



**ABCBC**

## **Building surveyor integrity and their role in enforcement**

Model guidance on BCR recommendations  
9 and 11

2021

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Enquiries about this publication can be sent to:

Australian Building Codes Board  
GPO Box 2013  
CANBERRA ACT 2601  
Phone: 1300 134 631  
Email: [ncc@abcb.gov.au](mailto:ncc@abcb.gov.au)  
Web: [abcb.gov.au](http://abcb.gov.au)

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## Preface

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The [Building Confidence Report](#) (BCR), published in April 2018, made 24 recommendations to Building Ministers to address systemic issues in the Australian building industry. Building Ministers established the BCR Implementation Team within the Office of the Australian Building Codes Board (ABCB) to work with governments and industry to respond to the recommendations with a focus on national consistency where possible.

The BCR Implementation Team's work aims to establish national best-practice models in response to BCR recommendations. If implemented, the responses will strengthen compliance with the National Construction Code (NCC), better protecting the interests of people who own, work in, live in and use Australian buildings.

All responses to BCR recommendations have been developed in accordance with the [Building Confidence National Framework](#) with input from industry and governments. Figure 1 lists the outputs developed under the Framework, and where to find them.

State and territory governments have agreed to consider implementation of all BCR endorsed responses. This process will take time depending on each government's regulatory reform agenda, and may be undertaken in stages.

The model guidance for Building surveyor integrity and their role in enforcement represents a nationally agreed response to BCR recommendations 9 and 11. These recommendations state:

- Recommendation 9: "That each jurisdiction establishes minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors."
- Recommendation 11: "That each jurisdiction provides private building surveyors with enhanced supervisory powers and mandatory reporting obligations."

The model guidance consists of 10 Principles, which reflect the matters described in the BCR that required addressing. The model guidance outlines the objective and context for each Principle, and then provides recommended legislative provisions, with further commentary where necessary.

Figure 1 – Building Confidence Implementation Framework - Outputs



### Next Steps

#### Implementation by state and territory governments

Governments have agreed to consider implementation of the responses. Contact the building authority in your jurisdiction for information on progress.

Each of the outputs listed in Figure 1 can be accessed on the [ABCB website](#).

While BCR recommendations 9 and 11 relate specifically to private *building surveyors*, feedback received through public consultation supports applying the model guidance to any *building surveyor* undertaking a statutory function. This would include a council

or government employed *building surveyor*. Ultimately, the application of this model guidance is a matter for each jurisdiction.

Defined terms used in this document are shown in italics. The definitions can be found in the [Building Confidence Glossary](#).

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## Adoption of model guidance

As a model, this guidance does not have any force until adopted by a jurisdiction. States and territories may have regard to the content of the model. This may include amending or adopting the model for application in their jurisdiction.

The model guidance needs to be read in conjunction with the relevant legislation in a jurisdiction. It is written in generic terms and is not intended to override legislative requirements.

# Background

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## Building approval process

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

All jurisdictions require that the *building approval process* is followed when carrying out *building work*<sup>1</sup>. The *building approval process* is intended to ensure that:

- plans and drawings are prepared demonstrating the nature of the proposed *building work* and that the work will be consistent with any statutory approvals (e.g. planning) and with the requirements of building laws, including the NCC
- all authorities that need to be aware of, or approve, the proposed works are consulted and, in some cases, that adjoining owners are consulted about works which may affect their property
- the documentation is checked and assessed for compliance and authority consents or comments are reviewed to ensure they have been adopted (as necessary) prior to the issuing of a *building approval*
- the work under construction is subject to *mandatory inspections* to determine whether the work inspected complies with the approved documentation
- that any necessary rectification work is performed, or adjustments to the approved documents are made, through a variation process (refer to the model guidance for [Design acceptance](#))

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<sup>1</sup> Unless the *building work* is exempt. The types of *building work* that may be exempt vary across jurisdictions but are usually minor works such as repairs or small, simple structures. *Building work* does not include infrastructure works such as roads, bridges and civil works.

- the completed work is presented for inspection to confirm it is substantially complete, compliant and suitable for occupation, and
- records of the *building work* and key maintenance requirements are lodged with government so that they can be accessed by government, owners, or future owners of the building as necessary.

The role of the *statutory building surveyor* and whether a *building surveyor* operating a privately owned business can be appointed to perform some, or all the above functions currently vary from jurisdiction to jurisdiction. In implementing this model guidance, each jurisdiction will need to determine which Principles apply depending on the statutory roles.

**Appendix 1** contains a diagram of the *building approval process* showing the relationship of key practitioners through the process and the statutory functions that can be undertaken by a *building surveyor*.

## The statutory building surveyor

The 10 Principles contained in this document are based on three fundamental objectives underlying the performance of *building surveyors* when they undertake statutory functions. These are independence and impartiality, skills and competence, and transparency. Each are discussed in further detail below.

## Independence and impartiality

*Building surveyors* exercising statutory functions must be independent and impartial in their decision making. It is crucial for the *statutory building surveyor* to make their *assessment* of the proposed design and *building work* impartially and in the interests of the public to ensure that the requirements of the NCC are strictly followed. If they are influenced to allow non-compliance; fail to properly check compliance; or favour an interpretation of requirements that will undermine broader safety and amenity objectives, this can lead to non-compliance or unsafe buildings.

