HOUSING INDUSTRY ASSOCIATION

Submission to the
New South Wales Department of Customer Service – Better Regulation Division

Draft Design and Building Practitioners Regulation 2020

11 January 2021

HOUSING INDUSTRY ASSOCIATION

contents

Housing Industry Association contact:

David Bare
Executive Director NSW
Housing Industry Association
4 Byfield Street,
MACQUARIE PARK NSW 2113

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.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. Our members are involved in delivering more than 170,000 new homes each year through the construction of new housing estates, detached homes, low & medium-density housing developments, apartment buildings and completing renovations on Australia's 9 million existing homes.

HIA members comprise a diverse mix of companies, including volume builders delivering thousands of new homes a year through to small and medium home builders delivering one or more custom built homes a year. From sole traders to multi-nationals, HIA members construct over 85 per cent of the nation's new building stock.

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 the manufacturing, supply and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

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."*

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 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. EXECUTIVE SUMMARY

In June 2020 the *Design and Building Practitioners Act 2020* (Act) passed through the NSW Parliament, however much of the detail regarding its operation was to be set out within the associated regulations.

Following a series of 'concept papers' published throughout the latter half of 2020, the Department of Customer Service has now released the *Draft Design and Building Practitioners Regulation 2020* (Draft Regulation) for public comment.

Whilst supportive of the intent of the Act and Draft Regulation, and the broader goal of improving building quality and providing the community with greater certainty on the quality and compliance of newly built Class 2 buildings, HIA is greatly concerned about how the new provisions are proposed to be implemented and would operate in practice. HIA has raised these concerns in response to the concept papers and the Act while it was being considered by Parliament. In reviewing the Draft Regulation these concerns remain and HIA believes further consultation and consideration is required before proceeding with the amendments.

Most notably, the Draft Regulation will represent significant duplication of process and added complexity to the building approval process for Class 2 (apartment buildings) as it already exists under the *Environmental Planning and Assessment Act 1979* (EP&A Act). This overlap and uncertainty will impact disproportionately on low-rise Class 2 buildings, but will impact all projects captured by the legislation. If the intention of the reforms is to create certainty and clarity about design, approval and inspection processes, the continued failure to address this confusion is not appropriate.

It is also disappointing that the accompanying Regulatory Impact Statement (RIS) presents an incomplete analysis of the potential impacts of the new laws and does not contain a sufficient breakdown of costs or assessment of impact relative to risk. Given the complexity and impact of the new laws this is highly undesirable and a more complete and through analysis should be undertaken and provided for public consultation prior to the reforms proceeding.

HIA's main concerns with the Draft Regulations include:

- The Draft Regulation will result in a fragmented and complex building approval process under two separate pieces of legislation.
- A failure to recognise the diversity of Class 2 building work which demands a more nuanced approach to the application of the requirements.
- A failure to adequately cater for staged construction.
- Unresolved complexity and uncertainty regarding professional indemnity insurance for design and building practitioners, along with building certifiers.
- Inadequate transitional arrangements.
- The application of a code of practice for practitioners covered by the Act.

These matters are elaborated on below and in the two attachments provided.

2. CONCERNS WITH DRAFT REGULATIONS

2.1 FRAGMENTED BUILDING APPROVAL AND DECLARATION RESULTING IN EXCESSIVE COMPLEXITY

The Draft Regulation will create an independent process for submission and declaration of "issued for construction" plans, variations and "as-built" drawings.

This process is completely separate from the existing building approvals process under the EP&A Act, despite their being several inherent points of interaction between the two processes. Integration of these two processes is essential to eliminate potential points of process failure.

HIA's concerns with the fragmentation of the building design and approval process have been set out in previous submissions to the Concept Papers released to date and outline numerous concerns. (Attached: refer to Section 2.1 on page 5 of *HIA Submission DBP Reg 2020 170720 and* answers to Questions 51-59 on pages 7-8 of *HIA Response to Concept Paper 4)*. It is disappointing that these concerns have not been addressed in the Draft Regulations and rather they reinforce the complicated and overlapping processes that will occur under the new laws.

Figure 1 has been generated in an attempt to highlight the additional complexity created by the Draft Regulation and the existing *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (RAB Act) acting in concert around the existing building approvals process under the *EP&A Act*.

