



AUSTRALASIAN RAILWAY ASSOCIATION INC

## **SUBMISSION**

**Senate Inquiry into the Disability  
Discrimination and Other Human Rights Legislation  
Amendment Bill 2008**

**16 January 2009**

## Executive Summary

The Australasian Railway Association (ARA) welcomes the Senate Inquiry as an opportunity to enhance the proposed Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (the Bill) by incorporating recommendations made by the Productivity Commission (the Commission) in relation to co-regulation. This aspect of the legislation is vital to ensure the provision of facilities for rail users with a disability, and potentially users with a disability of other transport modes.

The Australian Rail Industry has been working closely with the Human Rights Commission (HRC) to embrace a co-regulatory approach to the Disability Discrimination Act 1992 (DDA) as the most effective means to facilitate widespread adoption of appropriate DDA standards to railway rolling stock (trains), premises and infrastructure. This led to a major submission to the former Human Rights and Equal Opportunity Commission (HREOC – now HRC) for exemptions from the DDA's Disability Standards for Accessible Public Transport 2002 (DSAPT). These were subsequently granted.

The submission centred on exemptions from certain parts of the DSAPT standards for the construction of rolling stock and premises, that would be practicable. The rail industry standard to emerge from these exemptions, the Accessible Rail Services Code of Practice (Accessible Rail Code), will result in practicable access for people with a disability. The Accessible Rail Code is currently being developed by the Rail Industry Safety and Standards Board (RISSB) using expert industry input in close consultation with the Australian Federation of Disability Organisations (AFDO) and the HRC. The RISSB process for developing Industry standards for Rail Safety is about to be formally recognised by the Australian Transport Council of Ministers, and is already accredited with Standards Australia.

The nature of these exemptions has largely been to achieve improved disability standards (for facilities in trains and platforms) that recognise the physical size and practical limitations of the rail environment. The alternative to this very progressive step forward is continuing uncertainty for both the rail industry and rail passengers with a disability.

This uncertainty has so far created a strongly negative climate for infrastructure investment that prevents implementation of appropriate disability standards. Furthermore, there are a number of DDA standards that have conflicting requirements with workplace health and safety requirements. Both standards are covered by the legislation, for example requirements for lighting and mobility aids.

The impact of the above conflicts for rail operators would be to continue to pressure industry to defer massive investment in new trains and platforms. This is due to the grave concern about prosecution for not meeting standards that had their basis in building codes which were, and continue to be, irrelevant to the rail environment.

For example, there are major competing design constraints for rolling stock which are not relevant to rail, and do not exist for buildings. Some of these include: gauge constraints on car-body exterior due to historical placement of platforms, track centres, bridges and other associated infrastructure, optimisation of space within the train to maximise passenger load for peak hour travel, minimisation of train mass, optimisation of seating capacity versus standing capacity, aisle dimensions, and passenger loading/unloading times.

The very positive impact of the HRC decision on passengers with a disability and the rail industry has been to provide a degree of certainty to the passenger rail industry in every state and territory within Australia. This has facilitated the progression of major orders for new rolling stock and infrastructure in a number of organisations. It will mean significantly improved transport services for people with disabilities in future years.

At present, ARA has almost completed the first draft of the Code requirements based on exemptions, without diminishing the DDA requirements. To date the RISSB has applied \$110K to the development process with a further \$50K expenditure to come. The development will be accompanied by a continuing review process, as for all codes and standards.

The Rail Industry is very concerned that this highly constructive initiative has not been identified in the 2008 Bill for an Act to amend the Disability Discrimination Act 1992. Accordingly, the Australian Rail Industry strongly advocates for the inclusion of co-regulatory provisions in the Bill. This is essential to provide certainty for the continued development of appropriate standards that will optimise mobility for people with a disability on trains, trams and platforms and provide accessible journeys.

