

# How can I resolve my building dispute out of court?

## Fact Sheet



### This fact sheet covers:

- ✔ Formal offers pursuant to the VCAT Act
- ✔ Calderbank offers
- ✔ Pros and cons of using formal offers or Calderbank offers

This fact sheet provides some general information about how to make formal offers and Calderbank offers in proceedings at the Victorian Civil and Administrative Tribunal (VCAT).

If you're at VCAT, you can attempt to settle your dispute by issuing a formal offer of compromise or Calderbank offer to the other party. Both types of offers can provide you with some protection if you incur costs unnecessarily because the other party unreasonably failed to accept your offer.

It's up to you to decide if you want to make an offer and, if you do, what type of offer you make.

## 1. Settlement offers pursuant to the VCAT Act

If you're a party to a VCAT proceeding, you can make a settlement offer pursuant to the Victorian Civil and Administrative Tribunal Act 1998 (**VCAT Act**) at any time before VCAT makes its orders on the matters in dispute.

If you want to make a "formal offer" you have to make sure the offer complies with the requirements of the VCAT Act.

We've summarised the requirements for "formal offers" in this section of our fact sheet.

### FORMAL OFFERS

Because these offers have to comply with the VCAT Act, they are sometimes called "formal offers".

### 1.1 With prejudice or without prejudice?

"Formal offers" can be made "with prejudice" or "without prejudice".

If you make your settlement offer:

- **"with prejudice"** – this means that any party to the proceeding can refer to the offer, including the terms of the offer, at any time during the proceeding.
- **"without prejudice"** – this means that VCAT is not able to be told about the offer until after VCAT has made its orders

### TIP

Under the VCAT Act, if a settlement offer doesn't specify whether it is made with or without prejudice, it will be treated as if it had been made without prejudice.

about the matters in dispute (other than orders in respect of costs).

### CAUTION – “WITH PREJUDICE” OR “WITHOUT PREJUDICE”?

It is important to use “without prejudice” so you and the other side can talk freely and try to reach an agreement, without worrying that your offer could be used against you later.

**For example**, in your offer you might say “I will accept \$10,000 to settle this case”, but you ask VCAT to award you \$20,000. It could be unhelpful for your case if VCAT knew you would accept \$10,000.



## 1.2 Formal requirements applicable to settlement offers

### THE VCAT ACT

Sections 112, 113, 114 and 115 of the VCAT Act set out what is required if you want to make a formal offer. You can find a copy of the VCAT Act on the [Victoria law today library](#) by clicking “Acts” and searching under the letter “V” (for “Victorian”).



#### 1.2.1 Is it a formal offer?

If you’re going to make a “formal offer” you should say this in your offer.

**For example**, you could say: “*This settlement offer is made without prejudice and is made in accordance with the Victorian Civil and Administrative Tribunal Act 1998 (Vic)*”.

#### 1.2.2 How long does an offer have to be open for acceptance?

You can choose how long you want your offer to be open for acceptance by the other party, *but* your offer has to be open until:

- immediately before VCAT makes orders on the matters in dispute; or
- the expiry of the time period you put in your offer.

If you set out an expiry time in your offer, it has to be at least 14 days after the date you make your offer.

**For example**, you could say:

- “*This settlement offer is open for acceptance by the [party name] for 14 days after the date this settlement offer is made.*”; or
- “*This settlement offer is open for acceptance by [party name] until [date].*”

#### 1.2.3 Can you withdraw a formal offer?

You can’t withdraw a formal offer while it’s open for acceptance *unless* you get VCAT’s permission.

If you ask VCAT for permission to withdraw your offer, a VCAT member can look at the terms of your offer even if it was made “without prejudice”.

#### TIP – EXPIRY DATE

Because the other party can accept your offer, even if they have made a counter-offer, it can be a good idea to include an expiry date in your offer, rather than keep the offer open until VCAT decides your case.

#### NOTE

If a VCAT Member looks at your “without prejudice” offer, a different VCAT Member will have to hear the rest of your case.

### 1.2.4 Can you make more than one offer?

You can make more than one settlement offer. It's also possible for you to serve a combination of formal offers under the VCAT Act and Calderbank offers. If you do this – remember to include expiry dates in your offers!

### 1.2.5 Offers involving the payment of money

If your settlement offer sets out that one party will pay the other party, your offer will need to set out when the money is going to be paid.

**For example**, you could say: “*The Respondent will pay the Applicant \$[x] (Settlement Sum) in full and final settlement of the Applicant’s claim. The Settlement Sum shall be paid to the Applicant within [x] days of the date of acceptance of this offer*”.

### 1.2.6 Defective offers

If you make an offer which doesn't comply with the requirements of the VCAT Act (for example, because you didn't leave the offer open for a long enough time), in some cases the offer can still be treated as a Calderbank offer.

## 1.3 What happens if the other party accepts my formal offer?

The other party must accept your offer by giving you a signed notice of acceptance.

If the other party accepts your offer, you have to do what you said you would do in your offer.

If you don't do what you said you would, the other party can ask VCAT to:

- make an order giving effect to the terms of the offer, or
- if you started the VCAT proceeding (i.e. you are the “Applicant”):
  - dismiss the proceeding, or
  - if the party that accepted your offer made a counterclaim before you made your offer, make an order awarding any or all of the things they requested in their counterclaim, or
- if the other party started the VCAT proceeding (i.e. you are the “Respondent”):
  - make an order awarding the builder any or all of the things they asked for in their VCAT application.

## 1.4 What happens if the other party rejects your formal offer?

Usually in VCAT proceedings each party has to pay their own legal costs. This means, if you hire a lawyer, you have to pay for that lawyer's help.

