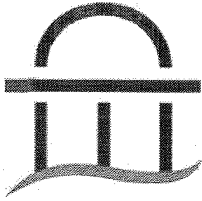


Submission No 84



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Thursday, 19 March, 2009

The Hon Mark Dreyfus QC, MP
Chairman, Standing Committee on Legal and Constitutional Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr Dreyfus,

Disability (Access to Premises — Buildings) Standards 2009

The Property Council of Australia appreciates the opportunity to provide a submission to the inquiry into the draft *Disability (Access to Premises — Buildings) Standards 2009* (the 'Premises Standards').

This submission summarises our position on the Premises Standards.

While we largely support the draft Standards, we remain concerned about several issues which we detail in the submission.

At the end of this submission, we recommend technical changes to the Premises Standards, the Guidelines, AS1428.1, and the Administration Protocol, which the Committee may wish to consider.

Yours sincerely,

Peter Verwer
Chief Executive

The Voice of Leadership

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1.0 Executive Summary

Australia's buildings should be more accessible to people with disabilities.

At present, however, there is no way of ensuring such access has been provided to the degree required by the Disability Discrimination Act (DDA).

This is not a good outcome for anyone.

The *Disability (Access to Premises — Buildings) Standards 2009* represents an important step in the history of the DDA.

It is intended to bridge the considerable gap between the needs of the DDA and the technical provisions of the Building Code of Australia (BCA).

This will provide certainty to industry and the community alike – owners and practitioners will understand what they need to do to comply with the law, while people with disabilities can be assured of greater accessibility within the built environment.

The Property Council supports the introduction of the Premises Standards, so long as the costs entailed in providing access are reasonably commensurate with the benefits, where both are measured objectively.

As a key stakeholder in the negotiations to develop them (both as a member of the Building Access Policy Committee and in the Disability Access Reference Group), we aimed to ensure a balance between the desires of the disability sector and the capacity of the industry to deliver them.

It is our hope that, with some fine tuning and the reconsideration of a few obvious problems of the draft Premises Standards, industry and the community will finally get the certainty we all seek.

2.0 Summary of Recommendations

1. The Government should amend the Premises Standards and the Guidelines to emphasise that they are absolute regulatory standards.
2. The Government should reinstate the '80th percentile' circulation spaces currently used in the Building Code until such time as empirical evidence is provided to demonstrate a need for increased dimensions.
3. 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.
4. The Committee should consider options that might protect owners from complaints about egress for people with disabilities until such a time as it is included in the BCA.
5. The Committee should make the following recommendations to the Government about the Administration Protocol:
 - a. there should be more than one Building Access Panel provided in each jurisdiction;
 - b. State and Territory governments should commit adequate resources to the Building Access Panels to prevent possible delays;
 - c. only one member of a Building Access Panel should need to be a *Person Competent in Access*, even if the size of the Panel increases; and
 - d. all decisions by Building Access Panels should be made within 30 days.

3.0 Summary of Key Issues

3.1 Premises Standards as an Absolute Standard

The Premises Standards will establish the minimum standards for access to premises, to clarify the rights and responsibilities of individuals.

This is important so that new buildings and new work in existing buildings can deliver an acceptable level of accessibility.

However, to ensure that industry does have certainty, the Premises Standards must also establish the maximum regulatory requirement for disability access.

It should not be open to local or state governments to increase access requirements above those specified in the Access Code, without any attempt to undertake a regulation impact assessment.

The Premises Standards have been developed through significant consultation and cost assessment and they should not be vulnerable to unilateral action to increase access.

Any changes to accessibility requirements should only occur through the review process outlined in the draft regulations.

This should be strongly emphasised both in the Premises Standards and the Guidelines, and be reinforced through an intergovernmental agreement.

Recommendation

The Government should amend the Premises Standards and the Guidelines to emphasise that they are absolute regulatory standards.

3.2 '80th' vs '90th' Percentile Dimensions

The draft Premises Standards and associated Australian Standards currently prescribe increased dimensions for:

- accessways, at the location of a turn greater than 60 degrees;
- new accessible sanitary facilities;
- new lifts; and
- doorways, including door width and circulation space.

The proposal to move to these new '90th percentile' dimensions for wheelchair circulation space in these areas is unprecedented.

The new dimensions were never agreed upon either at the Building Access Policy Committee level or at the Disability Access Reference Group.

They have never been supported by empirical research, but were introduced because of unsubstantiated anecdotal claims by members of the disability community.

The '90th percentile' dimensions were drawn from a study conducted over 25 years ago, which focussed on people living in an institutional facility.

