



National Model Code of Conduct for Building Surveyors

Discussion paper

2020

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Preface

The Building Confidence Report (BCR) by Peter Shergold and Bronwyn Weir was presented to the Building Ministers Forum (BMF) in 2018. The BCR made 24 recommendations to restore confidence in the building industry. In July 2019, the BMF agreed to the establishment of the BCR National Framework Implementation Team (Implementation Team) in the office of the Australian Building Codes Board (ABCB) to develop and publicly report on a national framework for the implementation of BCR recommendations.

Recommendation 10 of the BCR is that each jurisdiction should put in place a nationally consistent code of conduct for building surveyors which addresses key matters which, if contravened, would be grounds for a disciplinary inquiry. This would make clear the standard of conduct expected of those performing statutory certification functions, and make it easier for regulators to hold them to account if they do not meet the expected standard of conduct.

This discussion paper explores recommendation 10, the current status of its implementation across Australia, and seeks stakeholder feedback on a proposed draft national model code of conduct (Attachment A), draft explanatory statement (Attachment B), and draft compliance policy (Attachment C). This discussion paper and its attachments have been developed by the Implementation Team and do not necessarily represent the views of the ABCB or its board members.

The Implementation Team will use feedback from stakeholders to improve the code of conduct and supporting documents before presenting them to the ABCB for consideration. Implementation of a national code of conduct will be the responsibility of the states and territories, consistent with the mandate provided to the Implementation Team by the BMF.

Comments on this discussion paper should be provided via the ABCB Consultation Hub by Friday 24 April 2020. This can be accessed at:

<https://consultation.abcb.gov.au/engagement/discussion-paper-nmcoc-bs>.

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Introduction

This section discusses recommendation 10 of the Building Confidence Report (BCR) and the objectives of this discussion paper.

1.1 BCR Recommendation 10

The BCR report identified a code of conduct for building surveyors as essential for the effective regulation of the building industry, stating:

“Codes of conduct can be an effective means of documenting the clear standards of behaviour expected of professionals who have statutory responsibilities. They also provide a reference against which auditing can be carried out and disciplinary action taken where the code is not met.

Without a clear code of conduct, it is sometimes difficult for regulators to question the behaviour of private building surveyors. As a result, oversight and disciplinary action can be challenging.”¹

Recommendation 10 of the BCR was *“That each jurisdiction put in place a code of conduct for building surveyors which addresses the key matters which, if contravened, would be ground for a disciplinary inquiry.”²*

The BCR report also recommended that agreement should be reached on the core content of the code to create a nationally consistent code of conduct, that the code should have a statutory basis (i.e. a basis in legislation to enable regulators to enforce it), and should contain, at a minimum, six specific obligations, which are:

- *“the primary obligation of the building surveyor is to ensure compliance with legislation and to act in the public interest;*
- *building surveyors must not prepare Performance Solutions (but may assess and approve Performance Solutions prepared by others);*

¹ Shergold & Weir *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* (February 2018) p. 25

² *Ibid.*, p. 25.

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- *building surveyors must not participate in the development of the design (the code must set out clearly and unambiguously what this means in practice);*
- *building surveyors must act within their area of skill and expertise (regardless of the scope of their registration);*
- *building surveyors must have mechanisms in place to encourage owners to advise of any concerns about noncompliant work; and*
- *building surveyors must have policies and procedures for the proper management of complaints from owners, adjoining owners, builders and the regulator.”*

The BCR National Framework Implementation Team (Implementation Team) in the office of the Australian Building Codes Board (ABCB) has held discussions with stakeholders and industry experts such as Bronwyn Weir to better understand the context and aims that informed recommendation 10. These discussions identified a number of important points which have informed the development of the draft model national code of conduct, including:

- National consistency is critical. It is very difficult to drive cultural change across industry when standards of behaviour differ significantly between jurisdictions.
- It is important to clarify what is meant by building surveyors. In this paper, the term ‘building surveyor’ is used to refer to both publicly and privately engaged professionals who are responsible under statute for determining compliance with the National Construction Code (i.e. certification or inspection) and other state and territory requirements.
 - This paper uses the term ‘statutory functions’ to refer to certification, inspection and any other function accorded to building surveyors under state and territory legislation.
 - The term building surveyor is used in Victoria, WA and the ACT. The term ‘building certifier’ is used in NSW, Queensland, SA, Tasmania and the NT.
- Building surveyors perform both statutory functions and non-statutory functions. Non-statutory functions include things like providing advice on how to achieve compliance or helping to design Performance Solutions. While statutory functions require registration or licencing, and non-statutory functions do not, both types of work are closely linked since it is a building surveyor’s expertise in certification that makes their advice valuable to clients.
- A code of conduct needs a basis in legislation to be effectively enforced. A basis in legislation can be direct, such as the ACT’s *Construction Occupations (Licensing) Building Surveyors Code of Practice 2019* or indirect, such as Queensland’s code of conduct which is given a legislative basis under section 32 of *Building Act 1975* (QLD).

- Codes of conduct need to be clear and easy to understand to be effective. The obligations in a code need to be explained and supported by guidance and examples if building surveyors, regulators, building owners, other building practitioners, and the community more generally are to effectively apply and uphold the obligations.

1.2 Purpose of this Discussion Paper

The Implementation Team in the office of the ABCB has been tasked by the Building Ministers' Forum (BMF) with developing and publicly reporting on a national framework for the consistent implementation of the BCR recommendations.

In November 2019, the ABCB agreed that the Implementation Team should develop a draft national model code of conduct for building surveyors, supported by guidance material and a compliance policy.

The Implementation Team has developed this discussion paper to facilitate stakeholder feedback on a preliminary draft of the national model code of conduct (Attachment A), draft explanatory statement (Attachment B) and draft compliance policy (Attachment C). These drafts have been prepared by the Implementation Team and do not necessarily represent the views of the ABCB or its members. Stakeholder feedback will be used to refine these before they are presented to the ABCB for its consideration. If the ABCB is supportive, they will then be presented to the BMF for endorsement.

The implementation of a national code of conduct and supporting documents will, consistent with the mandate of the Implementation Team, remain a matter for the states and territories.

This discussion paper poses a number of questions intended to help the Implementation Team revise and improve the draft national model code of conduct. A full list of the questions posed in this paper is provided at Attachment D.

2 Why a National Code of Conduct?

This section discusses the current implementation of recommendation 10 and why the Implementation Team is seeking to develop a national model code of conduct for building surveyors.

2.1 Implementation of Recommendation 10

When the BCR was drafted, only three jurisdictions, Queensland (QLD), New South Wales (NSW) and South Australia (SA), had a code of conduct for building surveyors.³

Since publication of the BCR, there has been significant progress in the development of codes of conduct for building surveyors. Codes of conduct have been introduced in Tasmania and the Australian Capital Territory (ACT) (technically a code of practice), and another is under development in Victoria. In addition, SA and NSW have revised their codes of conduct, raising the standard of expected behaviour and locating these standards in legislation. While the Northern Territory (NT) does not have a specific code of conduct for building surveyors, the Building Practitioners Board does apply a code of conduct to registered practitioners which covers building surveyors. As a result, there will soon be seven jurisdictions with a code of conduct which applies to building surveyors.

It is important to acknowledge that there are codes of conduct that may apply in addition to those imposed by jurisdictions. Several industry associations have a code of conduct for members, including the Royal Institution of Chartered Surveyors (RICS), the Association of Accredited Certifiers (AAC) and the Australian Institute of Building Surveyors (AIBS) which updated its code in 2019. Publically engaged building surveyors, such as those engaged by local councils, may also be subject to their organisation's code of conduct.

A list of the current codes of conduct is provided at Table 1.

³ Ibid., p. 25.

Table 1 Current Codes of Conduct for Building Surveyors

Jurisdiction / Body	Code of Conduct
QLD	Code of Conduct for Building Certifiers
NSW	Building and Development Certifiers Regulation 2019 which replaces the Code of Conduct for Accredited Certifiers
ACT	Building Surveyors Code of Practice
VIC	Under development
TAS	Occupational Licensing (Building Surveyors) Code of Practice
SA	Accredited Professionals Scheme Code of Conduct
NT	Building Practitioners Board Code of Conduct
WA	<i>None</i>
AIBS	Code of Professional Conduct
RICS	Rules of Conduct (Members and Firms Regulated by RICS)
AAC	Professional Code of Conduct for Members (not public)

2.2 Current Challenges

While the recent progress towards expanding the coverage of codes of conduct is commendable, stakeholders have raised concerns about the implementation of recommendation 10, focused around consistency, completeness and comprehensibility.

2.2.1 Consistency

The first concern is that there are significant differences between the obligations in the existing codes of conduct.

The most obvious consistency issue is the diversity of obligations. It is not uncommon for something prohibited in one code of conduct to be unmentioned in another. Several regulators have stressed that codes of conduct should not be judged in isolation as they form one part of a broader regulatory framework. Therefore, just because something is not expressly prohibited in a code of conduct does not mean it is not prohibited elsewhere in regulation. While this is true in many cases, there are still significant differences between what conduct by building surveyors is permissible in different states and territories.

A second consistency issue is variation in language. For example, while many codes of conduct prohibit conflicts of interest, the exact language of the prohibition differs between 'actual', 'potential', 'real' or 'perceived' conflicts of interest, resulting in different legal interpretations. As a result, identical commercial relationships may be acceptable in one state (e.g. not an actual conflict of interest), but grounds for disciplinary action in another (e.g. a potential conflict of interest).

The final consistency concern is that the processes for investigating, managing and, if necessary, sanctioning non-compliance differ between jurisdictions. This is the understandable result of different administrative processes and sanction regimes; and complete alignment is unlikely to be possible or advisable. However, some industry stakeholders have raised concerns that these different policies and procedures mean that under a national code the same conduct could have different consequences. For example, one regulator may de-register a building surveyor for an action which other regulators might respond to with a fine or three month suspension.

These differences make it difficult for building surveyors (and clients) who work across multiple jurisdictions to comply. They also limit the ability of industry leaders and state and territory regulators to work together to address poor behaviours.

2.2.2 Completeness

The second concern that has been raised is that none of the existing codes of conduct include all the requirements recommended in the BCR. Specifically, the BCR recommended that *“At a minimum, each jurisdiction’s code of conduct should include the following:*

- *the primary obligation of the building surveyor is to ensure compliance with legislation and to act in the public interest;*
- *building surveyors must not prepare Performance Solutions (but may assess and approve Performance Solutions prepared by others);*
- *building surveyors must not participate in the development of the design (the code must set out clearly and unambiguously what this means in practice);*
- *building surveyors must act within their area of skill and expertise (regardless of the scope of their registration);*
- *building surveyors must have mechanisms in place to encourage owners to advise of any concerns about noncompliant work; and*

- *building surveyors must have policies and procedures for the proper management of complaints from owners, adjoining owners, builders and the regulator.*⁴

In some cases, the lack of inclusion is due to the relevant obligation being specified outside of the code of conduct, such as in other regulations. However, even when each jurisdiction's broader legislative framework is taken into account, it appears that no current jurisdictional or industry code of conduct covers all six of the minimum requirements recommended in the BCR.

Some jurisdictions have advised that they are considering adding these requirements in the future. Others have advised that they believe there are good policy reasons not to adopt all six requirements in full. For example, the requirement to have mechanisms in place to encourage owners to raise concerns over non-compliance has been raised by some as inappropriately extending the role of building surveyors into something best left to regulators.

