4

Concessions, exemptions and exceptions

4.1 The Premises Standards contain a number of exemptions and concessions. Concessions are provided in relation to certain existing lifts, accessible sanitary compartments and to lessees. The Premises Standards also provide an 'unjustifiable hardship' concession which is available to building certifiers, developers and managers where strict compliance with the Premises Standards would impose an unreasonable burden. In addition, the Premises Standards preserve the exception which the Disability Discrimination Act provides in cases where a discriminatory act is done in direct compliance with certain other laws.[1]

4.2 The exemptions and concessions in the Premises Standards are limited to matters regulated by the Premises Standards. They do not apply to general discrimination claims under the Disability Discrimination Act.

4.3 This chapter considers the key concessions, exemptions and exceptions raised during the inquiry.

Small buildings

Small building threshold for compliance

4.4 Paragraph D3.4(f) of the Access Code provides that accessibility requirements do not apply to the upper storeys of Class 5, 6, 7b or 8 buildings with no more than 3 storeys, where the floor area of each upper storey is not more than 200m^2, except where an accessible ramp or lift is provided. This exemption only applies to the upper storeys of these

1 Section 4.2, Disability (Access to Premises – Buildings) Standards 2009, hereafter 'Premises Standards'.

buildings; the accessibility requirements of the Premises Standards still apply to the ground floor, regardless of its size.

4.5 This exemption was not part of the 2004 draft Premises Standards.[2] The basis for its inclusion appears to be the significant proportionate cost of requiring a small building to provide access to its upper storeys.[3] The exemption also anticipates that most buildings of this size would be able to make an unjustifiable hardship claim.[4] Access to the upper storeys would require the installation of a lift or ramp and would also result in the loss of viable space as a proportion of floor space.[5] The Regulation Impact Statement estimates that the cost of installing a lift in a two storey building where it is not currently provided for is $100,000.[6]

4.6 A number of submissions commented on the threshold for the exemption. There was some acknowledgement that the threshold of 200m² is appropriate given the expense of installing a lift.[7] However, Master Builders Australia recommended that the threshold be increased to 300m² for consistency with certain other Building Code requirements for small buildings.[8] Conversely, two submissions from the disability sector recommended that the Committee consider reducing the threshold to 150m² for all buildings covered by the provision[9] or to 100m² for Class 6 buildings only.[10]

2 See Regulation Impact Statement, p. 20.

3 See Regulation Impact Statement, pp. 118, 136.

4 See Australian Human Rights Commission, *Submission 57*, p. 15. However, the Australian Human Rights Commission goes on to point out that while this may be generally true, some building developers would have sufficient resources to install a lift and would not have been able to claim unjustifiable hardship.

5 *Regulation Impact Statement: Proposal to Formulate Disability (Access to Premises – Buildings) Standards and Amend the Access Provisions of the Building Code of Australia (RIS2008-02)*, October 2008, p. 38. Hereafter 'Regulation Impact Statement 2008'. The Regulation Impact Statement 2008 is also *Exhibit 4* to the Committee's inquiry.

6 Regulation Impact Statement 2008, 'Standard Rates Adopted for Case Studies', p. 136, which uses the figure of $100,000 for a lift in a two storey building, where one is not currently provided. However, there is some evidence that the cost may now be less. See the discussion later in this chapter from paragraph 4.17.

7 See for instance Cairns Community Legal Centre, *Submission 93*, p. 17.

8 Master Builders Australia, *Submission 50*, p. 14; see also Master Builders Australia, *Attachment A* which states that 300m² is used as a part of a definitional threshold for Class 1b buildings, theatres and public halls and buildings which require the installation of emergency lighting.

9 Victorian Disability Advisory Council, *Submission 80*, p. 7; see also Mr Peter Conroy, *Submission 56*, p. 7.

10 Mr Peter Conroy, *Submission 56*, p. 7.

4.7 The Committee was informed that the threshold of 200m^2 is a result of compromise between cost and accessibility.[11]

> A line had to be drawn somewhere and a decision was taken that the 200 square metre threshold was appropriate. Obviously, there were a range of views either side of that particular threshold, with some in industry wanting a significantly larger threshold and others from the disability sector wanting a smaller threshold, but in the end 200 square metres was the threshold that was determined.[12]

4.8 There was some concern that this exemption would have a disproportionate impact on regional towns where small buildings of this kind are common.[13] This would limit employment opportunities for people with a disability in these towns as well as access to services or facilities located on upper storeys.[14]

4.9 Some of these submissions asked whether the exemption should be based on size at all. The key issue, they contended, is what the small buildings are being *used* for and, they argued, when government agencies, doctors, dentists, banks and other essential services are located in these buildings, the buildings should be accessible regardless of the size of the upper storeys:[15]

> Consideration should be given to the Standards requiring access to upper and lower floors of class 5, 6, 7b and 8 buildings in which the following services are provided:
>
> - the reception area of a company offering services to the public;
> - offices or facilities for a Commonwealth, State, Territory, or local government department or a government agency;
> - the professional office of a health care provider, medical consulting rooms, or dental surgery;
> - a retail financial institution;
> - a retail shopping outlet; and
> - a restaurant/café.[16]

11 See for instance the comments from Mr Peter Verwer, Property Council of Australia, *Transcript of Evidence*, 25 March 2009, p. 61.

12 Mr Detlef Jumpertz, Department of Innovation, Industry, Science and Research, *Transcript of Evidence*, 7 April 2009, p. 16.

