

# AUSTRALIAN HUMAN RIGHTS COMMISSION

**DISABILITY DISCRIMINATION ACT 1992 (Cth), Section 55**

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

**DISABILITY (ACCESS TO PREMISES – BUILDINGS) STANDARDS 2010 (Cth),  
Section 5.1**

## **NOTICE OF PRELIMINARY VIEW ON APPLICATION FOR TEMPORARY EXEMPTIONS: AUSTRALASIAN RAILWAY ASSOCIATION**

The Australian Human Rights Commission ('the Commission') gives notice of its preliminary view regarding an application made by the Australasian Railway Association ('ARA') on behalf of certain of its members for temporary exemptions pursuant to s 55 of the *Disability Discrimination Act 1992 (Cth)* ('DDA'), s 33A.1 of the *Disability Standards for Accessible Public Transport 2002 (Cth)* ('Transport Standards'), and s 5.1 of the *Disability (Access to Premises – Buildings) Standards 2010 (Cth)* ('Premises Standards').

### **1 THE APPLICATION**

1.1 The ARA is a peak industry body representing rail operators, track owners and managers, manufacturers, construction companies and other entities that form part of the rail sector. The ARA has made an application, on behalf of certain of its members listed in Schedule Two, for temporary exemptions from the following provisions in the following form:

- (i) section 2.1 of the Transport Standards: For a period of 5 years, flange gaps of up to 75mm are permitted where a level crossing forms part of an access path on rail premises or rail infrastructure
- (ii) section 2.6 of the Transport Standards: For a period of 5 years, an access path is only required at a single door of existing rail conveyances
- (iii) section 6.4 of the Transport Standards: For a period of 5 years, where the relationship between the platform and rail carriage means that an external boarding ramp can only be provided at a gradient greater than 1 in 8 and less than 1 in 4, ARA members are not required to provide staff assistance to customers to ascend or descend the ramp
- (iv) section 8.2 of the Transport Standards: For a period of 5 years, a manual or power assisted boarding device is only required at a single door rather than all doors of a rail conveyance, and
- (v) clause H2.2(1) of the Access Code for Buildings ('Access Code') in Schedule 1 of the Premises Standards: For a period of 5 years, flange gaps of up to 75mm are permitted where a level crossing forms part of an access path on rail premises or rail infrastructure.

1.2 An 'access path' is 'a path that permits independent travel for all passengers within public transport premises, infrastructure or conveyances' (Transport Standards, s 1.9). The term 'conveyances' includes, relevantly, trains, trams, light rail,

monorails and rack railways (Transport Standards, s 1.12). An 'accessway' is 'a continuous accessible path of travel (as defined in AS 1428.1) to, into or within a building' where 'accessible' means 'having features to enable use by people with a disability' (Premises Standards, cl A1.1 of Schedule 1).

- 1.3 A 'flange gap' is the gap between the steel rail track and the road or surrounding pavement that permits train wheels to safely travel through level crossings. A 'level crossing' is an intersection where a railway line crosses a road or path at the same level, rather than travelling above or under the road or path using an overpass or tunnel. Flange gaps are required at level crossings to allow a train's wheels to pass without obstruction.
- 1.4 In the context of rail premises and rail infrastructure, an access path or accessway includes the route which provides access to a conveyance and may require passage through a level crossing and, therefore, across flange gaps. Flange gaps pose a potential safety risk to pedestrians traversing a level crossing, including to those using assistance devices such as wheelchairs, wheeled walkers and walking canes which may become trapped in the gap.
- 1.5 In the context of trains, an access path includes the route which provides continuous and unhindered passage between the platform and the train and from the door of the train to the facilities and designated spaces provided on the train for passengers with disabilities, such as allocated spaces for wheelchairs and mobility aids and accessible toilets.

## **2 PRELIMINARY VIEW OF THE COMMISSION**

- 2.1 The Commission is of the preliminary view that temporary exemptions should be granted to the members of the ARA listed in Schedule Two pursuant to s 55 of the DDA, s 33A.1 of the Transport Standards, and s 5.1 of the Premises Standards, in the terms set out in Schedule One, and subject to the terms and conditions described in that schedule.
- 2.2 The preliminary view, based on advice from a technical expert engaged by the Commission, proposes to grant exemptions from 5 provisions of the Transport Standards and one provision of the Premises Standards for a period of 5 years, which is a reduction from exemptions from 30 provisions of those standards granted to members of the ARA in 2015.
- 2.3 Each exemption from the 6 provisions of the relevant standards is proposed to be granted subject to conditions requiring the relevant members of the ARA to take steps during the exemption period which are designed to eliminate the need for a future exemption. If those conditions are not complied with by a member of the ARA relying on the benefit of the exemption, those parts of the exemption would not apply in respect of that member of the ARA and a person affected by a breach of the relevant provision of the Transport Standards or Premises Standards may make a complaint to the Commission.
- 2.4 The Commission may, in its discretion, publish details of the ARA members that do or do not have the benefit of any exemptions ultimately granted having regard to the ARA member's compliance with the relevant conditions.

### **3 CONSIDERATION AND REASONS**

3.1 In reaching its preliminary view, the Commission considered the following:

3.1.1 the ARA's application and submissions

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

3.1.3 a letter from the Accessible Public Transport Jurisdictional Committee ('APTJC') dated 29 September 2020

3.1.4 submissions from other interested parties

3.1.5 ARA's response to the public submissions dated 13 November 2020

3.1.6 an expert report commissioned by the Commission, and

3.1.7 submissions from interested parties and the ARA with respect to the expert report.

3.2 These documents, with the exception of submissions provided to the Commission on a confidential basis, are available on the Commission's website at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth#ARA2020>.

3.3 In making its preliminary view, 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 Premises Standards

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

3.3.5 the Commission Guidelines: *Temporary Exemptions under the Disability Discrimination Act (2010)*, and

3.3.6 the Commission's *Guideline on the Application of the Premises Standards (version 2)* ('Premises Guidelines').

3.4 The history of the application and the reasons for the Commission's preliminary view are set out in sections 6 to 11 below.

### **4 MEANING OF IMPORTANT TERMS**

4.1 For the purposes of this preliminary view, 'rail' means trains, light rail and trams.

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

4.3 Unless the contrary intention appears, any term used in this preliminary view and in the Premises Standards has the same meaning in this preliminary view as it has in the Premises Standards.

4.4 Unless the contrary intention appears, any term used in this preliminary view and in the DDA has the same meaning in this preliminary view as it has in the DDA.

## **5 REVIEW OF FINAL DECISION**

5.1 Pursuant to s 56 of the DDA, s 33A.4 of the Transport Standards and s 5.4 of the Premises 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 final decision reached by the Commission by or on behalf of any person or persons whose interests are affected by the decision.

## **6 BACKGROUND**

6.1 The ARA is an association incorporated in the Australian Capital Territory. It is a peak industry body representing rail operators, track owners and managers, manufacturers, construction companies and other entities that form part of the rail sector.

6.2 On 22 January 2007 and 5 November 2007, the Commission granted members of the ARA a number of exemptions from the DDA and the Transport Standards pursuant to ss 55(1) and 55(1A) of the DDA. The Commission extended the effect of these by granting further exemptions on a number of occasions. Those exemptions expired on 30 September 2015.

6.3 On 1 October 2015, the Commission granted members of the ARA further exemptions from the DDA. The exemptions were granted from 21 provisions of the Transport Standards and 9 provisions of the Premises Standards pursuant to s 55 of the DDA ('the 2015 exemptions'). Those exemptions expired on 30 September 2020.

6.4 On 31 July 2020, prior to the expiry of the 2015 exemptions, the ARA made a new application to the Commission for exemptions under the DDA, the Transport Standards and the Premises Standards on behalf of certain of its members.

## **7 THE APPLICATION**

7.1 The ARA has applied, on behalf of certain of its members, for temporary exemptions from:

- sections 2.1 (access paths), 2.6 (access paths), 6.4 (ramps) and 8.2 (boarding) of the Transport Standards, and
- clause H2.2(1) of the Access Code (accessways) in the Premises Standards.

7.2 Schedule 1 of the Transport Standards and section 3.1 of the Premises Standards provide for levels of compliance with the respective standards by prescribed dates. For access paths, ramps and boarding under the Transport Standards, and accessways under the Premises Standards, 90% compliance with the respective standards was required by 31 December 2017. The Premises Standards require

full compliance by 31 December 2022 and full compliance with the Transport Standards is required by 31 December 2032.

- 7.3 The temporary exemptions sought in this application were previously granted to certain members of the ARA with conditions as part of the 2015 exemptions.
- 7.4 The application does not expressly seek exemptions from provisions of the DDA. Sections 23 and 24 of the DDA are provisions of general application which have the effect of making it unlawful to discriminate on the ground of disability in relation to access to premises and the provision of goods and services. The Commission understands that the intention of the ARA in seeking the exemptions identified in the application is to ensure that its members, insofar as they act in accordance with an exemption granted under the Transport Standards or the Premises Standards, will not be found to have acted unlawfully under ss 23 or 24 of the DDA.
- 7.5 The ARA asks that these exemptions be granted for a period of 5 years. This is the maximum period of time that a temporary exemption may be granted for. Further exemptions may be granted from the same provisions, again for a maximum period of 5 years at a time.
- 7.6 A copy of the ARA's application can be found on the Commission's website at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth#ARA2020>.
- 7.7 The members on behalf of which the application is made by the ARA is set out in Schedule Two to this preliminary view.

## **8 THE COMMISSION'S PROCESSES**

- 8.1 On 28 August 2020, the Commission called for public submissions concerning the merits of the application and commenced a four-week public consultation period. The Commission did this by:
- publishing the application 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 persons with disabilities, inviting them to make submissions, and
  - writing to the Accessible Public Transport Jurisdictional Committee (APTJC), inviting it to make submissions.
- 8.2 In this way, the Commission satisfied its obligation to consult with the APTJC, pursuant to s 33A.1(4)(a) of the Transport Standards and s 5.1(4)(a) of the Premises Standards.
- 8.3 In addition to a response from the APTJC, the Commission received 11 submissions during its public consultation, 2 of which were provided to the Commission on a confidential basis. A list of the non-confidential submissions received by the Commission is included in Schedule Three to this preliminary view.

Copies of those submissions were made available on the Commission's website and the ARA was given the opportunity to reply to those submissions.

- 8.4 On 13 November 2020, the ARA provided a supplementary written submission to the Commission, addressing matters raised in the public submissions.
- 8.5 This application, and the submissions received in relation to it, raise a number of technical issues about limitations affecting rail conveyances, rail premises and rail infrastructure, the requirements of the Transport Standards and Premises Standards in relation to these, and the extent to which compliance with the Transport Standards and Premises Standards is difficult or impossible to achieve. To assist in assessing these matters, the Commission engaged an external expert consultant from Equal Access Group to provide advice in relation to the application.
- 8.6 On 1 February 2021, the Commission wrote to the ARA requesting further information and documents. On 22 April 2021, the ARA provided additional information which it identified as 'confidential' to the Commission on the basis that it is not made public.
- 8.7 On 20 May 2021, representatives of the Commission attended a site visit to inspect certain infrastructure relevant to the application.
- 8.8 On 1 July 2021, Ms Shiels provided an expert report to the Commission. That report was made available on the Commission website on 5 July 2021. The Commission notified the ARA, the APTJC and members of the public who had previously made submissions of the publication of the report and invited comment on aspects of the report by 30 July 2021. In particular, all parties were invited to comment on the conditions Ms Shiels recommended be imposed on any temporary exemption she considered should be granted.
- 8.9 The ARA and 3 members of the public provided further submissions in response to the expert report. A list of the submissions received by the Commission is included in Schedule Three to this preliminary view. Copies of those submissions were made available on the Commission's website and the ARA was given the opportunity to reply.
- 8.10 On 13 August 2021, the ARA informed the Commission that it did not intend to provide a reply to the public submissions concerning the expert report.
- 8.11 The public submissions, the ARA's response to the public submissions, the expert report and the public submissions responding to the expert report can be accessed on the Commission's website at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth#ARA2020>.
- 8.12 The Commission has considered all of the materials referred to above in reaching its preliminary view in relation to the application.

