

AUSTRALIAN HUMAN RIGHTS COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (Cth), Section 55

DISABILITY STANDARDS FOR ACCESSIBLE PUBLIC TRANSPORT 2002 (Cth), Section 33A.1

NOTICE OF DECISION ON APPLICATION FOR TEMPORARY EXEMPTION: TRANSPORT FOR NSW

The Australian Human Rights Commission gives notice of its decision regarding an application made by Transport for NSW (TfNSW) for a temporary exemption pursuant to s 55 of the *Disability Discrimination Act 1992* (Cth) (DDA) and s 33A.1 of the *Disability Standards for Accessible Public Transport 2002* (Cth) (Transport Standards).

1 THE APPLICATION

- 1.1 TfNSW is an agency of the New South Wales Government and describes itself as 'the lead agency of the NSW Transport cluster'. The role of TfNSW is to 'lead the development of a safe, efficient, integrated transport system'. Relevantly, for the purposes of the Transport Standards, TfNSW is a 'provider' which is defined as 'a person or organisation that is responsible for the supply or maintenance of public transport infrastructure'.
- 1.2 TfNSW seeks a temporary exemption from compliance with the Transport Standards in relation to infrastructure at Birchgrove Ferry Wharf (Birchgrove Wharf). In particular, it seeks a temporary exemption from compliance with ss 2.1 and 2.2 of the Transport Standards in relation to 'the access path connecting the landside from Louisa Road entrance to the Birchgrove Wharf landside shelter'.

- 1.3 The relevant standards provide as follows:

2.1 Unhindered passage

- (1) An access path that allows unhindered passage must be provided along a walkway, ramp or landing.
- (2) An access path must comply with **AS1428.2 (1992) Clause 8.1**.

2.2 Continuous accessibility

An access path must comply with **AS1428.2 (1992) Clause 7**, *Continuous accessible path of travel*.

- 1.4 Clause 7 of AS1428.2 (1992) relevantly provides that:

- (a) Accessible paths of travel within the boundary of the site shall be provided from transportation stops, accessible parking and accessible passenger loading zones, and public streets or walkways to the accessible building entrance they serve.
- (b) Accessible paths of travel shall connect accessible buildings, facilities and spaces that are on the same site.

- 1.5 Infrastructure that is brought into use after the commencement of the Transport Standards must comply with the standards. This is an application for an exemption in relation to existing infrastructure (rather than new infrastructure). Schedule 1 of the Transport Standards sets out degrees of compliance with various standards that must be achieved by particular dates. In the case of access paths, the Transport Standards relevantly require 90% compliance by 31 December 2017 and full compliance by 31 December 2022.
- 1.6 The access path from Louisa Road to Birchgrove Wharf runs through land owned by Inner West Council (IWC). TfNSW says that IWC does not support the upgrade of the current pathway to an accessible path with the inclusion of a lift or long ramped sections due to the perceived visual impact on Yurulbin Park and the local vicinity. TfNSW seeks an exemption for a period of five years for a number of reasons including 'to allow for further negotiation between TfNSW and the IWC in addition to exploring options that may be available to provide equitable access that do not have the same visual impact as a lift structure and long ramped sections'.

2 DECISION OF THE COMMISSION

2.1 The Commission has decided that it will:

- (a) Grant an initial exemption for 6 months without conditions, which may be extended by the Commission for a further period of up to 3 months, to allow TfNSW and IWC to continue to negotiate in relation to an appropriate solution that improves access to Birchgrove Wharf for people with disabilities.
- (b) Grant a conditional exemption for a further 24 months, to allow the implementation of an agreed solution, on the conditions that:
 - i. TfNSW confirms in writing to the Commission during the initial negotiation period that agreement has been reached with IWC about how to improve access to Birchgrove Wharf for people with disabilities and describes the nature of the agreed solution; and
 - ii. the agreed solution would provide access in a way that is compliant with the DDA and the Transport Standards.

2.2 For the avoidance of doubt, if agreement on an accessible solution is not reached within the initial negotiation period described in paragraph (a), then the further exemption period will not apply; and if the agreed solution is not compliant with the Transport Standards then the further exemption period will not apply. In those circumstances, people with disability would retain their right to make a complaint, and TfNSW would retain the right to rely on equivalent access or unjustifiable hardship provisions if applicable.

2.3 While any upgrade to Birchgrove Wharf is being considered and planned, the Commission encourages TfNSW and IWC to consider alternative ways in which they can assist people with disability to connect between ferry services and places in Birchgrove that are ordinarily served by Birchgrove Wharf. This may include assisting residents with disabilities that affect their mobility to connect with alternative ferry services at Balmain and Balmain East. The Commission encourages TfNSW and IWC to consider the publication by the Commonwealth

Department of Infrastructure and Regional Development titled *The Whole Journey: A guide for thinking beyond compliance to create accessible public transport journeys*, particularly sections 3.2 on 'Journey start and end' and 3.7 on 'Disruption to business as usual'.

3 CONSIDERATION AND REASONS

3.1 In reaching its decision, the Commission considered the following:

3.1.1 the application and submissions by TfNSW

3.1.2 all information provided by TfNSW in response to the Commission's request for further information

3.1.3 a submission from the Accessible Public Transport Jurisdictional Committee (APTJC)

3.1.4 submissions from other interested parties

3.1.5 publicly available material in relation to the upgrade of Sydney's ferry wharves

3.1.6 the response by TfNSW to the Commission's preliminary view.

3.2 Documents described in paragraphs 3.1.1 to 3.1.4 and 3.1.6 are available on the Commission's website at: www.humanrights.gov.au/disability_rights/exemptions. Publicly available information relied on by the Commission is referred to in endnotes to this decision.

3.3 In reaching its decision, the Commission had regard to the following:

3.3.1 the terms and objects of the DDA

3.3.2 the Transport Standards

3.3.3 the *Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3)*

3.3.4 the *Commission Guidelines: Temporary Exemptions under the Disability Discrimination Act (2010)*.

3.4 The history of the application and the reasons for the Commission's decision are set out below.

4 MEANING OF IMPORTANT TERMS

4.1 Unless the contrary intention appears, any term used in this decision and in the Transport Standards has the same meaning in this decision as it has in the Transport Standards.

4.2 Unless the contrary intention appears, any term used in this decision and in the DDA has the same meaning in this decision as it has in the DDA.

5 BACKGROUND

- 5.1 On 3 November 2017, TfNSW made an application for a temporary exemption under s 55 of the DDA and s 33A.1 of the Transport Standards in relation to Birchgrove Wharf.
- 5.2 Birchgrove Wharf is situated at the end of Louisa Road. There is a level change of approximately 7 metres from the road to the wharf with a steep gradient. At present, there is a path from Louisa Road to the wharf that incorporates stairs. The stairs run alongside Yurulbin Park. TfNSW says that the stairs are not currently compliant with the DDA.
- 5.3 Birchgrove Wharf is part of the F8 ferry route between Cockatoo Island and Circular Quay.¹ This route operates 23 times a day Monday to Friday in each direction, 17 to 18 times a day on Saturday in each direction, and 12 to 13 times a day on Sunday and on public holidays in each direction.² Compared to other wharves, the patronage at Birchgrove Wharf is low. TfNSW says that Opal patronage for Birchgrove Wharf in FY16/17 was approximately 65 customers per day. Of the 32 wharves in the Sydney Ferries Network, it is one of 10 that are listed as not being wheelchair accessible.³
- 5.4 The closest public transport to Birchgrove Wharf is the route 441 bus which runs to the end of Grove Street. The nearest bus stop is approximately 1km from the ferry. The closest ferry wharf to Birchgrove is Balmain, also on the F8 route between Cockatoo Island and Circular Quay, which is approximately 1.8km away by road. Balmain Wharf has dedicated accessible car parking facilities but does not connect directly to buses either. The closest ferry wharf to Birchgrove that connects directly into a bus service is Balmain East, which is approximately 3.2km away by road. Balmain East connects with bus routes 442, 444 and 445.
- 5.5 TfNSW notes that it is progressively upgrading ferry wharves across Sydney to improve accessibility for customers. It says that new wharves are being delivered by Roads and Maritime Services (RMS) as part of the NSW Government's Transport Access Program (TAP) which involves an investment of \$890 million over four years until 2018/19. TfNSW says that, among other things, the TAP aims to provide wharves that are accessible to people with disabilities, ageing and parents with prams.
- 5.6 In May 2013, the New South Wales Government produced a document titled *Sydney's Ferry Future: Modernising Sydney's Ferries*. The document noted that:
- As part of the NSW Government's Transport Access Program, upgrades are underway at a number of wharves to make them secure, modern and accessible.
- Many wharves are located in spectacular locations with challenging topography. The Government will collaborate with local governments to identify opportunities to improve pedestrian access. ...
- Planning and design work has identified future projects, taking into account current and future patronage, the needs and demographics of customers, whether important services such as hospitals or educational facilities are nearby, and the accessibility of other nearby transport interchanges and facilities.⁴