13 See, for instance, Anti-Discrimination Commission Qld, *Submission 86*, p. 8.

14 Arts Alliance Victoria, *Submission 34*, p. 2; Welfare Rights Centre, *Submission 102*, p. 9.

15 Victorian Disability Advisory Council, *Submission 80*, p. 7; City of Yarra, *Submission 75*, pp. 3–4; Welfare Rights Centre Qld, *Submission 102*, p. 8.

16 Victorian Disability Advisory Council, *Submission* 80, p. 7.

4.10 New Zealand, for example, has a higher 'small building' threshold[17] but also requires access to the upper floors of such buildings where they are intended for use as banks, government offices or agencies, hospitals or healthcare services and public libraries.[18]

4.11 Although there is a clear need for these services to be accessible, at least one submitter had reservations with this approach because building use changes regularly:

> …Unfortunately businesses do not stay in one space for very long. Once you build a building—and we have talked about adaptability—it is hard to adapt. So I think we have got to look at the building itself rather than the organisation that is going into it.[19]

Committee comment

4.12 The Committee shares these reservations and is not convinced that providing access based on building use is the most effective means of codifying building access obligations. The Committee also accepts that, without further research, the impact of different types of threshold is unknown. It is unclear how many buildings, or what type, would be exempt under a 150m^2 threshold compared with a 200m^2 or 300m^2 threshold. For this reason, the Committee accepts the approach set out in the Premises Standards but has recommended, in Chapter 7, that this exemption be reconsidered as part of the five year review. The Committee considers that further research should be conducted before the review.

Narrowing the small building exemption

4.13 In addition to commenting on the size threshold, a number of submissions suggested that the content of the exemption is too broad as the upper storeys of small buildings are exempt from *all* accessibility requirements under the Premises Standards.[20] In practice, this means:

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17 Lifts are not required in buildings that are two storeys where the upper floor area is less than 400m^2, or three storeys where the combined area of the upper floors is less than 500m^2: Regulation Impact Statement 2008, p. 115.

18 Regulation Impact Statement 2008, p. 115.

19 Mr Andrew Sanderson, Blythe–Sanderson Group, *Transcript of Evidence*, 30 March 2009, p. 34. The Blythe-Sanderson submission proposed general accessibility for all buildings, regardless of size and use.

20 See for instance: Disability Council NSW, *Submission 58*, p. 38; Mr Max Murray, *Submission 39*, p. 13; City of Yarra, *Submission 75*, pp. 3–4; Cairns Community Legal Centre, *Submission 93*,

> Small buildings would not be required to incorporate features such as handrails on ramps and stairways, slip resistant luminance strips on the nosing of steps, tactile ground surface indicators and Braille and tactile signage, unisex accessible toilet amenities and ambulant toilet amenities on floors other than the entrance level. All of these elements are vital to supporting the safe access and egress of people who have an ambulant disability and those who are blind or vision impaired.[21]

Committee comment

4.14 One of the key purposes of the Premises Standards is to ensure that reasonably achievable, equitable and cost effective access to buildings, and facilities and services within buildings, is provided for people with a disability. Accordingly, there is considerable merit to the suggestion that the upper storeys of small buildings should not be exempt from *all* accessibility measures. This is particularly so where the accessibility measures do not impose a significant cost burden.

4.15 The Committee considers that the upper storeys of small buildings should not be exempt from all accessibility requirements. Consideration should be given to imposing low cost accessibility requirements on the upper floors of buildings regardless of size. However, the cost implications of provision of lift access may be unreasonably high compared to the total building cost for small buildings.

Recommendation 5

4.16 **The Committee recommends that the small building exemption for Class 5, 6, 7b or 8 buildings be limited to the provision of lift or ramp access between floors.**

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p. 18; Australian Human Rights Commission, *Submission 57*; Anti-Discrimination Commission Qld, *Submission 86*, p. 8.

21 Disability Council NSW, *Submission 58*, p. 38.

The cost justification of the small building exemption

4.17 The justification for this exemption relies largely on the cost of providing access to upper floors of small buildings. However, there was some debate as to whether installing a lift is now less expensive. At the public hearing in Melbourne, the Committee was informed that:

> From our understanding, this exemption is a result of the costs that might be borne by a building of a smaller size, like this one. However, in considering this, we now have AS1735 part 16 lifts, which means that lifts can be half their installation cost. We think that that particular concession should also be revisited.[22]

4.18 The Australian Human Rights Commission added that the cost of providing access to a small building,[23] as a proportion of the upgrade, is less than previously estimated as a consequence of increased construction costs. The result is that the proportionate costs for access to the upper floor of a two storey 400m^2 Class 5 or 6 building has dropped from 10 per cent to six or seven per cent.[24]

4.19 A number of submitters pointed out that a blanket exemption for small buildings assumed that all small buildings would suffer the same financial hardship.[25] A better approach, they suggested, would be to remove the exemption and allow the unjustifiable hardship provision to be used:

> The [Office of the Anti-Discrimination Commissioner] strongly supports a 5-year review of the Premises Standards, and that it specifically consider amending the small buildings concession to make it applicable only if unjustifiable hardship can also be established, or removing the small buildings concession so that only the unjustifiable hardship concession is available.[26]

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22 Mr George Xinos, Blythe-Sanderson Group, *Transcript of Evidence*, 30 March 2009, p. 28.

23 Based on a small building with two storeys and each storey being 200m^2.

24 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, 7 April 2009, p. 17.

25 Australian Human Rights Commission, *Submission 57*, p. 15; See also Anti-Discrimination Commission Queensland, *Submission 86*, p. 8.

