

**AUSTRALIAN HUMAN RIGHTS COMMISSION
DISABILITY DISCRIMINATION ACT 1992 (CTH), s 55(1)
DISABILITY STANDARDS FOR ACCESSIBLE PUBLIC TRANSPORT, s 33A.1
NOTICE OF GRANT OF A TEMPORARY EXEMPTION**

By this instrument, under section 55(1) of the *Disability Discrimination Act 1992* (Cth) (DDA) and section 33A.1 of the Disability Standards for Accessible Public Transport 2002 (Transport Standards), the Australian Human Rights Commission grants to Mr Shane Radburn (the Applicant) an exemption from the operation of sections 23 and 24 of the DDA and the requirements of the Transport Standards.

The exemption is granted for a period from the date of this instrument until 31 October 2014 and is granted subject to the conditions outlined below.

SUMMARY

The Commission has granted to the Applicant an exemption from compliance with sections 23 and 24 of the DDA and Transport Standards until 31 October 2014. The exemption is granted in relation to the Applicant's public transport route service.

The exemption is granted subject to the conditions that:

- (a) during the period of the exemption, the applicant will engage further with Palerang Council to encourage it to undertake repairs and upgrade the weight limit on the Foxlow Bridge;
- (b) if repairs to the Foxlow Bridge will not be carried out in time to accommodate a new bus, the applicant will negotiate with Transport NSW for a variation to his school route to cater for a larger bus;
- (c) at the conclusion of the exemption period, the applicant will provide all of its public transport services with a bus that fully complies with the Transport Standards.

BACKGROUND

The Applicant operates two bus services for Transport NSW, using the same bus. The services are:

- a school bus service for Captain's Flat Primary School; and
- a scheduled public passenger service from Captain's Flat to Queanbeyan one day per week from 9am (after school starts) and returning to Captains Flat prior to school finishing.

The bus is not wheelchair accessible. It is a 21 seat Toyota Coaster acquired new in 2008. The Applicant has been operating similar contracts for Transport NSW for the past 20 years.

The Application

The Applicant requests an exemption so that he may continue to provide the scheduled public transport service with his existing bus.

The scheduled passenger service operates on Fridays from Captain's Flat to Queanbeyan. The Applicant says that typically there are 6-8 passengers who use this service and that they are 'pensioners doing their weekly shopping'. He operates an outward trip departing Captain's Flat at 9.00am and arriving at Queanbeyan at 9.45am, and a return trip departing from Queanbeyan at 1.45pm.

The Applicant says that his bus is scheduled to be replaced in October 2014 and that at that time he intends to purchase a bus which has wheelchair access and enough seats to cover the school service.

The Applicant provides the following reasons for requesting the exemption:

- He says that if he were required to remove seats from the existing bus to install a wheelchair lifter in the existing bus it would be too small for the school service.
- The school bus service crosses the Molonglo River using a bridge engineered to a 5 tonne capacity. He says that the bus is 4.5 tonnes and that his research suggests that updating the bus to be wheelchair accessible would increase its weight over the 5 tonne limit of the bridge.
- To divert around the bridge would add an additional 80 kilometers to the school bus service which he says is unacceptable to the students and Transport NSW. He says that he has been negotiating with Palerang Council to increase the load bearing capacity of the Foxlow Bridge but that 'they have given no indication as to when this may happen'.
- The contract with Transport NSW to operate the scheduled service provides him with an income of \$13,000 p.a. which is insufficient to justify purchasing a separate bus which meets the accessibility requirements of the Transport Standards.

Submissions received by the Commission

The Applicant's request for a temporary exemption was posted on the Commission's website and interested parties were invited to comment on the Application. The Commission received one submission in response to the Application from the Accessible Public Transport Jurisdictional Committee (APTJC).

The members of APTJC were divided as to whether they supported the exemption.