- 5.7 At the time of the May 2013 document, the Government was considering whether to construct wharves in new locations. This included consideration of a new location for Birchgrove Wharf. The document said:

Transport for NSW has considered more than 30 new potential locations to be served by Sydney Ferries. Wharves exist at some of these but in some cases would need to be upgraded if to be used as commuter wharves. New wharves would need to be constructed at others. Locations were assessed based on:

- current and future demand with a focus on population, employment and attractions within the walking catchment of the wharf
- directness of the ferry route relative to the road alternative
- the costs of new infrastructure
- the frequency, cost, travel time and catchment of other modes compared to ferries.

Based on this assessment, locations recommended for further analysis are:

- Rhodes
- Glebe Point
- Johnstons Bay
- Woolloomooloo
- Elizabeth Bay.

A potential new location for Birchgrove Wharf will also be investigated.⁵

- 5.8 It appeared from the diagram on page 11 of the May 2013 document that consideration was being given to moving Birchgrove Wharf to the end of Grove Street in Birchgrove. As noted above, that location would have connected with bus route 441.

- 5.9 The responsible Commonwealth Minister is required to carry out a review of the Transport Standards every 5 years to consider their efficiency and effectiveness. The review must include whether discrimination has been removed as far as possible according to the requirements for compliance set out in Schedule 1 of the Transport Standards, and any necessary amendments to the Standards.⁶

- 5.10 On 9 December 2013, TfNSW made a submission in relation to the review of the Transport Standards for the 5 years to 31 December 2012. Relevantly, by 31 December 2012, providers of public transport infrastructure were required to be 55% compliant (by each type of public transport service) with the Transport Standards in relation to access paths (except at bus stops and premises to which the Premises Standards applied).⁷ The submission described issues that TfNSW had identified in achieving compliance with the Transport Standards in relation to the ferry network. It said:

Ownership of many of the commuter wharves (22 out of 46) was transferred to the NSW Government in 2007 when a number of local government authorities conceded that they were unable to maintain and improve their wharf infrastructure. As a result there is a significant backlog in wharf infrastructure development that Transport for NSW is required to address. To address the backlog, upgrades of ferry wharves are now incorporated in the \$770 million Transport Access Program and new works are prioritised as funding becomes available.

As at June 2013, 43 per cent of wharves provide accessibility from the wharf to the vessel. While Transport for NSW is working to provide entry platforms, gangways and pontoons that are accessible by people with disability, access to wharves continues to be restricted by the steep topography of the landside connections. In many locations around Sydney harbour, access from the street to the wharf remains non-compliant and the cost of doing so is prohibitively high. Transport for NSW is not the owner of these assets.⁸

- 5.11 As part of the TAP, TfNSW undertook consultation with councils, the local community and disability groups in relation to Birchgrove Wharf.
- 5.12 The first consultation that TfNSW identified to the Commission was with Leichhardt Council (prior to its amalgamation into IWC) on 24 April 2015. During this meeting, representatives of the RMS Wharf Upgrade team noted that Birchgrove Wharf needed to be upgraded to meet DDA requirements and that landside elements including pedestrian access from the wharf to the surrounding park would form part of this review. The RMS representatives noted that full compliance in relation to the landside elements would be hard to achieve in view of the geographical constraints of the area and that a concept design had not yet been developed.
- 5.13 According to minutes prepared by RMS, Leichhardt Council said that they would not support a reduction in ferry services and would prefer to see a supplementary ferry wharf in addition to Birchgrove Wharf. Council said that some residents supported relocation of the wharf to an area such as Grove Street which has good connectivity to public transport. Council identified a range of other issues that may impact on an upgrade of Birchgrove Wharf including: Yurulbin Park adjacent to the wharf is listed on the Council's heritage register and Council was planning an overhaul of the park, and Council would be concerned about the potential for obstruction of views by any upgrade of the wharf.
- 5.14 18 people attended a community information session run by TfNSW at St John's Church Hall on 7 May 2015 and signed a register saying that they wanted to be kept informed of the project. Most were nearby residents of Louisa Road. Some were residents of surrounding streets including Grove Street. Attendees were largely occasional users of the ferry rather than daily commuters. Notes of the feedback session say that 'preservation of heritage, the existing view, local ambiance and need to maintain a Birchgrove ferry service were major concerns'.
- 5.15 Initial concept design drawings for a new accessible pathway from Louisa Road to the wharf incorporating a lift were prepared, apparently on 18 November 2015. The Commission is not aware of the content of any discussions that took place between TfNSW and the Council about this project during 2016. In particular, it is not clear when the proposal of a lift or a ramp was first put to the Council. In May 2016, IWC was formed out of an amalgamation of the former Ashfield, Leichhardt and Marrickville Councils.
- 5.16 On 8 March 2017, TfNSW met with IWC to discuss the proposed concept design for the upgrade. A copy of concept drawings were provided to IWC in advance of the meeting. The meeting minutes record a representative from RMS noting that:

... previously the project had looked at different ways to create an accessible access path from Louisa Road to the wharf, with a lift, inclinor and accessible path through Council-owned Yurulbin Park considered due to change in levels. None of these options have been included within the current scope of works due to the

existing constraints involved, and impact of these proposed works on the existing park land.

