditation by another jurisdiction or industry body or other prescribed matters (where registration is not required in the relevant jurisdiction where the approval is being issued);
 - (iii) must document the checks they have made, for example confirming when registers were checked and that they have reviewed and considered the person's experience and its relevance to the project for which the certificate of compliance has been given,
- b. the certificate of compliance contains all of the prescribed information and is accompanied by documentation with adequate detail to demonstrate compliance with the NCC (such as evidence of suitability, reports or drawings in relation to declarations for design) or in the case of inspections, the building approval.

Option 2

Expressly provide that the reliance on any certificate of compliance by the building surveyor must be in 'good faith', which would import the common law obligation on the building surveyor to exercise some level of scrutiny to who has issued the certificate of compliance and the documentation itself.

This option could be accompanied by guidance on how to meet the 'good faith' test although this may end up being similar to what is proposed in Option 1.

Option 3

Allow for reliance on a certificate of compliance by the building surveyor provided it is issued by a prescribed person with no other checks or records required.

Recommended option

Option 1 is recommended as it provides explicitly for checks to be made to ensure competency.

Option 2 imposes a less specific option on the building surveyor to check the certificate of compliance, however the concept of 'good faith' and its implications may not be well understood.

Option 3 reduces liability for the building surveyor but also reduces the integrity of the process, particularly if the person issuing the certificate of compliance is not required to be registered and therefore is not held to professional standards.

Consultation questions

39. Do you agree with the recommended option for Principle 5?

40. For Option 2, do guidelines need to be prepared for how to meet the 'good faith' test?

41. For Option 2, should the guidance be developed nationally or should each jurisdiction prepare its own guidance?

42. Are there other options or matters that should be considered?

Principle 6: Provision of information to the owner, builder or applicant

Context and problem definition

BCR recommendation 9 states certain information should be provided to both the builder and the owner through the building approvals process. This recommendation relates to the issues about appointment and agency discussed above, in particular the need for transparency for owners where they have appointed the builder or another person as their agent.

The Building Acceptance Design discussion paper, which is available from the ABCB website, on recommendations 13-16 provides further detail and proposal in relation to the design process, documentation and variations during building work. This includes proposals about what documents should be created and what should be lodged with government or provided to the owner. For example, it proposes an owner should be notified of any proposed Performance Solution.

In this paper we are considering at a higher level the recommendations for information sharing made in BCR recommendation 9. The detail of what is in the information would be informed by the outcomes of the BCR Implementation Team's work on recommendations 13-16.

Current requirements across jurisdictions

As can be seen from the comparison table in Appendix A, some information recommended to be provided to owners, by the BCR, is commonly required to be provided across all or most jurisdictions. Other information is required to be provided by few or no jurisdictions. In some cases the information must be given to the applicant, which may mean a person other than owner. It is then a matter for the applicant to pass on the information to the owner.

Options

All jurisdictions require certain information to be given by the building surveyor within specified times and on that basis, there is already a consistency in the requirement for the building surveyor to give information to someone. The questions for consideration are:

- what types of information should be required to be given?; and
- should this information be required to be given to the owner and/or the builder directly, regardless of any agency arrangement in place?

The mode of providing this information may be simplified through the increased use of information lodgement platforms by some jurisdictions. This may depend on whether an owner has access to the platform or can be sent information via the platform. In any event, this recommendation is focused on what information an owner should be given or have access to rather than the best way to provide that information.

Types of information to be given

Option 1

The BCR recommends the following information be required to be provided:

- a. An approved information sheet about the role of the building surveyor;
- b. Information about the building surveyor's complaints management processes;
- c. All approved documents forming part of the building approvals process;
- d. Any approved variations to documents or new design documents approved during the works;
- e. Results of all mandatory inspections as they occur;
- f. Any directions issued following mandatory inspections;
- g. Any enforcement actions taken by the private building surveyor;
- h. Any occupancy approval or final inspection certificate.

Recommended option

There is only one option proposed.

Consultation questions

43. Do you agree with the recommended option for Principle 6 'Types of information to be given', being required to be provided by the building surveyor?
44. For the 'approved information sheet' in clause a of Option 1 of Principle 6 'Types of information to be given', should a national model be developed, or should each jurisdiction prepare their own versions?

Who should the information be given to?

Option 1

The information should be sent directly to the owner, the builder and the applicant (if they are not the owner or the builder) regardless of any agency relationship.

Option 2

The information should be sent directly to the applicant for the building approval only.

Option 3

The person to whom the information should be sent should vary depending on the type of information.

Recommended option

Option 1 is consistent with the BCR recommendation and therefore recommended.

Consultation questions

45. Do you agree with the recommended option for Principle 6 'Who should the information be given to?'
46. For Option 3 of Principle 6 'Who should the information be given to?' what information should be sent directly to the owner, builder or applicant?
47. Are there other options that should be considered?

Principle 7: Rights of appeal against decisions of the private building surveyor

Context and problem definition

BCR recommendation 9 provides that an owner should have rights of appeal against decisions of the building surveyor.

This reflects the fact that the decisions made by the building surveyor affect the rights of the owner, are administrative in nature (given they relate to a statutory process) and should be subject to due process and review. It also reflects the fact that the appointment of the statutory building surveyor should not be easy to terminate, enabling the building surveyor to make independent and impartial decisions which the owner may not agree with.

Provision for an appeal process requires a decision making body that can conduct the review. This could be a specialist body (such as the Building Appeals Board which operates in Victoria, or the State Planning Commission that operates in SA) or an administrative tribunal or other government decision maker.

This recommendation could apply to require any decision of the building surveyor to be subject to appeal rights. Alternatively, further consideration could be given to requiring only certain decisions to have a mechanism for review such as:

- whether a design or building work complies with the NCC or other provisions;
- decisions relating to protection of adjoining property (if they are made by the private building surveyor which is not the case in all jurisdictions);
- decisions relating to enforcement action.