## Introduction

### **Who is ARA?**

The ARA is a member-based association that represents the interests of the rail sector in Australia and New Zealand. Members include all Australian urban and regional passenger operators both Government and privately owned.

Additionally, the ARA includes all major freight operators as well as all manufacturers and suppliers to the rail industry. It is fair to say the ARA speaks on behalf of the entire Australian rail industry.

The fundamental purpose of the ARA is to create an environment that will permit the Australasian rail industry to thrive.

It is our view that such a goal will only be achieved by uniting efforts; that is why the ARA has established two companies to address, in a unified approach, issues such as the standardisation of rail practices across Australia, and rail skills shortages.

These two companies are: the Rail Industry Safety and Standards Board<sup>1</sup> (RISSB) and the Rail Skills and Careers Council (RSCC). RISSB manages the production of Rules, Codes of Practice, Standards and more recently the creation of Guidelines.

The RSCC focuses on the human resources in rail, overseeing the efficient development of projects such as the Attraction and Retention Research Project, the Graduate Program and the School Based TAFE and Employment program.

In addition, the ARA assists its members by providing relevant information on a wide range of topics affecting the rail industry including: Rail Research, Communications, Safety and Infrastructure. The ARA is also actively involved in the development of rail industry policy to ensure the industry's views are represented when decisions that affect it are being made.

## Failure to identify key recommendations of the Productivity Commission concerning “co-regulation”

The Rail Industry notes that on page 1 of the invitation to participate in this Inquiry it states:

*“This Bill amends the DDA 1992 to implement recommendations made by the Productivity Commission in its 2004 review of the Act”.*

However, the Bill does not address a critical element of the Productivity Commission Report dated 30 April 2004 that recommends co-regulation as a way forward (page XLVI).

*“A co-regulatory approach should be introduced to encourage the private sector to take a greater role in tackling discrimination. Industries could develop codes of conduct, and those that meet minimum criteria could be registered with HREOC. Organisations applying a code could be given some degree of protection from complaints under the DDA, for example by requiring that relevant complaints are first addressed under the code, before permitting them to be heard by HREOC.”*

Further on page LIV of the Report, recommendation 14.5 states “The Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to whom the Act applies.”

In spite of these very clear indications the Bill fails to address co-regulation.

## Strong Rail Industry support for co-regulation of DDA

The Rail Industry strongly supports a “co-regulatory” role as distinct from a “self-regulatory” framework in relation to regulation of the DDA in the Rail Industry. The Rail Industry is already operating in a co-regulatory framework for rail safety, whereby rail operators are “accredited” by Rail Safety Regulators in all jurisdictions. The Industry has a strong culture of managing its own affairs albeit with effective co-regulatory oversight. This stems from the acknowledgement by Governments that the responsibility for ensuring safety rests with the duty holder and is therefore best effected by that duty holder. In the context of this co-regulatory framework, rail has demonstrated it is the safest mode of transport in Australia (excluding large-scale commercial passenger aviation). This strong co-regulatory culture is well recognised and endorsed by all Governments and provides a sound context within which to oversee governance of Disability Standards in rail.

<sup>1</sup> See Appendix 1 – Role and functions of the Rail Industry Safety and Standards Board (RISSB)

## How would this work?

### **Co-regulation in practice**

Once the Accessible Rail Services Code of Practice (Accessible Rail Code) is finalised by the target date of end third quarter this year, the Rail Industry envisions it working in the same manner as co-regulation in rail safety. In other words, a rail operator would formally adopt the Rail Industry Disability Code of Practice as the basis for its procurement or modification of Rolling stock and Stations in relation to matters of disability access.

Formal adoption of the rail industry Disability Code would be enacted by the rail operator writing to HRC to advise its intention to adopt the Code. Alternatively, a rail operator would

be free to adopt a different standard or code, provided that it could demonstrate to the explicit satisfaction of HRC that the proposed Code or Standard would provide equal or better levels of accessibility. HRC would formally accept / reject the proposal of the rail operator – thereby “accrediting” their proposed minimum standard.

