

Conflicts of Interest During Design

Victorian Building Authority
Masterclass

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ROAD MAP

- Different types of Building Surveyors
- Different Building Surveyor functions
- Who can appoint a Building Surveyor to do what?
- Design – What must a private building surveyor not do?
 - The Building Act
 - Building Surveyor Code of Conduct (**Code**)
 - Consequences
- Interactive Q&A Poll – Where do you draw the line?
- Top 6 Takeaways
- Your Questions



THE DIFFERENT TYPES OF BUILDING SURVEYORS

Private
Building
Surveyor

Corporate
Building
Surveyor

Municipal
Building
Surveyor

Consultant
or
Advisor



Designated
Building
Surveyor

DIFFERENT BUILDING SURVEYOR FUNCTIONS

Statutory Functions



Section 76 Functions

- Issue building permit
- Carry out mandated inspections
- Issue occupancy permits
- Issue certificates of final inspection

Section 77 Functions

- Enforcement powers
- Make decisions set out in the Building Act
- Exercise discretions set out in the Building Act

When appointed the private building surveyor (PBS) = relevant building surveyor (RBS)

DIFFERENT BUILDING SURVEYOR FUNCTIONS

Contractual Functions



Contract based services that are consistent with their statutory functions

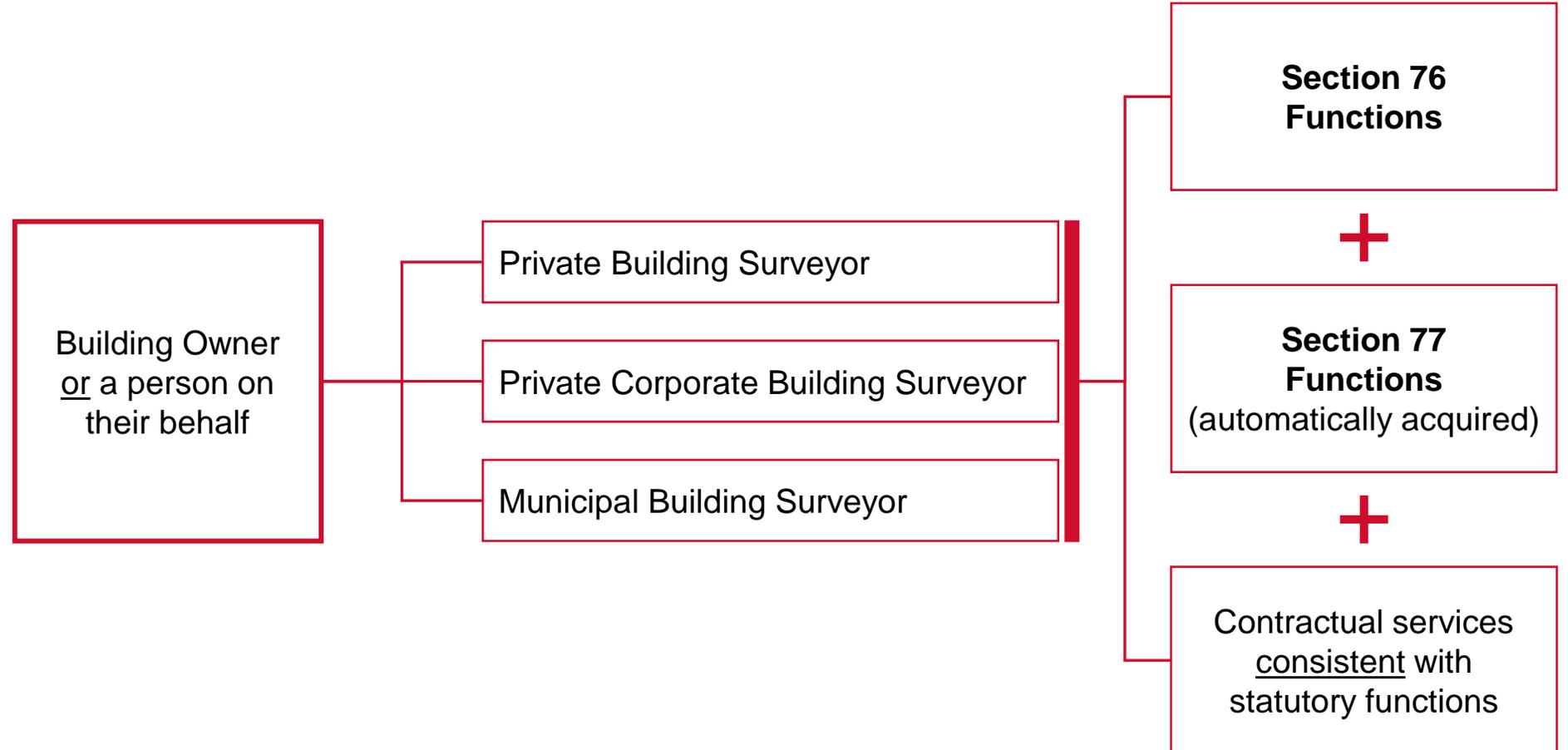
- Non-mandatory inspections for compliance
- Compliance reports
- Confirm or reject compliance is achieved by design
- Give opinion on solutions posed by an MBS

