8 July 2011

David Mason

Director of Disability Rights Policy

Australian Human Rights Commission

GPO Box 5218

Sydney NSW 2001

BY EMAIL: disability@humanrights.gov.au

Dear Mr Mason,

# Re: Application for temporary exemption: Redline buses, Tasmania

We are writing in relation to the application made by Redline buses, Tasmania (**Redline**) for an exemption from the *Disability Standards for Accessible Public Transport 2002* (Cth) (**DSAPT**). In determining this application, we ask the Australian Human Rights Commission (**AHRC**) to consider our submissions in relation to Redline’s application.

We submit that the application should be refused on the grounds that:

* exemptions should not be granted under the DSAPT solely on hardship grounds;
* it is important that newly acquired vehicles are accessible and compliant with the DSAPT; and
* the coach service industry already suffers from a low level of compliance.

## PIAC’s work on disability discrimination

The Public Interest Advocacy Centre (PIAC) has a long history of involvement in disability discrimination litigation and public policy development, including in relation to accessible public transport. Of particular relevance is PIAC’s work around the review of the DSAPT, with a focus on the experiences of people with disability in relation to airline travel, resulting in the report *Flight closed: the experiences of people with disabilities in domestic airline travel in Australia*. PIAC has also successfully run test case litigation in relation to accessible public transport. Recently, we represented Greg Killeen in relation to a DSAPT complaint against Transport NSW and two large taxi companies regarding wheelchair accessible taxis. PIAC currently represents Julia Haraksin in a DSAPT test case before the Federal Court against the bus company, Murrays Australia Ltd.

**Further information required**

PIAC notes that Redline has not provided sufficient information in its application. In particular, further additional information is required, including:

* details of Redline’s existing services, including routes or services which are accessible;
* how many non-compliant vehicles Redline purchased in 2010;
* which particular provisions of the DSAPT Redline seeks exemption from;
* the period for which Redline seeks an exemption from the DSAPT;
* evidence of the costs of installing wheelchair lifts in Redline’s non-accessible vehicles;
* details of Redline’s current financial position; and
* details of Redline’s proposed purchase of new coaches in 2012, including the number of vehicles to be purchased.

PIAC believes that this additional information is necessary in order to adequately consider Redline’s application.

**The importance of accessible public transport in Tasmania**

We understand that Redline is one of the largest private bus operators in Tasmania. Accessible public transport, including on major routes between cities, is particularly important in Tasmania, as there are no public train services. Aside from relatively expensive taxis, buses are the only public transport available in certain locations. For these reasons, it is important that applications for exemption are carefully considered.

**Why the application should be refused**

1. **Exemptions should not be granted solely on hardship grounds**

Redline states in its application that it seeks an exemption based on “the capital hardship that would be imposed” by fitting wheelchair lifts to its recently purchased vehicles.

We submit that it would be contrary to the objects of the DSAPT if exemptions were granted solely on the grounds of hardship. The purpose of the DSAPT is to eliminate disability discrimination ‘as far as possible’. We submit that exemptions under Pt 33A of the DSAPT should only be granted in limited circumstances, and not simply on the basis that compliance would cause unjustifiable hardship. Unjustifiable hardship is a defence available to complaints as set out in ss 11 and 29A of *Disability Discrimination Act 1992* (Cth) and s 33.7 of the DSAPT. Under these provisions, considerations of financial hardship are just one factor among many that must be considered in determining the availability of a defence of unjustifiable hardship. We submit that these provisions adequately provide for genuine claims of unjustifiable hardship by public transport operators, and that it would be inappropriate for the exemption provisions in Part 33A of the DSAPT to be used to exempt operators from the provisions of the DSAPT.

This is supported by previous decisions of the AHRC, which have confirmed that temporary exemptions will not be granted merely to certify the existence of hardship. In the WizzBus decision in 2009, the AHRC noted that temporary exemptions may be granted in return for specific commitments to improving access over time.[[1]](#footnote-1) Like the WizzBus decision, Redline does not provide any specific commitments to improve access over time and accordingly its application should be refused. In its application, Redline merely states that it plans to meet the 55% requirement from 2012, a commitment which is required in any case under s 33.2 of the DSAPT.

If Redline cannot comply with the requirements of the DSAPT because of financial reasons then it may seek to rely on a defence of unjustifiable hardship under s 33.7 in response to any complaint. However, this is a separate process from establishing the case for a temporary exemption. In any event, we submit that Redline has not provided sufficient details to prove unjustifiable hardship.

1. **Importance of new vehicle compliance**

The DSAPT seek to remove discrimination from public transport services through a systematic process of ensuring greater accessibility over time. The two main requirements under the DSAPT relate to compliance with specified standards at the target dates contained in Schedule 1 of the DSAPT (s 33.2) and immediate compliance with the DSAPT for all new conveyances (s 33.1) purchased since the commencement of the DSAPT on 23 October 2002.