More recent research to verify these dimensions, commissioned by the Australian Building Codes Board, was never completed.

Circulation spaces in the Building Code of Australia and AS1428.1:2001 (the '80th percentile') have never been shown to be inadequate.

In fact, the United Kingdom, the United States of America, and the ISO standard all require circulation spaces similar to the '80th percentile' dimensions used currently in Australia.

If the '90th percentile' dimensions are implemented, Australia will be regulating a standard far above that required by the rest of the world.

This will come at a significant cost to property owners, with the need for larger doors, toilets, lifts, and corridors to be installed in many new and existing buildings.

Recommendation

The Government should reinstate the '80th percentile' circulation spaces currently used in the Building Code until such time as empirical evidence is provided to demonstrate a need for increased dimensions.

3.3 Unjustifiable Hardship

The current approach to unjustifiable hardship attempts to cover most of the issues likely to arise in cases where this defence is called upon.

However, there are no clear rules that demonstrate whether unjustifiable hardship has occurred, and practitioners will need to rely upon the vagaries of the court system to obtain certainty.

The Property Council believes that there needs to be a financial benchmark over which unjustifiable hardship is automatically considered to have occurred.

Recommendation

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.

3.4 Lessees

The Property Council supports the proposal reflected in the Premises Standards that parties should only be responsible for those works they are undertaking.

3.5 Egress

In the negotiations to develop the Premises Standards, it was agreed that egress provisions would not be included, because there were no appropriate technical solutions available.

This creates a potential legal problem whereby a property owner or developer may be sued successfully under existing provisions of the DDA because they do not have specific egress options for people with disabilities.

The Australian Building Codes Board (ABCB) believes that owners are protected, because the principles requiring egress are met by the deemed-to-satisfy provisions of the BCA.

However, legal advisors suggest that this may not extend to owners who employ alternative solutions.

Recommendation

The Committee should consider options that might protect owners from complaints about egress for people with disabilities until such a time as it is included in the BCA.

3.6 The Administration Protocol

The Property Council generally supports the Administration Protocol and its purpose to "describe a model process that can be adopted by Administrations for determining access requirements for buildings".

We are keen to work with state and territory administrations to help establish effective and efficient Building Access Panels.

To avoid delays and increase certainty, each administration should establish a pool of experts from which Panels would be drawn to hear cases.

The proposed composition of these Panels also needs to be reconsidered and the requirement for 'at least a third' of all panellists to be a *Person Competent in Access* removed.

If Panel members have sufficient integrity and experience to be appointed, they should be trusted to make the right decisions on access issues.

If a Panel needs to co-opt additional experts to determine an application, the existing *Person Competent in Access* should be able to provide appropriate advice on access requirements without the need for additional support.

Recommendation

The Committee should make the following recommendations to the Government about the Administration Protocol:

- a. there should be more than one Building Access Panel provided in each jurisdiction;
- b. State and Territory governments should commit adequate resources to the Building Access Panels to prevent possible delays;
- c. only one member of a Building Access Panel should need to be a *Person Competent in Access*, even if the size of the Panel increases; and
- d. all decisions by Building Access Panels should be made within 30 days.

4.0 Property Council in Brief

The Property Council represents the property investment sector in Australia.

Its members include **every** major property investor in the country.

Members are engaged in the entire property investment universe, which includes all:

- dimensions of property activity (financing, funds management, development, ownership, asset management, transaction and leasing);
- major property types (offices, shopping centres, residential development, industrial, tourism, leisure, aged care, retirement and infrastructure);
- major regions of Australia and international markets; and,
- the four quadrants of investment – public, private, equity and debt.

5.0 Contact

Please contact the following to discuss any aspects of this submission:

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Appendix 1: The Premises Standards – Comments and Changes

Part 4 Exceptions and Concessions

4.1 Unjustifiable Hardship

The current approach to unjustifiable hardship attempts to cover most of the issues, but there are no clear rules that demonstrate whether unjustifiable hardship has occurred.

The Property Council recommends that where the cost of access increases the cost of the retrofit or construction by 15 percent or more, it should automatically qualify for unjustifiable hardship.

4.3 Lessees

The Property Council supports the proposal that where lessees undertake building work it should not trigger work for the building owner.

This means that only those who make a development application are required to implement access features.

The proposal recognises that owners and tenants are only able to implement changes in space for which they are responsible.

4.4, 4.5 Lift concession, toilet concession.

The Property Council welcomes the proposed concession for lifts and toilets.

This will make it easier for owners of existing buildings to comply with the requirements of the Building Code of Australia, as these features are harder to upgrade in existing buildings than most other areas.

