**Model Clauses - for engagement of design consultants**

**NSW Building Commissioner - Working Group 4**

**Guidance Notes**

1. **Use of the Model Clauses**

These Model Clauses are designed to interface with Parts 2 and 3 of the *Design and Building Practitioners Act 2020* (NSW) (**D&BP Act**) and the related parts of the *Design and Building Practitioners Regulation 2021* (**D&BP Regulation**).

It is recommended that these Model Clauses are used in an agreement to engage a design Consultant where the Consultant is being engaged to prepare a 'Regulated Design' or undertake 'Professional Engineering Work' (as defined in the D&BP Act).

These Model Clauses are intended to assist the parties to address only the D&BP Act and D&BP Regulation in their agreement. The Model Clauses are not intended to address or replace the commercial risk allocation agreed between the parties or alter the obligations of any party under legislation.

These Model Clauses are not intended to be used for the appointment of a Principal Design Practitioner as contemplated in the D&BP Act, such appointments will require different clauses.

The Model Clauses are based on AS4122 - 2010.

1. **Quick guides**

Pages 2 and 3 of this document set out diagrams to assist with understanding Parts 2 and 3 of the D&BP Act:

* page 2: practitioners and roles; and
* page 3: declaration process.

**3**. ***Home Building Act 1989* (NSW)**

These Model Clauses do not address the requirements of the *Home Building Act 1989*. You will need ensure that appropriate clauses are included to comply with the formal requirements under that Act.

**Quick guide – Practitioners and their roles**

Part 2 of the D&BP Act – Regulated designs and building work

**Design Practitioner**

* Prepares Regulated Designs
* Gives a **Design Compliance Declaration** for Regulated Designs suitable for use for building work (including variations)
* Must be registered and meet insurance requirement (if giving a Design Compliance Declaration)

*Note: There are special provisions for Engineers*

**Principal Design Practitioner**

* Optional on each project
* Must be registered and meet insurance requirements
* Gives a **Principal Compliance Declaration**

**Building Practitioner**

* Is the principal contractor (ie head contractor)
* Must be registered and meet insurance requirements
* Must manage variations in accordance with the Act and Regulation
* Gives a **Building Compliance Declaration** and other prescribed documents
* Lodges documents on NSW Planning Portal

**Applicant for Occupation Certificate**

* Gives notices of intention to apply for OC to registered Building Practitioner
* Passes Building Compliance Declaration to Certifier

--- Building Work ---

Work involved in, or involved in coordinating or
supervising work involved in, construction of a Class 2 building or a building containing a Class 2 part (or alterations, additions, repairs, renovations or protective treatment of a Class 2 building or a building containing a Class 2 part)

*Please note this diagram is intended for guidance only. You should refer to the D&BP Act for details. Current as at 17 June 2021.*

***Regulated Designs****:
Those prepared for a* ***building element*** *or performance solution for building work*

***Building element***

*Fire safety, waterproofing, structural, building enclosure, mechanical, plumbing, electrical*

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***Notes:***

*(1) References to 's.#' are references to a section in the Design and Building Practitioners Act 2020 (NSW). References to 'cl.#' are references to clauses in the Design and Building Practitioner Regulation 2021 (NSW).*

*(2) Flowchart does not include involvement of Principal Design Practitioner (****PDP****). If a PDP is appointed, they will need to provide Principal Compliance Declarations, and the builder will need to provide additional notices under clauses 23 and 24.*

*(3) Only registered practitioners can make declarations and lodge documents on the NSW Planning Portal.*

**Preliminary Design**

Registered Design Practitioner (**RDP**) prepares Regulated Designs for building work.

**Design & Construction Phase**

**Quick guide - Declaration process** - Part 2 of the D&BP Act

**Final Design and Declaration for Client**

RDP prepares Construction Issued Regulated Designs (**CIRD**) and Design Compliance Declarations (**DCD**) and provides copies to client (s.9(1)).

Client provides CIRD and DCD to builder and certifier (cl.29).

