



HOUSING INDUSTRY ASSOCIATION



# Housing Australians



## Reforming Building & Planning Laws

Submission to the Department of Planning and Environment

### **Combustible Cladding – Draft Regulation & Explanation of Intended Effect**

19 February 2018

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Housing Industry Association contact:

**Troy Loveday**  
**Assistant Director, Residential Development & Planning**  
Housing Industry Association  
4 Byfield Street,  
MACQUARIE PARK NSW 2113  
Phone: 02 9978 3342  
Email: t.loveday@hia.com.au

**Brad Armitage**  
**Assistant Director, Building Services**  
Housing Industry Association  
4 Byfield Street,  
MACQUARIE PARK NSW 2113  
Phone: 02 9978 3327  
Email: b.armitage@hia.com.au

## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

*"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

## 1.0 INTRODUCTION

The Housing Industry Association (HIA) would like to provide the following comments in relation to the proposed planning reforms addressing the use of combustible cladding on buildings.

This submission has been prepared in response to:

- a consultation draft regulation (*Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017*) and
- an Explanation of Intended Effect (EIE) proposing amendments to eight (8) State Environmental Planning Policies, including State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) regarding minor external building alterations (cladding and decorative work) as exempt development.

The Department of Planning and Environment has indicated that the basis for these proposals stem from the fire risk associated with the use of combustible cladding on external walls of buildings. The recent Grenfell fire in London and the Lacrosse fire in Melbourne in 2014 have triggered government to re-evaluate the use and presence of combustible cladding, particularly on high rise buildings. In both of these cases, the buildings were multi-storey and multi-occupant residential buildings with an inherent increased risk to life and property.

The scope of the draft Regulation covers many other building types which is considered appropriate but it is noted that they seek to extend to very minor forms of development in the case of the changes to exempt development which .

The proposed amendments to the Environmental Planning and Assessment Regulation 2000 will provide a framework for the establishment of a register of buildings with combustible cladding. These changes will only apply to certain categories of buildings based on the type of construction (Type A and B) defined under the Building Code of Australia. These aspects of the proposal are supported.

Other aspects of the draft regulation may cause undue concern to building owners , including those in buildings without combustible cladding. It is important that the Department ensure that building owners have access to information that will assist them to determine whether their buildings are impacted by the draft Regulation. An effective communications strategy should be implemented to help building owners to understand and where required meet their obligations under the draft Regulation.

It is unclear why changes are being made to the Codes SEPP, particularly for minor works currently allowed as exempt development on class 1a and 10 buildings. The amendments should be confined to high risk buildings (residential flat buildings, boarding houses, seniors housing, commercial and industrial building) identified in the EIE only.

The impact of minor external building work to detached houses in terms of affordability will be significant. Homeowners will incur costs of preparing and lodging complying development certificates, delays waiting for approval and the costs associated with inspections that are unreasonable and excessive in addressing the issue of external cladding on high risk buildings. The additional burden on local councils and private certifiers will also add further red tape to the planning system with little benefit. There has been no evidence provided by the Department to indicate there is a need for this element of the proposed change.



Given the severe impact these reform proposals will have on building owners, it is not clear why a Regulatory Impact Statement (RIS) has not been prepared. A RIS would have identified the costs and benefits of these changes on low risk buildings and allowed for the full impact to be measured.

HIA opposes the proposed amendments in their current form and call on the Department to prepare a RIS and make this available for public comment prior to any further decision being made.

## 2.0 DRAFT COMBUSTIBLE CLADDING REGULATION

The draft regulation seeks to establish a process for the identification of, and collection of information, about buildings where combustible cladding has been installed. Owners of buildings where combustible cladding has been installed will be required to provide certain information to the Secretary of the Department . Within 3 months of the regulation commencing building owners will be required to inform the Secretary of the details of the building and any combustible cladding. Clause 186V of the regulation requires building owners to provide the Secretary with a cladding statement generally within 7 months of the commencement of the regulation.

This imposes considerable responsibility onto the owner of a building regarding notification about the presence of combustible cladding on their building. In many cases, building owners will not have sufficient technical knowledge to understand whether a building is affected by combustible cladding.

### 2.1 DEFINITIONS

The draft regulation provides a definition for *combustible cladding*. This has been developed with an intended use different to that which would normally be defined for use in an industry standard or building code.

The definition is unclear and open to more than one interpretation. For example, it reads as though it captures all instances where timber is used as the framing of the building, which is inconsistent with common industry understanding of what a *cladding system* is.

It is essential that the definition be made amended to ensure that the draft Regulation is clear and only captures forms of combustible cladding that are equivalent to the safety risk that underpins the reform proposal.

