

## NCAT Home Building Disputes: Expert Witness

Independent experts are professionals who possess expertise in construction, plumbing, electrical, structural engineering, concreting, mould hygienist, and quantity surveyors among other home building-related fields. They may be ordered by the Tribunal Member at the hearing to assess building work and prepare a report for the [NSW Civil and Administrative Tribunal \(NCAT\)](#) and the parties involved.

### Understanding the Role of Expert Witnesses in NCAT Proceedings

The NCAT and construction law professionals often refer to independent expert witnesses as an expert witness, or simply, Expert.

If the NCAT appoints an expert witness, you will not be able to call your own expert witness or tender any other expert report except with the leave of NCAT. If the NCAT appoints an expert then the parties will equally bear the cost of the expert. It is not common for the NCAT to appoint an expert. It is more common that the NCAT will give the parties leave to rely on their own expert witness evidence. It is a matter for the party on whether or not they wish to rely on expert evidence in support of their case.

It is important to remember that NCAT decides cases based on the evidence presented at the hearing. Therefore, it is essential to have evidence that will prove your case and respond to any issues raised by the other party.

### Verbal Evidence

At the hearing, you will have the opportunity to give verbal evidence. The Applicant (the person who commenced the proceedings) will usually speak first, followed by the Respondent (the person defending the proceedings). It is important to be truthful and accurate as you will be asked questions about your evidence.

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## Written Evidence

Written evidence can be given to NCAT before the hearing in the form of a statement or an affidavit. Statements are used as evidence to support a case. They can be the statement of the Applicant, Appellant, or Respondent, or a Witness. A statement only needs to be signed by the person and does not have to be sworn or affirmed. An affidavit, on the other hand, is a written record of the facts of the case as seen by the person providing the affidavit. Affidavits are sworn or affirmed in front of a Justice of the Peace (JP) or a solicitor.

Whether the witness makes a statement or affidavit, the Member will require the witness to swear or provide an affirmation of their evidence.

## Attachments to Statements and Affidavits

If you refer to other documents in a statement or affidavit, attach and number them in the order in which they appear. For example, email from owner to Builder on 28 January 2023 (see Attachment 1) and a picture attached to the email (see Attachment 2).'

## Documents

You will need to provide NCAT and the other party with relevant documents in support of your case. These can include contracts, emails, text or WhatsApp messages, letters, voicemail recordings, invoices, phone records, minutes of meetings, plans and drawings, photographs, and film (CCTV footage on site). It is best to place your documents in a folder and label them for easy access during the hearing. It is best practice to number each page sequentially and include a table of content to assist with referencing. There are service providers like Law in Order Sydney that can professionally print, consolidate and file and serve your documents.

If you need evidence for your hearing and the person or organisation will not provide you with that information, you can request a summons.

## Witnesses

Witnesses can provide a statement or affidavit in support of your case. They may also be called to give evidence in person at the hearing. A witness can be anyone who can attest to an event or provide their opinion based on their expertise.

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## Expert Witnesses

If you need evidence of a technical nature, you should engage an expert to provide you with a report. The expert may also give verbal evidence at the hearing. NCAT Procedural Direction 3 - Expert Evidence provides details about expert witnesses. It is important to note that the Tribunal may rely on evidence from expert witnesses to reach a conclusion about a technical matter or area of specialised knowledge that is relevant to an issue to be determined in proceedings.

In summary, independent experts are professionals who possess expertise in home building-related fields and may be ordered by the Tribunal Member to assess building work and prepare a report. Usually, written evidence is made by the expert in the form of an independent expert report. This can be given in the form of a statement or an affidavit. Expert witnesses may also be engaged to provide evidence of a technical nature. NCAT Procedural Direction 3 - Expert Evidence provides further information about expert witness evidence.

Expert witnesses will usually be examined by the NCAT member or the parties legal representatives to test their evidence. To the extent there is any evidence that a party wants to challenge, that party should consider persuading the expert that there is an alternative preferred view which supports your case.