However, we still oppose the proposed move to 90th percentile dimensions, as this is unprecedented anywhere in the world.

The Property Council recommends that current circulation spaces listed in the Building Code should be reinstated until such time as empirical evidence can be provided to demonstrate a need for these increased dimensions.

Schedule 1 Access Code for Buildings

Part A1 Interpretation

A1.1 Definitions

If Class 2 buildings are not required to be accessible under the Premises Standards, part (a) of the definition of **private garage** should be amended to say "*any garage associated with a Class 1 or Class 2 building*".

Part A3 Access Code – Documents Adopted by Reference

A3.1 Documents adopted by reference

AS1428.1:2001 should be added to the list of documents referred to in the Access Code.

The concessions outlined in clauses 4.4 and 4.5 of the Premises Standards effectively refer to this Standard.

Part D3 Access for People with a Disability

Table D3.1

The Property Council agrees with the proposal to exempt Class 2 buildings from the Premises Standards.

The requirement for all areas normally used by the occupants within Class 6 buildings to be accessible will be problematic for restaurants. Some consideration should be given to allowing leniency for restaurant owners and not requiring complete access in all cases.

D3.2 Access to buildings

As noted previously, the Property Council does not believe the move to 90th percentile dimensions is justified, as this exceeds current international leading practice.

The dimensions in (4) should therefore be reversed to existing requirements.

D3.3 Parts of buildings to be accessible

The current wording of subclause (b) would still require some building features to be made accessible regardless of the need for them.

For example, ramps within shopping centre carparks servicing areas that do not have accessible parking, would still need to be made accessible, at great cost to the property owner.

The subclause should be amended to say "*every ramp and stairway **servicing areas required to be accessible**, except for ramps ...*"

D3.4 Exemptions

As noted for section D3.3, there is a risk with the current drafting of the Access Code that carparking levels that do not have accessible parking spaces would still need to have accessible lifts or ramps.

These areas should be exempted, as there is no need for access to be provided to such areas.

Subclause (g) – should be changed to (h) and a new subclause inserted:

- (g) *in a Class 7a building, any storey or level not containing accessible carparking spaces, as defined in D3.5;*

D3.11 Ramps

Some concern has been raised before about subclause (b).

While the Property Council can accept that sequential ramps should not have landings that overlap, there is no reason that ramps that are perpendicular cannot.

The subclause should therefore state:

- (b) *a landing for a step ramp must not overlap a landing for another sequential step ramp or ramp.*

Part E3 Lift installations

E3.6 Passenger lifts

The concession outlined in section 4.4 should be repeated in this clause to make sure that it is addressed within the Building Code of Australia.

Otherwise there is a risk that building certifiers will try to enforce the increased dimensions despite the concession.

Table E3.6 (a)

The restriction of AS1735.7 and AS1735.15 lifts in shopping centres prevents their use as an alternative solution, for example within a shop where there is a change in level, or to provide access to a projection room.

The Access Code should clearly define "high traffic public areas" to allow these types of lifts to be used in such situations.

Alternatively, the subclauses for each could be amended to say:

- be used in a high traffic public use area such as may be found within a theatre, cinema, auditorium, transport interchange, shopping centre or the like*

Table E3.6 (b)

As noted previously, the Property Council believes that the minimum size for lift floors should remain 1,100 mm x 1,400 mm, namely the 80th percentile dimensions.

Part F2 Sanitary and Other Facilities

F2.2 Calculation of number of occupants and fixtures

The Property Council does not oppose this clause. However, we are concerned about suggestions that the Australian Building Codes Board may remove the concession whereby a unisex accessible facility can be counted as two facilities.

This concession will make it easier for property owners and managers to comply with the access requirements, and it should be recorded within this clause.

F2.4 Accessible sanitary facilities

The concession outlined in section 4.5 should be repeated in this clause to make sure that it is addressed within the Building Code of Australia. Otherwise there is a risk that building certifiers will try to enforce the increased dimensions despite the concession.

Appendix 2: The Guidelines – Comments

The Property Council strongly supports the development of Premises Standards to codify the requirements of the DDA with the provisions of the Building Code.

The Guidelines provide a useful background to the Premises Standards, which helps to clarify some of the proposals.

However, following are some of key issues arising from the Guidelines document.

Access Upgrades

The Property Council supports the proposal described in section 5.3 which specifies that lessees are not required to provide an accessible path of travel from the entry of a building to the location of the building work.

However, it needs to be clarified that owners are similarly not required to provide this access when lessees undertake building work. This should be outlined in section 2.3(4) of the Guidelines, as well as in the Premises Standards themselves.

