

What can I claim in a building dispute at VCAT?

Fact Sheet



This fact sheet covers:

- ✔ What can I claim at VCAT?
- ✔ Tips on how to calculate the amount of your claim
- ✔ What is a “set off”?
- ✔ Other risks to consider

This fact sheet is relevant to homeowners who are attempting to claim damages from their builder in relation to a domestic building dispute.

WARNING: This fact sheet is intended as a general guide to the types of loss and damage claimable in domestic building disputes at VCAT. What you can actually claim against your builder will depend on the specific facts and circumstances of your case.

1. What can I claim at VCAT?

1.1 Key points

- ✔ **VCAT’s power:** VCAT has the power to make any order it considers fair to resolve a domestic building dispute, including ordering the payment of a sum of money.
- ✔ **What you can actually recover from your builder** in a domestic building dispute will depend on what loss and damage you have actually suffered. This is because generally the purpose of an award of damages is to put you back into the position you would have been had the problem not happened.

WHAT ARE DAMAGES?

In law, “damages” means what you can claim as a result of loss you have suffered because of another party’s actions.

1.2 Has your builder completed the work?

If your dispute with your builder arose because the builder didn’t *actually* complete the works that you contracted **and** paid for, then your damage might be the amount required for another builder to complete the works.

If the builder *unlawfully* failed to complete the work (for example, because they tried to terminate the contract when they didn’t have a right to), but you hadn’t paid for the work, your loss might still relate

to incomplete work. This is because a builder who comes in to complete another builder's half-finished work may charge you more than the first builder was going to. Here, your loss would be the difference in contract price.

CAUTION – TERMINATION OF CONTRACTS

If you are thinking about entering into a contract with a new builder, you may have to terminate your first contract.

Please note that there can be serious consequences from terminating a contract if you are not entitled to terminate the contract and the Builder may then have a right to claim damages against you. We strongly encourage you to seek advice from a lawyer before you take any steps to terminate the contract.

1.3 Are the works defective?

If your claim against the builder is that their work is defective, then your damage may be the cost to fix the defects and any consequential damage.

“Consequential damage” is loss subsequent to and related to an immediate loss. For example, if the builder built a defective roof, which caused a leak, and water damaged your plaster, the damage to the plaster is consequential.

1.4 Have you suffered other types of loss?

In addition to the amount claimed to fix and/or complete works, you may also be able to claim other losses that arose because of the dispute.

Examples of other types of loss which you might be able to claim, include:

- ✓ **Expert fees** – including the cost of obtaining reports and/or the fees an expert charges to appear at VCAT on your behalf.
- ✓ **Legal fees** – if you engage a lawyer to help you with your VCAT proceeding. Your lawyer will be able to discuss how much you might be entitled to recover - it is unlikely to be the actual total cost of legal fees you incur. **Note:** each party bears their own costs in a VCAT proceeding as VCAT is a no costs jurisdiction. However, there are avenues for legal costs to be ordered (see Section 4).
- ✓ **Loss of amenity** – such as having to live without a bathroom for a number of weeks.
- ✓ **Loss of rental income** – if you can prove that you were unable to rent the property because of defective or incomplete works, or that your tenants paid a reduced amount of rent because of the defects.
- ✓ **Rental costs** – if you had to live in a rental property because work to fix the defective or incomplete work was being done, or if the builder delayed completion of the work (outside the time allowed in the contract to complete the work).
- ✓ **Storage costs** – if you incurred costs (or will incur costs) of storing your belongings elsewhere when works to fix defects are being done.

Please note:

Physical injury – VCAT cannot award compensation for physical injury arising from domestic building disputes.

2. How do I calculate the amount of my claim?

2.1 Step 1 – Work out what the problems are

The first thing you need to do is work out what the defective or incomplete works are. You can do this in a number of ways. We have included two options in this fact sheet.

- ✔ **Option A:** Get a different builder to look at the problems and prepare a detailed quote.
- ✔ **Option B:** Get an expert report.

Option A: Get a quote from another builder

If there are only a few defects, which aren't too serious, you could ask another builder to look at the problems and prepare a detailed quote for you.

Option B: Get an expert report

If there are a lot of defects, or some very serious defects, you might prefer to engage a building expert to inspect your property and prepare an expert report for you.

This report should:

- identify any defective and/or incomplete works, and
- set recommended steps for the works to be rectified and/or completed.

It can also set out the estimated cost to fix the problems.

The expert report will strengthen your case by showing VCAT that the amount you're claiming is **necessary** to put you back into the position you would have been in if the works hadn't gone wrong.

The expert can also be called to give evidence for you at VCAT.



TIP

In VCAT, expert reports have to follow the requirements set out in the [Expert Evidence practice note](#).

2.2 Step 2 – Find out how much it will cost

If you engaged a building expert, you will still need to know what it will actually cost to fix the defects and/or complete the works at your property. You must be able to show that the amount you are claiming is **reasonable**.

You have two options when considering how to calculate your claim:

Option 1 – Claim, then fix

You may consider calculating your claim by getting quotes from other builders for the work listed in the expert's report, and then use the quotes to claim the cost you are likely to incur.

Option 2 – Fix, then claim

You may consider fixing and/or completing the works first, and then using the invoice to claim the actual costs you incurred from the builder.

If you intend to calculate your claim through the second option (i.e. by incurring the costs first) it is a good idea to tell your original builder that you intend to do so. This will give them an opportunity to come back and do the works themselves before you incur the additional costs.

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CAUTION – INCURRING COSTS

If you're not successful at VCAT, you risk being left out of pocket for the cost of works.

You should only pursue the second option if you are confident that you can cover the cost of the works even if your claim against the builder fails, or if you are awarded less than the actual costs you incurred.

3. Is the other party likely to claim any set-off?

Sometimes, your builder may claim amounts that they believe you owe them and that the amount you're claiming should be reduced to reflect this. This is called a **"set-off"**.

Your builder may claim set-off against your claims where they believe that:

- you have failed to pay a progress payment or the final payment (including the cost of any variations to the work under the contract), and/or
- they are entitled to interest because you failed to pay a progress or final payment within 7 days of it becoming due, and/or
- they are entitled to delay damages because the building works have been delayed by your action or inaction.

Any set-off claims made by your builder will be included in their Points of Defence.

4. Other risks to consider

4.1 VCAT Jurisdiction

General Rule

The general rule under s 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (the **Act**) is that each party bears its own costs as the VCAT is a no costs jurisdiction.

Although VCAT is a no costs jurisdiction, there are mechanisms under the Act which attempt to protect a party from having to bear their own costs in a situation where:

- VCAT exercises their discretion to award costs; or
- a presumption of an order for costs is triggered through an unreasonable rejection of a settlement offer.

CAUTION – RISK OF COSTS ORDER

If you prolong a matter on your own accord or unreasonably reject an offer from the Builder (which is reasonable), this opens up grounds for VCAT to have jurisdiction to award a costs order against you.

Power to Award Costs

VCAT has discretion to order that a party to a proceeding pays all or some parts of the costs of the other party if VCAT is satisfied that it is fair to do so.

In doing this, VCAT must have regard to factors such as:

- whether the party conducted the proceeding in an unnecessarily disadvantageous way to the other party; or
- whether they have delayed and prolonged the proceeding unreasonably.

If a party makes a settlement offer to the other party which is rejected, this may impact VCAT's discretion to award costs, for example if a party unreasonably refuses a settlement offer, VCAT may determine that that party should bear the costs of the other party.

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