**Final Design and Declaration for Planning Portal**

Lodgement Point #1

Builder must lodge CIRD and DCD on NSW Planning Portal

before commencing work (cl. 16).

**Apply for OC**

Before or when the OC is applied for, the applicant must provide the certifier with the Building Compliance Declaration (s.17(5); cl.30).

**Pre OC Notice**

At least 14 days before the OC is applied for, the applicant must notify the builder of the intention to apply for the OC. (s.16(1)).

Note: see also notice requirements under ss.7 and 8 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW).

**After applying for OC**

Within 7 days after the OC is applied for, the applicant must notify the builder that the application has been submitted (s.16(2)).

**Building Compliance Declaration**

Lodgement Point #3

Builder provides Building Compliance Declaration and other prescribed documents to client, and lodges those documents on NSW Planning Portal before the application for OC is made (s.17(1); cl.18).

If Building Compliance declaration sets out steps to achieve BCA compliance, builder must provide notice of steps to certifier (s.22(2)).

**Build**

Builder must not commence building work using Regulated Designs unless DCDs stating that design complies with BCA are obtained and lodged (s.19).

**Variations**

Lodgement Point #2

RDP prepares revised Regulated Design and gives new DCD to client before variation work commences.

Builder must lodge revised Regulated Design and DCD on NSW Planning Portal within 1 day of varied work commencing. (ss.9, 20; cl.17).

Note: see also requirement for a variation statement under cl. 27

**Certify**

Certifier can’t issue OC if all compliance declarations have not been lodged (s.27(1)).

Note: see also pre-conditions for an OC under s.9 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW).

**Final package lodged after OC issued**

Lodgement Point #4

90 days after OC is issued, builder must lodge Regulated Designs and other prescribed documents in NSW Planning Portal (s.15; cl.19, 26).