- 5.17 During the meeting, the Manager of Parks and Assets, Leichhardt at IWC 'confirmed that Council would not support a lift installation in this area, and queried whether an inclinometer would provide an effective solution'. The RMS officer 'confirmed previous investigation had shown an inclinometer would require greater land take than a lift, with adverse visual impact. The reliability of an inclinometer was also not seen as sufficient for an unmanned wharf.'
- 5.18 On 15 March 2017, TfNSW held a community feedback session to discuss the proposed design of the new wharf. The design did not include any change to the existing access path. TfNSW notes of the meeting record five comments made about accessibility. More comments were recorded about accessibility than about any other issue. All of these comments were directed at improving the accessibility of the wharf. The comments, as recorded by TfNSW were as follows:
- Acknowledge it would be difficult to meet DDA requirements however would like to see the access 'improved'
 - Condition of existing stairs – uneven heights and in poor condition, railings difficult to use, poor lighting
 - Would like an option to access the wharf without using stairs but not to DDA standards eg. Pathway through the reserve and bridge linking from the reserve to the start of the gangway
 - Requested RMS follow up with Council on previous community feedback asking for the provision of ramp/pathway from Louisa Road to Birchgrove Oval and the foreshore to connect to the existing bus service on Grove Street
 - Why provide a new wharf if it is very difficult to access both for able bodied customers and mobility impaired.
- 5.19 On 29 March 2017, TfNSW met with an Accessible Transport Advisory Committee (ATAC) in relation to a number of accessibility challenges faced by TfNSW as part of the TAP. The ATAC comprises representatives of peak disability organisations in New South Wales.⁹ It is not clear which organisations were represented at this meeting.
- 5.20 During the meeting, TfNSW referred to other projects in the TAP that had recently been completed. For example, over a period of 10 months from September 2015 to June 2016, TfNSW had upgraded Huntley's Point Wharf. This project involved the provision of a new lift, an accessible pathway, canopies, accessible parking and landscaping work including a retaining wall at a cost of \$30m. The kind of infrastructure built at Huntley's Point Wharf appeared to be similar to that proposed for Birchgrove Wharf. A representative of TfNSW noted that Huntley's Point was 'justified over other wharves' because it was connected to bus routes, an aged care facility and other points of interest. By contrast, there was limited usage of Birchgrove Wharf and there were no landside transport connections such as bus routes, a formal 'kiss and ride' zone or a taxi zone. The topography of the site at Birchgrove was steep and there was not a DDA compliant path of access to the wharf. It would require a lift or ramp system to achieve compliance with the DDA. The powerpoint presentation noted that Birchgrove wharf was in close proximity to

'high value residential housing' and that the proposed measures to achieve compliance would have a 'visual impact'.

- 5.21 Concerns were also expressed during the meeting by TfNSW about the difficulties posed by potential upgrades to wharves at Darling Point, Kirribilli Wharf, Kurraba Point and Cremorne. The notes of the meeting record the TAP Program Director reporting:

Desire to get exemptions – TAP feel that money can be better spent on other locations that are more frequently used or could provide better outcomes.

- 5.22 This suggests that, at that stage, it was envisaged that an exemption from compliance with the DDA and the Transport Standards could be sought in order to avoid having to upgrade Birchgrove Wharf. At the same time, it appears that it was envisaged that 'TAP exemptions could be changed' in the future, for example, if there were 'innovations'.

- 5.23 On 13 April 2017, the Manager of Parks and Assets, Leichhardt at IWC wrote a 'formal submission' to RMS expressing support for the provision of an accessible pontoon wharf and asking that an upgrade of the stairway at Birchgrove Wharf also be included in the project scope. More generally, he raised concerns about the absence of an accessibility solution that was compliant with the DDA, saying:

Failure to provide an accessible approach creates a credibility gap that undermines any of the authorities involved. If only half the required outcome is a priority and the rest is to be decided sometime in the years ahead, then that does nothing to improve the system for people excluded from it and is unlikely to achieve the 2022 target (100%) of the Disability Standards for Accessible Public Transport (DSAPT).

It is acknowledged that there is no land transport interchange at the site and the wharf has low usage rates. If there is reason to keep the wharf operating and it is a priority project for funding, then it needs to address everyone's needs and not just those it has to date. ...

Council has suggested that a modern inclinor may provide an appropriate accessibility solution.

- 5.24 On 27 June 2017, TfNSW met again with IWC. The purposes of the meeting were:

- To discuss Council's formal submission to the Birchgrove Wharf Upgrade
- To discuss proposed DSAPT compliance constraints and potential exemption
- To discuss potential landside improvements (stairs).

- 5.25 The TfNSW powerpoint presentation noted that:

Accessibility is difficult due to the natural topography and steep gradient of the land to access the wharf

RMS investigated options to achieve accessibility during the concept design phase for installing a lift and modifying the pathway through Yurulbin Park. Both options were not supported by Council.

- 5.26 There was a discussion about the potential installation of an inclinor. According to minutes of the meeting taken by TfNSW, TfNSW said that it undertook initial

research into the potential use of an inclinator but that this option was rejected due to: the operational and maintenance costs of having this infrastructure in a very isolated location, the reliability of an inclinator in a marine environment, and the need to have an 'operator' present. The powerpoint presentation also raised concerns about the risk of vandalism, the cost to manufacture, the lack of experience of RMS in installing an inclinator on public land, and the reliability of an inclinator. Potential advantages of an inclinator were that it may be DDA compliant and may have less visual impact due to following a similar profile of the vertical terrain. IWC suggested that there may be other inclinator technology available worldwide and that this should be investigated further.

- 5.27 The powerpoint noted that RMS was investigating accessibility improvements (that would not comply with the Transport Standards, but that would provide better accessibility than the current staircase) including providing a lightweight, BCA compliant suspended stair solution.
- 5.28 TfNSW proposed that IWC meet with relevant reference groups to discuss seeking an exemption from compliance with the DDA and the Transport Standards. The powerpoint presentation identified two justifications for an exemption:
- Proximity of accessible Balmain Wharf at Thames Street
 - No land transport interchange and low patronage.
- 5.29 TfNSW said that if an exemption were to be sought, it would be necessary to obtain 'localised engagement from residents with a disability'. IWC identified two reference groups that would be suitable for consultation: a transport reference group and a social inclusion reference group. However, the minutes record that IWC was 'reluctant to meet with the groups for the purpose of an exemption as it may be perceived as being politically difficult given that this first meeting is proposed for an exemption after the DIAP [Disability Inclusion Access Plan]'.
- 5.30 On 26 July 2017, the Project Manager of the Ferry Wharf Upgrade Program at RMS wrote to IWC. It appears from this letter that TfNSW had formed the view that the 'Birchgrove Wharf Interchange' involved only the wharf structure itself and did not include the access path up to Louisa Road. Accordingly, TfNSW appeared to suggest that it was only required to ensure accessibility on and off the ferry and did not have any responsibility to ensure that there was accessibility between the wharf and the nearest public road located seven metres above it. It appears that TfNSW was suggesting that the responsibility for ensuring that the access path was accessible rested with IWC. The letter relevantly provided:

During design development the existing and future needs of Birchgrove Wharf and its surrounding area were considered, with extents of the existing transport interchange clarified. For Birchgrove Wharf, which is accessed by pedestrians walking along Louisa Road, there are no other forms of transport considered within the wharf 'interchange', and the extent of the interchange can therefore be confirmed as the wharf structure itself.

As the primary access route to Birchgrove Wharf is via either Louisa Road or Yurulbin Park, RMS previously approached IWC with options to provide a DDA compliant pathway to the wharf interchange, consisting of a ramp, leading from Louisa Road to a lift, and a series of switchback ramps within Yurulbin Park. IWC objected to these options, stating 'an inclinator can achieve the same outcome by

following the landform by the stair, and hence without the visual and physical scale impacts on the site’.

IWC note the existing structure fails ‘to provide an accessible approach’, however accessibility will be provided throughout the Birchgrove Wharf Interchange. External to the Birchgrove Interchange, pedestrian access to the wharf [is] via paths along Louisa Road, and Yurulbin Park which are both owned and maintained by IWC. RMS note that these existing paths do not comply with DDA regulations.

RMS note IWC’s preference to provide a solution incorporating an inclinor, however an inclinor is not currently recognised within DSAPT, and RMS have been unable to source a provider who can produce a solution which complies with AS1735.12-1999. TfNSW are therefore proposing to apply for a DSAPT exemption for the landside components which will not comply. The application, if endorsed, will provide an exemption for a five (5) year period, during which time further investigation can take place and RMS can work closely with IWC to implement an accessible landside solution within the five year period.

