

AUSTRALIAN HUMAN RIGHTS COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (Cth), Section 55

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

NOTICE OF DECISION ON JOINT APPLICATION FOR TEMPORARY EXEMPTIONS: STATE OF QUEENSLAND (ACTING THROUGH THE DEPARTMENT OF TRANSPORT AND MAIN ROADS) AND QUEENSLAND RAIL

The Australian Human Rights Commission ('the Commission') gives notice of its decision regarding a joint application made by the State of Queensland (acting through the Department of Transport and Main Roads) ('TMR') and Queensland Rail for temporary exemptions pursuant to s 55 of the *Disability Discrimination Act 1992* (Cth) ('DDA') and s 33A.1 of the *Disability Standards for Accessible Public Transport 2002* (Cth) ('Transport Standards').

1 THE APPLICATION

1.1 In relation to the New Generation Rollingstock ('NGR') Train Project, the applicants have sought exemptions from the Transport Standards as below:

- (i) Section 2.6(1)
 - (A) Width of access path adjacent to the unisex accessible toilet module in the MB car
 - (B) Width of access path adjacent to an allocated space in the accessible cars
 - (C) Access path is only available at a single door
- (ii) Section 2.8(1)
 - (A) Extent of access path from the entrance of the single assisted boarding door to all allocated spaces and priority seats in the accessible cars.
 - (B) Extent of access path from the entrance of the single assisted boarding door to the unisex accessible toilet module.
- (iii) Section 8.2
 - (A) Availability of a manual assisted boarding device (ramp) at any accessible entrance.
- (iv) Section 15.3
 - (A) Availability of unisex accessible toilet to passengers using wheelchairs and mobility aids.

(v) Section 15.4(1)(b)

(A) Ability for passengers in wheelchairs or mobility aids to enter, position their aids and exit the toilet module.

(vi) Section 15.4(3)

(A) Dimension from the centre line of the pan to the far-side wall.

1.2 The applicants have also sought exemptions to s 23 and s 24 of the DDA for matters regulated by the above Transport Standards that are subject to an exemption granted by the Commission in this application.

2 DECISION OF THE COMMISSION

2.1 The Commission has decided that it will not grant temporary exemptions from:

- Sections 2.6(1), 2.8(1), 15.3, 15.4(1)(b) and 15.4(3) of the Transport Standards, and
- Sections 23 and 24 of the DDA.

2.2 The Commission will grant TMR a temporary exemption to s 8.2 of the Transport Standards on specified conditions until 1 October 2020. It will also grant TMR an exemption to s 23 and s 24 of the DDA to the extent that it complies with s 8.2 as modified by the exemption and the conditions of the exemption. This will allow TMR the same temporary exemption already granted to Queensland Rail in 2015 as a member of the Australasian Railway Association.

3 CONSIDERATION AND REASONS

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

3.1.1 The joint application and submissions by TMR and Queensland Rail

3.1.2 All information provided by TMR and Queensland Rail in response to the Commission's request for further information

3.1.3 Information from the Accessible Public Transport Jurisdictional Committee ('APTJC')

3.1.4 Submissions from other interested parties

3.1.5 The response of the applicants to the public submissions received by the Commission dated 9 February 2018

3.1.6 The response of the applicants to the Commission's preliminary view dated 16 March 2018, and

3.1.7 The responses of other interested parties to the Commission's preliminary view.

- 3.2 These documents are available on the Commission’s website at:
www.humanrights.gov.au/disability_rights/exemptions.
- 3.3 In reaching its decision, the Commission had regard to the following:
- 3.3.1 The terms and objects of the DDA
 - 3.3.2 The Transport Standards
 - 3.3.3 The *Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3)*, and
 - 3.3.4 The *Commission Guidelines: Temporary Exemptions under the Disability Discrimination Act (2010)*.
- 3.4 The history of the application and the reasons for the Commission’s decision are set out below.

4 MEANING OF IMPORTANT TERMS

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

5 REVIEW OF DECISION

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

6 BACKGROUND

- 6.1 On 27 September 2017, TMR and Queensland Rail made a joint application for temporary exemptions under s 55 of the DDA and s 33A.1 of the Transport Standards in relation to the NGR Train Project.
- 6.2 The NGR Train Project will ultimately deliver 75 new six-car passenger trains to South East Queensland through an Availability Public Private Partnership, which was awarded to the Bombardier Transportation-led consortium Qtectic in 2013.
- 6.3 The NGR trains will be owned by TMR and operated by Queensland Rail on its Citytrain network.
- 6.4 On 11 December 2017, the first NGR trains entered into passenger service in Queensland.
- 6.5 Compliance issues have been identified with the current NGR train configuration when assessed against the Transport Standards and the DDA.

