



Australian
Institute of
Architects

Guide for design practitioners and engineers

CONTRACT TERMS, PROFESSIONAL INDEMNITY
INSURANCE AND THE DESIGN AND BUILDING
PRACTITIONERS ACT 2020 (NSW)

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Contents

| | | |
|----|---|----|
| 1. | Introduction | 3 |
| 2. | The regulatory context | 4 |
| 3. | Practical suggestions for design practitioners and engineers | 5 |
| 4. | Model contract clauses | 9 |
| 5. | Checklist for design practitioners and engineers (non-exhaustive) | 11 |



1 Introduction

PURPOSE

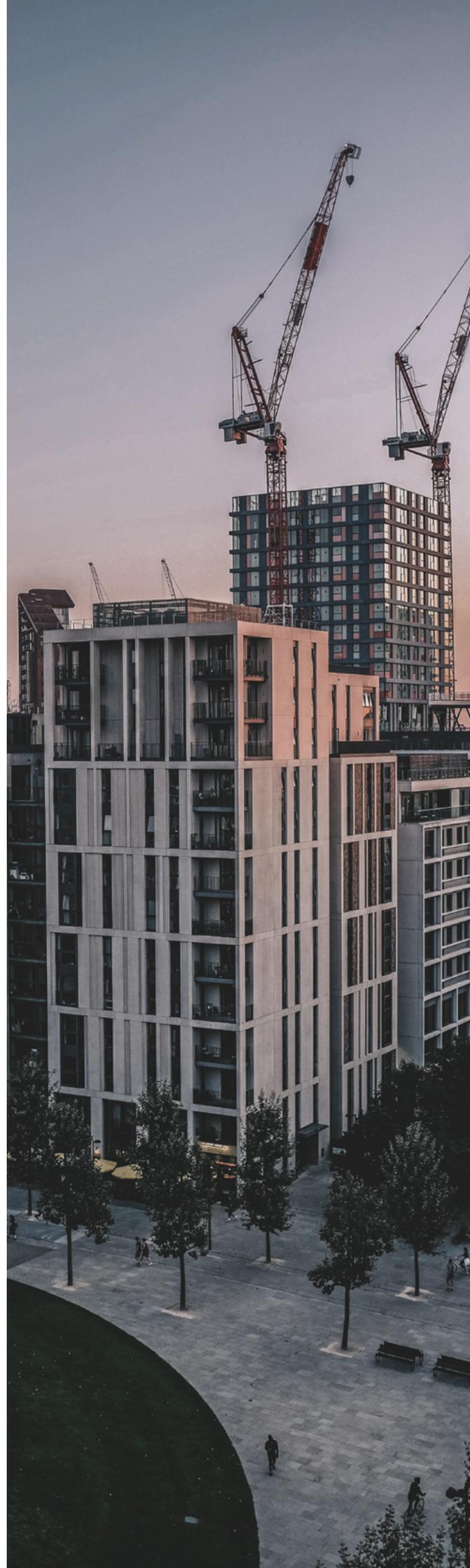
Consult Australia, Engineers Australia and the Australian Institute of Architects have developed this guide for design practitioners and engineers to highlight key issues relevant to contracts and professional indemnity (PI) insurance arising from the Design and Building Practitioners Act 2020 (the D&BP Act) and the Design and Building Practitioners Regulation 2021 (the D&BP Regulation). This guide encourages design practitioners and engineers to understand their role under the DB&P Act and the D&BP Regulation as well as under any contract they sign to ensure they can provide their services in accordance with those obligations and within their insurance coverage.

The interplay between contractual obligations and PI insurance policies is a critical issue for design practitioners and engineers that must be considered before signing a contract. PI insurance policies provide coverage for common law duties and statutory obligations (unless excluded). Therefore, design practitioners and engineers should ensure that any contractual liabilities do not exceed those duties or obligations, otherwise you risk exposure beyond insurance coverage.

