THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (EMERGENCY RESPONSE CONSOLIDATION) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP)
OUTLINE

This bill makes necessary amendments to the special measures to protect Aboriginal children in the Northern Territory, following up the Northern Territory National Emergency Response Act 2007 and the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007.

Schedule 1 – R 18+ programs

This bill amends the Broadcasting Services Act 1992 and the Northern Territory National Emergency Response Act 2007 to require particular pay television licensees not to provide television channels that contain a large amount of R 18+ programming into certain prescribed areas under the Northern Territory National Emergency Response Act 2007. The cessation of the television service would occur only on the request of the community and after consultation with the community, and an assessment that there would be benefit in such action to Indigenous women and children in particular.

Schedule 2 – Transport of prohibited material

The bill permits prohibited material to be transported through a prescribed area to a place outside the prescribed area. Specifically, amendments ensure that an offence does not apply if a person proves that the material was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area. Amendments to the seizure provisions ensure that prohibited material brought into the prescribed area for the purpose of transporting it through that area is not seized, and, if seized, will be able to be returned.

Schedule 3 – Access to Aboriginal land

The bill makes amendments to the Aboriginal Land Rights (Northern Territory) Act 1976 to repeal the permit system amendments that gave public access to certain Aboriginal land and which came into force on 17 February 2008.

Schedule 4 – Community stores

This bill makes sure that, if a community is substantially dependent upon a roadhouse for the provision of groceries and drinks, the roadhouse may be licensed as a community store.
Financial impact statement

The community stores measure has a financial impact of $0.6m in 2008-09. The financial impact of the remainder of the bill is negligible.
NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Act 2008.

Clause 2 provides a table that sets out the commencement dates of the various sections in, and Schedules to, the Act.

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

This explanatory memorandum uses the following abbreviations:

- ‘Broadcasting Services Act’ means the Broadcasting Services Act 1992;
- ‘Land Rights Act’ means the Aboriginal Land Rights (Northern Territory) Act 1976;
- ‘NT Amendment Act’ means the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007; and
Schedule 1 – R 18+ programs

Summary

This Schedule amends the Broadcasting Services Act and the NT NER Act to require particular pay television licensees not to provide television channels that contain a large amount of R 18+ programming into certain prescribed areas under the NT NER Act. The cessation of the television service would occur only on the request of the community and after consultation with the community, and an assessment that there would be benefit in such action to Indigenous women and children in particular.

Background

The Little Children are Sacred report by the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (30 April 2007) raised concerns about the availability of pornography in communities and children’s exposure to pornographic material (including videos, DVDs, magazines and subscription television) in light of submissions the Inquiry received and the regional meetings it conducted. The report noted that this exposure was a result of poor supervision, overcrowding in houses and acceptance or normalisation of this material. It further noted that the use of pornography as a way to encourage or prepare children for sex (‘grooming’) had featured heavily in prominent cases. At the Inquiry’s regional meetings, it was recommended that possible strategies to restrict access to pornography, generally, and by children in particular, be investigated.

In relation to subscription television services, the report noted that Austar was readily available in communities. Reports have been received from field workers since the emergency response commenced confirming this situation.

Austar is licensed as a subscription television broadcasting service under the Broadcasting Services Act. Austar also provides several subscription television narrowcasting services (under a class licence). Generally, a narrowcasting service comprises ‘special interest’ programming. Unlike a broadcasting service, which provides programming that is intended to appeal to, and be accessible by, the general public and is individually licensed under the Broadcasting Services Act, a narrowcasting service is provided under a class licence (Part 8 of the Broadcasting Services Act refers). An open narrowcasting service is provided free-to-air, whereas a subscription narrowcasting service is provided upon payment of a fee.

The statutory licence conditions in the Broadcasting Services Act for a subscription television narrowcasting service are set out in clause 11 of Part 7 of Schedule 2 to the Broadcasting Services Act.
Austar subscribers can access its ‘Adults Only’ service, which provides two channels of R 18+ erotic entertainment programming 24 hours a day, seven days a week, on a single pay-per-view or monthly basis. The provision of R 18+ programs under a subscription television narrowcasting licence is legal. Using the National Classification Scheme Guidelines, a film or television program would be rated R 18+ if it is regarded as unsuitable for a child or person under 18 to see.

