



Better pathways to resolve disputes sooner

A primer on complaints, prosecution and alternative dispute resolution by the NSW Architects Registration Board 2016

NSW
Architects
Registration
Board



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“...the public interest is advanced if all architects recognise that the fundamental and overriding obligation of a profession is to serve and promote the public interest.”

- NSW Architects Code of Professional Conduct

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NSW
Architects
Registration
Board



The NSW Architects Registration Board (ARB) administers the Architects Act 2003, the legislation regulating architects in NSW.

The objects of this Act are:

- (a) to ensure that architects provide services to the public in a professional and competent manner, and
- (b) to provide mechanisms to discipline architects who are found to have acted unprofessionally or incompetently, and
- (c) to ensure that the public is appropriately informed about the qualifications and competence of individuals or organisations holding themselves out as architects, and
- (d) to promote a better understanding of architectural issues in the community.

Reading this online? You can download a summary of the provisions of the Act [HERE](#)

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57 131

Consumer enquiries related to:

Investigations in to illegally representing as an architect*



Design **19%**

Documentation **23%**

Project Delivery **9%**

Practice Management **49%**



Complaints received* **9**

Complaints dismissed **7**

Complaints upheld **5**

Complaints avoided **51**

*including a breach of s9 & s10 of the Act

*complaints carried over from 2015 not included

Data from the 2015-2106 registration year on the compliance and enforcement activities of the NSW Architects Registration Board

- Professions earn their license to practice because we trust they are held to high standards. We think a key part of maintaining that trust is transparency and accountability. This primer aims to promote transparency and accountability by sharing mechanisms, methods and case studies. In doing so, we also hope to promote a better understanding of the Board's regulatory function in relation to compliance and enforcement powers granted to it under the 2003 Architects Act.

When the current Architects Act was introduced in to the NSW parliament in 2003, its stated purpose was "a community actively discussing architecture that is contributing to its wellbeing, a community that is serviced by architects who have a robust professional framework and a flexible system of professional discipline."The Act envisaged a more transparent profession, clearly attuned to community needs and conducting its business within a regulatory regime that is clear and simple to understand.

Among a range of powers, the Board has a role to ensure that the public is informed about the qualifications and competence of individuals or practices holding themselves out as architects, and to provide mechanisms to discipline architects who are found to have acted unprofessionally or incompetently.

In 2015-2016, the Board received 57 phone calls from homeowners seeking advice on working with an architect. Compared with other professions, architects attract a relatively low number of enquiries and complaints (measured as 0.02% of the total profession). By comparison, solicitors in NSW attract complaints measured at around 10% of the total profession. However, given the substantial financial and emotional investment at stake in renovating a home or building anew, the Board considers each enquiry to be an opportunity to inform, engage and mediate when necessary.

The Board's approach

The Board regularly receives calls from homeowners with queries or concerns about working with an architect, or enquiring if someone calling themselves an architect really is.

Where the query is about an architect's conduct, competence or services, the Board focuses on strategies that give the best chance for parties to keep working together. These calls are confidential unless the homeowner authorises contact with the architect to unblock an impasse or where 'telephone diplomacy' has a chance of helping.

We think this helps resolve issues before they escalate. As a result, we measure not just the complaints we handle each year, but more recently we've started to measure the complaints we help to avoid. This primer outlines how we do this.

Illegal use of the title 'architect'

The Board's enforcement role operates on two sides of a coin. The Act prohibits those who aren't architects from using the title, and it places standards on those who are. The Board plays a role in compliance on both sides of the coin so that consumers are clear about the choices they make.

That's why the Board investigates reports of persons or businesses illegally representing themselves or others as architects. We monitor websites, social media and other advertising to check compliance. In cases where a potential breach is identified, the individual or entity is given the opportunity to correct the error. Where the representation isn't corrected, the Board may take action against the individual or business in the Local Court.

Guiding Principles

If we have the authority to initiate disciplinary investigations against an architect, or legal proceedings against a non-architect, we think it's important we act honestly, fairly and hold ourselves to high professional standards.

The Board is responsible for a number of different disciplinary mechanisms and dispute resolution pathways. Whatever the pathway, we know it's important to deal with all issues promptly, without causing unnecessary delay. Each matter is dealt with according to procedures published on our website, and which are outlined at the earliest opportunity to ensure transparency and accountability. All parties are given the chance to respond to allegations, to ensure procedural fairness and natural justice.