## **9 PROCEDURAL FAIRNESS CONSIDERATIONS**

- 9.1 The Commission considers that, consistent with fundamental principles of procedural fairness, the process set out above has provided both the applicants

and the public with an adequate opportunity to comment on this application for temporary exemptions and the expert report provided by Ms Shiels.

- 9.2 The applicants supplied the Commission with both public and confidential information. This information was provided to the expert retained by the Commission for consideration in the technical analysis of the application. Broadly, the confidential information relates to further work, research and analysis undertaken by the ARA and its members in pursuit of progressing compliance with the standards and a report of the Australasian Centre for Rail Innovation (ACRI) concerning further analysis and options for addressing the issue of flange gaps.
- 9.3 After considering all of the information, the Commission has not needed to rely upon the confidential information in reaching its preliminary view. The Commission considers that, for the issues and facts relevant to the exercise of its discretion in this exemption application, the material available on the public record, including the expert report, is sufficient. The confidential information does not materially expand the factual matrix that the Commission considers determinative.
- 9.4 Given this, it was not necessary for the Commission to consider further whether its duty to afford procedural fairness required the disclosure of any of the confidential information to interested parties for comment.

## **10 LEGISLATIVE REGIME AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS**

### ***The DDA, the Transport Standards and the Premises Standards***

- 10.1 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).
- 10.2 The DDA also empowers the Minister to formulate disability standards (s 31(1)). The Transport Standards and the Premises Standards are disability standards made under this provision.
- 10.3 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)). At the time they were made, the Transport Standards regulated aspects of conveyances, premises and infrastructure used to provide public transport services.
- 10.4 The Premises Standards came into operation on 1 May 2011. Those standards regulate aspects of buildings, and facilities and services within buildings. They include, in Part H2 of the Access Code, a series of standards applicable to certain buildings and structures which are designated 'public transport buildings'. Public transport buildings include assembly buildings and certain other structures used for public transport.
- 10.5 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 discriminate unlawfully on the ground of disability.

10.6 Conversely, pursuant to s 32 of the DDA, it is unlawful to contravene a disability standard.

### ***The Commission's powers to grant exemptions***

10.7 Parliament has conferred broad powers on the Commission to grant exemptions under the DDA (s 55), the Transport Standards (s 33A.1) and the Premises Standards (s 5.1).

10.8 The effect of an exemption under the Transport Standards and the Premises Standards is that, where a person fails to comply with either the Transport Standards or the Premises Standards, but that failure is in accordance with an exemption that has been granted by the Commission, the person does not contravene the standards (Transport Standards s 33A.3; Premises Standards s 5.3). However, this does not automatically mean that the person's conduct is 'in accordance with' the relevant disability 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 would ordinarily also seek an exemption from the DDA.

10.9 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.

10.10 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. A failure to comply with a condition attached to an exemption means that the exemption will no longer apply and complaints of unlawful discrimination under the DDA as a result of the activities or circumstances which had been covered by the exemption may be brought against the beneficiary of that exemption.

10.11 Pursuant to s 55(1) of the DDA, the Commission's exemption power is exercisable 'on application' and any exemption is to be granted 'by instrument'. An exemption is to be granted for a period, specified in the instrument, not exceeding 5 years (DDA s 55(3)(c)). Despite this temporal limitation, the Commission is empowered by s 55(2) of the DDA to grant a 'further exemption' on application made before the expiration of the specified period. An exemption or further exemption may be granted 'subject to such terms and conditions as are specified in the instrument' and 'may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument' (DDA s 55(3)(a) and (b)). The current application seeks exemptions which are 'further exemptions'.

10.12 Section 33A.1(2) of the Transport Standards confers power on the Commission to grant an exemption from compliance 'with some or all' of the Transport Standards. This power is exercisable only 'after receiving an application' under s 33A.1 (Transport Standards s 33A.1(2)) and only after consultation with the APTJC occurs in accordance with s 33A.1(4). Consistent with exemptions under the DDA, exemptions from the Transport Standards 'must not be granted for a period of

more than 5 years' (Transport Standards s 33A.1(5)), however a 'further exemption' can be granted on application made before the expiration of the specified period (Transport Standards s 33A.1(3)).

- 10.13 Section 5.1(2) of the Premises Standards confers power on the Commission to grant an exemption from compliance 'with some or all' of Part H2 of the Access Code in the Premises Standards. As with the Transport Standards, this power is exercisable only 'after receiving an application' under s 5.1 (Premises Standards s 5.1(2)) and only after consultation with the APTJC occurs in accordance with s 5.1(4). Further, exemptions from the Premises Standards 'must not be granted for a period of more than 5 years' (Premises Standards s 5.1(5)), however a 'further exemption' may be granted on application made before the expiration of the specified period (Premises Standards s 5.1(3)).
- 10.14 Notwithstanding the few express limitations referred to above, the Commission's power to grant exemptions from compliance with the DDA, the Transport Standards or the Premises Standards is otherwise unconfined. Consistent with established principles of administrative law, the Commission's statutory discretion must be exercised in conformity with the subject matter, scope and purpose of the legislation under which it arises: *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 144 CLR 45 at 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22], [31].
- 10.15 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.
- 10.16 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.
- 10.17 However, this exemption power must be interpreted in light of the objects of the DDA and the legislative scheme as a whole. The DDA defines discrimination and makes discrimination on the grounds of disability unlawful. The grant of an exemption pursuant to s 55 of the DDA, s 33A.1 of the Transport Standards or s 5.1 of the Premises Standards has the effect of taking relevant conduct out of the

DDA's prohibitions and denying redress to a person who is affected by that conduct for the period covered by the exemption. While the exemption powers in the DDA, the Transport Standards and the Premises Standards recognise that there might be circumstances where a derogation from their prohibitions is appropriate, the effect of an exemption is to qualify the norms of conduct that the DDA, the Transport Standards and the Premises Standards seek to establish.

- 10.18 Consequently, the Commission considers that exemptions should not be granted lightly. In exercising its statutory discretion, the Commission must have regard to the circumstances of each individual case and balance the relevant factors. Given the significant legal consequences for potential complainants, the Commission must be satisfied that a temporary exemption is appropriate and reasonable, and persuasive evidence is needed to justify the exemption.
- 10.19 The Commission issued guidelines in 2010 (see [3.3.4]) concerning the way in which it proposes to exercise its power under the DDA. 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.
- 10.20 The Commission's guidelines do not expressly deal with the Commission's powers to grant exemptions under the Transport Standards or the Premises 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.

## **11 PRELIMINARY VIEW**

- 11.1 The purpose of the Transport Standards is 'to enable public transport operators and providers to remove discrimination from public transport services' (Transport Standards 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.

11.2 This is emphasised in section 1.2(4) of the Transport Guidelines 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.

11.3 The objects of the Premises Standards set out in s 1.3 are:

- (a) to ensure that dignified, equitable, cost-effective and reasonably achievable access to buildings, and facilities and services within buildings, is provided for people with a disability; and
- (b) to give certainty to building certifiers, building developers and building managers that, if access to buildings is provided in accordance with these Standards, the provision of that access, to the extent covered by these Standards, will not be unlawful under the Act.

11.4 Schedule 1 of the Transport Standards and section 3.1 of the Premises Standards provide for levels of compliance with the respective standards by prescribed dates. The staged requirements for compliance implement a mechanism for existing premises, infrastructure and conveyances still in use to be progressively made accessible over an extended period of time. Relevantly, for access paths, ramps and boarding under the Transport Standards, and accessways under the Premises Standards, 90% compliance with the respective standards was required by 31 December 2017. The Premises Standards require full compliance by 31 December 2022, 12 years after implementation of those standards, and full compliance with the Transport Standards is required by 31 December 2032, 30 years after implementation of those standards.

### ***Reasons for seeking temporary exemptions***

11.5 The ARA seeks the further exemptions on behalf of certain of its members. The reasons given by the ARA for seeking these exemptions include the following:

- multiple layers of complexity impact on the ability for Australian passenger rail operators to comply with the Transport Standards
- accessibility improvements have relied on significant funding from state governments and rail operators
- the temporary exemptions sought were previously granted to members of the ARA, are significantly reduced from the 2015 exemptions, and do not include requests for temporary exemptions which were previously denied by the Commission.

11.6 While ARA members have indicated that accessibility improvements to date have involved significant expenditure, they have not said that the necessary further expenditure to achieve full compliance would impose an unjustifiable hardship on them. The Commission is of the view that the fact that compliance with the

Transport Standards and Premises Standards would involve further expenditure is not a sufficient reason for a temporary exemption to be granted. Instead, any claim of unjustifiable hardship by members of the ARA is a matter that would be open for them to raise as a defence to a claim that they have not complied with the relevant standards.

Temporary exemption from s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards

- 11.7 Section 2.1(2) of the Transport Standards provides that an ‘access path that allows unhindered passage must be provided along a walkway, ramp or landing’ and, along with cl H2.2 of the Access Code in the Premises Standards provides that an access path, or accessway, must comply with AS1428.2. The ARA states that this standard is silent on flange gaps and where level crossings form part of the access path. As set out above, flange gaps are the gaps between the steel rail track and the road that permits train wheels to safely travel through level crossings. Where a level crossing forms part of an access path, flange gaps may pose a barrier to unhindered passage.
- 11.8 The ARA stated that, without guidance in the relevant standards, AS1742.7 ‘Manual of uniform traffic control devices’ should be considered, which stipulates that, where footpaths cross railway tracks, the flange gap shall be 65mm for newly constructed level crossings and maintained to a maximum of 75mm. The ARA considers this to be in direct conflict with the standards, as well as s 8.2 of the Transport Standards which allows for a horizontal gap of up to 40mm for unassisted boarding at an accessible entrance of a conveyance.
- 11.9 The ARA noted that Western Australia’s Public Transport Authority (PTAWA) has implemented a program to minimise flange gaps at pedestrian crossings to less than 75mm, with an aim to achieve a gap of 55mm. It also referred to a report it commissioned from Monash University concerning a review of the Transport Standards and Premises Standards which considered standards in the European Union (EU) that provide that wheelchairs being used around railways should be able to accommodate a horizontal gap of 75mm and a vertical gap of 50mm.
- 11.10 The ARA stated that various ‘gap filler’ products have been researched and trialled to reduce or remove flange gaps, however there are limited options which are suitable for Australia’s rail environment. It referred to trials of veloSTRAIL by V/Line and by MTM and the STRAIL filler product by the PTAWA. It also referred to a research report released by the ACRI which evaluated the effectiveness of products marketed as solutions for flange gaps in Australia and internationally. The ARA summarised the findings of the ACRI report as follows:
- the majority are made for low speed tracks (<40km/hr) not high track speeds;
  - there is an inspection and maintenance requirement to ensure the product does not become dislodged and create further tripping hazards;
  - compression products can strip grease from the wheels of rolling stock, creating slip hazards for people walking over the site;
  - further research and testing are required for most products.