It is not necessarily the case that the review body needs to be the same body for all matters, although this might be more efficient and less confusing for consumers.

In relation to enforcement action, the need for rights of appeal may depend on the nature of the enforcement powers. BCR recommendation 11 calls for enhanced enforcement powers which may mean the private building surveyor's decisions could give rise to penalty or costs without further review or action by a local council or other government body. This means the impact on the rights of owners could warrant

appeal rights more so than where a notice or direction from a building surveyor has no consequence unless it is escalated into an enforceable order by a local council or state or territory regulator.

Current requirements across jurisdictions

In 4 jurisdictions (Victoria, Tasmania, Queensland and NT) there is a statutory board or tribunal that can review decisions of private building surveyors. Notable amongst the decisions that private building surveyors can make in these 4 jurisdictions are decisions in relation to protection works and the taking of enforcement action.

In 6 jurisdictions there is a mechanism to seek a declaration that building work complies with the NCC and/or to modify the application of the NCC.⁴⁵ Whilst this is not a review of a decision as such, the mechanism may be used where there is a disagreement about whether a proposed design complies with the NCC. This may arise between a private building surveyor and owners, designers, builders or reporting authorities.

In NSW there is a power given to NCAT to hear an application to challenge the validity of a certificate (other than an occupancy approval). Whilst not expressed as an appeal right, a recent decision has confirmed that the effect of the power is to confer a broad right to judicial review of the private building surveyor's decision to issue a certificate (including a building approval).⁴⁶

In relation to the exercise of enforcement powers, in addition to the appeal rights in the 4 jurisdictions referred to in the first paragraph above, in the ACT the COR can review the decision of a private building surveyor to issue a stop work order. However, there are no appeal rights in relation to other types of enforcement actions that can be taken by private building surveyors in the ACT.

⁴⁵ Victoria, Queensland, Tasmania, Northern Territory, Western Australia, South Australia.

⁴⁶ Central Coast Council v 40 Gindurra Road Somersby Pty Ltd (No 2) [2019] NSWLEC 171.

Options

Option 1

That all jurisdictions ensure that all decisions made by private building surveyors can be subject to review and that there is information for consumers about these rights, for example:

- a. in the approved information sheet provided to the owner at the time of appointment of the private building surveyor; or
- b. as prescribed information in the written document containing the decision that is made; or
- c. on government websites where consumers can readily access information.

Option 2

That jurisdictions ensure that any decisions made by private building surveyors that may have a significant effect on the rights of an owner or other person are subject to a right of review and that there is information for consumers about these rights, for example:

- a. in the approved information sheet provided to the owner at the time of appointment of the private building surveyor; or
- b. as prescribed information in the notice of any reviewable decision that is made; or
- c. on government websites where consumers can readily access information.

Recommended option

Option 1 most closely reflects the recommendation in the BCR and is therefore recommended.

Consultation questions

48. Do you agree with the recommended option for Principle 7?

49. For Option 2, which types of decisions may have a “significant effect on the rights of an owner or other person” and should be subject to review rights?

50. Are there other options or matters that should be considered?

Principle 8: Enhanced supervisory powers

Context and problem definition

As noted in the BCR, in most jurisdictions private building surveyors have a statutory responsibility to assess building approval documentation. They may also inspect building work during construction. Their statutory role provides them with opportunities to detect fraudulent conduct and non-compliance. It is essential that they act on these issues but as private entities, they can only take enforcement action so far before referring the matter to a government body for escalation. Establishing ways for governments to co-regulate with private building surveyors collaboratively will enhance the oversight of the building and construction sector.

The BCR recommends that where private building surveyors conduct inspections or issue occupancy approvals, they should be given powers to issue directions to fix or to stop work where non-compliance is detected. If the directions are not complied with within a fixed timeframe, the building surveyor must refer the matter to the government.

This description of the direction to fix process reflects the powers given to building surveyors in the Victorian scheme. The power provides a level playing field for surveyors as the obligation to issue the written direction to fix is mandatory and the time allowed before the matter is referred to the owner is set at 7 days. The time to fix is at the discretion of the building surveyor and extension of time can be sought but if there is a failure to comply the matter is referred to the Victorian Building Authority (VBA). Any costs associated with complying with the direction to fix cannot be passed on to the owner.

An advantage of the Victorian direction to fix model is that the regulator receives intelligence about potential poor performance of builders across multiple sites which can inform their risk based approach to responding to the referral. However, receiving and analysing referrals might require considerable resources which some jurisdictions may not be in a position to fund.

The power to stop building work can be a very effective way of mitigating safety risks and making a builder rectify a safety or compliance issue promptly. However, used

incompetently or negligently, a stop work order can cause loss and damage leading to legal claims.

Current requirements across jurisdictions

Six jurisdictions provide private building surveyors with enforcement powers to use when non-compliant building work is detected. Of these, 2 (ACT and Victoria) provide a power to order a stop work; 5 (ACT, Victoria, NT, Queensland and Tasmania) provide powers to issue a notice or direction to fix non-compliant work detected during inspections or at other times. NSW has a power to direct a person to act but this cannot be used when non-compliance is detected during mandatory inspections.

With the exception of Victoria, when the private building surveyor's notice or direction does not result in the work being brought into compliance, the matter is referred to the relevant local council for further action. In Victoria, the referral is to the VBA.

In WA and SA private building surveyors do not carry out mandatory inspections or issue occupancy approvals and therefore they have no enforcement powers.