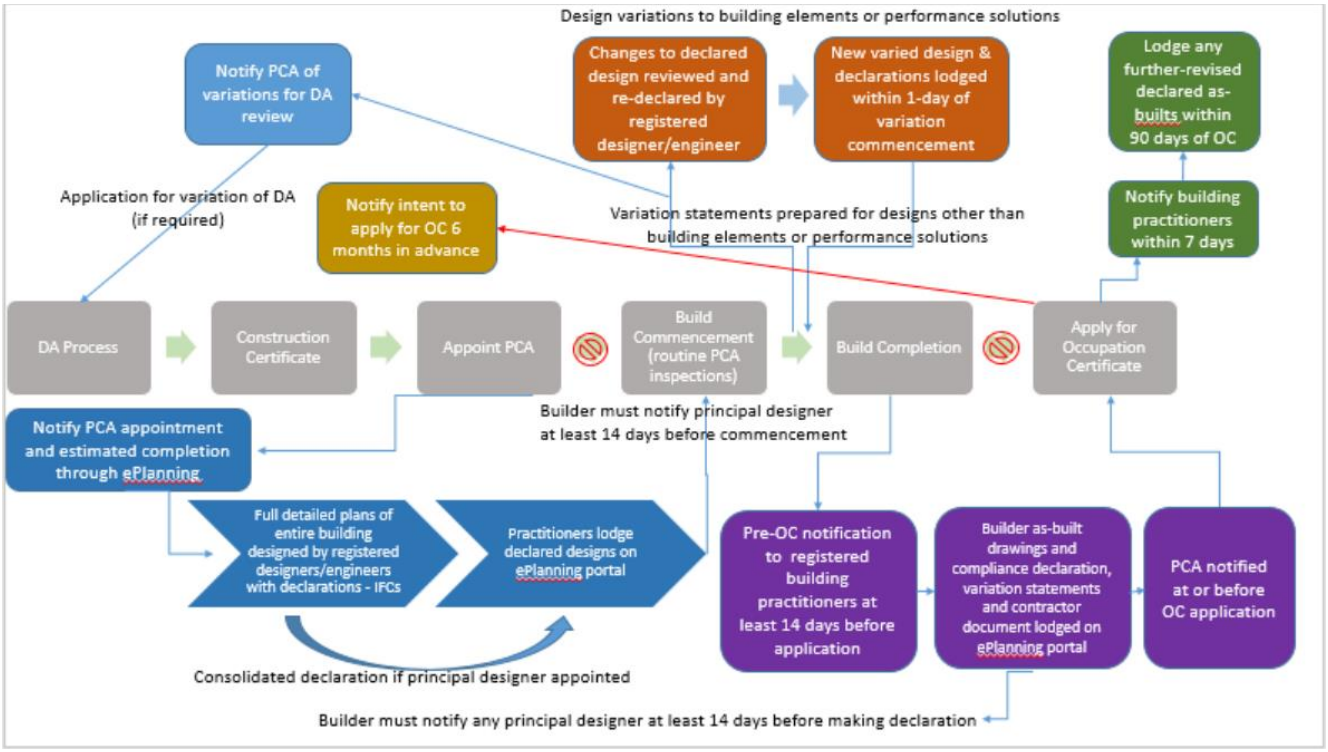

Figure 1: Future NSW Building Approvals and Declaration Process

Without an integrated process the applicant and building practitioners will be required to comply with significant additional administrative burden including several instances of "double-handling" of documentation and submissions. Feedback from members indicates this would require additional administrative headcount for many businesses attributing costs which the RIS has not factored into the analysis.

It was understood that the intention of the Act was to ensure that each person's role in the delivery of a building is clear and that each are held accountable for the role that they play in delivering the building. Based on the overlap of legislative requirements as set out in Figure 1, feedback indicates

that industry is not clear about 'who is responsible for what', and where those responsibilities will precisely begin and end. This is further complicated by the different operating models (design and construct, design only, construct only) that are applied on each project.

There is no logical reason why the three systems cannot be integrated, to ensure that there is at all times a single set of construction drawings which all parties understand to be the approved plans.

2.2 Disproportionate Impact on Low Risk Developments

The duplication of process and resulting complexity will represent significant additional administrative costs that will ultimately be borne by the home buyer. This will add to existing housing affordability issues within NSW, and will make construction of certain types of medium density dwellings less attractive.