5.31 In August 2017, RMS accepted a report of a Review of Environmental Factors (REF) in relation to the Birchgrove Wharf Upgrade.¹⁰ The report considered a proposal by RMS to upgrade the existing ferry wharf at Birchgrove. The need for the proposal was identified in response to TfNSW’s TAP. The report noted that an assessment of Birchgrove Wharf in 2009 identified the wharf as being in poor condition and potentially unsafe and as having limited access for less mobile passengers. Four options were considered to either upgrade the existing wharf or relocate it elsewhere in Birchgrove. The preferred option was to upgrade the existing wharf, and retain components of the existing infrastructure including the historic timber shelter. This option originally proposed upgrading an area of Council owned land between Louisa Road and Birchgrove Wharf, to provide an accessible landside route to the wharf.

5.32 Section 2.6 of the REF noted that:

Due to the constraints and issues faced with providing a DDA compliant access path from Louisa Road to Birchgrove Wharf, the preferred option was refined to remove any aspects of landside access upgrade from the scope, with the exception of new wayfinding signage.

Access to the wharf is therefore considered outside the scope of this document, with discussions ongoing between Inner West Council, as landowner, and Transport for New South Wales, as transport authority, to confirm whether improvements to this access will be completed in the future.

5.33 The REF was placed on public display for 21 days between 21 August 2016 and 11 September 2017. RMS received seven submissions by email on the REF and in September 2017 it published a submissions report.¹¹ The submissions report identified four main issues. Two of these issues related to accessibility, namely:

- The need for the proposal is based on the objectives of the Transport Access Program (TAP). One of the main objectives of the TAP is to make infrastructure more accessible for disabled or low-mobility passengers and parents. If accessibility on the landside is not currently in the scope, the submission recommends diverting funds to other wharves.
- The design of the proposal which does not address access from Louisa Road to Birchgrove Wharf.

6 THE COMMISSION'S PROCESS

- 6.1 On 3 November 2017, TfNSW made an application to the Commission, seeking an exemption from the DDA and the Transport Standards.
- 6.2 On 20 November 2017, the Commission wrote to TfNSW and requested further information and documents. TfNSW provided further information and documents to the Commission on 14 December 2017.
- 6.3 On 8 January 2018, the Commission called for submissions about the application's merits and commenced a six-week public consultation period. The Commission did this by:
- publishing the application and the further information and documents on its website, and calling for public submissions
 - writing to State and Territory anti-discrimination bodies, inviting them to make submissions
 - writing to a number of peak bodies representing people with disability, inviting them to make submissions, and
 - writing to APTJC inviting its members to make submissions.
- 6.4 In this way, the Commission satisfied its obligation to consult with APTJC, pursuant to s 33A.1(4)(a) of the Transport Standards.
- 6.5 The Commission received a number of submissions during its public consultation. A list of these submissions is contained in Schedule 2 to this decision. On 12 March 2018, the public submissions were made available on the Commission's website.
- 6.6 On 21 March 2018, the Commission issued a preliminary view to the parties. It also provided a copy of the preliminary view to the people and organisations that had made a submission in relation to the application, and it published the preliminary view on the Commission's website. The Commission called for responses in relation to the preliminary view.
- 6.7 TfNSW provided a response to the preliminary view on 13 April 2018. The Commission did not receive any other responses.
- 6.8 The Commission has considered all of the materials referred to above in reaching its decision in relation to this application.

7 LEGISLATIVE REGIME AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS

The DDA and the Transport Standards

- 7.1 The DDA makes it unlawful to discriminate on the ground of disability in a range of fields. Most relevantly for the present application, the DDA makes discrimination unlawful in relation to access to premises (s 23) and the provision of goods and services (s 24).

- 7.2 The DDA also empowers the Minister to formulate disability standards (DDA s 31). The Transport Standards are disability standards made under this provision.
- 7.3 The Transport Standards came into operation on 23 October 2002. The purpose of the Transport Standards is to enable public transport operators and providers to remove discrimination from public transport services (s 1.2(2)).
- 7.4 Pursuant to s 34 of the DDA, a person will not contravene the DDA if they act 'in accordance with a disability standard'. In this way, disability standards provide an avenue whereby persons and bodies such as public transport operators and providers can ensure that they will not be found to have discriminated unlawfully on the ground of disability.
- 7.5 Conversely, pursuant to s 32 of the DDA, it is unlawful to contravene a disability standard.

The Commission's powers to grant exemptions

- 7.6 The Commission has the power to grant exemptions under the DDA (s 55) and the Transport Standards (s 33A.1).
- 7.7 The effect of an exemption under the Transport Standards is that, where a person fails to comply with the Transport Standards but that failure is in accordance with an exemption that has been granted by the Commission to that person, the person does not contravene the standards (Transport Standards s 33A.3). However, this may not automatically mean their conduct is 'in accordance with' the relevant Standard (and so within the proviso contained in s 34 of the DDA). For that reason, a person seeking an exemption under a disability standard may also choose to seek an exemption from the DDA, as the applicant has done in this case.
- 7.8 Exemptions granted by the Commission may be granted subject to terms and conditions. Failure to comply with such a term or condition does not, of itself, amount to unlawful conduct. However, where the beneficiary of an exemption fails to comply with a condition attached to the exemption, they will be deprived of the benefit of the exemption. They will then be subject to the requirements of the relevant disability standard or the DDA in the usual way.
- 7.9 In practical terms, the granting of a temporary exemption means that the activities or circumstances covered by it cannot be the subject of a successful complaint under the DDA. Situations that might otherwise be unlawful under the DDA cannot be effectively contested through the usual discrimination complaints process with its consequent legal remedies.
- 7.10 The Commission's powers to grant exemptions under the DDA are expressed in broad terms. By conferring an exemption power on the Commission, Parliament has clearly contemplated that some discriminatory conduct might be justified and that, in certain circumstances, derogation from the terms of the DDA and the Transport Standards is permissible. However, in exercising its exemption powers, the Commission must also consider the objects of the DDA and the Transport Standards.

7.11 The objects of the DDA are stated in s 3 to be:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
 - (i) work, accommodation, education, access to premises, clubs and sport; and
 - (ii) the provision of goods, facilities, services and land; and
 - (iii) existing laws; and
 - (iv) the administration of Commonwealth laws and programs; and
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

7.12 The Commission has frequently expressed the view that exemptions should not be granted lightly. Given the significant legal consequences for potential complainants, the Commission must be satisfied that a temporary exemption is appropriate and reasonable, and substantial evidence is needed to justify the exemption.

7.13 The Commission has issued guidelines about how it proposes to exercise its power under the DDA.¹² These provide that the Commission will consider:

- whether an exemption is necessary
- whether granting an exemption would be consistent with the objects of the DDA
- an applicant's reasons for seeking an exemption
- submissions by interested parties
- all relevant provisions of the DDA, and
- any terms or conditions subject to which an exemption might be granted.

7.14 The Guidelines do not expressly deal with the Commission's powers to grant exemptions under the Transport Standards. However, the Commission considers that the factors that are relevant to the exercise of its powers under the DDA are also relevant to the exercise of its powers under the standards.

8 DECISION

Necessity

8.1 The first issue considered in the Commission's guidelines is whether an exemption is necessary in order to avoid a potential breach of the DDA. For an exemption to be necessary, there must be at least an arguable case that the activities that are the subject of the application constitute discrimination contrary to the DDA. The Commission accepts that there is an arguable case that TfNSW, as a provider of

public transport infrastructure, has an obligation to ensure that there is a continuous accessible path of travel linking the nearest public street to the wharf. This is consistent with the requirements of clause 7 of AS1428.2 (1992). If this is the case, then the access path must be constructed in such a way as to comply with clause 8.1 of AS1428.2 (1992) so as to ensure unhindered passage.