The terms 'responsibility' and 'control' within section 4.3 should also be clarified so that there is no confusion as to who is responsible for what under the Premises Standards.

Concessions

The Property Council supports the proposed concession for lifts and toilets, to minimise the costs of providing access in existing buildings.

However, we still strongly disagree with the introduction of 90th percentile dimensions into the Standards, which is unprecedented anywhere in the world.

The current dimensions in the Building Code and AS1428.1:2001 are equal to the world's leading regulation and the Premises Standards should not seek to extend those regulations.

Appendix 3: Changes to Australian Standards

The Property Council accepts the proposed changes to the following standards:

- AS1428.4.1 – Tactile ground surface indicators for the orientation of people with vision impairment
- AS2890.6 – Off-street carparking for people with disabilities.

All our comments in this submission relate to the current draft version of AS1428.1 – General requirements for access – New building work.

Recommended Changes to AS1428.1

Clause 2

The Property Council believes that AS 1428.1 should revert to 80th percentile wheelchair dimensions currently in the Building Code.

The dimensions for the 90th percentile circulation spaces were based on a study that is over 25 years old and was based on people living in an institution. It did not measure wheelchairs being used within the general community.

The fact that the US, UK, and the ISO standards all reference dimensions currently in the BCA and AS1428.1:2001 should be sufficient reason to retain the current 80th percentile dimensions.

Clause 4.14.3

The height limitation on threshold ramps will diminish their potential for weatherproofing, particularly on sloping ground.

These ramps should be reinstated to the current height of 56 mm.

Figure 2

The dimensions of the circulation space should be measured from wall, rather than from the face of the skirting, as they are meant to include knuckle space.

Figure 5

The 80th percentile dimensions should be reinstated.

Figure 8(b)

Why is Braille signage to direct people to the accessible toilet shown in the example? People with vision impairments are able to use ambulant facilities, so there is no need for such signage.

Figure 8(d)

The reference to a right hand toilet for ambulant disabled facilities in the example is irrelevant, as they have a standard design.

Clause 11.5.2

The landings for step ramps where there is no change of direction should be the same as required for kerb and accessible ramps – 1200mm.

There is no reason for step ramps to have a longer ramp than required for the steeper kerb ramps, as the wheels of a 90th percentile wheelchair easily fit within the 1200mm landing.

Clause 11.6

The original threshold ramp heights should be reinstated.

Figure 22(a)

Landings for step ramps have been increased to 1500mm, even though those for ramps and kerb ramps have not changed.

The landing dimensions for step ramps should be changed back to 1200mm to match the requirements for access ramps and kerb ramps.

In addition, Clause D3.11 (b) of the Access Code states that:

"a landing for a step ramp must not overlap a landing for another step ramp or ramp"

effectively requiring a 3m landing between two step ramps or a step ramp and ramp, for which there is no justification.

Figures 22 (a) and (b)

The implication of these diagrams is that step ramps require handrails and kerb rails.

This is generally not the case, as indicated in figure 24 (a) and (b), so the diagrams are misleading and should be changed.

Figure 26

The diagram has been drawn incorrectly:

- the slope of the step is drawn at an odd angle – a step like this would be a trip hazard; and
- the strip of contrasting on the face of the step is wrong and would be dangerous for people with a vision impairment.

Clause 13(b)

The wording is incorrect. It should instead say:

The cross-section of handrails shall be circular or elliptical, not less than 30mm (- 50mm) in height nor more than (30 -) 50 mm in width ...

Figures 29, 30, 31

The 80th percentile dimensions should be reinstated.

Clause 14.4.3.2(b)

The clause is very confusing when viewed with Figure 32 and should be reworded for clarity.

Figure 33

The 80th percentile dimensions should be reinstated.

Figure 45

The 80th percentile dimensions should be reinstated.

Clause 16.1

The revised floor gradients in sanitary facilities (1:80 – 1:100) are too shallow for construction tolerances and won't drain correctly.

Figure 49

The 1160mm wide shower, as indicated in Figure 13 of AS 1428.2:1992, which is the 90th percentile standard, has been deleted and should be reinstated. This is instead of the 1600 mm wide shower required by Figure 49.

Figure 51(a)

The 80th percentile dimensions should be reinstated.

Figure 51(b)

The 90th percentile dimension shown in Figure 13 of AS 1428.2 should be reinstated, as the current proposal increases the width of a combined bathroom space by 440mm, as mentioned for Figure 49.

Clause 17(c)

The clause should refer to AS1170.1, rather than to a force of 1100 N.