Contract based services inconsistent with their statutory functions or not permitted by the Building Act

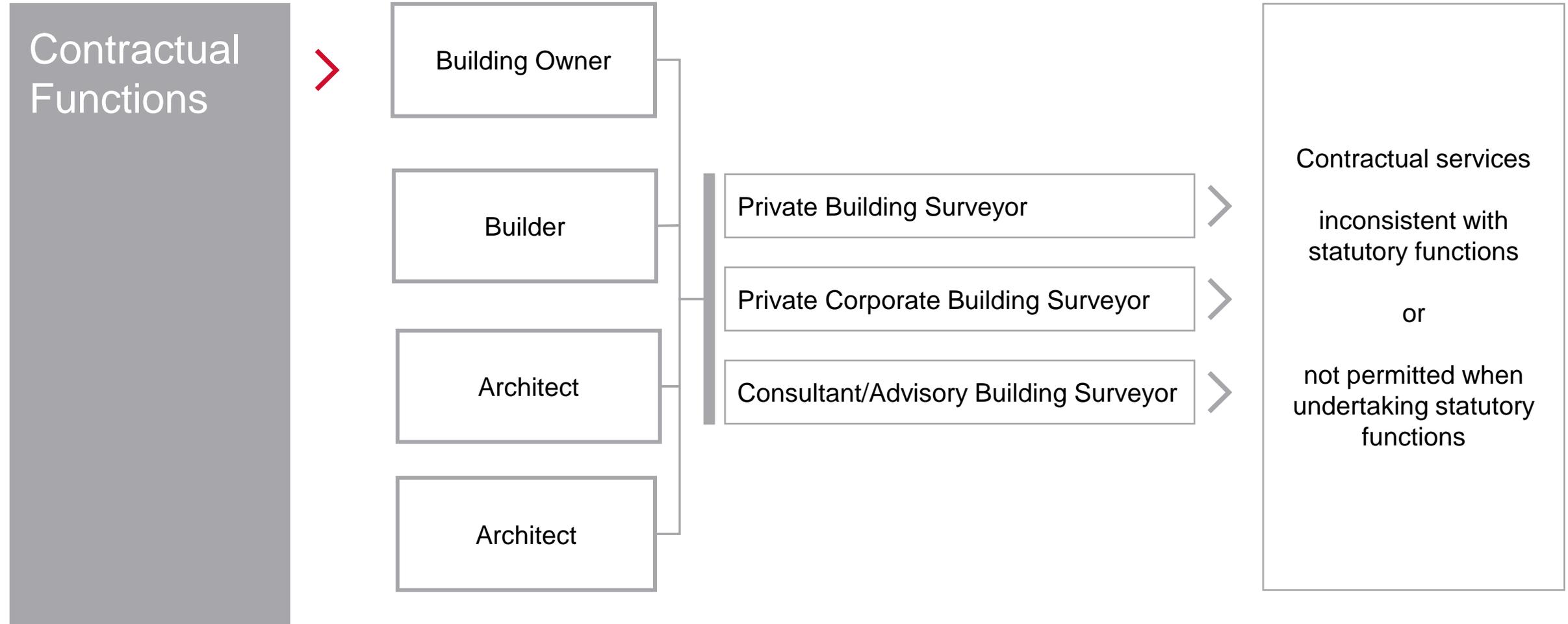
- Design input
- Design performance solution
- Design compliant outcome
- Work along design team
- Inspect to ensure design intent is met
- Section 238 certificates where building surveyor did not design the fire performance solution
- Expert evidence

ROLES AND FUNCTIONS – WHO CAN BE APPOINTED TO DO WHAT?

Statutory Functions



ROLES AND FUNCTIONS – WHO CAN BE ENGAGED TO DO WHAT?