2.2.3 Comprehensibility

The final concern that has been raised with the Implementation Team is the increasingly legalistic form and content of codes of conduct.

A statutory basis for codes of conduct is essential for regulators to be able to enforce them, and the use of precise legal terms can help prevent disputes over the meaning of terms. However, setting out codes of conduct wholly in legislation has made the standards harder for building surveyors to access and understand.

In addition, not all existing codes of conduct comprise a complete statement of the regulator's expectations. Where prohibitions are distributed across a code of conduct and other legislative provisions, there is a risk that some building surveyors may assume something is permissible, because it is not expressly prohibited in a code of conduct, even if it is prohibited elsewhere.

⁴ Ibid., p. 25

As a result, some stakeholders have suggested that the different responses to recommendation 10 may have inadvertently made it harder for building surveyors to understand their obligations.

The Implementation Team has raised this concern with Bronwyn Weir, who has advised that legal terminology in codes should be combined with clear, easy to understand guidance and examples which explain all major obligations and what legalistic concepts like a 'conflict of interest' mean in practice. This would not only provide guidance to building surveyors, but also help regulators apply general principles to specific cases.

The Explanatory Statements to the Tasmanian *Occupational Licensing (Building Surveyors) Code of Practice 2018* could serve as a model for this explanatory material.

Consultation Questions:

Do you agree with the characterisation of consistency, completeness and comprehensibility as issues with the current codes of conduct?

Are there any other issues with the existing building surveyor codes of conduct that you believe are impacting their effectiveness?

2.3 Addressing these issues

The issues of consistency, completeness and comprehensibility were raised with the ABCB, which agreed that the Implementation Team should seek to develop a national model code of conduct for building surveyors, supported by an explanatory statement and a sanctions policy.

3 Developing a National Code of Conduct

This section discusses how the Implementation Team developed the draft code of conduct for building surveyors and the key consultation questions.

3.1 Objective

The aim of the Implementation Team, in developing the draft national model code of conduct (at Attachment A), is to set a nationally consistent minimum standard of acceptable professional conduct for building surveyors. The draft code is not a best practice guide. A best practice guide might be appropriate in the context of a Professional Standards Scheme, which is discussed further at section 3.7.

The draft explanatory statement is intended to provide guidance and examples on how to apply the draft code in practice. It is not intended to be legally binding. The Implementation Team intends to expand the draft explanatory statement before it is finalised on the basis of feedback on where guidance would be most helpful.

The draft compliance policy is intended to provide a framework for the nationally consistent treatment of non-compliance in relation to the national model code of conduct. It is outcomes focused, noting that some jurisdictions may need to amend legislation and processes to implement it in full.

Consultation Questions:

Do you agree with the objective of setting a minimum standard of acceptable professional conduct?

3.2 Scope

The draft code of conduct is intended to apply to both private and public building surveyors in relation to the performance of statutory functions (e.g. certification) across all classes of building (i.e. NCC classes 1 – 10). It would not apply to actions in a personal or professional capacity unconnected to a building surveyor's statutory functions.

Stakeholders have raised a number of questions on this proposed scope, including:

- Should the code apply to anyone performing a certification or only registered (or licenced) building surveyors performing statutory functions?
- Should the code apply to any action undertaken in a professional capacity by a building surveyor, even if unrelated to statutory functions?
- Should building surveyors engaged by public bodies (e.g. local councils) be exempted from the code?
- Should certification for class 1 (houses) or class 10 (non-habitable structures) be exempted from the code of conduct?

The current codes of conduct across Australia contain a range of different scopes. Some cover any professional activity and even private actions in certain cases, while others are limited to actions related to statutory functions. Some codes cover anyone providing a private certification while others are limited to registered building surveyors. There are valid arguments for both expansive and narrow scopes, and the Implementation Team welcomes stakeholders' views on this point.

Consultation Question:

Do you agree with the proposed scope of the code of conduct?

3.3 Development

A review of existing codes of conduct was undertaken to inform development of the draft code. Where similar duties were repeated across multiple codes, it was considered as indicative of a commonly agreed national standard of behaviour. The draft also includes the six minimum requirements identified in the BCR. Finally, several duties were added to the draft code where they appeared to be appropriate when setting a minimum standard of professional conduct.

Ultimately, the Implementation Team is aware that the exact composition of a national minimum standard of professional conduct represents a judgment call and that stakeholders may disagree with these conclusions.

The discussion at section 4 briefly states why each duty is proposed for inclusion in the draft code. Comment on which duties should be included or not, and why, is welcome.

Consultation Question:

Do you agree with the reasons provided for the inclusion of specific obligations (refer to section 4 below)?

If you do not agree, please explain why you disagree with the reasoning.

3.4 Design

Five high-level professional obligations appear to be consistent across a majority of codes. These are obligations to:

- Act in the public interest and comply with the law;
- Act in accordance with a duty of care;
- Provide statutory functions free from a conflict of interest;
- Perform work honestly; and
- Treat people with respect.

In addition to these general obligations, sixteen sub-obligations are proposed to expand on the five general obligations. For example, consistent with the duty to provide statutory functions free from any conflict of interest, it would be inappropriate for a building surveyor to use their position for personal advantage; and consistent with the duty act in accordance with a duty of care, building surveyors should not act beyond their competency.

This approach of general obligations and specific sub-obligations has been applied to group the obligations into a small number of easy to remember duties. This is different to the current approach in most codes (with the exception of the draft Victorian code).

Consultation Question:

Do you find the obligation and sub-obligation approach helpful for understanding the nature and content of the code of conduct?

3.5 Wording

The proposed wording of specific obligations has been drawn from existing provisions where possible. Often provisions from two different codes of conduct have been combined to create an obligation which is intended to combine the best elements of both codes. To help explain how specific wording was developed, section 4 includes examples from existing codes.

The Implementation Team welcomes feedback on the proposed wording of obligations, especially where stakeholders believe an alternative approach would be more effective in achieving the objective of the obligation.

Consultation Question:

Do you consider any of the obligations should be rephrased or worded differently?

If you believe the proposed wording should change, please explain why you support a revised wording.

3.6 Supporting Documents

The draft national model code of conduct is supported by a draft explanatory statement and a draft compliance policy.

3.6.1 Explanatory Statement

The draft explanatory statement (at Attachment B) is intended to support the draft code of conduct by explaining the obligations in everyday language and providing examples. This reflects the advice of the BCR that what the code means in practice must be set out clearly and unambiguously. The draft version is over ten pages long and feedback is welcomed on whether this strikes the right balance between brevity, explanation and readability. Stakeholders are welcome to suggest where guidance should be expanded or condensed.

Some jurisdictions separate their code and guidance material, while others combine them in a single document. The Implementation Team welcomes feedback on which approach stakeholders would find most effective.

Consultation Questions:

Do you find the explanatory statement helpful in understanding how the code of conduct could apply in practice?

Are there any areas where additional guidance would be helpful?

Should the guidance be combined with the code to form a single document?

3.6.2 Compliance Policy

The draft compliance policy (at Attachment C) sets out a preliminary view on how compliance and enforcement of the obligations in the code should be managed.

This policy has been developed to address the concerns of industry stakeholders that the same conduct in different jurisdictions could result in significantly different outcomes. As a result, the compliance policy sets out draft high-level guidance on how the draft national model code of conduct should be enforced by regulators.

Compliance and enforcement policy is ultimately a matter for state and territory regulators. Therefore, implementation of any national compliance policy will be a matter for each jurisdiction to determine consistent with its legislative, administrative and constitutional requirements.

Some regulators do not have the exact powers, resources or processes to implement the draft policy. Therefore, the key question for stakeholders is not whether the policy is aligned to existing processes and practices, but whether it represents a reasonable statement of acceptable practice to guide implementation of the code of conduct.

Consultation Questions:

Does the draft compliance plan capture best practice?

If not, what changes would be required to ensure it does?

3.7 Interaction of Code of Conduct with a Professional Standards Scheme

Several industry and occupational associations are developing professional standards scheme (PSS) for building surveyors. A PSS is a legal instrument that binds an industry association to protect consumers and monitor, enforce and improve the professional standards of their members. In return for this commitment, a PSS may cap the amount of damages participating members can be required to pay by a court in the event of a civil action. A PSS must be approved by the Professional Standards Council (PSC) before it can commence.

Some stakeholders have suggested that if a PSS for building surveyors commences and participation is mandatory, that a national code of conduct would be unnecessary. This is because a PSS sets a higher standard of conduct than a code of conduct to justify potentially applying a cap to potential damages. The alternative view is that a code of conduct can complement a PSS. A code of conduct sets the minimum standard of acceptable conduct, while a PSS establishes a higher standard of conduct that may be linked to monetary ceilings that limit the civil liability of participating members based on this higher standard of conduct. Further, a PSS, even if mandatory, is enforced by the relevant industry or occupation association, not regulators. Therefore, to provide regulators with broad powers to investigate and sanction poor professional behaviour (as recommended by the BCR), it may be necessary to also maintain a code of conduct.

Consultation Question:

Is there a need for a code of conduct if a professional standards scheme is in place?

4 Discussion on a National Code of Conduct

This section discusses the proposed obligations in the draft national model code of conduct. The discussion focuses on:

- Why the duty is considered a minimum standard of professional conduct
- How the duty should be worded
- The practical implications of the duty

4.1 The primary duty to act in the public interest and comply with the law

The BCR recommended that the primary obligation of building surveyors should be ensure compliance with legislation and to act in the public interest. The requirement to act in the public interest is due to their performance of statutory functions. A building surveyor, if performing a public function under legislation, should act in the public interest.

The BCR recommended that these obligations should be the primary obligation of building surveyors. This means that the obligations in the code must be interpreted in light of the duty to ensure compliance with legislation and act in the public interest, and that if these obligations ever come into conflict with others, the primary obligation takes precedence.

Only a small number of codes of conduct explicitly provide for a primary obligation like this. One example is the AIBS code which provides that “*members and accredited persons must, at all times have regard to the welfare and rights of the public and ensure that these matters are put before commercial interests and responsibilities to clients and employers.*” Another is in the Explanatory Statement to the Tasmanian Code, which provides “*interests of a building surveyor’s client must be placed after the interests of the community wherever there is a conflict of interest.*”

Proposed Wording: *The primary obligations of a building surveyor is to act in the public interest and comply with the law when performing a statutory function.*

This obligation would require building surveyors to put the public interest in safe and compliant buildings ahead of their own interests and the interests of their clients,

colleagues and other practitioners. Actions which could constitute a breach of this obligation include:

- Issuing certification for a building which does not comply with the National Construction Code (NCC); and
- Failing to comply with relevant state or territory regulations.

4.1.1 Duty to report.

The Implementation Team considers it appropriate to impose an obligation on building surveyors to report reasonable suspicions of fraud and deliberate non-compliance with the NCC to state and territory regulators. A similar duty already applies in Queensland across the building supply chain (not building surveyors) in relation to non-conforming building products, as it was considered building surveyors had existing statutory obligations.

This would partially implement BCR recommendation 11, *“that each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations.”* Mandatory reporting has been suggested as a response to concerns that some clients engage a different building surveyor if their original building surveyor refuses to provide certification due to non-compliance. In such a situation, a duty of confidentiality can prevent the first building surveyor raising their concerns with regulators.

Some stakeholders have suggested that the duty to notify should be extended to the replacement building surveyor. This would ensure the replacement building surveyor was aware of the issue that had led to the dispute between the client and previous building surveyor. However, a duty to notify could further complicate a potentially fraught commercial dispute. Stakeholders’ views on who should be notified are welcomed.