We don't rush to prosecute, or discipline. We apply a few common tests that are tailored to each case in order to assess it on its merits. Where an individual or business is illegally using the title architect, we ask does the evidence offer reasonable prospects of conviction? Has the offence occurred within the last six months? If so, is it in the public interest to proceed with a prosecution?

Prosecution may be the final option in a range of responses the Board employs. For example, over the last 12 months, tailored case management has increased the effectiveness of compliance without the need to prosecute. Following up letters or emails with phone calls to explain the intent of the Act has helped lift compliance from a 51% to 87% success rate.

How do we deal with complaints?

Any person may make a complaint against an architect in respect of the architect's professional conduct. The Board may also make a complaint of its own volition.

The Board receives complaints in writing - including an outline of the complaint, the reasons and circumstances leading to the complaint, set out in a chronological order of events. The person making the complaint may also be asked to provide further details before the complaint proceeds.

The Board is required to advise the architect of the complaint unless providing notice of the complaint is likely to;

- prejudice the investigation of the complaint
- place the health or safety of a person at risk, or
- place the complainant or another person at risk of intimidation or harassment

After receiving a complaint, the Board writes to the architect against whom the complaint is made, giving notice of the nature of the complaint and the identity of the complainant as soon as practicable. The architect is directed to make a written response to the complaint within 28 days. Following the architect's response, the complainant is given 14 days to respond to the architect's submission. Following receipt of this, the architect is given a further 14 days to respond.

Once submissions are received from both parties, the Board considers whether a complaints committee is required to hear the matter, or whether the matter should be dismissed. The Board may dismiss a complaint if the Board is satisfied that the complaint is:

- frivolous or vexatious or otherwise lacking in merit;
- a complaint in respect of a matter that has already been dealt with as a complaint by the Board; or
- is trivial in nature.

The Board may also decline to deal with a complaint if further particulars of the complaint are not given, or not verified, as required by the Board. If the Board dismisses

a complaint, the Board may also issue a caution to the architect. The complainant and architect concerned will be notified as to the reasons for dismissing complaints.

The Board sits each month so there is regular opportunity to consider complaints. In some matters, the Board may convene a hearing. The hearing is meant to be less formal than a court, but the Board still has some of the powers of the court. After consideration of the complaint, the Board will come to a decision based upon the recommendation of a Complaints Committee convened to consider all of the evidence presented.

Investigating complaints

When investigating or determining a complaint, the Board is not bound to observe the rules of evidence but may inform itself of any matter in such manner as it thinks fit. However, the Board conducts any investigation in accordance with the principles of procedural fairness.

The Board may meet separately or jointly with the complainant and architect concerned in an attempt to resolve any issue raised by the complainant if it considers the complaint may be resolved expeditiously by doing so.

The Board may also be assisted by any person it considers has relevant expertise in mediation or alternative dispute resolution in any such attempt to resolve a complaint. The Board may require the architect to:

- provide written information by a certain date
- verify information by statutory declaration;
- produce any document
- otherwise assist in, or co-operate with, the investigation of the complaint in the specified manner.

The Board may also summons individuals as witnesses to appear before it to give evidence and to produce documents. Penalties can apply for failing to comply with a summons issued by the Board.