- 6.6 TMR and Queensland Rail asked that the temporary exemptions be granted for a period of three years to allow them to progressively resolve the areas of non-compliance and improve the functionality of the NGR train.
- 6.7 The applicants stated that the purpose of the joint application is to provide legal certainty while the agreed and funded rectification work is completed. The joint application indicates that, while the rectification work is underway, the NGR trains will enter passenger service in their current configuration and then gradually be removed and rectified.
- 6.8 Queensland Rail and TMR requested that this application be processed on an expedited basis because the NGR trains are needed for the 2018 Gold Coast Commonwealth Games. The Commonwealth Games commence on 4 April 2018.
- 6.9 The applicants have identified the following compliance issues with the current NGR train configuration and have requested the corresponding exemptions under the Transport Standards:
- (a) Access paths – width:
 - (i) The access path between the allocated spaces in the two accessible cars is not compliant
 - (ii) The access path past the unisex accessible toilet module is not compliant due to the narrow body width of the car
 - (b) Access paths – extent of path:
 - (i) The access path does not extend between the single assisted boarding point door and all allocated spaces and priority seats in the accessible cars
 - (ii) The access path does not extend between all allocated spaces and priority seats in the accessible cars to/from the unisex accessible toilet module
 - (c) Unisex accessible toilet module:
 - (i) Dimensions – one dimension within the toilet module (from the centre-line of the pan to far side wall) is non-compliant due to the design trade-off between the size of the toilet module and adjacent path past the toilet
 - (ii) Functionality – some customers using a mobility device may not be able to carry out a fully parallel side transfer to the pan due to the circulation space between the toilet module’s curved door and the wall and pan
- 6.10 The applicants noted that the Queensland Government has agreed to allocate funds for the rectification work.
- 6.11 The rectification work will bring the trains into substantial compliance with the Transport Standards — excepting s 2.6(1) and s 8.2 — as well as doubling the toilet facilities on the interurban trains, adding priority seating in new locations,

revising train signage, and adding grab/handrails and additional accessible buttons and controls to maximise functionality.

6.12 The applicants stated that the NGR trains are required to replace an aging portion of the existing Queensland Rail fleet which are reaching the end of their service lives.

6.13 The applicants noted that they undertook consultation with the disability sector during the train design process, including a series of consultations with the Queensland Rail Accessibility Reference Group ('ARG') between 2014 and 2017 which generated various options discussion papers and a final options report.

7 THE COMMISSION'S PROCESS

7.1 Following receipt of the joint application, the Commission wrote to the applicants and requested further information and documents. This further information was received by the Commission on 15 November 2017.

7.2 In response to the Commission's request to make the joint application and further information public, the applicants indicated that there were certain documents that they considered to be 'commercial-in-confidence' or that raised issues of personal privacy. While willing to provide the information to the Commission, the applicants requested that certain information be kept confidential. On 28 November 2017, the applicants provided the Commission with redacted copies of the requested information to be made available to the public.

7.3 On 4 December 2017, the Commission called for submissions about the application's merits and commenced a six-week public consultation period. The Commission did this by:

- Publishing the joint application and redacted further information on its website, and calling for public submissions
- Writing to State and Territory anti-discrimination bodies, inviting them to make submissions
- Writing to a number of peak bodies representing people with disability, inviting them to make submissions, and
- Writing to APTJC, inviting its members to make submissions.

7.4 In this way, the Commission satisfied its obligation to consult with APTJC, pursuant to s 33A.1(4)(a) of the Transport Standards.

7.5 On 6 December 2017, members of the Commission attended a viewing of the NGR train and participated in a Boarding Assistance Trial with members of the ARG. The Boarding Assistance Trial was arranged to familiarise people with disability with the new boarding procedures of the NGR train.

7.6 The Commission received a number of submissions during its public consultation. A list of these submissions is contained in Schedule 2 to this decision. On 25 January 2018, the public submissions were made available on

the Commission's website and the applicants were provided with the opportunity to reply.

- 7.7 On 9 February 2018, TMR and Queensland Rail provided a further written submission to the Commission addressing matters raised in the public submissions. This was uploaded onto the Commission's website on 14 February 2018.
- 7.8 On 2 March 2018, the Commission issued a preliminary view in this matter. It then gave interested parties the opportunity to respond to the Commission's preliminary findings.
- 7.9 On 16 March 2018, the applicants provided a joint response to the Commission's preliminary view.
- 7.10 The Commission also received nine responses to the preliminary view from interested parties who had provided submissions during the public consultation process.
- 7.11 The Commission has considered all of the material referred to above in reaching its decision in relation to this application.