26 The Office of the Anti-Discrimination Commissioner, Tasmania, *Submission 62*, p. 2; see also Anti-Discrimination Commission Queensland, *Submission 86*, p. 8.

Committee comment

4.20 The Committee has considered the issues raised by the submissions in relation to the cost of providing access to upper floors of small buildings in light of the unjustifiable hardship provision. Given the information currently available and the significant cost identified by the Regulation Impact Statement for installing a lift, an exemption for lift access in small buildings seems appropriate. However, the Committee has recommended in Chapter 7, that this exemption should be revisited as part of the five year review to determine whether it is appropriate to exclude lift access on the basis of cost. The review should specifically consider whether it would be more appropriate to remove the blanket exemption and instead rely on the unjustifiable hardship provision.

Other exemptions in clause D3.4

4.21 In addition to the small building exemption, clause D3.4 of the Access Code provides a list of other areas not required to be accessible. These areas, listed in paragraphs D3.4(a), (b), (c) and (e), include:

- cleaners store rooms, commercial kitchens, staff serving areas in a bar, foundry rooms, cool rooms, fire lookouts, lighthouses, rigging lofts;[27]
- areas only used for building services and maintenance;[28]
- areas containing raw or hazardous materials;[29] and
- upper floors of warehouses used wholly for wholesale and/or logistic distribution purposes.[30]

4.22 Many submissions indicated that these exemptions are too broad and potentially exclude people with a disability from areas in which they can safely work. A number of submissions commented specifically on paragraph D3.4(d) which excludes 'the upper floors of warehouses used

27 These areas are not required to be accessible under paragraph D3.4(a).

28 Paragraph D3.4(b) refers to areas such as a cooling tower and power plant, an equipment or lift motor room, a bunded area, a fire control area, a loading dock, an access route for maintenance or the like.

29 Paragraph D3.4(c) refers to areas such as a waste containment area, silo, grain bin, chemical store, storage racks or the like.

30 Paragraph D3.4(d).

solely for wholesale and or logistic/distribution purposes which are not accessible to the public':[31]

> There is absolutely no reason why the upper floors of warehouses should not be accessible. People with disabilities are quite capable of performing many duties associated with logistics and distribution of goods.[32]

4.23 Indeed, Blythe–Sanderson Group pointed out that the areas excluded by this provision 'constitute the main areas within which a person with a disability would be… likely to work in these types of buildings.'[33]

4.24 The list of exempt areas in clause D3.4(a), (b), (c) and (e) was also the focus of criticism. Submissions suggested that this clause, in general, assumes people with a disability have limited abilities:

> There seemed to be an underlying assumption about the sorts of jobs that people with a disability could and could not do in relation to parts of the buildings that did not need to be accessible.[34]

4.25 The primary concern is that this clause reduces employment opportunities for people with a disability.[35] This concern is not limited to the list of exempt areas in paragraphs D3.4(a), (b), (c) and (e); it was also raised in relation to the small building exemption.[36]

4.26 The Australian Building Codes Board informed the Committee that the intention of clause D3.4 was to provide more certainty:

> In the [Building Code of Australia], the current provision states that access is not required to an area if access would be inappropriate because of the particular purpose for which the area is used. It is basically a subjective performance type statement. Through the process of reviewing those provisions, practitioners identified that it was very difficult to actually identify when that occurred, so they were looking for more certainty, and the list that

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31 Physical Disability Australia, *Submission 45, Attachment A*, p. 12; NSW Disability Discrimination Legal Centre, *Submission 51*, p. 10; Disability Council NSW, *Submission 58*, p. 38; Welfare Rights Centre Qld, *Submission 102*, p. 9; Mr Max Murray, *Submission 39*, p. 13; Blythe–Sanderson Group, *Submission 47,* p. 6.

32 Mr Max Murray, *Submission 39*, p. 13.

33 Blythe–Sanderson Group, *Submission 47,* p. 6.

34 Mr William Lawler, Latrobe City Council, *Transcript of Evidence*, 30 March 2009, p. 71. See also Mr Max Murray, *Submission 39*, p. 13.

35 Physical Disability Australia, *Submission 45, Attachment A*, p. 12.

36 Arts Alliance Victoria, *Submission 34*, p. 2; Welfare Rights Centre, *Submission 102*, p. 9.

> we now have under D3.4 was a negotiated set of areas worked on through [Building Access Policy Committee] to identify those areas that were thought to be inappropriate, as the previous intent of the clause stated. Whether we have got them right or not is another matter, of course, but that was the outcome of those negotiations.[37]

4.27 The Committee was also advised that clause D3.4 attempted to identify areas likely to be subjects of successful unjustifiable hardship claims. Representatives from the Attorney-General's Department explained that clause D3.4 attempts:

> … to pre-chart what might be the basis of an unjustifiable hardship claim. To the extent that you could argue that some of these areas could not be the subject of a successful claim or might be defended on the basis of unjustifiable hardship, the list provides, if you like, a pre-determination of that issue.[38]

Committee comment

4.28 The Committee understands the desire for certainty. In most instances, the Premises Standards have effectively codified 'dignified access' by providing exact measurements, size and dimensions to be incorporated into building design. With regard to paragraphs D3.4(a), (b), (c) and (e), however, the same clarity was not achieved.

4.29 The Committee realises that certain areas, by their nature, cannot be made accessible for people with a disability. However, the Committee considers that in the attempt to achieve certainty, the net of exemptions in clause D3.4 (a), (b), (c), (d) and (e) has been cast too widely.