### 2.2 SHOULD THE DRAFT REGULATION APPLY TO NEW BUILDINGS?

The draft Regulation is intended to apply equally to new and existing buildings.

Although a case could be made for the Department to take steps to ensure that new buildings do not have significant non-compliances, this is the responsibility of the the building certification system. Suggesting that the draft Regulation would apply to a new building design, which has the appropriate use of any cladding material and is compliant with the building code at both the point of design, and completion second guesses that process. Building owners of new buildings, correctly certified in accordance with the building code should not be required to register.

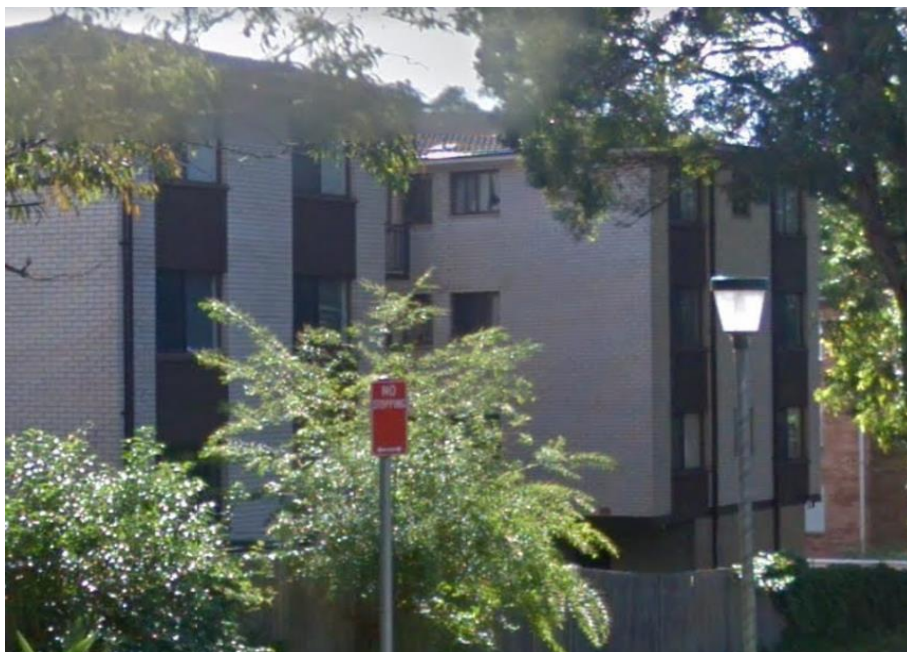
The proposal which requires newly constructed buildings to be placed on the register and submit a cladding statement, will only serve to undermine the NSW certification system. It is worrying if owners of new buildings have to engage a fire engineer or other properly qualified person to inspect their building and develop a report, at considerable cost, when the building had recently been completed and determined to be fit for occupation and the design was correctly certified as being in accordance with the building code.

It is HIA's view that the provisions of the draft regulation should not apply to any building where a Construction Certificate has been issued after the commencement of the Regulation.

## 2.3 IDENTIFICATION OF COMBUSTIBLE CLADDING

The identification of combustible cladding required by clause 186T and 186V of the draft Regulation has the potential of capturing more buildings and potential hazards beyond the intention of the proposal.

Below are several photographs of medium density townhouses and apartment buildings located around Sydney, including parts of Marsfield, North Ryde, Artarmon and Lane Cove.



These apartment and townhouse complexes are a very common type of building stock in New South Wales. Most of these buildings were built in the 60's, 70's and 80's have external timber components including; fascia's, posts, beams, lined gables and timber cladding to break up the brick façade. In some cases these cladding materials are Masonite which could be considered to be combustible cladding as defined by the draft Regulation.

HIA is not aware of any specific statewide building safety issue which would warrant these buildings now being captured by the draft Regulation. We suspect that the owners of these types of buildings will register them

under clause 186T as they meet the definition of a *building with combustible cladding*. Once registered, the building owners will be required to submit a *cladding statement* to the Secretary.

The draft regulation does not make it clear how a *properly qualified person* should approach to such a building. The timber components and claddings on these buildings pose minimal risk when they are considered in isolation. In some cases, some of these buildings may be located on bushfire prone land and that may present a dilemma to the *properly qualified person*. Most of these buildings were built before the introduction of bushfire building controls. As the regulation currently contains no exclusions and considering the potential liability on the professional, it is highly likely that a *properly qualified person* will determine that the cladding presents a risk due to external factors such as bushfire.

It is crucial to the success of the scheme that clause 186V is supported by practical guidance material and contains appropriate exclusions which enable a *properly qualified person* to better determine when a cladding statement is **not required**.