Introduction of a product that has not been tested, researched or proven successful in all situations, would create further risk in an already high-risk environment. Whilst the best outcome is gap elimination, without an adequately tested and researched product, that is suitable in all environments (high and low pedestrian movement, high speed and low speed tracks and all weather), the implementation of a flange gap filler has the potential to create additional risks, at the most extreme, potential train derailment.

- 11.11 The ARA says that the remaining option is grade separation which requires large scale infrastructure upgrades to create an overbridge or underpass to separate rail from the road, however this approach is costly, increases passenger travel time and physical effort and is not always appropriate, particularly in remote or regional areas.
- 11.12 The ARA considers an appropriate flange gap filler to be a more cost and time-effective solution than grade separation and states that it will continue to pursue a suitable option. However, until a tested and researched product is available, it proposes that the same requirements in AS1742.7 should be considered appropriate – that is, flange gaps shall be 65mm for newly constructed level crossings and maintained to a maximum of 75mm. It says that granting this exemption will align the requirement for flange gaps to an existing standard and provide ARA members with ‘a defined standard to achieve a safe, functional outcome for people traversing level crossings’.

#### Temporary exemption from s 2.6 of the Transport Standards

11.13 Section 2.6 of the Transport Standards provides for:

- an access path that allows continuous and unhindered passage to be provided with a minimum width of at least 850mm (or 800mm if the conveyance exists or is ordered before commencement of the section), and
- the above requirement to apply to doorways and stairs, and between entrances, exits, allocated spaces and other essential facilities for passengers using wheelchairs and other mobility aids.

11.14 The ARA states that it does not seek an exemption from s 2.6 of the Transport Standards concerning the internal access path requirements or door widths, however it says that an exemption is required to provide certainty that an access path and assisted boarding devices (as required by s 8.2 of the Transport Standards) are only required at a single door of rail conveyances, rather than all doors. This is because the Transport Standards do not expressly state that all doors should be accessible and do not define ‘accessible doorway’.

11.15 Further, the ARA considers the exemption to be necessary because the Transport Standards encourage consolidation of onboard accessible amenities and, in the view of the ARA, nominating a primary boarding point:

- ensures that customers who may require an allocated space or onboard accessible facilities can easily identify where they should board given that allocated spaces are not provided in all carriages

- provides clarity to customers who require direct boarding assistance, noting that '[c]ustomers who do not require direct assistance are not prevented from using other boarding points'
- provides consistent accessible boarding at a dedicated location across the entire network, providing familiarity for customers
- allows customers to access onboard allocated spaces which provide safety benefits for customers using mobility devices by guiding customers to stop front-to-back so that if a train or tram must stop urgently, the risk of tipping is reduced, and
- provides certainty to operators, allowing rail customer service staff to identify customers who may require direct assistance and in the interests of providing a reliable service, allow quick deployment of a ramp and customer assistance to meet the needs of customers.

#### Temporary exemption from s 6.4 of the Transport Standards

11.16 Section 6.4 of the Transport Standards provides that the slope of an external boarding ramp must not exceed:

- (a) 1 in 14 for unassisted access
- (b) 1 in 8 for unassisted access where the ramp length is less than 1520mm, and
- (c) 1 in 4 for assisted access.

11.17 The ARA states that, due to the variety of rolling stock and varied platform heights and shapes, the gap between the train and the platform can differ with different rolling stock. Site constraints and legacy infrastructure at many stations means that significant structural and track works with significant impact on the network are required to achieve compliance. Due to large cost implications and heritage limitations, localised solutions are being considered, such as raising sections of a platform, to improve accessibility and support independent access.

11.18 The ARA seeks an exemption from s 6.4 of the Transport Standards to ensure that rail staff are not required to physically assist customers using a boarding ramp when the gradient is larger than 1 in 8 and less than 1 in 4. It considers this to be necessary due to the potential for injury and occupational health and safety risks to rail staff. It states that free travel is available for any carer or companion of a person who holds a Companion Card issued by the Department of Health and Human Services.

#### Temporary exemption from s 8.2 of the Transport Standards

11.19 Section 8.2 of the Transport Standards provides that a manual or power assisted boarding device must be available at an accessible entrance to a conveyance that has a vertical gap exceeding 12mm or a horizontal gap exceeding 40mm.

11.20 Further to the reasons set out above for the exemptions sought from s 2.6 and 6.4 of the Transport Standards, the ARA states that an exemption from s 8.2 of the Transport Standards is required to provide certainty that assisted boarding devices are only required at a single door of rail conveyances, rather than all doors. This is

because the different rolling stock and varied heights of the platforms means there is inconsistency in alignment between the platform and the conveyance. The ARA considers that providing a ramp at a nominated boarding point ensures certainty to passengers and efficiency in deployment of the device, ensuring the train is not delayed and does not impact all passengers.

### ***Submissions of interested parties***

- 11.21 In addition to a response from the APTJC, the Commission received 11 submissions concerning the application from a variety of government agencies, individuals and disability advocacy groups.
- 11.22 The response from the APTJC advised that ‘a majority of the members made no comment or did not express a position concerning the application’, however it noted that the Victorian Department of Transport and Transport for New South Wales, both members of the APTJC and members of the ARA on whose behalf this application is made, provided support for the application.
- 11.23 The majority of the public submissions opposed the grant of the exemptions sought by the ARA for reasons including the following:
- members of the ARA have had 18 years to comply with the Transport Standards and have had the benefit of exemptions from compliance for more than 13 years
  - it is not appropriate for long-term blanket exemptions to be granted or exemptions to be granted as a theme
  - exemptions should only be granted in exceptional circumstances and members of the ARA should not continuously seek temporary exemptions from compliance
  - rather than seeking temporary exemptions, members of the ARA should rely on the mechanisms of equivalent access and unjustifiable hardship provided for in the legislation
  - the need for, and delay to, the modernisation of the Transport Standards does not explain or resolve the non-compliances by the members of the ARA with the Transport Standards, should not delay compliance with the Transport Standards, and is no basis for the grant of further exemptions
  - the exemptions sought do not satisfy the objects of s 3 of the DDA
  - with respect to the exemptions sought from s 2.1 of the Transport Standards and cl H2.2(1) of the Access Code in the Premises Standards:
    - flange gap technologies have been investigated for more than two decades with various solutions identified, including veloSTRAIL for speed trains up to 120 km/h, and
    - access paths which cross railway tracks pose a significant safety hazard and identifying a solution should be a priority

- with respect to the exemptions sought from ss 2.6 and 8.2 of the Transport Standards, allocating a single boarding point significantly discriminates against people with disabilities, including because they may:
  - be required to travel to the extreme end of a platform away from designated safe zones, call buttons and shelters
  - be required to pass several doors of the conveyance labelled with the international accessibility sign and have allocated spaces inside those carriages
  - encounter difficulty in safely navigating from the entrance to the designated boarding areas at times of high patronage, including moving dangerously close to the edge of the platform, and
  - not have sufficient time to travel from the designated boarding area to the door of the accessible carriage, and
  
- with respect to the exemption sought from section 6.4 of the Transport Standards:
  - the occupational health and safety concerns identified by the ARA for rail staff assisting a person using a mobility aid apply equally to a companion or carer of a person with a disability who should not be placed at the same risk
  - the risks identified exist because of the failure by the rail service providers and operators to address the causes over the last 18 years
  - free travel for companions or carers is insufficient to address the significant expense and inconvenience placed on passengers affected by this exemption. Compensation for the cost of having a companion or carer to enable persons with disability to travel should be provided, and
  - such an exemption puts the onus on the passenger to determine the location of non-compliant boarding ramps on their journey prior to embarking on their travel and make arrangements to be accompanied.

11.24 Noting that the members of the ARA have had 20 years to complete these works, the Disability Resources Centre opposed the grant of all temporary exemptions sought. Instead, it considered operators should be required to submit comprehensive annual plans demonstrating how they intend to meet the Transport Standards by the required date as well as transparent progress reports. With respect to the exemption sought from s 6.4 of the Transport Standards, it recommended data mapping of stations and stops state-wide in order to prioritise the work of implementing bespoke raised boarding platforms.

11.25 The Queenslanders with Disability Network ('QDN') opposed the grant of any of the temporary exemptions sought. It called for greater transparency and accountability with respect to the issue of flange gaps and suggested that the issue be addressed by replacing level crossings with grade separated crossings. It also suggested that members of the ARA address the vertical gaps between platforms and conveyances by following the actions of Queensland Rail in raising the entire length or portions of platforms. Instead of temporary exemptions, it recommended

that, with respect to the requirements of ss 2.1 and 6.4 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards, members of the ARA provide to the Commission action plans for:

- the removal of level crossings, outlining plans for public consultation, costing and project timeframes, and
- reducing the vertical gaps at as many stations as possible, in consultation with the disability sector.

- 11.26 The Physical Disability Council of NSW expressed concern about the ARA's consultation with the disability community and recommended the application be rejected in full. It submitted that, if the temporary exemptions are to be granted, the ARA should be required to provide a publicly accessible strategic plan to meet accessibility requirements, identifying responsibilities, outcomes and timeframes, and a report of progress made to date in meeting accessibility requirements. It also proposed that any temporary exemption be for a shorter timeframe with requirements for regular reports on progress to determine whether the exemption is still necessary.
- 11.27 The All Aboard Network proposed that any exemption from s 2.1 of the Transport Standards be limited to a duration of 3 years and require flange gaps to be reduced to a maximum of 65mm within that time, with annual reporting requirements. In its supplementary submission responding to the public submissions, the ARA stated that, due to the number of pedestrian level crossings, meeting this proposed requirement within 3 years would be unachievable. However, the ARA would agree to continuing to report annually on these matters.
- 11.28 The National Inclusive Transport Advocacy Network ('NITAN') also expressed concern about the ARA's consultation with the disability community and considered that any exemption from s 2.1 of the Transport Standards should be conditioned on the provision of business case modelling within 6 months from the date of the exemption, showing a fully costed and funded plan for grade separation of pedestrian crossings or suitable gap filled flange gaps to reduce the width of flange gaps to 55mm. It noted the various trials of gap filler materials, the global use of STRAIL's modular system since 1976, and that veloSTRAIL had 'proved effective for speed trains up to 120 km/h'. In response to NITAN's submission, the ARA said that it does not consider NITAN's proposal to be practical, noting the 6-month timeframe to be insufficient given the number of pedestrian level crossings and cost associated with grade separations. It expressed a need to hold the transport industry to more rigorous standards in terms of action, report and engagement.
- 11.29 The All Aboard Network and the NITAN opposed the grant of an exemption from s 6.4 of the Transport Standards. Both organisations proposed that any grant of an exemption from ss 2.6 and 8.2 be subject to one of two alternative sets of conditions. The first option proposed the grant of an exemption for single door access to existing rail conveyances for a period of 3 years if all of the allocated spaces are accessible from that single door, clear markings indicate that this is the only accessible entry, an internal access path is available to allow movement between carriages and reporting requirements are complied with. The second option, proposed to be granted for 5 years, requires an access path at all doors of existing rail conveyances which have the international symbol of disability access

displayed and have allocated spaces inside the rail car that are accessible from that door, in addition to compliance with reporting requirements.