In the event that a member of the public is aggrieved by a matter related to disability access, the person would initially assess the conformance of the rail operator in question with the relevant element(s) of the Code and directly challenge the operator concerned to improve the service. Should this fail and the rail operator did not comply with the Code, the person would then take the complaint to the HRC.

HRC would:

- examine the complaint to establish the extent to which the Code is relevant to the particular situation,
- assess the extent to which the rail operator has failed to comply with the Code, and take any appropriate action.

This co-regulatory governance structure provides clarification and certainty for people with disabilities. They will know what to expect relating to accessibility of rail services in Australia as all States and Territories will be implementing the Accessible Rail Code. Further, it will provide Industry with certainty of standard setting (not available in the non-authoritative Guidelines provided in the DSAPT) and thereby provide a sound basis for the procurement of rolling-stock and establishment of stations that provide access for people with a disability.

The ARA is already including the HRC as well as the Australian Federation of Disability Organisations (AFDO) in the process of developing the Accessible Rail Code of Practice. A copy of the (early) draft outline of the “Accessible Rail Services Code of Practice” illustrates the structure and elements of the Code, and is attached at Appendix 2.

The RISSB process under which the Code is being developed is a more rigorous process than that used by Standards Australia for its many standards. Under the RISSB process there is opportunity for stakeholder input, industry subject matter experts, extensive consultation, quality control and review. The RISSB processes are overseen by an independent body known as the Development Advisory Board (DAB) which has a brief to monitor process and to respond to stakeholder concerns about the process. An added benefit of the RISSB process is that it ensures that standards developed account for the interface of the standards with other critical issues such as safety and operational implications.

## RECOMMENDATION

The ARA strongly recommends that the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 incorporate amendments to Section 34 of the Disability Discrimination Act 1992. This will give authoritative effect to make mode specific industry Codes of Practice an additional compliance mechanism. This is to give effect to the outcome that compliance with a Code would constitute a defence, partial or complete, to obligations under the DSAPT and the DDA.

Industry understands that the DSAPT would still apply as a compliance mechanism for transport modes that do not develop an accredited Code of Practice.

Industry anticipates that a further compliance power may need to be assigned to the HRC to allow it to “recognise” Codes such as that being developed currently by the RISSB. This aligns with the type of role which the Australian Transport Council is moving to for rail safety regulation, as advised earlier.

## Appendix 1

### **The Rail Industry Safety and Standards Board**

The Rail Industry Safety and Standards Board (the RISSB) is the operational arm of the Australasian Railway Association (ARA) and it is charged with harmonising the rail industry through the development and management of rail industry standards, codes of practice, rules and guidelines. The RISSB has been accredited by Standards Australia as a Standards Development Organisation (SDO). As a consequence all standards produced by it are promulgated as Australian Standards. The RISSB is the second largest Standards Development Organisation in Australia, second only to Standards Australia. Over the next five to eight years the RISSB will produce 140 standards; 32 have already been developed and approved for use.

The RISSB is also responsible for harmonising safety across the Australian Rail Industry as well as executing the industry's strategy for reducing rail level crossing deaths and injuries.

The RISSB's structure is lean and has evolved in a manner to ensure a focus on effective industry engagement and industry ownership of the product developed by RISSB. It also has a healthy working relationship with the rail safety regulators and the Rail Unions; both have a direct input into the product produced by the RISSB. The Regulators also have an input into the product produced by the RISSB.

Underpinning the RISSB structure is an outcomes driven culture which engages industry and the public, and is professional and supportive. The culture ensures the rigour and robustness of the RISSB product while maintaining effective control over resources. Within the RISSB there is a strong belief in transparency and a clear audit trail.

The RISSB culture is unique as it has enabled a relatively small organisation to produce prolifically when compared with other standards generation organisations in Australia and internationally.

## Appendix 2

### Accessible Rail Services: Code of Practice

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