While a number of existing codes of conduct contain exemptions to the duty of confidentiality when disclosure is required under law, none of them currently provide a positive duty to disclose non-compliance (although such an obligation may exist under elsewhere in state and territory legislation). To avoid unnecessary disclosures, the Implementation Team believes the duty should be limited to reasonable suspicions and serious non-compliance.

Proposed Wording: *A building surveyor must notify the relevant government official where they have a reasonable suspicion that fraudulent practices or a significant departure from approved documentation has occurred in relation to a building for which they are, or have been, engaged to provide a statutory function.*

The relevant government official would be a matter for each state and territory to determine. It is envisioned that the relevant official would be the jurisdiction's Building Commissioner or equivalent.

A requirement to report reasonable suspicions would mean that building surveyors must report suspicions which are supported by evidence even if the evidence is not conclusive. For example, falsified product data test sheets, unapproved changes to a building's structural design or product substitution could support a reasonable suspicion. A significant departure from approved documentation would be one that could endanger the safety of occupants or the general public.

Where a client rectifies non-compliance raised by the building surveyor it would not trigger the mandatory reporting obligation.

4.1.2 Duty to interpret building codes in the public interest.

As part of the duty to act in the public interest, building surveyors should have a specific obligation to interpret the NCC in the public interest.

This is intended to address the concern raised in the BCR that some building surveyors approach the NCC not as a document setting out the minimum necessary requirements for safety and health; amenity and accessibility, and sustainability in the design, construction, performance and liveability of new buildings; but as a document to be massaged, interpreted creatively, and searched for loopholes to the benefit of clients.

There are no codes of conduct which expressly provide that building surveyors must interpret the NCC in the public interest. However, there are a number of codes which do contain such an obligation as part of the duty to act in the public interest. For example, Queensland requires building surveyors to "*perform building certifying functions in the public interest*", and the ACT requires them to "*perform their services and functions, including exercising any discretionary powers*:"

- *in the public interest;*
- *in a way that does not undermine the integrity and reputation of the building regulatory system”*

Proposed Wording: *A building surveyor must interpret and apply the National Construction Code in the public interest.*

This would mean that building surveyors are required to read the NCC in light of its wider policy objectives, including ensuring safe, accessible and sustainable buildings. This is particularly important where building surveyors encounter provisions with multiple possible interpretations. Where this occurs, building surveyors have a duty to adopt the interpretation which best aligns with the intention of the provision as informed by its context (e.g. is the provision aimed at improving safety) and any explanatory guidance (e.g. NCC 2019 Guide to Volume One).

4.2 Duty to act in accordance with a duty of care

A duty to act in accordance with a duty of care is proposed because the concept of a duty of care succinctly covers a number of obligations in existing codes of conduct.

A duty of care is a legal concept based on a view that certain people, due to their position or actions, have an obligation to ensure the safety or well-being of others, and as a result, must exercise reasonable care and diligence.

The inclusion of a duty to act in accordance with a duty of care would not necessarily mean that building surveyors are subject to a civil law duty of care under tort law. Instead, it would mean there is an expectation that building surveyors will act as if they are subject to duty of care to their clients and future owners and occupants of the building. As a result, where a building surveyor has acted in a manner inconsistent with a duty of care, regulators are able to take action.

Several codes of conduct use language drawn from the concept of a duty of care. For example, SA requires building surveyors to “*exercise reasonable care and diligence in carrying out their statutory function and providing services to clients and employers*”, the ACT requires building certifiers to “*perform their services and functions, including exercising any discretionary powers with reasonable care and diligence*” and the RICS requires members to “*carry out their professional work with due skill, care and diligence and with proper regard for the technical standards*”

expected of them.” However, the concept of reasonable care and diligence is contextual and subject to interpretation, so it should be supported by a number of sub-obligations that spell out what this means in practice.

Proposed Wording: *A building surveyor must exercise reasonable care and diligence when performing statutory functions.*

The sub-obligations under the duty of care are intended to provide examples of the conduct that would be expected of building surveyors subject to a duty to act in accordance with a duty of care. The examples are not intended to form an exhaustive list of what the duty of care means in practice.

4.2.1 Duty to act within licence conditions and professional competency

Consistent with a duty of care, building certifiers should not undertake work which they are not licensed to perform or which is beyond their qualifications, skills or experience. This aligns with the requirement in the BCR that codes of conduct require *“building surveyors must act within their area of skill and expertise (regardless of the scope of their registration).”*

The requirement to act within licensing and competency is a common requirement across existing codes. The NSW code provides that a *“registered certifier must not carry out certification work that is not authorised by the registered certifier’s registration or is beyond the registered certifier’s competence and expertise.”* The Queensland’s code provides that *“A building certifier must not perform building certifying functions beyond their level of competence or outside their area of expertise”* and then expands on this in the explanatory statement with the statement that *“a building certifier, when performing building certifying functions, must have the appropriate level of accreditation and level of licensing.”* Alternatively, the South Australian code of conduct provides several specific requirements, including:

- *An accredited professional must ensure that they are appropriately authorised or qualified to undertake a statutory function before commencing that function.*
- *An accredited professional must, despite their level of accreditation, carry out their duties only within their level of competence or expertise.*

- *Persons undertaking Building Rules assessments must ensure that all assessments undertaken and advice provided are:*
 - *within the scope of the person's qualifications (as prescribed by regulation 87 of the Development Regulations 2008);*
 - *within the scope of the person's experience and expertise and that any appropriate advice has been obtained where a matter is outside that experience, expertise and qualifications (other than those in (1));*
 - *relevant to the particular application;”*

Proposed Wording: *A building surveyor must only perform statutory functions that are permitted under their registration or licence and within their professional competency.*

This would mean a building surveyor cannot perform certifications (or other functions under state or territory legislation) beyond their registration or licence conditions, or which are beyond their qualifications, skills or experience to perform competently. For example, if a building surveyor possess an unrestricted licence and has extensive experience with class 2, 3 and 5 buildings, but has never worked on a Class 9 building, the certification of a hospital or university would generally be outside their experience and therefore beyond their professional competency.

In the event that a building surveyor was unsure as to whether they possess the competencies required to perform a statutory function, they would be expected to refuse the engagement.

4.2.2 Duty to maintain professional competencies

A duty to maintain competencies fits within the general duty to act in accordance with a duty of care. It would require building surveyors to maintain and update their professional skills and knowledge to account for changes in practices and technology.

A duty to maintain professional competencies would help support implementation of BCR recommendation 3, that “*each jurisdiction requires all practitioners to undertake compulsory Continuing Professional Development on the National Construction Code.*” Currently, Tasmania, AIBS, AAC and RICS offer CPD training for building surveyors (with schemes also being developed in Queensland and Victoria). However, the duty should be seen as broader than merely participating in a CPD

scheme given the potential for some schemes to not cover off on all relevant competencies for a building surveyor.

The Queensland and Tasmania codes require building surveyors to “*maintain satisfactory levels of competence*”. The Tasmania Explanatory Statement goes further and provides that: “*a building surveyor must commit to a process of continuing professional development to ensure they constantly keep informed of developments in building design and practice, business management principles, and the law relevant to performing building surveying functions.*” Alternatively, AIBS provides “*members and accredited persons must, at all times continually strive to improve technical and professional skills and services to align with current knowledge and processes.*”

Proposed Wording: *A building surveyor must maintain their professional competencies, including participating in relevant continuing professional development.*

Whether a CPD scheme is “relevant” would be a matter for state and territory regulators to determine in light of the training available in their jurisdiction.

Where a building surveyor possesses a specialised professional competency and relies on this in their practice, they would be expected to maintain this competency as well. For example, a building surveyor who is also a registered engineer would be expected to participate in the Engineers Australia CPD scheme (or equivalent). Alternatively, a building surveyor who puts themselves forward as an expert in cladding would be expected to stay up to date with the latest products, construction techniques and standards.

In general, it is envisioned that no sanction would be applied where a building surveyor failed to maintain a specialised professional competency or expertise (as opposed to maintaining their professional competency as a building surveyor). Instead, it is expected that where a specialised competency lapsed, the building surveyor would cease to market these unmaintained skills or rely on them for the purposes of performing a statutory function. Such actions would breach the duty to act within their competency.

4.2.3 Duty to actively seek out all relevant facts before making a decisions

Acting in accordance with a duty of care means that building surveyors should not perform a statutory function unless they are reasonably satisfied that they understand the facts required to make that decision.

A number of codes require building surveyors to take reasonable steps to obtain relevant facts before making a decision. The wording of these obligations is fairly consistent. The SA approach, which provides that “*an accredited professional must take all reasonable steps to obtain all relevant facts and information when making decisions and carrying out any other statutory function*” is both representative of other codes and a useful model for the proposed wording.

Proposed Wording: *A building surveyor must take reasonable steps to obtain all relevant facts and information before carrying out a statutory function.*

This would mean building surveyors are required to assure themselves that a building is compliant before issuing certification. If a building surveyor was unsure whether a product or technique is NCC compliant, they would be required to actively seek out the information, test reports and expert opinion they require to be satisfied of compliance. The Implementation Team is currently working towards a number of reforms intended to make this assessment easier for building surveyors as part of other BCR recommendations.

A building surveyor who assumes a new product or technique is compliant due to the absence of any evidence to the contrary, would generally not be considered to be exercising reasonable care and diligence.

4.2.4 Duty not to uncritically accept the work of others

An effect of the duty to seek out relevant facts before making a decision, is a duty to ensure that facts and information obtained from third parties are a reliable basis for that decision.

A duty not to uncritically accept the work of others would not mean that building surveyors are required to interrogate experts or reproduce their work. Rather, it

means that building surveyors should make reasonable efforts to assure themselves that documents which purport to demonstrate NCC compliance really do demonstrate this, and that a person who presents themselves as an expert actually is one.

The South Australian code provides that “*a person undertaking a statutory function must ... ensure that when certified documentation is received from an independent technical expert, the person providing the certification is appropriately qualified and the certification is supported by adequate documentation.*” Alternatively, the ACT code which combines this duty with the duty to actively seek out facts, provides that a “*building surveyor must take all reasonable steps to obtain all relevant facts and information to perform a service or function, including seeking advice from other licensees or design and construction practitioners with relevant competency or expertise, where required to satisfactorily perform the service or function.*”

Proposed Wording: *A building surveyor who relies on documentation or information from someone else to make a decision in relation to a statutory function must take reasonable steps to assure themselves, as relevant, that the documents or information actually demonstrates compliance and that any opinion is independent, reliable and accurate.*

This obligation would mean that a building surveyor who relies on a third party must assure themselves that the information they are relying upon is reliable, genuine, current and relevant.

For example, if supplier tells a building surveyor that a product has been tested as compliant against the relevant Australian Standard, the building surveyor would be expected to request a copy of the test report and confirm that the product was tested to, and passed, the relevant standard for its use in that building. Similarly, if a building surveyor relied upon the opinion of a structural engineer as to whether a Performance Solution was appropriate, they would be expected to assure themselves that this person is a qualified and, if required in that jurisdiction, registered or licensed appropriately.

4.2.5 Duty to be responsible for the work of employees and subcontractors

The duty to exercise due care and diligence should extend to those working under a building surveyor. Some building surveyors rely on employees and sub-contractors to perform inspections, calculations and paperwork on their behalf, and if these people do not act in accordance with a duty of care, the impact on owners, occupants and others can be significant.