- 11.30 In response to the proposal by the All Aboard Network and the NITAN, the ARA noted that the conditions proposed are similar to the current requirements of the Transport Standards, meaning the same constraints on compliance with these conditions would exist. It considers that the proposals do not take account of the significant upgrades required to rolling stock to accommodate additional allocated spaces concentrated at one door of the train, or to the train to platform interface which exists regardless of rolling stock type.
- 11.31 The Disability Council NSW recommended that the ARA invest in education of workforce and ensure that formalised disability accessibility plans include, at a minimum, commitments and outcomes to:
- continue to upgrade and improve railway level crossings where possible and trial new products and technologies to minimise flange gaps
  - improve communication to passengers as to the location of the one access path for alighting the train to avoid confusion for passengers, particularly where boarding and disembarking assistance is required, and
  - with respect to s 6.4 of the Transport Standards, aim toward making all stations accessible, noting that companions and carers should not be required to place themselves at the same level of risk identified by the ARA with respect to its own staff.
- 11.32 Anti-Discrimination New South Wales did not oppose any of the exemptions sought, provided that any exemptions granted were subject to the same conditions as the 2015 exemptions. It noted that, while it did not oppose the exemptions, it did not support the ARA repeatedly seeking temporary exemptions under the DDA every 5 years, emphasising that ‘the ARA and its members have a continued obligation to find permanent solutions to achieve compliance with the [Transport Standards] and Premises Standards’.

### ***Expert report***

- 11.33 The expert report prepared by Ms Shiels of Equal Access Group considers the exemptions sought by the ARA and the non-confidential submissions received by the Commission, including technical issues and limitations with compliance with the Transport Standards and Premises Standards, whether the temporary exemptions should be granted, and any conditions she considers appropriate to be imposed on any exemptions granted.

### **Temporary exemption from s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards**

- 11.34 As set out above, the ARA seeks exemptions from these provisions so that flange gaps of up to 75mm are permitted at level crossings that form part of an access path on rail premises or rail infrastructure. A flange gap is the gap between the steel rail track and the road or surrounding pavement that allows train wheels to safely travel through level crossings. Where a level crossing forms part of an

access path, flange gaps may pose a barrier to unhindered passage, which is required by these provisions of the standards.

- 11.35 Ms Shiels confirmed in her report that flange gaps have been the subject of discussion for many years with no universal solution identified to date. She stated that:

[f]lange gaps are an essential part of the supporting infrastructure for Australia's rolling stock.

The gaps have the potential to catch a wheelchair users (*sic*) castor wheels where they can become lodged within the gaps, trapping the user within the rail corridor.

- 11.36 Ms Shiels' technical assessment first involved the consideration of s 2.1(1) of the Transport Standards:

An access path that allows unhindered passage must be provided along a walkway, ramp or landing.

She confirmed that the Transport Standards do not prescribe how 'unhindered passage' is to be achieved along an access path and do not reference flange gap widths. As a result, she found that it is necessary to consider the maximum gap width that would provide access for people with mobility limitations without creating an obstacle or impediment when passing through the crossings unassisted.

- 11.37 As part of this consideration, she referred to s 8.2 of the Transport Standards which prescribes a maximum horizontal gap of 40mm between a boarding point and a conveyance for independent use, which she said 'is considered to provide "unhindered passage" over the flange gaps'. She suggested, however, that achieving a 40mm flange gap may not be possible and considered information provided by the ARA concerning acceptance in the European Union of horizontal flange gaps of 50mm.

- 11.38 Ms Shiels then considered the requirement in s 2.1(2) of the Transport Standards for access paths to comply with AS1428.2 (1992) cl 8.1 and in cl H2.2 of the Access Code in the Premises Standards for an accessway to comply with AS1428.2. Clause 8.1 of AS1428.2 provides for compliance with cl 5.1.2 and cl 12 of AS1428.1 which state:

Clause 5.1.2 Continuous accessible paths of travel are to be constructed with no lip or step at joints between abutting surfaces with a 5mm bevelled construction tolerance permitted.

Clause 12 Gratings located within walkways are required to provide spaces no greater than 13mm wide x 150mm long and where grate openings are elongated, they are to be placed to have the long dimension transverse to the dominant direction of travel.

- 11.39 Ms Shiels considered that neither of the above clauses are relevant to flange gaps and do not assist in determining how to achieve 'unhindered passage' or accessways that are 'unhindered'. This is because flange gaps are horizontal openings in the path, rather than a vertical 'lip' or 'step' as referenced in cl 5.1.2 and do not have the function of draining and transporting water as referenced in cl 12.

- 11.40 Ms Shiels also considered AS1742.7 'Manual of uniform traffic control devices – Railway crossings' referenced by the ARA as what should be considered acceptable to achieve compliance with s 2.1 of the Transport Standards and cl H2.2 of the Premises Standards. Ms Shiels noted that this standard relates to the safety of pedestrian crossings at grade for rail traffic, road users and pedestrians, including people with mobility aids, but is not referenced by the Transport Standards or the Premises Standards and should not be considered as acceptable for compliance with those standards.
- 11.41 Ms Shiels then had regard to additional information provided by the ARA, including information concerning trials of gap filler materials and information relating to gap widths accepted internationally and outcomes of laboratory testing conducted by the ACRI. She noted that:
- a report by the European Cooperation in the field of Scientific and Technical Research (COST) of a study conducted in France, Germany and Great Britain found that, while a horizontal gap of 100mm was manageable with difficulties, gaps of 50mm or less are preferred, and
  - laboratory testing in Australia of 65-75mm horizontal and 50mm vertical gaps found that entrapment may occur with mobility devices and that dislodgement was not possible without assistance. Dislodgement was only found to be possible with a 10mm vertical gap and was greatly difficult with assistance.

11.42 Having regard to the information before her, Ms Shiels found that:

a gap of 50mm is considered functional and accessible for independent use to negotiate flange gaps within an 'access path' or 'accessway', with an additional 5mm construction tolerance deemed acceptable (55mm total).

She stated that 'there is insufficient evidence presented at this point in time that demonstrates horizontal gaps greater than this being safe for independent use'. She also noted that the PTAWA are aiming for flange gap widths of 55mm and recommended that other jurisdictions follow suit.

11.43 Ms Shiels was of the opinion that the ARA have taken reasonable measures in the previous exemption period to research, test, document and record attempts to rectify and overcome the issue of flange gaps. She recommended granting the temporary exemption from s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards to allow flange gaps of 75mm for a period of 5 years subject to conditions that would require the ARA 'to present a strategy to the [Commission] for improving the crossings with timeframes to either reduce or eliminate the gap or alternatively separate the pedestrian access paths by grade'.

#### Temporary exemptions from ss 2.6 and 8.2 of the Transport Standards

- 11.44 In considering whether the Transport Standards require access from all doors of a conveyance, Ms Shiels considered ss 2.6 and 8.2 in the context of the language in:
- section 3.2 of the Transport Standards, which refers to 'accessible rail cars' and requires passengers in wheelchairs or with mobility aids to be able to enter and exit a conveyance and position their aids in the allocated space, failing which, equivalent access by direct assistance must be provided

- section 12.1 of the Transport Standards, which refers to ‘doors on access paths’ and provides that any doors along an access path must not present a barrier to independent passenger travel
- section 12.2(1) of the Transport Guidelines, which deals with ‘activation of doors’ and provides, relevantly, that ‘if not all doors are accessible, the [Transport Standards] provides that the accessible doors be clearly identified’
- section 16.1 of the Transport Standards, which provides that the international symbols for accessibility and deafness ‘must be used to identify an access path and which facilities and boarding points are accessible’, and
- section 16.5 of the Transport Standards, which provides that ‘[t]he international symbols for accessibility must be clearly visible both inside and outside accessible doors on these conveyances’.

11.45 In Ms Shiels’ opinion, these provisions imply that not all doors to a conveyance are required to be accessible. However, at a minimum, Ms Shiels considers that the Transport Standards require access to be provided to essential facilities of a conveyance including accessible boarding point, accessible entry, access path to allocated spaces and exits, with appropriate signage displaying the international symbol for accessibility. In her view, if an accessible rail carriage is fully occupied or where allocated accessible spaces are taken up, alternative options need to be provided for access to the conveyance.

11.46 Ms Shiels recommended granting the temporary exemptions for a period of 5 years with a number of conditions.

*Temporary exemption sought from s 6.4 of the Transport Standards*

11.47 In Ms Shiels’ opinion, having regard to s 8.3 of the Transport Standards and ss 8.2(2) and 37.3 of the Transport Guidelines, the term ‘assisted access’ in s 6.4(c) of the Transport Standards is not intended to require staff to physically push passengers up and down ramps. Those sections provide that:

- if a conveyance has a manual or automatic boarding device, it must be available for use at all designated stops and must be deployed if a passenger requests its use (Transport Standards s 8.3)
- ‘although operators would normally be responsible for activating boarding devices, this should not be seen as diminishing the principle that independent access is desired under the Disability Standards’ (Transport Guidelines s 8.3), and
- customer service programs and education and awareness programs should include ‘training in the use and upkeep of accessible features such as boarding ramps, wheelchair lifts, hearing loops and tactile tiling’ (Transport Guidelines s 37.3).

11.48 She acknowledged that this interpretation means that passengers with mobility limitations who are travelling unaccompanied may be prevented from accessing the relevant service. She recommended that the temporary exemption be granted with conditions for 5 years to allow the ARA members ‘to work toward providing a

safer and more independently accessible environment for passengers with mobility limitations in the future’.

### ***Responses of interested parties to expert report***

- 11.49 The Commission notified the ARA, the APTJC and members of the public who had previously made submissions of the publication of the report and invited comment on aspects of the report, in particular, the conditions recommended by the expert. The Commission received 4 public submissions in response to the report, including one from the ARA.
- 11.50 The NITAN expressed its view that a technical expert was not best placed to be providing input in the conditions relating to matters such as equivalent access and provision of strategies for implementation. It considered that the conditions of any temporary exemptions would be better developed in consultation with the disability community and advocacy groups. Any conditions proposed by the expert are recommendations only and any conditions imposed with the grant of a temporary exemption are ultimately determined by the Commission.

### ***Temporary exemption from s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards***

- 11.51 The public submissions largely expressed disappointment with the lack of resolution for the issue of flange gaps despite the long running trials and research conducted to date. They also expressed concern with the expert’s consideration of a European study identified by the ARA and did not support the grant of a temporary exemption or the conditions proposed by Ms Shiels.
- 11.52 The QDN did not support relaxation of the technical requirements by accepting flange gaps of 55mm or a further 5-year exemption to address the members of the ARA’s lack of compliance. It noted the difference between level crossings in Europe which it states are supervised by staff and in Australia which are unsupervised and that the study conducted by ACRI in Australia was limited in considering only 3 mobility aids. It considered that more time and testing is required to determine the safety of the proposed width of flange gaps and that any conditions should be implementable and provide for clear and immediate actions.
- 11.53 The NITAN submitted that an end date for the research should be a firm condition of the exemption and that the ‘strategy’ proposed by Ms Shiels to be provided within 12 months should include funding allocation and time frames.
- 11.54 The All Aboard Network considered that any temporary exemption should expire on 31 December 2022 and the conditions proposed by the expert should be amended to require that:
- the audits of all access paths that intersect with railway tracks, whether or not within the precinct of a railway station, should be completed by 31 December 2021, and
  - the audit reports and progress reports should be published, in a timely manner, on the Commission’s website.
- 11.55 In response to Ms Shiels’ proposed conditions, the ARA proposed that this temporary exemption be granted with the same conditions imposed by the

Commission in the 2015 exemptions. It did not consider 12 months to be sufficient time for the members of the ARA to develop an informed or funded strategy, instead proposing 24 to 36 months from the date of the grant. It also considered that the proposed audit required in the expert's proposed conditions extends beyond the scope of the temporary exemption sought and should be limited to an audit against s 2.1 of the Transport Standards and cl H2.2(1) of the Access Code in the Premises Standards.