4.30 Indeed, it is arguable that the list of areas exempt by paragraphs D3.4 (a), (b), (c) and (e) does not provide certainty because the list itself is not exhaustive. The use of the phrase 'or the like' where there is no common class in the list of disconnected examples does not provide certainty and invites litigation.

4.31 It is difficult to accept paragraphs D3.4(a), (b), (c), (d) and (e) in their current form when they are likely to reduce employment opportunities for people with a disability. This is contrary to the Australian Government's

37 Mr Kevin Newhouse, Australian Building Codes Board, *Transcript of Evidence*, Tuesday 7 April 2009, p. 20.

38 Mr Stephen Fox, Commonwealth Attorney-General's Department, *Transcript of Evidence*, Tuesday 7 April 2009, p. 22.

Social Inclusion Agenda which includes a commitment to constructively address barriers that exclude Australians from community life.[39] As a part of the Social Inclusion Agenda, the Federal Government is developing a National Mental Health and Disability Employment Strategy. This strategy will form a key part of the Government's response to increasing employment opportunities for people with a disability.[40]

4.32 While recognising that some spaces cannot safely be made accessible, the Committee concludes that a more effective way to provide access to a range of buildings is to remove paragraphs D3.4(a), (b), (c), (d) and (e) and replace them with an exemption for areas which pose a clear health and safety risk for people with a disability. The unjustifiable hardship provision of the Premises Standards should continue to be available.

Recommendation 6

4.33 **The Committee recommends that the exemptions in paragraphs D3.4 (a)–(e) be replaced with a general exemption for areas which pose a clear health and safety risk for people with a disability.**

Unjustifiable hardship

4.34 Perhaps the most important limitation on the application of the Premises Standards is the 'unjustifiable hardship' exception.[41] This exception reflects an existing exception for unjustifiable hardship in the Disability Discrimination Act.[42]

4.35 The Premises Standards provide that it is not unlawful to fail to comply with a requirement of the Standards to the extent that compliance would impose unjustifiable hardship on a person or organisation.[43] Unjustifiable

39 Australian Government, *National Mental Health and Disability Employment Strategy Discussion Paper*, 2008, p. 1. <www.workplace.gov.au/workplace/Publications/PolicyReviews/EmploymentStrategy/>.

40 Australian Government, *National Mental Health and Disability Employment Strategy Discussion Paper*, 2008, p. 1. <www.workplace.gov.au/workplace/Publications/PolicyReviews/EmploymentStrategy/>.

41 Section 4.1, Premises Standards.

42 Section 11, *Disability Discrimination Act 1992* (Cth).

43 Subsection 4.1(1), Premises Standards.

hardship can only be assessed on a case-by-case basis and even where unjustifiable hardship is proven, compliance is still required to the maximum extent not involving unjustifiable hardship.[44]

4.36 All relevant circumstances of the particular case must be taken into account in determining whether there is unjustifiable hardship. The Premises Standards sets out 16 factors which may be taken into account in making such a determination.[45]

4.37 Submissions focused mainly on three of the sixteen factors: the cost involved in compliance in paragraph 4.1(3)(a); the reference to 'regional or remote location' in paragraph 4.1(3)(f) and the heritage provision in paragraph 4.1(3)(k).

Unjustifiable hardship based on cost

4.38 In making a determination of unjustifiable hardship, paragraph 4.1(3)(a) allows 'any additional capital, operating or other costs, or loss of revenue, that would be directly incurred by, or reasonably likely to result from, compliance with the requirement' to be taken into account.

4.39 The Property Council of Australia, although not directly addressing this paragraph, noted that unjustifiable hardship is decided without an exact formula on a case-by-case basis. For this reason, the Property Council proposed a financial benchmark:

> Where the cost of access increases the cost of the retrofit or construction by 15 percent or more (including losses of rentable space), a project should automatically qualify for unjustifiable hardship.[46]

4.40 The Australian Human Rights Commission responded to this proposal with concern, pointing out that the 15 per cent benchmark 'would seriously oversimplify the way that unjustifiable hardship is assessed and the balancing that needs to be taken into account in order to achieve that assessment by a tribunal.'[47]

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44 Subsection 4.1(2), Premises Standards.

45 Subsection 4.1(3), Premises Standards.

46 Property Council of Australia, *Submission 84*, p. 6.

47 Commissioner Graeme Innes, Australian Human Rights Commission, *Transcript of Evidence*, 25 March 2009, p. 33.

Committee comment

4.41 The Committee understands the concern that there are no clear rules for determining unjustifiable hardship. However, it does not support the proposal for a benchmark which would automatically determine claims for unjustifiable hardship. This would undermine the intent of the unjustifiable hardship provision which is to only exempt compliance where it would be unjustifiable in the circumstances of the person concerned.

Unjustifiable hardship based on regional or remote location

4.42 Subsection 4.1(3) provides that in determining whether compliance with a requirement of the Premises Standards would involve unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including, in paragraph (f):

> Any exceptional technical factors (such as the effect of load bearing elements on the structural integrity of the building) or geographic factors (such as gradient, topography or regional or remote location), affecting a person or organisation's ability to comply with the requirement.

