

Model Clauses - Construct Only Contract

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 construction contracts for construct-only 'building work'² where:

- the contract sum is under \$25 million (but the Model Clauses may also be used for works over \$25 million); and/or
- the Contractor or the Principal has less than 5 years' experience on similar projects.

These Model Clauses are intended to assist the parties to address only the D&BP Act and D&BP Regs in their contract. 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.

The Model Clauses are based on AS4000.

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. Role of Superintendent

The role of the Superintendent under AS4000 is not directly impacted by the D&BP Act, however all Superintendents will need to:

- understand that designers and builders are obliged to meet the standards under the D&BP Act; and
- be aware that any variations must be administered in compliance with the D&BP Act (see s. 20 of the D&BP Act).

4. Home Building Act 1989 (NSW)

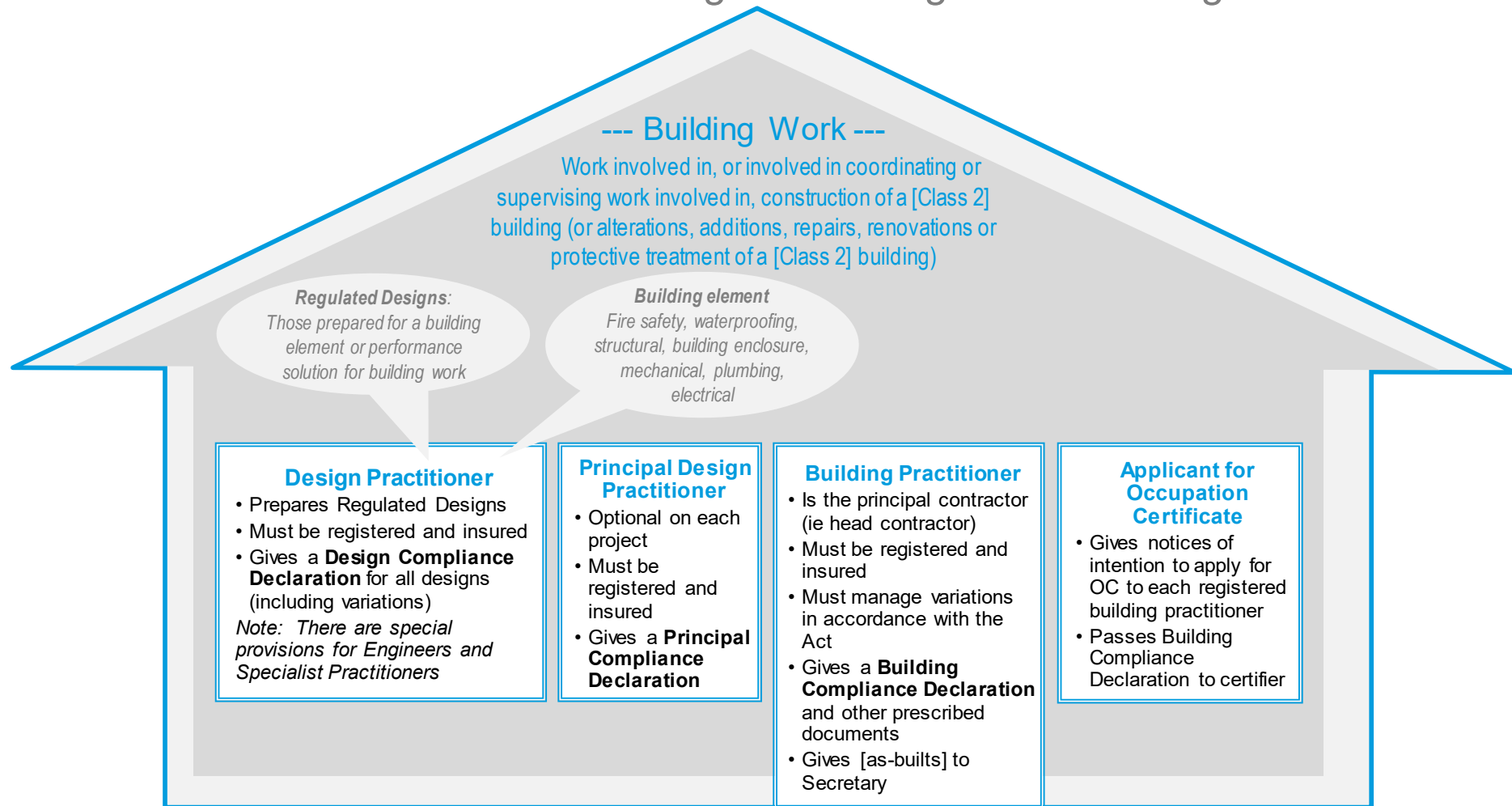
These Model Clauses do not address the requirements of the *Home Building Act 1989*. You will need ensure that appropriate clauses are included to comply with the formal requirements under that Act.