Options

Option 1

To provide for private building surveyors to have as a minimum:

- a. a power to direct the builder to fix non-compliant building work with the features of the directions to fix power in the Victorian scheme including:
 - (i) that where non-compliant building work is detected (at any time), the private building surveyor must direct the builder to fix;
 - (ii) where the direction is given orally and the work is not rectified, within 7 days it must be followed up in writing;
 - (iii) the written direction to fix must be sent to the owner and, if it is not complied with, a relevant government body;
 - (iv) the builder is not entitled to receive payment for or in respect of any cost arising from complying with a direction to fix;
 - (v) the timeframe for compliance and ability to extend that timeframe are at the discretion of the private building surveyor;
- b. a power to issue orders to stop work, which if not complied with can be referred to a government body for prosecution or court orders.

Option 2

To provide for private building surveyors to have as a minimum:

- a. a power to direct the builder to fix non-compliant building work with the features of the directions to fix power in the Victorian scheme including:
 - (i) that where non-compliant building work is detected (at any time), the private building surveyor must direct the builder to fix;
 - (ii) where the direction is given orally and the work is not rectified, within 7 days it must be followed up in writing;
 - (iii) the written direction to fix must be sent to the owner and, if it is not complied with, a relevant government body;
 - (iv) the builder is not entitled to receive payment for or in respect of any cost arising from complying with a direction to fix;
 - (v) the timeframe for compliance and ability to extend that timeframe are at the discretion of the private building surveyor

Recommended option

Option 1 is recommended as the ability to stop building work provides a powerful tool to mitigate risks and require prompt compliance.

Consultation questions

51. Do you agree with the recommended option for Principle 8?

52. Should the type of enforcement powers a private building surveyor has vary depending on the specifics of the building (building class, number of storeys or complexity)?

53. Are there other options or matters that should be considered?

Principle 9: Mandatory reporting obligations

Context and problem definition

Many have reported high levels of non-compliance, deceptive behaviours and fraud in the building industry. The senate inquiry into non-conforming building products⁴⁷ was told that there was a high incidence of fraudulent certificates and information in relation to building products. Government regulators cannot be on every building site and even with proactive audit programs, will not always detect behaviour that is deliberate and intended to deceive. Because building surveyors work very closely with building practitioners throughout the construction process, they are in a position to observe poor practices and may become aware of significant non-compliance, misleading behaviour and fraud. Building surveyors should not walk past such conduct.

Mandatory reporting is a way for regulators to gain improved intelligence about poor practices in the industry. As a co-regulator, building surveyors should refer serious matters to government. However, if they do, they may be subject to recrimination or retribution.

Mandatory reporting provides building surveyors with an obligation to notify government of serious issues such as fraudulent practices or serious non-compliant building work. This can contribute towards creating a level playing field and signalling to industry that they will be reported regardless of which building surveyor they deal with.

Mandatory reporting or incident reporting occurs in other sectors and legal frameworks, some of which are referred to below. In general, they require reporting on specified incidents (reportable incident) by specified people (reporter). The trigger for reporting is when the reporter has a reasonable belief that a reportable incident has occurred. Such belief can be based on something observed or a professional opinion. The regulatory bodies administering these regimes provide information

⁴⁷ On 23 June 2015, the Senate referred an inquiry into non-conforming building products to the Senate Economics References Committee. The Committee [produced reports](#) on 4 May 2016; 6 September 2017 and 22 November 2017.

sheets, decision trees and the like to assist reporters to understand their obligations. In most cases, the failure to report within a specified time is an offence.

An alternative to mandatory reporting may be to encourage voluntary reporting to the regulator through education and providing a process for efficient and, if requested anonymous reporting.

Another model is a confidential reporting scheme operated by an industry body to which building surveyors and other practitioners can report on specified issues. Confidential Reporting on Structural Safety (CROSS) is a scheme run by the Institution of Structural Engineers. It receives confidential reports on structural safety issues detected by practitioners. These reports are used in regular newsletters to the industry about issues observed. Another example of similar schemes are the REPCON confidential reporting scheme administered by the Australian Transport Safety Bureau in relation to rail safety, marine safety and aviation safety.

The CROSS and REPCON schemes are not intended to result in enforcement or disciplinary action and operate as industry awareness and education programs. They may also inform changes to standards or regulations.

Current requirements across jurisdictions and in other sectors

Two jurisdictions currently require building surveyors to notify governments of certain matters in certain circumstances.

In the ACT a building surveyor must tell the COR about contraventions and offences as specified and about building work that is fundamentally non-compliant. The regulations prescribe what fundamental non-compliance is by reference to significant departures from guides and standards, as well as tolerances on certain matters. The maximum penalty for failure to report is 5 penalty units. The building surveyor is not required to report work that is fundamentally non-compliant if a written notice with directions is given and the builder complies within 14 days.⁴⁸

⁴⁸ Building Act 2004 (ACT) s 50

In NSW, the building surveyor must notify council about significant fire safety matters.⁴⁹

Victoria's new code of conduct requires building surveyors to report fraud or significant non-compliance to the VBA.

There are various regimes operating across Australia that require proactive reporting. Examples include:

- Work health and safety incident reporting which applies to all workplaces and requires notification of deaths, serious injury or exposure to a risk of serious injury;
- In Queensland, obligations to notify the Queensland Building and Construction Commission (QBCC) (which do not apply to building surveyors):
 - of a death or serious injury or illness or an incident that exposes a person to a risk or serious injury on building sites; or
 - contraventions of notices issued by Worksafe or the electrical safety regulator;
 - that a building product is non-conforming (which applies to persons in the supply chain);
- reporting of serious breaches by auditors carrying out a review of trust accounts;
- Notifiable data breaches which apply to Australian government agencies and private sector entities in relation to privacy and cyber security breaches;
- Notifiable incidents under the National Laws for Early Childhood Education and Care which apply to approved providers of childcare services across Australia and require notification to the regulator of:
 - serious incidents, death injury or where treatment from a medical professional is required;
 - complaints made to the service;
 - potential risk to a child,
- Child abuse reporting which applies in all jurisdictions to a range of defined groups such as teachers, police officers, those providing human services and medical professionals.

