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## Advice

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**To** **Peter Jolly**  
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**Date** 17 October 2023

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**Subject** **Advice regarding consultant building surveyors**

- Questions**
1. Can a private building surveyor (**PBS**) carry out services and functions under sections 76 and 77 of the *Building Act 1993 (Act)* whilst concurrently working for one or more councils as a municipal building surveyor or building surveyor registered under Part 11 of the Act, whether as a contractor, agency staff member or direct employee?
  2. Are contractors and agency staff building surveyors considered to be officers of a council for the purpose of section 79(2A) of the Act?

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**Summary of advice** *Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.*

- 1.1 A PBS who is employed by a Council cannot carry out functions under sections 76 and 77 of the Act in respect of a building situated in or building work carried out in the municipal district of that Council because they are prohibited from doing so under section 79(2A)(a) of the Act.
- 1.2 A PBS who is engaged as a consultant or contractor by a Council is not prevented from carrying out functions under sections 76 and 77 of the Act in respect of a building situated in or building work carried out in the municipal district of that Council by virtue of section 79(2A)(a) of the Act because a contractor is not an officer or employee of the Council for the purpose of that section.
- 1.3 However, the Code of Conduct for Building Surveyors requires building surveyors to avoid acting in circumstances where that would give rise to an actual, perceived or potential conflict of interest. In our view where a PBS accepts appointment to carry out functions under sections 76 and 77 for a building or building work in

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the same municipality in which they act for Council, this would give rise to either an actual or a potential conflict of interest. Accordingly, in our view, a PBS who is engaged by a Council as a consultant or contractor is effectively prevented by the Code of Conduct from carrying out functions under sections 76 and 77 of the Act in that municipal district while engaged by Council.

- 1.4 It is open to Councils to include in any contract with a PBS conditions which prevent the PBS from accepting appointments as a PBS in that municipality during the term of the contract and which require the PBS to notify Council of any actual or potential conflict of interest which may arise.
- 1.5 A PBS who is engaged by Council as an MBS is prevented from accepting an appointment as a PBS for work in that municipality pursuant to section 79(2A)(b). This is not dependent on whether the MBS is a contractor or an employee.

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## Contact

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## Partner



**Simone Holding**

## Detailed analysis

### Background

1. The Victorian Municipal Building Surveyors Group Inc (**VMBSG**) has received a number of enquiries from members about the engagement of private building surveyors (**PBS**) as a contractor or consultant building surveyor for councils.
2. In many cases, PBS' continue to carry out PBS functions under sections 76 and 77 of the *Building Act* 1993 (Vic.)(**Act**) while engaged by councils – whether directly as an employee, consultant or contractor, or through an agency hire arrangement. Due to resourcing requirements, it is commonly the case that building surveying staff engaged to work by councils are engaged not as employees but as consultants or via agency hire and are paid hourly rates.
3. The VMBSG has sought advice on the construction of section 79(2A) of the Act which prohibits a PBS from carrying out functions as a PBS if they are also “an officer or employee of a council and the building is situated in or the building work is to be carried out in the municipal district of that council.”

### Qualifications and assumptions

4. This advice is general in nature and does not consider any particular PBS or the terms of their engagement with a council.
5. We have assumed that VMBS is seeking advice only in relation to building surveyors engaged by Councils to provide services within Council's building team and not in relation to a PBS who is appointed as the municipal building surveyor for the municipality. However, for completeness, we have noted this scenario also.