#### Temporary exemptions from ss 2.6 and 8.2 of the Transport Standards

- 11.56 The QDN disagreed with Ms Shiels' interpretation of ss 2.6 and 8.2 having regard to the context of the Transport Standards, pointing to the language of ss 8.2 and 8.3 which require boarding devices at all accessible entrances. If a carriage has accessible features such as wheelchair spaces or accessible toilets, it submitted that these must be connected to an accessible entrance via an access path in accordance with s 2.8 of the Transport Standards. Further, it stated that the proposal to have a single alternate boarding point diminishes the rights of passengers who require boarding assistance and will result in some accessible facilities being unavailable to those who require them.
- 11.57 The All Aboard Network considered the expert's proposed conditions to be inadequate and, in substance, no different to the conditions imposed in the 2015 exemptions. It noted that the proposed conditions only provide for equivalent access and signage, rather than including requirements to take steps to make more than one door available as the primary entrance.
- 11.58 Further to the conditions proposed by Ms Shiels for an exemption from s 2.1 of the Transport Standards, the NITAN submits that a full equivalent access process be conducted by each ARA member and that reports be made publicly available within 6 months.
- 11.59 With respect to s 8.2 of the Transport Standards, the NITAN considered that any exemption should only be in respect of existing rail stock and the ARA should be required to commence a co-design project with the disabled community and rail industry on the feasibility of automated ramp solutions within 6 months, to be completed within 12 months.
- 11.60 The ARA opposed Ms Shiels' proposal to mandate the use of signage to communicate primary boarding point locations as a condition of the grant of a temporary exemption from s 2.6 of the Transport Standards. Instead, the ARA proposed that communications take place through customer information channels which it considers to be best practice. It also proposed 6 to 12 months from the date of the grant of an exemption to provide a management plan, rather than the 3 months proposed by Ms Shiels.
- 11.61 The ARA expressed no opposition to the conditions proposed by Ms Shiels for a temporary exemption from s 8.2 of the Transport Standards.

#### Temporary exemption from s 6.4 of the Transport Standards

- 11.62 The public submissions received by the Commission in response to the expert report strongly opposed the grant of the temporary exemption from s 6.4 of the Transport Standards and disagree with Ms Shiels' interpretation of the term

'assisted access'. The NITAN asserted that the temporary exemption should not be granted. If the exemption is to be granted, the All Aboard Network considered that it should only apply to conveyances brought into service before 2002 and that the ARA member should be required to reimburse all reasonable expenses incurred by a person with disability if they are required to be accompanied by a carer or assistant as a result of this exemption.

- 11.63 The ARA considered that the 12-month time frame proposed by Ms Shiels for members of the ARA to develop a strategy on how platforms can be improved at nominated boarding points is insufficient given the number of stations involved and the need to obtain project funding within the funding cycle, instead proposing 24 to 36 months.

### **Consideration**

- 11.64 In passing the DDA and making the Transport Standards and Premises Standards, the Australian Government sought to reverse a history of exclusion from areas of public life for people with disability. It created a comprehensive regime intended to ensure the accessibility of public transport for people with disability. The DDA, Transport Standards and Premises Standards also contain a number of provisions that offer latitude and flexibility to public transport operators and providers in bringing about this change. These include the equivalent access and alternative solutions provisions under the Transport Standards and Premises Standards, the adoption of target dates for gradual, progressive compliance for existing conveyances, and the availability of a defence of unjustifiable hardship.
- 11.65 In its decision with respect to the 2015 exemptions, the Commission stated that there could be no assumption that further exemptions would be granted to members of the ARA beyond the 2015 exemptions. That decision made clear that persuasive reasons would be required to justify the grant of any further exemptions, including detailed evidence of the need for a further exemption and evidence of the impact the further exemption would have on persons with disabilities.
- 11.66 At the time of the expiry of the 2015 exemptions, the Transport Standards had been in effect for 18 years and members of the ARA had enjoyed the benefit of temporary exemptions granted by the Commission for 13 years. The ARA now seeks 4 further exemptions from the Transport Standards and one further exemption from the Premises Standards which were previously granted with conditions as part of the 2015 exemptions.
- 11.67 The Commission is empowered by s 55(2) of the DDA, s 33A.1(3) of the Transport Standards and s 5.1(3) of the Premises Standards to grant a 'further exemption' on an application made before the expiration of the specified period of the earlier temporary exemption. This application was made by the ARA prior to the expiry of the 2015 exemptions.
- 11.68 The ARA has made extensive reference in its submissions to the review and anticipated modernisation of the Transport Standards. In the Commission's view, any potential modernisation of the Transport Standards is not relevant to the delay in compliance with the Transport Standards and is not a basis for the grant of further exemptions. In the event and to the extent that the non-compliances the subject of this application are resolved by an amendment to the Transport

Standards, any related temporary exemption granted by the Commission will cease to have effect.

- 11.69 As set out above, the majority of the members of the APTJC made no comment or did not express a position concerning the application. Only the Victorian Department of Transport and Transport for New South Wales, both members of the APTJC and members of the ARA on whose behalf this application is made, provided support for the application.

Temporary exemption from s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards

- 11.70 The Commission accepts the expert's views that it is necessary for steps to be taken to reduce the width of flange gaps at level crossings forming part of an access path and, ideally, to eliminate them altogether. The public submissions understandably express frustration with the lack of progress in resolving this issue and concerns with the associated safety hazard currently posed at access paths at level crossings. However, the expert confirms that no universal solution has been identified for flange gaps at level crossings to date and her opinion that the ARA took reasonable measures during the period of the 2015 exemption to research, test, document and record attempts to rectify and overcome the issue of flange gaps.
- 11.71 The Commission accepts that the standards do not prescribe how unhindered passage along an access path is to be achieved and do not specify a maximum gap width that would provide safe access for people with mobility limitations when traversing level crossings unassisted. The expert confirms that the only guidance provided by the Transport Standards is the allowable gap of up to 40mm horizontally and up to 12mm vertically for unassisted boarding of a conveyance in s 8.2. However, the Commission understands that the expert considers that a horizontal gap of 40mm or less may not be achievable for flange gaps at level crossings.
- 11.72 The Commission agrees with the expert's findings that the specifications provided for in AS1742.7 should not be accepted as sufficient to achieve compliance with the Transport Standards and Premises Standards, particularly in the context of the results of the testing undertaken by ACRI. Without more conclusive evidence of a gap width that would provide safe passage over flange gaps, the Commission considers that progress should be made toward further reducing the width of flange gaps from 75mm on access paths or eliminating them altogether. The expert's technical analysis and conclusion is that a gap of 50mm would be functional and accessible for independent use to negotiate flange gaps within an 'access path' or 'accessway', with an additional 5mm construction tolerance.
- 11.73 The preliminary view of the Commission is that the concerns raised in the public submissions can be addressed by imposing targeted conditions which require the members of the ARA to take steps towards achieving compliance within defined timeframes. The Commission granted this exemption as part of the 2015 exemptions subject to annual reporting conditions. Reports provided to the Commission by the ARA members relying on this exemption are published on the ARA's website. Should a member of the ARA for which an exemption is granted not comply with the conditions imposed, the relevant exemption will no longer apply in respect of that member of the ARA.

- 11.74 In the circumstances, the Commission's preliminary view is that it would be appropriate to grant an exemption from s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards with appropriate conditions. The Commission proposes to largely adopt the conditions proposed by the expert, with some amendments to increase the specificity of the reporting requirements and to ensure that action is taken during the exemption period to progress a solution to the flange gap issue in the locations where it occurs. These amendments are generally consistent with the public submissions which call for comprehensive and transparent reports, including the submissions made by the Disability Resource Centre, QDN, Physical Disability Council of NSW and NITAN. The conditions require identification of the locations of the accessibility issues, the time frames proposed to address the accessibility issues and the proposed and actual expenditure for implementing the relevant remedy.
- 11.75 The conditions provide for an improvement of the flange gaps by elimination with a suitable product, reducing the gap to a maximum width of 55mm or phasing out access paths across level crossings. The Commission's imposition of these conditions as recommended by the expert is not a statement by the Commission that it considers flange gaps of 55mm to be ideal for access paths at level crossings or that such a width would achieve compliance with the Transport Standards and Premises Standards in the absence of an exemption. The imposition of these conditions is aimed at improving the issue of flange gaps on access paths.
- 11.76 The Commission accepts the ARA's submission that the scope of the audit proposed by the expert should be limited to s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards. However, the Commission does not accept the ARA's proposal to extend the time frame for the members of the ARA to provide a strategy for how it intends to improve the flange gaps within each relevant access path from 12 months to between 24 and 36 months. The expert report notes the research and work undertaken by the ARA with respect to this issue during the period of the 2015 exemptions and that this issue affects a number of access paths nationally. In the Commission's preliminary view, 12 months from the date of any grant of an exemption would be sufficient time for members of the ARA to provide a strategy for how it intends to improve each relevant access path and the timeframe within which the improvement will be effected.
- 11.77 Having regard to the time which will be required for implementation of the strategy by each member of the ARA across all access paths at level crossings, the Commission's preliminary views is that it would be reasonable and appropriate in the circumstances for the temporary exemption to be granted for a period of 5 years on the basis that prompt and reasonable steps are taken within this period to implement the remediation strategy at each of the relevant locations.
- 11.78 In weighing up the evidence, the opinions of the expert and the submissions from the public, the Commission considers that the grant of a temporary exemption with appropriate conditions to ensure that progress is made toward compliance is consistent with the objects of the DDA and is of the preliminary view that it will grant to the members of the ARA a temporary exemption from s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards with the conditions set out in Schedule One to this preliminary view.

Temporary exemption from s 2.6 of the Transport Standards

11.79 The ARA seeks a temporary exemption from s 2.6 of the Transport Standards such that ‘an access path is only required to a single door of existing rail conveyances’. It states that this exemption is required to clarify that an access path is only required at a single door of rail conveyances, rather than all doors of the conveyance. For the reasons set out below, the Commission has treated the ARA’s application for this exemption as an application for an exemption from both ss 2.6 and 2.8 of the Transport Standards.

11.80 The expert considered s 2.6 in the context of ss 3.2, 12.1, 16.1 and 16.5 of the Transport Standards and s 12.2(1) of the Transport Guidelines and concluded that there is no mandatory requirement in the Transport Standards to provide that every boarding point or conveyance door is accessible. She also found that the standards are silent on the provision of an alternative boarding point for passengers with mobility limitations that are unable to board at the nominated boarding point. The expert concluded that:

At a minimum, the [Transport Standards] require access to be provided to essential facilities of a conveyance including accessible boarding point, accessible entry, access path to allocated spaces and exits. Signage including the international Symbol of Access is also required to nominate these facilities for people with disability for wayfinding purposes.

11.81 The Commission accepts the expert’s opinion that the provisions she considered indicate that the Transport Standards do not require every boarding point or conveyance door to be accessible. It also agrees with the expert’s conclusion that the Transport Standards require an access path from an entrance of a conveyance to any facilities or designated spaces on the conveyance for passengers with disabilities.

11.82 Relevantly, an ‘access path’ is described in s 1.9 of the Transport Standards as ‘a path that permits independent travel for all passengers within public transport premises, infrastructure or conveyances’. The Transport Guidelines state at ss 2.1 and 2.4 that:

[t]he concept of an ‘access path’ is used in the Disability Standards to specify requirements for independent movement of passengers through premises and infrastructure. The existence of an access path is implicit in many sections of the Disability Standards.

