



Submission No 46

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MINISTER FOR CHILDREN AND YOUNG PEOPLE
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House of Representatives Standing Committee on
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RECEIVED
03 MAR 2009
BY: LACA

Dear Committee Secretary

As the ACT Minister for Planning, responsible for administration of ACT planning and building laws, I am pleased to provide you with this submission to the inquiry into the draft *Disability (Access to Premise—Buildings) Standards*, (the premises standards).

My submission addresses the inquiry's terms of reference, and in accordance with your office's advice on content, sets out facts, opinions, arguments and recommendations.

I commend the premises standards to your committee, except in relation to its failure to address class 2 buildings. The attached further particulars set out details about likely adverse outcomes from the omission of class 2 building provisions from the premises standards, and recommends actions to resolve those issues.

I understand that if you accept my submission it may be published on the Australian Parliament's web site.

I trust that my submission will assist you in your inquiry, and that it will assist the Attorney-General to formulate effective premises standards. I look forward to the finalised premises standards commencing in the near future so as the community can enjoy the benefits that compliance with the premises standards will bring.

Yours sincerely

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Submission—further particulars

Part 1—Preliminary

Purpose

This is a submission to the Australian Parliament's House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) in relation to the Committee's inquiry into the draft *Disability (Access to Premises—Buildings) Standards*, (the premises standards)—

proposed under subsection 31 (1) of the *Disability Discrimination Act 1992* (Commonwealth) (the DDA); and

tabled in the House of Representatives on 2 December 2008.

Scope

This submission only relates to the Committee's inquiry's terms of reference.

Terms of reference

The Committee's inquiry's terms of reference are—

- the appropriateness and effectiveness of the proposed Premises Standards in achieving their objects;
- the interaction between the Premises Standards and existing regulatory schemes operating in state and territory jurisdictions, including the appropriateness and effectiveness of the proposed Model Process to Administer Building Access for People with Disability;
- whether the Premises Standards will have an unjustifiable impact on any particular sector or group within a sector; and
- any related matters.

Objects of the premises standards

Under the premises standards, section 1.3 (Objects), the objects of the standards are:

- (a) to ensure that reasonably achievable, equitable and cost-effective access to buildings, and facilities and services within buildings, is provided for people with disabilities; and
- (b) to give certainty to building certifiers, building developers and building managers that, if access to buildings is provided in accordance with these Standards, the provision of access, to the extent covered by these Standards, will not be unlawful under the Act.

Part 2—achieving objects

2.1 Disability access—facts and opinion etc

1. The premises standards are not appropriate or effective in achieving their objects in relation to disability access to class 2 buildings because they fail to ensure that reasonably achievable, equitable and cost-effective access is provided for people with disabilities to—
 - a. common areas in class 2 buildings; and
 - b. facilities and services provided within common areas in class 2 buildings.
2. That is because the premises standards fail to prescribe provisions for class 2 buildings, which predominantly comprise residential apartment buildings.
3. Building design and construction market failures historically exist that prevent a significant proportion of people with disabilities from gaining reasonable access to common areas in class 2 buildings. Generally, apartments in class 2 units are accessible only through such common areas, so a failure to be able to access those common areas prevents people from being able to live in those apartments. Often those common areas are publically accessible rather than being restricted to building occupants and their authorised visitors.
4. The market failure was recognised in the 2004 version of the premises standards, which prescribed provisions to address the failure. Provision of disability access to such common areas assists people with disabilities to—
 - a. live permanently in class 2 apartments and enjoy common area facilities that are entitlements attached to such apartments; and
 - b. visit people's homes that are units in class 2 apartment buildings; and
 - c. temporarily stay in class 2 apartments used as short term accommodation, for holidays, business travel, and for other reasons.
5. The 2004 version of the premises standards did not apply to areas inside sole occupancy class 2 units, but did apply to common areas in class 2 buildings.
6. It may be the case that when all of the class-2-building provisions of the 2004 premises standards are taken as a whole, they are not cost-effective when applied to each and every kind of class 2 building. In particular, class 2 apartment buildings catering to the low-end of the market might not be required by local laws to have lifts provided in some jurisdictions. Requiring lifts to enhance disability access in those cases might not be cost-effective because of the significant costs involved in providing lifts during construction.