**The role of the
private building
surveyor appointed
to undertake the
statutory functions**



THE ROLE OF THE PRIVATE BUILDING SURVEYOR APPOINTED TO UNDERTAKE STATUTORY FUNCTIONS (THE RBS)

‘....in carrying out his functions, a building surveyor plays a critical role in maintaining public safety and protection in design, demolition and construction of buildings; and that responsibility requires an independence and impartiality. Impartiality engenders confidence or an acceptance of the decision. An aberration exists in that a surveyor is appointed by the building owner, but that is to carry out a statutory function under which the surveyor is called on to give an independent opinion.... ’

Colonial Range Pty Ltd v Akritidis [2017] VSC 337

DESIGN – WHAT THE BUILDING ACT DOES NOT ALLOW

Section 79(1) – Without an exemption from the VBA, a **private building surveyor** must not carry out any **statutory functions** where it or a 'related person':

- ✗ Prepared the design (or any part of the design)
- ✗ Is employed or engaged by the designer preparing the design to do more than carry out a s76 function
- ✗ Was employed or engaged in the last 12 months by the designer preparing the design to do more than carry out a s76 function
- ✗ Has a direct or indirect pecuniary interest in the body preparing the design
- ✗ Has a direct or indirect pecuniary interest in the building or building work
- ✗ Has a direct or indirect pecuniary interest in any body carrying out the building work (eg builder, architect, tradesperson)

DESIGN – WHAT THE BUILDING ACT DOES NOT ALLOW

Section 79(1) – Without an exemption from the VBA, a **private building surveyor** must not carry out any **statutory functions** where it or a ‘related person’:

X Has a conflict of interest

Regulation 265

A building surveyor must immediately inform a client in writing if a conflict of interest arises or appears likely to arise between them

The test

A fair minded and informed observer might conclude that the decision maker might not be impartial

A reasonable apprehension of bias

DESIGN – WHAT THE BUILDING ACT DOES NOT ALLOW

Who is a ***related person***:

- a partner of the PBS in a partnership
- director of a corporate PBS
- related company of a corporate PBS
- Employer of a PBS
- Employee of a PBS
- Contractor of a PBS
- Spouse or domestic partner of a PBS
- parent, child or sibling of a PBS
- any person that PBS has a contractual arrangement that might reasonably be seen to give rise to a conflict of interest between the PBS' functions and the PBS' interests under the arrangement

DESIGN – WHAT DOES THE CODE REQUIRE?

Independence (section 4 of the Code)

How to conduct yourself

- Be independent
- Appear independent
- Don't simply uphold an owner or a builder's decisions
- Don't appear for the owner or its agent at any appeal hearing
- Clearly distinguish your services if you act as a consultant and an RBS

Don't be the RBS if:

- You were involved in the design
- You are involved in the design
- You advised on the design solution
- You provided consultancy services
- You are providing consultancy services
- You designed the performance solution

Compliance

- Advise on Building Act, Regulations and NCC requirements but leave it to the design team to decide how their design will achieve compliance
- Provide advice on deemed-to-satisfy solutions
- Don't provide a compliance certificate for design work if your colleague is the RBS
- Don't peer review design work if your colleague is the RBS

DESIGN – WHAT DOES THE CODE REQUIRE?

Independence (section 4 of the Code)

Novation

- Don't accept novation to a builder for commercial building work
- Don't accept novation to a builder for domestic building work
- Don't accept novation

Design

- Don't get involved in the design
- Separate yourself from the design process
- Separate yourself from the design development
- Don't suggest design solutions
- Only suggest names of a designer, don't engage them

Performance solutions

- Discuss the concept of having a performance solution
- Don't get involved in the actual preparation of a performance solution
- Don't get involved in preparation of any supporting documents for a performance solution
- Don't get involved in choosing who undertakes a performance solution
- Only suggest names of a fire engineer, don't engage them

DESIGN – WHAT DOES THE CODE REQUIRE?

■ Avoid conflicts of interest (**section 5 of the Code**)

conflicts of interest includes *'circumstances where a building surveyor could be influenced or could reasonably be perceived to be influenced by a private or business interest when carrying out a statutory function or when required to act in the public interest.'*

- A conflict of interest can be **actual, perceived** or **potential**
- Don't accept engagement as a consultant building surveyor on one project and the RBS on a separate project for the same developer
- Private building surveyor should:
 - keep assessing this throughout the project
 - have policies and procedures in place to detect potential conflicts of interest
- PBS is expected to remove themselves if there is a conflict of interest

DESIGN – CONSEQUENCES

A breach of s79(1) or s79(1A)

A PBS can apply for an exemption from the VBA

Any exemption must be in writing

May result in disciplinary action if no exemption

A breach of s79(1) specifically carries penalties

Individual = up to \$82,610
Corporation = up to \$413,050

A breach of the Code

May result in disciplinary action

A PBS cannot apply for an exemption from the VBA



**Where do you
draw the line?**



Q&A –
Interactive and
Anonymous Poll



QUESTION

1

Jane is a private building surveyor. She has been approached by Smick Architects Pty Ltd to enter into a consultancy agreement on behalf of the building owner. The scope of work is limited to issuing the building permit and the occupancy permit. Can Jane accept the offer and enter into the consultancy agreement?