Certain Secondary Dwellings (such as where a lower-storey space or basement of a Class 1 house is converted into a granny flat), townhouse developments involving understorey shared carparks or storage areas, and other constructions covered under the Low Rise Housing Diversity Code can be Class 2 buildings depending on their particular design features. Low rise apartment buildings up to 2 storeys require insurance under Home Building Compensation Fund and are not captured within *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development* (SEPP 65).

These are all examples of much-needed medium density housing which will be captured under the Draft Regulation. These developments are disproportionately impacted by the Draft Regulations relative to their respective risk (and cost); and the impact on affordability of these developments runs counter to the desire to encourage development of the so called "missing middle".

The Australian Building Codes Board (ABCB) is considering a "risk-based" approach to the administrative framework for building control as part of the actions arising from the Building Confidence Report recommendations. There is significant scope to draft streamlined processes for these lower risk developments that captures the essence of the reforms without introducing the complexity and uncertainty for all parties.

Any apartment buildings up to 2-storeys (i.e. not captured in SEPP 65), and buildings in-line with the Low Rise Housing Diversity Code should be exempt from the requirements of the Act and Draft Regulations altogether, to avoid any further roadblock to supply or that would adversely affect the affordability of these dwellings.

2.3 Lack of Clear Provision for Staged Construction

It was understood that the regulation would make provision for staged construction work, based on discussions held with the Office of the Building Commissioner (OBC).

However this is not clearly reflected within the Draft Regulation. In fact, page 43 of the RIS contradicts this position, stating that *"designs for all the building works that require a regulated design must be lodged prior to **any** building work commencing".* The RIS goes on to state (p.44) that all parts of the building reliant on an preceding part of construction.

This requirement that all designs be fully completed and lodged prior to commencement represents a lack of practical understanding or insight into the realities of construction. As an example, the final detailing of the active fire safety system within the building would have no impact on the structural foundation design, which should be able to commence without the complete fire system being finalised.

It would be better to require only the designs and declaration for those elements of the building impacting upon or interacting with, and therefore required to complete any stage of the construction,

prior to commencement of that stage. This would work as a staged lodgement process similar to the existing process for staged construction certificates.

The Regulation does not appear to specifically limit this practical approach but as HIA has sought clarity on this previously and the RIS has raised uncertainty on the application of this requirement, HIA would appreciate clarification on how traditionally 'staged' construction works will need to manage processes under the legislation.

2.4 INSURANCE REQUIREMENTS FOR PRACTITIONERS

In earlier feedback, HIA had recommended that a more detailed analysis and further consultation with construction insurance industry experts was needed regarding professional indemnity insurance (PII) for building practitioners. As such, HIA is supportive of the proposed 2 year transition period set out at Clause 82 of the Draft Regulation to continue to investigate this complex area and allow sufficient time for industry adjustment.

HIA remains concerned that the Draft Regulation requires the practitioner to estimate their own exposure to claims and to ensure the adequacy of their cover. Estimation of risk and liability is a complex matter in any one building and construction project, let alone in aggregate over the course of a practitioners career as required under Clause 65 of the Draft Regulation. HIA questions whether it is reasonable to impose such obligation on the building practitioner when it is unlikely such a practitioner possesses the necessary competency to make such estimates.

It is still also unclear if the insurance industry will be able to develop or offer suitable insurance products at a viable price to practitioners, particularly since the Draft Regulation makes no provision for any cap on the insurance required. Therefore HIA is also supportive of Clause 66 the Draft Regulation which provides for an exemption from the insurance requirements for building practitioners where it is demonstrated to be unavailable.

Similar exemption provisions should be made available to design and engineering practitioners. The recent example of "cladding exclusions" applied by insurers to many practitioners PI policies, while practitioners were still required by law to hold insurances to practice lead to a stalling of the industry and is a lesson that should be heeded in drafting any legislative obligation for practitioner insurance. It is clear that inability for any one of the classes of practitioner to obtain the required insurance products would impact the proposed regulatory framework and could stall development activity in the multi-residential property in NSW if not properly managed.

2.5 INADEQUATE TRANSITIONAL PERIOD

The transitional arrangement included within Part 8 Division 2 of the Draft Regulation, to enable practitioners to be "deemed registered" for 6 months from commencement are extremely important to the smooth implementation of the reforms.