Design practitioners and engineers should ensure the contracts they present and sign:

- clearly set out the obligations of each party so everyone understands them
- are fair and balanced in terms of each party's rights and obligations, and
- do not include unnecessary or inappropriate clauses that are uninsurable

This guide provides practical suggestions for design practitioners and engineers to consider when preparing to sign a contract to provide services on class 2 buildings in NSW. This guide is not exhaustive and is general in nature. It has been prepared for informational purposes only and should not replace legal advice or advice from your insurance broker on coverage and exposure.



2 The regulatory context

The NSW Government has developed a reform package with the intention of transforming the NSW building sector into a customer centric industry focused on quality construction. Consult Australia, Engineers Australia and the Australian Institute of Architects support this policy intention.

As at the date of publication of this guide the D&BP Regulation prescribes that the class or type of building to which the definition of building work under the D&BP Act applies are class 2 buildings or mixed-use buildings that contain a class 2 part.¹ However, this could be extended to other building classes in the future.

Key elements of the D&BP Act that should be considered for translation into contractual obligations include:

- Registration – design practitioners and engineers will need to be registered to undertake certain services.
- Regulated designs – regulated designs will need to be prepared by registered design practitioners:
 1. before construction can begin, and
 2. where there is a relevant variation during construction, within one day of commencement of that variation work, otherwise the variation work must stop until a regulated design for the variation is lodged.
- Compliance declarations – registered design practitioners will need to prepare and provide design compliance declarations in respect of regulated designs (including varied regulated designs).*

According to the D&BP Regulation, regulated designs are designs (including a plan, specification or report detailing a design) that is prepared for a building element, or for a performance solution, for building work.

The D&BP Act and D&BP Regulation also impose insurance requirements on registered design practitioners and registered professional engineers. There is a one-year transition period until these requirements come into effect (i.e. these requirements come into effect on 1 July 2022).² This guide does not explore those insurance requirements.

THE INSURANCE MARKET

The insurance market is currently severely constrained. Dramatic changes in PI market conditions in recent times make it difficult to predict future market conditions in respect of pricing, coverage, and capacity, even in the short to medium term.³

For design practitioners and engineers, we have seen premium increases for PI insurance from 20% up to over 200% depending on discipline, where usual premium increases have historically been 1-2%.

Insurers are increasingly reviewing the activities of the insured, including what exposure is regularly accepted in contracts. For this reason, it is vital for design practitioners and engineers to understand the relationship between contract clauses and their PI insurance. This guide highlights some of these issues but is not exhaustive. Talk to your insurance broker for more information.

* Building practitioners are responsible for lodgement of relevant documents with the NSW government. Therefore, design practitioners will provide the declarations to building practitioners for lodgement (unless the building practitioner has delegated their responsibility to the design practitioner).

¹ Be aware that Part 4 of the D&BP Act has its own definition of building and building work for the purposes of that part only. Part 4 deals with the imposition of a duty to exercise reasonable care to avoid economic loss caused by defects and is not restricted to class 2 buildings.

² See clause 106 of the D&BP Regulation (as at 9 June 2021 the D&BP Regulation provides for a two-year transition, but NSW government advises this will shortly be amended to be a one-year transition).

³ See Aon's Professional Indemnity Insurance Market Insights Q3 2020 at: <https://aoninsights.com.au/professional-indemnity-insurance-insights-2020/>



3 Practical suggestions for design practitioners and engineers

BE CLEAR ON YOUR SCOPE OF SERVICES AND DELIVERABLES IN THE CONTRACT

The scope of services and deliverables in the contract must reflect what the design practitioner or engineer will actually do and can and will deliver.

The Lacrosse Tower Fire decision⁴ demonstrates the importance of ensuring for every project that the services the consultant expects to perform match the services articulated in the contract. 'Usual practice' should not be relied on over and above the terms of the contract. The same is true for any deliverables.

In the context of the D&BP Act, this means that design practitioners should not agree to provide regulated designs and design compliance declarations under the D&BP Act without expressing all that needs to be done to achieve that deliverable. Also, design practitioners and engineers should carefully consider any time provisions as they relate to the scope and deliverables.

