

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (Cth), Sections 55(1) and 55(1A)

NOTICE OF DECISION ON APPLICATION FOR TEMPORARY EXEMPTION: AUSTRALASIAN RAILWAYS ASSOCIATION: CARRIAGE AND STOWAGE OF MOBILITY AIDS AND TRANSFER TO AND FROM MOBILITY AIDS

By this instrument, the Human Rights and Equal Opportunity Commission ('HREOC') grants an application by the Australasian Railways Association ('the ARA') for temporary exemptions pursuant to sections 55(1) and 55(1A) of the *Disability Discrimination Act 1992* (Cth) ('DDA') in relation to:

- stowing mobility aids on booked services; and
- transfer of passengers to and from their mobility aids.

This decision is further to a number of separate exemptions granted by HREOC to the ARA on 22 January 2007. These previous exemptions are available on HREOC's website at: http://www.humanrights.gov.au/disability_rights/exemptions/ara/dec.htm

THE APPLICATION

The ARA has made an application, on behalf of its members ('members of the ARA'), for a number of temporary exemptions from the DDA and from the Disability Standards for Accessible Public Transport 2002 ('DSAPT').

DECISION OF HREOC

HREOC hereby grants to ARA Operators (as defined in clause 1.1 of Schedule One) a temporary exemption pursuant to sections 55(1) and 55(1A) of the DDA in the terms set out in Schedule One.

CONSIDERATION AND REASONS

In making its decision, HREOC relied upon the following:

- The documents referred to in its exemptions granted to the ARA on 22 January 2007. As noted above, these exemptions are available on HREOC's website at http://www.humanrights.gov.au/disability_rights/exemptions/ara/dec.htm
- Further consultation with the Australasian Railways Association and the Australian Federation of Disability Organisations, as set out in Schedule 2 to this decision.

In making its decision, HREOC had regard to the following:

- the terms and objects of the DDA;
- the DSAPT; and
- the Disability Standards for Accessible Public Transport Guidelines 2004 (No 3) ('the DSAPT Guidelines').

The process by which HREOC considered the ARA's application and the reasons for HREOC's decision are set out in Schedule Two.

MEANING OF IMPORTANT TERMS

- For the purposes of this decision, **rail** means trains and light rail.
- Unless the contrary intention appears, any term used in this decision and in the DSAPT has the same meaning in this decision as it has in the DSAPT.
- 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.

REVIEW OF DECISION

Subject to the *Administrative Appeals Tribunal Act 1975* , 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.

Dated this 5th day of November 2007

Signed by Commissioner Graeme Innes AM, on behalf of HREOC.

SCHEDULE ONE

1 GRANT OF TEMPORARY EXEMPTION

1.1 This exemption applies to members of the ARA who are operators of rail conveyances, infrastructure, or premises that are the subject of the DSAPT ('ARA Operators').

1.2 HREOC grants ARA Operators a temporary exemption as specified below from the operation of:

- sections 23 and 24 of the DDA; and
- section 32 of the DDA in relation to the DSAPT.

2 EXEMPTION PERIOD

2.1 The Commission has decided to grant to ARA operators an exemption until 22 January 2010 ('the exemption period') in the terms and on the conditions as set out below.

2.2 In accordance with clause 34 of the DSAPT, the Minister for Transport and Regional Services, in consultation with the Attorney-General, is to review the DSAPT within five years after they take effect ('the Ministerial review').

2.3 If, following the Ministerial review, and during the exemption period, the DSAPT are re-made (by the Attorney-General with the approval of the Parliament), in an amended form on any point, the temporary exemption now granted by the Commission will be displaced and become inoperative.

3 EXEMPTION GRANTED

Relevant DSAPT provisions

3.1 The relevant provisions of the DSAPT to which this exemption relates are as follows:

Part 30 Belongings

30.1 Disability aids to be in addition to baggage allowance

(1) Disability aids (for example, equipment and apparatus including mobility, technical and medical aids) are to be in addition to normal baggage allowances.

(2) If possible, disability aids are to be treated in the same way as cabin or accompanied baggage.

Conveyances

- Aircraft
- Coaches
- Ferries
- Trains

33.3 Equivalent access

(1) Compliance with these Standards may be achieved by:

(a) applying relevant specifications in these Standards before the target dates; or

(b) using methods, equipment and facilities that provide alternative means of access to the public transport service concerned (but not using separate or parallel services) with equivalence of amenity, availability, comfort, convenience, dignity, price and safety.