Austar’s ‘Adults Only’ service is considered a subscription ‘narrowcasting’ service, as it is a service whose reception is limited by way of access controls and by provision of programs of limited appeal. The fact that children may be exposed to the adult erotic content provided by this service – despite the availability of blocking devices to subscribers and legal sanctions for exposing a child under the age of 16 to indecent material – is a particular cause for concern.

As part of the special measures in the Northern Territory, the amendments discussed below will enable particular subscription television narrowcasting services to be prohibited from being provided to subscribers located in particular communities. This would be achieved through the addition of a new licence condition in Part 7 of Schedule 2 to the Broadcasting Services Act. (A related amendment to the NT NER Act would be made to provide a process for determining which communities should be prohibited from accessing certain subscription television narrowcasting services.) That Broadcasting Services Act licence condition would only apply to those licensees who:

- allot more than 35 per cent of their total broadcast hours to programs that are rated R 18+; and

- are subject to a written declaration made by the Minister.

The amendments made by this Schedule commence on the 35th day after Royal Assent. This will allow affected television broadcasters sufficient time to make necessary adjustments to their business.

**Explanation of the changes**

**Items 1 and 2** make amendments to the criminal offence and civil penalties provisions in the Broadcasting Services Act that apply to breaches of a subscription narrowcasting television licence condition. The amendments extend the existing criminal and civil penalties that apply to such breaches to the new licence condition inserted by **item 10** below.

**Item 3** would amend the Broadcasting Services Act to provide for merits review by the Administrative Appeals Tribunal (AAT) of certain decisions made by the Minister responsible for the Broadcasting Services Act (the Communications Minister) pursuant to the amendments provided by **item 10** below. The Communications Minister’s decisions would also be subject to judicial review.
Items 4 to 9 would amend clause 5 of Schedule 2 to the Broadcasting Services Act. Items 4 and 6 to 9 make minor amendments to the cross-references in the clause as a consequence of the substantive amendment proposed by item 5.

Item 5 would impose a special record-keeping obligation on a subscription television narrowcasting licensee whose service is capable of being received by a subscriber in a prescribed area of the Northern Territory (as defined in section 4 of the NT NER Act), and who broadcasts at least one R 18+ program on a given day. Such a licensee would potentially become subject to the standard licence condition imposed in relation to declared prescribed areas (see items 10 and 16 below). This record-keeping requirement would assist the Communications Minister to determine which particular subscription television narrowcasting services should be subject to the licence condition (due to their level of R 18+ content).

A licensee subject to the record-keeping requirement would need to keep records of the number of hours of R 18+ programs broadcast on that day, and the total number of program hours broadcast that day. No records would need to be kept in relation to any day when there is no R 18+ program broadcast.

For record-keeping purposes, program hours would not include advertising, promotional, or other informative material that may be broadcast in breaks during or between television programs – that is, material broadcast during ‘ad breaks’. A licensee would need to retain their records for at least 120 days. These special record-keeping obligations would sunset in accordance with subclause 12(2) (item 10 refers).

Item 10 adds four new clauses at the end of Part 7 of Schedule 2 to the Broadcasting Services Act. Part 7 of Schedule 2 to the Broadcasting Services Act sets out the statutory conditions that apply to class licences, including subscription television narrowcasting licences.

Licence condition for certain subscription television narrowcasting services in the Northern Territory

The first of the new clauses (clause 12) will impose an additional standard condition that applies only to a licensee who provides a declared subscription television narrowcasting service under a class licence to a subscriber who is in a declared prescribed area (subclause 12(1) refers). The process for determining whether a service is a declared subscription television narrowcasting service is set out in subclauses 12(4) to (17).
Sunset clause

Subclause 12(2) provides that the proposed licence condition be repealed after five years, or on an earlier date (if any) specified in a legislative instrument made by the Minister. The sunset provision is appropriate in light of the fact that this licence condition is designed to respond to an emergency situation currently in the Northern Territory. It is appropriate to enable this special measure to be repealed as soon as the measure is no longer needed – this should be within the five-year ‘outer limits’ period specified in paragraph 12(2)(a).

