AUSTRALIAN HUMAN RIGHTS COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (Cth), Section 55

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

NOTICE OF PRELIMINARY VIEW 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 preliminary view 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.

2 PRELIMINARY VIEW OF THE COMMISSION

2.1 The Commission is of the preliminary view 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 is proposing to grant TMR a temporary exemption to s 8.2 of the Transport Standards on specified conditions until 1 October 2020. It also proposes to 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 preliminary view, 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, and

3.1.5 The applicants' joint response to the public submissions received by the Commission.

3.2 These documents are available on the Commission's website at: www.humanrights.gov.au/disability_rights/exemptions

3.3 In reaching 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 *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 preliminary view are set out below.

4 MEANING OF IMPORTANT TERMS

4.1 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.

4.2 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 BACKGROUND

5.1 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.

5.2 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.

5.3 The NGR trains will be owned by TMR and operated by Queensland Rail on its Citytrain network.

5.4 On 11 December 2017, the first NGR trains entered into passenger service in Queensland.

5.5 Compliance issues have been identified with the current NGR train configuration when assessed against the Transport Standards and the DDA.

5.6 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. The applicants stated that the purpose of the joint application was to provide certainty while agreed and funded rectification work is completed.

5.7 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.

5.8 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

5.9 The applicants noted that the Queensland Government has agreed to allocate funds for the rectification work.

5.10 The rectification work will bring the trains into substantial compliance with the Transport Standards — excepting s 2.6 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.

5.11 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.

5.12 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.

6 THE COMMISSION'S PROCESS

6.1 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.

6.2 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.

6.3 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.

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

6.5 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.

6.6 The Commission received a number of submissions during its public consultation. A list of these submissions is contained in Schedule 2 to this preliminary view. 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.

6.7 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.

6.8 The Commission has considered all of the materials referred to above in reaching its preliminary view in relation to this application.

7 PROCEDURAL FAIRNESS CONSIDERATIONS

7.1 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.

7.2 The applicants supplied the Commission with certain redacted information. After considering all the information, the Commission has not relied upon any of this redacted information in forming its preliminary view. Broadly, this 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. As this information has not proved to be relevant or significant to its decision-making, the Commission formed the view that procedural fairness did not require its disclosure to the public for comment. The Commission has given no weight to the redacted information provided by the applicants.

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

The DDA and the Transport Standards

8.1 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).

8.2 The DDA also empowers the Minister to formulate disability standards (DDA s 31). The Transport Standards are disability standards made under this provision.

8.3 The Transport Standards came into operation on 23 October 2002.

8.4 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.

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

The Commission's powers to grant exemptions

8.6 The Commission has the power to grant exemptions under the DDA (s 55) and the Transport Standards (s 33A.1).

8.7 The effect of an exemption under the Transport Standards is that, where a person fails to comply with the Transport Standards but that failure is in accordance with an exemption that has been granted by the Commission, 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 that 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.

8.8 Exemptions granted by the Commission may be granted subject to terms and conditions. Failure to comply with such a term or condition does not, of itself, amount to unlawful conduct. However, where the beneficiary of an exemption fails to comply with a condition attached to the exemption, they will be deprived of the benefit of the exemption. They will then be subject to the requirements of the relevant disability standard or the DDA in the usual way.

8.9 In practical terms, the granting of a temporary exemption means that the activities or circumstances covered by it cannot be the subject of a successful complaint under the DDA. Situations that might otherwise be unlawful under the DDA cannot be effectively contested through the usual discrimination complaints process with its consequent legal remedies.

8.10 The Commission's powers to grant exemptions under the DDA are expressed in broad terms. By conferring an exemption power on the Commission, Parliament has clearly contemplated that some discriminatory conduct might be justified and that, in

certain circumstances, derogation from the terms of the DDA and the Transport Standards is permissible. However, in exercising its exemption powers, the Commission must also consider the objects of the DDA and the Transport Standards.

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

(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:

(i) work, accommodation, education, access to premises, clubs and sport; and

(ii) the provision of goods, facilities, services and land; and

(iii) existing laws; and

(iv) the administration of Commonwealth laws and programs; and

(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

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

8.13 The Commission has issued guidelines 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.

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

9 PRELIMINARY VIEW TO REFUSE EXEMPTIONS

9.1 The Commission is of the preliminary view 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

9.2 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.

9.3 The purpose of the Transport Standards is stated to be 'to enable public transport operators and providers to remove discrimination from public transport services' (s 1.2(2)). The Transport Standards apply 'to the widest possible range of people with disabilities as defined by the [DDA]' (s 1.4) and apply 'to all operators [and providers] and the conveyances they use to provide public transport services' (s 1.4).

9.4 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.

9.5 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.

9.6 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.