Below are just some of the matters you should consider detailing in the scope and deliverables parts of your contracts.

⁴ *Victorian Civil and Administrative Tribunal decision by Judge Woodward, largely upheld by the Supreme Court of Victoria Court of Appeal.*

SUFFICIENT TIME TO PROVIDE THE SERVICES AND DELIVERABLES AND FLEXIBILITY FOR CHANGING CIRCUMSTANCES

Timing is a key aspect that design practitioners and engineers need to consider – clear timing provisions give all parties to the contract certainty. You need to ensure that you will be entitled to sufficient time to provide the services and deliverables agreed as well as have sufficient flexibility for more time if circumstances change. This includes time to consider variations and resultant design and engineering work. Be particularly aware of timing on milestones for the provision of regulated designs in any program for services.

Timing is of particular importance under the D&BP Act. The NSW government has noted that building quality is adversely affected when insufficient time is provided to design and conduct engineering work. Therefore, the D&BP Act anticipates that detailed regulated designs will be drafted before construction work begins and construction is expected to stop while varied regulated designs are prepared. Further, the D&BP Regulation requires the following to be lodged on the NSW Planning Portal no later than one day after commencing a variation to building work:

- where the variation is relevant to an existing regulated design:
 - a copy of the varied regulated design
 - a copy of each design compliance declaration for the varied regulated design
- where the variation is for a new building element or performance solution:
 - a copy of the new regulated design
 - a copy of each design compliance declaration for the new regulated design.

Design practitioners and engineers should ensure that the scope of services (as well as the fee for services) allows sufficient time to accommodate these requirements.

CONSULTATION ON VARIATIONS

The NSW government has noted that building quality is adversely affected when variations to design occur during construction and are not documented in the design. Therefore, the D&BP Act requires variations to be included in regulated designs and that design compliance declarations are made for those variations.

A clear process in the contract for variations that ensures design practitioners and engineers are consulted on proposed variations will help to mitigate the risks of variations. It is important that the contract is clear about the role of all parties to the contract when there is a variation. As indicated above, it is also important that design practitioners are provided enough time to prepare varied regulated designs (or new regulated designs for variations for new building elements or performance solutions).

Design practitioners and engineers need to ensure that the scope of services (as well as the fee for services) accommodates this requirement. You should consider including an obligation in the contract for the contractor to contact you if a variation is contemplated, so you can work together to decide if a variation is necessary and how best to achieve the outcome needed. You will also likely need site access to assess the variation as soon as possible (and not at the conclusion of construction).

The D&BP Act and D&BP Regulation does not mandate that the original design practitioner also prepare varied regulated designs and provide design compliance declarations on those. If you are asked to prepare a varied regulated design and you did not prepare the original regulated design, you may be held responsible/liable for the work of the original designer as well as your own work, depending on the variation. Make sure you understand your responsibility and you check the work of others thoroughly. This will have an impact in terms of time and cost – ensure you have enough time to become familiar with the original design and any related designs and that you are paid for all work you do including this additional work.

CLARIFY ROLE DURING CONSTRUCTION

Lack of clarity in the contract about the roles of parties during construction can be problematic where design practitioners and engineers are expected to provide services during the construction phase – such as providing varied regulated designs. Where you have a role during construction, you should ensure that you are entitled under the contract to sufficient site access to enable you to perform that role and meet your obligations (e.g. to satisfy yourself that building work is in accordance with your designs, where relevant).

The D&BP Act does not limit design practitioner and engineering roles or liability to pre-construction. You may need to do new regulated designs or design compliance declarations during construction. Aspects to consider providing for in the contract include:

- the extent of your site visits (if any) and the elements you will be observing during these visits
- your role in the review/approval of elements designed by others, shop drawings and materials substitution where permitted, and
- the wording of the certificate (if any) you will be providing regarding the 'as built' elements and who is able to rely on your certificates.