## Legal analysis

### Legislative background

6. Under section 76 of the Act, a PBS can be appointed to issue building permits, carry out inspections, and issue occupancy permits under the Act. In addition, under section 77 of the Act, a PBS can carry out any other function conferred on PBS' by the Act or *Building Regulations* 2018 (Vic.)(**Regulations**).
7. However, section 79 of the Act places limitations on the circumstances in which a PBS can act. Section 79(2A) provides the following limitation:
 

(2A) *A private building surveyor must not carry out any functions set out in section 76 or 77 in relation to a building or building work if the private building surveyor—*

  - (a) *is also an officer or employee of a council and the building is situated in or the building work is to be carried out in the municipal district of that council; or*
  - (b) *is engaged by a council under section 215 to carry out the functions of municipal building surveyor and the building is situated in or the building work is to be carried out in that municipal district.*

*Penalty: 500 penalty units.*
8. Effectively, where a building surveyor is engaged by a council building team but is also continuing to carry out private building work, that building surveyor will be prevented from

carrying out private building surveying work in the municipality in which they are engaged by Council if they are an 'officer or employee' of Council. If they are not an 'officer or employee' of Council then no such restriction applies.

9. Accordingly, in circumstances where councils are engaging PBS to act for them to assist in carrying out the enforcement roles of the MBS in that municipality, it is very important for councils to know with certainty whether a PBS engaged by them is an 'officer or employee' of the council.
10. Where Council has engaged a PBS to act as an MBS under section 215 of the Act, the position is clearer. Section 79(2A)(b) makes clear that the MBS cannot undertake PBS functions in that municipality. It does not matter whether the MBS is a contractor or an employee, because the term 'engaged by a council' covers either circumstance.

**When is a PBS an officer or employee of a council for the purpose of section 79(2A)(a) of the Act?**

*Employees*

11. Whether a person is characterised as an employee or an independent contractor can be a complex question. It is not the title given to the relevant person or how they are described in the contract but the totality of the relationship that is paramount in determining whether an employment relationship exists. The sorts of factors that are relevant to whether a worker is a contractor or an employee include (but are not limited to) whether the worker:
  - 11.1 is paid a wage or an hourly rate;
  - 11.2 has PAYG tax deducted;
  - 11.3 has an ABN;
  - 11.4 works set hours;
  - 11.5 has an entitlement to annual leave, long service leave and personal leave;
  - 11.6 has superannuation contributions paid by Council.
12. Councils should consider the terms on which they have contracted with building surveyors to confirm whether or not they could be regarded as employees. However, it is assumed for the purposes of this advice that a PBS engaged as a contractor or consultant will not meet the criteria to be regarded as an employee of a council.
13. Where building surveying staff are engaged via a labour hire arrangement, they will not be employees of Council, as there is no direct contract between Council and the worker in question. Council's contract is instead with the labour hire provider, who then engages the building surveyor.
14. Where a person is employed by a council as a building surveyor, section 79(2A) of the Act will operate to limit their ability to carry out PBS functions. They will not be able to carry out PBS functions in the municipal district of their employer council. However, they can, subject to a contrary provision in their contract of employment, carry out PBS functions outside the relevant municipality.

*Officer of a Council*

15. There is no definition in the Act of an 'officer of a council'. However, the Act does contain this definition:

*Officer, in relation to a body corporate, has the same meaning as officer of a corporation has in section 9 of the Corporations Act.*