One member opposed the application. The grounds for opposition were as follows:

- The Transport Standards apply to all public transport conveyances brought into public transport service after the Transport Standards came into effect on 23 October 2002. As the bus in question was brought into public transport service after the standards commenced (21 seat 2008 Toyota Coaster) it was and is required to comply with the Transport Standards.
- Under Part 2 of Schedule 2 of the Transport Standards, conveyances must be 55% compliant with respect to, amongst other features, ramps and boarding. The target date for this to be achieved was 31 December 2012. This compliance target has not been met in this case even though the applicant

has indicated that his intention is to replace the existing bus in 2014 with a DDA compliant bus.

- Research demonstrates that no other regular passenger transport service in the area exists and therefore a person requiring the use of a mobility aid such as a wheelchair or mobility scooter would be denied a transport service. This is contrary to the purpose of the DDA.

Three members of the APTJC offered support for the application and two other members noted the application and stated that they did not object to an exemption being granted. The members supporting the application considered that an exemption until 2014 should be made on the grounds that:

- the applicant has indicated that he intends to replace the existing bus with a DDA compliant bus in 2014; and
- the applicant has been proactive on a number of fronts with regards to the issues surrounding bridge weight limits.

They also noted that adherence to the 31 December 2012 Transport Standards compliance target of 55% is difficult to apply to an operator who only runs one bus.

RELEVANT LAW

Disability Discrimination Act 1992 (Cth)

The Commission may grant exemptions from the provisions of Division 1 or 2 of the DDA.¹ An exemption may be granted subject to terms and conditions and may be expressed to apply only in particular circumstances or to particular activities.² Exemptions are to be granted for a specified period not exceeding five years.³ It is not unlawful for a person who has been granted an exemption to act in accordance with the exemption.⁴

It is unlawful to discriminate on the ground of disability in access to premises⁵ and in the provision of goods, services and facilities.⁶ The relevant provisions are located in Division 2 of Part 2 of the DDA. It is also unlawful under the DDA to contravene a disability standard.⁷

Transport Standards

The DDA empowers the Minister to make disability standards.⁸ The purpose of the Transport Standards is to enable public transport operators and providers to remove discrimination from public transport services.⁹ The Transport Standards apply to operators and providers of conveyances. A conveyance includes a bus.¹⁰

The Commission may grant an exemption from compliance with some or all of the Transport Standards.¹¹ Before granting an exemption from the Transport Standards the Commission must consult with APTJC and may consult with any other body or person that the Commission considers appropriate to consult.¹²

An exemption granted by the Commission from the Transport Standards may not be granted for a period longer than five years.¹³ A person does not contravene the Transport Standards if the person's failure to comply with the Transport Standards is in accordance with an exemption granted to that person or that person's employer.¹⁴

The Transport Standards state that operators and providers must comply with the Transport Standards in relation to new conveyances from the date on which the Transport Standards came into effect.¹⁵ The Transport Standards came into effect on 23 October 2002.

Conveyances that were in use for public transport service must become compliant with the Transport Standards in accordance with Schedule 1 of the Transport Standards.¹⁶

Schedule 1 of the Transport Standards states that by 31 December 2012, operators and providers of conveyances must fully comply with the Transport Standards in relation to gateways, vending machines, surfaces and handrails and grabrails.¹⁷

Schedule 1 of the Transport Standards further states that by 31 December 2012 operators and providers of conveyances must comply with the Transport Standards by 55% of each type of service in relation to many aspects of accessibility including: resting points, boarding, allocated space, street furniture, ramps, lifts and doorways and doors.¹⁸

REASONS FOR DECISION

The Commission has considered all of the material that has been placed before it, together with the Commission's Guidelines on Temporary Exemptions under the DDA, and has decided to grant the Application for a period from the date of this instrument until 31 October 2014, subject to the condition outlined below.

The initial basis upon which the applicant sought an exemption was that modifying his current vehicle so that it is accessible would increase its weight above the 5 tonne limit of the Foxlow Bridge over the Molonglo River that is on his school route, and that the alternative route would add an additional 80 kilometers to the school bus service.

The Commission noted that there were 2007 Toyota Coasters available for sale which had been modified to make them accessible and which were less than 4.5 tonnes GVM. It appears that the 2008 Toyota Coaster has a GVM of 4990kg. The evidence is not conclusive that the necessary modification to the bus would increase the weight of the bus, but given the fine margins involved, the Commission is prepared to give the applicant the benefit of the doubt in this instance (including because of the undertakings given by the applicant described below).