Subclause 12(3) provides that the Minister’s instrument to repeal the licence condition is a legislative instrument. Accordingly, it is disallowable.

Subclauses 12(4) to (17) set out the process by which the Communications Minister is to decide whether to make, or revoke, a declaration that a particular service is a declared subscription television narrowcasting service and thus eligible to be subject to the licence condition imposed in relation to declared prescribed areas that are determined by the Indigenous Affairs Minister under the NT NER Act (see item 16 below).

A service may only be a declared subscription television narrowcasting service if, over a particular seven-day period (known as the declaration test period), more than 35 per cent of the program hours (excluding advertisements, promotions, news breaks, etc) broadcast by the service are rated R 18+. The term R 18+ program is defined in subclause 12(18).

To ensure that the declaration is timely and relevant, the Communications Minister’s decision must be made within 21 days of the beginning of the declaration test period. A declaration made by the Communications Minister would remain in force until the Minister revokes it. The Minister may only revoke a declaration if satisfied that the number of R 18+ program hours broadcast by the service concerned during a particular revocation test period is either nil or less than 35 per cent of the total hours broadcast during that period. When revoking a declaration, the Communications Minister must have regard to the need to improve the well-being of people living in the prescribed areas.

The instrument by which the Communications Minister either declares that a particular service is a declared subscription television narrowcasting service, or revokes such a declaration, is not a legislative instrument. This is merely declaratory of the law, confirming that the instrument is not a legislative instrument under section 5 of the Legislative Instruments Act 2003.

Whenever the Communications Minister makes or revokes a declaration, a copy of the instrument would be published in the Gazette, so that subscribers in prescribed areas are aware of those services that may be affected by a determination by the Indigenous Affairs Minister (see item 16 below). The Gazette is published on the internet (www.ag.gov.au/govgazette).
The Australian Communications and Media Authority (ACMA) will be able to access licensee records about R 18+ programs and inform the Communications Minister accordingly. The Communications Minister may issue directions to ACMA to facilitate the gathering of relevant information to assist the Minister’s decision-making under this clause.

The remaining clauses 13 to 15 will protect people who do things in relation to the additional licence condition from particular causes of action.

Exclusion of some Northern Territory laws

New clause 13 will provide that the licence condition in clause 12 (above) and related provisions of the Broadcasting Services Act operate to the exclusion of Northern Territory discrimination laws, and that any acts done in relation to the licence condition are lawful regardless of any contrary Northern Territory discrimination laws.

Similarly, new clause 14 will exclude section 49 of the Northern Territory (Self-Government) Act 1978 (which guarantees that trade and commerce between the Northern Territory and other States shall be absolutely free) with respect to the new standard class licence condition and related provisions of the Broadcasting Services Act.

Item 11 would make a minor amendment to clause 24 of Schedule 6 to the Broadcasting Services Act, regarding the record-keeping obligations of licensed datacasting services. This amendment would exempt datacasting licensees from keeping records in relation to the Northern Territory special measures (refer items 4 to 9 above). Such a record-keeping obligation is not needed for datacasting services, and this amendment would put the issue beyond doubt.

Amendments to the NT NER Act

Item 12 inserts a definition of child into section 3, being a person under 18 years of age.

Item 13 inserts a definition of declared prescribed area into section 3, this term having the meaning provided by new section 127B.

Item 14 inserts a definition of R 18+ program into section 3, this term having the same meaning as in clause 1 of Schedule 2 to the Broadcasting Services Act.

Item 15 inserts a definition of subscription television narrowcasting service into section 3, this term having the same meaning as in the Broadcasting Services Act.