7. In the ACT, planning laws have required lifts to be provided to multistorey class 2 buildings, for several years, in line with the 2004 premises standards. If those laws were to be amended to align with the proposed 2009 premises standards, the requirement for lifts would need to be omitted, representing a roll-back in access rights for the ACT community.
8. Further cost-benefit analysis and appropriately proportioned regulatory intervention should be used to devise standards that achieve a range of limited disability access for common areas in certain kinds of class 2 buildings. For example, class 2 buildings targeting the high end of the market usually include reasonably sized lifts, comparatively wide corridors, and fixtures and fittings of substantial cost, whereas less prestigious buildings might not.
9. It therefore might be of no additional cost, or be of insignificant additional cost, to change the design of prestigious class 2 buildings to better cater for disability access. Such analysis could examine cost impacts of providing lifts that cater for the 90th percentile range of wheelchair sizes, compared to providing for 80th percentile chairs. The rationale should be that even if only catering for the 80th percentile is cost effective, then that is better than catering for no wheelchairs, despite other provisions of the premises standards catering for the 90th percentile.
10. The analysis could then be applied down the range of class 2 building types to determine the degree to which various kinds (eg low-end of the market, higher quality, prestige, etc) typically have inherent characteristics that make a commensurate degree of disability access cost-effective.
11. The premises standards could then be amended to reflect the results of the analysis. For example, it could prescribe that where a class 2 building is provided with a lift of at least a minimum prescribed floor plate size, servicing common areas, the lift should be designed and constructed to cater for disability access to the 80th or 90th percentile mentioned above, as the case requires to achieve cost-effectiveness and appropriately proportioned regulatory intervention.
12. The cost-benefit analysis should not necessarily be limited to a "whole-of-building" solution. Rather, it could examine the cost effectiveness of individual facets of typical class 2 building in isolation from other facets. For example, it is likely that it is cost-effective to provide reasonable disability access to many ground-storey common areas of class 2 buildings, because lifts would not necessarily be required. In that case, the premises standards could be amended to reflect the level of construction necessary to achieve that access to that storey. If the ground storey is significantly elevated above the ground because of an undercroft carpark, for example, then the premises standards could take that into consideration and not require disability access where the length of access ramp required exceeds a prescribed limit.
13. The fact that many, but not all, class 2 buildings have undercroft carparking, thus making wheelchair access to the ground storey above impractical without a lift, should not necessarily deter the premises standards requiring the ground storey

common areas to meet disability access provisions. That is because many people with disabilities do not self-drive cars, but rely on taxis or carers to provide transport to the kerb outside their home. Those people could therefore effectively live in an apartment on the ground storey of a class 2 apartment building if the common areas of the ground storey have disability accessibility from the kerb through the building's common areas to the front internal door of the apartment. It would then not be a matter for the premises standard to mandate accessibility within the apartment unit, as that would be a discretionary matter for the occupant.

14. Failure to provide for reasonable disability access to class 2 buildings will deny people with disabilities the benefits derived from living in apartments, including—
 - a. the benefits of proximity to community facilities and CBDs in many cities;
 - b. lower purchase costs or rental costs than houses;
 - c. not having to maintain grounds such as lawns, gardens and backyards;
 - d. close integration with neighbours in adjacent apartments rather than the social isolation that living in a house can cause.