⁴⁹ Environmental Planning and Assessment Regulations NSW 129D and 169D

Options

Option 1

Where a building surveyor forms a reasonable belief that a “reportable matter” has occurred or is likely to occur, they must report it to their state or territory government regulator within 48 hours (or other specified time) after becoming aware of the reportable matter (i.e. a failure to do so would be an offence).

‘Reportable matters’ are defined as:

- a. where the building surveyor has received a document which they reasonably believe is fraudulent or misleading;
- b. where the building surveyor has become aware of a substantial non-compliance which includes building work that:
 - (i) is a significant departure from the approved plans;
 - (ii) has or could endanger the safety of the public or occupants.

This option would require guidance with examples on what constitutes a ‘significant departure’ and what would be considered to ‘endanger the safety of the public or occupants’.

Option 1 is mandatory reporting.

Option 2

That each jurisdiction develop a voluntary reporting scheme that enables efficient and, if requested, anonymous reporting by building surveyors and that provides guidance to building surveyors about the process for reporting and the types of matters that it should report such as:

- a. where the building surveyor has received a document which they reasonably believe is fraudulent or misleading;
- b. where the building surveyor has become aware of a substantial non-compliance which includes building work that:
 - (i) is a significant departure from the approved plans;
 - (ii) has or could endanger the safety of the public or occupants.

This option would require guidance with examples on what constitutes a ‘significant departure’ and what would be considered to ‘endanger the safety of the public or occupants’.

Option 2 is voluntary reporting.

Option 3

That there be engagement with industry associations to support the establishment of a confidential reporting scheme for building regulatory issues based on the CROSS and REPCON schemes.

Recommended option

Option 1 most closely resembles BCR recommendation 11 and is therefore recommended.

Consultation questions

- 54. Do you agree with the recommended option for Principle 9?
- 55. For Option 1, should the guidance be developed nationally or should each jurisdiction prepare its own guidance?
- 56. For Option 2, should the guidance be developed nationally or should each jurisdiction prepare its own guidance?
- 57. For Option 3, which industry bodies could run the scheme?
- 58. For Option 3, would a new industry body need to be established?
- 59. For Option 3, should the scheme operate nationally or would there need to be a scheme in each jurisdiction?

Principle 10: Regulatory supports for private building surveyors

Context and problem definition

As co-regulators, private building surveyors need training and support to exercise enforcement powers. The preparation of notices and orders to ensure they meet legal requirements and are enforceable is a skill that private building surveyors may not have. These activities also take time which a private building surveyor may not be able to recover their costs for. Further, taking enforcement action is not seen as a customer service and building surveyors can be reluctant to regulate their clients.

The BCR reported that when private building surveyors refer unresolved notices to local or state/territory government regulators, they are often not acted on leaving the matter unresolved and discouraging the private building surveyor from taking such actions in the future.

If the regulatory oversight mechanisms do not operate to require non-compliance to be rectified, particularly when the builder is being recalcitrant, there will be little incentive for compliance.

BCR recommendation 11 identifies there should be training, help desks and other support to assist private building surveyors with drafting directions and notices. It also recommends that matters referred by private building surveyors should be prioritised for action by the receiving authority so that a reliable system of regulator support is given and the non-compliance is resolved.

The supports and collaboration between private building surveyors and local and state/territory government are not necessarily matters for legislation. These recommendations are related to BCR recommendation 5 which calls for formal mechanisms for a more collaborative and effective partnership between those responsible for regulation and enforcement. They also require consideration of which level of government the private buildings surveyor should refer unresolved notice or directions to and how that recipient will be funded and resourced to respond.

Options

Option 1

That each jurisdiction will publish its strategy on how it will support and collaborate with private building surveyors to enable them to effectively exercise their enforcement functions and to act on referrals to resolve non-compliance.

In addition, require any model guidance for continuing professional development (BCR recommendation 3) include compulsory training for private building surveyors on how to exercise their enforcement powers.

Recommended option

Only one option is recommended.

Consultation questions

60. Do you agree with the recommended option for Principle 10?

61. How else could these parts of BCR recommendation 11 be implemented?

APPENDICES



Appendix A Jurisdictional legislation relevant to BCR recommendations 9 and 11

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Amendments relating to rec 9 & 11 issues since BCR	Yes – Amendments to Building Act & new Code of Practice Sep 2019	Yes – BDCA commenced 1 July 2020	Yes – new Code of Conduct Jan 2019	Yes – BA amended June 2020 and new Code of Conduct Oct 2020	Yes – new Code of Conduct commenced in April 2019. Various regulatory amendments.	Yes Occupational Licensing (Building Surveyors) Code of Practice March 2018	Yes – new Code of Conduct Jan 2021	No
Legislation	Building Act 2004 and Building (General) Regulations 2008 Construction Occupations (Licensing) Act 2004 and Construction Occupations (Licensing) Regulation 2004	Building and Development Certifiers Act 2018 and Building and Development Certifiers Regulation 2020 Environment Planning and Assessment Act 1979 (EPAA) and Environment Planning and Assessment Regulation 2000	Building Act 1993 and Building Regulations 2018	Building Act 1975 and Building Regulation 2006 QBCC Act 1991 and Regulation 2018	Development Act 1993 and Development Regulations 2008 (soon to be replaced) Planning Development and Infrastructure Act 2016 Planning, Development and Infrastructure (Accredited Professionals) Regulations 2019 and PDI (General)	Building Act 2016 and Building Regulations 2016 Directors Determinations Occupational Licensing Act 2005 and Regulations Occupational Licensing (Building Surveyors) Code of Practice 2018 Residential Building Work Contracts and	Building Act 1993 and Building Regulations 2018	Building Act 2011 and Building Regulations 2012 Building Services (Registration) Act 2011 & Regulations Building Services (Complaint Resolution and Administration) Act 2011 & Regulations

