

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 Part 2 of the *Design and Building Practitioners Act 2020* (NSW) (**D&BP Act**) and the related parts of the *Design and Building Practitioners Regulations 2021* (**D&BP Regs**)¹.

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' or 'Specialist Work'² (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 Regs 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.

2. Quick guides

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

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

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

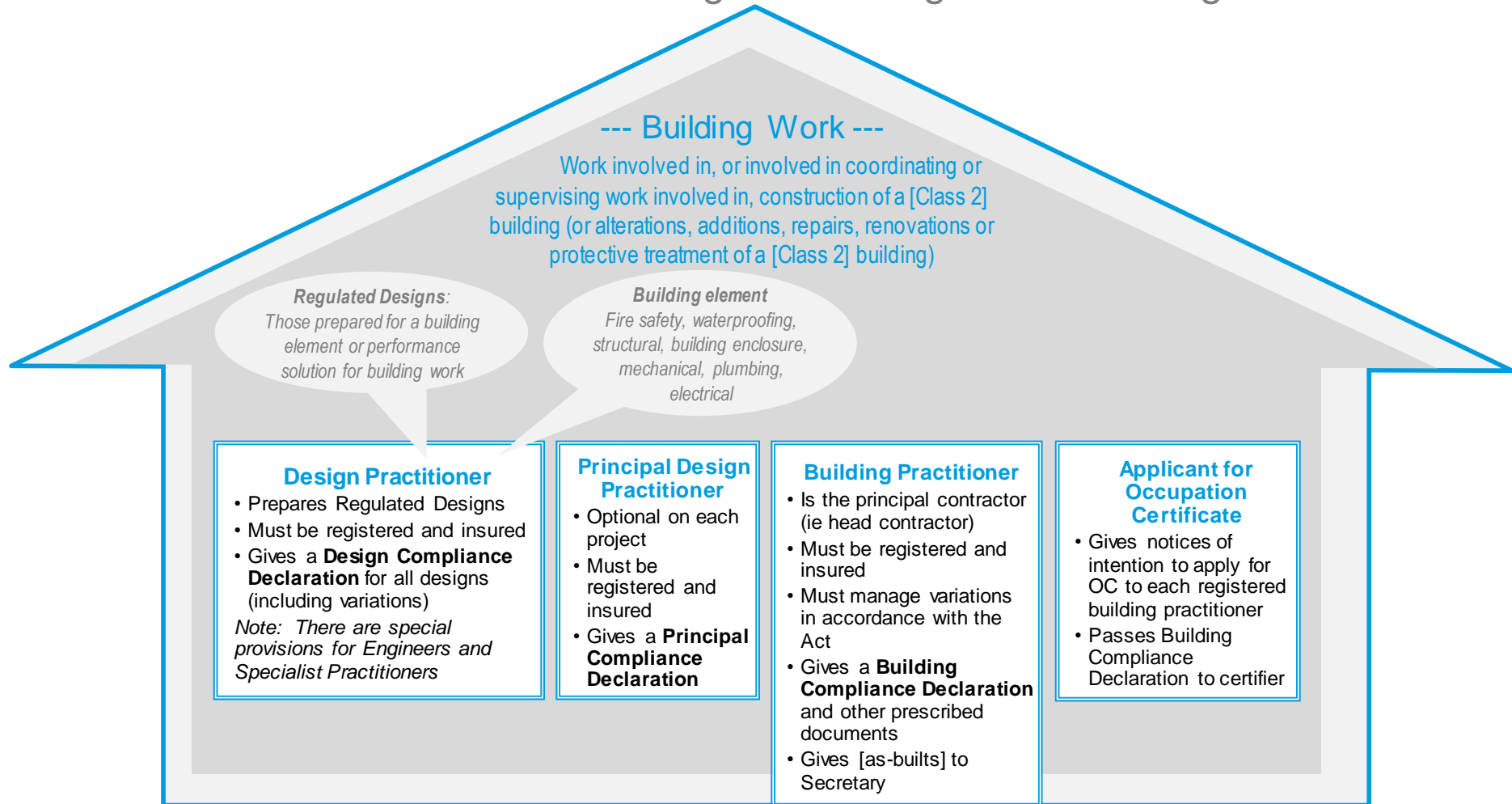
These Model Clauses do not address the requirements of the *Home Building Act 1989*. You will need ensure that appropriate clauses are included to comply with the formal requirements under that Act.