## Skills and competence

The *building approval process* provides for a *statutory building surveyor* to administer the process relying on their skills, judgement and competency. Where necessary,

the *statutory building surveyor* may be assisted by others with adequate skills and competency to design, inspect and confirm compliance of key aspects of *building work*.

## **Transparency**

Transparency of decisions made, requests for changes, the identification of non-compliance and resolution of these issues is essential to ensure safe buildings. An owner is entitled to be made aware of decisions that may affect the outcomes and their contractual rights with designers and builders.

Regulators also need to be able to understand what has occurred to monitor conduct and compliance. Future owners and managers of buildings need to have access to clear and accurate documentation about what is built so that they can understand maintenance obligations and design assumptions to ensure the building remains safe to occupy post-construction.

# Principles

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## Principles for building surveyor integrity and their role in enforcement

1	A statutory building surveyor is appointed by the owner of the land or their agent
2	The appointment of a statutory building surveyor is documented by a written agreement and government is notified
3	The termination of a statutory building surveyor's agreement and the transfer of their functions to another statutory building surveyor is strictly controlled
4	Statutory building surveyors to be prohibited from accepting an appointment or continuing to act if they, or a related person to them, has a conflict of interest
5	Certificates to be checked by the statutory building surveyor
6	Information to be provided to relevant parties
7	Statutory building surveyors' decisions can be reviewed
8	Statutory building surveyors to have enforcement powers to regulate where they detect non-compliance
9	Statutory building surveyors to report specified conduct to the government building regulator
10	Government provides co-regulatory support to statutory building surveyors

## Principle 1 – Appointment by the owner or their agent

A statutory building surveyor is appointed by the owner of the land or their agent

### Objective

The objective of this Principle is to ensure that there is a contractual relationship between the owner of the land or *building work* and the *statutory building surveyor* for the duration of the *building work*. This reflects the fact that the *building approval* is for the land and building, and affects the rights and obligations of the present and future owners of the land.

### Context

The appointment of the *statutory building surveyor* usually occurs at the commencement of the *building approval process*.<sup>2</sup> The appointment triggers the *building surveyor* to have statutory power and functions in relation to specified *building work* on defined land. The appointment also creates an agreement for the provision of services by the *statutory building surveyor* or their employee. The agreement for services governs the payment of fees for services and can also cover matters such as the scope of services, service delivery obligations, insurance and rights to terminate.

The *building approval* is issued for *building work* on land. The decisions made in the *building approval process* affect the rights of the owner of the land. Ultimately the *building work* is for the present and future owners of the land and the *building approval* applies to, and runs with, the land.<sup>3</sup> For these reasons, the owner or their agent should engage the *statutory building surveyor* and have a direct contractual relationship with

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<sup>2</sup> Appointment may need to occur during the process where the original *statutory building surveyor's* appointment is discontinued.

<sup>3</sup> The *occupancy approval* may impose ongoing obligations on the owner for example, to maintain fire safety features in a building in accordance with maintenance standards.

the *statutory building surveyor* for the performance of their services throughout the duration of the agreement. This means that the *statutory building surveyor's* agreement must not be novated from the owner to the builder or other person involved in the project at any time during their engagement.

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

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

## **Legislative provisions**

It is recommended:

1. Only the owner or their agent may appoint a *statutory building surveyor* to carry out the functions allowed under the legislation.
2. The *statutory building surveyor's* agreement must not be novated from the owner to the builder or other person involved in the project at any time during their engagement.
3. An owner can appoint an agent to act on their behalf in relation to their interactions with the *statutory building surveyor*.
4. The appointment of an agent must:
  - a. be in writing; and
  - b. require the *statutory building surveyor* to:

- i. seek written confirmation from the owner when the agent makes an application or requests the building permit be varied<sup>4</sup>; and
- ii. give specified information directly to the owner (the information that should be given is in Principle 6).

## **Further comment**

Ownership arrangements can be complex. Legislation could use definitions or other provisions to clarify how complex ownership situations can be simplified by referring to matters such as:

- what constitutes proof of ownership or that the owner is the person named on the certificate of title or other means by which ownership is determined
- where there are multiple owners, that one or more may be appointed with written consent of the others
- where the proposed work is to common property, the owners corporation may engage the *statutory building surveyor*
- where the land or building is owned by government, the mechanism for appointment by a government body, and
- what would be deemed to constitute written confirmation from the owner when there are complex ownership arrangements.

It is acknowledged that in jurisdictions where owners can choose which *statutory building surveyor* to appoint, they may appoint a *statutory building surveyor* that is recommended or favoured by a builder or designer. Adopting this Principle will not prevent these practices. However, adopting this Principle will ensure the owner has a direct contractual relationship with the *statutory building surveyor* providing both parties with legal rights and obligations. This includes the provision of information from the *statutory building surveyor* directly to the owner throughout the process.

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<sup>4</sup> An example is provided in the [ACT's Code of Practice for Building Surveyors](#).

