



## NCAT Procedural Direction 3

### EXPERT EVIDENCE

<b>This Procedural Direction applies to:</b>	<p>Proceedings in which the rules of evidence apply.</p> <p>Proceedings in the Consumer and Commercial Division involving claims under the <i>Home Building Act 1989</i> (NSW) where the amount claimed or in dispute is more than \$30,000.</p> <p>Proceedings in the Occupational Division for a “profession decision” as defined in cl 29(1) of Sch 5 to the NCAT Act.</p> <p>Any other proceedings in which the Tribunal directs that this Procedural Direction is to apply.</p>
<b>Effective Date:</b>	11 September 2024
<b>Replaces Procedural Direction:</b>	NCAT Procedural Direction 3 (28 February 2018)
<b>Notes:</b>	<p>You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at <a href="http://www.ncat.nsw.gov.au">www.ncat.nsw.gov.au</a></p>

#### Introduction

1. 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. It is important that experts’ opinions are soundly based, complete and reliable.
2. The Tribunal is bound by the rules of evidence in proceedings in exercise of its enforcement jurisdiction, proceedings for the imposition of a civil penalty in exercise of its general jurisdiction, proceedings under the Legal Profession Uniform Law (NSW) or *Public Notaries Act 1997* concerning a question of professional misconduct and any other proceedings where so required by the relevant enabling legislation (“Evidence Rules Proceedings”), see, for example, s 35, s 38(2) and (3) and Sch 5 cl 20 of the NCAT Act. In Evidence Rules

Proceedings, it is appropriate to require expert evidence to be prepared and presented in a manner which seeks to ensure its admissibility and usefulness.

3. In proceedings where the Tribunal is not bound by the rules of evidence, the acceptability of expert evidence is a question of weight not admissibility. Nonetheless, if those proceedings involve complex or difficult expert issues, it is appropriate to require expert evidence to be prepared and presented in a manner which seeks to ensure its usefulness.
4. For proceedings to which it applies, this Procedural Direction sets out a code of conduct for expert witnesses.

### Compliance and Other Matters

5. The Tribunal may excuse a party or an expert witness from complying with this Procedural Direction before or after the time for compliance.
6. In Evidence Rules Proceedings, a failure to comply with the code of conduct may, depending on the circumstances, render the report or evidence inadmissible or adversely affect the weight to be attributed to that report or evidence.
7. In non-Evidence Rules Proceedings, a failure to comply with the code of conduct does not render any expert report or evidence inadmissible but it may, depending on the circumstances, adversely affect the weight to be attributed to that report or evidence.
8. Nothing in this Procedural Direction prevents the Tribunal from giving any directions concerning expert witnesses or expert evidence that the Tribunal considers appropriate in any particular proceedings before the Tribunal.
9. This Procedural Direction is made by the President under s 26 of the *Civil and Administrative Tribunal Act 2013*.

### Definitions

Word	Definition
NCAT Act	<i>Civil and Administrative Tribunal Act 2013</i>
NCAT Rules	<i>Civil and Administrative Tribunal Rules 2014</i>
Expert witness or expert	A person who has specialised knowledge based on the person's training, study or experience and who gives evidence of an opinion based wholly or substantially on that knowledge.

10. Words used in this Procedural Direction have the same meaning as defined in the NCAT Act and the NCAT Rules.

## Application

11. This Procedural Direction applies in:
- (a) Evidence Rules Proceedings or proposed Evidence Rules Proceedings;
  - (b) proceedings or proposed proceedings in the Consumer and Commercial Division involving claims under the *Home Building Act 1989* (NSW) where the amount claimed or in dispute is more than \$30,000;
  - (c) proceedings or proposed proceedings in the Occupational Division for a “profession decision” as defined in cl 29(1) of Sch 5 to the NCAT Act; and
  - (d) any other proceedings in which the Tribunal directs that this Procedural Direction 3 is to apply,
- (together referred to as “Subject Proceedings”).

## Parties’ and Experts’ Duties

12. Any party who retains an expert to provide evidence or a report for the purposes of Subject Proceedings in the Tribunal must bring to the expert’s attention the contents of this Procedural Direction, including the experts’ code of conduct.

## Experts’ Code of Conduct

### Application of code

13. This experts’ code of conduct applies in respect of any expert witness engaged or appointed in Subject Proceedings:
- (a) to provide an expert’s report for use in those proceedings; or
  - (b) to give opinion evidence in those proceedings.

### General duty to the Tribunal

14. An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert witness’s area of expertise.
15. An expert witness’s paramount duty is to the Tribunal and not to any party to the proceedings including the person retaining the expert witness.
16. An expert witness is not an advocate for a party.
17. An expert witness must abide in a timely way by any direction given by the Tribunal.

### Duty to work co-operatively with other expert witnesses

18. An expert witness, when complying with any direction of the Tribunal to confer with another expert witness or to prepare a joint report with another expert witness in relation to any issue, must:

- (a) exercise his or her independent, professional judgment in relation to that issue;
- (b) endeavour to reach agreement with any other expert witness on that issue; and
- (c) not act on any instruction or request to withhold or avoid agreement with any other expert witness.

### **Experts' reports**

19. An expert's report must, either in the body of the report or in an annexure, include the following:
- (a) an acknowledgement that the expert has read the experts' code of conduct and agrees to be bound by it;
  - (b) the expert's name, address and qualifications as an expert on the issue the subject of the report;
  - (c) reference to any private or business relationship between the expert and the party for whom the report is prepared, and an actual or perceived conflict of interest that may impact on his or her role of which the expert is aware;
  - (d) the letter of instruction or details of the questions or issues the expert has been asked to address in the report, as well as documents or other materials the expert has been asked to consider;
  - (e) the material facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed);
  - (f) the expert's reasons for each opinion expressed;
  - (g) if applicable, an acknowledgement that a particular issue falls outside the expert's field of expertise;
  - (h) any literature or other materials used in support of the opinions;
  - (i) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out;
  - (j) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
  - (k) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Tribunal;
  - (l) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).

20. If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
21. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
22. If an expert witness changes his or her opinion on a material matter after providing a report, the expert witness must immediately provide a supplementary report to that effect containing the information referred to in subparagraphs (c) to (f) and (h) to (l) of paragraph 19, and, if applicable, subparagraph (g) of paragraph 19.
23. In any subsequent report (whether prepared in accordance with paragraph 22 or not), the expert may refer to material contained in the earlier report without repeating it.
24. Where the expert report relates to the completion or rectification of residential building work under the *Home Building Act 1989* (NSW) or the duty of the owners corporation to maintain and repair property under the *Strata Schemes Management Act 2015* (NSW), as appropriate the report of an expert witness must also include the following matters:
  - (a) if rectification, demolition, repair or other alteration of property is recommended, the reasons for such recommendation, the scope of the recommended works, and the likely costs involved (including, where relevant, how those costs have been calculated);
  - (b) whether any alternative remedy or remedies are a reasonable alternative.

### **Experts' conclaves, conferences and evidence**

25. An expert witness must abide by any direction of the Tribunal:
  - (a) to attend a conclave or conference with any other expert witness;
  - (b) to endeavour to reach agreement on any matters in issue;
  - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement;
  - (d) to base any joint report on specified facts or assumptions of fact; and
  - (e) to give evidence concurrently with other experts.
26. An expert witness must exercise his or her independent, professional judgment in relation to such a conclave or conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

**Armstrong J**

President

11 September 2024