PROCESS FOR RESOLVING ISSUES

We know that better projects result from better communication and collaboration. It benefits all parties to have a process for resolving issues. Design practitioners and engineers should seek to include processes for identifying, discussing, and resolving issues collaboratively during the project.

Have contract clauses that are clear, balanced and can be met by your PI insurance

With the significant pressure in the PI market, it is vital that design practitioners and engineers understand how their contract interacts with their PI insurance policy.

In the context of the D&BP Act, this means ensuring that contractual obligations match the obligations in the legislation, and that you do not accept additional liability. Below are some of the issues to be aware of that have the potential to impact on PI insurance coverage. Issues included are not exhaustive. For example, liability clauses, indemnities, and contracting out of proportionate liability are also relevant. Talk to your insurance broker for more information.



DO NOT ACCEPT RESPONSIBILITY FOR THE CLIENT'S COMPLIANCE WITH THE D&BP ACT

The D&BP Act requires certain practitioners and engineers to do certain things. As a design practitioner or engineer you can assist a client (such as another design practitioner or a building practitioner) to meet their obligations by meeting your obligations – this is not the same as having an obligation under a contract to ensure the client complies with the Act.

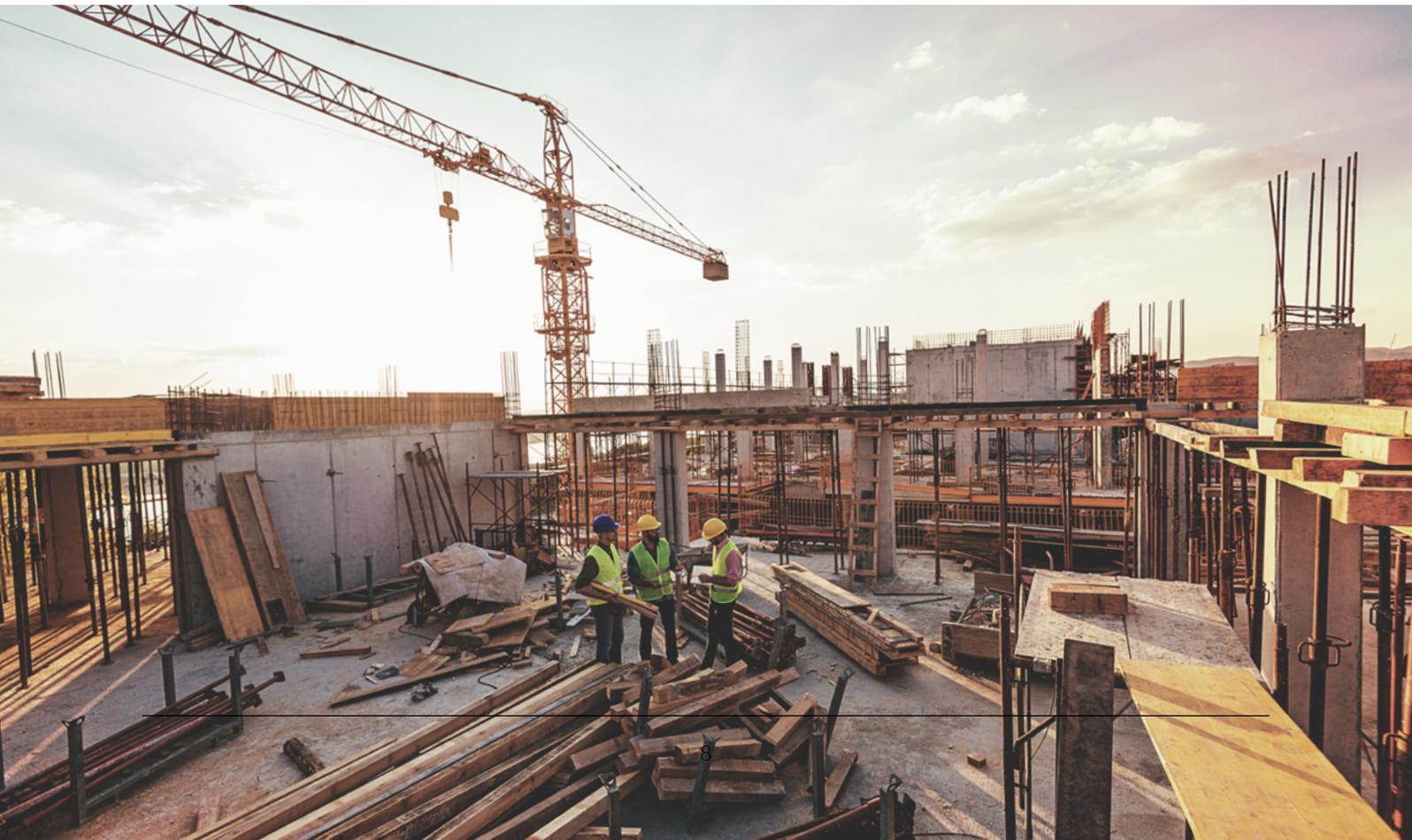
It is not advisable to agree to a clause like this:

The Consultant must do all things reasonably necessary to ensure that the Client complies with [relevant section] of the D&BP Act, including: ...

Instead, set out the obligations of both parties needed to ensure compliance with the relevant section of the D&BP Act. For example, if the clause relates to design variation, the obligations on the client could include contacting the design practitioner and discussing the variation before proceeding. The obligations on the design practitioner could include assessing the variation and determining if a new regulated design or a variation to an existing regulated design is needed and if a design compliance declaration can be made (and making it where it can).

DO NOT ACCEPT CONTRACTUAL WARRANTIES

Key contract obligations are sometimes expressed as 'warranties' which unnecessarily creates a potential trigger for insurers to deny or restrict cover for claims under some policy wordings. Contractual warranties are usually mentioned specifically in the 'assumed liability' exclusion in PI insurance policies as being an obligation the insurer will not cover (except to the extent the consultant would have had the same liability in the absence of the warranty). If the obligation is suitable for a consultant, then it can be included in the contract but it is preferable to avoid clauses such as '...the consultant warrants that...'. Instead use '...the consultant agrees that...'. If the obligation is not suitable for a consultant, the clause should be removed from the contract or otherwise amended to make it a suitable obligation.



4 Model contract clauses

CONSIDER IF MODEL CONTRACT CLAUSES ARE APPROPRIATE

The NSW government has suggested some Model Contract Clauses for use with the relevant Australian Standard contracts to embed the obligations of the D&BP Act into contracts. Consult Australia, Engineers Australia and the Australian Institute of Architects encourage all design practitioners and engineers to consider the advice in this guide when determining if the Model Contract Clauses are appropriate for your situation.

To assist design practitioners and engineers put into practice the suggestions in this guide, below are some tips in the context of AS4122-2010 General Conditions of Contract for the Engagement of Consultants.

These tips are general in nature and do not replace the need for legal advice or advice from your insurance broker for your specific situation. Design practitioners and engineers should consider the context of their role, the coverage of any relevant insurance policy and the services provided when negotiating contracts.

NOTES AS TO SCOPE (SEE CLAUSE 1 AND ITEM 4 OF AS4122-2010)

- Before agreeing to requirements imposed on the consultant to provide regulated designs and design compliance declarations, the consultant should ensure that the services to be provided fall within the D&BP Act and the D&BP Regulation. For example, certain designers might provide designs or advice for class 2 buildings, but those designs or advice do not meet the definition of regulated designs under the law.
- Where the scope includes a requirement for the consultant to provide regulated designs, the consultant will need to assess compliance with the requirements of the Building Code of Australia and any other requirements or matters prescribed by the D&BP Regulation.
- Where the scope includes a requirement for the consultant to provide design compliance declarations for regulated designs, the consultant will need to ensure the declaration meets the D&BP Act and D&BP Regulation which state (in summary):