2.2 Disability access—recommendations for action.

15. **Recommendation 1**—undertake further cost-benefit and appropriately proportioned regulatory intervention analysis to determine the extent to which facets or parts of proposed class 2 buildings can be cost-effectively made to provide for reasonable disability access to their common areas, and thereby to the internal entrance door of class 2 sole occupancy units (eg apartments).
16. For example, a comparatively low-cost apartment building might be able to provide for cost-effective disability access to its ground-level storey only, whereas a prestigious apartment building might be able to cost-effectively provide for such access to all of its common areas on all storeys.
17. A philosophy of providing only for what is cost-effective should be applied, rather than an “all or nothing” philosophy. For example, if it is cost effective to provide access only to the ground storey of certain kinds of class 2 buildings, that should be required by the premises standards even though undercroft carparking associated with that kind of building cannot cost-effectively provide for disability accessibility. Even low-cost requirements such as signage and other indicators to assist people with sight disabilities should be considered in isolation, even if it is not cost effective to mandate other provisions for the particular kind of class 2 buildings. In that case, the premises standards' protection from claims of unlawful discrimination would only apply in respect of matters relating to the signage and indicators, rather than applying generally to the areas served by those things.

18. **Recommendation 2**—amend the premises standards to prescribe construction solutions to give effect to the cost-effective access provisions resulting under recommendation 1 above, and to make it clear that—the scope of the premises standards is limited to the parts or facets of class 2 buildings it prescribes for; and the accessibility and protection afforded by compliance with the premises standards in that case is also limited to that extent.
19. For example, if the premises standards are amended to prescribe construction standards only for access to the ground storey of a class 2 building that is not provided with a lift, then the effect of compliance with the standard is limited to that storey. In that case, a claim of discrimination in relation to access to public spaces in storeys or car parks other than the ground storey would not be afforded the protection of complying with the premises standards, as the standards should indicate they not apply to other storeys in that case.

2.3 Discrimination claim protection—facts and opinion etc

20. The premises standards are not appropriate or effective in respect of their object of giving certainty to—class-2-building certifiers, developers and building managers—that, if access to class 2 buildings is provided in accordance with the premises standards, the provision of access, to the extent covered by the premises standards, will not be unlawful under the DDA.
21. That is because the premises standards fail to prescribe for class 2 buildings.
22. It is therefore the case, that no matter the lengths that building certifiers, building developers and building managers go to to construct in a way that facilitates disability access in class 2 buildings, they cannot eliminate the uncertain risk of suffering unlawful disability discrimination claims. Such claims can amount to significant costs where the resolving the complaint involves modification of a completed building, or compensation for loss of employment opportunity.
23. Even if a class 2 building is constructed with an access ramp that complies with the relevant requirements of the premises standards in relation to a class 3 motel, for example, the class 2 building's ramp does not gain the benefits of compliance with the premises standards that is afforded to a ramp in a class 3 building.
24. That is an anomalous, illogical and inequitable outcome.
25. A more logical and equitable approach would be to amend the premises standards so as their relevant provisions for class 3 buildings, if reflected in class 2 buildings, provide the same level of protection for the class 2 building, against claims of unlawful discrimination, as would be the case for the class 3 building.
26. In that case, the premises standards could make it clear that there is no requirement for a class 2 building to comply with the class 3 provisions that are above and beyond what is intended for class 2 units. For, example, the premises standards have provisions that apply to the inside of accommodation rooms in

class 3 buildings, whereas it is not the intent that the premises standards apply to the inside of sole occupancy units in class 2 buildings.

27. The distinction between the uses of certain class 2 apartments and certain class 3 hotel or motel units is increasingly difficult to discern. A significant portion of newly constructed class 2 apartments are being used exclusively as short-term accommodation, including for overnight stays, a la hotel or motel rooms or serviced apartments. It therefore seems incongruous that the premises standards apply to class 3 hotel and motel common areas, but fail to apply to class 2 building common areas that are used in an identical way to hotel and motel common areas, ie both are used to access the accommodation apartment or room.