As the draft code of conduct would apply personally to building surveyors, its extension to others can be complicated. One approach is to require proper procedures and training. For example, the RICS code requires firms regulated by RICS to “*have in place the necessary procedures to ensure that all its staff are properly trained and competent to do their work.*” Alternatively, building surveyors can be held accountable for the actions of subordinates, which is the approach in Tasmania and the ACT, which require building certifiers to “*be accountable for the supervision, competence and conduct of staff and contractors whom they employ or contract with to assist them in fulfilling their functions as a building surveyor.*” Both approaches are potentially workable, although the latter may work better when applied to individuals.

Proposed Wording: *A building surveyor who relies on staff members or contractors to assist them in performing a statutory function is responsible for ensuring that they are properly trained, sufficiently competent and adequately supervised to provide this assistance to the level consistent with the building surveyor’s duty to exercise reasonable care and diligence.*

This obligation would mean that building surveyors have a duty to ensure that those who assist them in the performance of a statutory function are trained, competent and supervised to the level required to meet the building surveyor’s obligations. In effect, the mistake of a subordinate is attributable to the building surveyor unless they can demonstrate they took reasonable actions to prevent that outcome.

For example, a building surveyor who asks an employee to manage the records on a project should ensure the employee understands the building surveyor’s record management system and their duty to maintain records (discussed below).

4.2.6 Duty to maintain confidentiality

Building surveyors regularly handle information which is commercially sensitive. An unauthorised disclosure of this information can harm clients, other building practitioners and the public interest by discouraging future disclosures. As a result, confidentiality forms part of a building surveyor's duty of care to clients.

This duty may conflict with other duties. For example, a duty of confidentiality can conflict with a duty to act in the public interest when a client refuses to address non-compliance. As a result, it is critical that the duty of confidentiality is caveated to the extent necessary to protect the public interest.

While confidentiality requirements are common in existing codes, only some apply the type of caveat the Implementation Team considers necessary. SA provides that: *“an accredited professional must not disclose information acquired in the course of their professional work except where consent of the relevant person has been granted or where there is a legal or professional duty to disclose such information”* and a similar caveat exists in the AIBS code of conduct. Alternatively, the NT provides that building surveyors *“must not use or disclose confidential information obtained in the course of their work for a client for their personal or another party's benefit. Exceptions to this general duty include disclosure with the client's free and informed consent, and disclosure authorised or required by law.”*

Proposed Wording: *A building surveyor must not disclose confidential information obtained in the course of performing statutory functions except where the relevant person has granted consent, or there is a legal or professional duty to disclose the confidential information (including as required by this code).*

Whether information is confidential depends on context. A building surveyor's contract may specify specific information to be confidential. Alternatively, information may become confidential due to its content and the context in which it is provided. For example, if a building surveyor is provided by a supplier with product specifications labelled “confidential” it would be reasonable to assume this is confidential information.

This duty would mean that building surveyors can disclose confidential information with the explicit or implicit consent of the person who owns the confidential

information or where the building surveyor is subject to a duty to disclosure. For example, where a building surveyor is required under this code to disclose reasonable suspicions of non-compliance to regulators they must disclose relevant information even if confidential.

4.2.7 Duty to record the reasons for decisions

A duty to record reasons for decisions is a critical element of the obligation to act in accordance with a duty of care, because a building surveyor's records are the proof they acted with reasonable care and diligence in the event of an audit.

The Implementation Team has identified three common aspects to the duty to maintain records.

- The first aspect is a duty to properly document the reasons for decisions. For example, the Queensland code requires certifiers "*clearly document reasons for building certifying decisions*" and the Explanatory statement adds to this by providing that documented reasons must include the reasons for the decision and the evidence relied upon.
- The second aspect is a duty to ensure records are clear and, if relevant, in the prescribed format. For example, the ACT code provides that building certifiers must "*ensure that all documents relied on in the performance of a service or function, or given to the Construction Occupations Registrar, are clear and legible, and if the Construction Occupations Registrar has prescribed a format the document must be given in, is in the prescribed format.*"
- The final element is a duty to securely maintain these records for a certain period of time. For example, the ACT code requires building surveyors to "*create and keep records in accordance with relevant Acts and this code.*"

Proposed Wording: *A building surveyor must clearly and adequately document the reasons for decisions on statutory function matters and maintain these records in an accessible format for the duration of their statutory warranty period.*

The practical implication of this duty is that building surveyors would be required to retain sufficient information to enable another building surveyor to replicate their conclusions and understand their reasoning in the event of an audit. At a minimum, it is expected that this would require building surveyors to ensure their records, whether electronic or paper, are legible, secure and clearly named and filed. It is

envisioned that state and territory regulators may impose additional specifications, such as setting a specific format in which records must be stored.

4.3 Duty to provide statutory functions free from a conflict of interest

The BCR raised concern over the independence of building surveyors, especially given the potential for a mutually dependent relationship to develop over time amongst building surveyors, developers, designers and builders. This concern resulted in BCR recommendation 9 that “*each jurisdiction establishes minimum statutory controls to mitigate conflict of interest and increase transparency of engagement and responsibilities of private building certifiers.*” One way of imposing statutory controls on conflicts of interest is to prohibit conflicts of interest in the code of conduct.

Under a private certification model there is an inevitable potential for a conflict of interest to arise. As noted in the Review of the Building Act 1975 and building certification in Queensland (Wallace Report), “*the very fact that private certifiers are engaged and more often than not paid by the persons they are statutorily bound to police creates a potential conflict of interest.*”⁵ Therefore, it is important to understand that the objective here is not to prohibit all potential conflicts of interest, but rather to manage the risks within the existing structure of private building certification.

As noted above, there are significant differences in how different jurisdictions deal with conflicts of interest. Queensland and Tasmania prohibit building surveyors from providing certification where there is a *potential* conflict of interest, while SA prohibits *real or perceived* conflicts (the AIBS uses similar language of *actual or perceived*). While this may appear to be merely semantic differences, in legal terms there is a big difference between prohibiting potential, perceived, actual or real conflicts of interest.

The preliminary view of the Implementation Team is that an objective standard, based on whether a reasonable person (i.e. the regulator), aware of the relevant facts, would conclude that there was a conflict of interest is appropriate. This is

⁵ Andrew Wallace *Review of the Building Act 1975 and building certification in Queensland: Final report of discussion paper* (2014) p. 62: <https://www.hpw.qld.gov.au/SiteCollectionDocuments/TheWallaceReport.pdf>.

because an objective standard is much easier for regulators to apply and such a standard directs building surveyors to consider how the regulator would view their relationships.

A number of codes include a positive duty on building surveyors to actively avoid conflicts of interest. For example, the NSW code provides “*a registered certifier must take all reasonable steps to manage and avoid conflicts of interest*” and the RICS requires members to “*avoid conflicts of interest*”. The Implementation Team believes a positive duty should also be included to make clear that building surveyors should avoid becoming involved in situations which could give rise to a conflict.

Proposed Wording: *A building surveyor must take all reasonable steps to avoid conflicts of interest and must not perform a statutory function where a reasonable person would conclude there is a real risk that their decision could be influenced by an actual or potential conflict of interest.*

For the avoidance of doubt, the engagement of a building surveyor to provide private certification or another statutory function would not, in and of itself, constitute a conflict of interest. Nor would acting in the public interest (as required by the primary obligation) constitute a conflict of interest.

This duty would mean that building surveyors would generally be required to:

- Refuse offers from clients and other building practitioners that could be seen as influencing their decisions. For example, attending a client’s Christmas party, accepting an offer to watch a sporting event for free from a corporate box, or accepting free tickets to an industry conference could be seen by a reasonable person as potentially influencing a building surveyor.
- Refuse to provide statutory functions where the building surveyor has a personal or family interest. For example, a building surveyor should not provide certification for a business they hold shares in or for an apartment complex a family member has bought into.
- Resign when an unexpected conflict of interest arises. For example, if a building surveyor becomes aware during a project that the lead builder has engaged a family member as an employee, they would need to resign or transfer responsibility for statutory functions to another building surveyor.

4.3.1 Duty not to act where there is a reasonable apprehension of bias

Alongside a general prohibition on acting under a conflict of interest, a specific prohibition on providing statutory functions where a reasonable person would conclude that the building surveyor is biased should also be provided. The reason for separately focusing on bias is that there is a tendency to narrowly interpret conflicts of interest as limited to financial relationships, while bias is generally understood to include non-financial factors such as friendship, animosity and personal beliefs.

There are few explicit prohibitions on acting when subject to bias in existing codes. One example is the South Australian code which provides that: “*an accredited professional must always have regard to any affiliation, disposition or any material, pecuniary or other interest that would lead to a reasonable apprehension that the accredited professional may be biased in carrying out any function or duty of their professional role.*” The NSW code is similar but goes further, stating “*where an accredited certifier has an affiliation, disposition or any material, pecuniary or other interest that would lead to a reasonable apprehension that the accredited certifier may be biased in carrying out an aspect of his or her professional role, he or she shall not carry out that aspect*”

Proposed Wording: *A building surveyor must not perform a statutory function where a reasonable person would conclude that they would be biased in performing this role due to an affiliation, disposition or any material interest.*

Bias may make someone positively or negatively inclined, and the use of the phrase ‘an affiliation, disposition or any material interest’ is intended to make clear that the source of bias is irrelevant. As a result, a positive bias resulting from shared sporting affiliations could be just as relevant as negative bias due to a difference of opinion.

A pre-existing relationship or difference in personal values would not, in and of itself, mean a building surveyor cannot provide a statutory function. The critical question is whether a reasonable person (e.g. the regulator) would conclude that the strength of the relationship or inclination results in a situation where a building surveyor cannot be expected to perform their role in an impartial manner. A reasonable person would

assume that a building surveyor is capable of a certain level of professional detachment.

For example, while a reasonable person would assume a building surveyor would be influenced if engaged to certify their parent's new house, a building surveyor who happens to support the Carlton Football Club would generally not be presumed to be biased when providing certification services on the Collingwood Football Clubhouse despite their potential disposition towards the rival team.

4.3.2 Duty not to misuse position for improper personal advantage

The misuse of a building surveyor's position for personal advantage would generally be seen as a conflict of interest and not in the public interest. However, for emphasis and clarity, the Implementation Team believes this prohibition should be made explicit as a sub-obligation.

The NSW, SA, ACT and AIBS codes all contain similar prohibitions on building surveyors misusing their positions. The AIBS code provides a good example of the common approach, stating that building certifiers must "*not use their position or power for the purpose of obtaining, either directly or indirectly, any preferential treatment or other improper advantage for themselves or for any other person.*"

Proposed Wording: *A building surveyor must not use their role in providing a statutory function for the purpose of obtaining, either directly or indirectly, any preferential treatment or other improper advantage for themselves or for any other person.*

For the avoidance of doubt, the engagement of a building surveyor under standard terms and conditions to provide private certification would not, in and of itself, constitute preferential treatment or an improper advantage.

This duty is focused on the risk that building surveyors may misuse their statutory role to obtain an inappropriate benefit. It is not intended to prevent building surveyors from benefiting from their professional skills and experience more broadly. For example, a building surveyor who is offered a role advising a former client because the client was impressed with their professionalism when performing statutory

functions would not breach this prohibition. However, a building surveyor who threatened a client that they would withhold certification until they are offered another job or benefit would be in breach.