Based on the maps provided by the applicant, it appears that if the applicant had to divert around the relevant river crossing this would result in a longer route. However, it is not clear that it would be an additional 80 kilometers as claimed.

The applicant then submitted that if his bus was modified to make it accessible, the reduction in the number of seats would make it too small for his school service. The alternative would be to purchase a new accessible bus with sufficient seats. The applicant said that the contract with Transport NSW to operate the scheduled service provides him with an income of \$13,000 p.a. which is currently insufficient to justify purchasing a separate bus which meets the accessibility requirements of the Transport Standards. However, his existing bus is due to be replaced in October 2014.

The Transport Standards provide that it is not unlawful to fail to comply with a requirement of the Transport Standards if it would impose an unjustifiable hardship on any person or organisation.¹⁹ The cost that would be incurred by, or is reasonably likely to result from, compliance with the relevant requirement of the Transport Standards and the extent to which the service concerned operates on a commercial or cost recovery basis are factors that are relevant to an assessment of unjustifiable hardship.²⁰

Usually the Commission will not grant a temporary exemption if the only reason that it is sought is that compliance with the DDA would involve an unjustifiable hardship. If the Applicant claims that it would impose an unjustifiable hardship upon it to comply with the Transport Standards, it is open to the applicant to rely on this defence in the event that a complaint is made against it.

In this case, there is some evidence that modifying the existing bus may result in it being unable to cross the Foxlow Bridge. As noted by the APTJC, the applicant has been proactive in negotiating with Palerang Council in relation to the upgrade of this bridge.

The applicant has said that he plans to acquire an accessible bus and have it 'up and running by the 31st October 2014'. He has also undertaken to engage further with Palerang Council to encourage it to undertake repairs and upgrade the weight limit on the Foxlow Bridge. If the repairs will not be carried out in time to accommodate a new bus, the applicant will negotiate with Transport NSW for a variation to his school route to cater for a larger bus.

On balance, the Commission considers that it is reasonable to grant the exemption sought, subject to conditions.

Accordingly, the Commission grants the applicant an exemption from the operation of sections 23 and 24 of the DDA and the requirements of the Transport Standards for a period from the date of this instrument until 31 October 2014, subject to the following conditions:

- (a) during the period of the exemption, the applicant will engage further with Palerang Council to encourage it to undertake repairs and upgrade the weight limit on the Foxlow Bridge;
- (b) if repairs to the Foxlow Bridge will not be carried out in time to accommodate a new bus, the applicant will negotiate with Transport NSW for a variation to his school route to cater for a larger bus;
- (c) at the conclusion of the exemption period, the applicant will provide all of its public transport services with a bus that fully complies with the Transport Standards.

APPLICATION FOR REVIEW

Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 13 day of June 2013.

Signed by the President, Professor Gillian Triggs, on behalf of the Commission.

¹ Section 55(1) DDA.

² Section 55(3)(a) and (b) DDA.

³ Section 55(3)(c) DDA.

⁴ Section 58 DDA.

⁵ Section 23 DDA.

⁶ Section 24 DDA.

⁷ Section 32 DDA.

⁸ Section 31(1) DDA.

⁹ Section 1.2(2) Transport Standards.

¹⁰ Section 1.12(b) Transport Standards.

¹¹ Section 33A.1(2) Transport Standards.

¹² Section 33A.1(4) Transport Standards.

¹³ Section 33A.1(5) Transport Standards.

¹⁴ Section 33A.3 Transport Standards.

¹⁵ Section 33.1 Transport Standards.

¹⁶ Section 33.2 Transport Standards.

¹⁷ Sections 2.1 and 2.2 of Schedule 1 Transport Standards.

¹⁸ Section 2.4 and 2.5 of Schedule 1 Transport Standards.

¹⁹ Section 33.7 Transport Standards.

²⁰ Section 33.7(3)(a) and (c) Transport Standards.