## Principle 2 – Appointment is documented and government is notified

The appointment of a statutory building surveyor is documented by a written agreement and government is notified

### Objective

The objective of this Principle is to provide a clear record of the appointment of the *statutory building surveyor* to perform statutory functions and to mandate matters that must be included in the written agreement. This will inform owners and provide for consistency between contractual terms, the Principles in this model guidance document, relevant codes of conduct for *statutory building surveyors* and their statutory obligations.

### Context

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

If the appointment of a *statutory building surveyor* is not clearly defined and documented or government is not notified of the appointment, when an issue arises at the site, it may be unclear whether there is a *statutory building surveyor* that can or should act on the issue.

The appointment should be in writing and should contain prescribed matters. Implied terms should be mandated to ensure that any agreements made are not in conflict with the fundamental statutory obligations of the *statutory building surveyor*.

## Legislative provisions

It is recommended:

1. The *statutory building surveyor* notify the relevant state or local government body within 5 business days after accepting an appointment to carry out *statutory building surveying work*.<sup>5</sup>
2. The term ‘accepting an appointment’ in 1. means entering into a written agreement to provide services or commencing to provide services for which fees would usually be charged, whichever is sooner.
3. The agreement to carry out *statutory building surveying work* must be in writing, termed a ‘Statutory Building Surveying Services Agreement’ (SBSSA).
4. The SBSSA contain:
  - a. the name, registration details and contact details of the *statutory building surveyor*;
  - b. the name of all owners of the land on which the proposed *building work* is to be carried out;
  - c. the name and contact details of the owner(s) that is a party to the agreement;
  - d. the address and title details for the land on which the proposed *building work* will be carried out;
  - e. a description of the work to which the *building approval* is proposed to apply;

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<sup>5</sup> Where the local council is appointed to issue the *building approval* and there is no requirement for a state government body to be notified, notification to the relevant local council will only be necessary if the local council is issuing the *building approval* for *building work* outside its municipality.

- f. details of any related building or any required planning approval for the work;
- g. insurance details, including:
  - i. the name of each insurer providing cover to the *statutory building surveyor*;
  - ii. the identifying number of the insurance contract; and
  - iii. the dates the insurance contract has effect;
- h. the statutory functions which the *statutory building surveyor* is engaged to perform;
- i. any other functions the *statutory building surveyor* is engaged to perform provided that those functions are not inconsistent with the statutory functions and the applicable *statutory building surveyor* code of conduct;
- j. the name and registration details of practitioners proposed to carry out work or provide services in connection with the SBSAA;
- k. a schedule of fees and charges that may be charged by the *statutory building surveyor* during the engagement, including how fees and charges are to be calculated;
- l. the *statutory building surveyor's* complaint management policy and procedures or information for where these documents can be found;
- m. the date the agreement is made;
- n. a declaration by the owner confirming that they have:
  - i. not appointed a *statutory building surveyor* already to perform *statutory building surveying work* in relation to the proposed *building work*, or if they have, that the appointment has been terminated in accordance with the requirements of relevant provisions (see Principle 3);
  - ii. freely chosen to appoint the *statutory building surveyor*; and

- iii. read the agreement and any document accompanying the agreement and understood the roles and responsibilities of the *statutory building surveyor*.
- o. an explanatory Information Sheet that sets out:
  - i. the role and statutory obligations of *statutory building surveyors* including their enforcement powers and obligations to provide information;
  - ii. the relevant code of conduct for *statutory building surveyors* including where to find it;
  - iii. the role and obligations of owners;
  - iv. where further information can be found about the building regulatory system for that jurisdiction including any available dispute resolution process or regulator that complaints can be made to;
  - v. review rights the owner has regarding decisions made by the *statutory building surveyor* (as outlined in Principle 7).
5. The SBSSA be signed, or otherwise appropriately executed, by the parties to the contract.
6. The following is implied in an SBSSA and cannot be contracted out of:
  - a. novation of the SBSAA to another party involved in the proposed *building work*;
  - b. any contract term that is inconsistent with the *building surveyor's* statutory functions and the applicable *statutory building surveyors'* code of conduct is void and of no effect;
  - c. a request to receive payment of fees and charges related to any services that have been provided;
  - d. the ability of a *statutory building surveyor* to withhold their services if a request for fees and changes is not paid;

- e. prohibiting an owner from withholding of fees or charges where the *statutory building surveyor* refuses, on the grounds that the design or *building work* does not comply with the *building approval*, Act or Regulations to:
  - i. approve an application for a *building approval*; or
  - ii. approve a variation to a *building approval*; or
  - iii. issue an *occupancy approval*;
- f. the ability of an owner to exercise their rights of breach of agreement is maintained;
- g. that the *statutory building surveyor* will notify the owner as soon as reasonably possible upon becoming aware of any matter that gives rise to a conflict of interest (as defined in Principle 4) and will:
  - i. cease to provide services;
  - ii. take all *reasonable steps* to facilitate a transfer of functions to another *statutory building surveyor*; and
  - iii. make all necessary notifications to the relevant government body in relation to the transfer.

## **Further comment**

Building surveying functions provided by a local council may be required to meet certain requirements under local or state government laws or procurement requirements that are not consistent with the above matters. Jurisdictions may therefore determine that some or all the above matters should not apply to contracts for building surveying services between owners and local councils.