However the 6 month timeframe is likely to be insufficient duration compared to the expected number of applications for registration that may be received and the administrative processes that need to be implemented. It would not be fair or equitable for practitioners to be unable to practice because the government authority was unable to process the volume of applications within the transitional period allowed.

An extension of the transitional period to 12 months, or the opening of the registration process earlier in 2021 prior to the enactment of the regulation, potentially with a delay to commencement or staged commencement of the Act and Regulations, warrant careful consideration. This would enable more time for all parties to establish processes and implement the steps necessary to process the expected applications.

2.6 Application of Code of Practice Provisions

The code of practice provisions set out in Schedule 4 of the Draft Regulation appear to adopt many of the requirements contained within the *Building and Development Certifiers Regulation 2020.* It is reasonable for certifiers to be subject to certain obligations due to their nature as public officials and independent regulators.

HIA rejects the assertion that the same risks and obligations apply to the same extent to building practitioners captured by this legislation where they are not public officials and do not act in a regulatory capacity. The risks associated with conflict of interest in particular are not present with respect to the work carried out by building practitioners, and therefore a code of practice of a similar nature to that applied to certifiers in this instance may be an unnecessary overreach and beyond the function and intent of the Act.

3. REGULATORY IMPACT STATEMENT

3.1 General Comments

Under the *Subordinate Legislation Act 1989* the basic role of a Regulatory Impact Statement (RIS) is to assess both the direct and indirect costs and benefits, including economic and social cost and benefits, of the proposed subordinate legislation in light of the objectives of the regulations.

In HIA's view the RIS associated with the Draft Regulations fails to fulfil this function.

Moreover, our preliminary estimates indicate the additional administrative work required by the Draft Regulation could represent an additional 5 per cent or more to the cost of construction, which would ultimately be reflected in the costs to be borne by a prospective home owner.

This will have a detrimental impact on housing affordability, and will capture some forms of low-rise and medium density construction intended to provide affordable housing options. Affordability of housing is a major issue which should be considered carefully in any new regulations applied to the supply of housing.

These reforms warrant a fulsome regulatory impact assessment.

Further, the RIS presents as a discussion paper and contains no economic modelling and does not present a thorough impact assessment of the proposed regulation on industry or the cost of housing. Whilst consultation is welcome, transparency as to those matters of consultation is paramount. A RIS should present as such and if feedback is invited on specific aspects of the regulations the appropriate way to do this is through a discussion paper separate and distinct from a formal RIS.

HIA is concerned that without this work being undertaken, the regulatory reforms will have a detrimental impact on housing affordability in NSW.

3.2 Scope of Reforms

1. Do you think the reforms should be expanded to other types of buildings over time? Why/Why not? If so, which types of buildings do you think should be next?

Further consideration for expansion of the reforms should be avoided until the initial reforms have been operating for sufficient time for their effectiveness and impact to be adequately assessed and any shortcomings addressed.

2. Do you agree that the reforms should only apply to existing arrangements where the Complying Development Certificate or Construction Certificate has been applied for on or after 1 July 2021? Why/Why not?

The Draft Regulations should apply only to building contracts entered into on or after 1 July 2021.

3.3 Regulated Design

3. Are the proposed exclusions from 'building work' appropriate? Why/Why not?

Yes. Exempt development is low-risk work and should not be subject to the regulation.

4. Are there other works that should be exempted? Please provide the basis for the exemption and when the exemption should be effective (for example, a description of the works or threshold of the value including the reason for that value).

The proposed exclusions do not go far enough. The Draft Regulations apply a "blanket" obligation across all Class 2 buildings, despite these buildings representing a range of construction types and therefore risk.

As outlined in item 2.2 of this submission, Class 2 buildings with a rise-in-storey of less than 3 should be exempt from the Draft Regulation (in-line with SEPP 65 and the Low Rise Housing Diversity Code). These are relatively simple buildings, and the scale and extent of risk is substantially reduced compared to larger/more complex developments.

3.4 Registration of Compliance Declaration Practitioners

7. Do you support the proposed qualification, skills, knowledge and experience requirements for each class of practitioner? Why or why not? Please make suggestions for additional or alternative requirements.

"Façade engineering" is not a single-disciplinary field, but incorporates elements of civil, structural & fire engineering, as well as thermal, hygrothermal and acoustic sciences (building science). A wider range of practitioners than just civil or structural engineers should be able to practice as "façade" design practitioners, as long as they have sufficient experience and can demonstrate reliance on an appropriate multi-disciplinary mix of experts in forming the design.