Defining unsatisfactory professional conduct and professional misconduct

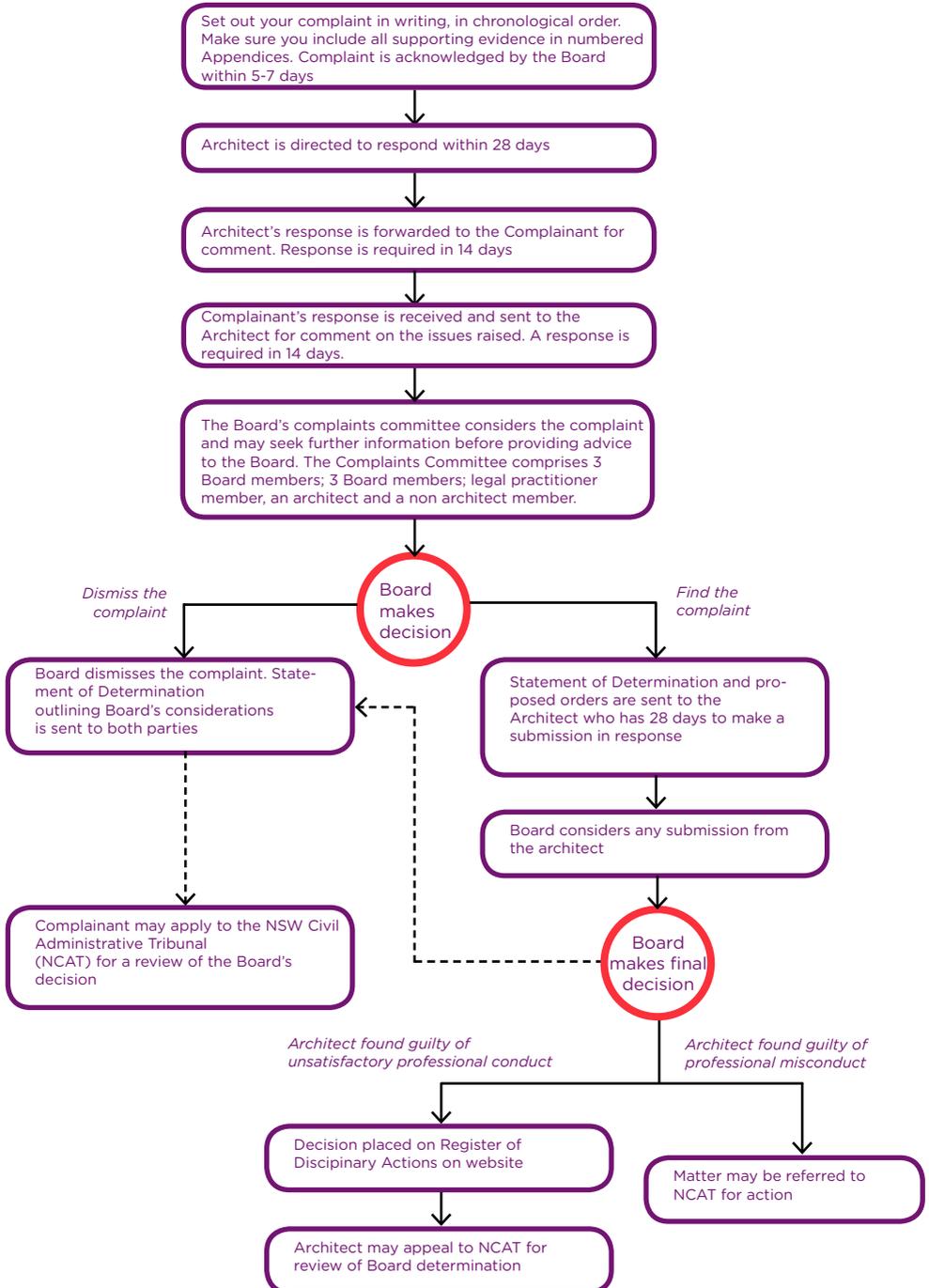
The NSW Architects Code of Professional Conduct sets out in broad terms what is expected of architects in their professional conduct and the level of accountability expected of them in the providing architectural services. We view it as a 'yardstick' for measuring the competence and conduct of architects providing services.

The Act defines professional misconduct as: "unsatisfactory professional conduct of a sufficiently serious nature to justify the suspension of an architect or the cancellation of an architect's registration" or "unsatisfactory professional conduct where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence for an architect".

Unsatisfactory professional conduct includes, but is not limited to: a failure to comply with the NSW Architects Code of Professional Conduct; any contravention of the Architects Act; any conduct which indicates the architect is not a fit and proper person to be registered; any conduct that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care in the practice of architecture; any other improper or unethical conduct of the architect in the course of his/her practice; or any failure by a nominated architect to supervise properly the provision of architectural services.

Reading this online? Download the NSW Architects Code of Professional Conduct [HERE](#)

How does the complaints process work?



Complaint case studies

The Board receives a number of complaints each year. Given that investigations are confidential, most of the lessons to be gained from these complaints can be hidden from those who would gain most from knowing. Do the complaints reveal trends? Are there areas in which architects can improve communication? Are more resources required to give homeowners a better start?