Each jurisdiction should develop an Information Sheet as referred to in clause 4. above, which references provisions under the relevant legislation, relevant government bodies and links to websites and other material.

## Principle 3 – Termination of agreement and transfer of functions

The termination of a statutory building surveyor's agreement and the transfer of their functions to another statutory building surveyor is strictly controlled

### Objective

The objective of this Principle is to:

- provide controls on the termination of appointment to ensure the *statutory building surveyor* can exercise their statutory functions without fear or favour,
- define a process for the transfer of functions so that at any point in time it is clear to all parties which *statutory building surveyor* has statutory authority, and
- provide that a *statutory building surveyor* that accepts a transfer of functions and makes all reasonable enquires is not liable for the work of the previously appointed *statutory building surveyor*.

### Context

One of the key foundations for the integrity of the *building approval process* is for the *statutory building surveyor* to be an independent and impartial decision maker. If the *statutory building surveyor's* services can only be terminated in special circumstances or with the approval of a government body, this can prevent 'shopping around' for another *statutory building surveyor* when an owner or their agent is unhappy with an interpretation or decision of their appointed *statutory building surveyor*.

### Legislative provisions

It is recommended:

1. An SBSSA cannot be terminated and the statutory building surveying functions transferred to another *statutory building surveyor* without the consent of the relevant government body.
2. Applications for termination be made to the relevant government body and for that body to have the necessary powers to accept and determine those applications.

3. Appeal rights from decisions made by the relevant government body, regarding application for termination, should be provided.
4. Principles 1 and 2 would apply to any appointment of a second or subsequent *statutory building surveyor*.
5. It be an offence and a ground for disciplinary inquiry for:
  - a. a *statutory building surveyor*, without reasonable excuse, to accept an appointment or carry out *statutory building surveying work* if they knew, or could reasonably be expected to know, that another *statutory building surveyor* has been appointed and that appointment has not been terminated in accordance with the related provisions for termination; and
  - b. the first *statutory building surveyor* to not cooperate with any request by the relevant government body to hand over relevant documents and information to the *statutory building surveyor* to which their functions are being transferred.
6. The second or subsequent *statutory building surveyor*, appointed following the consent to termination of the previous *statutory building surveyor's* SBSSA, should not be liable for the work of the earlier *statutory building surveyor* provided that the second or subsequent *statutory building surveyor* makes all reasonable enquiries (including making reasonable inspections of the *building work*) in relation to the decisions made by the first *statutory building surveyor* when performing the remaining *statutory building surveying work*.

## **Further comment**

The relevant government body to which applications for consent to termination of agreement and transfer of functions should develop policy and procedures on the factors it will consider when determining applications. This might include streamlining the consent process where transfers occur due to the movement of *statutory building surveyors* between corporate entities.

## Principle 4 – Mitigating conflicts of interest

Statutory building surveyors to be prohibited from accepting an appointment or continuing to act if they, or a person related to them, has a conflict of interest

### Objective

The objective of this Principle is to mitigate against conflicts of interest that impact the impartiality and independence of the *statutory building surveyor* when they are performing *statutory building surveying work* and undermines the integrity of the *building approval process*.

### Context

Given their role as an independent impartial decision maker, the *statutory building surveyor* or a related person to them, must be free from conflicts of interest when they are performing statutory functions.

A fundamental task of the *statutory building surveyor* engaged to perform statutory functions is to assess *building approval* documentation to determine whether it demonstrates compliance with relevant acts, regulations and the NCC. If the *statutory building surveyor* has participated in the development of the design, they are not able to make an impartial *assessment*.

If the *statutory building surveyor* has a pecuniary interest in the project or the business of other practitioners involved in the project, they may be conflicted when exercising their functions. If they are receiving inducements or other benefits unrelated to the payment for their services, their decisions may be influenced by those benefits. The same conflicts and undue influences may arise where a person to whom the *statutory building surveyor* is related has these relationships as they may indirectly benefit from the interest of the related person.

This Principle seeks to prohibit conduct which may give rise to perceived or actual conflicts of interest that may unduly influence a *statutory building surveyor* to make decisions that are not in the public interest.

## Legislative provisions

It is recommended:

1. A *statutory building surveyor* be prohibited from accepting an appointment or carrying out *statutory building surveying work* where they participate in design work for the same building.
2. The phrase 'participate in design work':
  - a. includes:
    - i. not maintaining a high degree of separation and objectivity from the design process;
    - ii. providing advice as to how to detail or amend a plan or specification; and
    - iii. preparing or providing input into the preparation of any supporting documents for a *Performance Solution*, including choosing who undertakes that task.
  - b. does not include:
    - i. preliminary or routine advice on *Deemed-to-Satisfy Solutions*;
    - ii. discussing the concept of *Performance Solutions* and which *Performance Requirements* are relevant; and
    - iii. providing input into a *Performance-based design brief* as a stakeholder consulted as part of development of the Brief.
3. A *statutory building surveyor* be prohibited from:
  - a. accepting an appointment or performing *statutory building surveying work* or continuing to act if they have a direct or indirect pecuniary interest in:
    - i. the land on which the *building work* is being carried out;
    - ii. the *building work* that is being carried out; and/or

