

Australiasian Railways Association application for exemption from DSAPT

**Submission to the Australian Human Rights
Commission**

July 2015

About VCOSS

The Victorian Council of Social Service (VCOSS) is the peak body of the social and community sector in Victoria. VCOSS members reflect the diversity of the sector and include large charities, peak organisations, small community services, advocacy groups, and individuals interested in social policy. In addition to supporting the sector, VCOSS represents the interests of vulnerable and disadvantaged Victorians in policy debates and advocates for the development of a sustainable, fair and equitable society.

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Executive Summary

The Victorian Council of Social Service (VCOSS) welcomes this opportunity to provide a response to the Australasian Railways Association's (ARA) application to the Australian Human Rights Commission (the Commission) for an exemption from the *Disability Standards for Accessible Public Transport 2002* (the Standards), which exists under the *Disability Discrimination Act 1992* (the Act).

VCOSS has had a long history of advocacy for improved public transport in Victoria, including for accessibility improvements to the public transport system. We have produced numerous reports and submissions on public transport accessibility, including:

- Accessible Public Transport Watch Project¹
- Creating Accessible Journeys²
- Submission to the 2007 Review of the Disability Standards for Accessible Public Transport³
- Submission to the 2012 Review of the Disability Standards for Accessible Public Transport⁴

Due to the extensive length of the exemption application, VCOSS has confined our comments to a general discussion of the application, and not made detailed recommendations about each of the 31 different elements covered by the application.

VCOSS opposes the ARA application for the following reasons:

- The application does not meet the objectives of the Act, which include reducing discrimination and equality before the law
- The main basis for the exemption appears to be unjustifiable hardship, which is already exempted under the Standards
- The applicant does not provide any public transport services; they are applying on behalf of their members, lacking clarity as to which operators it is intended to cover
- The exemption process should not be a means of modifying the Standards
- Many parts of the exemption clearly relate to a single operator in one city, yet request a nation-wide and industry-wide exemption, making the exemption apply more broadly than required

¹ Victorian Council of Social Service, *Accessible Public Transport Watch Project: A statewide consultative report of experiences in accessing Victoria's public transport system by people with a disability*, 2007, available at: <http://vcoss.org.au/document/accessible-public-transport-watch-project/>

² Victorian Council of Social Service, *Creating Accessible Journeys*, 2011, available at: <http://vcoss.org.au/document/creating-accessible-journeys/>

³ Victorian Council of Social Service, *Submission to the 2007 Review of the Disability Standards for Accessible Public Transport*, 2007, available at: <http://vcoss.org.au/document/issues-paper-review-of-the-disability-standards-for-accessible-public-transport/>

⁴ Victorian Council of Social Service, *Submission to the 2012 Review of the Disability Standards for Accessible Public Transport*, 2013 <http://vcoss.org.au/document/2012-review-of-the-disability-standards-for-accessible-public-transport-2002/>

- Many parts of the exemption are subject to milestone targets and thus already do not require full compliance
- The exemption applies to newly procured or upgraded vehicles and infrastructure, which can reasonably be expected to fully comply with the Standards
- The application contradicts other reports that state rail systems are generally compliant and have met targets

Our preferred approach is that the Commission declines the application, and invites individual operators apply for exemptions that are reasonable in their individual circumstances, while maintaining the integrity of the legislated Standards as having national, industry-wide application. In the event that the Commission is considering granting any part of the exemption, we ask that the Commission consider the following limitations and conditions:

- Limit the exemption to specified operators
- Limit the application of exemptions for each element only to those operators who can provide evidence that they require the exemption
- Limit the exemption to apply only to infrastructure or conveyances constructed or purchased before the 2002 commencement of the Standards, and have not been substantially upgraded since.
- Limit the exemptions for each element to circumstances where the Standards had not previously been met, to prevent retrograde change
- Limit the exemption to the end of the current milestone target period
- Exclude elements subject to milestone targets where the applicant has only provided anecdotal evidence of difficulties, as this does not prevent current targets being reached
- Consider substituting a reduced milestone target for each operator rather than a full exemption where milestone targets apply and operators supply evidence that they cannot be reasonably achieved
- Ensure each element of the exemption is specifically limited to trains, trams, or both, and clarify the application of the exemption to multi-modal facilities
- Limit the exemption to circumstances where an operator can provide evidence that they have taken all reasonable steps to comply with the Standards, including investigating alternate solutions
- Limit the exemption to circumstances where all reasonable steps have been taken to notify customers that a particular piece of infrastructure or conveyance is not compliant with the Standards
- Place a condition on the exemption that customers who cannot use the transport as a result of the exemption are provided with an alternate transport option to reach their desired destination at an equivalent fare
- Apply the exemption only if the operator reports publicly every 12 months on the current level of compliance with the Standards (excluding any exemptions), and the progress achieved since the last report, including the percentage level of compliance for each element

Reasons for opposing the application

Exemption does not meet objectives of the Disability Discrimination Act

Many people with disability are among Australia's most disadvantaged. VCOSS advocacy for systemic change that improves the lives of people with a disability is informed by a social model of disability, which understands the disadvantage and discrimination experienced by people with disability is not created by their impairments, but by the physical and social environment in which they live. Part of this understanding is that when the built environment is not designed for universal use, people with disability are prevented from living like other people in our society, physically and socially separating them as 'different' people with 'special' needs.

The capacity for people with disability to move freely in their lives is fundamental to their ability to live with dignity and meaning. Being able to move freely means people can reach valuable destinations, including for employment, education, healthcare, community services, and to engage in social relationships and community activity. Barriers to this freedom of movement, such as being prevented from using public transport services, reduces the opportunities for people with disability to access valuable opportunities, which contributes to their unequal status in society. The objectives of the *Disability Discrimination Act 2002* are to eliminate discrimination, ensure people with disability have the same rights as other people, and promote their recognition and acceptance.

Should an exemption be approved for the applicant this has the potential to undermine these objectives. Rather than helping remove discrimination and ensure equal rights, the application may reduce the capacity of people with disability to use train and tram services on the same basis of other people.

Operator already subject to unjustifiable hardship

The application relies heavily on claiming unjustifiable hardship as a reason for the exemption. Section 33.7 of the Standards already provides that it is not unlawful to fail to comply with the Standards if compliance would impose unjustifiable hardship. If the basis of the exemption application is that meeting the Standards would impose unjustifiable hardship, then an exemption is unnecessary as this is already permitted.

Throughout the application, a range of terminology are used to suggested that the Standards impose an unjustifiable hardship on operators, such as ‘constrained’, ‘significant cost’, ‘challenges’, ‘solutions not available’, ‘not possible’, ‘extremely difficult’, ‘not achievable’, ‘significant capital improvement is required’, ‘impractical’, and ‘engineering and technical difficulties’. However, if these claims are correct, then the operators do not require an exemption from the Standards in order to act lawfully.

Section 33.7 provides an exhaustive list of 16 factors to be considered in making a judgement about whether there is unjustifiable hardship on an operator. The fact that there would be circumstances where compliance would not be possible was considered when the Standards were drafted, and section 33.7 was drafted to provide relief for operators in these circumstances. If compliance is indeed impossible, or prohibitively expensive, then operators are not acting unlawfully if they do not comply. They do not require an exemption in addition to this clause.

VCOSS urges the Commission to consider whether the circumstances articulated in the application are already provided for by section 33.7 of the Standards. If these appear to fall within the scope of the unjustifiable hardship provision of the Standards, then consider declining the application as unnecessary.

Nature of the applicant

The application is unusual in that is not made by an organisation that is subject to the Standards. The ARA does not provide any public transport services. Instead, the ARA is applying for an exemption on behalf of its members.

While section 33A.1 allows a person to apply for an exemption on behalf of another person, this mechanism is problematic in this instance.