4.3.3 Duty not to provide statutory functions where otherwise engaged to perform work or services on a project

The BCR raised concerns that some building certifiers are performing multiple roles during the design, build and certification phases, creating a risk that they may be signing off on their own work. In particular, the BCR raised concerns over the involvement of building surveyors in the development of building designs and Performance Solutions, recommending that building surveyors be prohibited from engaging in these activities if they are also providing certification for that building. This is because where a building surveyor is certifying their own work they will have an incentive to ignore or hide mistakes and may fail to notice problems that an outside perspective would bring.

Several stakeholders have stressed that it is important to continue to allow building surveyors to provide clients with advice on how to achieve compliance or be involved in the development of designs or Performance Solutions. Therefore, it is important to stress that the intention is to only prohibit the same building surveyor from being engaged to develop and then certify their own work.

Exactly where to draw this line is something the Implementation Team would welcome feedback on. For example, where two building surveyors in the same firm are engaged, one to provide advice on the design of a building and another to perform the statutory functions, would this be appropriate? Would the establishment of information barriers in a firm (e.g. an internal procedure prohibiting the two employees from discussing their respective work with each other) change this conclusion?

The ACT and Tasmania are currently the only jurisdictions that prohibit multiple engagements. In Tasmania's case, this is done under section 28 of the *Building Act 2016* which is referenced in the explanatory statement to its code of conduct. As the

language used in the legislation does not align with style used in this draft code, the Implementation Team has developed its own proposed wording.

Proposed Wording: *A building surveyor must not perform a statutory function in relation to a building if they have been directly or indirectly engaged by the client or another person to assist with the design of that building or the design of a Performance Solution used in that building.*

This obligation means that building surveyors can be involved in the design of a building or the development of a Performance Solution, however this involvement excludes them from performing a statutory function on that building. They cannot be engaged to check their own work. This includes involvement in design changes or Performance Solutions that take place during construction.

A building surveyor would be able to provide general advice to a client on what changes are required to achieve compliance with the NCC. However, if they are paid for this advice or suggest a specific solution (as opposed to providing general guidance), then they would not be permitted to provide statutory functions and must transfer their responsibility to another building surveyor.

4.4 Duty of honesty

Public confidence in the certification process depends on the public being able to trust that building surveyors will carry out their role honestly. As a result, dishonest conduct by a building surveyor constitutes unprofessional conduct and ought to be prohibited. Prohibitions on dishonesty are common across existing codes, but there are significant differences between their scopes.

One difference is whether building surveyors are prohibited from being dishonest beyond the performance of statutory functions. Currently, the codes in Queensland, Tasmanian and NSW only require honesty when performing statutory functions, while the NT, AIBS and draft Victorian codes cover professional activities generally. The ACT sits in the midpoint, covering licensable functions. For example, the draft Victorian code requires that a *“building surveyor must act with integrity, honesty, objectivity and impartiality in all professional and business relationships and activities.”*

Another difference is whether the duty is negative (e.g. an obligation not to something) or positive (e.g. an obligation to do something). A negative duty of honesty is provided in the draft NSW *Building and Development Certifiers Regulation 2019*, which provides that “*a registered certifier must not misinform or mislead any person or body about any matter relating to the carrying out of certification work*”. Alternatively, the AIBS impose a positive duty on members to “*inform their client of any matters or changes that may affect the rights or authority of the accredited person to carry out their statutory functions.*”

The Implementation Team has formed a preliminary view that the duty of honesty should:

- relate only to statutory functions to be consistent with other provisions in the draft code of conduct;
- be expressed in the negative, that is, specify what the building survey should not do; with the exception of
- containing a positive duty to inform regulators of events which call into question a building surveyor’s suitability to perform public functions.

However, we welcome alternative views and note that some stakeholders have already indicated a strong preference for the prohibition to apply to all actions undertaken in a professional context given the importance of honesty to public confidence.

The existing codes of conduct which contain a negative duty of honesty use a variety of different terms, variously prohibiting statements or acts which are misinforming, misleading, misrepresenting, dishonest, false or deceptive. The terminology of ‘misleading and deceptive conduct’ is preferred for three reasons:

- Firstly, misleading and deceptive or very similar language is already used in several codes of conduct. For example, the NT code provides that “*a practitioner must promote their services, qualifications and experience in an accurate and fair manner, which is not misleading or deceptive.*” SA requires that “*an accredited professional must not provide any information, statement or document knowing it to be false or misleading or omit to provide any information, statement or document knowing that the omission results in a false or misleading impression.*” NSW’s draft regulations provide that a “*registered certifier must not misrepresent the registered certifier’s qualifications, experience or expertise to any person or body.*” Finally, AIBS requires “*Members and accredited persons must, at all times not engage in*

any anti-competitive behaviour or provide any false or misleading information or statement (through act or omission) in advertising their professional services”.

- Secondly, the use of the terminology ‘conduct’ makes clear that it is not just oral or written statements that must not be misleading and deceptive, but actions in general. This allows the wider context and behaviour of building surveyors to be taken into account.
- Finally, the meaning of misleading and deceptive conduct is well understood due to its use in competition law, such as in the *Competition and Consumer Act 2010* (Cth). This means there is extensive case law and written guidance on what the concepts means in practice.

Proposed Wording: *A building surveyor must not engage, whether by act or omission, in misleading or deceptive conduct in connection with the performance of a statutory function.*

This is a general prohibition and would prohibit acts such as:

- Misrepresenting a building’s compliance with the NCC, such as certifying a building as compliant when it is not or falsifying the records of a decision.
- Seeking to deceive potential clients about a building surveyor’s capabilities, qualifications, experience or expertise to perform statutory functions.
- Misrepresenting the requirements of the NCC or the role of building surveyors under legislation.

The Australian Competition and Consumer Commission (ACCC) advises that the most important criteria when determining whether conduct was misleading or deceptive is whether the overall impression created was false or inaccurate. This means that conduct can be misleading and deceptive even if it was not intended to be and that a positive obligation to correct a misunderstanding can arise if previous conduct has created a false or misleading impression. For example, if a building surveyor realises during discussions about an upcoming project that a potential client has misunderstood their qualifications and experience, they may be required to correct this misunderstanding, even if they did not intend to mislead the potential client.

4.4.1 Positive duty to disclose information to regulators

A positive duty to disclose information is proposed to ensure regulators are made aware of information which calls into question whether a building surveyor's registration remains appropriate.

Several codes of conduct contain positive obligations to disclose information. For example, as referred to above, the AIBS code requires members to disclose changes in their capacity to undertake statutory functions to clients. Alternatively, the ACT code of practice requires building surveyors to make all reasonable efforts to help a member of the public understand their entitlements, and any requirement the person is obliged to meet, under ACT laws. The SA code of conduct requires building surveyors to advise the government if they are subject to a formal investigation into, or found to have breached, another code of conduct; found guilty of a breach of any legislation related to planning, building or a development related matter; or subject to a claim against their professional indemnity insurance policy.

The SA approach makes sense in the context of a national code of conduct. After all, if one regulator is concerned by a building surveyor's conduct, it is likely that other regulators would also be concerned, especially if the building surveyor operates in their jurisdiction. As a result, the SA approach has been incorporated into the draft code of conduct.

Proposed Wording: *A building surveyor must notify regulators in every state and territory where they are registered if they:*

- *are under formal investigation and/or sanction for a breach of this code of conduct in another jurisdiction;*
- *have been found to have breached legislation related to planning, building or development in a jurisdiction; or*
- *have a claim accepted against their professional indemnity insurance policy.*

This would mean that building surveyors have a positive duty to inform the regulator, in any state or territory they practice in, if they are investigated or sanctioned for a breach of the code in another jurisdiction; found by a court or tribunal to have breached any requirements in relation to planning, building or development requirements; or have a claim accepted against their professional indemnity

insurance (i.e. their insurer pays out a claim). The notification would need to be provided within a reasonable time.

4.5 Duty to treat people with respect

The final obligation proposed is to treat everyone with respect. No code currently contains an explicit duty to treat people with respect. However, the Implementation Team consistently identified obligations drawn from a premise that building surveyors should treat everyone with respect.

The Implementation Team believes that there are two key elements to such a duty. Firstly, a requirement to be professional and courteous. For example, the AIBS code of conduct requires certifiers to “*be polite, courteous and professional in the professional practice.*” The draft Victorian code provides that building surveyors must be “*polite, courteous, appropriate and professional in all your dealings as a building surveyor.*” Finally, the Queensland code requires building surveyors to “*abide by moral and ethical standards expected by the community.*” The second element is an obligation to avoid unfair or discriminatory practices. For example, the NSW code of conduct requires that certifiers “*must act with honesty, integrity and impartially, and must not unreasonably discriminate against any person or organisation*” with similar language used by SA. Alternatively, the draft Victorian code cuts across several duties, providing building surveyors must “*not engage in fraudulent, misleading, dishonest, corrupt, or criminal conduct, or exert undue influence, intimidate, bully, harass or pressure any person.*”

It is worth considering whether the duty to treat people with respect should only apply to acts related to statutory function or expand to cover all professional activities. An expanded scope may be justified for this duty given the impact on the public reputation of the profession if building surveyors regularly engaged in discrimination or discourteous behaviour.

Proposed Wording: *A building surveyor must be polite, courteous and professional to everyone in connection with the performance of a statutory function. They must not engage in discrimination.*

This duty would require building surveyors, in connection with their statutory role, to avoid conduct which is:

- Offensive or derogatory towards others;
- Discriminatory on the basis of gender, race, disability, sexuality or religion; or
- Otherwise likely to bring the profession into disrepute.

This obligation can be summarised as a duty to avoid behaviours unbecoming of a professional engaged to provide public functions such as certification.

The prohibition on discrimination would not prevent a building surveyor from distinguishing between differing opinions or advice on the basis of expertise or competency. For example, when seeking an expert opinion on whether a Performance Solution is acceptable, a building surveyor should prefer the views of an expert to a layperson.

4.5.1 Duty to have a system in place for owners to raise issues

The BCR expressed concerns that there is often no direct relationship between building surveyors and the eventual building owner. One consequence of this is that there is not necessarily any way for owners to raise concerns with the building surveyor who certified their property. As a result, the BCR recommended that codes of conduct “*have mechanisms in place to encourage owners to advise of any concerns about noncompliant work.*”

Some stakeholders have advised the Implementation Team that they are unconvinced of the need for owners to raise concerns with building surveyors. Some government stakeholders would prefer concerns be raised directly with regulators, while some industry stakeholders would prefer issues be raised with developers or builders. However, contact may potentially benefit both owners and building surveyors, at least until the implementation of BCR recommendation 20, that a comprehensive building manual for commercial buildings be lodged with building owners and made available to successive purchasers.⁶ Benefits may include greater understanding by owners of the reasoning behind and intended operation of

⁶ An effective building manual development and issuance process would remove many of the concerns that informed the recommendation of this contact process in the BCR.

Performance Solutions, and the opportunity for building surveyors to address owners' concerns before they escalate to a complaint.

Stakeholders have raised concerns that providing owners with an opportunity to advise them of non-compliant work creates the potential for contractual issues, such as disputes over the quality of work, to become entangled with the issue of certification and compliance. It is important that any duty to facilitate enquiries is focused on matters relevant to statutory functions.

Some stakeholders have suggested that the duty to allow issues to be raised should extend beyond building owners to consumers generally, such as renters and boards.

The Implementation Team welcomes stakeholders' views on whether they consider this duty would be useful, and if so, under what conditions.