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					Regulations 2017. (New legislation to fully commence in early 2021 – this table is based on new Act & Regs)	Dispute Resolution Act 2016		
Who appoints/ engages the private surveyor/ certifier?	BA s17A application from land of owner BA s19 owner appoints in writing BA s26 owner may apply in writing to certifier for a building approval – Notes agent may apply on owner's behalf	EPAA 4.26(2) CDCs owner or person with consent of owner 6.6 'person having the benefit of the development consent' (6.6(4) does not include contractor unless they are the owner)	BA s56 Owner or agent	Any person 'client' BA s143A if client is not owner, client must give BC owners name and contact details (offence 20 PU) within 15 days after the engagement starts, BC must give owner notice of their name and details in an approved form of the responsibilities of the private certifier	Owner or other person provided they get written consent from owner.	Owner or their agent	Owner or agent Domestic building work - builder prohibited from appointing PBS	No provisions controlling appointment of private building surveyors
Notification of appointment	BA s24 notice of appointment or end to appointment	EPAA 6.6 EPAR r135 – 2	No – only have to send copy of permit within 7	BA s143 within 5 days of engagement must give	No- have to advise prescribed body after	BA s30 No – only have to send copy of the permit	S80 notify council within 7	No

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	within 7 days – to CO Registrar	days before work starts	days after issued	notice to local gov	making a decision in accordance with the Regulations (s89 of PDI Act).	within 7 days after issued	days of appointment	
Ability to terminate appointment	BA s19D appointment ends if owner revokes; entity resigns the appointment (must have written approved of CO Registrar); building occupancy certificate issued, 5 years since appointment.	EPAR 162 Registration Authority must approve replacement; or current PC, proposed PC and person eligible to appoint the certifier agree	BA s44 Certifier may refer their engagement to another certifier at any time. S45 Owner cannot remove engagement of certifier without the consent of the Director.	No approval required. Can change if application is not decided or lapses BA s144 must notify council of discontinuance Replacement may accept and without further checking rely on an act or inspection given by the original certifier	Must have consent of the Minister	Must have consent of Director– unless parties agree, and a new BS agrees to transfer	Transfer of functions can occur by agreement. Otherwise PBS appointment cannot be terminated without consent of VBA.	No restrictions
Engagement of BS to be documented	No	BDCA s31 – written contract required with prescribed information. Regs Part 5 – name, reg number, POB, contact info, insurance	No	BA s141 Engagement must be written and state the fees payable. Mere making of a BDA to a PC does not of itself constitute	No – engagement to be captured via ePlanning system	No – legislation does not require the engagement to be in writing, but generally this is how compliance with s.35 and s.28(3) of the	No	No

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		details, certification work to be carried out, development info, fees info, date – signed, declaration, info sheet (reg 31)		an engagement of the certifier		Building Act is demonstrated.		
Arrangement for Payment of surveyor/ certifier	Certifier can require payment before application is decided and that payment must be made before certifier is required to issue the permit	BDCR Reg 29 require payment on or before lodgement for certification services – also see Information Sheet	None	BA s141 Engagement must be written and must state fees. BA s146 If certifier refuses to approve, certify etc. client must still pay agreed fee for work.	None	Must not accept engagement unless schedule of fees provided and accepted s 28(3)	Application for permit must be accompanied by fees as determined by surveyor	None
Obligations relating to the acceptance of compliance certificates	May request a certificate from a professional engineer	May rely on a certificate	May rely on a certificate	Competent person assessment must be carried out and recorded	May rely on a certificate in good faith Must accept the certificate of independent technical expert in certain cases, if provided.	May rely on a certificate in good faith and receive immunity s321 and 326	May rely on a certificate 'in good faith'	No duty to check certificate
Information to 'owner' or other person –	No	BDCR Reg 31 contract must have	No	BA s143A w/in 15 days of engagement	No	No	No	No

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approved fact sheet		information sheet approved by Secretary		BC to give owner details, in an approved form of the responsibilities of the private certifier performing the work (offence 40 PU)				
Information to 'owner' or other person – complaints management procedures	CoP provides for copy of complaints policy to be provided to people they provide services to on request	No	No	No	No	No – consumer building complaints are administered under the RBWC&DR Act	No (required in Code of Conduct which commenced in Jan 2021)	No
Information to 'owner' or other person – all approved documents	BA s28A certifier to give copy of approval and relevant plans to <u>person that applied</u>	EPAR 142 must notify applicant of determination of application – docs to be lodged in NSW planning portal	BA s42 must lodge building and occupancy permit and specified documents with Government within 7 days	BC to give approval docs to council and applicant only	No to owner Certifier must, on making a decision to grant a building consent, or vary a building consent, must inform the final relevant authority, and provide documents as required (PDI s89)	BA s143 Permit authority to issue a building permit to applicant, owner, BS, builders. 134 if applicant for CLC for Permit Work is not the owner, then the BS is to issue a copy to the owner	BR r39 BS must give a copy of the permit and 2 copies of approved plans to the applicant; copy of the building permit to the builder and owner (if not applicant), within 7 days of issue.	BA s28 Permit authority to issue building permit document to builder, owner, applicant (if not builder or owner).