- that the Regulated Design provided as part of the Services complies with the requirements of the Building Code of Australia
- whether or not other standards, codes or requirements have been applied in preparing the design.
- It is recommended that the scope includes sufficient time to provide the services and deliverables and flexibility for changing circumstances (including variations). The consultant should also ensure their fee accounts for the scope and deliverables and covers contingencies for variations.
- It is recommended that design practitioners and engineers make clear when design drawings are to the 'issued for construction' standard.
- If the consultant is to be engaged by, or novated to, a builder it is recommended that a list of persons who provided the services is created which identifies 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.

PERFORMING THE SERVICES (SEE CLAUSE 2 OF AS4122-2010)

Where a consultant needs to be or needs to appoint a registered design practitioner or registered professional engineer or registered specialist practitioner – this should be a contract obligation that matches the legislative requirements (not a contractual warranty).

VARIATIONS TO DESIGNS (SEE CLAUSE 9 OF AS4122-2010)

- As both clients and consultants have a role in variations, it is recommended that the obligations of each party are made explicit.
- Example obligations for a client that forms the view that a variation to the works is needed, or otherwise requires a variation, include:
 - promptly notify the consultant of the variation
 - provide prompt site access to the consultant for the purposes of the consultant assessing the variation and the need for a new design
 - request from the consultant (if they are the relevant registered design practitioner) a varied regulated design and related design compliance declaration in respect of each variation
 - provide all necessary information to the consultant for the purposes of the consultant producing a varied design/ varied regulated design and design compliance declaration
 - if the consultant advises that a design compliance declaration cannot be made in respect of the variation, work collaboratively with the consultant to resolve the issue.
 - provide the consultant with sufficient time to provide the services relevant to the variation.
- Example obligations for a consultant when notified of a variation by a client:
 - attend the site promptly for the purposes of assessing the variation
 - consider whether a varied design is needed (including a varied regulated design)
 - consider any information provided by the client and request any necessary further information from the client for the purposes of producing a varied regulated design and related design compliance declaration
 - if a design compliance declaration cannot be made in respect of the variation, advise the client and work collaboratively with the client to attempt to resolve the issue.

5 Checklist for design practitioners and engineers (non-exhaustive)

The scope of services and deliverables are clear and reflect the services and deliverables you will provide.

You are entitled to sufficient time before construction commences to do relevant design and/or engineering work.

You have sufficient flexibility in timing requirements to cater for changed circumstances.

There is a process for variations, including an entitlement for you to be notified and assess the variations.

If you have a role during construction (including potentially producing varied regulation designs), that is made clear, including:

- your entitlement to sufficient time to perform the relevant services (such as provide a varied regulated design)

- extent of your site visits (if any) and what elements you will be observing during these visits

- the role you will have in the review/approval of:

 - elements designed by others

 - shop drawings and materials substitution

- the wording of the certificate (if any) you will be providing regarding the 'as built' elements and who is able to rely on your certificates.

There is a process for identifying, discussing, and resolving issues collaboratively during the project.

Your fees match the services and deliverables.

You are responsible for your obligations under the D&BP Act and D&BP Regulation.

You do not have responsibility for the client's compliance with the D&BP Act and the D&BP Regulation.

There are no unnecessary contractual warranties in the contract or other uninsurable liabilities.

This guide is provided for informational purposes only. It is general in nature and is not legal or other professional advice. It has been reviewed by Paul Bannon of Colin Biggers & Paisley <https://www.cbp.com.au/people/paul-bannon>

You should not rely on any information contained in this guide as if it were legal or other professional advice. Consult Australia, Engineers Australia, the Australian Institute of Architects and Colin Biggers & Paisley have attempted to ensure the currency and accuracy of the information provided in this guide, but do not guarantee the currency and accuracy of this information. We make no warranties or representations about this guide or any of the content. We exclude, to the maximum extent permitted by law, any liability which may arise as a result of the use of this guide or any of its content.



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