## Should You Engage an Expert?

The use of independent experts, written and verbal evidence, and witnesses can be crucial in building disputes that are being heard by the NSW Civil and Administrative Tribunal (NCAT). These experts can provide valuable technical knowledge and assistance in determining the outcome of the case. It is important to understand that the costs of these experts will be met equally by both parties, and that NCAT will rely on their evidence in reaching a conclusion.

It is also important to provide relevant documents, such as contracts, letters, and photographs, to support your case. If necessary, you can also request a summons to obtain evidence from the other party. Remember to provide copies of all documents to the other party and the Tribunal Member, and to label them for easy access during the hearing.

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It is more likely that the Member will give more weight to the credible witness. Experts provide more credible evidence that they are experienced and qualified in the subject matter of their report. In circumstances where each party engages experts of reasonably similar qualifications and experience then it will be a matter on whose evidence the Member prefers having regard to many factors.

You should consider engaging an expert as early as possible. Often, parties accept findings of experts who are able to clearly articulate their views with reference to relevant standards, codes, and contract provisions. The Tribunal encourages Applicants to commission and obtain their independent expert report in final form prior to commencing NCAT proceedings.

### **Costs of Experts**

There are many former Builders who try to play expert witness. Often these professionals are not suitably qualified, experienced, or knowledgeable with NCAT procedures. The expert often has a critical role in the strength of your case. Your expert may let you down during cross-examination when an expert construction lawyer or barrister is able to persuade the NCAT that your expert's evidence should be given less weight.

In essence, you get what you pay for. The standard fee of expert witnesses from the writer's experience starts from \$8,000 for a standard building dispute.

The cost of the expert should be a serious consideration on whether or not to litigate your matter or try to [resolve the dispute](#) by other means such as settlement agreement. Parties should be aware that it is not uncommon for the NCAT to award the party that fails in the proceedings to pay the costs of the other party including their expert and legal costs.

## **Home Building Act and the Expert Witness**

The [Home Building Act](#) does not expressly refer to the role of experts. However, based on the common, the Tribunal relies on precedent established by prior determinations to guide them in forming their determination.

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## Construction Lawyer and the Expert Witness

Considering the above, a solicitor that specialises in construction law, and in particular, a construction lawyer with expertise with the Home Building Act can help Owners advocate their case. This is because construction lawyers tend to have strong working relationships with expert witnesses who are credible and have the ability to respond to barristers during cross-examination.

## Questions to Qualify Your Expert

If your expert witness is not referred by your specialist construction lawyer then here are some example questions that you could ask experts that you shortlist.

- What is your area of expertise and how does it relate to the issue in my case?
- Can you provide me with examples of similar cases you have worked on in the past?
- What is your fee for preparing a report and giving evidence in court?
- How long will it take for you to prepare a report?
- Can you provide me with references from previous clients?
- Are you available to attend the hearing and give evidence in person?
- Are you impartial and independent, or do you have any conflicts of interest?
- Are you familiar with the relevant laws and regulations related to my case?
- How do you ensure the accuracy and reliability of your findings and conclusions?

Provide examples of your work where you explain your findings and conclusions in a clear and understandable manner for the Tribunal and the parties.

## How to Engage an Expert Witness?

Are you a homeowner dealing with a building dispute? Independent experts can provide valuable technical knowledge and assistance in resolving these disputes.

You should first engage a building and construction lawyer that has expertise with the Home Building Act. Your lawyer will be able to refer you to independent experts who can assist you. Alternatively, you can approach the [Master Builders Association](#) to get the contact details of the building consultants.

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[Contracts Specialist](#) is a law firm that specialises in construction law with particular expertise with the Home Building Act and the NCAT. If you are a homeowner and you have an issue with a Builder with the issue in dispute that exceeds \$30,000 then feel free to call [John Dela Cruz](#) for a free 15 minutes phone consultation.

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