No code currently imposes this requirement, so the proposed wording has been developed by the Implementation Team.

Proposed Wording: *A building surveyor must have a system in place for receiving and managing enquiries about potential non-compliant work in buildings they have certified. They must make reasonable efforts to ensure building owners are aware of this system.*

This obligation would require building surveyors, at a minimum, to have:

- A process for building owners to raise concerns over non-compliance with them directly, such as a contact form or details on their website; and
- An established procedure for managing and resolving enquiries. This would include a system for determining and locating relevant documents, preparing responses and issuing them to owners within a reasonable time. It should also include a process for re-directing non-relevant enquires, such as complaints over building work unrelated to NCC compliance.

4.5.2 Duty to have a process for responding to complaints

As part of the duty to treat everyone with respect, it is critical that building surveyors respond to any complaints in a prompt and professional manner. The BCR

recommended that “*building surveyors must have policies and procedures for the proper management of complaints from owners, adjoining owners, builders and the regulator.*”

The question of whether codes of conduct should prescribe a process for handling complaints is contested. Some stakeholders have questioned whether regulators should proscribe how private businesses manage complaints. However, it is the preliminary view of the Implementation Team that if someone is performing a public function then it is appropriate to require them to have a procedure for receiving, handling and resolving complaints. An effective system of handling complaints also has the potential to reduce the workload of regulators by encouraging the resolution of potential conflicts before they proceed to a formal complaint to the regulator.

If we accept that building surveyors should have a process for responding to complaints, the next question is: how much of this process should be specified in the code? The RICS code requires firms regulated by RICS to “*operate a complaints-handling procedure and maintain a complaints log. The complaints handling procedure must include an Alternative Dispute Resolution (ADR) mechanism that is approved by the Regulatory Board.*” In contrast, in the ACT the *Construction Occupations (Licensing) Building Surveyors Code of Practice 2019* sets out a number of minimum requirements for complaints policies, including that they must:

- explain how a person can make a complaint;
- identify the steps the building surveyor will take in discussing, addressing and managing complaints;
- indicate some of the solutions the building surveyor offers to manage complaints;
- apply to complaints made during, and up to 10 years after completion of, the relevant services;
- include processes for responding to complaints in a reasonable time; and
- include processes for recording the details of complaints, including any action taken in relation to the complaint.

Alternatively, the NT building practitioners code provides that: “*practitioners must establish a written procedure for timely and respectful handling of complaints with a view to achieving resolution of the complaint as quickly as possible and without resorting to litigation wherever reasonably possible.*”

The Implementation Team has formed a preliminary view that the obligation on building surveyors should be simple, but backed by clear guidance about what the obligation means in practice.

Proposed Wording: *A building surveyor must have in place a policy for receiving, managing and (where possible) resolving complaints. The policy must be in writing, available on request, and set out a specific process for resolving complaints within a reasonable timeframe.*

This duty would mean, at a minimum, that building surveyors must establish a system for handling complaints about their work on statutory functions which is:

- Recorded in writing;
- Able to be provided to others upon request; and
- Sets out a reasonable process for managing and resolving complaints.

The duty to be polite, courteous and professional does not mean that building surveyors need to agree with every complainant or accept abuse. There will be complaints that they cannot resolve or should refer elsewhere, such as those related to building quality. The key point is that building surveyors should try to resolve complaints about their work in a fair and respectful manner. A failure to do so could be considered a breach of the code.

4.5.3 Duty to work effectively and cooperatively with other building professionals

As part of the duty to treat everyone with respect, there should be a specific duty to work effectively and cooperatively with other building professionals.

The preliminary view of the Implementation Team is that there should be two key elements to this sub-obligation. Firstly, building surveyors should perform statutory functions in a reasonable manner which avoids unreasonable or unnecessary impositions on other building professionals. Secondly, when performing statutory functions, building surveyors should ensure that everyone's roles and responsibilities under legislation are understood.

The Implementation Team's intention with this duty is to address concerns that have been raised that a small subset of building surveyors may mistreat other

professionals or deliberately encourage misunderstandings about their role in the certification process among other practitioners. While such activities would breach other prohibitions in the draft code, this sub-obligation would make it clear that such conduct is unacceptable.

The ACT code captures the second element reasonably closely, when it provides that building surveyors must, if *“dealing with a member of the public, including a building or design practitioner—make all reasonable efforts to help the person to understand the person’s entitlements, and any requirement the person is obliged to meet, under a relevant territory law”*. However, no current code perfectly captures the first aspect of the duty. Some potentially comparable obligations are in the draft Victorian code which requires that building surveyors engage with *“clients, the [Victorian Building Authority], other practitioners and any other person in a collaborative and cooperative manner”* and that they be *“open, fair and transparent in your dealings with ... any other person when carrying out your functions.”* The AIBS code prohibits members from committing *“any act or omission that would bring the profession into disrepute.”* Drawing from these examples, the Implementation Team has developed a hybrid.

Proposed Wording: *A building surveyor must work cooperatively with other building practitioners. This includes avoiding imposing inappropriate impositions and demands on others, and ensuring their role and responsibilities are properly understood by others.*

Nothing in this obligation should be taken as indicating that building surveyors should compromise the performance of their statutory functions or breach their primary obligation to act in the public interest and comply with the law.

This obligation would require building surveyors to minimise the disruption and inconvenience the performance of their statutory functions causes to other building professionals. For example, a building surveyor must not deliberately delay providing certification for a compliant building as part of a personal grudge against other practitioners working on the building.

APPENDICES



Appendix A Draft National Model Code of Conduct

1. The primary obligations of a building surveyor is to act in the public interest and comply with the law when performing a statutory function.
 - 1.1. A building surveyor must notify the relevant government official where they have a reasonable suspicion that fraudulent practices or a significant departure from approved documentation has occurred in relation to a building for which they are, or have been, engaged to provide a statutory function.
 - 1.2. A building surveyor must interpret and apply the National Construction Code in the public interest.
2. A building surveyor must exercise reasonable care and diligence when performing statutory functions.
 - 2.1. A building surveyor must only perform statutory functions that are permitted under their registration or licence and within their professional competency.
 - 2.2. A building surveyor must maintain their professional competencies, including participating in relevant continuing professional development.
 - 2.3. A building surveyor must take reasonable steps to obtain all relevant facts and information before carrying out a statutory function.
 - 2.4. A building surveyor who relies on documentation or information from someone else to make a decision in relation to a statutory function must take reasonable steps to assure themselves, as relevant, that the documents or information actually demonstrates compliance and that any opinion is independent, reliable and accurate.
 - 2.5. A building surveyor who relies on staff members or contractors to assist them in performing a statutory function is responsible for ensuring that they are properly trained, sufficiently competent and adequately supervised to provide this assistance to the level consistent with the building surveyor's duty to exercise reasonable care and diligence.

- 2.6. A building surveyor must not disclose confidential information obtained in the course of performing statutory functions except where the relevant person has granted consent, or there is a legal or professional duty to disclose the confidential information (including as required by this code).
- 2.7. A building surveyor must clearly and adequately document the reasons for decisions on statutory function matters and maintain these records in an accessible format for the duration of their statutory warranty period.
3. A building surveyor must take all reasonable steps to avoid conflicts of interest and must not perform a statutory function where a reasonable person would conclude there is a real risk that their decision could be influenced by an actual or potential conflict of interest.
- 3.1. A building surveyor must not perform a statutory function where a reasonable person would conclude that they would be biased in performing this role due to an affiliation, disposition or any material interest.
- 3.2. A building surveyor must not use their role in providing a statutory function for the purpose of obtaining, either directly or indirectly, any preferential treatment or other improper advantage for themselves or for any other person.
- 3.3. A building surveyor must not perform a statutory function in relation to a building if they have been directly or indirectly engaged by the client or another person to assist with the design of that building or the design of a Performance Solution used in that building.
4. A building surveyor must not engage, whether by act or omission, in misleading or deceptive conduct in connection with the performance of a statutory function.
- 4.1. A building surveyor must notify regulators in every state and territory where they are registered if they:
- are under formal investigation and/or sanction for a breach of this code of conduct in another jurisdiction;
 - have been found to have breached legislation related to planning, building or development in a jurisdiction; or

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- have a claim accepted against their professional indemnity insurance policy.
5. A building surveyor must be polite, courteous and professional to everyone in connection with the performance of a statutory function. They must not engage in discrimination.
- 5.1. A building surveyor must have a system in place for receiving and managing enquiries about potential non-compliant work in buildings they have certified. They must make reasonable efforts to ensure building owners are aware of this system.
- 5.2. A building surveyor must have in place a policy for receiving, managing and (where possible) resolving complaints. The policy must be in writing, available on request, and set out a specific process for resolving complaints within a reasonable timeframe.
- 5.3. A building surveyor must work cooperatively with other building practitioners. This includes avoiding imposing inappropriate impositions and demands on others, and ensuring their role and responsibilities are properly understood by others.

Appendix B Draft Explanatory Statement

- 1. The primary obligations of a building surveyor is to act in the public interest and comply with the law when performing a statutory function.**

The most important and overarching obligation incumbent on building surveyors when performing statutory functions such as certification is to act in the public interest and comply with relevant legislation and regulation.

Acting in the public interest means that building surveyors must put the interest of the public in assessing whether buildings are safe and compliant ahead of both their own private interests and the interests of their clients, colleagues and other practitioners.

Building surveyors must not issue certification if they are unsure whether a building complies with the National Construction Code (NCC) and relevant state and territory legislation.

Example 1: *A building surveyor must notify the relevant government official where they have a reasonable suspicion that fraudulent practices or a significant departure from approved documentation has occurred in relation to a building for which they are, or have been, engaged to provide a statutory function.*

The states and territories will advise building surveyors as to who is the relevant regulator for reporting.

A significant departure from approved documentation would be one that could endanger the safety of occupants or the general public. For example, the use of a lower quality concrete which is not rated to sustain the required load.

A suspicion would be reasonable when it is supported by evidence, even if the evidence is not conclusive. For example, falsified product data test sheets, unapproved changes to a building's structural design or product substitution could support a reasonable suspicion.

Where a client or other building practitioner rectifies non-compliance raised by the building surveyor, this is not required to be reported to the regulator.

Example 2: *A building surveyor must interpret and apply the National Construction Code in the public interest.*

Building surveyors must interpret and apply the NCC in light of its objects and purposes such as safety and health; amenity and accessibility, and sustainability in the design, construction, performance and liveability.

Where a building surveyor is uncertain as to the correct interpretation to apply, they should consult explanatory and guidance materials (e.g. the Guide to Volume 1 of the NCC) and prefer the interpretation which aligns with the objectives and purpose of the NCC and relevant state and territory legislation.

2. A building surveyor must exercise reasonable care and diligence when performing statutory functions.

When performing statutory functions such as certification, building surveyors must act as if they are subject to a legal duty of care towards their clients, other practitioners, future building owners and occupants and the public in general (which they often will be as a matter of law). That is, building surveyors must act with reasonable care and diligence.

The code provides examples of what the duty to act with reasonable care and diligence means in practice which are discussed as examples below. These examples are not exhaustive. Additional activities may also be held to constitute a failure to act with reasonable care and diligence.

Example 1: *A building surveyor must only perform statutory functions that are permitted under their registration or licence and within their professional competency.*

Building surveyors must not perform statutory functions which are:

- beyond their registration or license conditions in the relevant jurisdiction; or
- beyond their qualifications, skills or experience.