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Information to 'owner' or other person – any approved variations	<p>Yes – BA s33(3) must give a copy of amended approval and amended (marked)plans asap to the person who applied for the approval (approval for amendment s31, amendment s32))</p> <p>CoP must inform 'client' of any matters or changes that may affect rights,</p> <p>CoP general obligation on building surveyor required to confirm agency</p>	<p>No</p> <p>EPAR 148 – modifications envisaged</p>	<p>No</p> <p>BA s60B may amend building permit on application of owner in writing</p>		<p>No – varied plans will be available in ePlanning system.</p>	<p>BA s145 Permit authority may add/vary/revok e condition on building permit, takes effect on notification to applicant, owner and builder (equivalent re demolition permit, s195, permit of substantial compliance s261)</p> <p>s.136 BS may amend the Certificate of Likely Compliance at any time.</p> <p>148 amended permit work must be performed in accordance with approval of BS and also the Permit Authority for certain matters only</p>	<p>No</p>	<p>N/A</p>

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Information to 'owner' or other person – results of all mandatory inspections as they occur	No to owner BA s44 directions given to licensee CoP must inform 'client' of any matters or changes that may affect rights, CoP general obligation on building surveyor required to confirm agency	Yes – EPAA 6.6 EPAR r135A Notification to owner of critical stage inspection EPAR 143C must make a record of inspection and lodge in NSW planning portal	No to owner BA s63 issue inspection certificate to person who carried out the work	Yes – BA s122 if BDA lapses the BC must give owner copy of inspection documentation for the building (offence 40 PU) BA s124A owner may give notice to BC asking for copy of any inspection documentation – BC must give documentation within 5 days (offence 20 PU) BA s143B if additional certifying function performed, w/l 5 days after, BC to give copies of documents relevant to that function BA s148 if engagement of PC is discontinued before final the	No – records of inspection retained by council. Note: ePlanning system will also capture range of inspection data	No	No	No to owner BR r29 Inspection certificates to be provided to builder

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				PC must give owner copy of documentation for inspection				
Information to 'owner' or other person – directions issued following mandatory inspections	No – BA s44 directions to be given to building licensee CoP must inform 'client' of any matters or changes that may affect rights,	No (direction power does not apply to mandatory inspections – EPAR 161A(2))	No – BA s64 directions as to work are issued to person in charge of work	N/A	No – directions are issued to person in charge of work	No – BA ss 101, 150 inspection directions issued to responsible person for the work	Yes – BA s37J RBS must give copy of written direction to owner (and any notice of extension, stay) BA s37K if non-compliance with direction must give written notice to Authority and owner within 7 days	N/A
Information to 'owner' or other person – Enforcement actions taken	No to owner BA s46 Safety precaution direction to be given to building licensee CoP must inform 'client' of any matters or changes that may affect rights, CoP general obligation on building	Yes – if issue direction (EPAA 6.31) and it is not complied with within time – must notify owner EPAR 161A(9)	Yes – BA Part 10 Division 2 building notices and owners served on owner No obligation re direction as to work BA s64	Yes if enforcement order issued to owner (e.g. building work dangerous) BA s248, applies to PC given s48) If notice directed to builder, no notice to owner. BA s48(7) if the person does not comply with the	No to owner	Yes – BA ss237, 238 building and plumbing notices issued to owner. However if matter needs to be escalated to a Building Notice under s.237 owner is to be notified as well as builder. If written direction to	Yes – BA Part 8 Notices and orders (inc to stop work) are issued to owner	N/A – no enforcement powers

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	surveyor required to confirm agency			enforcement notice, PC must give a notice that person has not complied to local government.		address defective work (BA s208), no notice to owner		
Information to 'owner' or other person – Occupation or final certificate	No to owner Note BA s48 must provide documents to COR CoP must inform 'client' of any matters or changes that may affect rights, CoP general obligation on building surveyor required to confirm agency	Yes – EPAR 151 – must notify applicant of determination of application – docs to be lodged in NSW planning Portal	No to owner Note BA s42 Occupancy certificate to be lodged with government within 7 days	Yes – BA s99 BC must give owner final inspection certificate and inspection documentation – 5 days s102 BC must give owner copy of CoO asap; s107 – copy of CoO to referral authority; s108 – copy of CoO to local council within 5 days	Not specifically in PDI Act, but relevant authority must issue CoO within 5 days. This will be uploaded until the ePlanning system for access by owner / applicant.	Yes to the owner 223 the BS is to give the OP to the applicant (owner or their agent) BA s224 must also notify the permit authority and provide a copy of the permit within the prescribed period.	No to owner Note BA s73 must provide occupancy permit and documents lodged with application to council within 7 days	N/A
Conflict of interest provisions	BA s23 Cannot perform services as a certifier if certifier or a person related to them, has an 'interest' – includes legal or equitable	BDCA Part 3 – s28-30 Must not carry out any inspection, issue any certificate or carry out certificate work prescribed if	Code of Conduct published Jan 2019 requires all registered building practitioners in NT to avoid and manage actual or	BA s136, 137 Private certifier must act in public interest (defined) (offence 1665 PU), must not perform function if have	PDI s235(5) a person must not exercise any of the functions if have a direct or indirect interest in any aspect of the development or	BA s28(2)(l) must not accept engagement if have a potential conflict of interest between functions and	BA s79(1A) must not act if surveyor or related person has a conflict of interest (offence 500 PU)	BA ss20 and 58 Building surveyor who issues a certificate of design compliance (for building permit) or certificate of construction