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 Building work has the meaning given in the D&BP Act, and can be further defined once the D&BP Regs are published, but is anticipated to capture Class 2 buildings, including mixed use buildings that contain a Class 2 element.

Quick guide – Practitioners and their roles

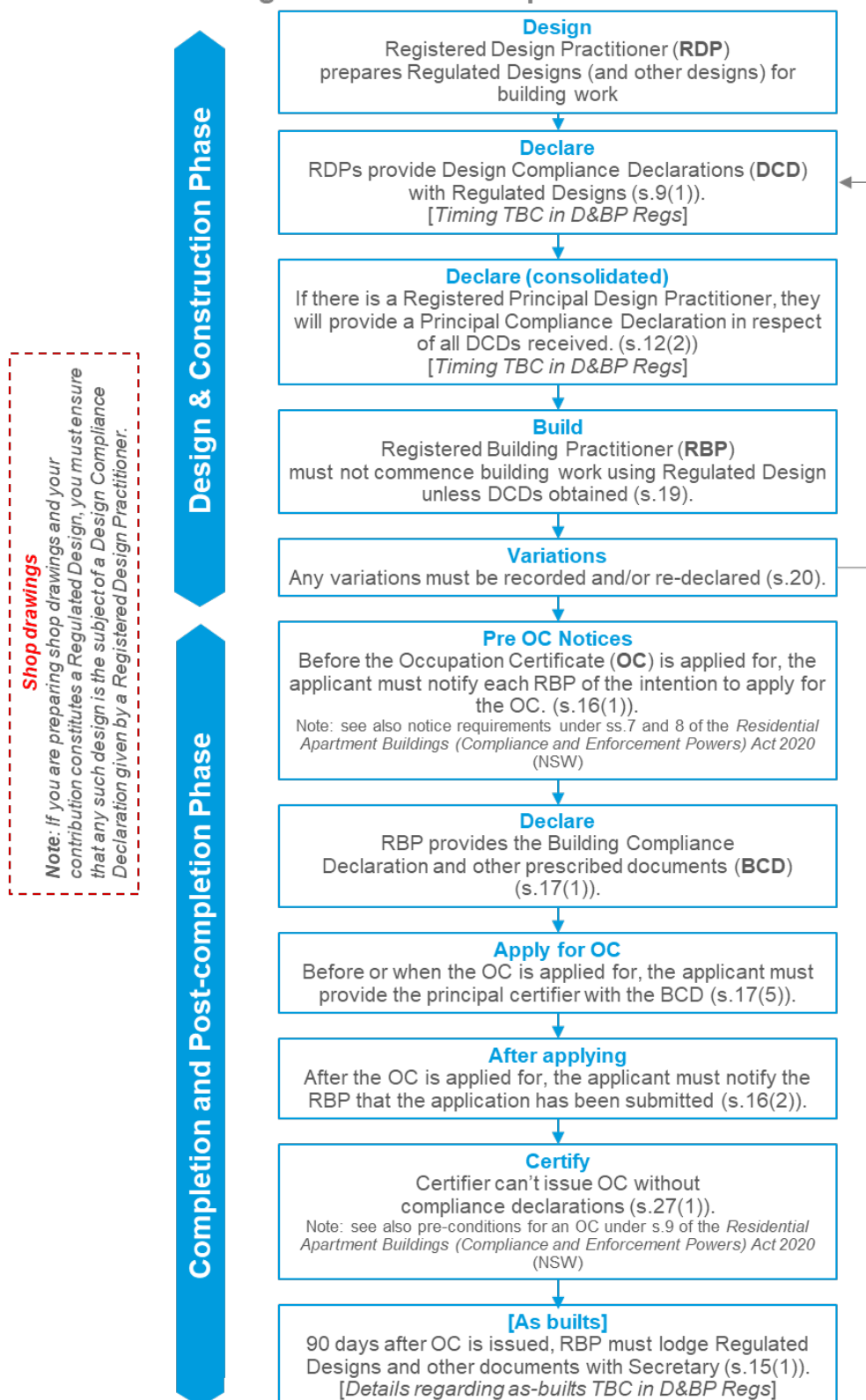
Part 2 of the D&BP Act – Regulated designs and building work



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 - Construct Only Contract – AS4000