## 2.4 PROPERLY QUALIFIED PERSON

The term *properly qualified person* used in the draft Regulation raises conjecture among industry professionals, let alone building owners, regarding who is responsible for choosing a *properly qualified person*. For the proposed arrangements to be successful it is necessary for the Department to issue guidance materials to support the draft Regulation and provide clear guidance to building owners about who would be entitled to act as a *properly qualified person*.

## 2.5 CONFLICT WITH CERTIFICATION REGIME & NEED FOR A SUNSET CLAUSE

It is not clear how the draft Regulation will operate for new buildings. Given the concerns regarding the use of combustible cladding on high risk buildings, the planning and building certification processes for new buildings is under considerable scrutiny over the use of dangerous, non-compliant cladding materials. Consent authorities, certifying authorities and Principal Certifying Authorities will increasingly review any combustible cladding use during the development application and construction certificate process. It would be a concern if the use of non-compliant combustible cladding on high risk buildings was allowed to continue.

When a Principal Certifying Authority is requested to issue an Occupation Certificate in respect of a new building certain statutory requirements must be satisfied. Section 109H of the Environmental Planning and Assessment Act 1979 prevents a Principal Certifying Authority from issuing an Occupation Certificate in relation to a new building unless it is suitable for occupation or use in accordance with its classification under the Building Code of Australia. In this case a building owner would rely upon the Principal Certifying Authority's expertise regarding the building's safety and its compliance with the Building Code of Australia.



The draft Regulation will create a competing inspection regime whereby another professional (likely to be a fire engineer) will inspect the building and advise the owner (and the Secretary) if the building requires further work to make it safe. In most cases, it is reasonable to expect the inspection finds no dangerous combustible cladding and no rectification works will be needed, as it has been certified under the existing legislative requirements in NSW which includes reference to the Building Code of Australia.

It is not clear from the draft Regulation how a conflict between a Principal Certifying Authority and a *properly qualified person* would be resolved. After the commencement of the draft Regulation it would be highly unlikely that a new high risk building would be constructed using combustible cladding. A situation could arise where an inspection of cladding by a *properly qualified person* could arrive at a different conclusion to the Principal Certifying Authority. This type of conflict undermines the NSW building certification system that has been in place for 20 years and is not supported.

The draft Regulation has a role to play for existing buildings and can be used to rectify pre-existing fire safety issues for high risk buildings. Once all existing buildings have been added to the register and, if required, inspected by a *properly qualified person*, the relevant provisions would have served their purpose. At that point, the provisions should be repealed. The use of a sunset clause in the draft regulation may be appropriate

### 3.0 EXPLANATION OF INTENDED EFFECT (EIE)

#### 3.1 CODES SEPP

The changes proposed *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP) as set out in the EIE involve new restrictions relating to building work involving combustible cladding (cladding work).

Currently clause 2.53 of the Codes SEPP permits “minor external non-structural building alteration” including cladding and attaching fittings or decorative work as exempt development. This type of development must comply with the relevant deemed to satisfy provisions of the Building Code of Australia and, in relation to an existing building, not cause the building to contravene the Building Code of Australia.

As with most forms of exempt development, there is no checking process to ensure the builder/owner adheres to these requirements, but any failure to build in accordance with the relevant building standards could result in penalties imposed by either the local council or the Department of Fair Trading. Should this instance arise, local council has appropriate powers to seek the removal of the material or to address the building work through an approval process.

This clause currently does not distinguish between building types or classifications, it can apply to any building from a detached house to a multi-storey apartment building. It would be appropriate to review the scope of this provision given the concerns regarding combustible cladding. Recent events have shown that certain types of cladding material is a risk when used in certain situations and efforts to avoid those risks are supported. But the clause as drafted will have an overreach to buildings which are low risk.

The EIE proposes to prevent any cladding work (including the installation, repair or replacement of cladding and decorative work) being carried out as exempt development on high risk buildings. In these cases, a complying development certificate would be needed to undertake this type of work. The EIE identifies high risk buildings as residential apartment buildings, boarding houses, shop top housing, seniors housing, commercial buildings and industrial buildings. These measures are appropriate and the complying development certificate process allows for a certifier or local council to assess the cladding work complies with the relevant provisions in the Building Code of Australia.





The other change proposed to the Codes SEPP is to “specify where cladding and decorative work can be installed on other buildings as exempt development under the Codes SEPP, the materials used must not be combustible cladding”. In relation to this amendment, other buildings means most types of residential accommodation, including detached houses, secondary dwellings, dual occupancies, villas and townhouses. Many of these types of houses incorporate some form of combustible cladding into their construction either through use of timber sheeting, panels or frames. Any work to repair or replace deteriorated or damaged components not matter what size would need a complying development certificate.