- 8.2 IWC has not sought an exemption from the Commission and this decision does not address the question of whether an exemption ought to be granted in favour of IWC. It is possible that IWC may have obligations under the Transport Standards, and likely that it has obligations under the DDA more generally. For example, the Commission has previously noted that a footpath comes within the definition of 'premises' and would therefore be covered by s 23 of the DDA.¹³
- 8.3 The purpose of the Transport Standards is 'to enable public transport operators and providers to remove discrimination from public transport services' (s 1.2(2)). Since the commencement of the Transport Standards in 2002, operators and providers have been required to comply with the relevant sections of the standards in relation to all new premises, infrastructure and conveyances brought into use. Further, they have been required to ensure that existing premises, infrastructure and conveyances still in use are progressively made accessible over a period of 30 years.
- 8.4 This is emphasised in section 1.2(4) of the *Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3)* which states:
- (4) Under the Disability Standards, public transport services and facilities will become more accessible by:
 - (a) the replacement or upgrading of conveyances, premises and infrastructure in accordance with the compliance timetable outlined in Schedule 1 to the Disability Standards (usually at the end of their service lives); and
 - (b) the requirement that, from the commencement of the Disability Standards, all new items comply with the requirements of the Disability Standards.
- 8.5 By 31 December 2017, providers of public transport infrastructure were required to be 90% compliant (by each type of public transport service) with the Transport Standards in relation to access paths (except at bus stops and in premises to which the Premises Standards apply).¹⁴ By 31 December 2022, providers of public transport infrastructure are required to be fully compliant with the Transport Standards in relation to access paths (except in premises to which the Premises Standards apply).¹⁵

Reasons why the exemption is sought

- 8.6 In its initial application, TfNSW said that it was seeking an exemption from complying with ss 2.1 and 2.2 of the Transport Standards for the following reasons:
- Birchgrove Wharf is situated at the end of Louisa Road and there is a significant level change from road level to water level with a steep gradient involved. Current access to the wharf is provided via stairs owned and maintained by Inner West Council.

- Council do not support the upgrade of the current pathway to an accessible path with the inclusion of a lift or long ramped sections due to the perceived visual impact on Yurulbin Park and the local vicinity.
- Visual impact of providing an accessible path through Yurulbin Park, listed on the council heritage register.
- Limited existing patronage at Birchgrove wharf.

- 8.7 TfNSW does not own the land that links Birchgrove Wharf to Louisa Road and is reliant on the agreement of IWC to provide an accessible path. This presents difficulties for TfNSW if it proposes an accessible solution that is rejected by IWC.
- 8.8 If a complaint were brought against TfNSW alleging a breach of the Transport Standards, it may seek to rely on the defence of unjustifiable hardship. Pursuant to s 33.7(1) of the Transport Standards, it is not unlawful to fail to comply with a requirement of the standards if, and to the extent that, compliance would impose unjustifiable hardship on any person or organisation. A similar provision exists in s 11 of the DDA.
- 8.9 In determining whether compliance with a requirement of the Transport Standards would involve unjustifiable hardship, the standards provide that all of the relevant circumstances of the particular case are to be taken into account, including:
- 8.9.1 any exceptional operational, technical or geographic factors, including at a local or regional level, affecting a person or organisation's ability to comply with a relevant requirement of the standards
- 8.9.2 a loss of essential heritage values
- 8.9.3 whether compliance with the requirements may reasonably be achieved by less onerous means than those objected to as imposing unjustifiable hardship.
- 8.10 The Commission does not regard it as appropriate to use its power to grant temporary exemptions to certify, potentially on a continuing basis, that unjustifiable hardship exists.
- 8.11 The effect of an exemption is that a person is unable to make a complaint under the DDA in relation to a matter that is the subject of the exemption. In a submission to the Commission in relation to this application, Vision Australia said:
- The suspension of the right of a person with a disability to lodge a complaint under the DDA or an associated Disability Standard is a serious matter, and should only be considered when it is clear that the medium to long-term benefits of such suspension far outweigh the temporary, short-term detriment that inevitably results when a fundamental right is forgone.
- 8.12 In the event that a final decision is made by the Commission refusing to grant an exemption, such a decision would not prevent TfNSW from seeking to establish a defence of unjustifiable hardship, or rely upon the equivalent access provisions, in response to any complaints. However, the Commission is of the view that the exemption process is not the appropriate vehicle for seeking to establish these defences.

- 8.13 TfNSW also said as part of its initial application that an exemption for a period of five years would ‘allow for further negotiations between TfNSW and the IWC in addition to exploring options that may be available to provide equitable access that do not have the same visual impact as a lift structure and long ramped sections’. This part of the application raised the prospect of TfNSW using an exemption period to actively investigate other options to provide access. Provided that there was a sufficient prospect of such investigations leading to greater accessibility for Birchgrove Wharf, an exemption in such circumstances may be consistent with the objects of the DDA.
- 8.14 After receiving the application, the Commission asked TfNSW to respond to provide a number of documents and to respond to three questions. The questions were:
- What steps does TfNSW intend to take as part of the proposed further negotiations with IWC?
 - At this stage, what other options does TfNSW consider may be available that have not already been canvassed with IWC?
 - Why does TfNSW consider that it is necessary for an exemption to be granted for a period of 5 years in order for these negotiations to take place?
- 8.15 In response to all of these questions, TfNSW described previous negotiations and noted that:
- IWC have recently undergone council amalgamations and council elections whereby these changes may allow for new negotiations to take place to reach agreement on a solution.
 - There is the potential opportunity to partner with IWC with their planned works for upgrading Yurulbin Park – however this will be dependent on negotiations.
 - This time will also allow for further investigation of any new technologies that have been developed and worldwide best practice that may apply to meet the requirements under the Transport Standards.
 - Due to the complexity of the land topography and the marine environment it may take a considerable period of time to find and develop an optimal solution.
 - The planning and delivery of infrastructure is a lengthy process.

Submissions of interested parties

- 8.16 The Commission received 12 submissions from a variety of government agencies, individuals and disability advocacy groups in response to the application and to the Commission’s request for further information. Seven of the submissions were opposed to the exemption. Only three were in favour or had no objection to an exemption, with two not expressing a view on whether an exemption should be granted while providing other comments about the project.
- 8.17 IWC provided a detailed submission opposing the grant of an exemption. IWC’s primary position was that an exemption was not necessary, either for TfNSW to negotiate with IWC or in order to investigate new technology. IWC emphasised that it had ‘actively and consistently argued for full accessibility to be delivered as an outcome of the project’. IWC’s preferred approach was for the installation of an

inclinator. It was also open to an 'improved accessible path within Yurulbin Park' in order to achieve a 'performance based solution without adversely impacting on the heritage and bush like aesthetic of the park'.

- 8.18 Several individual residents of Birchgrove made submissions to the Commission that emphasised the need for an accessible solution and the importance of TfNSW and IWC working together to achieve this. Helle Poulson said:

There is no need for a 5 year exemption, rather they should design and build a path allowing disabled access. This should not be too hard and both bodies need to collaborate to commence on this.

- 8.19 In a similar vein, Lewis Kaplan, also a local resident, said:

I wish to emphasise that there is every need to make this wharf accessible from Louisa Road. For people with disabilities, people using prams, people who can't safely manage the steep and irregular steps.

This can be readily achieved by installing a lift to the left of the steps (going down).

Please stop mucking around and make this wharf accessible.

- 8.20 A third resident also argued against an exemption and said:

If they argue the wharf has low usage, this is because of the lack of access! Build the access and people will come. Improved access will not only benefit the disabled, but also the old, infirm, those with child in prams and cyclists.

- 8.21 Another resident who provided feedback directly to TfNSW said that the wharf should be moved to the end of Grove Street 'where there is level access and connection to the bus service'.