...

An access path that departs in minor ways from the Disability Standards may be regarded as satisfying the Disability Standards if it meets the performance requirements of AS1428.2 (1992) Clause 7 with equivalent effectiveness, amenity, availability, convenience, dignity and safety. However, direct assistance may be required to ensure that a non-conforming access path of this kind is available to all passengers.

11.83 Section 2.6 of the Transport Standards applies to trains and light rail and provides as follows:

### **2.6 Access paths — conveyances**

- (1) Subject to subsection (3) and section 2.7 [which relates to the minimum width between front wheel arches of a bus], an access path that allows continuous and unhindered passage must be provided with a minimum width of at least 850 mm.
- (2) Subsection (1) applies to doorways and stairs, and between entrances, exits, allocated spaces and other essential facilities for passengers using wheelchairs and other mobility aids.
- (3) If the conveyance exists or is ordered before the commencement of this section, the minimum width may be reduced to 800 mm at any doorway restriction.

(emphasis added)

11.84 Section 2.8 applies to conveyances including trains and light rail and provides that:

### **2.8 Extent of path**

- (1) An access path must extend from the entrance of a conveyance to the facilities or designated spaces provided for passengers with disabilities.
- (2) Up to 50 mm of an adjacent allocated space may be used as part of the access path.
- (3) If an access path cannot be provided, the operator must provide equivalent access by direct assistance.

(emphasis added)

11.85 Section 3.2 applies to conveyances including ‘accessible rail cars’ and ‘accessible light rail cars’ and provides that:

### **3.2 Access for passengers in wheelchairs, etc**

- (1) Passengers in wheelchairs or mobility aids must be able to enter and exit a conveyance and position their aids in the allocated space.
- (2) If this is not practicable, operators must provide equivalent access by direct assistance.

11.86 Section 8.2 of the Transport Standards provides that ‘[a] manual or power assisted boarding device must be available at any accessible entrance to a conveyance’ (emphasis added) that meets the criteria in s 8.2(1)(a) and (b) and, pursuant to s 8.3 of the Transport Standards, must be available for use at all designated stops and on request.

11.87 Section 12.1(1) of the Transport Standards provides that ‘[a]ny doors along an access path must not present a barrier to independent passenger travel’.

11.88 In the Commission’s view, while the Transport Standards do not mandate that an access path be provided at all doors of a conveyance, the effect of ss 2.6, 2.8, 3.2

and 12.1 of the Transport Standards is that, where a conveyance includes facilities or designated spaces provided for passengers with disabilities, an access path must be provided to those facilities or spaces from the entrance of the conveyance. It follows that such an entrance must be an 'accessible entrance' in order for it to form part of an 'access path' for the purposes of s 1.9. This is supported by the requirements in ss 12.1 and 3.2 of the Transport Standards discussed above.

- 11.89 Accordingly, if multiple cars of a conveyance include facilities or designated spaces for passengers with disabilities, ss 2.6, 2.8, 3.2 and 12.1(1) of the Transport Standards require an access path to be provided from an entrance to those facilities and, therefore, must allow passengers with disabilities to access each of the relevant cars. In addition, those accessible doors, access paths and the facilities and boarding points which are accessible must be clearly identified using the international symbol of accessibility (Transport Standards ss 16.1(1) and 16.5).
- 11.90 On this basis, by seeking to provide an access path at a single door of a conveyance, members of the ARA may not be in compliance with ss 2.6 and 2.8 of the Transport Standards. However, as set out in ss 2.8(3), if the requirement cannot be provided, the operator must provide equivalent access by direct assistance. Further, s 33.3 provides an alternative method of achieving compliance through equivalent access where there are unavoidable constraints on unassisted access.
- 11.91 The grounds on which the ARA seeks this temporary exemption are focused on identifying a single location to provide direct assistance to passengers with mobility aids or requiring assistance to board the conveyance, which may be considered as 'equivalent access', and directing passengers to areas where onboard accessible facilities are available, which is already required by the Transport Standards. For example, ss 16.1(1) and 16.5 require the international symbol for accessibility to be used to identify an access path and be clearly visible inside and outside accessible doors.
- 11.92 The reasons provided by the ARA for the need for this exemption are predominantly grounded in the certainty and convenience in nominating a primary boarding point for passengers requiring assistance in boarding a conveyance. Notably, the ARA states that '[c]ustomers who do not require direct assistance are not prevented from using other boarding points'. The ARA's response to the public submissions explained that the reasoning set out in its application for an exemption from s 8.2 of the Transport Standards, summarised at paragraphs 11.5 and 11.112, also applies in respect of its application for this exemption. In response to conditions proposed by the All Aboard Network and NITAN which included requirements to move toward providing an access path to more than one door of a conveyance, the ARA stated that the recommendations:

are not feasible as they do not consider the significant upgrades required to rolling stock in order to accommodate additional allocated spaces concentrated at one door of the train, or the train to platform interface which exists regardless of rolling stock type.

As set out at paragraph 11.5 above, while the ARA has stated that its members have incurred significant expenditure in improving accessibility to date and that

significant upgrades are still necessary, it has not been said that the further expenditure necessary to achieve full compliance with the standards would pose an unjustifiable hardship. Determining whether compliance with the Transport Standards would involve unjustifiable hardship involves the consideration of a number of factors provided for in s 33.7 of the Transport Standards including, where a substantial issue of unjustifiable hardship is raised, the extent to which substantially equal access to public transport services is provided and any measures taken to ensure such access.

- 11.93 Members of the ARA have enjoyed the benefit of this temporary exemption for almost 14 years, with the exemption first being granted in 2007 and, again, in 2015. The effect of this temporary exemption is to limit persons with disabilities from boarding at more than one door of a conveyance and may limit their access to facilities and designated spaces provided for those passengers in other parts of the conveyance. Further steps should be taken by the members of the ARA to provide an access path between entrances and the facilities and designated spaces provided for passengers with disabilities or, as set out in s 2.8(3) of the Transport Standards, '[i]f an access path cannot be provided, the operator must provide equivalent access by direct assistance'.
- 11.94 The Commission acknowledges the significance of the matters raised in the public submissions and the limitations such a temporary exemption places on persons with disabilities. It also accepts that further works and upgrades to existing rail stock and train to platform interfaces are necessary to enable greater access to be facilitated to conveyances. Having regard to the material before the Commission, the Commission's preliminary view is that it would be reasonable to grant a further temporary exemption to the members of the ARA with conditions requiring further progress be made to enable greater access for persons with disabilities to facilities and designated spaces created for them.
- 11.95 The Commission granted this exemption to members of the ARA as part of the 2015 exemptions subject to conditions requiring equivalent access to be provided in certain circumstances and requiring a written report to be provided to the Commission, and published on the member's website, concerning the measures taken to ensure staff and passengers are adequately informed of the accessible locations and equivalent access available. Reports provided to the Commission by the ARA members relying on this exemption are published on the ARA's website. Should a member of the ARA for which an exemption is granted not comply with the conditions imposed, the relevant exemption will no longer apply in respect of that member of the ARA.
- 11.96 The Commission proposes to largely accept the conditions recommended by the expert; however, it considers further conditions would be necessary to ensure progress is made towards compliance with the Transport Standards and to provide for annual reporting on time frames and proposed and actual expenditure for implementing the ARA member's strategy to improve access and achieve compliance. These amendments are generally consistent with the public submissions which call for comprehensive and transparent reports, including the submissions made by the Disability Resource Centre, QDN, Physical Disability Council of NSW and NITAN. The conditions require identification of the time frames proposed to address the accessibility issues and the proposed and actual expenditure for implementing the relevant remedy.

- 11.97 The Commission's preliminary view is that an exemption of 5 years would be appropriate for the members of the ARA to progress toward compliance with the requirements of the Transport Standards outlined above. The ARA objects to the expert's recommendations for the installation of signage to communicate primary boarding point locations, instead proposing communications through customer information channels. The Commission considers it appropriate for the installation of physical signs to be a condition of the grant to ensure immediately visible on-site communication to all passengers.
- 11.98 The conditions on which the temporary exemption from ss 2.6 and 2.8 of the Transport Standards are proposed to be granted are set out in Schedule One to this preliminary view.

#### Temporary exemption from s 6.4 of the Transport Standards

- 11.99 The ARA seeks this exemption to clarify that rail staff are not required to physically assist passengers with mobility aids to travel up or down a boarding ramp when embarking or disembarking a conveyance.
- 11.100 The public submissions strongly oppose the grant of this exemption and disagree with the expert's interpretation of the term 'assisted access' in s 6.4(c) of the Transport Standards as not intending to require assistance from rail staff. The concerns raised by the public submissions with respect to the significant barrier this exemption would place on independent travel for persons with disabilities, the burden of determining the location of these barriers and the expense and inconvenience placed on persons with disabilities impacted by this exemption are compelling.
- 11.101 The expert considered the requirements of s 6.4 in the context of s 8.2(2) of the Transport Standards and ss 8.2(2) and 37.3 of the Transport Guidelines in reaching her conclusion that there is no obligation on the rail staff to provide assistance to members of the public on ramps with a slope of between 1 in 8 and 1 in 4. The Commission also refers to s 33.10 of the Transport Guidelines concerning 'direct assistance', which provides that:

#### **33.10 Assistance during boarding and alighting**

- (1) People with disabilities can be assisted to board or alight from conveyances, such as coaches and aircraft, through the provision of:
    - (a) mobility aids on conveyances where design constraints prevent use of a person's own mobility aid; or
    - (b) assistance in moving from a wheelchair into a fixed seat if an allocated space is not provided.
  - (2) In giving assistance, the operator may decide that passengers with disabilities should board before, and alight after, other passengers.
- 11.102 This provision suggests 'direct assistance' to persons with disabilities may be limited to the provision of a mobility aid and assisting a passenger in moving between a wheelchair and fixed seat and may not extend to pushing a mobility aid up and down a ramp.

- 11.103 The Commission accepts that the occupational health and safety concerns raised by the ARA for its staff are also risks for the companion or carer of persons with disabilities affected by this exemption. However, the Transport Standards do not define the term 'assisted access' and do not clearly prescribe whether the term requires physical assistance from rail staff. The expert report notes that 65 stations across the Metro network and 90 V/line stations have ramps with gradients between 1 in 8 and 1 in 4.
- 11.104 Given the lack of clarity in the Transport Standards, and having regard to the expert report, the public submissions and the need for public certainty, the Commission's preliminary view is that it would be appropriate and consistent with the objects of the DDA to grant an exemption to the members of the ARA from s 6.4 of the Transport Standards with appropriate conditions that recognise the need for certainty in implementation and transparency in compliance.
- 11.105 The Commission granted this exemption to members of the ARA as part of the 2015 exemptions subject to conditions requiring annual reporting to the Commission, information to be made available to the public concerning the location of restrictions and free travel to be provided to any assistant accompanying a person who requires assistance boarding a train as a result of the non-compliance with s 6.4 of the Transport Standards. Reports provided to the Commission by the ARA members relying on this exemption are published on the ARA's website. Should a member of the ARA for which an exemption is granted not comply with the conditions imposed, the relevant exemption will no longer apply in respect of that member of the ARA.
- 11.106 The Commission's preliminary view is that, as identified by the expert in her report, it is in the best interests of the public for the stations to be reviewed and addressed on a case-by-case basis. The Commission considers that the conditions proposed by the expert would be appropriate with some amendments to provide for identification of the locations at which ramps are only able to be provided at a gradient greater than 1 in 8 and less than 1 in 4 and for the reporting of the proposed time frames and proposed and actual expenditure to address the slope of the relevant boarding ramps at each location. These amendments are generally consistent with many of the public submissions which call for comprehensive and transparent reporting by the ARA members utilising this exemption, including the submissions made by the Disability Resource Centre, QDN, Physical Disability Council of NSW and NITAN.
- 11.107 The Commission considers that 12 months from the date of the grant would be sufficient for members of the ARA to develop a strategy on how platforms can be improved at each nominated boarding point. It does not agree with the ARA's submission that this timeframe should be extended to between 24 and 36 months.
- 11.108 Having regard to the time which will be required for implementation of the strategy at each of the 155 stations identified, the Commission is of the preliminary view that it would be appropriate for the temporary exemption to be granted for a period of 5 years.
- 11.109 The All Aboard Network submitted that any temporary exemption should only apply to conveyances brought into service before 2002, being the time that the Transport Standards commenced operation. The Commission understands the rationale for

this submission however it notes that the cause of the issue is identified by the ARA as:

the mix of rolling stock coupled with different platform heights and other network variables [which] creates gaps of varying degrees that can require a boarding ramp for customers to board and/or alight.