Geotechnical engineering often works hand in hand with the structural and drainage engineering, providing data and input into their designs. HIA is not convinced this should be a design registration in its own right, but is reasonable to stay as an engineering registration.

9. Do you agree that practitioners should be required to have 5 years of recent and relevant practical experience?

Practitioners working on lower risk buildings (low and medium rise) should have a lower threshold of experience e.g. 3 years; then may commence working on higher risk buildings (i.e. taller and more complex) after an additional 2 years of experience (i.e. 5 years total). In any profession the creation of career paths is critical. Experience requirements inherently create the risk that a person cannot get a start in the industry as they are 'qualified' but not 'experienced' in the actual thing they are seeking to do. A cautious and practical approach to experience requirements is warranted for each practitioner category to avoid such an outcome.

10. Some classes of practitioner have been proposed with authority to work on low and medium rise buildings? Do you support this approach?

Yes, this approach is reasonable and should be extended to other aspects of the regulation as noted elsewhere in this submission.

3.5 Registration of Professional Engineers

12. Do you support a co-regulatory approach for the registration of engineers?

NSW has previously applied a co-regulatory approach for engineers under the original 1998 amendments to the EP&A Act. This model failed all stakeholders and was disbanded in 2005 with the creation of the Building Professionals Act.

While the professional bodies for engineering have a strong record in managing 'membership' matters, the interplay with regulatory oversight is a complex matter. There is in fact the potential that professional bodies may not take up such a pathway, therefore leaving the regulations ineffectual.

Pathways allowing industry-lead self-regulation are fraught with risk due to inherent conflict of interest between retaining members (and thus income) and enforcing rules on members. Should an organisation choose to take on the role of a professional gatekeeper association and perform a regulatory role, there may be merit in ensuring that they adopt a model such as the Professional Standards model, to create clarity of the role being performed.

In contrast, industry associations that exist to support members with advice, education, and advocacy and other benefits, should not be seen as organisations that suit the role of co-regulator.

3.6 Compliance Declaration Scheme: Practitioner Requirements

19. Do you support the proposal that all construction issued regulated designs must be lodged before any building work can commence? Why or why not?

No. As outlined in 2.3 of this document there must be provision for staged lodgement of design documentation similar to the current process of staged construction certificates. Only those designs required for a given stage should be required prior to commencement of that stage.

Some design work is inherently iterative as information is gathered during the process e.g. excavation, piling and pile-testing. While a certain minimum level of design is required prior to this work to establish the expected total structural load on the foundations, the entire foundation design itself cannot be completed prior to excavation, piling, and pile-testing.

The design and construction submission requirements should be structured as to allow staged lodgement to occur – this is not clearly accounted for in the regulation, and the RIS implies the expectation that the entire building must be completely designed before any works can commence.

20. Do you support the Building Practitioner being primarily responsible for lodging regulated designs on the NSW Planning Portal? Why or why not? If not, who do you think should be responsible at the different lodgement points? Please explain your answer.

No, the operation of the portal should be such that the design practitioners can lodge as they complete their designs and declarations. There should be a mechanism within the portal to provide notification of events relating to a project to the registered practitioners for that project, such as notifying the building practitioner as design declarations are lodged. Building practitioners can then lodge their declarations with the as-built drawings progressively as work is completed, which should automatically notify the design practitioners registered against the project.

This will reduce administrative burden on all practitioners and reduce double-handling.

21. Do you support the matters covered in the Design Compliance Declaration? Why or why not?

There are concerns from our members regarding the level of detail expected within a declared design (e.g. would it be necessary to specify specific brands and products within registered designs, and how would this relate to 3rd line forcing?). This needs clarification.

25. Do you support the proposal that varied regulated designs be lodged within 1 day of the building work being commenced? Why or why not?

If the portal were to operate as proposed in our response to Q20 above, the designer would be responsible for lodging the varied regulated design before work could commence; the building practitioner could then receive notification and access the declared design through the portal and commence work immediately upon receipt of notice.

26. Do you support the proposal that the Building Compliance Declaration, regulated designs and variation statements be lodged prior to the application for the Occupation Certificate? Why or why not?

This seems to be a logical point for lodgement, although we are concerned with the communication obligations placed on practitioners within the regulations (which should be left as business arrangements and solely the domain of negotiation between the practitioners). There should be a block on applicants submitting an application until the ePlanning portal flags that all required submissions have been completed, eliminating risk of incompletion.