8 PROCEDURAL FAIRNESS CONSIDERATIONS

- 8.1 Consistent with fundamental principles of procedural fairness, the Commission considers that the process outlined above has provided both the applicants and the public with an adequate opportunity to comment on this application for temporary exemptions.
- 8.2 The applicants supplied the Commission with both public and confidential information. After considering all of the information, the Commission has not needed to rely upon the confidential information in reaching its decision. Broadly, this confidential information relates to the current status of the NGR build and its deployment plan, internal documents relating to consultations with the ARG, a high-level timetable for the proposed rectification work and personal information about members of the ARG.
- 8.3 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 is sufficient. The confidential information does not materially expand the factual matrix that the Commission considers determinative.
- 8.4 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.

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

The DDA and the Transport Standards

- 9.1 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).

- 9.2 The DDA also empowers the Minister to formulate disability standards (DDA s 31(1)). The Transport Standards are disability standards made under this provision.
- 9.3 The Transport Standards came into operation on 23 October 2002.
- 9.4 Pursuant to s 34 of the DDA, a person will not contravene the DDA if they act 'in accordance with a disability standard'. In this way, disability standards provide an avenue whereby persons and bodies, such as public transport operators and providers, can ensure that they will not be found to have discriminated unlawfully on the ground of disability.
- 9.5 Conversely, pursuant to s 32 of the DDA, it is unlawful to contravene a disability standard.

The Commission's powers to grant exemptions

- 9.6 Parliament has conferred broad powers on the Commission to grant exemptions under the DDA (s 55) and the Transport Standards (s 33A.1). The effect of an exemption under the Transport Standards is that, where a person fails to comply with the Transport Standards but that failure is in accordance with an exemption that has been granted by the Commission, the person does not contravene the standards (Transport Standards s 33A.3). However, this does not automatically mean their conduct is 'in accordance with' the relevant standard (and so within the proviso contained in s 34 of the DDA). For this reason, a person seeking an exemption under a disability standard may also choose to seek an exemption from the DDA, as the applicants have done in this case.
- 9.7 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.
- 9.8 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.
- 9.9 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)).

- 9.10 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 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)).
- 9.11 Notwithstanding the few express limitations referred to above, the Commission's power to grant exemptions from compliance with the DDA or the Transport 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'.¹
- 9.12 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.
- 9.13 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.
- 9.14 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 or s 33A.1 of the Transport 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 and the Transport 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 and the Transport Standards seek to establish.

- 9.15 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.
- 9.16 The Commission issued guidelines in 2010 (see [3.3.4]) about how 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.
- 9.17 The guidelines do not expressly deal with the Commission's powers to grant exemptions under the Transport Standards. However, the Commission considers that the factors that are relevant to the exercise of its powers under the DDA are also relevant to the exercise of its powers under the standards.

10 DECISION TO REFUSE EXEMPTIONS

- 10.1 The Commission has decided that it will not grant Queensland Rail and TMR temporary exemptions to:
- Sections 2.6(1), 2.8(1), 15.3, 15.4(1)(b) and 15.4(3) of the Transport Standards, and
 - Sections 23 and 24 of the DDA.
- 10.2 Queensland Rail and TMR recognise that the new trains do not meet the Transport Standards and have made this application for temporary exemptions. A conspicuous accessibility issue with the current NGR train configuration is that a person using a mobility device who boards the MA carriage will likely not be able to access the only toilet on the train, in the MB carriage, because the access path between the carriages is too narrow to navigate. Additionally, even if a person using a mobility device boards the MB carriage, he or she may not be able to use the toilet because its dimensions

do not allow for a full side-on transfer. This is not compliant with s 15.3 and s 15.4 of the Transport Standards.

- 10.3 The purpose of the Transport Standards is stated to be ‘to enable public transport operators and providers to remove discrimination from public transport services’ (Transport Standards s 1.2(2)). The Transport Standards apply ‘to the widest possible range of people with disabilities as defined by the [DDA]’ (Transport Standards s 1.4(1)) and apply ‘to all operators [and providers] and the conveyances they use to provide public transport services’ (Transport Standards s 1.4(2)).
- 10.4 The Transport Standards are framed around the concept that public transport services and facilities will progressively become more accessible as older, non-compliant conveyances are replaced with new, compliant conveyances.
- 10.5 This is emphasised in s 1.2(4) of the *Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3)* where it 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.
- 10.6 Pursuant to s 33.1 of the Transport Standards, from the date the Transport Standards came into effect — 23 October 2002 — all new conveyances must be compliant with the Transport Standards.
- 10.7 For existing conveyances, the Transport Standards contain provisions providing target dates for increasing compliance with the standards. These dates, and the percentage of required compliance, varies depending on the particular standard and item regulated.
- 10.8 The NGR trains for which these temporary exemptions are sought were procured after the Transport Standards came into effect.