We've simplified four complaints received over the last few years and removed the identifying names. We think each complaint reveals some lessons for architects, and homeowners looking to work with architects.

Complaint 1 - Homeowner complaint

Background

In late 2013 an architect was engaged for substantial renovations to an existing house. The Client Architect Agreement required 50% of the Stage 1 lump sum fee for Preliminary Sketch Design to be paid up front. The architect invoiced for this amount, and it was paid. 10 weeks after commencing (in early 2014) the architect met with the homeowner to present the first hand drawn sketches. After the meeting, the architect emailed with notes from the meeting and some revised drawings. A week later, the homeowner responded with comments on the revised drawings, including those areas that still concerned the homeowner. A week after this, the architect and homeowner met to review newly revised drawings and a proposed perspective of the house. The following day, the architect emailed through revised plans.

A few days after their meeting, the homeowner instructed the architect to stop work - advising the architect that while the plan was functional, there was a lack of sympathy for the original charm of the existing home. The architect responded to express disappointment but decided to delay the issue of invoices pending his return from overseas travel. A few weeks later, the architect issued the final invoice for Stage 1, and an invoice for the full amount in Stage 2, Concept Design. The homeowner expressed surprise. Given that the project had been stopped, the homeowner could not see how the architect could have proceeded to Stage 2.

Complaint

The homeowner alleged the architect failed to adequately advise on progress between stages of the work, and that he had unreasonable invoice and contracting practices. The architect argued that the Client Architect Agreement stipulated that, if services were terminated before a Stage was completed, the whole of the cost of the Stage was owing.

Result

The Board found that the architect could have done more to expressly state the completion of a stage - aided by the prompt issuing of an invoice for the same. However notwithstanding this, and the brief period in which the services were provided, the Board also considered the homeowner had sufficient information to appreciate the architect was undertaking stage 2 work. The Board also found that the architect's invoicing practice to be clearly stated in the Client Architect Agreement prepared by the architect, and in the supporting Terms and Conditions, which clarified that invoices would be issued on a monthly basis. The architect delayed issue of the invoices, giving rise to a dispute with the homeowner that resulted in a reduction in fees charged. The Board noted advice from the parties that an agreement had been reached on the reduction of monies. As a result, the Board found the homeowner had not been disadvantaged in the timing or quantum of fees paid. The Board dismissed the complaint.

Lessons for the homeowner:

- Read the Client Architect Agreement carefully, including the fine print on how services are to be invoiced. It may be relevant in the event the relationship ends earlier than expected.
- Make sure you choose an architect who is attuned to your aspirations. Reviewing an architect's website for their portfolio of work can help.

Lessons for architects:

- Ensure your services are consistent with the terms set out in your Client Architect Agreement.
- Be clear about the progress of your services and ensure you obtain the client's authorisation to proceed

with the service described in the agreement

Complaint 2 - Builder initiated complaint

Background

In late 2013, a homeowner engaged an architect to renovate a home. The architect was engaged to manage the tender process. The builder originally engaged to build the works was forced to withdraw prior to commencing; requiring the architect to call again for tenders from builders. The architect entered negotiations with a second builder on behalf of the homeowner. Given the time lost in the original tender, the architect gave 3 weeks for a full quotation from the preferred tenderer. To assist, the architect provided the tender price from the first builder - making it easier to quote in a faster time. The architect maintained that no undertaking was ever given that the earlier tender price was final, or accurate.

However it was later alleged that the architect had altered the price from the first builder to influence the price offered by the second builder. After receiving the tender price from the second builder, the architect expressed concern that some of the subcontractor prices were high, and that alternative prices were required. The architect provided names for alternative subcontractors.

A week before the contract was due to be signed, the architect asked the builder to add a further \$11,000 in to the contract sum for architectural fees, and \$24,460 for the supply of PC items to be provided by the architect. The architect also detailed how the amounts should be invoiced. The builder agreed, but later discovered that the PC items had never been supplied by the architect, alleging the architect had retained the money.

Relations on site deteriorated. The builder contacted the homeowner directly to express concern over the architect's administration of the construction contract. The homeowner met with the architect to discuss the builder's concerns. The architect asserted that, following the withdrawal of the first builder, the architect had expended all the fees associated with the Tender Stage and was seeking to streamline the process the second time around. The architect agreed to refund the homeowner.