(2) This may include direct assistance over and above that required simply to overcome discrimination.

33.6 Direct assistance

(1) Nothing in these Standards prevents operators or providers from offering assistance directly to passengers.

(2) If these Standards have not been fully met, direct assistance may be a means of providing equivalent access.

(3) In addition to compliance with other provisions of these Standards, direct assistance to passengers is required if:

(a) it is necessary to provide equivalent access to a service; and

(b) direct access can reasonably be provided without unjustifiable hardship.

4 Exemption granted

3.2 During the exemption period, and in relation to the provisions of the DSAPT appearing above, HREOC hereby grants to ARA Operators the following exemptions:

(a) ARA Operators are not required to carry or stow mobility aids on booked services if the mobility aid does not comply with the “Assumptions for Mobility Aids” set out in the DSAPT Guidelines.

(b) Where, in connection with the stowage of a mobility aid, a passenger requires an ARA Operator (or its staff) to assist with:

- folding and/or unfolding of a wheelchair (or wheelchairs); and/or
- disconnecting and/or re-connecting of the batteries associated with a wheelchair (or wheelchairs),

the ARA Operator may require that the passenger or a person on behalf of the passenger is able to provide directions (either orally or in written form) for the procedure involved.

(c) ARA Operators are not responsible for transferring passengers by lifting to or from mobility aids where an access path to an allocated space is available but the passenger chooses instead to transfer to a fixed seat. This exemption is granted on the condition that ARA Operators agree to report to HREOC during the exemption period on research into and implementation of alternatives to lifting, including in relation to:

- installation of movable armrests on seating;
- development and deployment of height adjustable aisle chairs to assist in transfer to fixed seating or sleeping berths; and
- lifting devices comparable to the “Eagle Lifter” in use by Qantas Airways).

SCHEDULE 2: HREOC'S CONSIDERATION OF THE EXEMPTION APPLICATION AND THE REASONS FOR ITS DECISION

THE APPLICATION

On 29 July 2005, the ARA made an application to HREOC on behalf of its members for a number of temporary exemptions from the DDA and the DSAPT, on the condition that members of the ARA comply with a revised set of obligations.

On 2 August 2005, HREOC published a public Notice of Inquiry in relation to ARA's application. In response to that Notice of Inquiry, HREOC received a number of submissions from interested individuals and groups.

On 24 February 2006, the ARA submitted a revised application to take into account a number of matters raised in the submissions responding to the Notice of Inquiry. This revised application sought, amongst other things, to limit the obligations of ARA members in relation to mobility aids not conforming to the assumptions in Part 40 of the DSAPT Guidelines.

CONSIDERATION OF THE APPLICATION

On 22 January 2007, HREOC published its decision in relation to the ARA's application. In that decision, HREOC granted certain exemptions and deferred its decision in relation to other exemptions, including the present. In relation to the present exemption, HREOC deferred its decision because it formed the view that further consultation was required between the ARA and interested parties, represented by the Australian Federation of Disability Organisations (“AFDO”), on the following issues:

- more precise specification of the situations in which limitations on the size of mobility aids might be necessary in a rail environment; and
- limitations which might be placed on obligations to provide direct assistance in relation to mobility aids.

FURTHER CONSULTATION

On 9 May 2007 a further meeting was held between representatives of ARA, AFDO and HREOC to discuss an exemption regarding direct assistance. Discussions at that meeting indicated the following:

- ARA members accepted that they had responsibility for assisting with operation of mobility aids where a passenger was required to transfer from their own mobility aid to an aisle chair because of space constraints within conveyances.
- AFDO accepted that where an access path to an available allocated space was available in accordance with the DSAPT but a passenger chose to transfer to fixed seating for greater comfort, transfer was the passenger's responsibility.
- ARA members were concerned by occupational health and safety risks presented by staff lifting passengers into or out of seats or berths.

- AFDO accepted that operators were not responsible for assisting passengers to transfer onto toilets but considered that operators should explore options for devices such as Qantas' Eagle Lifter to avoid the need for manual lifting.
- ARA members agreed that in addition to folding and stowing manual wheelchairs, staff assistance could be expected in disconnecting batteries of electric wheelchairs and folding down backs of these devices where necessary for safe stowage.

On 23 May 2007, HREOC circulated to the ARA and AFDO a revised proposal for the exemption.

On 26 September 2007, representatives of ARA and AFDO met in Adelaide and agreed to HREOC's revised proposal for the exemption.