Public consultation

- 10.9 The Commission received 20 submissions from a variety of government agencies, individuals and disability advocacy groups in response to the joint application and the applicants’ response to the Commission’s request for further information.
- 10.10 The APTJC and the Acting Commissioner for Equal Opportunity in Western Australia had ‘no objections’ to the Commission granting the temporary exemptions as requested, and the Office of the Commissioner for Equal Opportunity of South Australia considered it ‘reasonable’.

10.11 The remainder of the submissions broadly opposed the Commission granting the temporary exemptions, either outright or on the conditions requested by the applicants.

10.12 The Anti-Discrimination Commission of Queensland submitted that:

It is a grave indictment on the State that a major public works project was procured with apparent disregard for the laws that prohibit discrimination and set out minimum standards for public transport accessibility.

...

That the Queensland Government would in 2013 commission a fleet of trains that do not fully comply with the Transport Standards, and in other respects are likely to discriminate against people with disabilities, is reprehensible. And in further defiance and disregard for the law, the NGR trains have been put in use without any rectification work and without the benefit of an exemption granted by the Australian Human Rights Commission.

10.13 Queensland Advocacy Incorporated submitted that:

Green-lighting the application and allowing the trains to run sends an unfortunate message: that transport providers can deliberately or negligently commission and run non-[Transport Standards]-compliant conveyances, and if someone objects, they will be permitted to run the non-compliant vehicles as long as they undertake to fix them.

10.14 Vision Australia stated:

All the accessibility issues with the trains were entirely foreseeable, and the current situation is entirely the result of bad planning, flawed consultation, and non-compliance with the DDA/[Transport Standards]. In adopting this approach, the Applicant would have known, or ought reasonably to have known, that they would be leaving themselves open to the risk of DDA complaints. People should not be denied the opportunity to enforce their rights through a complaints process, including the Federal Court.

10.15 The ARG, which was referred to in the joint application and has consulted with Queensland Rail since 2014 on NGR accessibility issues, stated that:

Only a refusal without terms and conditions will address the root cause – discriminatory procurement – of the discriminatory practice.

10.16 The ARG also disputed that TMR and Queensland Rail engaged the group in meaningful consultation on the accessibility issues, indicating:

The Queensland Government did not include people with disabilities in consultation until 2014, and this was after the design of the train's structure was finalised. The ARG could only comment on preferred fit out within a discriminatory structure.

10.17 Many submissions raised concerns about the discriminatory impact of using the pre-rectified NGR trains, particularly for those using wheelchairs and other mobility devices. One individual stated in his submission that proximity to an accessible rail station was his primary reason for choosing his current home and that, while he currently accessed the toilets on board existing trains, he

did not believe that he would be able to access the toilet in the NGR train because of the dimensions of his wheelchair.

Consideration

- 10.18 In passing the DDA and making the Transport 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 and the Transport 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, the adoption of target dates for gradual, progressive compliance for existing conveyances, and the availability of a defence of unjustifiable hardship.
- 10.19 The joint application by TMR and Queensland Rail noted that planning and procurement for the NGR project commenced in 2008 and the contract was awarded to Qtectic in 2013, some 6 and 11 years after the Transport Standards came into operation.
- 10.20 The applicants have acknowledged in their response to the Commission dated 15 November 2017 that many of the existing non-compliances in the NGR trains can be resolved by rectification. This suggests that these are not 'unavoidable design constraint' issues. On the material before the Commission, the only non-compliances that will remain post-rectification relate to the provision of an access path (s 2.6(1)) and a boarding device (s 8.2) at a single or alternate door, rather than at all doors. The matter of post-rectification non-compliance is addressed later in this decision.
- 10.21 On the material before the Commission, it is not clear why the Queensland Government procured non-compliant trains in 2013, or why the rectification work did not occur between procurement in 2013 and entry into passenger service in 2017. The only explanation provided to the Commission is set out below:
- In September 2012, the Department of Transport and Main Roads (TMR) became the principal delivery agency for the NGR project and the responsibility for project procurement was handed to Projects Queensland (now Queensland Treasury Commercial Group).
- The technical specification for the NGR train provided to Treasury Commercial Group at that time did not include a second toilet, calling for a six-car driver-only train, with one toilet in the middle (to align with the platform assisted boarding point). The decision to include one toilet module (rather than two) was made at Cabinet level by the State Government at that time.
- 10.22 The applicants have stated that the proposed exemptions fit within the objects of the DDA by allowing them an appropriate and reasonable time to address the areas of non-compliance with the NGR. They submitted that the requirement in s 3 of the DDA that discrimination be eliminated 'as far as possible' necessarily implied that it might not be reasonable to immediately or completely eliminate discrimination in every instance.