4.43 The submissions indicated a concern that a claim of unjustifiable hardship could be made simply because a building was located in a regional or remote area. As well, submissions pointed out that the need for access is not any less in regional or remote areas:[48]

> Many older people and people with a disability live and reside in areas which would be deemed regional and/or remote. The necessity for access is therefore not reduced and could be seen to be more important in smaller towns and villages. Our concern is that this reference infers that a 'blanket exemption' applies to buildings and businesses in regional and remote areas.[49]

4.44 At the roundtable in Melbourne, the Committee was told that the phrase 'regional or remote location' was not intended to provide a lower standard of accessibility in regional and remote Australia but rather, was intended to capture geographically specific problems, such as snow and ice:

> For example, a ski lodge may have three entrances, but for seven months of the year two of them are only usable if you are coming

48 Disability Alliance, *Submission 77*, p. 8.

49 Disability Council of NSW, *Submission 58*, p. 30.

> in on skis. There were some questions about the number of entrances there needed to be on an accessible path of travel.[50]

4.45 There was acknowledgement that this intention may not be adequately represented in paragraph 4.1(3)(f).[51]

Committee comment

4.46 The Committee considers that the intention of the provision is not clearly reflected in the use of the phrase 'regional or remote location'. The conditions envisaged could be taken into account under 'geographic factors' without a specific reference to regional or remote areas. The Committee therefore recommends that the phrase 'regional or remote location' be removed from paragraph 4.1(3)(f).

Recommendation 7

4.47 **The Committee recommends that the words 'regional or remote location' be deleted from paragraph 4.1(3)(f) of the Premises Standards.**

Unjustifiable hardship based on loss of heritage value

4.48 In making a determination of unjustifiable hardship the Premises Standards provides that the heritage value of a building can be taken into account:

> If detriment under paragraph (j) involves loss of heritage values – the extent to which relevant heritage value or features of the building are essential, and to what extent incidental, to the building.[52]

4.49 Where submissions addressed this provision, they generally accepted that heritage value was an appropriate consideration in determining unjustifiable hardship, although there was some concern that heritage

50 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, Tuesday 7 April 2009, p. 22.

51 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, Tuesday 7 April 2009, p. 22.

52 Paragraph 4.1(3)(k), Premises Standards.

value may be inappropriately used as the justification for not complying with the provisions of the Premises Standards.[53]

4.50 In general, submitters questioned the perceived assumption that increasing access must necessarily result in a decrease in heritage value.[54] In response to this perceived assumption, Arts Access Australia referred the Committee to research which found that 'heritage and disability legislation can co-exist such that physical access is provided for people with a disability while not impacting significantly on the heritage value of the venue.'[55]

4.51 The Victorian Equal Opportunity and Human Rights Commission provided examples where a greater level of accessibility has been achieved in cities with heritage buildings much older than in Australia:

> The one that springs to mind for me is London, where there are buildings which are much older than our heritage buildings and they have been made accessible in a dignified way without taking too much away from the actual physical appearance of heritage buildings.[56]

4.52 There was concern that the heritage value provision of the unjustifiable hardship provision is too vague and requires clarification. The submission from Eric Martin and Associates asks who attributes 'heritage value':

> Is a listing on a National, State/Territory or local statutory list required? Are non-statutory lists such as the National Trust of Australia or Professional Institutions considered acceptable?[57]

4.53 There was a suggestion that to provide clarity, the provision should adopt the language used by the heritage sector itself:

> Council would encourage the Committee to consider re-wording this clause to reflect the practice and terminology used by the Heritage sector in determining the appropriateness of alterations to heritage buildings. i.e. 'whether the application of the Premises

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53 Disability Alliance, *Submission 77*, p. 8; Older Women's Network New South Wales, *Submission 9*, p. 3; Mr William Lawler, Latrobe City Council, *Transcript of Evidence*, 30 March 2009, p. 71.

54 See for instance Mr Placido Belardo, Disability Discrimination Legal Service, *Transcript of Evidence*, 30 March 2009, p. 50; Mr William Lawler, Latrobe City Council, *Transcript of Evidence*, 30 March 2009, p. 71.

55 Arts Access Australia, *Submission 61*, p. 2.

56 Dr Helen Szoke, Victorian Equal Opportunity and Human Rights Commission, *Transcript of Evidence*, 30 March 2009, p. 41.

57 Eric Martin and Associates, *Submission 35*, p. 8.

> Standards requirements would impact on the elements of the buildings which have significant heritage value'.[58]

4.54 The Heritage Council of New South Wales recommended that the provision be amended so that 'detriment' means:

- the potential loss of cultural significance of a heritage listed place and/or
- the potential loss of fabric of high heritage value, and/or
- An irreversible impact on the cultural significance.[59]

4.55 In its current format, the heritage provision distinguishes between heritage features which are 'essential' and heritage features which are 'incidental'. It is unclear how this distinction would work in practice. The Committee was informed that:

> If the building is heritage because somebody lived in it, then it would be incidental. The building would essentially still be there. But if it is a heritage building because of its architectural and aesthetic value, then it is an essential feature of the building.[60]

Committee comment

4.56 The Committee supports the inclusion of a heritage value provision in determinations of unjustifiable hardship. However, the Committee also agrees with the arguments raised by many submitters that providing access to heritage buildings does not have to diminish the heritage value. The Australian heritage industry could look overseas for examples of how a compromise might be reached.

4.57 The extent to which heritage value or features of the building would be diminished by providing access should be considered when determining whether there is unjustifiable hardship. However, there is evidently some concern with the wording of this provision and it does not seem to capture the intended policy. At the very least, it appears the meaning of 'heritage value' is unclear and that the phrase 'to what extent incidental' adds little meaning.

58 Disability Council of NSW, *Submission 58*, p. 7; See also Disability Alliance, *Submission 77,* p. 8.

59 Heritage Council of NSW, *Submission 110*, p. 2.

60 Mr Greig Ryan, Commonwealth Department of Innovation, Industry, Science and Research, *Transcript of Evidence*, 7 April 2009, p. 24.