Rail stock in use may include refurbished items or items commissioned after 2002 which, combined with differing platform heights and site constraints, result in the requirement for steeper ramps. The expert's opinion is that the exemption should be granted in respect of existing rail stock. The Commission considers that the conditions requiring the identification of a strategy to address the issue on a case-by-case basis within 12 months and for the provision of annual updates on the implementation of this strategy should be sufficient to address any concerns that the members of the ARA may rely on the exemption to upgrade conveyances, premises or infrastructure to a standard below that required by the Transport Standards.

11.110 The conditions on which the temporary exemption is proposed to be granted are set out in Schedule One to this preliminary view.

Temporary exemption from s 8.2 of the Transport Standards

11.111 Further to the exemption sought in respect of s 2.6 of the Transport Standards, the ARA seeks this exemption to clarify that assisted boarding devices are only required at a single door of rail conveyances, rather than all doors of the conveyance.

11.112 It seeks this exemption because the different rolling stock used does not always align with the station platforms. This is caused by the varied heights of the platforms, the way the tracks are maintained, the wear of the wheels on the rolling stock, passenger loads and integration with the freight network. Further, rail operators have different procedures for deploying the assisted boarding device, with some requiring the driver to deploy the device or provide assistance to passengers and others relying on assistance from a conductor, guard or customer service staff. In addition to providing certainty to passengers requiring assistance boarding a conveyance, the ARA submits that provision of an assisted boarding device at a nominated point ensures the train is not delayed, impacting all passengers.

11.113 In the Commission's view, the issue of delay would only arise at stations that are not otherwise compliant with the Transport Standards and where the use of assisted boarding devices is necessary. The Commission is not persuaded that the potential for a train to be delayed while a person with a disability boards the train is a convincing reason to limit the number of assisted boarding points where the delay is primarily a result of non-compliance with the Transport Standards.

11.114 The expert report finds that:

[c]ompliance can be achieved by ensuring passengers can gain access to essential facilities including an accessible boarding point, accessible entry door, boarding device which is to be available at all designated stops and deployed by staff when requested, allocated spaces, toilets where provided and signage to identify the location of these accessible facilities.

Similar to the discussion [concerning the exemption sought from s 2.6 of the Transport Standards], although the [Transport Standards] indicates that not all doors are to be accessible, passengers are to be afforded the option of an alternative entry to the conveyance in the event that they are unable to enter at the nominated boarding point to align with the intent of the Disability Discrimination Act, provide an inclusive service and protect stakeholders. The ARA have confirmed that this option has been and will continue to be available and that any other door of the existing conveyances can be utilised if required by passengers.

- 11.115 As set out above in respect of the exemption sought from s 2.6 of the Transport Standards, the Commission's preliminary view is that the Transport Standards require an access path to any facilities or designated spaces provided for passengers with disabilities from an entrance of the conveyance, which must be an 'accessible entrance'. On this view, s 8.2 of the Transport Standards requires a manual or power assisted boarding device to be available at any 'accessible entrance' to a conveyance with a vertical gap exceeding 12mm and a horizontal gap exceeding 40mm.
- 11.116 The Commission understands and accepts the public submissions which expressed concern that providing assisted boarding devices at only one nominated entrance significantly limits the access of people with disabilities, often requiring them to travel further distances and navigate additional barriers and difficulties in accessing the only point of entry to a rail conveyance available to them. The Commission also understands that further works and upgrades are necessary for greater access to conveyances to be achieved and that, currently, rail operators have different procedures for deploying the assisted boarding device with some requiring the driver to deploy the device and others provided for deployment of the device by staff on the platform.
- 11.117 The Commission's preliminary view is that, in the circumstances, while further progress is being made to achieve compliance with the Transport Standards, the nomination of a single boarding point at which a manual or automatic boarding device will be made available for passengers requiring assistance boarding a conveyance would be appropriate with conditions requiring clear communication with the public, assistance for the deployment of the assisted boarding device to be provided without the need for prior arrangement, alternative options available for access if, for any reason, access is not possible at the nominated door and reporting on the implementation of these measures. This would also provide greater clarity to passengers and rail operators concerning access and assistance to rail conveyances in circumstances where, currently, access is not possible at all entrances to rail conveyances at all platforms.
- 11.118 The Commission granted this exemption to members of the ARA as part of the 2015 exemptions subject to conditions requiring annual reporting to the Commission, equivalent access to be provided in certain circumstances and information concerning particular boarding points to be made available to passengers. Reports provided to the Commission by the ARA members relying on this exemption are published on the ARA's website. Should a member of the ARA for which an exemption is granted not comply with the conditions imposed, the relevant exemption will no longer apply in respect of that member of the ARA.
- 11.119 It is the preliminary view of the Commission that an exemption of 5 years would be reasonable and appropriate for the members of the ARA to progress toward compliance with the requirements of the Transport Standards and has largely

accepted the conditions recommended by the expert with amendments to ensure that assistance in the deployment of the assisted boarding device is readily available at each station to passengers without booking and providing for reporting on staffing levels, budget and actual expenditure in implementing the necessary measures. These amendments ensure no pre-arrangements are necessary for assistance to be provided in deploying the device, acknowledging that procedures for deployment of the device vary between rail operators and stations. The amendments are generally consistent with many of the public submissions which call for comprehensive and transparent reporting by the ARA member utilising this exemption, including the submissions made by the Disability Resource Centre, QDN, Physical Disability Council of NSW and NITAN.

11.120 The conditions on which the temporary exemption is proposed to be granted are set out in Schedule One to this preliminary view.

### **Conclusion**

11.121 By the time of the expiry of the temporary exemptions now being granted, the target dates for compliance with the Premises Standards will have lapsed. The members of the ARA will have had 24 years to achieve compliance with the Transport Standards, and 15 years to achieve compliance with the Premises Standards.

11.122 In the long term, the Commission considers it appropriate that members of the ARA comply with the standards or, where appropriate, rely on the defences provided in the standards. Further grants of temporary exemptions should not be expected without detailed evidence and persuasive reasons being provided to the Commission to justify the grant of any further exemptions.



Emeritus Professor Rosalind Croucher AM

**President**

on behalf of the Commission.

29 November 2021

## SCHEDULE ONE

### PRELIMINARY NOTICE OF GRANT OF TEMPORARY EXEMPTIONS

The Commission proposes to grant to members of the Australasian Railway Association ('ARA'), on the terms and conditions set out in this schedule, the following temporary exemptions from the operation of the provisions of the Transport Standards, the Premises Standards, and the DDA set out below.

As well as the terms and conditions specified below, each of these exemptions is proposed to be 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 conveyances, infrastructure and premises to which each proposed exemption applies are identified in the heading to each temporary exemption.

The exemptions would be granted for a period of 5 years.

Pursuant to s 34.1 of the Transport Standards and s 6.1 of the Premises Standards, each of those sets of standards is subject to review every 5 years. If, at any time in the 5 years following a decision with respect to this application, either the Transport Standards or the Premises Standards are remade in an amended form, any exemption granted from a section of the Standards that is amended would cease operation at the time the amendment comes into effect.

The relevant standard is reproduced below, followed by the exemption that is proposed to be granted and the terms and conditions to which the grant would be subject.

### PART A – EXEMPTIONS FROM THE TRANSPORT STANDARDS

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#### 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.

<b>Premises</b>	<b>Infrastructure</b>
except premises to which the Premises Standards apply	except airports that do not accept regular public transport services

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## **Temporary exemption: existing rail premises and existing rail infrastructure**

For a period of 5 years, flange gaps of up to 75mm are permitted where a level crossing forms part of an access path on existing rail premises or existing rail infrastructure, subject to the following conditions:

1. the ARA member concerned provides a strategy to the ARA and Commission within 12 months of this exemption to demonstrate how the member intends to improve the flange gaps within each access path within a level crossing by:
  - (a) eliminating the flange gaps with a suitable product
  - (b) reducing the flange gaps to a maximum horizontal width of 55mm, or
  - (c) phase out by grade separation,including its proposed timeframes for actioning this strategy at each location
2. the ARA member concerned conducts an audit of existing crossings against s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards and provides a written report to the ARA and the Commission for each jurisdiction within 24 months outlining the findings, the proposed actions for remedy in each location, the proposed timeframes for the remedy in each location, and the proposed expenditure to remedy each location
3. the ARA member concerned take prompt and reasonable steps to implement the strategy at each of the locations identified in the audit
4. the ARA member concerned provides reports to the Commission every 12 months following the audit identifying each station where a level crossing forms part of an access path, the progress made to implement the strategy at that location, the actual expenditure incurred in implementing the remedy at each location in the previous 12 months and the percentage rate of improvement of access paths through level crossings by eliminating, reducing or phasing out flange gaps on access paths in accordance with condition 1, and
5. the ARA member makes these reports available on its website.

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## 2.6 Access paths — conveyances

- (1) Subject to subsection (3) and section 2.7, an access path that allows continuous and unhindered passage must be provided with a minimum width of at least 850 mm.
- (2) Subsection (1) applies to doorways and stairs, and between entrances, exits, allocated spaces and other essential facilities for passengers using wheelchairs and other mobility aids.
- (3) If the conveyance exists or is ordered before the commencement of this section, the minimum width may be reduced to 800 mm at any doorway restriction.

### Conveyances

- Buses
  - Ferries
  - Trains
  - Trams
  - Light rail
- 

### Temporary exemption: existing rail conveyances

For a period of 5 years, an access path is only required at a single door of existing rail conveyances, subject to the following conditions:

1. equivalent access is provided at an alternative door of the rail conveyance in the following circumstances:
  - (a) if an allocated space is not available
  - (b) to ensure access to unique facilities, including an accessible bathroom (where provided), or
  - (c) to ensure a passenger can both board and alight the rail conveyance
2. the ARA member utilising this exemption installs signage in close proximity to the primary boarding point to notify passengers with mobility disability how access can be achieved to an alternative entry point, with staff assistance if required
3. the ARA member utilising this exemption reports to the Commission within 12 months of the exemption on the progress of its installation of the signage and annually until all stations affected have signage erected
4. the ARA member utilising this exemption provides a management plan to the Commission within 3 months of this exemption detailing:
  - (a) the management controls set out by the ARA member on how staff manage passengers with disability who require an alternative boarding point, and

- (b) the methods used to educate passengers on the availability of the alternative boarding point and staff assistance
5. the ARA member utilising this exemption provides a strategy to the ARA and the Commission within 12 months of this exemption to demonstrate how the member intends to provide access paths between the entrance of a conveyance and the allocated spaces and other essential facilities for passengers with disabilities, including its proposed timeframes for actioning this strategy, and proposed expenditure for that action
  6. the ARA member utilising this exemption provides reports to the Commission every 12 months from the date of this exemption setting out the member's progress toward providing access paths between the entrance of a conveyance and all allocated spaces and facilities for passengers with disabilities, including the actual expenditure incurred in implementing the strategy in the previous 12 months and the number of conveyances over which this exemption is claimed, and
  7. the ARA member utilising this exemption makes these plans and reports available on its website.