- iii. any contractor engaged to carry out the work including a builder or designer.
  - b. accepting any inducements or benefits, whether financial or otherwise, other than payment for *statutory building surveying work*; and
  - c. knowingly issue a false or misleading document.
4. That conflict of interest and pecuniary interest provisions, set out above, apply to the *statutory building surveyor* and any related person, including:
  - a. a partner in a partnership, where the *statutory building surveyor* is a member of the partnership;
  - b. if the *statutory building surveyor* is a body corporate, a director of the body corporate or any related body corporate;
  - c. an employer of the *statutory building surveyor*;
  - d. an employee of the *statutory building surveyor*;
  - e. the spouse, domestic partner, sibling, aunt, uncle, grandparent, grandchild, parent or child of the *statutory building surveyor*; or
  - f. a person with whom the *statutory building surveyor* has a contractual relationship with, that might reasonably be seen to give rise to a conflict of interest.

## Further comment

Whilst the above guidance is detailed, further practice guides or examples can be developed by jurisdictions to assist stakeholders to apply the above controls in a consistent manner. The above provisions and any guidance material should be consistent with applicable codes of conduct for *statutory building surveyors*.

Some jurisdictions prohibit a *statutory building surveyor* from accepting an appointment or carrying out *statutory building surveying work* where the *statutory building surveyor* is currently providing *advisory building surveying work* to the same owner, builder or

designer, or has provided *advisory building surveying work* for the same owner, builder or designer within a prescribed period (for example the past 12 months).

Including this requirement may be appropriate where it is considered that there is a sufficient market supply of practitioners available to provide services in an area or region. Jurisdictions are best placed to determine whether to introduce this prohibition.

## Principle 5 – Acceptance of certificates

Certificates to be checked by the statutory building surveyor

### Objective

The objective of this Principle is to set out the checks that a *statutory building surveyor* is required to undertake when relying on a *certificate of design compliance*, or a *certificate of construction or installation compliance*, for work undertaken by another practitioner. These checks will confirm the competency of the *certifying* practitioner and that their certification is, on its face, appropriately issued.

### Context

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

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

When the *statutory building surveyor* accepts a *certificate of design compliance*, or a *certificate of construction or installation compliance* they are allowing another person to assess and approve or confirm compliance. They need to make necessary checks before accepting such certificates.

### Legislative provisions

It is recommended:

1. The *statutory building surveyor* determine that a *certificate of design compliance*, or a *certificate of construction or installation compliance* is provided

by a person that is *registered* and has adequate experience relevant to the building and NCC *Performance Requirement/s* to which the certificate relates.

2. In making this determination the *statutory building surveyor*:
  - a. can rely on the practitioner register maintained by the relevant jurisdiction;
  - b. must document the checks they have made, for example confirming when registers were checked and that they have reviewed and considered the person's experience and its relevance to the project for which the *certificate of design compliance*, or *certificate of construction or installation compliance* has been given; and
  - c. must check that the *certificate of design compliance*, or *certificate of construction or installation compliance* contains all the required information (usually prescribed in relevant provisions) and is accompanied by documentation with adequate detail to demonstrate compliance with the NCC (for example evidence of suitability, reports or drawings in relation to certificates for design) or in the case of inspections, references the relevant *building approval* documentation and NCC provisions.
3. Legislation expressly state that provided the above checks are properly completed, the *statutory building surveyor* will have immunity from liability in relation to the matters certified.

## Further comment

The above legislative provisions do not seek to set out requirements for the issuing of and reliance on a *certificate of design compliance*, or a *certificate of construction or installation compliance*, who may issue them and in relation to what aspects of design or work. These are matters considered in other model guidance or are matters for each jurisdiction.

This Principle is not intended to apply in relation to the issuing of *declarations of construction or installation compliance*, or *declarations of design compliance*.

Refer to Figure 2 for the difference between declarations and certificates.

Figure 2 - Declarations and certificates

Document	Declaration of Compliance		Certificate of Compliance	
	Design	Construction / Installation	Design	Construction / Installation
Definition	<p>Is a document that:</p> <p>(a) is provided by the <i>registered</i> person who is responsible for the design work; and</p> <p>(b) states the design complies with the NCC and other prescribed requirements.</p>	<p>Is a document that:</p> <p>(a) is provided by the <i>registered</i> person who is responsible for the construction or installation work; and</p> <p>(b) states the construction or installation work complies with the <i>building approval</i> documentation and other prescribed requirements.</p>	<p>Is a document that:</p> <p>(a) is provided by an appropriately <i>registered</i> and, where necessary, independent, person who has examined and assessed design work; and</p> <p>(b) states that the design complies with the NCC and other prescribed requirements.</p>	<p>Is a document that:</p> <p>(a) is provided by an appropriately <i>registered</i> and, where necessary, independent person who has examined and assessed construction or installation work; and</p> <p>(b) states that their examination and assessment confirms the construction or installation work complies with the <i>building approval</i> documentation, the NCC, and other prescribed requirements.</p>
Who provides?	A <i>registered</i> building practitioner responsible for the work.		A <i>registered</i> building practitioner at an appropriate level in the relevant occupation. Legislation may require an <i>assessment</i> to be undertaken by a <i>registered</i> practitioner who is independent to the design or construction process.	
Who receives?	A person who contracted the work or who will rely on the work.		A person who contracted the <i>assessment</i> or who will rely on the <i>assessment</i> . <sup>1</sup>	
How recorded?	Must be provided to the <i>building approval authority</i> <sup>2</sup> when seeking a <i>building approval</i> or <i>occupancy approval</i> and kept as part of the building records <sup>3</sup> .		Must be recorded by the <i>statutory building surveyor</i> or other person relying on the certificate to make a statutory assessment of building compliance <sup>4</sup> .	
Legal effect?	Holds the person responsible for the work liable for its compliance.		Holds an expert liable for advice. Indemnifies the <i>building surveyor</i> or other person relying on the advice.	