27. Are there further matters that should be included in the Building Compliance Declaration? If so, what are they?

As stated in previous submissions, we believe the building compliance declaration should be modelled on QLD's Form 16.

Seeking a declaration or sign off by a person that has constructed a building element and stating that the work meets a range of outcomes is much more challenging than design plans and details. The list of potential declarations is extensive and in some respects potentially impossible for any individual to declare with certainty and with surety from the perspective of the insurer.

Further work is required to determine the form and obligations that will be included in the building compliance declarations, to ensure that these documents can in fact be provided by the parties that are expected to deliver them, & recognizing the complex supply chains that exist in these types of buildings.

These comments are not raised to suggest that no declaration can be made, but to ensure that the declaration sought is appropriate, practical and most importantly insurable, in respect to completed building work.

3.7 INSURANCE

29. Do you support the approach proposed for insurance requirements for Design Practitioners and Professional Engineers? Why or why not?

It is unclear if suitable insurance will be available not only for builders but for the other registered practitioners and how the industry will function if suitable insurance products are not offered to the market.

It is unreasonable to expect that practitioners will have the knowledge or capability to accurately estimate their liability exposure. It is also unreasonable to expect the insurance industry to offer or support uncapped liability.

30. Do you consider additional insurance requirements should be prescribed for Design Practitioners and Professional Engineers? If so, what?

No.

31. Do you support the proposed transitional arrangements that exempt Building Practitioners from being insured for issuing Building Compliance Declarations? Why or why not?

The transitional period of 24 months seems reasonable, but should also be applied to the transitional arrangements for practitioner registration, as the 6 months allowed will be insufficient compared to the estimated volume of registrations expected within the period immediately after the regulations are enacted.

Registration should be open earlier than July, to allow more time for registrations to occur in advance of July 1 and for those registrations to be processed.

3.8 Continuing Professional Development (CPD)

32. Do you support the proposed CPD requirements for Design and Building Practitioners? Why or why not?

HIA supports continuing improvement and professional development to achieve acceptable standards of building quality delivered by a competent and skilled workforce, however HIA remains uncomfortable with the proposition that Builders (who are also Building Practitioners for the purposes of the Act) will be subject to 2 separate and distinct systems of continuing professional development.

Whilst the RIS states that *"it is likely that meeting the CPD obligations under the Regulations will so count towards other CPD obligations"* this would appear to be far from settled and must be resolved prior to the commencement of the Draft Regulations.

Industry participants must have clarity regarding their obligations and responsibilities in order to ensure compliance.

In terms of the detail of the proposed CPD scheme, it would appear that a more common sense approach has been adopted. While the requirement to complete at least three hours of CPD appears reasonable, as does the commentary regarding the need for such education and training to be relevant to the practitioners class of registration and area of practice, the fact that these hours must be earned by undertaking approved courses is unnecessarily restrictive. HIA strongly recommends that this be revised to ensure a diverse offering can be provided to meet the needs of the variety of practitioners covered by the proposed scheme.

33. What types of training, education or topic areas would be relevant for the functions carried out by Design and Building Practitioners?

Relevant topics or areas could include: Operation of and obligations under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and *Design and Building Practitioners Act 2020* and associated regulations; Types and documentation of evidence of suitability under the NCC; Required content of forms of evidence, and how to read and interpret evidence against the NCC; Classification of buildings and types of construction; General operation of the NCC.

4. CONTINUING PROFESSIONAL DEVELOPMENT GUIDELINES

4.1 CPD Guideline for prescribed practitioners

1. Do you consider that requiring practitioners to undertake three hours of CPD activity is appropriate? Why or why not?

See Item 3.8, question 32 above.

2. Do you support that CPD activities must be from the approved platforms? If not, please explain why.

The CPD activities should be opened up to a broader range of delivery options. People have different learning styles, and some would benefit from (for example) face-to-face learning. The content of the CPD is more important than the delivery platform. A review of the CPD delivery options is required to ensure a diverse range of delivery options (together with a diverse range of content) is developed to meet the needs of the variety of practitioners captured under the proposed scheme, and should have consideration for both online and face-to-face options.

5. ATTACHMENTS

5.1 HIA SUBMISSION DBP REG 2020 170720