9.7 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.

9.8 The NGR trains for which these temporary exemptions are sought were procured after the Transport Standards came into effect.

Public consultation

9.9 The Commission received 20 submissions from a variety of government agencies, individuals and disability advocacy groups in response to the joint application and the redacted response to the Commission's request for further information.

9.10 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'.

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

9.12 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.

9.13 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.

9.14 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.

9.15 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.

9.16 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.

9.17 The Commission considers that there is considerable force in such submissions. 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.

9.18 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.

9.19 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. 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) 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 preliminary view.

9.20 Given that the DDA has prohibited discrimination in public transport since 1993, and the Transport Standards have required new conveyances to be compliant since 2002, it is difficult to understand why the State of Queensland procured new trains in 2013 and then applied for temporary exemptions to the DDA and the Transport Standards. When asked by the Commission to respond to this issue directly, the applicants stated:

> 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.

9.21 The applicants 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.

9.22 Queensland Advocacy Incorporated responded to this point in its submission by stating that the question would not have arisen if compliant trains had been procured in the first place. The Commission is inclined to agree. The DDA and the Transport Standards do not require that discrimination be eliminated immediately or completely. The Transport Standards do require, however, that all *new* conveyances coming into passenger service are compliant with the Transport Standards. It is not clear to the Commission 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.

9.23 The Commission recognises that the procurement of the NGR trains is a large and complicated infrastructure project that has spanned successive Queensland governments and that the trains are needed for the 2018 Commonwealth Games. 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.

9.24 During the public consultation process, the Commission received submissions from people with disability, as well as disability advocacy organisations. 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.

9.25 The Queensland Government has principally undertaken, within three years, to meet a legal obligation that has existed since the Transport Standards came into effect in 2002. The Commission is not persuaded that the reasons advanced in favour of the exemptions outweigh the impact on people with disability who are likely to experience discrimination in the meantime.

9.26 The Commission also notes that rectification works are only at the concept design stage, and a detailed timeframe for each step of the rectification process is still to be developed. On the evidence available, significant uncertainty remains regarding the proposed rectification process.

9.27 The applicants have submitted that, compared to the existing trains, the NGR trains have new features that increase passenger amenity for everyone, including people with disability. These include Wi-Fi, internal and external ‘Passenger Information Displays’, extra priority seats and allocated spaces, new braille signage, high-back seats and hearing aid loops. Post-rectification, the new interurban fleet will also have double the number of toilets on board. These are commendable improvements. Nonetheless, the Queensland Government has decided to put trains into passenger service that do not comply with the Transport Standards. Weighed against the discriminatory impact of this decision on people with disability,

particularly those using mobility devices, the Commission is not satisfied that it is reasonable to suspend their primary avenue of redress under the DDA by way of temporary exemption.

Relocation of the guard issue

9.28 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.

9.29 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.

9.30 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.

9.31 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

9.32 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.

9.33 In their response to the public submissions dated 9 February 2018, the applicants have outlined why they consider that it is not in the public interest for the NGR trains to be withheld from service until the completion of the rectification work. The Commission is not called upon to decide whether the entry of the NGR trains into passenger service before rectification is in the public interest. 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. In effect, the question before the Commission is whether people who might experience discrimination while using pre-rectified NGR trains should be able to avail themselves of the usual discrimination complaints process. For the reasons outlined above, the Commission considers that they should.

Non-compliances post-rectification and unjustifiable hardship

9.34 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 and s 8.2.

9.35 The applicants stated that, in possible breach of s 2.6, 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.

9.36 In the applicants' response to the public submissions dated 9 February 2018, they stated that exemptions to s 2.6 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).

9.37 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

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

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

9.40 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.

9.41 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.

9.42 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.

9.43 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.

9.44 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.

9.45 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.

9.46 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.

9.47 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.

9.48 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.

9.49 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.

9.50 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 of the Transport Standards in this matter.

9.51 In the event that a final decision is made by the Commission refusing to grant these exemptions, such a decision would 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.

10 PRELIMINARY VIEW TO GRANT SOLE EXEMPTION

10.1 The Commission is of the preliminary view that it will grant to TMR an exemption to s 8.2 of the Transport Standards until 1 October 2020. The proposed exemption can be found at Schedule 1.

10.2 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.

10.3 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)).

10.4 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.

10.5 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 does not grant this exemption to TMR, it might mean that Queensland Rail would enjoy the benefit of this exemption but TMR would not.

10.6 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.

10.7 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.

2 March 2018

SCHEDULE ONE

PRELIMINARY NOTICE OF GRANT OF TEMPORARY EXEMPTION

The Commission proposes to grant 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 would 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 exemption would be 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 would be granted and the terms and conditions to which the grant would be 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 ss 23 and 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