Redline claims that it currently meets the 25% requirement in Schedule 1 and plans to meet or exceed the 55% requirement by the end of 2012. As outlined above, further detail is needed from Redline to confirm how this requirement is currently being met and plans to be met by the end of 2012.

Redline’s exemption application is therefore focused on its new vehicles and s 33.1 of the DSAPT. We submit that it is important that new vehicles be accessible to ensure that there is a staged progression towards full compliance of the entire fleet by 2022. Indeed the purpose of the DSAPT was to ensure new fleet vehicles are compliant. If operators are allowed an exemption from this requirement, it may make it more difficult for the operator to comply with s 33.2 of the DSAPT and the dates in Schedule 1.

Redline has provided no evidence as to what it plans to do with the non-accessible vehicles it purchased in 2010. Previous decisions by the AHRC suggest that the exemption should not be granted unless Redline can provide evidence of plans to improve accessibility over time. In 2006, the AHRC refused an exemption application made by Airport Direct.[[2]](#footnote-2) Airport Direct had sought an exemption for 18 months in relation to a newly acquired non-compliant vehicle on the basis that it would purchase a larger accessible vehicle after 18 months. The application was refused on the basis that there was no commitment to improve access over time either by upgrading or replacing the inaccessible vehicle.[[3]](#footnote-3)

This can be contrasted with other cases where exemptions have been granted in return for commitments to improve accessibility. For instance, in 2004, an application made by Mr G Kinny for Coffs Harbour-Sydney Travel and Tours Service was granted after the applicant committed to replacing the non-complying vehicle within 3 years.[[4]](#footnote-4) Similarly, in 2007, a temporary exemption was granted to Hervey Bay RSL Club on the condition that the non-complying vehicles be replaced or retrofitted within 12 months.[[5]](#footnote-5)

We submit that it is imperative that newly acquired vehicles are accessible. This ensures that there is continual movement towards achieving progressive compliance with the DSAPT and that accessible vehicles enter the fleet as part of an operator’s usual fleet upgrade and replacement. In the present case, Redline has no commitment to upgrade or replace the newly acquired non-compliant vehicles after the exemption period. Redline states that it plans to purchase new accessible coaches to be introduced from 2012 but it does not state whether the non-complying vehicles will continue to operate. We submit that this would be contrary to the objects of the DSAPT and a step backwards in achieving accessible coach services in Tasmania.

1. **Low level of industry compliance**

As already outlined above, the DSAPT provides for accessible public transport over a staged period of time. Despite the commencement of the DSAPT in October 2002, and the first compliance target at the end of 2007, the bus and coach industry has a low level of compliance. The recently released Review of the DSAPT,[[6]](#footnote-6) concluded that there was no evidence to suggest that accessibility to coach travel has improved to that required under the DSAPT.[[7]](#footnote-7)

We submit that if the exemption were allowed, it would add to the already low levels of compliance in industry. Given the low levels of compliance, we submit a stricter stance in the granting of temporary exemptions is justified in order to send a message to industry that compliance with the DSAPT is important.

**Conclusion**

We submit that Redline’s application for a temporary exemption does not provide adequate information to enable the AHRC to make a decision.

Nonetheless, as outlined above, we submit that it would be contrary to the purposes of the DSAPT to grant Redline an exemption solely on the grounds of unjustifiable hardship. Also, Redline has not made any specific commitment to improve accessibility over time and has provided no details as to how long the non-accessible vehicles will be in Redline’s fleet. Finally, given the low level of compliance with the DSAPT by the bus and coach service industry, and the relative size and importance of Redline in Tasmania’s bus industry we submit that the exemption should not be granted as it will not assist in removing discrimination against persons with disability.

Yours sincerely

**Gemma Namey**

**Solicitor**

Public Interest Advocacy Centre

Direct phone: +61 2 8898 6504

E-mail: [gnamey@piac.asn.au](mailto:)

1. Application by WizzBus Bus and Coach, decision dated 18 February 2009. [↑](#footnote-ref-1)
2. Application by Airport Direct, decision dated 15 February 2006. [↑](#footnote-ref-2)
3. The exemption was eventually granted in a decision dated 15 December 2006, when additional details were provided. [↑](#footnote-ref-3)
4. Application by G Kinny Coffs Harbour-Sydney Travel and Tours Service, decision dated 21 September 2004. [↑](#footnote-ref-4)
5. Application by Hervey Bay RSL Club, decision dated 28 May 2007. [↑](#footnote-ref-5)
6. The Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport* (2009) Report to the Minister for Infrastructure, Transport, Regional Development and Local Government and the Attorney-General, released on 3 June 2011. [↑](#footnote-ref-6)
7. Ibid 74. [↑](#footnote-ref-7)