**Notes on figure**

1. A *statutory building surveyor* making a statutory *assessment* may rely on a Certificate of Compliance. A *statutory building surveyor* may choose not to rely on a Certificate of Compliance if not satisfied.
2. The legal entity that issues the *building approval*. This may be a private *building surveyor*, a local government or other body, depending on each jurisdiction's relevant legislation.
3. The building records may be kept by a different legal entity from the *building approval authority*. In most jurisdictions the building records are kept by the relevant local, state or territory government.
4. *Building approval* legislation in each jurisdiction will state whether the *statutory building surveyor* keeps the *assessment* records or includes them in the building records.

## Principle 6 – Communicating information and decisions

Information to be provided to relevant parties
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### Objective

The objective of this Principle is to improve transparency of the decisions made by the *statutory building surveyor* during the *building approval process*.

### Context

This Principle provides for the provision of specified information about the decisions made by the *statutory building surveyor* when exercising their statutory functions. The information is to be accessible by the owner as well as the builder and the agent (if they are not the owner or builder).

### Legislative provisions

It is recommended:

1. The following information be provided by the *statutory building surveyor* to the owner, the builder and their agent (if they are not the builder):
  - a. All approved documents forming part of the *building approval process*;
  - b. Any approved variations to documents or new design documents approved during the works;
  - c. Results of all *mandatory inspections*;
  - d. Any directions issued following *mandatory inspections* including the reasons why those directions were issued;
  - e. Any enforcement actions taken by the *statutory building surveyor* including the reasons why those actions were taken;
  - f. Any *occupancy approval* or final inspection certificate.

2. The above information should be provided:
  - a. directly to the owner regardless of whether the owner has appointed an agent;
  - b. within a specified timeframe of a related event or of the decision being made which should generally be no less than 5 business days.

## Further comment

The mode of providing this information may be simplified through the increased use of information lodgement platforms by some jurisdictions. This may result in an owner having access to the platform or being sent the required information via the platform. In these cases, the *statutory building surveyor* may not need to provide the information to the owner. So long as the outcome is that the owner receives or can access the information in a timely manner, the objective of this Principle will be met.

## Principle 7 – Right of review

Statutory building surveyors' decisions can be reviewed

### Objective

The objective of this Principle is to provide rights for merits review to those affected by decisions of the *statutory building surveyor* consistent with their statutory and administrative nature.

### Context

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

### Legislative provisions

It is recommended:

1. All decisions made by the *statutory building surveyor* can be subject to review.
2. Information is available for consumers about these rights, including:
  - a. in the approved Information Sheet provided to the owner at the time of appointment of the *statutory building surveyor* (refer Principle 2); or
  - b. as prescribed information in the written document containing the decision that is made; and/or
  - c. on government websites where consumers can readily access information.
3. Review rights should specify who may seek review and provide appropriate limits to those affected by the decisions of the *statutory building surveyor*.

## Further comment

Provision for a review process requires a decision making body that can conduct the review. This could be a specialist body (such as the Building Appeals Board that operates in Victoria, or the State Planning Commission that operates in South Australia) or an administrative tribunal or other government decision maker. It is not necessarily the case that the review body needs to be the same body for all matters, although this might be more efficient and less confusing for consumers.

## Principle 8 – Enforcement powers

Statutory building surveyors to have enforcement powers to regulate where they detect non-compliance

### Objective

The objective of this Principle is to provide *statutory building surveyors* with suitable powers to enable them to require rectification of non-compliances identified during inspections of *building work*.

### Context

In most jurisdictions *statutory building surveyors* have a responsibility to assess *building approval* documentation. They may also inspect *building work* during construction. Their statutory roles provide them with opportunities to detect fraudulent conduct and non-compliance. It is essential that they act on these issues. However, where the *statutory building surveyor* is operating as a privately owned business, they can only take enforcement action so far before referring the matter to a government body for escalation. This means that the referral process and collaboration between state and local government, and the enforcement actions commenced by *statutory building surveyors* operating as a privately owned business, must be well functioning and effective.

Enforcement powers that enable the *statutory building surveyor* to enter the site, undertake inspections and direct that any non-compliances be rectified are essential to enforce compliance with building legislation. The provision of such powers is complementary to the role of the *statutory building surveyor* when conducting inspections and without such powers there is no way to promptly compel compliance. Builders that carry out non-compliant *building work* should fix that work, at their cost. In instances of *serious non-compliance*, it may be appropriate to stop all other works on the site until the matter is resolved. *Statutory building surveyors* exercising such powers in good faith should not be at risk of legal claims by builders or others.