Recommendation 8

4.58 **The Committee recommends that further consideration be given to clarifying the meaning of 'heritage value' in paragraph 4.1(3)(k) of the Premises Standards. Consideration should be given to ensuring consistency with the tests used in State and Territory legislation in relation to heritage. The Committee further recommends that the words 'and to what extent incidental' be deleted from paragraph 4.1(3)(k) of the Premises Standards.**

The benefits of compliance in determinations of unjustifiable hardship

4.59 The unjustifiable hardship provision in the 2004 Premises Standards varies considerably from the current provision. The main difference is the emphasis that the 2004 provision gives to the *benefits of compliance* in making a determination of unjustifiable hardship. Currently, paragraph 4.1(3)(i) provides that 'benefits reasonably likely to accrue from compliance with these Standards, including benefits to people with a disability, to building users or to other affected persons, or detriment likely to result from non-compliance' can be taken into account.

4.60 However, the 2004 provision for unjustifiable hardship included noticeably more detail, such as:

> The extent to which the building work concerned involves public funds, and consequently the extent to which it is expected that the building will be accessible to the public, including people with disabilities;[61]
>
> The extent to which the building is used, or is intended to be used for significant public purposes (such as electoral purposes or for holding public consultation by local government); and[62]
>
> The extent to which the building has a significant community function (including serving the cultural, religious, artistic, sporting or educational needs of the community)…[63]

61 Paragraph 4.1(4)(b), Draft Premises Standards 2004.

62 Subparagraph 4.1(4)(c)(ii), Draft Premises Standards 2004.

63 Subparagraph 4.1(4)(c)(iii), Draft Premises Standards 2004.

Committee comment

4.61 The Committee received little comment on this issue but considers it appropriate that the hardship of compliance should be balanced against the benefits of compliance. The Committee recommends that the unjustifiable hardship provision be amended so that consideration of the benefits of compliance includes specific reference to the use of public funds, the use of the building for public purposes and the extent to which the building has a significant community function.

Recommendation 9

4.62 **The Committee recommends:**

- **that subsection 4.1(3) of the Premises Standards be amended to include consideration of the extent to which the building work concerned involves the use of public funds; and**
- **that paragraph 4.1(3)(i) be amended to include specific reference to the use of the building for public purposes and the extent to which the building has a significant community function.**

Fire-isolated stairs and ramps

4.63 Clause D3.3 of the Access Code specifies which parts of a building are required to be accessible. Paragraph D3.3(b) provides that every stairway and ramp must be accessible:

> Except for ramps and stairways in areas exempted by clause D3.4, *fire-isolated ramps* and *fire-isolated stairways*…[64]

4.64 The Disability Council NSW explained the effect of this exemption on fire stairs and ramps as follows:

> In functional terms this means that the stairs are not required to feature handrails on both sides of the stairs, slip resistant, contrasting strips on the nosing to enhance detectability or feature

64 Emphasis in original.

> tactile ground surface indicators to alert people who are blind or vision impaired to the stairs.[65]

4.65 The Committee heard that this paragraph was an attempt to clarify a provision of the Building Code which exempts stairways not used by the public:

> The current building code provision talks about stairways that are not used by the public not being subject to the accessibility provisions. Once again, this was an attempt to provide some more certainty around that term because practitioners were unaware of what it meant. How do you determine whether a stairway in a building is used by the public or is there for other purposes? Some people had a view that fire-isolated stairs were not meant to be used by the public except in emergency egress circumstances, whereas a stair connecting two levels in the middle of a floor obviously would be used by the public in moving between those floors.[66]

4.66 Many submissions have pointed out that fire-isolated ramps and stairways could still be subject to certain accessibility requirements for ambulant people with a disability.[67] This could include luminance contrast, tactile ground surface indicators and a second handrail.

4.67 The Committee is aware of concerns that tactile ground surface indicators could be hazardous in an emergency evacuation.[68] However, the Committee was also told that where tactile ground surface indicators have presented a trip hazard, evidence indicates that this is because they have not been installed according to specifications.[69]

4.68 A second hand rail is not currently required in fire-isolated stairs by the Building Code. Imposing such a requirement would require many stairways and landings to be widened.[70]

4.69 It seems incongruous that fire-isolated stairs and ramps are exempt from the accessibility features of the Premises Standards. Indeed, the Australian Human Rights Commission pointed out that:

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65 Disability Council of NSW, *Submission 58*, p. 22.

66 Mr Kevin Newhouse, Australian Building Codes Board, *Transcript of Evidence*, 7 April 2009, p. 40.

67 People with Disability NSW, *Submission 120, Attachment A*, p. 2.

68 Mr Kevin Newhouse, Australian Building Codes Board, *Transcript of Evidence*, 7 April 2009, p. 40.

69 Mr Bruce Maguire, Vision Australia, *Transcript of Evidence*, 25 March 2009, p. 4.

70 The Building Code only requires handrails on both sides of a stairway wider than 2 metres.

> …emergency egress would probably be a prime time where you would want the access features for ambulant people with disabilities, and perhaps others who are caused more stress or pressure by the need to evacuate promptly.[71]

Committee comment

4.70 There is value in clarifying the obligations of the current Access Code with respect to public use stairways. However, it is questionable whether it can be said that emergency stairs should be excluded from the phrase 'public use' as many people choose to use these stairways as an alternative to the lift or elevator. Indeed, there are campaigns in many buildings encouraging people to take the stairs rather than the lift. There are also buildings where designated fire-isolated stairs are also the most frequently used stairwells in the building. For instance, many of the stairs in Parliament House are designated fire-isolated stairs but are used frequently by building occupants to move between floors.