For example, if a building surveyor holds an unrestricted license, but has never worked on a class 9 building, then the certification of a hospital would generally be considered outside their experience (even if within their licence) and would therefore be beyond their professional competency.

If a building surveyor is unsure as to whether they have the competencies required to perform a statutory function they should refuse to accept the relevant engagement.

Example 2: *A building surveyor must maintain their professional competencies, including participating in relevant continuing professional development.*

Whether a continuing professional development (CPD) course or scheme is “relevant” will be advised by state and territory regulators.

Where a building surveyor possesses a specialised professional competency and relies on this competency in their practice, they would be expected to maintain this competency. For example, a building surveyor who is also a qualified engineer would be expected to also participate in the Engineers Australia CPD scheme (or equivalent). Alternatively, a building surveyor who puts themselves forward as an expert in cladding issues would be expected to stay up to date with the latest products, techniques and standards.

Where a building surveyor fails to maintain a specialised competency, they should cease to personally perform statutory functions which require that skill and cease any promotional activities which refer to it.

Example 3: *A building surveyor must take reasonable steps to obtain all relevant facts and information before carrying out a statutory function.*

Building surveyors must assure themselves that a building is compliant before issuing certification. If a building surveyor is unsure whether a product or technique is compliant, they should actively seek out the information, test reports and expert opinion they need to be satisfied that it is compliant.

Where there are specific jurisdictional requirements for product information to be made available to building practitioners, building surveyors should understand these requirements and seek out the information others are required to make available.

A building surveyor who simply assumed a new product or technique was compliant due to the absence of any evidence to the contrary, would generally not be considered to be exercising reasonable care and diligence.

Example 4: *A building surveyor who relies on documentation or information from someone else to make a decision in relation to a statutory function must take reasonable steps to assure themselves, as relevant, that the documents or*

information actually demonstrates compliance and that any opinion is independent, reliable and accurate.

Building surveyors may need to rely on experts or information produced by someone else (e.g. test report) to determine whether or not a building is compliant. This is perfectly acceptable. However, a building surveyor exercising reasonable care and diligence would be expected to assure themselves that the information they are relying upon is reliable, genuine, current and relevant.

For example, if a building surveyor is told that a product has been tested to the Australian Standard, they should request a copy of the test report and confirm that the product was tested to, and passed, the standard relevant to the intended use of the product.

For example, if a building surveyor relies on the opinion of a structural engineer as to whether a Performance Solution is appropriate, they should assure themselves that the person is a qualified and, in jurisdictions where is relevant, appropriately registered or licensed structural engineer.

Example 5: A building surveyor who relies on staff members or contractors to assist them in performing a statutory function is responsible for ensuring that they are properly trained, sufficiently competent and adequately supervised to provide this assistance to the level consistent with the building surveyor's duty to exercise reasonable care and diligence

Building surveyors may rely on employees and contractors to help them perform statutory functions. However, building surveyors must ensure that anyone who assists them is properly trained, competent and supervised to the level necessary for them to provide this assistance to the standard expected of the building surveyor themselves.

For example, a building surveyor who asks an employee to manage the records on a project should ensure the employee understands the building surveyor's record management system and their duty to maintain records (under sub-obligation 2.7).

Example 6: A building surveyor must not disclose confidential information obtained in the course of performing statutory functions except where the relevant person has

granted consent, or there is a legal or professional duty to disclose the confidential information (including as required by this code).

Information can become confidential in a number of ways. For example, a building surveyor's contract with their client may specify certain information is confidential. Alternatively, information may become confidential due to its content and the context in which it is provided. For example, if a building surveyor is provided by a supplier with product specifications labelled "confidential" it would be reasonable to assume this is confidential information. If a building surveyor is unsure whether information is confidential, they should check with their client or the owner of the information.

Confidential information can be disclosed with consent. Consent may be explicit or implicit. Implicit consent can arise when it is obvious the owner expected it to be passed on to others. For example, if a building surveyor is provided with a confidential test report to demonstrate compliance it is reasonable to assume that test report may be provided to an auditor who reviews a building surveyor's work at a later date.

Confidential information can also be disclosed when it is ordered by a court or required as part of a building surveyors professional duties. This includes the obligation under the code to disclose reasonable suspicions of non-compliance to regulators.

Example 7: *A building surveyor must clearly and adequately document the reasons for decisions on statutory function matters and maintain these records in an accessible format for the duration of their statutory warranty period.*

State and territory regulators may provide additional guidance on what they consider to be adequate documentation and an accessible format.

Minimum professional record keeping practices for building surveyors should ensure:

- Legibility. Recording decisions in indecipherable handwriting or shorthand indicates a failure to exercise due care and diligence;
- Proper naming and filing. A failure to properly file documents is likely to indicate a failure to exercise due care and diligence; and
- Security. Failure to store records safely or maintain a backup is likely to indicate a failure to exercise due care and diligence.

At a minimum, building surveyors should seek to retain sufficient information to enable another building surveyor to replicate their conclusions and understand their reasoning. Put another way, if a building surveyor was subject to an audit, could they easily find the relevant records and would these be able to satisfy an auditor? If not, they are probably not keeping adequate records.

3. A building surveyor must take all reasonable steps to avoid conflicts of interest and must not perform a statutory function where a reasonable person would conclude there is a real risk that their decision could be influenced by an actual or potential conflict of interest.

For the avoidance of doubt, the engagement of a building surveyor to provide a private certification does not, in and of itself, constitute a conflict of interest. This is a normal and acceptable arrangement where a jurisdiction has adopted a private certification model.

A conflict of interest in the context of a statutory functions means a situation where the private interests of a building surveyor (or their immediate friends and family) come into conflict with their duty to act in the public interest (as a result, acting in the public interest would not give rise to a conflict of interest).

There are two aspects to the duty. The first is to actively avoid situations which could give rise to a conflicts of interest. The second is to stop acting if a conflict arises, that is resign or transfer their work to another building surveyor.

It is important to note that the critical question is not whether a building surveyor believes they would be influenced, but whether a reasonable person (e.g. the regulator) would think there was a real risk that the building surveyor could be influenced. This means that building surveyors should:

- Refuse offers from clients and other building practitioners that could be seen as influencing their decisions. For example, attending a client's Christmas party, accepting an offer to watch for free a sporting event from a corporate box, or accepting free tickets to an industry conference could be seen as potentially influencing a building surveyor's decisions.
- Refuse to provide statutory functions where the building surveyor has a personal or family interest in the project. For example, a building surveyor

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should not provide certification for a business they hold shares in or for an apartment if their child has bought an apartment off the plan in that complex.

- Resign when an unexpected conflict of interest arises. For example, if a building surveyor becomes aware part way through a project that the lead builder has engaged a family member as an employee, they would need to step down.

The code of conduct expressly prohibits three examples of a conflict of interest. These are examples of how the general rule applies and do not limit the application of the general rule. Other actions may also constitute a breach of the duty.

Example 1: *A building surveyor must not perform a statutory function where a reasonable person would conclude that they would be biased in performing this role due to an affiliation, disposition or any material interest.*

Building surveyors are required to refuse engagements where a reasonable person would conclude that they would be biased in the performance of their role. For example, a building surveyor who provides certification for a close personal friend or family member would generally be seen as liable to be biased in their favour.

Bias can make someone positively or negatively inclined, and the use of the phrase 'any affiliation, disposition or material interest' is intended to make clear that the source of any bias is irrelevant. As a result, a positive bias resulting from a shared sporting affiliation can be just as relevant as negative bias due to differences over politics.

It is important to note that a pre-existing relationship or difference in values does not, in and of itself, prevent a building surveyor from accepting work. The critical issue is whether a reasonable person (e.g. the regulator) would conclude that the strength of the relationship or inclination means a building surveyor cannot perform their role in a disinterested or impartial manner. In general, a reasonable person would assume a certain level of professionalism from building surveyors. Therefore, the fact that a building surveyor supports the Carlton Football Club would generally not preclude them from providing certification services on the Collingwood Football Clubhouse. However, if the building surveyor had repeatedly and publicly expressed a hatred for the club and its supporters, then this would indicate they held a bias which was very likely to overwhelm their professional detachment.

Example 2: *A building surveyor must not use their role in providing a statutory function for the purpose of obtaining, either directly or indirectly, any preferential treatment or other improper advantage for themselves or for any other person.*

An improper advantage would generally be one that goes beyond the normal commercial compensation (i.e. fee for service) associated with the performance of a statutory function.

An important distinction exists between a building surveyor who benefits from their professional skills and experience and one who benefits from providing a statutory function. For example, a building surveyor who withholds certification to pressure a client into offering them a job would be in breach of the code. However, a building surveyor who is offered a position advising on compliance for a future project by a former client who was impressed by their professionalism is not.

Building surveyors should also note that accepting preferential treatment or any advantage beyond normal commercial compensation would generally indicate they had failed to actively avoid a potential conflict of interest.

Example 3: *A building surveyor must not perform a statutory function in relation to a building if they have been directly or indirectly engaged by the client or another person to assist with the design of that building or the design of a Performance Solution used in that building.*

Building surveyor should not accept roles where they are required to check their own work, even if they were only tangentially involved in the design of a building or the development of a Performance Solution.

Building surveyors may provide general advice to their clients on how to achieve compliance. They should not suggest a specific solution as this will see them reviewing their own advice.

Where a building surveyor was involved in the design of a building or the development of a Performance Solution used on that building they must refuse to accept an engagement to provide statutory functions.

Where a building surveyor who has already been engaged to provide statutory functions for a building is offered an engagement to assist in the redesign of that

building or the development of a Performance Solution (e.g. to address non-compliance raised by the building surveyor) they must either refuse the offer or resign their statutory functions before accepting the engagement.

4. A building surveyor must not engage, whether by act or omission, in misleading or deceptive conduct in connection with the performance of a statutory function.

Building surveyors must be honest at all times in relation to statutory functions. This means not only refusing to certify non-compliant work, but also that they must not:

- Falsify records of their decisions or the supporting evidence;
- Misrepresent the requirements for compliance under the NCC and relevant state or territory legislation;
- Mislead other building practitioners as to their role in the certification process; and
- Seek to deceive regulators and auditors.

When determining whether conduct was misleading or deceptive, the Australian Competition and Consumer Commission advises that the most important question is whether the overall impression created by the conduct was false or inaccurate? This means that conduct can be misleading and deceptive even if it was not intended to mislead or deceive and that a positive obligation to correct a misunderstanding can arise where conduct creates a false impression.

The phrase 'in connection with' is intended to make clear that acts and omissions leading up to or made in reference to a statutory function are covered. For example, a building surveyor who misrepresents their license conditions to a potential client would be in breach.

For example, if a building surveyor realises during discussions on an upcoming project that a potential client has over-estimated their skills and experience, they should correct this misunderstanding. Similarly, a building surveyor who has an unrestricted license, but has never worked on high rise residential building must not tell potential clients that they are experienced managing compliance in high rise buildings even if the purpose of this representation was to obtain design work rather than work performing a statutory function.

In addition to the duty not to engage in misleading or deceptive conduct, building surveyors have a positive duty to disclose certain information to regulators.

Example 1: *A building surveyor must notify regulators in every state and territory where they are registered if they:*

- are under formal investigation and/or sanction for a breach of this code of conduct in another jurisdiction;*
- have been found to have breached legislation related to planning, building or development in a jurisdiction; or*
- have a claim accepted against their professional indemnity insurance policy.*

The duty to notify only applies in jurisdictions where a building surveyor is currently registered (including suspended registrations).