The application states that it is made “on behalf of all members of the ARA listed at Appendix 1”. Appendix 1 lists the 10 members who contributed to the application, and provides a weblink to the full list of ARA members. It is ambiguous whether the application applies to only those 10 members, or all ARA members.

The exemption is contingent on membership of the ARA. Specifically, it is unclear whether a member ceases to be a party to the exemption if they cease to be a member of the ARA, or whether a non-member of the ARA could automatically become a party to the exemption by becoming a member in the future.

It is unduly arduous for a member of the public to determine whether an operator is subject to the exemption, as it requires them to determine an operator’s membership of the ARA. We are not aware of any requirement upon the ARA to publicly disclose its membership, or that would prevent them from refusing to disclose it in the future.

A better process for determining exemptions from the Standards would be for individual operators to submit exemption applications for the particular items relevant to their individual systems, which vary considerably across the country. VCOSS encourages the Commission to decline the application and request individual operators to apply for appropriate exemptions suited to their individual circumstances.

Exemptions should not modify standards in their entirety

An exemption should not seek to modify the standards across all operators in an industry. This is stretching the concept of an exemption, which the Commission should reserve for 'exceptions that prove the rule'. Applying exemptions on an industry-wide basis effectively undermines the Standards, which have been legislated and subject to Parliamentary scrutiny.

The Australian Government has announced in its recent Response to Review of the Disability Standards for Accessible Public Transport that they "will commence a process for updating the Transport Standards which will involve close consultation with industry, all levels of government and the disability sector".⁵

The applicant specifically states an intention to "pursue amendment of the compliance requirements, to which the application seeks temporary exemption, as part of this process." In other words, the explicit goal of the application is to support a permanent modification of the Standards. The Commission is not empowered to make amendments to the Standards.

We ask that the Commission not pre-empt this process, as making a determination on industry-wide exemptions from the Standards would effectively pre-judge the outcomes of the review.

Local difficulties should not receive national exemptions

It is clear from the detail of the application that the vast majority of elements included in the exemption application are difficulties identified by a single operator. The fact that a single operator is not meeting the Standards should not be sufficient reason to award a national, industry-wide exemption. For instance, the application seeks an exemption applying to double deck rail cars.⁶ This is clearly a situation that only arises for Sydney Rail, as other public transport systems do not operate these conveyances. Similarly, the application seeks an exemption from providing accessible toilets in rail cars, due to problems identified only in narrow gauge trains.⁷ It is clearly unnecessary for Victorian operators, almost wholly operating single deck broad gauge systems, to be awarded an exemption for either of these issues.

⁵ Australian Government, *Response to the Review of the Disability Standards for Accessible Public Transport*, 2015, p.2

⁶ ARA Exemption Application, p.17

⁷ ARA Exemption Application, p.44

This suggests the application been developed on the basis that a problem for **any** operator should result in an exemption for **every** operator. This is not a proportionate response under human rights principles. It also presents a risk of retrograde changes, where operators that previously were meeting the Standards alter their services to meet the lower requirements allowed by the exemptions. Industry-wide exemptions reduce the incentive for operators to devise local solutions for compliance, fail to recognise the diversity of systems in operation, and impede meaningful input by people with disabilities, who are generally more familiar with their local operator than the totality of national systems. In essence, an industry-wide exemption, if approved, drives the industry towards the 'lowest common denominator', rather than encouraging best practice.

VCOSS requests the Commission decline the application and require that individual operators apply for exemptions based on their individual circumstances.

Occasional difficulties are insufficient to require an exemption to elements subject to milestone targets

The Standards were designed to be progressively realised. Where elements had been identified that might take time and resources to implement, operators were not required to meet them in their entirety, and instead were given a series of milestone targets for their progressive implementation. The current 2012 milestones require that the Standards are met for certain elements on 55 per cent of services.

Significant parts of the application request exemptions from elements subject to milestone targets. The reasoning often cites arguments about the nature of legacy infrastructure, or heritage concerns, or the particular technical complexities in certain circumstances. However, the applicant never provides any evidence that these problems are so great that they prevent reaching the current milestone target of 55 per cent. Indeed, we observe that the applicant never identifies the extent of non-compliance with the Standards for any operator. We also note that there is considerable variance from network to network in the extent of these problems.