Complaint

In this instance, the complaint was made by the builder who alleged the architect took monies by deception and attempted to influence the tender price. The Complaints Committee invited the homeowner to a meeting. In particular, the Committee was interested in the discussion between the homeowner and the architect that led to the repayment of fees to the homeowner by the architect. The homeowner's recollection of events varied from those of the architect. The homeowner's evidence was shared with the architect for comment.

Result

The Board dismissed the complaint related to the architect attempting to influence the tender price - adopting the view that a builder preparing a price for the works is solely responsible for that price.

The Board referred to s8 (2)(a) of the NSW Architects Code of Professional Conduct which requires an architect to administer a building contract with fairness and impartiality. But the Board found this is impossible if the builder's contract sum comprises an amount of financial gain accruing to the architect, and where that is not disclosed to the architect's client prior to entering the construction contract.

s8 (2)(d) of the Code states that an architect should not seek or receive any payments or inducements from any person wishing to influence the architect to administer the

contract for the benefit or detriment of any party to the contract. Payments required by the architect of the builder, evidenced in invoices, showed the architect sought payments or other inducements.

s6 (1) of the Code requires an architect provide sufficient relevant information with reasonable promptness to enable a client or prospective client to make an informed decision in relation to the provision of architectural services. s6 (2)(a) states that, in particular, the architect should take all reasonable steps to ensure that all information and material provided is truthful, accurate, unambiguous and relevant to the client's interest. The deliberate concealment of fees and other monies by the architect is inconsistent with this.

The Board found that while the technical competence and standard of work of the architect was acknowledged, the architect failed to act with integrity or fairness. The Board found the architect guilty of unsatisfactory professional conduct; requiring the architect attend a course on business ethics, and to report for a 12 month period to certify that no payments or inducements were included in a contractor's price for any other building contract the architect was engaged to administer. The architect was also ordered to pay a fine of \$1,100.

Lessons for the architect:

- If an architect is administering a building contract on behalf of a client, the architect should act with fairness and impartiality in administering the contract
- The architect should not seek or receive any payments or other inducements from any person wishing to influence the architect to administer the contract for the benefit or detriment of any party to the contract.
- In providing architectural services an architect should act with integrity and reasonable care and provide the services in a manner that may be widely accepted in Australia by peer professional opinion as competent professional architectural practice

Complaint 3 - Homeowner complaint

Background

In mid 2013, a homeowner engaged an architect and long term friend for renovations to a home in Sydney. The architect prepared a Client Architect Agreement that provided for the preparation of architectural drawings and a detailed project specification. The agreement specified the scope of Stage 1 and Stage 2 services, including the preparation of documents issued 'For Construction'.

The Agreement comprised a total fee of around \$40,000. It also required a deposit of \$11,000 - equal to the total fee for Stage 1 services. The homeowner paid this amount in two instalments. In early 2014, the homeowner entered in to a contract with a builder, before the Construction Certificate had been approved. The homeowner asked the architect if the builder was happy with all the details in the documents. The architect advised that the specification was outstanding, as the builder had indicated it was not needed. The homeowner checked this advice directly with the builder, and was advised that the outstanding documents were indeed required. The builder prepared a list of documents that were required.

Meanwhile the homeowner engaged a private certifier to provide the Construction Certificate. The certifier identified a number of issues requiring modification or resolution in the documentation, and advised the architect. The architect advised the homeowner that these modifications were minor.

As works progressed, the homeowner lost confidence in the architect's ability to share information and provide documentation. The homeowner decided that the builder would deal directly with the certifier. The homeowner advised the architect not to provide Stage 3 services. The architect did not respond. Later the same day, the builder advised that information was still required from the architect. The homeowner emailed the architect requesting this information. The architect did not respond.

The architect issued a Notice of Termination shortly afterwards.

The homeowner requested that the architect complete the modifications to the documents and forward missing documents, including the specification. The architect did not respond. The architect was not responsive to phone calls or emails. At the time of lodging the complaint, the homeowner did not have a copy of the project specification.

Complaint

The homeowner alleged that the architect failed to provide adequate information with reasonable promptness, and that the architect failed to take all reasonable steps to ensure that the client was informed of the implications of decisions required to be made - especially in relation to time, cost and changes to the service.