16. Section 9 of the *Corporations Act* 2001 (Cth) defines 'officer of a corporation' to mean either:
  - 16.1 a director or secretary of the corporation; or
  - 16.2 someone who makes or participates in making decisions which affect the whole or substantial part of the corporation or who has the capacity to affect the corporation's financial standing.<sup>1</sup>
17. This raises the question of whether the definition in the Act of officer (which is restricted to applying to bodies corporate), applies to Councils. The term 'council' is defined in the Act to mean a council within the meaning of the *Local Government Act* 2020 (Vic.) (**LGA**). For the purpose of the LGA, councils are bodies corporate and are held to be capable of doing all things which bodies corporate may do by law. On that basis it is open to conclude that an officer of council, for the purpose of section 79(2A) of the Act, is someone at Council who has the authority to make decisions which affect the whole of Council or which affect Council's financial standing.
18. The definition of 'officer' was not inserted into the Act until 2016, whilst section 79(2A) has been in the Act since 1995. In that context, it seems more likely that the intention of the insertion of the definition was to make it clear, in the context of infringement or prosecutions under the Act, who could be regarded as being responsible for decisions made by a body corporate who has contravened the Act.
19. If that is the case, then the phrase 'officer of a council', rather than taking its meaning from the 'officer' definition in section 3 of the Act, would take its generally accepted meaning. We understand that the generally accepted meaning of an officer of Council is a person who was appointed to an office. This would include, for example, the chief executive officer of a council.
20. Building surveyors who have been engaged as contractors or consultants cannot be said to have been appointed to an office. Rather, they are carrying out services pursuant to a contract for the provision of those services.
21. The generally accepted meaning of 'officer of a council' is similar to the 'officer' definition in the Act, in that an officer is someone who is more than a mere employee or someone engaged to provide services. Unlike the 'officer' definition from the Act, it isn't necessary to show that the person can make decisions affecting the whole of Council or affect Council's financial standing, but rather that the person has been appointed to a particular position, rather than employed or contracted with to provide services. In practice, that would usually be a position which carried some seniority, such as the chief executive officer role.
22. This is consistent with the terminology used in the Act. Had it been intended that section 79(2A) of the Act should apply to any PBS engaged by a council however that engagement occurs, the provision could have been drafted to have that broad application. See for example section 79(1)(b) which applies to a PBS who is or was 'employed or engaged' by a person or body that prepared the relevant design. See also section 216B of the Act which enables an MBS to delegate their functions to any person 'employed or engaged' by the council, subject to meeting registration requirements.
23. For the reasons set out above, we consider that a PBS who is engaged as a contractor or consultant, whether directly by a council or through an agency hire provider, will not be an 'officer' of a council for the purposes of the limitation in section 79(2A) of the Act. Accordingly, a contractor or consultant PBS of a council is not prevented, under section

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<sup>1</sup> There are a number of other roles of a corporation which are considered 'officer' roles which are not relevant for the purposes of this advice.

79(2A) of the Act, from carrying out PBS functions in the same municipality in which they are also engaged as a building surveyor for a Council.

### Application of the Building Surveyor Code of Conduct

24. Although section 79(2A) does not apply to Council building surveyors who are contractors or consultants rather than employees, they may nevertheless be prevented from accepting appointments as a PBS within the municipality for which they are engaged by Council.
25. Clause 5 of the Victorian Building Surveyor's Code of Conduct provides that, in addition to statutory obligations, a building surveyor must take reasonable steps to avoid situations that could be an actual, perceived or potential conflict of interest. In our view, if a building surveyor is contracted to act for Council but then accepts an appointment to act as an RBS in respect of a building or building work within the same municipality there will be a potential conflict of interest because Council has a role to play in the enforcement of the Act and the Regulations in respect of that property. We accordingly think it likely that accepting such an appointment would constitute a breach by that building surveyor of the Code of Conduct, even section 79(2A) of the Act does not apply.
26. Arguably, this obligation extends to MBS', in circumstances where building surveyors are delegated to exercise the MBS' powers. We recommend that an MBS, where appointing a building surveyor to exercise their powers via a delegated authority, should take active steps to ensure that the building surveyor (if they are a contractor and not an employee and therefore not subject to section 79(2A)(a) of the Act) does not act in a manner that would constitute an actual, perceived or potential conflict of interest.

### Other options for councils

27. In order to ensure that a conflict of interest is avoided, councils could, when entering into a contract with a PBS, include as conditions of that contract that the PBS:
  - 27.1 is not permitted to carry out functions under sections 76 and 77 of the Act within the municipal district of that council while engaged by that council;
  - 27.2 must take active steps to avoid any actual, potential or perceived conflict of interest in relation to any buildings or building work within the municipality in respect of which the PBS has acted as RBS in the past; and
  - 27.3 must notify council of any actual or perceived conflict of interest which has arisen or which the PBS considers is likely to arise as a result of their appointment to carry out the functions under sections 76 and 77 of the Act.
28. For completeness, we note that where section 79(2A) does apply to restrict an officer's or employee's ability to act as a PBS within a municipality, councils cannot exclude the operation of that section, whether by contract or otherwise.

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### Contact

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