HIA collects a substantial amount of data in respect to the Australian home renovations market and the long term forecast is for more renovations project to be undertaken to the key renovations age bracket of 30-35 years. The total value of renovation work carried out nationally during 2016 was \$34 billion and will remain above \$30 billion for the next 3 years. The HIA Renovation Roundup Report for October 2017 found more than half of all renovation work involves repairs and maintenance and almost 10% of work is external work. Exempt development provides a simple planning pathway for home renovations and encourages this investment to proceed with minimal red tape and delay.

Between 2014 and 2017 renovation activity growth in NSW increased by as much as 6.5% annually. That growth was forecast to peak in 2017 (4.5% annual growth) and remain steady in 2018 (0.3%). Beyond this year, the total value of home renovations in NSW is expected to reach \$11.4 billion in 2020. Given the significant scale of the home renovation sector in NSW, it is important that no changes are made to the State-wide approvals policy without full consideration being given to their economic impact.

The problem that the current proposal entails is that many homeowners or tradespeople carry out small repairs on detached houses with no approval (as the work is rightly defined as exempt development) and this may continue despite the proposed changes outlined in the EIE. If these works were carried out without a complying development certificate, the homeowner and the tradesperson would be in breach of the Environmental Planning and Assessment Act 1979. It is important that any changes made to the Codes SEPP are communicated and publicised to the home building and renovation industry to avoid unintended breaches of the State’s planning legislation.

### **3.2 OTHER STATE ENVIRONMENTAL PLANNING POLICIES**

Minor changes are being made to six other State Environmental Planning Policies to prohibit the use of combustible cladding on external walls as exempt development.

The instruments to be amended include:

- State Environmental Planning Policy (Infrastructure) 2007
- State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017
- State Environmental Planning Policy (Three Ports) 2013
- State Environmental Planning Policy (Affordable Rental Housing) 2009
- State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007
- State Environmental Planning Policy (Western Sydney Parklands) 2009

In each of these cases, the types of buildings involved would generally fall into the high risk building category (for example, schools, boarding houses, commercial buildings and industrial buildings). Accordingly, the changes proposed to require a complying development certificate for all cladding work are appropriate.



## 4.0 REGULATORY IMPACT STATEMENT

The scope of the proposed changes contained within the draft Regulation and EIE are significant and will come at some cost to the housing industry and hence home owners. The changes will impact owners of both new and existing homes and apartments as well as the owners of commercial and industrial buildings. The impacts will largely be financial but more importantly there are safety issues involved.

Section 5 of the *Subordinate Legislation Act 1989* provides that Regulatory Impact Statements (RIS) are to be prepared (as far as reasonably practical) before a principal statutory rule is made. The matters required to be contained in a RIS are set out in Schedule 2 of the legislation, including an assessment of the costs and benefits of the proposal, including direct and indirect economic and social costs and benefits. A RIS allows for the economic and social costs and benefits to be fully examined to allow the community to be satisfied that the benefits of the regulation exceed its costs.

In the draft Regulation there are new provisions that will establish an inspection regime that will apply to a very large number of buildings in NSW. The costs associated with the implementation of this scheme will be borne by building owners. Building owners may have to engage a *properly qualified person* to prepare a cladding statement. If rectification works are needed to make a building safe, the cost of those works would also be incurred by the building owner.

The changes proposed in the EIE will also restrict home renovation projects by requiring owners to obtain a Complying Development Certificate. Building work which previously could be carried out as exempt development would need plans to be drawn, a complying development certificate to be obtained and an inspection of the building work. The costs of this additional red tape would be incurred by the owner of the building.

## 5.0 CONCLUSION

The proposals relating to the use of combustible cladding on buildings extends from the planning approval of works through to identification of the presence of combustible cladding on certain existing buildings. Following the tragic events at the Grenfell Tower in London it is important that the Government is taking appropriate steps to ensure that dangerous combustible cladding is identified and if necessary, rectified with removal and replacement.

The factors motivating the proposed amendments are recognised and the majority of the outcomes the NSW Government is seeking to achieve are worthy of support. HIA has identified a number of issues which in some cases if implemented could have significant impacts and, in other cases, if not implemented properly could also have serious consequences.

Given the unresolved nature of those issues, we are requesting the NSW Government to defer finalisation of the reform package until the implementation of those specific proposals can be further discussed with industry groups to ensure unnecessary concern and financial costs to homeowners and industry is avoided.