

# Information Sheet

## Accessing Alternative Dispute Resolution

June 2016

*The Board's Complaints process is an effective mechanism to investigate architects who may have acted in an unprofessional or incompetent manner.*

*However the Board regularly receives calls from people seeking advice on issues that may be currently unfolding on site, or which are at a critical phase where early and prompt action can assist.*

*This information sheet outlines an alternative dispute resolution pathway for home owners and their architects that is agile and responsive to home owners who may have well founded concerns in relation to the professional conduct of an architect, but which may not be suited to the formal complaints process. For architects, the process is consistent with Part 6 (18) of the NSW Architects Code of Professional Conduct that requires architects to promote alternative dispute resolution mechanisms.*

### What is our ADR method?

The Board's Alternative Dispute Resolution (ADR) pathway focuses on the ability for both parties to seek a resolution to the matter in an informal and impartial setting.

The Board's process focuses on the ADR mechanism of mediation. The Board believes mediation is often the most effective way to solve the types of issues that can lead to conflict in the client-architect relationship.

Mediation, rather than other processes such as arbitration, adjudication and litigation, allows for both parties to engage with each other and endeavour to reach an agreement, with an impartial mediator to assist in the facilitation and direction of conversation.

### Resolving matters sooner

The Board's Alternative Dispute Resolution (ADR) pathway allows for both parties to attempt to reach a resolution for a dispute and also for the Board to consider and investigate the dispute, prior to a complaint being received.

For the home owner, it can mean speedy resolution of a matter. For the architect it means avoiding the complaints procedure.

The Board recognises there is an even greater incentive to resolve matters early that are only at the enquiry or concern level. This is why the

Board offers a voluntary ADR process to the parties where enquiries fall short of a complaint.

### Is my matter suited to ADR?

The Board applies the following test when assessing the suitability of an application for the ADR pathway;

- Are both parties willing and open to achieving a resolution in good faith?
- Is the issue related to a current, pressing or urgent matter that would benefit from early intervention?
- What is the likelihood that the issue will be resolved through ADR?
- Is ADR likely to prejudice any related proceedings?

### Who selects the mediator?

Parties are encouraged to agree on a mediator from a pool of mediators identified by the Board as having expertise in architecture and construction. All mediators are registered with NCAT, the Law Council or Law Society of NSW, or with recognised industry bodies such as the Resolution Institute.

The Board's ADR pathway is designed to be consistent with the provisions of the NSW Civil Administrative Tribunal's Resolution processes outlined in Schedule 1 of the NSW Civil Administrative Regulation 2013.

### How do I apply to access ADR?

To apply to undertake ADR under this process, it is necessary to complete the application form which can be found on our website.

Once an application is completed, all communication thereafter under this ADR process is considered to be 'without prejudice', and confidential to the participants to the process, the Board and any mediator appointed.

Consistent with s36 (3), an application for the Board to consider and investigate a matter using the ADR pathway should;

- be in writing
- identify the name and contact address of the applicant
- the issues
- identify the name and registration number for the architect
- identify the exceptional nature of the issue that makes it urgent

- assert that, in good faith, the complainant seeks to resolve the issue without blame, without prejudice and to mutual benefit.

## What happens next?

Upon receipt of the application for ADR, the following process applies;

1. the Registrar consults with the Legal member of the Board to confirm the application is eligible and suited to the ADR pathway
2. the Registrar makes contact with the applicant to ascertain further details of the issues of concern and to confirm the timeframe in which the Board may choose to act
3. the Registrar or Board staff will enter details of the application in to the ADR Register, including contact details of the applicant, the architect and a summary of issues identified in the application
4. the Registrar will make contact with the architect to advise of the receipt of the application, and to seek an initial response to the issues of concern and the application to utilise the ADR pathway
5. following discussion with the architect, the Registrar will forward a copy of the application to the architect and direct the architect to provide a written response to the issues of concern within seven (7) days
6. the Registrar will issue to both parties a list of pre-qualified mediators who are available to conduct mediation
7. the parties must agree on the selection of a mediator, and the date and time of mediation
8. a mediation will comprise the following persons only; the mediator (chair); the Registrar of the Board (secretariat); the applicant and the architect. Legal representation through the ADR pathway is discouraged to provide optimal chance of parties resolving issues themselves
9. mediation will be based on the matters set out in the submissions of both parties and will highlight the key issues, address both parties' concerns and encourage effective negotiation
10. at the conclusion of the session, both parties should reach an agreement between them, with a signed record of the agreement being issued to the parties and also the Board.

All communications and negotiations under an ADR process, once commenced, are on a *without prejudice* basis. This approach is designed to create a forum that encourages open and honest debates of the issues and a focus towards achieving a satisfactory outcome.

Nothing in this process removes the option available to the applicant to lodge a formal complaint against the professional conduct of an architect pursuant to s36, and for the Board to investigate that complaint in accordance with the provisions of the Act.

## What does it cost?

Each party to the dispute is required to pay a fee that covers all costs including:

- Preliminary briefing of the mediator of up to one hour by the Registrar, and
- One mediation session of up to two hours.

The cost is \$750 (including GST) per party.

The mediation fee is refundable if a party withdraws prior to the preliminary conference.

## Where does the mediation take place?

Mediation is held at the NSW Architects Registration Board; Level 2, 156 Gloucester St, Sydney (the Board's offices).

Mediation meetings are generally scheduled between 3-5pm, Monday-Friday.

## Statutory legal considerations

Part 6 (18) of the NSW Architects Code of Professional Conduct requires that; *An architect should inform a prospective client that a written agreement between the architect and the prospective client in respect of the provision of architectural services may provide for alternative dispute resolution to be used to resolve disputes between them instead of court proceedings.*

Part 4, s40 of the Architects Act 2003 (NSW) *Proceedings before Board in respect of complaints* states that the Board; (3) *...may be assisted by any person that it considers has relevant expertise in mediation or alternative dispute resolution in any such attempt to resolve a complaint*

Part 4, s36 (3) of the Act provides power for the Board to consider and investigate a complaint even if it does not comply with the requirements of this section (except the requirement that it identify the complainant) but must not proceed to deal with the complaint under this part until they are complied with.

Part 1, s3 *Objects of the Act* states that the Board should; (b) *Provide mechanisms to discipline architects who are found to have acted unprofessionally or incompetently.*

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