Thus, the application appears to have been developed on the basis that if an operator **sometimes** encounters a difficulty, this should result in an exemption **all the time**.

If the Commission cannot establish that the circumstances identified are so frequent that they will cause all operators covered by the exemption to be unable to meet the current milestone target, then they do not have sufficient information to establish that the exemption is required. In this case the Commission would have grounds to decline the application.

New conveyances and infrastructure should not be exempt

VCOSS acknowledges in certain circumstances there are difficulty with applying the Standards to legacy infrastructure and conveyances that began operating before the commencement of the Standards in 2002. These are largely catered for by the inclusion of milestone targets and the unjustifiable hardship clause.

The exemption application requests a far broader coverage for exemptions than merely those caused by legacy infrastructure. In many cases, the exemption would apply to all infrastructure and conveyances, including those recently purchased or built. In some instances, the application restricts the exemption to 'existing' infrastructure or conveyances, but the term 'existing' is not defined and is ambiguous. It could be construed that 'existing' includes any infrastructure that in fact 'exists', which would include infrastructure and conveyances that commenced operation after the commencement of the Standards. Similarly, it is unclear whether 'existing' includes infrastructure that has been substantially upgraded since the commencement of the Standards, where there has been ample opportunity to ensure the improved facilities met them.

The Commission could reasonably decline to grant an exemption that applies to any conveyance or infrastructure that commenced service or has been substantially upgraded since the commencement of the Standards.

Compliance with the Standards is widely claimed

The recent *Final Report of the Review of the Disability Standards for Accessible Public Transport* highlights that State Governments report that their rail systems are largely compliant with the Standards. For instance, in Victoria, it is reported that over 90 per cent of trains are accessible, and around 55 per cent of infrastructure is accessible.⁸ Given that most jurisdictions claim they are compliant or close to compliant with the Standards, it seems inconsistent that the ARA seeks broad exemptions from the Standards due to the extreme difficulty in achieving compliance.

Given that State Governments claim their public transport systems are largely compliant with the Standards, and claim to have largely met the milestones required by them, there appears to be little justification for the Commission to grant exemptions to the Standards for rail operators.

⁸ Department of Infrastructure and Regional Development, *Review of the Disability Standards for Accessible Public Transport 2002: Final Report*, 2015, pp.27-33

Potential conditions on any exemption

VCOSS does not support the exemption application. However, we are aware that, having previously granted a similar exemption, the Commission may again grant all or part of this exemption application. In these circumstances, VCOSS would request the Commission to consider the following limitations or conditions on any exemption.

Limiting the exemption to specified operators

If the Commission is considering granting any part of the application, VCOSS requests that the particular operators it is intended to cover are individually listed as the persons granted the exemption. Inclusion should not be contingent on membership of the ARA, and the Commission should ensure that all listed operators have consented to the application.

As previously observed, the application is ambiguous as to whether it applies only to the 10 members listed in Appendix 1, or to all ARA members. The application is also ambiguous as to whether non-current members could be added to the exemption by joining the ARA, or whether the exemption ceased to apply if an operator ceased to be a member of the ARA. This ambiguity could be resolved if the Commission individually listed the operators to whom the exemption applied.

Limiting elements only to operators requiring them

If any part of the application is granted, VCOSS requests that the Commission consider whether each operator listed requires every specific element of the application. Where an element only applies to a single or limited number of operators, the exemption to that element could individually name the operator(s) to which it applies, while continuing to require that other operators meet the Standards.

For example, the application requests an exemption from the requirement to provide an access path to all doorways, and gives the reason that because of the legacy difficulties with infrastructure and vehicles, the 'boarding gap' cannot be met at all doors, requiring manual deployment of a ramp by the driver or guard at a nominated door. This exemption is not required by all operators. For instance, V/Line trains have a conductor on board all services who can assist with deploying a boarding ramp at potentially any door.