2.4 Discrimination claim protection—recommendations for action

28. **Recommendation 3**—amend the premises standards so as they apply to class 2 buildings, in accordance with recommendations 1 and 2 above.
29. That will provide certainty to—class-2-building certifiers, developers and building managers—that, if access to class 2 buildings is provided in accordance with the premises standards, the provision of access, to the extent covered by the premises standards, will not be unlawful under the DDA.
30. **Recommendation 4**—amend the premises standards so that it is clear that—if an aspect of a class 2 building complies with provisions for the same aspect of a class 3 building, then—that aspect of the class 2 building is taken to comply with the premises standards if the premises standards do not otherwise have provisions in relation to the class 2 building aspect.
31. The premises standards should however also be amended to make it clear that there is no requirement to make an aspect of a class 2 building comply with provisions for class 3 buildings that are beyond the intent of the standard.
32. It is intended to not apply to class 2 buildings the provisions that apply to the inside of accommodation rooms in class 3 buildings.
33. An example of the effect of recommendation 4 is as follows—if a class 2 building's access ramp complies with the premises standard's provisions for a comparable class 3 building's ramp, then the class 2 building's ramp must be taken as complying with the premises standards, for example.
34. That will increase both disability access and certainty about discrimination protection, while resolving the current anomalous, illogical and inequitable situation of the premises standards covering an aspect of a class 3 building, but even if all things are equal, the identical kind of aspect is not covered by the premises standards if provided in a class 2 building.

Part 3—regulatory interaction

3.1 Interaction with ACT regulatory schemes—facts and opinion etc

35. The ACT broadly has two main “schemes” that regulate building construction—
 - a. development approvals (DAs), which cover planning matters; and
 - b. building approvals (BAs), which cover Building Code of Australia (BCA) matters and related other matters.
36. The *Planning and Development Act 2007* regulates DAs and is at <http://www.legislation.act.gov.au/a/2007-24/default.asp>. The *Building Act 2004* regulates BAs and is at <http://www.legislation.act.gov.au/a/2004-11/default.asp>.
37. Those Acts and other relevant laws apply to most ACT land and Jervis Bay Territory (adjacent to the NSW mid south coast) land. The Commonwealth is not necessarily bound by those Acts, but is a significant premises owner in the ACT.
38. Under the *Planning and Development Act 2007*, chapter 7 (Development approvals), it is unlawful to carryout certain developments without a required DA. Such development includes construction of class 2 buildings. DA applications are assessed against codes made under the territory plan made under that Act, chapter 5 (Territory plan). The territory plan map and written documents are at <http://www.legislation.act.gov.au/ni/2008-27/default.asp>. The territory plan, item 11 (General Codes), contains item 11.3 (Access and Mobility General Code), and is at <http://www.legislation.act.gov.au/ni/2008-27/copy/60799/pdf/2008-27.pdf>.
39. Under the *Access and Mobility General Code*, rule R5 requires passenger lifts to be designed to meet AS1735.12—*Facilities for persons with disabilities*. The effect of that rule is to require DAs to only be approved for multistorey class 2 buildings if the proposal has lifts designed to meet AS1735.12.
40. Rule R5 correlates with requirement for lifts in class 2 buildings that the 2004 edition of the premises standards provides for.
41. The ACT is a party to Council of Australian Government (COAG) decisions that discourage planning instruments from regulating building construction matters that are the purview of the BCA, at a higher level of stricture than the BCA. Those decisions will force the ACT to align its regulatory systems with the BCA, and if the BCA mirrors the premises standards, that will mean that the ACT will have to omit from its laws the above-mentioned provision about passenger lifts in relation to class 2 buildings.
42. The ACT disability and building construction sectors have for several years been accustomed to the benefits of having those lifts in class 2 buildings. Such a roll back of their legal entitlements to have lifts in class 2 buildings in the ACT, in particular, will significantly disadvantage the ACT’s disability sector.
43. The *Access and Mobility General Code* similarly has several other provisions that apply to class 2 buildings, which also provide a greater level of disability access to class 2 buildings than the premises standards provide for.