- 10.23 The DDA and the Transport Standards do not require that discrimination be eliminated immediately or completely. However, since 2002, the Transport Standards have required that all *new* conveyances coming into passenger service are compliant with the Transport Standards.
- 10.24 The Commission recognises that the procurement of the NGR trains is a large and complicated infrastructure project that has spanned successive Queensland governments. It also notes that the applicants have acknowledged in their response to the Commission’s preliminary view that their procurement and consultation process ‘could have been much improved’ and that they have taken steps to improve the situation. The new Accessible Transport Networks team within TMR is a commendable development in this regard for the future.
- 10.25 While the Commission acknowledges that the Queensland Government has agreed to allocate funds to bring the trains into substantial compliance with the Transport Standards within three years, the Commission is not convinced that this commitment is sufficiently persuasive to suspend the rights of people who might experience discrimination on the NGR trains during this time to make a complaint under the DDA. Submissions received by the Commission during the public consultation period emphasised the discriminatory impact on people with disability of using the pre-rectified NGR trains. A person using a mobility device may not be able to access or use a toilet on a pre-rectified NGR train for up to three years. The Commission considers that this is not a trivial matter. The rectification process proposed by the applicants principally undertakes to meet a legal obligation that has existed since 2002.
- 10.26 In their joint response to the Commission’s preliminary view, the applicants have submitted that the power in s 55 of the DDA and s 33A.1 of the Transport Standards takes as a starting point that there is a non-compliance with the law and that the Commission will fall into legal error by considering the past conduct of the applicants.
- 10.27 The Commission respectfully disagrees. Accepting the applicants’ submission would require the Commission to ignore important context when making its decision. In weighing up whether an exemption is reasonable in the circumstances, the Commission considers that the past conduct of the applicants and any compelling reasons for the non-compliances — or lack thereof — may be relevant factors for the Commission to consider in exercising its statutory discretion.

Public interest considerations

- 10.28 The applicants have identified a number of issues that they consider to be factors of public interest that weigh in favour of the Commission granting their application for exemptions. These include:
- the public interest in maintaining and improving the capacity of South East Queensland’s passenger rail network for all customers, including those with disabilities
 - that withholding the NGR trains from service is likely to incur costs for the State of Queensland under the Public Private Partnership contract

- that the NGR trains include a wide range of new and improved features for all customers
- that the NGR trains are substantially accessible to customers with a disability, and
- the public interest in ensuring that the NGR fleet can service increased demands for passenger travel during the Commonwealth Games in April 2018.

10.29 The Commission accepts that these are relevant considerations and that it may have regard to broad considerations of public interest in determining whether the grant of an exemption is reasonable.

10.30 However, the Commission also recognises that there is significant public interest in upholding the important protections that the DDA provides and considers that they should not be lightly overridden.

10.31 The DDA has been in operation since 1993 and the Transport Standards have been in effect since 2002. This is significant because the Transport Standards represent a national commitment to the community, particularly people with disability, that public transport services and facilities will progressively become more accessible as older, non-compliant conveyances are replaced with new, compliant conveyances. This commitment is undermined if new conveyances that do not comply with sections of the Transport Standards are brought into passenger service and then exempted readily from the ordinary application of the DDA and the Transport Standards.

10.32 The Commission considers that there is significant public interest in the predictable application of this longstanding anti-discrimination law and the national standards. Proposed exceptions to this beneficial legislation, and its concomitant complaint process, must be carefully assessed on a case-by-case basis. The public submissions received by the Commission reflect that there is an expectation in the community that laws relating to disability discrimination will be taken seriously.

10.33 The applicants have provided limited evidence to support a number of the matters asserted in this application, particularly their public interest considerations. The submissions of the applicants suggest the possibility of withholding the NGR trains from passenger service if the Commission does not grant these exemptions. However, the applicants have not provided direct submissions or evidence to the Commission to indicate that this will be a likely consequence.

10.34 The Commission understands that, since December 2017, nine pre-rectified NGR trains have been introduced into passenger service in Queensland during the time that the Commission has been considering this application. The Commission is also aware that Queensland's Transport Minister has made statements to Parliament² and to the media stating that — whatever the outcome of the Commission's decision in this matter — the NGR trains will be used to deliver the Commonwealth Games transport plan. The Commission has not been provided with submissions or evidence about what the

Queensland Government intends to do with the NGR trains after the Commonwealth Games if this application for temporary exemptions is refused.