Limiting the exemption to legacy infrastructure

If any part of the application is granted, VCOSS requests that the Commission consider restricting the exemption to infrastructure and conveyances that began operation before the 2002 commencement of the Standards, excluding any that have been substantially upgraded since.

While there are particular instances where the design and siting of infrastructure and conveyances procured before the commencement of the Standards has presented challenges for retro-fitting, this does not apply for new infrastructure and conveyances, or those that have been substantially upgraded since. In these circumstances, infrastructure and conveyances can be reasonably expected to comply. New infrastructure and conveyances have been procured in full knowledge of the standards, while substantial upgrades provide considerable resources to meet compliance.

The term 'existing' should be avoided in any exemption, as this does not give a clear criterion to divide 'legacy' from 'new' infrastructure.

Preventing retrograde changes

If any part of the application is granted, VCOSS requests that the Commission consider excluding use of the exemption to reduce the level of compliance where conveyances or infrastructure had previously met the Standards. This is in keeping with the human rights concept of progressive realisation. The current application is so broad that it potentially allows the exemption to operate in circumstances where conveyances or infrastructure already meet the Standards, making it lawful for operators to reduce the level of compliance to the level allowed for by the exemption.

Limiting the exemption to the end of the milestone target period

If any part of the application is granted, VCOSS requests that the Commission consider limiting the time period for the exemption to the end of the current milestone target period, at 31 December 2017. The circumstances for considering exemptions for this milestone period are substantially different to the next period, with the targets being 55 per cent and 90 per cent respectively. Any exemptions for these two periods should be considered separately.

Refuse elements where milestone target can be met

If the Commission is considering granting any part of the application, VCOSS requests that the Commission determine which operators could be reasonably able to meet the milestone target for a particular element, and exclude those operators from that element. In the case that no operator can demonstrate that they cannot reasonably meet the target for an element, that element could be excluded.

As previously presented, many elements of the application are subject to milestone targets, and the applicant has not provided evidence that the issues identified are so widespread that they prevent all operators from reaching the current milestone targets. Where an issue is identified that only affects a minority of services, this does not prevent the targets being reached, and hence does not require an exemption. Similarly, the circumstances of operators vary considerably, and the Commission could make sure that it was only granting exemptions to the particular operators whose issue was so widespread that it could reasonably prevent them achieving the targets.

Substitute reduced target rather than exemption

If the Commission is considering granting any part of the application, VCOSS requests that the Commission consider substituting a reduced milestone target rather than a complete exemption for each element.

Many of the elements identified in the application are subject to milestone targets which have been at least partially met. It would seem to be unduly broad to completely exempt conveyances and infrastructure from an element of the Standard where some progress had been made toward compliance. Substituting a lower, achievable, milestone target specific to each operator in these circumstances is preferable to completely exempting operators from any responsibility to meet that element of the Standards.

Clarify the modes to which the exemption applies

If the Commission is considering granting any part of the application, VCOSS requests that the Commission ensure the exemption is limited to those transport modes for which it is intended to apply.

Many of the members of the Australian Railways Association operate public transport services other than trains and trams. Some parts of the application request a general exemption to an element, and do not specifically state that they only apply to train and/or tram transport services.⁹ Feasibly, this could be interpreted to mean that operators are exempt from those elements of the standards where they provide services using other transport services, for instance, rail replacement buses or coach services. In addition, some of the elements only give reasoning associated with train services, and make no reference to tram systems.

The Standards often separately consider the application of the Standards to train and tram systems, and this convention could be followed if any exemption were granted. Use of the general term 'rail' should be avoided, as it is ambiguous as to whether this is intended to apply to trains, trams or both. Further, transport interchanges often feature facilities that cater for a multiplicity of modes, allowing people to change between trains, trams or buses. It could similarly be interpreted that in these circumstances the exemption applied to the entire facility, rather than those parts solely dedicated to interacting with trains and/or trams.