Yes or No?



QUESTION

2

Smick Architects Pty Ltd is not sure about a new ACP they are thinking of using on the façade of a new high rise building they are designing. The private building surveyor they are planning to use to issue the building permit in due course happens to be in their office and Smick asks him if a performance solution is needed. The private building surveyor says ‘yes’ and offers to give up his afternoon at no cost to sit with Smick and help work out what the performance solution would look like. Can the private building surveyor issue the building permit?

Yes or No?



QUESTION

3

DevCo asked Tick of Approval Building Surveyors to do some preliminary work to suggest design changes and develop design solutions to achieve deemed-to-satisfy compliance as the design was being developed. A year later, DevCo calls Tick of Approval and wants to engage Tick of Approval to issue a building permit. Tick of Approval decide to get the new private building surveyor that just started working there to do it. Can the new private building surveyor they have hired issue the building permit?

Yes or No?



QUESTION

4

Your architect's husband is a private building surveyor. Can you engage him to issue a building permit and the occupancy permit?

Yes or No?



QUESTION

5

DevCo hires Smick Architects Pty Ltd to design a low rise high density apartment block. DevCo appoints Jane, a private building surveyor, early on to ensure Smick prepares a deemed-to-satisfy compliant design first time and on time and to also issue the building permit in due course. Jane has monthly meetings with the design team. She reviews the design each meeting and tells them what is deemed-to-satisfy compliant and what is not. Can Jane proceed to issue a building permit when the time comes?

Yes or No?



QUESTION

6

Let's continue to follow Jane on this project. Before application for a building permit is made, Jane is asked to issue a BCA compliance report setting out whether the final design is compliant with the BCA. Having issued the BCA compliance report, can Jane now issue the building permit?

Yes or No?



QUESTION

7

DevCo has engaged Smick Architects Pty Ltd to design a smart ‘one stop’ mini city. The works include a link bridge connecting two existing residential buildings to a new mixed use low rise building and an adjacent retail centre connected by a covered walkway to each building. DevCo is worried that the 50% rule may operate requiring the upgrade of the existing buildings to meet current BCA requirements. Jane, a PBS, is engaged to advise Smick as to how to design the buildings to avoid the 50% rule and to issue the building permit. A year later, a builder is appointed, Jane is novated to the builder and is asked to issue the building permit. Why should Jane cease acting?

- A. She designed to avoid the 50% rule
- B. She was novated to the builder
- C. She is not appointed on behalf of the owner
- D. All of the above



QUESTION

8

DevCo want to develop the next 7 star rated and tallest building in the southern hemisphere. Smick Architects Pty Ltd are engaged following their win of a global design competition. To help with the complex design, Smick engage Tick of Approval Building Surveyors to provide compliance advice as they develop the design, formulate performance solutions, prepare a BCA compliance report for DevCo and recommend modifications that can be sought under section 160 of the Building Act, to ease the compliance burden. Can Tick of Approval accept the engagement?

Yes or No?



QUESTION

9

DevCo is developing a commercial building in the CBD. Its demolisher SmashCo applies on DevCo's behalf to a private building surveyor for a building permit to undertake demolition works. DevCo issues protection work notices to the neighbour. The neighbour disputes the protection works and Jane, a PBS, is engaged by SmashCo to review the neighbour's response notice and give expert evidence in the BAB appeal relating to the protection works. Nine months later, the RBS was given permission by the VBA to terminate his appointment. DevCo, appoints Jane as the new RBS. DevCo withdraws its original building permit and a new building permit is issued by Jane.

Is Jane's appointment as RBS valid?

Yes or No?



QUESTION

10

As the land owner, you engaged Jane, a PBS, to issue a building permit to construct a set of townhouses. You and Jane both know each other as you both volunteer with the SES. Does Jane have a conflict of interest?

Yes or No?

Top 6 Takeaways

- 1. The RBS must be appointed by the land / building owner or someone on their behalf (but not builder for major domestic contract works)**
- 2. The RBS must be independent, must be seen to act independently and must make decisions independently**
- 3. Don't get the RBS involved in design work**
- 4. If you need design advice or support, engage a consultant building surveyor**
- 5. Avoid Novation**
- 6. The Code supplements the obligations already in the Act – it needs to be followed too**

Questions & Answers



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