4.71 The Committee recommends that the current exemption for fire-isolated stairs and ramps in paragraph D3.3(b) be amended to provide accessibility as far as practicable.

Recommendation 10

4.72 **The Committee recommends that the current exemption for fire-isolated stairs and ramps in paragraph D3.3(b) be amended to provide accessibility as far as practicable, with particular consideration given to tactile ground surface indicators, luminance contrast stair nosings and second handrails.**

Lessee concession

4.73 The Premises Standards provide that where the applicant for building approval is a lessee and not the owner of a building there is no requirement for an upgrade of the path of travel from the entrance of the

71 Commissioner Graeme Innes, Australian Human Rights Commission, *Transcript of Evidence*, 7 April 2009, p. 40.

building to the new work.[72] The concession is not available if the lessee occupies the whole building.[73]

4.74 The Premises Standards guidelines state that 'this concession recognises that, in most instances, the lessee is not responsible for common areas of the building and requiring them to upgrade the path of travel themselves would be unreasonable.'[74] The lessee would still be required to comply with the Premises Standards in relation to the new work which is under their control.

4.75 Although there was support for the concession in principle, there was some concern raised in submissions that building owners might use the lessee concession to avoid their responsibilities under the Premises Standards,

> …the lessee concession may be used by some building owners who wish to avoid the Premises Standards 'new building works' trigger. Council are concerned that some building owners may seek to encourage lessees to submit applications for new building works on their behalf to avoid having to undertake more extensive access improvements to the building as required by the Premises Standard.[75]

4.76 The Australian Building Codes Board was able to provide the Committee with further information relating to the number of building applications made by lessees rather than building owners. These figures indicate that one of the key assumptions in the analysis provided by the Regulation Impact Statement – that 50 percent of major upgrades on commercial buildings are tenant driven – was unable to be substantiated.[76] However the Australian Building Codes Board went on to note that this would have little impact on the cost-benefit analysis:

> While a reduction to costs and benefits has been identified, these are only 'delayed', given the assumption that the public area of major commercial buildings will be upgraded over a 15 year cycle. Thus, when considered over this period, there is no net reduction in costs or benefits.[77]

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72 Section 4.3, Premises Standards.

73 Subsection 5.3(6), Disability (Access to Premises – Buildings) Standards Guidelines 2009.

74 Subsection 5.3(5), Disability (Access to Premises – Buildings) Standards Guidelines 2009.

75 Disability Council of NSW, *Submission 58*, p. 24.

76 Australian Building Codes Board, *Submission 133*, p. 5.

77 Australian Building Codes Board, *Submission 133*, p. 5.

Committee comment

4.77 The Committee is of the view that section 4.3 provides an important concession for lessees, who should not be financially responsible for upgrading the path of travel between the entrance and the new work. However, further consideration should be given to whether building owners should take on this responsibility. The lessee concession should remain part of the Premises Standards but the Committee has recommended, in Chapter 7, that this exemption be reconsidered as part of the five year review.

Lift concession

4.78 The Premises Standards require the floor space of a lift that travels more than 12 metres have a minimum dimension of 1400mm by 1600mm.[78] Section 4.4 of the Premises Standards provides that this requirement:

> does not apply to an existing passenger lift that is in a new part, or an affected part, of a building, if the lift travels more than 12 metres and has a lift floor that is not less than 1100mm by 1400mm.[79]

4.79 As with the toilet concession, discussed in the following section of this chapter, the Premises Standards distinguishes between new and existing buildings. The lift concession applies to existing buildings undergoing new work where there is a lift travelling more than 12 metres. The concession means that there is no need to upgrade the size of the floor dimensions as long as the existing lift is at least 1100mm by 1400mm.[80] These dimensions meet current access requirements for lifts under the Building Code.[81]

4.80 The concession recognises that requiring lifts already compliant with the Building Code dimensions to upgrade to the 90th percentile dimensions would impose an unreasonable cost relating to increasing the size of the

78 See Access Code, Table E3.6(b).

79 Premises Standards, section 4.4.

80 Part 5.4, paragraph 2, Disability (Access to Premises – Buildings) Standards Guidelines 2009.

81 Part 5.4, paragraph 3, Disability (Access to Premises – Buildings) Standards Guidelines 2009.

lift shaft.[82] Further discussion on the 80th and 90th percentile is found in Chapter 5. [83]

4.81 Only a small number of submissions commented on the lift concession. The Housing Industry Association and the Property Council of Australia both support the inclusion of the lift concession.[84]

Committee comment

4.82 The Committee considers that where existing lifts travelling more than 12 metres already meet the dimensions 1100mm by 1400mm, it would impose an unreasonable burden to require an upgrade to the 90th percentile dimensions as part of the upgrade of an existing building. The Committee supports the inclusion of the lift concession.

Toilet concession

4.83 The Premises Standards adopt the 90th percentile dimensions for accessible toilets.[85] However, a concession is provided for existing buildings in respect of toilets which are compliant with the 80th percentile dimensions.[86] The Premises Standards Guidelines explain that this concession means:

> Where there is an existing accessible toilet in an existing building that meets the layout requirements and floor dimension requirements of the 2001 edition of AS 1428.1 of 1600mm by 2000mm, there would be no need to increase the size of the facility to meet the new requirements.[87]

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82 Part 5.4, paragraph 3, Disability (Access to Premises – Buildings) Standards Guidelines 2009.