The Commission could ensure that any exemption clearly stated whether the exemption applied trains, trams, or both, and further specify that it only applied to those parts of a multi-modal facility for that part dedicated to providing services on that mode.

⁹ For instance, the application does not specify a rail environment for exemptions for sections 21.2 or 21.3, pp.69-71

Require taking all reasonable steps to comply

If any part of the application is granted, VCOSS requests that the Commission consider limiting the exemption to circumstances where the operator has taken all reasonable steps to comply with the Standards before relying on the exemption.

We remain concerned that on occasion, people with disability report that operators respond to accessibility complaints by pointing out that they are exempt from the Standards, rather than determining whether relatively simple changes to practice or facilities could allow services to meet the Standards. The applicant states in several places that, in their view, operators do take all reasonable steps to comply with the Standards, so we could reasonably infer that they would not oppose this condition.

For example, V/Line coaches recently made a change to their policy on allocated spaces, requiring coaches to leave the allocated spaces free of removable seating, so that a person requiring an allocated space did not need to make a booking ahead of time for the allocated space to be available. This simple change in practice allowed V/Line to comply with section 28.2 of the Standards.

To help encourage operators to assess the feasibility of meeting the Standard before relying on the exemption to defend their practices, the Commission could place a condition on any exemption that it applies only where an operator had first undertaken all reasonable steps to comply with the Standard.

Require notification of non-compliance due to exemptions

If any part of the application is granted, VCOSS requests that the Commission consider limiting the exemption to circumstances where the operator has taken all reasonable steps to inform passengers that services do not meet the Standards due to the exemption.

As the Standards are progressively implemented, people with disability are increasing their expectations that services will be accessible and compliant with the Standards. Granting exemptions to the Standards fails to meet these expectations, as passengers have not been informed that operators have been excused from meeting them. If the Commission required that operators take all reasonable steps to inform passengers of their exemptions from the Standards, people would develop a greater understanding of the reasons services fail to meet the Standards.

Require alternative transport where exemption results in inaccessibility

If any part of the application is granted, VCOSS requests that the Commission consider placing a condition on the exemption that customers who cannot use the transport as a result of the exemption are provided with an alternate transport option to reach their desired destination at an equivalent fare.

Ultimately, the purpose of public transport is for people to reach their desired destination. The proposed exemption will reduce some people's ability to do. To help reduce the effect of the exemption on people's ability to travel, the Commission could include a condition that the operator is required to provide an alternative transport service (such as a taxi) at an equivalent fare, if the reason the person could not use the transport was a result of the exemption.

This would also encourage operators to provide innovative solutions to enabling people to use the public transport, even if it was by means other than full compliance with the Standards, as if interim and relatively low-cost solutions could be found to allow people to use the transport, then operators would not have to fund an alternative transport option. This would help focus operators on providing accessibility outcomes, even in situations where they are not required to comply with the Standards.

Require public reporting of compliance status and progress

If any part of the application is granted, VCOSS requests that the Commission consider placing a condition that any operator relying on the exemption publicly report reports publicly every 12 months on the current level of compliance with the Standards (excluding any exemptions), and the progress achieved since the last report, including the percentage level of compliance for each element for which an exemption has been granted.

A number of elements of the Commission's previous exemption to the ARA included a condition that the ARA and/or operators report to the Commission on its impact or progress made towards improving accessibility. These reports have not been publicly available, so we are unable to make any judgement about their quality. We also observe that the applicant has not proposed continuing these conditions.

There is a lack of transparency in reporting that makes monitoring the quality and impact of the Standards difficult. There is very little public information on the extent of the effect of the Standards or the level of compliance by individual operators. By including a requirement that operators exempted from any elements of the Standards make regular reports on the extent of non-compliance and the progress towards achieving compliance, greater understanding can be generated about their application and effects.

By extending the reporting requirement, to include public dissemination of reports, the Commission could not only provide a more substantive basis for policy discussion, but also allow for a more inclusive public discussion.

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