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	interest in land, has prepared or intends to prepare drawings for use in the construction, has carried out or intends to carry out the building work or has a financial interest in the construction or completion of the work (not an offence)	have a conflict of interest. CoI = Private interest comes into conflict with and may affect the duty to act in the public interest. Private interest = obtaining the benefit of the certification work or has a 'pecuniary interest' or has provided services on the design, development application for a councillor to employee of council, person who has a relationship with above (offence 300 PU). Exemptions available – also see prescribed matters	perceived conflicts of interest (not an offence)	a conflict of interest (defined)	any body associated with it or have employed any person associated with it (offence \$20,000) PDI s91 An accredited professional must act in accordance with the public interest (maximum penalty \$50,000)	personal or business interests (offence natural person 100 PU body corporate 500 PU) BA s307 Offence for BS to receive payment or gratuity other than to perform services under Act (100 PU) Building Surveyor in council acting as a Permit Authority cannot be engaged as the Building Surveyor Clause 3 Code of Practice	Can seek exemption from VBA to act	compliance (for occupancy permit) must be 'independent in relation to the application' – independent BS defined (s4) not the owner of the land or an employee of the owner of the land. Is not the builder or demolisher or an employee of the builder or demolisher (not an offence)
Other offences with integrity focus	CoP general obligations on BS inc to	BDCA s42 Improper influence –	General obligations in CoC	BA ss127 and 136 BC to act in the public	PDI s 91 must act in accordance	BA s307 Offence for BS to receive	None (CoC requires BS to avoid situations)	None

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<p>relating to conduct The table does not include all offences directed at building surveyors, only those which have an integrity focus.</p>	<p>perform functions in the public interest, impartially and honestly, without applying improper influence, favouritism or patronage.</p>	<p>accepting benefits (10,000 PU, 2 years imprisonment) S43 False representation that work can only be carried out by registered certifier (300 PU) S44 False or misleading certificates (10,000 PU, 2 years imprisonment) BDCR Sched 5, cl 1 offence not to comply with Code of Conduct</p>		<p>interest. Prevails to the extent of any inconsistency with any other obligation under Act or to another person. Includes not seeking / accepting / agreeing to accept benefit (whether for certifier's benefit or someone else) as a reward or inducement to Act</p>	<p>with the public interest, not perform any act or make any omission that results in a failure to comply with the Act or seek, accept or agree to accept a benefit from another person as a reward or inducement to act against a provision of the Act.</p>	<p>payment or gratuity other than to perform services under Act Clause 1 Code of Practice</p>	<p>that a reasonable person may conclude has or could compromise impartiality or professional judgement</p>	
<p>Requirement for separation from design</p>	<p>BA s23 Cannot perform services if certifier or a person related to them, has an 'interest' in the work – includes if have prepared or intends to prepare the</p>	<p>Covered in detail in definition of Col</p>	<p>None</p>	<p>BA s137 Col defined to include carrying out building the subject of the building certifying function which is defined to include the preparation of design</p>	<p>s235 must not exercise any functions if they have been involved in any aspect of planning or design (other than through the provision of preliminary advice of a</p>	<p>BA s28 must not accept an engagement if have provided technical advice or prepared or reviewed the design or a Performance Solution that is proposed, was</p>	<p>BA s79(1) Must not act if surveyor or a related person prepared design, was engaged by designer in past 12 months, has pecuniary interest in body</p>	<p>None</p>

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	<p><i>drawings</i> for the work – but can sketch a required design solution as part of a direction in a s44 notice 23(4)</p> <p>CoP must keep a written record of any advice provided on design or compliance of the building work</p>				<p>routine or general nature)</p> <p>Also r30 of the AP Regs replicates this requirement specifically for accredited professionals (building certifier)</p>	<p>employed in past 12 months by a designer of the work or has a pecuniary interest in the designer</p> <p>Clause 3 Code of Practice</p>	<p>that prepared the design (natural person 500 PU, body corporate 2500 PU)</p>	
Direct or indirect pecuniary interest	<p>BA s23, practitioner or related person has a financial interest in the construction or completion of the building work</p>	<p>BDCA Part 3 – ss28-30. Col = Private interest comes into conflict with and may affect the duty to act in the public interest. Private interest = obtaining the benefit of the certification work or has a 'pecuniary interest' or has provided services on the design, development</p>	No	<p>BA s136 must act in public interest, not create a conflict of interest under s137. Col includes where certifier has direct or indirect pecuniary interest in the building (s137(2)(c)</p>	<p>PDI s235 (5) a person must not exercise any of the functions if have a direct or indirect interest in any aspect of the development or any body associated with it or have employed any person associated with it (offence \$20,000).</p> <p>PDI s91 An accredited</p>	<p>BA s28(2)(k) must not accept engagement if have a direct, or indirect pecuniary interest in the designer of the work, work or premises where the work is to be performed, or any other person associated with the work or premises where the work</p>	<p>BA s79(1)(d) must not carry out functions if have a direct or indirect pecuniary interest in the building/building work/ any body carrying out the building work (natural person 500 PU, body corporate 2500 PU)</p>	No

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		application for a councillor to employee of council, person who has a relationship with above (offence 300 PU).			professional must act in accordance with the public interest (maximum penalty \$50,000) AP Regs r30 – certifier must not act if the accredited professional is employed by any person or body associated with any aspect of the development.	is to be performed. Clause 3 Code of Practice		
Col expressly applies to related persons	BA s23 personal, professional, commercial or financial relationship, employer or employee of practitioner, company of which practitioner is a director or shareholder	BDCA Part 3 – ss28-30. Applies to a person who has a relationship (whether family, personal, employment or business)	No	No But note BA s127 must act in public interest, includes not seeking / accepting / agreeing to accept a benefit as a reward or inducement, whether for certifier's benefit <u>or</u>	No In Code of Conduct, an accredited professional must take all reasonable steps to ensure that a person related to them does not receive gifts or benefits that could appear to be an attempt to influence or	Yes Act. s.28: is the employer of a is the employer of a person referred to in paragraph (f) or of persons performing building contracts generally; or of persons performing building	BA s79(1A) must not carry out function as a private BS in relation to which he/she or related person has a Col. Defined as partner, director, related body corporate, employer, employee, spouse or domestic	No