44. The *Building Act 2004* requires class 2 buildings to be built only in a way that is likely to produce a building that complies with the most recent version of the BCA. The ACT does not vary the BCA's content about disability access etc, so if the BCA is eventually amended to reflect the finalised premises standards, the *Building Act 2004* will require class 2 buildings to be built only in a way that is likely to produce a building that complies with the amended BCA.
45. In relation to the the proposed *Model Process to Administer Building Access for People with Disability*, (the protocol) tabled with the premises standards, it is above and beyond the ACT's regulatory systems.
46. The object of the protocol is to describe a model process that can be adopted by *Administrations* [jurisdictions] for determining access requirements for buildings. The process aims to ensure, as far as possible, that the application of the *BCA* results in the provision of an accessible environment consistent with the objectives of the *DDA* and the *Premises standards* and, as a result, minimises the likelihood of a complaint against a building owner, occupier or practitioner.
47. The ACT does not have a comparable statutory system for determining any requirements for buildings, and therefore has no relevant statutory processes about the application of the BCA. It then follows that the ACT has not had resources allocated to administer such systems or processes, and therefore would prefer complete discretion to decide if or not it adopted such a system or process.
48. In the ACT, private sector building certifiers exclusively provide the privatised building regulation function, including approval of BAs, except that in a market failure Government can step in to provide the service. The certifier is the sole ultimate arbiter of what complies with the BCA and what does not, when determining a BA application. Currently, if a proponent for a BA does not agree with the certifier's determinations about BCA compliance the proponent can informally—ask the certifier to review the decision, or seek a peer review to help sway the certifier's view, or appoint an alternative certifier.
49. To date that system of redress through certifiers had not produced situations in the ACT that would warrant the adoption of the protocol. It is therefore not anticipated that the protocol will be necessary in the ACT.
50. Provided adoption of the protocol is discretionary, adopting the finalised premises standards through the BCA would be harmonious with the ACT's regulatory schemes (subject to resolving the class 2 building's issue mentioned above).

3.2 Interaction with ACT regulatory schemes—recommendations for action

51. **Recommendation 5**—amend the premises standards in accordance with recommendations herein, to reduce the adverse impacts on the ACT disability sector that will arise from aligning the ACT's statutory *Access and Mobility General Code* with the premises standards. That code requires disability access to be provided to all new class 2 building common areas, whereas the premises standards do not.

Part 4—impacts

4.1 Unjustifiable impacts—facts and opinion etc

52. For the reasons discussed above, the fact that the premises standards fail to cater for class 2 buildings will impact unjustly on—
- a. people with disabilities who wish to visit, temporarily stay in, or permanently live in, new ACT class 2 buildings; in that many will not be able to access class 2 buildings without assistance if ACT laws are aligned to the premises standards; and
 - b. class-2-building—certifiers, developers and building managers; in that even if the class 2 buildings they have responsibility for fully comply with the comparable requirements of a similar class 3 building, they will not enjoy the protection that the class 3 building will derive from its compliance with the premises standards.

4.2 Unjustifiable impacts— recommendations for action

53. **Recommendation 6**—amend the premises standards in accordance with recommendations herein, to mitigate the above-mentioned adverse impacts on people with disabilities and building certifiers, developers and building managers.

Part 5—Related matters—recommended action

54. **Recommendation 7**—the provisions of the premises standard should be finalised and implemented without undue delay, taking account of the outcomes of consultation, and the recommendations herein, so as the community can enjoy the benefits the premises standards will deliver.
55. However, if addressing the class 2 building issues would significantly delay promulgating the premises standards, consideration should be given to promulgating the premises standards without addressing the class 2 building issues, but with a commitment to as soon as practical repealing the initial in-force premises standards and simultaneously reformulating them with the addition of the necessary class 2 provisions.