83 References to the 80th and 90th percentiles relate to research conducted in 1983 by John Bails for the Australian Uniform Building Regulations Co-ordinating Council. The 80th percentile dimensions refer to the dimensions of building features required to allow adequate manoeuvring of 80 per cent of wheelchairs. See Chapter 5 for further discussion of the 80th and 90th percentile.

84 Property Council of Australia, *Submission 84*, p. 11; Housing Industry Association, *Submission 48*, p. 6. However, the Property Council of Australia does not support the use of 90th percentile dimensions elsewhere in the Premises Standards; see p. 11 of Submission 84.

85 See Chapter 5 for discussion on 80th and 90th percentile. The new requirements include floor dimensions of 1900mm by 2300mm.

86 Section 4.3, Premises Standards.

87 Part 5.4, paragraph 3, Disability (Access to Premises – Buildings) Standards Guidelines 2009.

4.84 The concession recognises that requiring toilets already compliant with the 80th percentile dimensions to upgrade to the 90th percentile dimensions would impose an unreasonable cost.[88]

4.85 Only a handful of submissions commented on the toilet concession. Similar to the lift concession, both the Housing Industry Association and the Property Council of Australia support the inclusion of the toilet concession.[89] The Property Council of Australia submission goes on to note their opposition to the use of 90th percentile dimensions elsewhere in the Premises Standards.[90]

4.86 The submission from Mr Robert Knott noted that the provision provided for dimensions less than the 90th percentile, which 'was considered to be the objective of the [Disability Discrimination Act].'[91] The Disability Discrimination Legal Service support the concession but recommended the following qualification:

> If the new building works would affect an existing toilet facility, then the Standards should apply; and
>
> In any other case, the permit application should be accompanied by a costs estimate to support any claim of unjustifiable hardship (instead of the unreasonable costs of complying with the Premises Standards).[92]

Committee comment

4.87 The Committee considers that where existing toilets already meet the dimension requirements of the 2001 edition of AS 1428.1 of 1600mm by 2000mm, it would impose an unreasonable burden to require an upgrade to the 90th percentile dimensions. The Committee supports the inclusion of the toilet concession in its current format.

88 See Part 5.4, paragraph 4, Disability (Access to Premises – Buildings) Standards Guidelines 2009.

89 Property Council of Australia, *Submission 84*, p. 11; Housing Industry Association, *Submission 48*, p. 6;

90 Property Council of Australia, *Submission 84*, p. 11.

91 Mr Robert Knott, *Submission 25*, p. 3.

92 Disability Discrimination Legal Service, *Submission 78*, p. 8.

Effect of concessions, exemptions and exceptions

4.88 As discussed in Chapter 2, compliance with the requirements of the Premises Standards would provide certainty to building developers, owners and managers that they would not be subject to a successful discrimination complaint in relation to the matters covered by the Premises Standards.

4.89 Section 34 of the Disability Discrimination Act provides that if a person acts in compliance with a disability standard the unlawful discrimination provisions contained in Part 2 of the Disability Discrimination Act do not apply.

4.90 This general rule also applies with respect to the concessions, exemptions and exceptions in the sense that these buildings are acting in compliance with the Premises Standards where the Premises Standards explicitly states that there is no requirement to provide access. As a result, successful complaints, where access has not been provided in accordance with the concessions or exemptions provided in the Premises Standards, are unlikely.

4.91 There is, however, some question as to how section 24 of the Disability Discrimination Act will interact with the Premises Standards. Section 24 of the Disability Discrimination Act provides that it is unlawful for a person who provides goods or services, or makes facilities available, to discriminate against a person with a disability.[93] The Australian Human Rights Commission suggested that:

> If a dentist, a solicitor or a doctor is providing a service in the upper level of a small building, there will still be a basis for a complaint against the provision of that service, which is not to do with the building; it is to do with the provision of the service. It is not clear how that will play out, but I cannot see that the standard will prevent that section applying.

4.92 The Attorney-General's Department reiterated that 'there was some doubt on how all that will play out':

> because the provision in the Disability Discrimination Act that empowers a standard—that makes a standard as forceful as it is—

93 Section 24(1) of the *Disability Discrimination Act 1992* (Cth) states that:

> It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discrimination against another person on the ground of the other person's disability or a disability of any of that other person's associates.

> provides that, if a particular act is done in direct compliance with a standard, then, insofar as that act is concerned, it is completely immune from any of the operative provisions in part II of the Disability Discrimination Act. So it is not only okay in terms of access to premises but it is okay in terms of any of the requirements under part II of the act. So it will become a question of whether or not the service provision falls within the particular act that we are looking at… So if access is covered in the service provision, and we purport to cover access in this standard, then that will provide complete immunity, even to a complaint made under the service provision part of the DDA.[94]

4.93 Finally, as mentioned at the start of this chapter, the exemptions and concessions in the Premises Standards are limited to the application of the Premises Standards and are not applicable in general discrimination claims under the Disability Discrimination Act. Complaints can still be made under section 23 of the Disability Discrimination Act in relation to access to buildings outside the scope of the Premises Standards; buildings within the scope of the Premises Standards but where the application of the Premises Standards has not yet been triggered; and, matters outside the scope of the Premises Standards, such as fitout and places other than buildings.

Committee comment

4.94 The Committee recognises the importance of the exceptions, exemptions and concessions in reducing the cost implications of the Premises Standards. Notwithstanding this, the Committee has recommended that the exemption, exception or concession be narrowed for certain provisions. In recommending changes to these provisions in this chapter, the Committee has been careful to enhance accessibility without creating a significant increase in costs.

94 Ms Rachel Antone, Commonwealth Attorney-General's Department, *Transcript of Evidence*, 7 April 2009, p. 19.