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				<u>someone else</u> , as a reward or inducement to act other than under the Act.	secure or have the effect of influencing or securing, a favour from the accredited professional.	contracts generally; or is the employer of a person referred to in paragraph (f) or of persons performing building contracts generally. (k) has a direct, or indirect, pecuniary interest in – (i) the designer of the work; or (ii) the work or premises where the work is to be performed; or (iii) any other person associated with the work or premises where the work is to be performed;	partner, sibling, parent or child. (Offence - natural person 500 PU, body corporate 2500 PU)	
Certifications by others	S47 – can require owner to provide a certificate from a 'professional engineer' (in	EPAR 130(2A) must not issue CDC which has a PS for fire safety requirement	s40 certifier can rely on certificates from building practitioners (registered	S60 certifier may rely on compliance certificates by any person whom they	PDI s146 completion notification must be accompanied	S321 & Director's Determination – who can issue a certificate for	S238 prescribed persons may issue certificates on prescribed	S16(g) and 17(3)(b) Building surveyor can rely on technical

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	field for which they are giving certificate) on structural sufficiency or matters relating to health safety and amenity– no statutory immunity given	unless have a performance solution report 6.16 Compliance certificates required as prescribed or may accept if not prescribed. 6.30 can rely on certificates and are not liable for loss or damage arising from a matter for which a certificate was issued. (does not apply to certificate issued by certifiers) EPAR 143A must have statement from a qualified designer re residential apartment development	persons) s69 certifier cannot issue an OP unless builder (natural person) has issued a declaration and regulatory authority approvals (health etc.)	consider to be a ‘competent person’. BR s49 BC may accept and without further checking rely on a certificate from a competent person if the BC ‘has decided the person is a competent person’ For certain types of design or work competent person must be licensed. See Part 5 of Regs	by a statement of compliance. PDI Act s235 councils and certifiers may rely on certificates issued by persons with prescribed qualifications r61 certificate of an independent technical expert may be relied upon in defined circumstances.	an assessable item – generally licensed or accredited persons (some exceptions). BS can rely on such certificates and statutory immunity given. S103 Standard of work certificate to be issued by person responsible for the work S54 OLA Administrator can require prescribed licence holder to issue a certificate on completion of prescribed work	matters. S128 surveyor has immunity if they rely on a s238 certificate in good faith	certificates from prescribed specialists when issuing a certificate of design compliance (see also s144 which says can rely on such certificates) – however currently there are no prescribed specialists S144 Permit authority has no duty to check or form own opinion about matters in certificates issued by private surveyors
Appeals against decisions of BS	Enforcement decisions – may apply to COR for	EPAA 4.31 & 6.31 can challenge validity of	Appeal rights for BC decisions in all	Some appeal rights to Development Tribunals for	Only provision for Committee with statutory role to consider	Appeal rights for BS decisions in all categories, to	Appeal rights for BS decisions in all	Mechanisms to address protection work type provisions

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(considered categories of , protection works, modifications/ variations, enforcement)	cancellation of stop work notice (BA ss55, 56, 57), no appeal rights re directions following inspections (s44) or safety precaution direction (s46)	certificates at NCAT within 3 months of issue of certificate	categories, to statutory board	building matters, which may include decisions by BCs.	compliance matters BC does not play key role in protection work regime, and no enforcement powers	statutory Tribunal Note general provision that captures exercise of all surveyors powers – BA s280, owner (or others as specified) may appeal building surveyor’s exercise of power, or failure to exercise power to appeal tribunal	categories, to statutory board	and to modify standards, but neither focus on certifier decisions
Mandatory reporting obligations – fraud or significant non-compliance	BA s50 – offence if certifier does not tell CO Registrar about contraventions that come to the notice of the certifier – exceptions CoP must inform COR of any matters that affect rights or authority of BS e.g. Col;	No Must notify council of significant fire safety matters (EPA Regs 16D)	No	No	No	No Copy of Building Order to be provided to the Permit Authority s.153. s. 265 Non-compliance with a Building Order issued by the building surveyor is to be reported to the Permit Authority for further action	No (required in CoC)	No

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	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
	unlawful occupation							
Enforcement powers held by private surveyors/certifiers	<p>BA 17A refers to functions - giving building licensee notice of non-compliance and directions, giving direction about safety precautions, issuing stop notices</p> <p>BA s44 non-compliant work identified during stage inspection – written notice and directions</p> <p>BA s46 safety precaution direction is to be issued to building licensee if work is near a street or public place and it is unsafe</p> <p>BA s53 Stop notice can be issued by certifier</p>	<p>6.31 – can issue notices directing person to act. Does not apply if non-compliance identified during inspection. Time for compliance at discretion of certifier (EPAR 161A) – must send copy to council and owner if direction not complied with</p>	<p>S64 – can issue directions to fix work after inspecting. S109 and s112 can issue building notices and orders</p>	<p>S48 – can issue enforcement notice to builder and must refer matter to local gov if builder does not comply (only until the final inspection certificate or CoO issue)</p>	<p>None, unless the certifier is appointed as an authorised officer to perform inspections on behalf of the council (r112)</p>	<p>s31(2) – issue building notices (s237) and building orders (s246-247), inspection directions (s101, s150, 200, 208), s31 Powers to enter premises, collect evidence, take photos etc.</p> <p>S32 – offence if BS does not exercise those powers as appropriately</p>	<p>Part 4 – directions to fix</p> <p>Part 8 – building notices and orders</p> <p>Must refer non-compliance to VBA and take no further action.</p> <p>Power to enter for inspections authorised by the Act.</p>	None