- 10.35 Similarly, while the applicants have suggested potential cost implications arising out of the Public Private Partnership ('PPP') contract if these exemptions are not granted, the Commission has not been provided with the PPP contract or with any detailed submissions on this issue. The Commission accepts that issues relating to the expenditure of public funds are a relevant matter of public interest to be balanced. However, given that there is no specific material before the Commission regarding the detail of the PPP contract and relevant corollary issues such as costings, insurance or potential contractual redress, it is unable to give significant weight to this issue.
- 10.36 The Commission notes that a general defence of unjustifiable hardship exists under the DDA and may be argued by the applicants in response to complaints.
- 10.37 In deciding whether the grant of temporary exemptions in this application is reasonable, the Commission must balance competing issues of public interest. In light of the limited evidence put to the Commission regarding the public interest considerations advanced by the applicants, and taking into account the purpose, scheme and objectives of the DDA and the Transport Standards, as well as the countervailing public interests identified above in [10.30]–[10.32], the Commission considers that the public interest considerations raised by the applicants should not be given determinative weight.

Conditions

- 10.38 The applicants have suggested that the Commission could impose certain conditions on the temporary exemptions that they have requested. Broadly, these conditions would require that, within a three-year period, the applicants: rectify the non-compliances (as far as possible), facilitate physical access for the ARG to conduct inspections of the reconfigured NGR trains, consult with the ARG every six months on the impact of the exemptions on passenger amenity and report to the Commission at least every six months during the exemption period. In this way, the Commission would be given a monitoring role over the progress of the rectification process and the benefits of the exemptions would be tied to the rectification process.
- 10.39 If complied with, the suggested conditions would ensure that — to the extent possible — the NGR trains will be rectified within a period of three years. However, granting these exemptions would also suspend the rights of people with disability to seek redress for discrimination that they might experience on the NGR trains for a period of three years. This is not an insignificant period of time.
- 10.40 For the reasons discussed above, the Commission is not satisfied that, in the circumstances, it is reasonable and appropriate to suspend the rights of people with disability to make a complaint while this rectification work is undertaken.

Relocation of the guard issue

- 10.41 In the new NGR trains, the guard carriage is located at the back of the train. This is a change from past and existing trains in South East Queensland where the guard carriage is located in the middle of the train, next to the assisted boarding point on many platforms. Concern about the relocation of the guard carriage animated many of the submissions received by the Commission. Individuals such as Mr Brendan Charles Donohue and Ms Wendy Lovelace emphasised their worry that service levels for people who require assistance to board or alight trains will diminish because the guard is further away and because stations might not be reliably staffed.
- 10.42 Queensland Rail and TMR did not seek any temporary exemptions in relation to the relocation of the guard carriage. As such, this issue falls outside the scope of the current exemption application.
- 10.43 In their response to the public submissions dated 9 February 2018, the applicants set out in considerable detail why they consider that the operational model for the NGR train will not result in discriminatory outcomes for people with disability.
- 10.44 For matters that fall outside an issue regulated by a current temporary exemption, the primary method of ensuring compliance with the DDA and the Transport Standards is through the complaints mechanism contained in the *Australian Human Rights Commission Act 1986* (Cth).

Trains entering into passenger service

- 10.45 A number of the submissions received from the public urged the Commission to prevent the NGR trains from entering into passenger service until they have been rectified. The Commission does not have this power. Decisions about the layout of the NGR train, and the timing of their entry into passenger service, are for the Queensland Government. The Commission's power in this matter is limited to deciding whether to grant or refuse the specific temporary exemptions requested in the joint application.

Non-compliances post-rectification and unjustifiable hardship

- 10.46 In their further information provided on 15 November 2017, the applicants indicated that all non-compliances with the NGR trains and the Transport Standards can be resolved, with the exception of s 2.6(1) and s 8.2.
- 10.47 The applicants stated that, in possible breach of s 2.6(1), an access path will only be provided at a single door, or an alternate door, if available and that, in contravention of s 8.2, a boarding device can only be provided at a single door, or an alternate door, if available, rather than at all accessible entrances. The applicants submitted that access paths cannot be provided at all doors, at all stations, due to infrastructure and operational constraints across the South East Queensland Rail network. Limited technical or expert evidence about the relevant infrastructure and operational constraints was provided to the Commission to support this submission.
- 10.48 In the applicants' response to the public submissions dated 9 February 2018, they stated that exemptions to s 2.6(1) and s 8.2 have been requested on the

basis that the nominated assisted boarding point on station platforms only aligns with one door of the NGR train (and all of Queensland Rail's existing fleet).