Subject	Clause number in AS4000	
1. Formal Instrument of Agreement	(relates to clause 6)	<p>The Formal Instrument of Agreement shall include recitals that identify that:</p> <ul style="list-style-type: none"> (a) the Principal has procured: <ul style="list-style-type: none"> (i) Regulated Designs; (ii) Design Compliance Declarations in respect of the Regulated Designs; and (iii) other design work and specifications, for the Works; and (b) the Principal engages the Contractor, on the terms of the Contract, to perform the WUC in accordance with the documents described in the Contract.
2. Interpretation	1	<p>Insert the following definitions at clause 1:</p> <ul style="list-style-type: none"> • Building Element has the meaning given in the D&BP Act; • D&BP Act means the <i>Design and Building Practitioners Act 2020</i> (NSW); • D&BP Regulations mean the <i>Design and Building Practitioners Regulations 2021</i> (NSW); • Design Compliance Declaration has the meaning given in the D&BP Act; • Design Package has the meaning given in clause 2.6; • Performance Solution has the meaning given in the D&BP Act; • Principal Compliance Declaration has the meaning given in the D&BP Act; • Registered Building Practitioner has the meaning given in the D&BP Act; • Registered Design Practitioner has the meaning given in the D&BP Act; • Registered Principal Design Practitioner has the meaning given in the D&BP Act; • Regulated Design has the meaning given in the D&BP Act; • Relevant Document has the meaning given in s.15(4) of the D&BP Act;

3.	Interpretation	1	<p>The definition of practical completion shall be amended as follows: <i>'practical completion is that stage in the carrying out and completion of WUC when:</i></p> <p>a) <i>the Works are complete except for minor defects:</i></p> <ul style="list-style-type: none"> <i>i) which do not prevent the Works from being reasonably capable of being used for their stated purpose;</i> <i>ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and</i> <i>iii) the rectification of which will not prejudice the convenient use of the Works;</i> <p>b) <i>those tests which are required by the Contract to be carried out and passed before the Works reach practical completion have been carried out and passed; and</i></p> <p>c) <i>documents and other information required under the Contract which, in the Superintendent's opinion, are essential for the use, operation and maintenance of the Works have been supplied; and</i></p> <p>d) <u><i>the Contractor has provided to the Principal:</i></u></p> <ul style="list-style-type: none"> <u><i>(i) a Building Compliance Declaration for the Works which states that the Works comply with the requirements of the Building Code of Australia and any other applicable requirements prescribed by the D&BP Regulations for the purpose of s.8(3) of the D&BP Act; and</i></u> <u><i>(ii) the contractor documents and other required documents described in s.17(6) of the D&BP Act.'</i></u>
4.	Design Package	new clause 2.6	<p>Insert a new clause 2.6 as follows:</p> <p>'2.6 Design Package</p> <p><i>The Contractor acknowledges and agrees that:</i></p> <p>(a) <i>as part of the request for tender, the Principal provided the Contractor with:</i></p> <ul style="list-style-type: none"> <i>(i) Regulated Designs;</i> <i>(ii) Design Compliance Declarations in respect of the Regulated Designs;</i> <i>(iii) a Principal Compliance Declaration in respect of the Regulated Designs (where there is a Registered Principal Design Practitioner appointed); and</i> <i>(iv) other design work and specifications,</i> <p><i>for the WUC (Design Package);</i></p>

			<p>(b) <i>the Design Package is attached to the Contract at Annexure Part [D];</i></p> <p>(c) <i>the Design Package is of a sufficient level of detail to enable the Contractor to provide an accurate contract sum for the WUC; and</i></p> <p>(d) <i>the Contractor must undertake the WUC in accordance with the Design Package.'</i></p>
5.	Warranties	new clause 2.7	<p>Insert a new clause 2.7 as follows:</p> <p>'2.7 Contractor Registration</p> <p><i>The Contractor warrants that, on and from the date of the Contract and until the end of the defects liability period, the Contractor is a Registered Building Practitioner and the Contractor's registration authorises the Contractor to provide a Building Compliance Declaration in respect of the Works.'</i></p> <p>Guidance Note: Clause 2.7 above replicates the Contractor's obligations under the D&BP Act, in order to provide that the Principal will have a contractual remedy against the Contractor if the Contractor fails to meet those obligations. The clause is drafted as a warranty (rather than an essential condition), as the intention is that a breach of this clause would give rise to a right to claim damages (rather than termination). Note in addition clause 39.2 below which provides that a failure to maintain registration or insurance may lead to termination, but only after the Contractor has been given the opportunity to show cause.</p>
6.	Warranties	new clause 2.8	<p>Insert a new clause 2.8 as follows:</p> <p>'2.8 Regulated Designs</p> <p><i>The Principal warrants that:</i></p> <p>(a) <i>each Regulated Design that forms part of the Design Package was prepared by a Registered Design Practitioner;</i></p> <p>(b) <i>each Design Compliance Declaration that forms part of the Design Package was obtained from a Registered Design Practitioner whose registration authorises them to provide a declaration as to the matters to which the declaration relates; and</i></p> <p>(c) <i>if a Principal Compliance Declaration forms part of the Design Package, the Principal Compliance Declaration was obtained from a Registered Principal Design Practitioner whose registration authorises them to provide a declaration as to the matters to which the declaration relates.'</i></p> <p>Guidance Note: Clause 2.8 above is drafted as a warranty (rather than an essential condition), as the intention is that a breach of this clause would give rise to a right to claim damages (rather than termination).</p>