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## 2.8 Extent of path

- (1) An access path must extend from the entrance of a conveyance to the facilities or designated spaces provided for passengers with disabilities.
- (2) Up to 50 mm of an adjacent allocated space may be used as part of the access path.
- (3) If an access path cannot be provided, the operator must provide equivalent access by direct assistance.

### Conveyances

- Buses
  - Ferries
  - Trains
  - Trams
  - Light rail
- 

### Temporary exemption: existing rail conveyances

For a period of 5 years, an access path is only required at a single door of existing rail conveyances, subject to the following conditions:

1. equivalent access is provided at an alternative door of the rail conveyance in the following circumstances:
  - (a) if an allocated space is not available

- (b) to ensure access to unique facilities, including an accessible bathroom (where provided), or
  - (c) to ensure a passenger can both board and alight the rail conveyance
- 2. the ARA member utilising this exemption installs signage in close proximity to the primary boarding point to notify passengers with mobility disability how access can be achieved to an alternative entry point, with staff assistance if required
- 3. the ARA member utilising this exemption reports to the Commission within 12 months of the exemption on the progress of its installation of the signage and annually until all stations affected have signage erected
- 4. the ARA member utilising this exemption provides a management plan to the Commission within 3 months of this exemption detailing:
  - (a) the management controls set out by the ARA member on how staff manage passengers with disability who require an alternative boarding point, and
  - (b) the methods used to educate passengers on the availability of the alternative boarding point and staff assistance
- 5. the ARA member utilising this exemption provides a strategy to the ARA and the Commission within 12 months of this exemption to demonstrate how the member intends to provide access paths between the entrance of a conveyance and the allocated spaces and other essential facilities for passengers with disabilities, including its proposed timeframes for actioning this strategy, and proposed expenditure for that action
- 6. the ARA member utilising this exemption provides reports to the Commission every 12 months from the date of this exemption setting out the member's progress toward providing access paths between the entrance of a conveyance and all allocated spaces and facilities for passengers with disabilities, including the actual expenditure incurred in implementing the strategy in the previous 12 months and the number of conveyances over which this exemption is claimed, and
- 7. the ARA member utilising this exemption makes these plans and reports available on its website.

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## 6.4 Slope of external boarding ramps

The slope of an external boarding ramp must not exceed:

- (a) 1 in 14 for unassisted access (**AS/NZS3856.1 (1998) Clause 2.1.8 (e)** (including the notes)); and
- (b) 1 in 8 for unassisted access where the ramp length is less than 1520 mm (**AS1428.2 (1992) Clause 8.4.2 (a)** and **AS1428.1 (2001) Figure 8**); and
- (c) 1 in 4 for assisted access (**AS/NZS3856.1 (1998) Clause 2.1.8 (e)**).

## Conveyances

except dedicated school  
buses and small aircraft

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### Temporary exemption: existing rail conveyances

For a period of 5 years, for existing rail stock, where the relationship between the platform and rail carriage means that an external board ramp can only be provided at a gradient greater than 1 in 8 and less than 1 in 4, ARA members are not required to provide staff assistance in ascending or descending the ramp, subject to the following conditions:

1. the ARA member utilising this exemption undertake within 12 months data mapping of all stations and stops state-wide to identify the relevant locations where an external board ramp can only be provided at a gradient greater than 1 in 8 and less than 1 in 4
2. a strategy is developed by the ARA member utilising this exemption and provided to the Commission within 12 months of this exemption on how platforms can be improved at nominated boarding points on a case-by-case basis, including timeframes for action and planned expenditure for the improvements
3. the ARA member utilising this exemption reports to the Commission annually thereafter on the number of locations where an external board ramp can only be provided at a gradient greater than 1 in 8 and less than 1 in 4, progress to demonstrate how the boarding ramp gradients are being improved at each station, and actual expenditure on the required works at each station in the last 12 months
4. the ARA member utilising this exemption makes these reports available on its website
5. the ARA member utilising this exemption ensures that service users can obtain information about restricted access at any particular rail station or infrastructure:
  - (a) at the location of the restriction
  - (b) via the ARA members' websites and downloadable fact sheets
  - (c) in person at Travel Centres, where they exist
  - (d) via a telephone call to the Customer Contact Centre, where available, and
  - (e) via any other forms of communication provided by the ARA member (such as a mobile application), and
6. any ARA member utilising this exemption provides free travel for any assistant accompanying a person with disability who requires assistance to use the ramps between 1 in 8 and 1 in 4 and publicises the free travel arrangements:
  - (a) at the location of the restriction
  - (b) on the ARA members' websites and downloadable fact sheets

- (c) at Travel Centres, where they exist
- (d) to enquirers calling the Customer Contact Centre concerning access, where relevant, and
- (e) via any other forms of communication provided by the ARA member (such as a mobile application).

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## 8.2 When boarding devices must be provided

- (1) A manual or power assisted boarding device must be available at any accessible entrance to a conveyance that has:
  - (a) a vertical rise or gap exceeding 12 mm (**AS/NZS3856.1 (1998) Clause 2.1.7 (f)**); or
  - (b) a horizontal gap exceeding 40 mm (**AS/NZS3856.1 (1998) Clause 2.1.8 (g)**).

### **Conveyances**

except dedicated  
school buses and  
small aircraft

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### **Temporary exemption: existing rail conveyances**

For a period of 5 years, a manual or power assisted boarding device is only required at a single door of an existing rail conveyance, subject to the following conditions:

- 1. equivalent access is provided at an alternative door of the rail conveyance in the following circumstances:
  - (a) if an allocated space is not available
  - (b) to ensure access to unique facilities, including an accessible bathroom (where provided), or
  - (c) to ensure a passenger can both board and alight the rail conveyance
- 2. any ARA member utilising the exemption ensures that service users can obtain information about specified boarding points at any particular rail station or infrastructure:
  - (a) at any platform at which there is a specified boarding point
  - (b) via the ARA members' websites and downloadable fact sheets
  - (c) in person at Travel Centres, where they exist
  - (d) via a telephone call to the Customer Contact Centre, where available, and
  - (e) via any other forms of communication provided by the ARA member (such as a mobile application)

3. any ARA member utilising this exemption ensures that assistance is provided at each station in deploying the assisted boarding device for passengers who require assistance boarding and alighting a rail conveyance without the requirement for passengers to book or make prior arrangements for assistance
4. any ARA member utilising the exemption provides a report to the Commission and the ARA within 12 months of the grant of this exemption on:
  - (a) the number of conveyances over which this exemption is claimed;
  - (b) measures taken to ensure that staff and passengers are adequately informed of:
    - i. the doors of rail conveyances at which boarding devices are available, and
    - ii. the equivalent access measures available, and
  - (c) measures taken to ensure that assistance is provided to passengers at each station at all times the railway is operating, whether by the driver of the conveyance or by ensuring sufficient staff are available at stations to assist passengers through the deployment of the assisted boarding device, the number of staff at each station and the roles in which they are employed, and the planned and actual expenditure incurred in implementing these measures
5. the report be updated every 12 months
6. the ARA member utilising this exemption makes the report available on its website, and
7. the ARA member utilising this exemption provides de-identified reports to the Commission on any complaints made to it or an external agency (of which the ARA member is aware) alleging a failure in the provision of equivalent access. The report should identify the station that was the subject of the complaint.

## **PART B – EXEMPTION FROM THE PREMISES STANDARDS**

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### **H2.2 Accessways**

- (1) An *accessway* must comply with AS 1428.2.
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## **Temporary exemption: existing rail premises and existing rail infrastructure**

For a period of 5 years, flange gaps of up to 75mm are permitted where a level crossing forms part of an access path on existing rail premises or rail infrastructure, subject to the following conditions:

1. the ARA member concerned provides a strategy to the ARA and Commission within 12 months of this exemption to demonstrate how the member intends to improve the flange gaps within each access path within a level crossing by:
  - (a) eliminating the flange gaps with a suitable product
  - (b) reducing the flange gaps to a maximum horizontal width of 55mm, or
  - (c) phase out by grade separation,including its proposed timeframes for actioning this strategy at each location
2. the ARA member concerned conducts an audit of existing crossings against s 2.1 of the Transport Standards and cl H2.2 of the Access Code in the Premises Standards and provides a written report to the ARA and the Commission for each jurisdiction within 24 months outlining the findings, the proposed actions for remedy in each location the proposed timeframes for the remedy in each location, and the proposed expenditure to remedy each location
3. the ARA member concerned take prompt and reasonable steps to implement the strategy at each of the locations identified in the audit
4. the ARA member concerned provides reports to the Commission every 12 months following the audit identifying each station where a level crossing forms part of an access path, the progress made to implement the strategy at that location, and the actual expenditure incurred in implementing the remedy at each location in the previous 12 months and the percentage rate of improvement of access paths through level crossings by eliminating, reducing or phasing out flange gaps on access paths in accordance with condition 1, and
5. the ARA member makes these reports available on its website.

## **PART C – EXEMPTIONS FROM THE DISABILITY DISCRIMINATION ACT**

The Commission also proposes to grant to members of the ARA an exemption from ss 23 and 24 of the DDA as follows:

If:

- a matter is regulated by a section of the Transport Standards or Premises Standards, and
- the relevant section of the Transport Standards or Premises Standards is subject to an exemption granted by this instrument, and

- a member of the ARA complies with the relevant section of the Transport Standards or Premises Standards, as modified by the relevant exemption, and
- the member of the ARA complies with any conditions subject to which the relevant exemption is granted,

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

## SCHEDULE TWO

### ARA MEMBERS TO WHICH EXEMPTIONS APPLY

SA	NSW	VIC	WA
Journey Beyond Rail Expeditions	Transport for New South Wales  Sydney Trains  NSW TrainLink  Transport Asset Holding Entity of New South Wales	Department of Transport Victoria  Metro Trains Melbourne Pty Ltd  VLine	Public Transport Authority  TransPerth  TransWA

## **SCHEDULE THREE**

### **SUBMISSIONS RECEIVED**

The Commission received submissions concerning the application from the following people and organisations:

- Disability Council NSW
- Richard Witbreuk
- Physical Disability Council of NSW
- All Aboard Network
- Disability Resources Centre
- National Inclusive Transport Advocacy Network
- Anti-Discrimination NSW
- Queenslanders with Disability Network
- Accessible Public Transport Jurisdictional Committee
- Australasian Railway Association

Three additional submissions were provided to the Commission on a confidential basis.

The Commission received submissions concerning the expert report from the following organisations:

- All Aboard Network
- National Inclusive Transport Advocacy Network
- Queenslanders with Disability Network
- Australasian Railway Association

Copies of all non-confidential submissions are available on the Commission's website at <https://www.humanrights.gov.au/australasian-railway-association-ara>.