- 8.22 Three disability organisations that were part of the ATAC for TfNSW provided submissions: Physical Disability Council of NSW (PDCN), Guide Dogs NSW/ACT and Vision Australia. Each of these organisations represents people with disabilities who are likely to need adjustments to public transport infrastructure to make it accessible. They all argued for the need for accessibility to be provided at Birchgrove Wharf as soon as possible, although they took different approaches to whether or not an exemption should be granted.

- 8.23 PDCN said that it was happy to support the application on the basis that it believed TfNSW had taken significant steps to engage with IWC to resolve the accessibility issues and meet their compliance obligations. PDCN said that it would like to see the parties work with each other to provide access as soon as possible. It believed that 'IWC should honour their commitment to providing an accessible and inclusive community, as outlined in their Inclusive Action Plan (for people with disability) 2017-2021'. PDCN considered that a lift or a compliant accessible ramp 'are the only appropriate options' for providing access. It said that an inclinator would not allow for fully independent access by people with disabilities and would also be unsuitable because of the risk of vandalism and the maintenance required.

- 8.24 Vision Australia strongly opposed the application. It said that while the application referred to the need for further discussions, it did not offer any remediation plan or suggestions as to how those discussions would result in improvements in the safety and accessibility of the wharf.

8.25 Guide Dogs NSW/ACT acknowledged the substantial topographical challenges present on the site, but said that ‘these impediments do not negate the rights of people with disability to be provided with a safe, independent and accessible path both to, from and onto an accessible ferry, at the same level of amenity and dignity of use afforded to other users without a disability’. It encouraged both TfNSW and IWC to continue their dialogue with a view to achieving a suitable solution.

8.26 Significantly, Guide Dogs NSW/ACT made reference to a recent publication by the Commonwealth Department of Infrastructure and Regional Development titled *The Whole Journey*. The guide is designed to ‘encourage policy makers, planners, designers, builders, certifiers and operators to think beyond compliance and the physical and governance boundaries of services and infrastructure, and to focus instead on people’s accessibility needs across their whole journey’.¹⁶

8.27 The guide notes that the journey from home to a public transport node ‘is not addressed by the Transport Standards, but is subject to broader DDA requirements’.¹⁷ In relation to this part of the journey, the guide says:

Pathways leading to public transport nodes should be maintained to a high standard by the relevant authority. This will make this part of the journey as safe, convenient and comfortable as possible for those with accessibility requirements. Improving pathways means fixing broken pavements, maintaining levels, managing street clutter and avoiding trip hazards.¹⁸

8.28 The guide also addresses issues about interconnection:

People with disability will often use taxis to travel to their chosen stop, station or terminal. Consideration should be given to creating a drop off/pick up point with access to the public transport node. This may include locating the area a suitable distance from the public transport node, **providing an accessible route** (including level footpaths, kerb ramps, wayfinding information and cues), and considering how ticketing, security and other activities at the stop/station/terminal may impact a person’s journey to the public transport node.¹⁹

(emphasis added)

8.29 In the case of Birchgrove Wharf, the original design provided for a ‘Kiss and ride’ drop off/pick up point at the end of Louisa Road.

8.30 The members of APJAC made no objection to the exemption sought by TfNSW. No detail of their consideration of the application was provided to the Commission. Of the State and Territory anti-discrimination bodies, the only one to make a submission was the Equal Opportunity Commission of Western Australia which said that it had no objection to the application as it appeared necessary for the applicant to continue negotiation with IWC and take steps to make Birchgrove Wharf compliant with the DDA and the Transport Standards.

Terms or conditions subject to which an exemption might be granted

The need for negotiation

8.31 A common theme through almost all of the submissions was the need for TfNSW and IWC to negotiate an accessible outcome as a matter of priority. Both parties have expressed a willingness to continue to negotiate. It is clear, given the circumstances of the site, that an accessible solution can only be provided as a

result of agreement. Between them, TfNSW and IWC have proposed four different solutions.

- 8.32 The Commission's power in this matter is limited to deciding whether to grant or refuse the specific temporary exemptions requested by the TfNSW application. While this can be done subject to conditions, it would not be appropriate for the Commission to nominate for the parties a particular way in which access should be provided where there is more than one option that would comply with the Transport Standards. The options identified by the parties are summarised below in order to make clear the scope of negotiations to date.
- 8.33 The first option was for the construction of a lift. TfNSW provided the Commission with copies of initial concept design drawings for a new accessible pathway from Lousia Road to the wharf incorporating which were apparently prepared on 18 November 2015.²⁰ It appears to be common ground that this solution would comply with the Transport Standards. A lift has been used in other locations on the ferry network such as Huntley's Point Wharf. An image of the lift as installed at Huntley's Point Wharf appears in a TfNSW presentation dated March 2017.²¹
- 8.34 The second option was for the construction of a ramp system. The Commission does not have detailed drawings for this option, but part of the March 2017 presentation by TfNSW to IWC included a sketch of a series of 5 switchback ramps.²² It appears that this would also be compliant with the Transport Standards.
- 8.35 The March 2017 TfNSW presentation noted that the topography of the site 'will require a lift or ramp system to achieve compliance'. This is also the view of PDCN which submitted that 'a lift or compliant accessible ramp are the only appropriate options for providing equitable access for people with disabilities'.
- 8.36 It appears that IWC has objected to each of these options for aesthetic reasons. According to the application by TfNSW, IWC was opposed to a lift or long ramped sections 'due to the perceived visual impact on Yurulbin Park and the local vicinity'. The March 2017 presentation by TfNSW flagged whether the cost of these options was justified ('low patronage, inaccessibility of site and monetary expenditure may be a justification against work')²³ and noted the visual impact of these options on nearby 'high value residential housing'.²⁴ However, it appears from the application by TfNSW to the Commission that it would be willing to proceed with either of these options with the agreement of IWC. That also appears to be the understanding of PDCN, based on its involvement with the ATAC, saying that it believes that TfNSW has 'taken significant steps to engage with [IWC] to resolve the accessibility issues and meet their compliance obligations under the [Transport Standards]'.
- 8.37 The third option, proposed by IWC, was for the construction of an inclinor. This is IWC's primary position. IWC reportedly submitted to TfNSW that 'an inclinor can achieve the same outcome [as a lift or a ramp system] by following the landform of the stair, and hence without the visual and physical scale impacts on the site'. TfNSW investigated the option of an inclinor and raised a number of objections including that:
- 8.37.1 it would require a 'greater land take' than a lift
- 8.37.2 it would be costly to manufacture and install

- 8.37.3 it would involve greater ongoing operational and maintenance costs than a lift
 - 8.37.4 there were concerns about the reliability of an inclinor in a marine environment and in circumstances where the wharf was unmanned
 - 8.37.5 RMS did not have any experience in installing an inclinor on public land
 - 8.37.6 there was a risk that an inclinor would be subject to vandalism
 - 8.37.7 RMS had been unable to source a provider who could produce an inclinor solution that complied with AS1735.12-1999 (Lifts, escalators and moving walks: facilities for persons with disabilities).
- 8.38 IWC responded to a number of these objections in its submission to the Commission, saying:
- 8.38.1 an inclined lift beside the current stairway provides the shortest access approach and does not alienate any part of the park
 - 8.38.2 IWC has identified a local manufacturer of inclinors which claimed that it could install an inclinor that complies with AS1735.8 (Inclined lifts) at less cost than a vertical lift
 - 8.38.3 while inclined lifts do not form part of the Transport Standards, this solution would satisfy the requirements of 'equivalent access' to AS1735.12
 - 8.38.4 one example of an inclinor being installed in a public environment was Lisgar Gardens, owned by Hornsby Shire Council
 - 8.38.5 an inclined lift could be turned off outside the usual hours of operation of the ferry
 - 8.38.6 the risk of vandalism could be mitigated by extending the CCTV surveillance system being installed at the wharf
 - 8.38.7 if an inclined lift was successfully installed at Birchgrove Wharf, it could then be applied elsewhere in the ferry network.
- 8.39 IWC would like to see TfNSW undertake a 'comprehensive study of inclined lifts or similar mechanisms'. It says that if an inclinor is ultimately unachievable, it would like TfNSW to 'provide resources to undertake a full site assessment to enhance accessibility'.
- 8.40 The fourth option, also proposed by IWC, is for a path through Yurulbin Park that is 'designed sympathetic to the park's heritage and aesthetic character that also provides improved access to the ferry'. IWC says that it would be possible to create 'a trench for an access ramp from the wharf deck into the park, providing a path which would rise into the middle lawn level of the park' and that 'existing and upgraded paths would provide further access within the park and up to Louisa Road'. A sketch of this concept is included at page 26 of IWC's submission. It appears that this option would not comply with AS1428 (Design for access and

