

# How to work with building experts to support a claim at VCAT

## Fact sheet



### This fact sheet covers:

- ✔ The role of an expert witness
- ✔ Choosing the right expert
- ✔ Instructing your expert

**This fact sheet provides information about how to deal with experts when using them as expert witnesses in the Building and Property List at the Victorian Civil and Administrative Tribunal (VCAT).**

This fact sheet is relevant to self-represented homeowners who intend to pursue a claim against their builder at VCAT, and are considering using an expert witness.

### DOMESTIC BUILDING DISPUTE RESOLUTION VICTORIA (DBDRV)

Except in some limited circumstances, you must make an application at DBDRV – and complete the DBDRV process – before you can commence domestic building proceedings at VCAT.

You may be able to ask DBDRV to appoint an Assessor to inspect the builder's work at your property. You should ask DBDRV about this option.

If you are confused about where you should go to resolve your dispute, please have a look at our fact sheet – "[Domestic building disputes – where to start](#)".



## 1. The role of an expert witness

An expert witness is a person who has specialised knowledge about a subject matter because of their training, study or experience.

An expert witness's professional opinion can be useful as evidence for your claims against your builder.

However, this is only the case if the expert's opinion:

- is objective (this means the expert is independent), and
- relates to the subject they have specialised knowledge about.

For example, a plumbing expert generally won't have specialised knowledge about plastering.

### Always remember -

- 1. The expert witness's paramount duty is to the Tribunal** – they are there to help the Tribunal understand the technical issues that have caused the defects in your home.

### NOTE

Expert witnesses must abide by the requirements set out in the [VCAT Practice Note](#) on Expert Evidence.

- 2. The expert witness's overriding duty is to assist the Tribunal on matters relevant to their expertise** – they can only help the Tribunal by giving their professional opinion about matters relevant to their special area of expertise.
- 3. The expert witness is not an advocate for either party to the proceedings** – they will not advocate on your behalf to the Tribunal. The professional opinion they provide can only be used as evidence. You must then use the evidence to make your own case to the Tribunal.

## 2. Choosing the right expert

### 2.1 Identifying the right type of expert

It is important to choose an expert with appropriate expertise to give evidence supporting the matters you need to prove in your claim. For example, if you allege the builder's works were defective, you should:

- identify the items in your house that you allege are defective
- consider what may have caused the damage, and
- choose an expert with expertise to examine the cause of the damage.

#### CASE STUDY



You notice cracks appearing in your plaster. You ask Jamie, a builder, to come and quote to fix the cracking. Jamie says he thinks the cracks might come back if he patches them up and that it could be a structural problem. He says he can give you a quote for the work once you know what needs to be done. Jamie puts you in touch with an engineer. The engineer thinks there is movement in your slab, and tells you the next step would be to see whether any water is leaking under the slab. He works with a plumbing expert to test the pipes. The test shows the pipes are fine. He then wants to test the type of soil around your slab, and works with a soil expert.

Who do you ask to be your expert witness at VCAT?

- ✓ **Building expert** could provide evidence about what works would be required to fix the problems caused by the foundation movement, like replacing plaster.
- ✓ **Engineer** has specialised knowledge because the cause of the defect relates to the foundations.
- ✗ **Jamie** may have specialised knowledge but would not be appropriate because of a potential business relationship with you.
- ? **Plumbing expert** has specialised knowledge but their professional opinion may not be relevant, depending on whether the pipes contributed to the cause of the defect.
- ? **Soil expert** has specialised knowledge but their professional opinion may not be relevant, depending on whether the soil contributed to the cause of the defect.

**IMPORTANT NOTE** - The facts of every case are different. You will need to consider for yourself whether the expert you choose has specialised knowledge in relation to the factors that you allege are causing defects in your specific case. Generally, the expert will be able to tell you.

## 2.2 Finding the right person to be your expert

Once you have identified the right type of expert you need as your expert witness, do some research and make a shortlist of professionals with that expertise. Consult them to find out whether you would like to engage them as your expert.

When consulting an expert, you may consider asking the following questions:

- What kind of expertise or qualifications do they have?
- Do they have any conflicts that would prevent them from appearing as your expert witness?
- Do they have a business relationship with you such that they might not be independent?
- Have they given evidence in legal proceedings before?
- Have they prepared expert reports for use in legal proceedings before?
- Do they have time to prepare a report for you?
- Do they have time to appear as an expert witness at VCAT for you?
- How much does it cost to engage them to prepare a report and appear as a witness for you?



TIP

It can be a good idea to speak with an expert over the phone before engaging them. This will give you an idea of how they might present as an expert witness at VCAT.

### NOTE – COSTS OF ENGAGING AN EXPERT

You might be able to recover the costs of engaging an expert if you are ultimately successful in your claim at VCAT.

For more information about what you could include in your claim at VCAT, please see our fact sheet – [“What can I claim at VCAT?”](#)



## 3. Instructing your expert

It is important that you instruct your expert appropriately by providing them with a **detailed letter of instruction**. Please see our checklist on the next page for what you should include in your letter of instruction.

### CAUTION

Be careful what you include in your letter of instruction to the expert because the other party may be able to see it. Often, your letter of instruction will be attached to the expert report when it is submitted to VCAT.

Also, anything you have communicated with or instructed to the expert may be discoverable. This means that the other party in your legal proceeding can request to see it.



#### Checklist: What to include in a “letter of instruction”

- The names of the parties.
- Request confirmation that the expert has no conflicts of interest which would interfere with their ability to provide an objective opinion.
- Request confirmation that the expert is aware of and will comply with their duties as an expert witness at VCAT.
- Attach the [VCAT Practice Note](#) on Expert Evidence.
- The date by which you require the report – remember to allow yourself enough time to review the expert report before any key procedural dates, such as deadlines for filing expert reports and/or hearings dates.
- A brief summary of the dispute with the other party.
- The scope of what the report should cover (see below at [Point 3.1](#)).
- Any assumptions that the expert should rely on (see below at [Point 3.2](#)).
- Attach any reports that you wish the expert to consider.

### 3.1 Identifying the “scope”

It is important to identify the right scope by asking the expert to respond to the right questions. The expert’s answer to your questions will become the evidence you need to prove your claim.

When identifying the scope, be careful not to instruct the expert as to your opinion of the cause. It’s important that the expert’s responses are impartial and objective.

#### Checklist: How to identify the scope

- Identify for the expert the defective or incomplete work you have observed.
- Ask the expert to provide their opinion as to the likely cause/s of that damage, or a list of the work required to finish the job.
- Ask the expert to identify any further consequential damage not yet observed, if any.
- Ask the expert what rectification works are required for both the defective works and the consequential damage, if any.
- Ask the expert to set out what work is required to finish the job, if any.
- Estimated cost of rectification works or completion works.

## 3.2 Identifying “assumptions”

When giving instructions to your expert, you should make clear whether any of the background materials or information you have provided them are assumptions.

For example, assumptions may be that:

- the background to the dispute you have provided to the expert is true and correct, or
- the professional opinion contained in other expert reports being relied on is correct.

You should make sure that you can prove the assumptions that the expert is relying on to the Tribunal. If the assumption cannot be proved, then the Expert’s professional opinion would not be very useful as evidence.

If you find out that the assumptions you told the expert is wrong after the expert’s report has been prepared, you will need to ask the expert to amend the report to reflect the changes.

### WAS THIS FACTSHEET HELPFUL TO YOU?

Please take the time to give us some feedback by completing a quick survey [here](#).  
Your comments and suggestions will help us to develop tailored content in the future.