¹ At the date of issue of this document, the D&BP Regs are not yet published. This document will require updating following publication of the D&BP Regs.

² Note that Specialist Work extends beyond design and includes construction, installation and maintenance of a building element, however these model clauses only deal with design consultants.

Quick guide – Practitioners and their roles

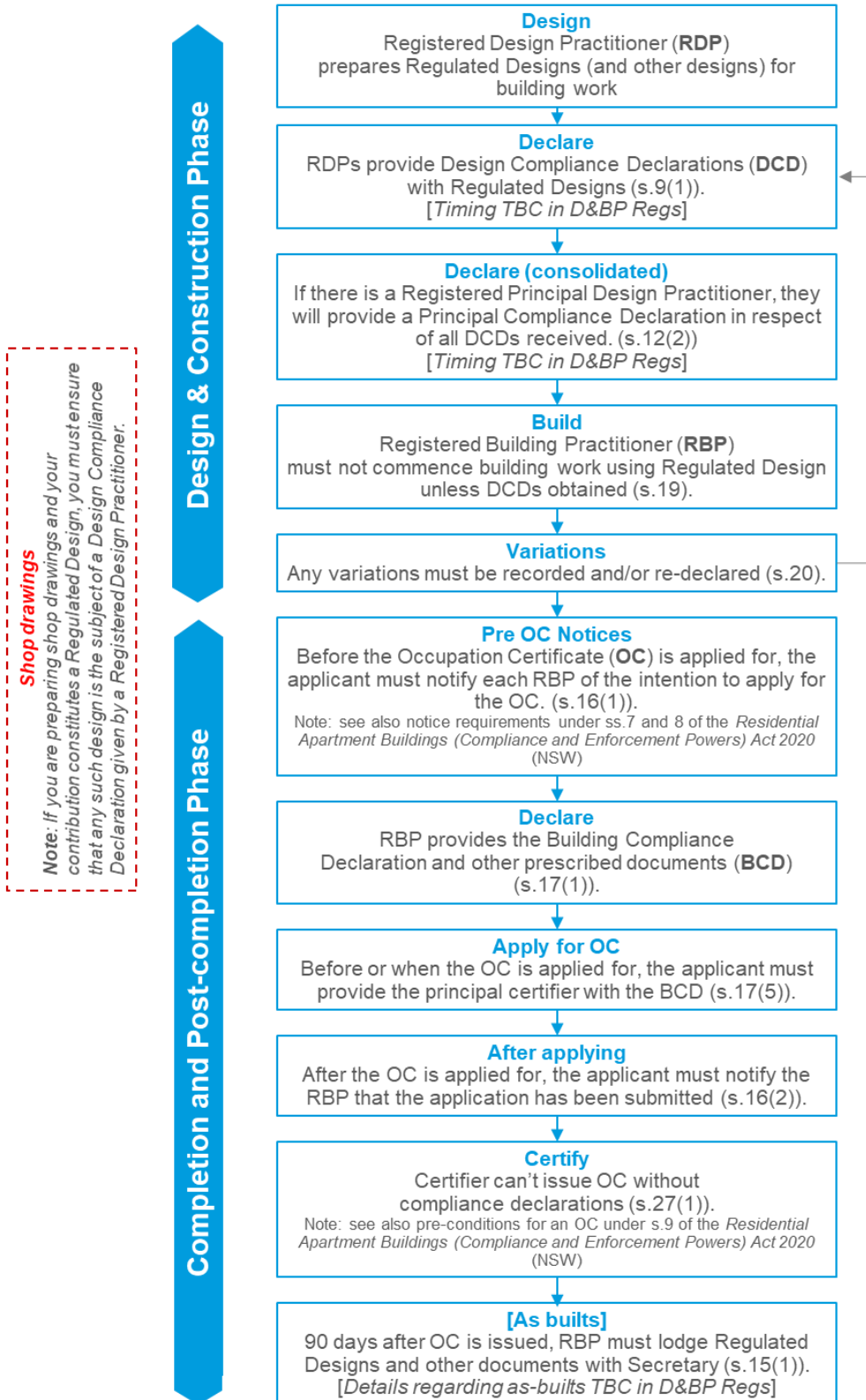
Part 2 of the D&BP Act – Regulated designs and building work



Please note this diagram is intended for guidance only. You should refer to the D&BP Act for details.