In all jurisdictions, local councils or territory governments or their officers have powers to require *building work* to be carried out where it is non-compliant or unsafe. *Statutory*

*building surveyors* operating privately owned businesses need similar powers given they are performing these statutory functions in most jurisdictions. They need to be able to act promptly, seek to resolve non-compliances during the works and escalate enforcement to the relevant state or local government body where the matter is not resolved in a timely manner.

The direction powers should be such that the *statutory building surveyor* must use them when non-compliance is detected. This seeks to ensure a level playing field where all *statutory building surveyors* act on non-compliance without having to be concerned that they are the only one enforcing the laws or that they will not attract work if they use their powers to require compliance because other *statutory building surveyors* are not doing so.

## **Legislative provisions**

It is recommended:

1. A *statutory building surveyor* have a power to enter land on which *building work* is being carried out, or to which a *building approval* applies for which they are responsible, for the purposes of inspecting *building work* and monitoring compliance.
2. A *statutory building surveyor* have powers to direct the builder to fix non-compliant *building work*.
3. Powers to direct the builder to fix non-compliant *building work* include:
  - a. requiring a *statutory building surveyor* to direct the builder to fix non-compliant *building work* at any time where it is detected (i.e. not just following a mandatory inspection);
  - b. requiring the direction to fix be provided in writing;
  - c. requiring the direction to fix to be sent to the owner and, if it is not complied with, a relevant local or state government body;
  - d. that the builder is not entitled to receive payment for or in respect of any cost arising from complying with a direction to fix; and

- e. the timeframe for compliance and ability to extend that timeframe are at the discretion of the *statutory building surveyor*.
4. A *statutory building surveyor* have a power to issue orders to stop all work other than work required to resolve the safety or compliance issues where it was the reason for issuing the order. If the order is not complied with, it should be referred to a relevant local or state government body for investigation, prosecution or court orders.
5. A *statutory building surveyor* is not liable for anything done or omitted to be done in good faith in exercising the above powers and functions.

## **Further comment**

Where the *statutory building surveyor* causes or is responsible for overseeing inspections carried out by other *registered* practitioners, the expectation would be that those persons would report back to the *statutory building surveyor* promptly after each inspection and the *statutory building surveyor* would then use their powers as necessary. Refer to the model guidance for [Independent third party review](#) for more information.

The powers given to local government or their officers should be consistent where they are engaged to perform *statutory building surveying work*. However, local government or its officers may also have powers to respond to safety or compliance issues in buildings that are not under construction or the subject of a *building approval*.

## Principle 9 – Reporting specified conduct to government

Statutory building surveyors to report specified conduct to the government regulator

### Objective

The objective of this Principle is to provide a mechanism for governments to be made aware of fraud or *serious non-compliance*.

### Context

Industry stakeholders have reported high levels of non-compliance, deceptive behaviours and fraud in the building industry. The senate inquiry into *non-conforming building products*<sup>6</sup> was told that there was a high incidence of fraudulent certificates and information in relation to *building products*. Government regulators cannot be on every building site and even with proactive audit programs, will not always detect behaviour that is deliberate and intended to deceive.

Given *statutory building surveyors* work very closely with building practitioners throughout the construction process, they can observe poor practices and may become aware of *serious non-compliance* and fraud. *Statutory building surveyors* should not ignore such conduct.

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

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

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

## Legislative provisions

It is recommended:

1. Where a *statutory building surveyor* forms a reasonable belief that a “reportable matter” has occurred or is likely to occur, they must report it to their state or territory government regulator within 48 hours (or other specified time) after becoming aware of the reportable matter (i.e. a failure to do so would be an offence).
2. ‘Reasonable belief’ means supported by evidence or information even if the evidence or information is not conclusive.
3. ‘Reportable matters’ are defined as:
  - a. where the *statutory building surveyor* has received a document they reasonably believe is fraudulent or misleading;
  - b. where the *statutory building surveyor* has become aware of *serious non-compliance* that includes *building work*, which:
    - i. is a departure from the approved plans beyond acceptable standards and tolerances; and/or
    - ii. has or could endanger the safety of the public or occupants of the building.

## Further comment

Jurisdictions should develop guidance with examples on matters such as what constitutes a ‘departure beyond acceptable standards and tolerances’ referencing their own guides to standards and tolerances or other material. The guidance might also

cover what would be considered to 'endanger the safety of the public or occupants of the building'.

## Principle 10 – Co-regulatory support

Government provides co-regulatory support to statutory building surveyors

### Objective

The objective of this Principle is to improve the regulatory oversight of the building and construction sector through a more effective, efficient and collaborative partnership between state and territory government, local government and *statutory building surveyors* operating privately owned businesses that perform statutory functions.

### Context

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

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

The support and collaboration between state or territory government, local government and *statutory building surveyors* operating privately owned businesses are not necessarily matters for legislation. These matters are related to the model guidance for [Building regulator collaboration](#), which outlines formal mechanisms for a more collaborative and effective partnership between those responsible for regulation and enforcement. Consideration should be given to which level of government a *statutory building surveyor* operating a privately owned business should refer unresolved notice or directions to, and how that recipient will be funded and resourced to respond.