Item 16 inserts new Part 7A into the NT NER Act.
New section 127A sets out the objects of new Part 7A. The first such object is to define the term *declared prescribed area*, which is relevant for the purposes of subclause 12(1) of Schedule 2 to the Broadcasting Services Act.

New subsection 127A(2) sets out the object of this Part, when read together with new clause 12 of Schedule 2 to the Broadcasting Services Act. This object is to protect communities from violence and sexual abuse and should be read as a ‘special measure’ for the purposes of the *Racial Discrimination Act 1975*.

A ‘special measure’ is based on Article 1.4 of the Convention on the Elimination of All Forms of Racial Discrimination, which allows governments to enact laws that, in a lay person’s terms, are positively discriminating so as to ensure the adequate development and protection of individuals with the purpose of securing and advancing their fundamental freedoms. The Convention relevantly provides that:

‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’

The Northern Territory national emergency response recognises the importance of prompt action, as well as Australia's obligations under international law. The Convention on the Rights of the Child requires Australia to protect children from abuse and exploitation and ensure their survival and development. The International Convention for the Elimination of All Forms of Racial Discrimination requires Australia to ensure that people of all races are protected from discrimination and equally enjoy their human rights and fundamental freedoms.

The provisions in this Schedule are intended to advance Indigenous Australians, and especially Indigenous children, living in prescribed areas, by prohibiting access to declared subscription television narrowcasting services that broadcast R 18+ content, determined by the Indigenous Affairs Minister, at the request of the community, to be unsuitable. This response is reasonable because the prohibition is for a limited period of time, and is not intended to result in the maintenance of separate rights for different racial groups for any longer than is necessary.
New section 127B provides that the Minister may, by legislative instrument, determine that a prescribed area, as defined in section 4 of the NT NER Act, is to be a **declared prescribed area** for the purposes of the NT NER Act. The Minister is not to make such a determination unless he or she has been requested to do so by a person living in the particular prescribed area. The practical effect of the Minister making such a determination is that R18+ programming provided by a **declared subscription television narrowcasting service** will be prohibited from being broadcast into the **declared prescribed area**.

New section 127C provides that, before the Minister can make a determination under new section 127B, the Minister must ensure that there has been adequate community consultation. The ways in which the Minister would ensure that adequate consultation has been undertaken are listed in this section. A failure by the Minister to consult adequately the community, in accordance with this section, does not affect the validity of a determination under new section 127B.

New section 127D provides a number of matters that the Minister must have regard to in deciding whether or not to make a determination under section 127B. These matters are to ensure that the sole purpose of making such a determination is to help secure the adequate advancement of residents of the particular prescribed area and to give those residents such protection as may be necessary in order to ensure that those residents have equal enjoyment or exercise of human rights and fundamental freedoms.

New section 127E provides that, where the Minister has made a determination under section 127B, the determination will come into effect on the day specified in the determination, providing this is within 35 days of the making of the determination, or otherwise, on the day after its registration on the Federal Register of Legislative Instruments. A determination under section 127B must specify an expiry date and this date must be within 12 months of the day on which the determination came into force.

New section 127E also empowers the Minister to extend the period in relation to which the original determination, under new section 127B, will operate, as long as any extension is for not more than a further 12 months. There is also nothing in the NT NER Act that would stop the Minister from making a fresh determination under section 127B in relation to an area that has already been subject to such a determination but that previous determination has previously expired.

New section 127F expressly provides that the Minister can revoke any determination under section 127B, prior to its stated expiry, regardless of the fact that subsection 33(3) of the *Acts Interpretation Act 1901* would provide the Minister with the power to do this in any event.
**Item 17** removes the new Part 7A from the operation of subsections 132(1) and (2) of the NT NER Act. That is, new Part 7A is not expressly deemed to be a 'special measure' for the purposes of the *Racial Discrimination Act 1975*, nor excluded from the operation of Part II of that Act. New Part 7A is intended to be interpreted in such a way as to recognise that it was drafted as a ‘special measure’ for the purposes of the *Racial Discrimination Act 1975*. 
Schedule 2 – Transport of prohibited material

Summary

This Schedule permits prohibited material to be transported through a prescribed area to a place outside the prescribed area. Specifically, amendments ensure that an offence does not apply if a person proves that the material was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area. Amendments to the seizure provisions ensure that prohibited material brought into the prescribed area for the purpose of transporting it through that area is not seized, and, if seized, will be able to be returned.