7.	Novation	clause 9.4	<p>Clause 9.4 is amended as follows:</p> <p><i>'When directed by the Principal, the Contractor, without being entitled to compensation, shall promptly execute a deed of novation in the form included in the invitation to tender, such deed being between the Principal, the Contractor and the subcontractor or selected subcontractor stated in Item 18 for the particular part of WUC, <u>provided that a design consultant cannot be novated by the Principal to the Contractor.</u>'</i></p>
8.	Excepted risks	clause 14.3(f)	<p>Clause 14.3 is amended as follows:</p> <p><i>'The excepted risks causing loss or damage, for which the Principal is liable, are:</i></p> <p>(a) <i>any negligent act or omission of the Superintendent, the Principal or its consultants, agents, employees or other contractors (not being employed by the Contractor);</i></p> <p>(b) <i>any risk specifically excepted elsewhere in the Contract;</i></p> <p>(c) <i>war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;</i></p> <p>(d) <i>ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or its subcontractors or either's employees or agents;</i></p> <p>(e) <i>use or occupation of any part of WUC by the Principal or its consultants, agents or other contractors (not being employed by the Contractor); and</i></p> <p>(f) <i>defects in the design of <u>the Works</u>WUC, other than design provided by the Contractor.'</i></p>
9.	As-builts	new clause 34.10	<p>A new clause 34.10 is inserted as follows:</p> <p>'34.10 Relevant Documents</p> <p><i>The Contractor must:</i></p> <p>(a) <i>within [30] days after the date of practical completion, provide to the Principal the Relevant Documents for the Works in the format required under s.15(1) of the D&BP Act and the D&BP Regulations; and</i></p> <p>(b) <i>no later than 90 days after the occupation certificate is issued for the Works, provide the Relevant Documents to the Secretary in accordance with s.15(1) of the D&BP Act, and in the format required under the D&BP Regulations.'</i></p>
10.	Variations	clause 36	<p>Clause 36.1 is amended as follows:</p>

			<p><i>'The Contractor shall not vary WUC except as directed in writing.</i></p> <p><i>The Superintendent, before the date of practical completion, may direct the Contractor to vary WUC by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Contract:</i></p> <ul style="list-style-type: none"> <i>a) increase, decrease or omit any part;</i> <i>b) change the character or quality;</i> <i>c) change the levels, lines, positions or dimensions;</i> <i>d) carry out additional work;</i> <i>e) demolish or remove material or work no longer required by the Principal.</i> <p><i><u>provided that the Superintendent cannot direct the Contractor to undertake design work.</u></i></p> <p><i><u>If the Works (other than in relation to a Building Element or Performance Solution) are varied from a Regulated Design, the Contractor must ensure that the variation is recorded in accordance with s.20(1) of the D&BP Act, and provide to the Superintendent a copy of that record.</u></i></p> <p><i><u>If the Works (in relation to a Building Element or Performance Solution) are varied from a Regulated Design, the Superintendent's direction under this clause must be accompanied by a Design Compliance Declaration in respect of that varied Regulated Design.'</u></i></p>
11.	Contractor's default	clause 39.2	<p>Clause 39.2 is amended as follows:</p> <p><i>'If the Contractor commits a substantial breach of the Contract, the Principal may, by hand or by certified post, give the Contractor a written notice to show cause.</i></p> <p><i>Substantial breaches include, but are not limited to:</i></p> <ul style="list-style-type: none"> <i>a) failing to: <ul style="list-style-type: none"> <i>i) provide security;</i> <i>ii) provide evidence of insurance;</i> <i>iii) comply with a direction of the Superintendent pursuant to subclause 29.3; or</i> <i>iv) use the materials or standards of work required by the Contract;</i> </i> <i>b) wrongful suspension of work;</i> <i>c) substantial departure from a construction program without reasonable cause or the Superintendent's approval;</i>

			<p><i>d) where there is no construction program, failing to proceed with due expedition and without delay; and</i></p> <p><i>e) in respect of clause 38, knowingly providing documentary evidence containing an untrue statement; <u>and</u></i></p> <p><i><u>f) failing to maintain registration and be adequately insured in accordance with the D&BP Act.'</u></i></p>
12.	Annexure Part D	new annexure	Insert a new Annexure Part D containing the Design Package.