*But* if you:

- make an offer that complies with the the VCAT Act
- the other party doesn't accept the offer, and
- VCAT makes orders which aren't better than what you offered,

### ! CAUTION

If you are self-representing, you won't incur your own legal costs. But, if the other party has a lawyer and serves an offer on you, which you don't accept, you might have to pay their legal fees if they get a more favourable outcome than their offer.

then VCAT can make the other party pay “all costs” that you incurred after you made the offer.

### 1.4.1 What does “all costs” mean?

“All costs” doesn’t always mean the other party will have to pay all your legal costs after you made the offer. This is because VCAT can make an order that the other party pay your costs in different ways, these include:

- **Solicitor/client costs** – means what a lawyer charges their client for legal help.
- **Party/party costs** – means the amount VCAT orders one party to pay the other. VCAT works this out by applying a “costs scale”, unless you and the other party agree to another way to calculate the costs.
- **Costs on an “indemnity basis”** – means all costs, except when they were unreasonably incurred or are an unreasonable amount.

## 2. Calderbank offers

A ‘Calderbank’ offer is another kind of settlement offer. It’s an offer made “*without prejudice save as to costs*”.

This means that the person who made the offer can tell VCAT about it when VCAT is deciding whether to make a costs award. This is because there should be consequences for a party that rejects a reasonable offer, and doesn’t get a better award than what the offer set out.

**Remember:** VCAT always has a discretion about whether to award costs, and if so, how the costs will be awarded.

### CALDERBANK?

The name “Calderbank” comes from an English Court of Appeal decision called *Calderbank v Calderbank* [1976] Fam 93, which considered a settlement offer.

### NO AUTOMATIC RIGHT TO A COSTS ORDER

Just because the other party didn’t accept your offer and didn’t get a better result than your offer, doesn’t mean you will automatically get an indemnity costs order.

Making a Calderbank offer is just one factor that might trigger VCAT’s discretion to make a costs award under section 109 of the VCAT Act.



### 2.1 What is an “unreasonable rejection”?

If you say the other party should have accepted your offer, you have to show VCAT that the other party’s failure to accept your offer was “unreasonable”.

VCAT will look at things like:

- when you made your offer
- how long the other party had to think about your offer
- the extent of the compromise you offered
- the other party’s chances of winning the case after you made your offer
- how clear your offer was, and

- whether your offer said you would ask VCAT to award you indemnity costs if the other party rejected it,

to work out whether the rejection of your offer was “unreasonable in the circumstances”<sup>1</sup> and to decide whether to make a costs award in your favour.

### 2.1.1 Your offer should involve a “real and genuine” element of compromise

The extent of the compromise you set out in your offer is a really important factor VCAT will look at to work out whether or not it was unreasonable for the other party to reject it.

For example, if your claim is for \$10,000, and your offer is to accept \$10,000 – instead of being a compromise, your offer would just be re-stating your full claim.

**NOTE:** “Genuine offers” don’t just include the offer of a cash settlement. Sometimes, they can include an offer to “walk away” with each party paying their own costs.

#### “REAL AND GENUINE”

Offers must ‘not amount to a demand to capitulate’ (i.e. a demand for the other party to admit defeat) or a ‘token amount’. Instead, they need to represent a ‘serious endeavour to resolve the proceedings’.<sup>2</sup>

## 2.2 Drafting Calderbank offers

### TIPS

There aren’t any strict rules about the wording to use when drafting a Calderbank offer, but here are some tips to consider:

- ✓ State that your offer is made “without prejudice save as to costs”.
- ✓ Clearly sets out what you will do and what the other party will do.
- ✓ Make sure the terms of your offer are clear and unambiguous - your offer should be capable of immediate acceptance without the other party needing to ask you questions about it.
- ✓ Include reasons why the offer should be accepted, and why it would be unreasonable for the other party to reject it.
- ✓ If your offer doesn’t seem like much of a compromise (e.g. – if your claim is for \$10,000, but you offer to accept \$9,500), you need to be really clear about what the compromise you are making is, and why it would be unreasonable for the other party not to accept it.
- ✓ Clearly state the claims, causes of action and counterclaims covered by the offer (e.g. if it relates to all the things in dispute in your proceeding, say this).
- ✓ The offer should be unconditional and a genuine attempt to settle the dispute.
- ✓ Your offer must be open for acceptance for a reasonable period of time.
- ✓ Your offer must make provision for costs separate from the principle offer.
- ✓ Make sure you set out what will happen if the other party doesn’t accept your offer (e.g. you will see an order for indemnity costs).

<sup>1</sup> The test about unreasonable rejection comes from a case called *Hazeldene’s Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435.

<sup>2</sup> *Kermani v Gaylard & Ors (No 2)* [2011] VSC 143

## 2.3 Which kind of offer should you make?

**If you need flexibility** – a Calderbank offer could be a good choice for you. For example, even though Calderbank offers are usually left open for at least 14 days (the minimum time a formal offer has to be kept open), if time is critical, your Calderbank offer could be kept open for less time.

**If a costs award is really important to you** – a formal offer could be a good choice for you. It's really important to remember that there isn't an automatic entitlement to a costs order just because the other party rejects your offer. Both types of offers can lead to a costs award, but you might choose to use a formal offer under the VCAT Act, if you want more certain consequences.

### NOTE

In *Velardo v Andonov* [2010] VSCA 38 the Court found that settlement offers which comply with the requirements of the VCAT Act fall within the scope of the statutory regime and promote certainty and fairness. This means that VCAT may look at the substance of the offer, not just its form – just because you call an offer a “Calderbank offer”, won't mean it's not a “formal offer”.



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