**Completion and Post-completion Phase**

**Model Clauses - General conditions of contract for engagement of consultants – AS4122 - 2010**

|  | **Subject** | **Clause number in AS4122** |  |
| --- | --- | --- | --- |
|  | **Interpretation** | clause 1 | Insert the following definitions at clause 1:* ***D&BP Act*** *means the Design and Building Practitioners Act 2020* (NSW)*;*
* ***D&BP Regulation*** *mean the* Design and Building Practitioners Regulation 2021 (NSW)*;*
* ***Design Compliance Declaration*** *has the meaning given in the D&BP Act*
* ***Professional Engineering Work*** *has the meaning given in the D&BP Act and Regulation;*
* ***Prescribed Area of Engineering*** *has the meaning given in the D&BP Act;*
* ***Registered Design Practitioner*** *has the meaning given in the D&BP Act;*
* ***Registered Professional Engineer*** *has the meaning given in the D&BP Act;*
* ***Regulated Design*** *has the meaning given in the D&BP Act;*
 |
|  | **Interpretation** | clause 1 | The definition of Legislative Requirements shall be amended as follows:*'****Legislative Requirements*** *means legislation and subordinate legislation of the Commonwealth of Australia or the State or Territory applicable to the Services, and any instruments made under such legislation or subordinate legislation, and the Building Code of Australia and any other applicable requirements prescribed by the D&BP Regulation for the purpose of section 8(1) of the D&BP Act.'* |
|  | **Consultant to perform services** | clause 2 | Clause 2 shall be amended as follows:*'****2******CONSULTANT TO PERFORM SERVICES****2.1 The Consultant must perform the Services in accordance with the Contract.**2.2 If the Consultant is required to prepare Regulated Designs as part of the Services, the Consultant agrees that on and from the date of the Contract and until completion of the Services:*  *(a) the Consultant is a Registered Design Practitioner and the Consultant's registration authorises the Consultant to provide a Design Compliance Declaration in respect of each Regulated Design that forms part of the Deliverables; or* *(b) the Consultant will engage a Registered Design Practitioner whose registration authorises that person to provide a Design Compliance Declaration in respect of each Regulated Design that forms part of the Deliverables.**2.3 If the Consultant is required to carry out Professional Engineering Work in a Prescribed Area of Engineering as part of the Services, the Consultant agrees that on and from the date of the Contract and until completion of the Services:*  *(a) if the Consultant is not a body corporate:**(i) the Consultant is a Registered Professional Engineer and the Consultant's registration authorises the Consultant to carry out the Services; or**(ii) the Consultant will ensure that all Professional Engineering Work undertaken by the Consultant is performed under the direct supervision of a Registered Professional Engineer whose registration authorises them to carry out the relevant Services; and**(b) if the Consultant is a body corporate, the Consultant will ensure that all Professional Engineering Work undertaken by the Consultant is performed by a Registered Professional Engineer whose registration authorises them to carry out the relevant Services, or performed under the direct supervision of a Registered Professional Engineer whose registration authorises them to carry out the relevant Services.*Guidance Note: Clauses 2.2 and2.3 above replicate the Consultant's obligations under the D&BP Act, in order to provide that the Client will have a contractual remedy against the Consultant if the Consultant fails to meet those obligations.  |
|  | **Variations** | clause 9 | A new clause 9.5 should be inserted as follows:9.5 *If the Consultant is directed to perform a Variation that is:* *(a) a variation to a Regulated Design; and**(b) instructed after the building work the subject of the Regulated Design has commenced,**then:**(c) if the performance of the Variation requires an inspection of on-site building work relevant to the Regulated Design:* *(i) the Client must provide prompt site access to the Consultant; and**(ii) the Consultant must attend the site promptly,**for the purposes of the Consultant inspecting the relevant building work;**(d) the Client must provide to the Consultant the information required under s.20(2) of the DBP Act (to the extent that the information was not prepared by the Consultant) and any other information reasonably requested by the Consultant;**(e) subject to clause 9.5(f), the Consultant must provide, with the Deliverables in respect of the Variation, a Design Compliance Declaration in accordance with the D&BP Act stating that the Regulated Designs provided as part of the Variation comply with the requirements of the Building Code of Australia and any other requirements or matters prescribed by the D&BP Regulation for the purpose of section 8(1) of the D&BP Act, and whether or not other standards, codes or requirements have been applied in preparing the design; and**(f) if the Consultant forms the view that it is unable to issue a Design Compliance Certification which states that the varied Regulated Design is compliant with:* *(i) the Building Code of Australia;**(ii) the other applicable requirements prescribed in cl. 8 of the D&BP Regulation; and**(iii) the matters prescribed in cl 9of the D&BP Regulation,**and such non-compliance is not caused by the Consultant, then the Consultant and the Client must work collaboratively to resolve the non-compliances*.' |
|  | **Termination** | clause 27.2 | Clause 27.2 shall be amended as follows:*'Substantial breaches include but are not limited to:**(a) suspension of work other than as permitted in clauses 10.8, 24 and 25;**(b) failure to proceed with due diligence and without delay;**(c) failure to provide evidence of insurance in accordance with clause 30.5; ~~and~~**(d) failure of the Client to pay the Consultant under clause 10; and**(e) failure of the Consultant to maintain registration and be adequately insured in accordance with the D&BP Act.'* |
|  | **Annexure Part A – Item 4** | Item 4 (Scope) | The parties should ensure that the Scope described in Item 4 includes a requirement for the Consultant to provide: 1. Design Compliance Declarations in accordance with the D&BP Act and D&BP Regulation which state:* that the Regulated Designs provided as part of the Services comply with the requirements of the Building Code of Australia and any other requirements or matters prescribed by the D&BP Regulation for the purpose of section 8(1) of the D&BP Act; and
* whether or not other standards, codes or requirements have been applied in preparing the design;

2. design drawings to the ' construction issued regulated design' standard (as defined in the D&BP Regulation); *[Guidance Note: Only include this item if the Consultant is engaged for this purpose]* and 3. (if the Consultant is to be engaged by, or novated to, a builder) a list of persons who provided the Services and identifying the work done by each person, and any other documents relevant to the Services that are required under section 17(6) of the D&BP Act. |