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



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

Subject		Clause number in AS4122	
1.	Interpretation	clause 1	<p>Insert the following definitions at clause 1:</p> <ul style="list-style-type: none"> • D&BP Act means the Design and Building Practitioners Act 2020 (NSW); • D&BP Regulations mean the Design and Building Practitioners Regulations 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; • 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; • Registered Specialist Practitioner has the meaning given in the D&BP Act; • Regulated Design has the meaning given in the D&BP Act; • Specialist Work has the meaning given in the D&BP Act;
2.	Interpretation	clause 1	<p>The definition of Legislative Requirements shall be amended as follows:</p> <p>'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, <u>and the Building Code of Australia and any other applicable requirements prescribed by the D&BP Regulations for the purpose of section 8(1) of the D&BP Act.</u>'</p>
3.	Consultant to perform services	clause 2	<p>Clause 2 shall be amended as follows:</p> <p>'2 CONSULTANT TO PERFORM SERVICES</p> <p><u>2.1</u> The Consultant must perform the Services in accordance with the Contract.</p> <p><u>2.2</u> <u>If the Consultant is required to prepare Regulated Designs as part of the Services, the Consultant warrants that on and from the date of the Contract and until completion of the Services the Consultant is a Registered Design</u></p>

	Subject	Clause number in AS4122	
			<p><u>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.</u></p> <p><u>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 warrants that on and from the date of the Contract and until completion of the Services the Consultant is a Registered Professional Engineer and the Consultant's registration authorises the Consultant to carry out the Services.</u></p> <p><u>2.4 If the Consultant is required to carry out Specialist Work as part of the Services, the Consultant warrants that on and from the date of the Contract and until completion of the Services the Consultant is a Registered Specialist Practitioner and the Consultant's registration authorises the Consultant to carry out the Services.'</u></p> <p>Guidance Note: Clauses 2.2, 2.3 and 2.4 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. The clauses are drafted as warranties (rather than essential conditions), as the intention is that a breach of these clauses would give rise to a right to claim damages (rather than termination). Note in addition clause 27.2 below which provides that a failure to maintain registration or insurance may lead to termination, but only after the Consultant has been given the opportunity to show cause.</p>
4.	Variations	clause 9	<p>If the Consultant is to be novated to, or engaged by, a Building Practitioner, a new clause 9.5 should be inserted as follows:</p> <p><u>9.5 When performing any Variation, the Consultant must do all things reasonably necessary to ensure that the Client complies with section 20 of the D&BP Act, including:</u></p> <p><u>(a) ensuring that the Variation is recorded in accordance with s.20(1) of the D&BP Act, and providing to the Client a copy of that record; and</u></p> <p><u>(b) providing a Design Compliance Declaration in respect of variations to Regulated Designs.'</u></p>
5.	Termination	clause 27.2	<p>Clause 27.2 shall be amended as follows:</p> <p>'Substantial breaches include but are not limited to:</p> <p>(a) suspension of work other than as permitted in clauses 10.8, 24 and 25;</p> <p>(b) failure to proceed with due diligence and without delay;</p> <p>(c) failure to provide evidence of insurance in accordance with clause 30.5; and</p> <p>(d) failure of the Client to pay the Consultant under clause 10; <u>and</u></p>

Subject		Clause number in AS4122
		<u>(e) failure of the Consultant to maintain registration and be adequately insured in accordance with the D&BP Act.'</u>
6.	Annexure Part A – Item 4	<p>Item 4 (Scope)</p> <p>The Client should ensure that the Scope described in Item 4 includes a requirement for the Consultant to provide:</p> <ol style="list-style-type: none"> 1. Design Compliance Declarations in accordance with the D&BP Act and D&BP Regulations which state: <ul style="list-style-type: none"> • 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 Regulations for the purpose of section 8(a) of the D&BP Act; and • whether or not other standards, codes or requirements have been applied in preparing the design; 2. (if the builder is to undertake the works on a construct-only basis) design drawings to the 'issued for construction' standard³; 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.

³ To be reviewed following publication of the D&BP Regs, which may provide guidance on the 'issued for construction' standard.