Where a building surveyor is subject to an audit by a jurisdiction this does not need to be reported to other regulators. However, if an adverse finding is made by the regulator as a result of an audit, this would need to be reported to the other regulators.

Where a building surveyor's insurer settles a claim against their professional indemnity insurance out of court this must be reported to relevant regulators. However, where a settlement is confidential, the building surveyor does not need to report the amount or reasons.

5. A building surveyor must be polite, courteous and professional to everyone in connection with the performance of a statutory function. They must not engage in discrimination.

Building surveyors should treat this obligation as applying broadly to their statutory functions. For example, building surveyors should not, in connection with a certification or other statutory function:

- Be offensive or derogatory to others;
- Discriminate on the basis of gender, race, disability, sexuality or religion;
- Ignore complaints about their conduct;
- Impose unnecessary requirements on others; or
- Question the competence of other practitioners without reason.

Where a building surveyor prefers the views of an expert over those of a layperson (non-expert) when making a decision in relation to a statutory function, this is not considered discrimination.

The national code of conduct provides three specific examples of how the general obligation applies in practice. These are provided as examples only and do not limit the application of the general duty.

Example 1: *A building surveyor must have a system in place for receiving and managing enquiries about potential non-compliant work in buildings they have certified. They must make reasonable efforts to ensure owners are aware of this system.*

Building surveyors must have a system which enable building owners (including subsequent building owners) and their representatives to make enquiries in relation to potential non-compliance with their building. At a minimum, this system should include:

- A process for building owners to raise concerns directly with building surveyors, such as a contact form or details made available on their website; and
- A procedure for managing enquiries, including a system for determining and locating relevant documents, preparing a response and issuing it to owners within a reasonable time.

Where a building manual has been produced, it may be sufficient for a building surveyor to refer owners to the relevant section of the manual if that will answer their question.

Example 2: *A building surveyor must have in place a policy for receiving, managing and (where possible) resolving complaints. The policy must be in writing, available on request, and set out a specific process for effectively resolving complaints within a reasonable timeframe*

Building surveyors must have a system to handle complaints from clients, other building practitioners, building owners and the general public. A good complaints handling process helps manage unexpected issues and resolve misunderstandings before they proceed to a formal complaint to the regulator. A complaints handling system must, at a minimum:

- Be recorded in writing;
- Be able to be provided upon request; and
- Provide a reasonable process for managing and resolving complaints.

The duty to be polite, courteous and professional does not mean that building surveyors need to accept every complainant or tolerate abuse. It does mean they must try to resolve complaints in a fair and respectful manner.

Example 3: *A building surveyor must work cooperatively with other building practitioners. This includes avoiding imposing inappropriate impositions and demands on others, and ensuring their role and responsibilities are properly understood by others.*

The duty of building surveyors to be polite, courteous and professional extends to their fellow practitioners. Building surveyors should ensure that their work causes only as much as disruption and inconvenience to others as is necessary for them to perform their statutory functions.

For example, a building surveyor who abuses workers on a building site or deliberate delays certification to 'get even' over not receiving further work from the client is not working cooperatively and is imposing unreasonable impositions.

This does not mean that building surveyors should compromise the public interest. Where non-compliance is identified, building surveyors have a duty to ensure it is corrected before certifying or report it to the regulator.

Appendix C Draft Compliance Policy

Introduction

A key objective in developing a national code of conduct is to encourage consistency. However, consistency can be undermined if regulators enforce the code inconsistently. To help reduce this risk, the Implementation Team was asked to develop a draft compliance policy to set out the general parameters on how the risk of non-compliance should be managed.

This draft compliance policy reflects the Implementation Team's preliminary views on how compliance with the draft national code should be managed. The enforcement of the code is ultimately a matter for state and territory regulators to determine, based on their own policies, resourcing and powers. Therefore, it is best to see this compliance policy as a starting point for a broader discussion on how the national code should be enforced.

The Implementation Team welcomes feedback on this draft compliance plan. In particular, three questions are asked of stakeholders:

- *Is the compliance philosophy appropriate in light of recent issues with building certification such as those identified in the BCR?*
- *Will this draft compliance policy improve compliance with the code of conduct?*
- *Will this compliance policy be workable for regulators? If not, what needs to change to make it work?*

Compliance Philosophy

This draft compliance plan has been developed on the basis of three assumptions (which have yet to be tested). These are that:

- 1. The majority of building surveyors are conscientious professionals who can be trusted to act in a professional manner.*
- 2. Some building surveyors may from time to time act unprofessionally, including when under pressure from clients, building practitioners and competitors.*

3. A minority of building surveyors may knowingly breach the code of conduct unless they are held accountable by regulators.

These assumptions lead to a number of conclusions. Firstly, that an active and effective education and awareness campaign should be sufficient to ensure most building surveyors comply with the code. Secondly, that this compliance can be strengthened by an effective audit regime that creates a real risk that non-compliance will be detected. Finally, that regulators need the power to remove rouge operators to protect the reputation of the industry and restore public confidence. This means that regulators must be able to apply serious sanctions in response to repetitive or serious non-compliance.

Serious non-compliance is any behaviour, action or omission that results in an actual or a serious risk of substantive harm to the public interest. It includes actions such as:

- Certifying a building as compliant when a building surveyor knows (or ought to know) that it does not comply and it could be unsafe;
- Accepting gifts or special treatment when a reasonable person would assume these were intended to influence the building surveyor's decisions; and
- Deliberately frustrating the performance of an audit or the work of the regulator.

Priorities

The preliminary compliance priorities are:

- *Education and Outreach:*

Regulators will communicate to building surveyors and industry participants the expectations in the code to ensure everyone understands the standards expected of building surveyors. This could include holding training sessions on the code as part of building surveyor's continuing professional development (CPD) requirements and ensuring the obligations in the code are made clear to new building surveyors.

- *Auditing:*

Regulators will establish an auditing regime to monitor compliance with the code of conduct. At a minimum, this would see every building surveyor in a jurisdiction audited at least once every three years. The auditing regime would also set out the

process for conducting audits in response to complaints from the public. It would make sense for this auditing regime to be developed alongside implementation of BCR recommendation 7.

- *Records Management*

Regulators will work with building surveyors to explain their expectations for how the requirements in relation to record keeping are to be satisfied. This should set out the regulators' expectations as to how decisions and evidence should be recorded (e.g. acceptable formats for electronic records), stored (e.g. whether back-up copies must be kept and if so how) and catalogued (e.g. naming conventions) to enable swift recovery in response to audits and owner enquiries. These expectations should be supported by guidance to ensure all building surveyors can manage their records effectively.

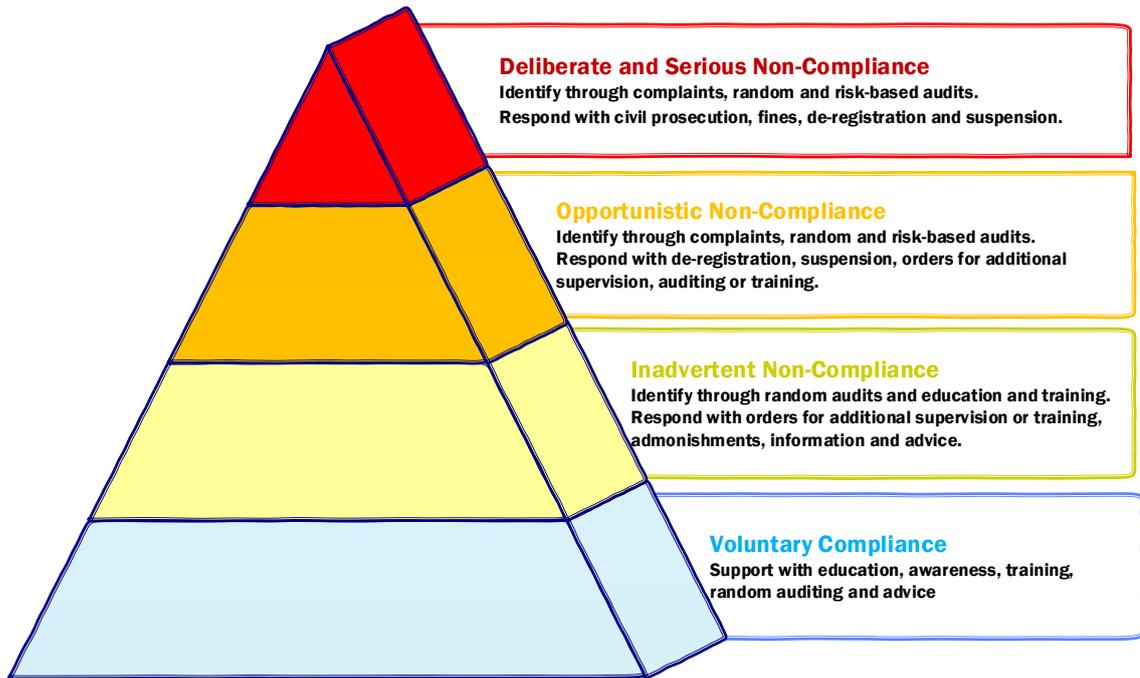
Response to Non-Compliance

Where regulators determine that a building surveyor has breached the code, they would apply a tiered approach when determining the appropriate sanction to apply.

High impact sanctions such as civil prosecutions, fines and immediate de-registration would be reserved for deliberate, repetitive or serious non-compliance. In contrast, isolated, low consequence or opportunistic non-compliance would, depending on its seriousness, be dealt with by suspension and enforceable undertakings, such as agreements to undertake additional training, operate under supervision or to accept and pay for additional oversight or audits. Inadvertent and unintentional non-compliance that has minimal consequences would be dealt with through enforceable undertakings, a finding of non-compliance without further penalty (admonishment) and the provision of information and advice. This approach is set out at **Figure 1** below.

Ultimately, the correct sanction will be a matter for regulators to determine in light of all the relevant facts.

Figure 1 – Proposed Compliance Model



Building surveyors should have the opportunity to seek judicial review of regulators' decisions and sanctions. However, while awaiting judicial review, a building surveyor subject to a serious administrative penalty such as de-registration or suspension should be prohibited from practicing until such time as the decision of sanction is overturned. This is essential to ensure public confidence in the enforceability of the code of conduct.

Appendix D Summary of Questions

1. Do you agree with the characterisation of consistency, completeness and comprehensibility as issues with the current codes of conduct? Are there any other issues with the existing building surveyor codes of conduct that you believe are impacting their effectiveness?
2. Do you agree with the objective of setting a minimum standard of acceptable professional conduct?
3. Do you agree with the proposed scope of the code of conduct?
4. Do you agree with the reasons provided for the inclusion of specific obligations (refer to section 4)? If you do not agree, please explain why you disagree with the reasoning.
5. Do you find the obligation and sub-obligation approach helpful for understanding the nature and content of the code of conduct?
6. Do you consider any of the obligations should be rephrased or worded differently? If you believe the proposed wording should change, please explain why you support a revised wording.
7. Do you find the explanatory statement helpful in understanding how the code of conduct could apply in practice? Are there any areas where additional guidance would be helpful? Should the guidance be combined with the code to form a single document?
8. Does the draft compliance plan capture best practice? If not, what changes would be required to ensure it does?
9. Is there a need for a code of conduct if a professional standards scheme is in place?

You can respond to these questions via the ABCB Consultation Hub until 24 April 2020 at <https://consultation.abcb.gov.au/engagement/discussion-paper-nmcoc-bs>.