10.49 It provided:

It is not possible for Queensland Rail to provide boarding assistance at each door of the NGR train. This is because station infrastructure restrictions mean that the required manoeuvring area is not available at all locations of certain platforms. Therefore, assisted boarding must occur through a single door (rather than all doors) of an NGR train, with equivalent access being provided at an alternative door if boarding through the nominated door is not available.

10.50 On 1 October 2015, the Commission gave notice of its decision on an application for temporary exemptions made by the Australasian Railway Association (ARA).

10.51 The ARA decision, and the relevant materials, are accessible on the Commission's website at www.humanrights.gov.au/disability_rights/exemptions.

10.52 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 firms contributing to the rail sector.

10.53 The ARA application, and the submissions received in relation to it, raised a large number of technical issues about limitations affecting rail conveyances, rail premises and rail infrastructure, the requirements of the Transport and Premises Standards in relation to these, and the extent to which compliance with the standards is difficult or impossible to achieve. To assist the Commission in assessing these matters, it engaged an external expert consultant.

10.54 ARA members had submitted that their ability to provide access to each rail car pursuant to s 2.6 and s 8.2 of the Transport Standards is affected by a number of factors including:

- variations in existing infrastructure that results in differing vertical and horizontal gaps necessitating the use of boarding ramps
- variations in passenger and freight rollingstock, track curves, track cants, safety clearance requirements and maintenance tolerances, and
- difficulties in deploying the manual boarding ramp at each railcar door given platform obstacles, timetable requirements and railway staff capabilities.

10.55 In the ARA decision, the Commission concluded that, given the issues above, it was satisfied that exemptions to s 2.6 and s 8.2 were reasonable, subject to certain conditions.

10.56 It is significant to note however that, in the ARA decision, the temporary exemption to s 2.6 was limited to existing rail conveyances. It does not apply to new conveyances.

10.57 In the ARA decision, the Commission stated:

The Commission considers that a five year exemption period should provide the ARA and its members with sufficient time to:

- comply with the provisions of the Transport and Premises Standards; or
- explore, identify, document, and implement methods of providing equivalent access or alternative solutions; and/or
- identify and document situations where compliance with the standards would impose unjustifiable hardship on particular members of the ARA, and comply with the Standards to the maximum extent not involving unjustifiable hardship.

The Commission considers that in the long term, it is appropriate that members of the ARA comply with the Standards, or rely, where appropriate, on the defences they provide. At the expiry of the exemptions now granted, the Transport Standards will have been in effect for 18 years. Members of the ARA will have benefited from exemptions granted by the Commission for 13 years. Further, the target dates in the Transport Standards and the Premises Standards will at that stage require 90% compliance with most elements of those standards. That means that the effect of granting further exemptions will potentially have a greater impact on the rights of persons with disabilities. In light of these considerations, there can be no assumption that further exemptions will be granted to members of the ARA. Persuasive reasons would be required to justify the grant of any further exemptions, as would detailed evidence establishing both the justification for any further grant, and the impact such a grant would be likely to have on persons with disabilities.

10.58 The applicants have stated in the present application that, even post-rectification, it is 'not possible' for Queensland Rail to provide boarding assistance at each door of an NGR train. This non-compliance with the Transport Standards appears to be set to continue indefinitely.

10.59 As noted in the ARA decision above, the Commission considers that, in the long-term, it is appropriate for public transport providers and operators to either comply with the standards or to rely, where appropriate, on the defences available to them.

10.60 Section 33.3(1)(b) of the Transport Standards provides that compliance with the standards may be achieved by providing equivalent access – using methods, equipment and facilities that provide alternative means of access to the public transport concerned (but not using separate or parallel services) with equivalence of amenity, availability, comfort, convenience, dignity, price and safety.

10.61 Pursuant to s 33.7(1) of the Transport Standards, it is not unlawful to fail to comply with a requirement of the standards if, and to the extent that, compliance would impose unjustifiable hardship on any person or organisation. A similar provision exists in s 11 of the DDA.

10.62 The Commission does not regard it as appropriate to use its power to grant temporary exemptions to certify, potentially on a continuing basis, that equivalent access or unjustifiable hardship exists. Given the circumstances,

and the stated impossibility of compliance with the Transport Standards, the Commission is not prepared to grant a temporary exemption to s 2.6(1) of the Transport Standards in this matter.

- 10.63 The Commission's decision to refuse to grant the exemptions does not prevent the applicants from seeking to establish a defence of unjustifiable hardship, or rely upon the equivalent access provisions, in response to any complaints. However, the Commission is of the view that the exemption process is not the appropriate vehicle for seeking to establish these defences.