mobility) but IWC submits that it would 'meet the broad intent of AS1428 albeit with a level of variance appropriate to the environmental and heritage context and with respect to all user needs'. It is not clear whether such a solution would satisfy the test for 'equivalent access' in section 33.3 of the Transport Standards.

- 8.41 Finally, the Commission notes that in the June 2017 presentation by TfNSW, it said that 'RMS are investigating accessibility improvements including providing a lightweight, BCA compliant suspended stair solution'. The presentation included a sketch of this proposal.²⁵ This would make the existing stairs safer but would not make Birchgrove Wharf wheelchair accessible.

The appropriate period

- 8.42 In its initial application, TfNSW requested an exemption for a period of five years.
- 8.43 Vision Australia said that 'it is simply not credible that it will require five years for discussions to occur and for alternatives to be considered'. There is considerable force in this submission.
- 8.44 IWC noted that public transport infrastructure is required to fully comply with the Transport Standards relating to access paths by 2022. It considered that an exemption to the standards should not be granted which would permit access paths to be non-compliant beyond this deadline.
- 8.45 As noted above, IWC's primary position was that an exemption was not necessary. However, IWC said that if the Commission were to grant an exemption, then 1 to 2 years would be more than adequate to conduct the research and negotiations necessary.
- 8.46 Both TfNSW and IWC have expressed a willingness to make Birchgrove Wharf accessible. At present, there is a difference of opinion as to how to achieve this objective. Achieving an accessible solution is clearly consistent with the objects of the DDA. Given the importance of negotiation in the current circumstances in order to achieve an accessible solution, the Commission considers that it would be appropriate to grant a short exemption to TfNSW to allow the existing negotiations to continue and to provide an incentive to reaching agreement promptly if this is possible.
- 8.47 The Commission is mindful that, in granting an exemption, it is preventing people who might experience discrimination while seeking to use the ferry at Birchgrove Wharf from availing themselves of the usual discrimination complaints process. For this reason, the Commission considers that any exemption for the purposes of negotiation should be strictly confined. In its preliminary view, the Commission proposed that this period be limited to a period of 6 months.
- 8.48 In response to the Commission's preliminary view, TfNSW said that it would endeavour to collaborate with IWC over the six month initial exemption period to negotiate a solution that meets the DDA and Transport Standards. TfNSW made two submissions in relation to the negotiation period. First, it said that the negotiation period should commence from the date of any final exemption decision made by the Commission. Secondly, it said that negotiation period should be able to be extended by the Commission for a further period of up to 3 months. The

Commission considers that each of these submissions are reasonable and has made changes to the terms of the exemption to reflect them.

- 8.49 If agreement can be reached between TfNSW and IWC on an accessible solution the negotiation period, the Commission considers that it would be appropriate for TfNSW to continue to have the benefit of an exemption for a reasonable period of time to allow the implementation of that agreement. The Commission notes that a similar project at Huntley's Point Wharf was completed by TfNSW in 10 months. In order to account for potential differences between the projects and the potential for delays, the Commission proposed in its preliminary view to grant an exemption for a further period of 18 months, conditional on agreement on an accessible solution being reached.
- 8.50 In response to the Commission's preliminary view, TfNSW said that it was feasible to construct a solution within an 18 month timeframe. However, it said that additional time would be required for planning and that for a project of this scale the planning and approval process generally takes about six months prior to construction. It also said that there may be other factors that impacted on the timing of any project including its relationship with other planned capital works. TfNSW sought a 12 month extension of the conditional period, which would be a total of 30 months.
- 8.51 In the circumstances, the Commission is prepared to extend the period of the conditional exemption to a total of 24 months which it understands is sufficient to cover both planning and construction of a project of this nature.
- 8.52 The Commission has decided that it will:
- (a) Grant an initial exemption for 6 months without conditions, which may be extended by the Commission for a further period of up to 3 months, to allow TfNSW and IWC to continue to negotiate in relation to an appropriate solution that improves access to Birchgrove Wharf for people with disabilities.
 - (b) Grant a conditional exemption for a further 24 months, to allow the implementation of an agreed solution, on the conditions that:
 - i. TfNSW confirms in writing to the Commission during the initial negotiation period that agreement has been reached with IWC about how to improve access to Birchgrove Wharf for people with disabilities and describes the nature of the agreed solution; and
 - ii. the agreed solution would provide access in a way that is compliant with the DDA and the Transport Standards.
- 8.53 For the avoidance of doubt, if agreement on an accessible solution is not reached within the initial negotiation period described in paragraph (a), then the further exemption period will not apply; and if the agreed solution is not compliant with the Transport Standards then the further exemption period will not apply. In those circumstances, people with disability would retain their right to make a complaint, and TfNSW would retain the right to rely on equivalent access or unjustifiable hardship provisions if applicable.

8.54 Pursuant to s 56 of the DDA and s 33A.4 of the Transport Standards, and subject to the *Administrative Appeals Tribunal Act 1975* (Cth), an application may be made to the Administrative Appeals Tribunal for a review of the decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.

Emeritus Professor Rosalind Croucher AM
President
on behalf of the Commission

3 May 2018

SCHEDULE ONE

NOTICE OF GRANT OF TEMPORARY EXEMPTION

The Commission grants to Transport for NSW (TfNSW), on the terms and conditions set out in this schedule, a temporary exemption to ss 2.1 and 2.2 of the Transport Standards.

As well as the terms and conditions specified below, this exemption is granted subject to the condition that the Commission may, on its own motion, revoke the exemption if it becomes satisfied that the exemption is no longer justified.

The exemption is granted for an initial period of 6 months from the date of this decision (with the possibility of extension for a further 3 months), and then for a further period of 24 months if the conditions specified in the exemption are satisfied.

Pursuant to s 34.1(1) of the Transport Standards, the Transport Standards are subject to review every five years. If, at any time following this decision, the Transport Standards are remade in an amended form, any exemption granted from a section of the Standards that is amended will cease operation at the time the amendment comes into effect.

The relevant standards are reproduced below, followed by the exemption that is granted and the terms and conditions to which the grant is subject.

EXEMPTION FROM SECTIONS 2.1 and 2.2 OF THE TRANSPORT STANDARDS

2.1 Unhindered passage

- (1) An access path that allows unhindered passage must be provided along a walkway, ramp or landing.
- (2) An access path must comply with **AS1428.2 (1992) Clause 8.1**.

Premises
except premises to which the Premises Standards apply

Infrastructure
except airports that do not accept regular public transport services

2.2 Continuous accessibility

An access path must comply with **AS1428.2 (1992) Clause 7**, *Continuous accessible path of travel*.