Decision

The Board found the homeowner was justified in expecting that documents like the project specification would be completed and presented for review prior to the signing of the construction contract so all parties were informed. All parties were agreed that documents identified in the Client Architect Agreement were not delivered with reasonable promptness, despite the architect having been paid (upfront) for the same.

In the Board's view, the architect was not prevented from issuing the project specification at the time of the signing of the construction contract. Further, the architect did not

act with reasonable care in the manner in which information was provided in the period following the issuing of the Notice of Termination, and while the provision was yet to take effect. It was during this period that the architect should have taken the opportunity to finalise the provision of documents owing under the Client Architect Agreement.

However, the Board also noted the builder willingly entered in to a contract with the homeowner in the full knowledge that essential information was missing and to the possible detriment of the homeowner. With a project specification appended to the contract, the Board was unable to see how the builder could provide an appropriate level of confidence on the scope and cost to the homeowner.

The Board also noted the deposit stipulated by the architect was in excess of the maximum deposit permitted by the NSW Architects Code of Professional Conduct. While this deposit formed an explicit component of the Client Architect Agreement, and so can be viewed as having been expressly agreed, the amount of the deposit further demonstrates the Complainant's willingness to advance payment in the reasonable expectation that services would be completed.

For this reason, the Board found the architect guilty of unsatisfactory professional conduct, and reprimanded the architect for failing to provide services for which the architect had been paid, notwithstanding the actions of others who may or may not have exerted influence over the direction taken on the project. The Board also ordered that the architect undertake mentoring with a senior practitioner.

Lessons for homeowners:

- While it can be useful to gain a builder's advice early on, care should be taken to understand that engaging a builder before the design is resolved can result in conflicting advice to the homeowner.
- Take care when paying up front - especially if a large deposit is being asked of you.

Lessons for architects:

- Note that in most cases, a Notice of Termination does not take effect immediately. While it is inevitable that some relationships will break down, it is expected that architects will take the opportunity to finalise documents to ease hand over should it be required.
- It is never acceptable for a professional to be non responsive to attempts by the homeowner to make contact.

At the heart of this dispute was a homeowner seeking a specification from the architect, and an architect concerned that discussions between the homeowner and the builder had superseded the specification in a manner that may have placed the architect at some liability. Importantly, this case highlighted to the Board the need for more early options to intervene in disputes that could be resolved through alternative means.

Complaint 4 - Board initiated complaint

Background

In March each year, a group of randomly selected architects are notified they will be audited for compliance with their obligations in relation to undertake Continuing Professional Development. For those being audited, evidence of CPD must be provided to the Board by 30 June each year. In August 2014, an architect who failed to provide evidence of CPD was contacted by the Board, with a reminder of the notification issued in March, and a copy of the Board's CPD Activity Record to assist in complying. The Architect had affirmed during the online re-registration that they had complied with CPD requirements.

In response, the architect advised that, due to financial difficulties, the architect was unable to undertake any CPD. In November 2014, the Board advised the architect that, in its view, there are numerous options for CPD to be undertaken free of charge, or at low cost. The Board directed the architect to provide any evidence of CPD. Further, that failure to demonstrate any attempt to undertake CPD could be deemed a breach of the Act. The architect reiterated that no attempt had been made due to financial difficulties. The Board discussed the architect's submission at its December meeting, and resolved that the architect should provide evidence of financial difficulty. Should evidence not be received, the Board may initiate a complaint against the architect.

In February 2015, the architect wrote to the Board, asserting that around 40 years of practice should satisfy the Board of the requirement to maintain and improve the skills of an architect. The architect advised that there were no records to audit. Later the same month, the Board advised the architect that the Board had initiated a complaint against the architect for failure to comply with obligations under the Act, the Regulations and the NSW Architects Code of Professional Conduct.

7

Complaint

The Board alleged that;

- the architect failed to provide evidence of CPD when submitting the approved fee for annual registration
- the architect failed to provide evidence of extenuating circumstances that would prevent him from complying with his obligations under the NSW Architects Code of Professional Conduct

The architect failed to provide a response by the due date, and the Board wrote to remind the architect of the elements of the complaint. The architect relied on previous correspondence for his defence.