11 DECISION TO GRANT SOLE EXEMPTION

- 11.1 The Commission has decided to grant to TMR an exemption to s 8.2 of the Transport Standards until 1 October 2020. The exemption can be found at Schedule 1.
- 11.2 In their application to the Commission, the applicants stated that both TMR and Queensland Rail are members of the ARA. However, only Queensland Rail is listed in Schedule 4 of the 2015 ARA decision. Schedule 4 sets out the ARA members that are party to the temporary exemptions granted by the Commission.
- 11.3 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, including rail conveyances, 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)).
- 11.4 Many of the temporary exemptions granted in the ARA decision are not relevant to the present application because they were limited to existing rail conveyances. As the NGR trains are new conveyances, neither Queensland Rail nor TMR enjoy the benefit of the majority of these temporary exemptions with regards to the NGR trains.
- 11.5 However, the temporary exemption granted in the ARA decision to s 8.2 was not limited in such a manner and would arguably include the new NGR trains. If the Commission did not grant this exemption to TMR, it might mean that Queensland Rail would enjoy the benefit of this exemption but TMR would not.
- 11.6 The Commission is satisfied that, to avoid a legal inconsistency between Queensland Rail as operator and TMR as provider, it is reasonable to grant TMR a temporary exemption to s 8.2 of the Transport Standards to align it with the temporary exemption already enjoyed by Queensland Rail under the ARA decision. This is in place until 1 October 2020.
- 11.7 In light of the ARA decision and the discussion regarding s 2.6 above, the Commission reiterates that there can be no assumption that further exemptions to s 8.2 will be granted in the future.



Signed by the President, Emeritus Professor Rosalind Croucher AM on behalf of the Commission.

29 March 2018

¹ *Le v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 875 [58]. See also *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 144 CLR 45 at 49.

² Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 171 (Hon MC Bailey, Minister for Transport and Main Roads).

SCHEDULE ONE

NOTICE OF GRANT OF TEMPORARY EXEMPTION

The Commission grants to the State of Queensland (acting through the Department of Transport and Main Roads) ('TMR'), on the terms and conditions set out in this schedule, a temporary exemption to s 8.2 of the Transport Standards.

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

The exemption is granted until 1 October 2020.

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

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

EXEMPTION FROM SECTION 8.2 OF THE TRANSPORT STANDARDS

8.2 Boarding – 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

Temporary exemption: rail conveyances

Until 1 October 2020, a manual or power assisted boarding device is only required at a single door rather than all doors of a rail conveyance, subject to the following conditions:

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

- to ensure access to unique facilities, or
- to ensure a passenger can both board and alight the rail conveyance
- TMR (either itself or through its operator) ensures that service users can obtain information about specified boarding points at any particular rail station or infrastructure:
 - at any platform at which there is a specified boarding point
 - via a website and downloadable fact sheets
 - in person at train stations, and
 - via a telephone call to the Customer Contact Centre where available
- TMR (either itself or through its operator) provides a written report to the Commission and the Australasian Railway Association within 12 months of this decision on measures taken to ensure that staff and passengers are adequately informed of both the doors of rail conveyances at which boarding devices are available and the equivalent access measures available, and
- the report is updated every 12 months, with the updated report provided to the Commission and the Australasian Railway Association.

EXEMPTIONS FROM THE DISABILITY DISCRIMINATION ACT

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

If:

- a matter is regulated by s 8.2 of the Transport Standards, and
- s 8.2 of the Transport Standards is subject to an exemption granted by this instrument, and
- TMR complies with s 8.2 of the Transport Standards, as modified by this exemption, and
- TMR complies with any conditions subject to which this exemption is granted

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

SCHEDULE TWO

SUBMISSIONS RECEIVED

The Commission received submissions from the following people and organisations:

- Equal Opportunity Commission (Western Australia)
- Anti-Discrimination Commission (Queensland)
- Mr Brendon Charles Donohue
- Queensland Advocacy Incorporated
- Community Legal Centres Queensland
- Queensland Rail Accessibility Reference Group
- Spinal Life Australia
- Rail Back on Track (RailBoT)
- MS Queensland
- Vision Australia
- Mr William Thomas Simpson
- Physical Disability Australian Human Rights Commission
- Queenslanders with Disability Network
- Equal Opportunity Commission (South Australia)
- Ms Wendy Lovelace
- Inclusion Moves
- Accessible Public Transport Jurisdictional Committee

The Commission also received three submissions from individuals who requested that their names not be disclosed.

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