Figure 56(a) – Section A-A

In the diagram, the wheelchair shouldn't require additional space in front of the wheelchair. This space should be the same as exists for fixed seating, as shown in 56(c).

Figure 56(b) – Plan

The line behind the wheelchairs is meant to be a wall and should be drawn as such.

Figure 56(b) – Section A-A

The diagram should show the wall behind the wheelchair. The reference to "Crossover" in the diagram should be removed.

Appendix 4: A Model Process to Administer Building Access for People with a Disability

General Position on the Protocol

The Property Council generally supports the Administrative Protocol and its purpose to "describe a model process that can be adopted by *Administrations* for determining access requirements for buildings".

We are willing to work with state and territory administrations to establish effective and efficient Building Access Panels.

The Role of Building Access Panels

Building Access Panels will help to resolve uncertainty arising from alternative solutions and unjustifiable hardship claims, to ensure better, more cost-effective access.

The Property Council agrees that there is a need for such a body, as it will provide a more reasonable alternative to complaints being made to the AHRC or the Federal courts.

This will be made more reliable with the requirement that decisions of panels be recognised when these bodies are considering unjustifiable hardship claims.

However, we are still concerned that the panels process could result in delays for applicants, particularly if there is only one established in each state or territory.

When the Premises Standards come into effect, it is likely that building certifiers and local councils will initially be reluctant to approve any application that deviates from the Deemed-to-Satisfy provisions of the Access Code.

Such cases will be referred to panels for determination, as councils or certifiers seek to insure themselves against the potential of future complaints. This could add significantly to the time it takes for a project to be approved.

To avoid delays and increase certainty, each administration should establish a pool of experts from which Panels would be drawn to hear cases.

Composition of Panels

The current version of the Protocol still specifies a panel of three, with one member being a *Person Competent in Access*.

The Property Council does not oppose this, as the panels will need to have the right expertise to be able to make a reasonable and rational decision.

However, we disagree with the proposal that any increase in the size of the panel will need to be reflected with an increase in the number of *Persons Competent in Access*.

This would mean that if the panel needed to seek input from a structural engineer, lift expert, or fire services expert, it would increase in number by at least two people – even if the issue being discussed was not specifically access-related.

If panel members have sufficient integrity and experience to be appointed, they should be trusted to make the right decisions on access issues.

If the arguments of the *Person Competent in Access* are sound, they will be accepted. Having greater numbers does not make such arguments stronger.

Building Upgrade Plans

The Property Council agrees that the use of Building Upgrade Plans will be helpful for property owners and operators to improve access to their premises, while at the same time being flexible enough to allow normal business practice to occur.

However, such mechanisms should not be used to justify even greater access requirements.

If owners have to provide greater access due to the use of Building Upgrade Plans than they would if they were exempted under unjustifiable hardship provisions, there will be an increase in their costs.

This would mean that this viable mechanism for planning for the upgrade of a building would not be used, which would ultimately undermine the potential for improving the building's accessibility.

Recommended Changes to the Protocol

Preamble

The last two bullet points of the Preamble should change "aims to" to "should", because the purpose of the Protocol should be described more forcefully.

Article 1 – part (1)

The "and"s at the end of each paragraph should be changed to "or", because not all conditions are required for any access-related matter.

Article 1 – part (2)(b)

"undertakes the approval" should be changed to "approves".

Article 1 – part (3)

Change the clause to:

"The Protocol only covers parts of a building regulated under building law and not elements such as fixtures and fittings, street furniture, and operational

issues, which are covered under the general provisions of the DDA. A builder, owner, occupier, or Building Control Authority that creates, or permits the creation of access barriers in such elements would not be covered by the Protocol."

Article 2 – part (1)(a)

Change "refusing" to "refusal".

Article 3 – title

Change "outcomes" to "objectives", as it's not an outcome until it's delivered.

Change the first line to "The objectives of the process of using this Protocol are to:"

Article 3 – part (4)

Add a word: "... States and Territories **will** address ..."

Article 4 – part (3)

As discussed above, the composition of an Access Panel should have one *person competent in access*, not a third of the panellists.

The clause should be changed to remove

and where the *Access Panel* consists of more than 3 persons, at least one-third of the *Access Panel* must be represented by *Persons Competent in Access*.

Annex 1 – clause 1.3 (2)

As discussed above, the composition of an Access Panel should have one *person competent in access*, not a third of the panellists.

The clause should be changed to remove

and where the panel is greater than three persons, at least one-third of the *Access Panel* must be represented by *Persons Competent in Access* matters.