## Non-legislative actions

It is recommended:

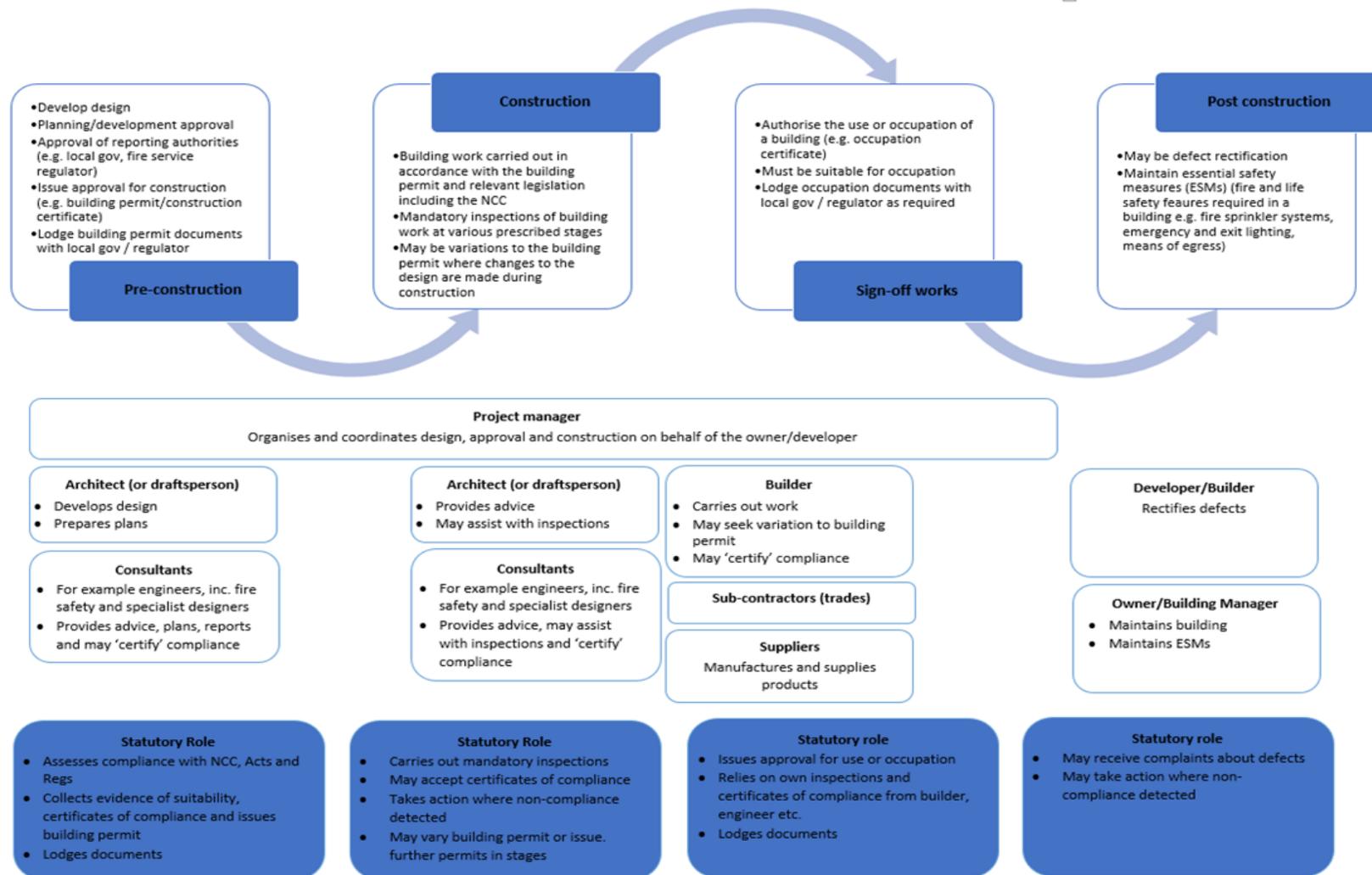
1. Each jurisdiction publish its strategy on how it will support collaboration between state or territory government, local government and *statutory building surveyors* operating privately owned businesses. This will enable these bodies to effectively exercise their enforcement functions and to act on referrals to resolve non-compliance. The strategy would be supported by the model guidance on [Building regulator collaboration](#).
2. Jurisdictions require mandatory *continuing professional development* be undertaken by *statutory building surveyors* that includes a minimum number of hours covering how to exercise their enforcement powers. Refer to the model guidance for [Continuing professional development on the NCC and ethics](#) for more information.

# APPENDICES



# Appendix 1

Figure 3 Building approval process, the relationships of key practitioners and the statutory functions of building surveyors



**Notes on Figure 3**

1. This figure shows the typical process and roles at a high level. It does not include all statutory obligations, responsibilities, nor does it depict contractual relationships.
2. Further information on the proposed roles and responsibilities of all building practitioners identified in this figure can be found in the [National Registration Framework for building practitioners](#).