Premises
except premises to which the Premises Standards apply

Infrastructure
except airports that do not accept regular public transport services

Temporary exemption: ferry infrastructure

For 6 months from the date of this decision (which may be extended by the Commission for a further period of 3 months), TfNSW is exempt from compliance with ss 2.1 or 2.2 of the Transport Standards in relation to Birchgrove Wharf. This exemption is granted without conditions, to allow TfNSW and Inner West Council (IWC) to continue to negotiate in relation to an appropriate solution that improves access to Birchgrove Wharf for people with disabilities.

From the end of the initial negotiation period described above, TfNSW is exempt from compliance with ss 2.1 or 2.2 of the Transport Standards in relation to Birchgrove Wharf for a further period of 24 months, on condition that:

- (a) TfNSW confirms in writing to the Commission by the end of the negotiation period that agreement has been reached with IWC about how to improve access to Birchgrove Wharf for people with disabilities and describes the nature of the agreed solution; and
- (b) the agreed solution would provide access in a way that is compliant with the DDA and the Transport Standards.

EXEMPTIONS FROM THE DISABILITY DISCRIMINATION ACT

The Commission also grants to TfNSW an exemption from ss 23 and 24 of the DDA as follows:

If:

- a matter is regulated by ss 2.1 or 2.2 of the Transport Standards, and
- ss 2.1 or 2.2 of the Transport Standards are subject to an exemption granted by this instrument, and
- TfNSW complies with any conditions subject to which this exemption is granted

TfNSW is, with respect to that matter, exempt from the operation of ss 23 and 24 of the DDA.

SCHEDULE TWO

SUBMISSIONS RECEIVED

The Commission received submissions from the following organisations and individuals:

- Inner West Council
- Accessible Public Transport Jurisdictional Committee
- Physical Disability Council of NSW
- Guide Dogs NSW/ACT
- Vision Australia
- Equal Opportunity Commission of Western Australia
- Helle Poulsen (individual)
- Lewis Kaplan (individual)

The Commission also received four other submissions from individuals. The Commission has treated the identities of these four submitters as confidential.

Copies of the above identified submissions are available on the Commission website at www.humanrights.gov.au/disability_rights/exemptions.

Endnotes

- 1 New South Wales Government, *Sydney Ferries Network* (2017). At <https://transportnsw.info/document/2382/sydney-ferries-network-map-1017.pdf> (viewed 27 February 2018).
- 2 New South Wales Government, *F8 Cockatoo Island timetable* (2018). At <https://transportnsw.info/documents/timetables/09-F8-Cockatoo-Island-20180127.pdf> (viewed 27 February 2018).
- 3 New South Wales Government, *Sydney Ferries Network* (2017). At <https://transportnsw.info/document/2382/sydney-ferries-network-map-1017.pdf> (viewed 27 February 2018).
- 4 New South Wales Government, *Sydney's Ferry Future: Modernising Sydney's Ferries* (2013), p 17. At <http://mysydneycbd.nsw.gov.au/sites/default/files/user-files/uploads/ferries-future-web.pdf> (viewed 26 February 2018).
- 5 New South Wales Government, *Sydney's Ferry Future: Modernising Sydney's Ferries* (2013), p 13. At <http://mysydneycbd.nsw.gov.au/sites/default/files/user-files/uploads/ferries-future-web.pdf> (viewed 26 February 2018).
- 6 Transport Standards, s 34.
- 7 Transport Standards, Sch 1, cl 2.5.
- 8 Transport for NSW, *2012 Review of the Disability Standards for Accessible Public Transport* (2013), p 11. At https://infrastructure.gov.au/transport/disabilities/review/files/2012_Submissions/No_95_Transport_for_New_South_Wales.pdf (viewed 26 February 2018).
- 9 The membership of the ATAC includes: Alzheimer's Australia NSW, Arthritis NSW, Assistance Dogs Australia, Blind Citizens Australia, Brain Injury Association of NSW, Carers NSW, Combined Pensioners and Superannuants Association, Council On The Aging, Community Transport Organisation, Deafness Council of NSW, Deaf Australia (NSW), Guide Dogs NSW/ACT, Disability Council of NSW, NSW Council for Intellectual Disability, Multicultural Disability Advocacy Association, ParaQuad, NSW Council of Social Services, Physical Disability Council of NSW, People with Disability Australia, Spinal Cord Injuries Australia, Vision Australia (NSW).
- 10 Roads and Maritime Services, *Birchgrove Wharf upgrade: Review of environmental factors* (2017). At <http://www.rms.nsw.gov.au/documents/projects/sydney-inner/birchgrove-wharf/birchgrove-wharf-upgrade-ref-2017-08.pdf> (viewed 27 February 2018).
- 11 Roads and Maritime Services, *Birchgrove Wharf Upgrade: Submissions report* (2017). At <http://www.rms.nsw.gov.au/documents/projects/sydney-inner/birchgrove-wharf/birchgrove-wharf-upgrade-ref-submissions-report-with-appendices-2017-09.pdf> (viewed 27 February 2018).
- 12 Australian Human Rights Commission, *Commission Guidelines: Temporary exemptions under the Disability Discrimination Act 1992 (Cth)* (2010). At <http://www.humanrights.gov.au/temporary-exemptions-under-disability-discrimination-act-1992-cth> (viewed 27 February 2018).
- 13 Australian Human Rights Commission, *Frequently asked questions: Access to premises* (2014). At <http://www.humanrights.gov.au/frequently-asked-questions-access-premises#footpath> (viewed 27 February 2018).
- 14 Transport Standards, Sch 1, cl 3.2.
- 15 Transport Standards, Sch 1, cl 4.2.
- 16 Australian Government, Department of Infrastructure and Regional Development, *The Whole Journey: A guide for thinking beyond compliance to create accessible public transport journeys* (2017), p 4. At <https://infrastructure.gov.au/transport/disabilities/whole-journey/guide/index.aspx> (viewed 27 February 2018).
- 17 *Ibid*, p 19.
- 18 *Ibid*, p 20.
- 19 *Ibid*, p 26.
- 20 Copies of these drawings appear at pages 4 to 7 of the document titled 'TfNSW Attachment A (public)' on the Commission's website in relation to this application. At <https://www.humanrights.gov.au/sites/default/files/TfNSW%20Attachment%20A%20%28public%29.pdf> (viewed 28 February 2018).
- 21 The slide of the relevant presentation appears at page 14 of the document titled 'TfNSW Attachment A (public)' on the Commission's website in relation to this application. At <https://www.humanrights.gov.au/sites/default/files/TfNSW%20Attachment%20A%20%28public%29.pdf> (viewed 28 February 2018).

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- ²² The slide of the relevant presentation appears at page 15 of the document titled 'TfNSW Attachment A (public)' on the Commission's website in relation to this application. At <https://www.humanrights.gov.au/sites/default/files/TfNSW%20Attachment%20A%20%28public%29.pdf> (viewed 28 February 2018).
- ²³ This is noted in the minutes of the meeting at page 18 of the document titled 'TfNSW Attachment A (public)' on the Commission's website in relation to this application. At <https://www.humanrights.gov.au/sites/default/files/TfNSW%20Attachment%20A%20%28public%29.pdf> (viewed 28 February 2018).
- ²⁴ The slide of the relevant presentation appears at page 15 of the document titled 'TfNSW Attachment A (public)' on the Commission's website in relation to this application. At <https://www.humanrights.gov.au/sites/default/files/TfNSW%20Attachment%20A%20%28public%29.pdf> (viewed 28 February 2018).
- ²⁵ The slide of the relevant presentation appears at page 34 of the document titled 'TfNSW Attachment A (public)' on the Commission's website in relation to this application. At <https://www.humanrights.gov.au/sites/default/files/TfNSW%20Attachment%20A%20%28public%29.pdf> (viewed 28 February 2018).