Result:

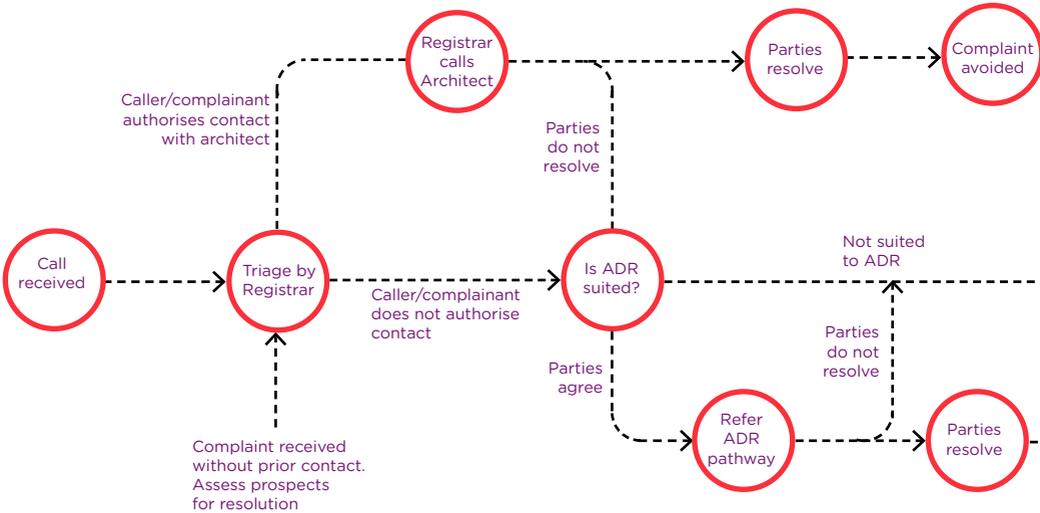
The Board did not accept the architect's defence of financial hardship, given the architect's own admission that no steps had been taken to avail himself of alternative low or no-cost CPD options. The Board did not accept the architect's defence that 40 years of practice was, of itself, evidence of maintaining and improving necessary for the provision of architectural services".

The Board found the architect guilty of unsatisfactory professional conduct and cautioned the architect for failing in his professional duty to provide satisfactory evidence to the Board to demonstrate the maintenance and improvement of the architect's skills and knowledge. The Board ordered the architect to pay a fine of \$1,100.

Lessons for architects:

- The requirement to undertake CPD is contained in s17 of the Regulations.

How are parties given the chance to resolve?



Review of decision

A person who makes a complaint, or the architect against whom a complaint is made may apply to the NSW Civil Administrative Tribunal (NCAT) for a review of a decision of the Board to dismiss the complaint before investigation.

Outcome of the disciplinary actions are made public

A Register of disciplinary actions must be kept by the Board and must be made freely available to the public. The Board must publicise the outcomes of matters where it has taken disciplinary action against an architect. The List of Disciplinary Actions listed in the Consumer section of the Board's website.

Towards a culture of sharing and learning

As the industry regulator, the Board regularly asks itself; where is the evidence that the architectural sector is learning from its mistakes to improve systems and experiences for all those involved in making architecture; graduates, para- and allied professionals, clients, consultants and more? We know practice-based research can be an important tool. Professional Practice courses at the schools of architecture are critical too - especially given the high number of enquiries and concerns related to Practice Management.

The Board's role to administer the provisions of Continuing Professional Development (CPD) may be relevant here. CPD is a means to demonstrate an architect is maintaining and improving knowledge and skills required to provide architectural services. That's one reason we've opened the Board's archives to share the knowledge we hold. We hope that a greater focus on how and where things can go wrong can help the sector focus on how best to avoid disputes in the future.

An alternative approach

We think the Board's Complaints process is an effective mechanism to investigate architects after an instance of unprofessional or incompetent behaviour.

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. As a statutory authority, the Board needs a framework in which it can seek to resolve matters by working with both parties.

Alternative dispute resolution pathway

Over the last 12 months, the Board has developed an alternative dispute resolution pathway for homeowners 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.

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 may mean avoiding the complaints procedure.

So how does it work?

Once an application for alternative dispute resolution is received, the following steps are taken;

- the Registrar consults with the Legal member of the Board to confirm the application is eligible and suited to the ADR pathway