Background

Part 10 of the Classification (Publications, Films and Computer Games) Act 1995 (the Classification Act) introduced offences for possessing ‘pornography’ within a prescribed area, and for supplying pornography in and to those areas. It commenced on 14 September 2007.

The provisions were intended to correspond with alcohol offences. However, the alcohol provisions provide that it shall not be an offence if a person possesses or controls alcohol within the prescribed area for the purpose only of transporting the alcohol to a destination outside the prescribed area. An equivalent provision was not included in the Classification Act.

Industry has expressed concerns about their inability to transport lawfully goods via road to and from areas that are not prescribed. For example, a distributor delivering prohibited material from Darwin to Alice Springs could be charged with possession and/or supply offences as the Stuart Highway passes through prescribed areas. The amendments would enable Industry to carry on their business legally in areas of the Northern Territory that are not prescribed.

The amendments made by this Schedule commence on the day after Royal Assent.

Explanation of the changes

Items 1 to 4 insert a new subsection (2) into each of sections 101 and 102. They provide that an offence for the possession or control of level 1 or 2 prohibited material does not apply if the person proves that the material was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area. The defendant bears the legal burden of proof.
Item 5 inserts new subsection (2A) into section 103. It provides that an offence for the supply or intended supply of prohibited material does not apply if the person proves that the material was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area. The defendant bears the legal burden of proof.

Item 6 repeals and substitutes paragraph 106(b) so that a police officer may seize material found in a prescribed area if the officer suspects on reasonable grounds that the material is prohibited material and was not brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area.

Item 7 repeals and substitutes paragraph 108(3)(b) to provide for the return by the responsible officer of seized material if the officer is satisfied on reasonable grounds that the material is not prohibited material or was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area.

Item 8 repeals and substitutes new subsection 109(3) to provide for the return by the magistrate of seized material if they are satisfied the material is not prohibited material or was brought into the prescribed area for the sole purpose of transporting it to a place outside the prescribed area.
Schedule 3 – Land rights

Summary
This Schedule makes amendments to the Land Rights Act to repeal the permit system amendments that gave public access to certain Aboriginal land and which came into force on 17 February 2008.

Background
The NT Amendment Act included provisions amending the Land Rights Act to abolish the requirement for people to obtain permits prior to visiting major Aboriginal communities. These provisions commenced on 17 February 2008.

Aboriginal people and the Land Councils which represent them have voiced overwhelming opposition to the opening up of communities to public access. The power to determine who can enter their land is viewed by Aboriginal people as an important part of their rights to land. It is not clear how the removal of the requirement for the public to obtain permits contributes to the success of the emergency response in the Northern Territory, and it may make it easier for drugs, alcohol and people with criminal intent to enter communities.

The amendments made by this Schedule reinstate the permit system for major communities. The amendments also include adjustments to the power of the Minister to make authorisations providing access to Aboriginal land to certain people for the five year period of the emergency response in the Northern Territory. The adjustments will enable the Minister to ensure that certain people, such as journalists, can access communities under conditions.

The amendments made by this Schedule commence on the day after Royal Assent.

Explanation of the changes

Amendments to the Land Rights Act

Ministerial authorisations to enter and remain on Aboriginal land

Item 1 repeals and substitutes subsection 70(2BB). New subsection 70(2BB) provides for the Minister to make authorisations in relation to all Aboriginal land, or in relation to any particular Aboriginal land such as community land (see item 5 below, which provides for the definition of community land) and land which allows access to community land. Item 1 also inserts new subsection 70(2BBA), which provides that Ministerial authorisations under subsection 70(2BB) may be subject to conditions. This will mean, for example, that a condition of an authorisation may be that sacred sites are not entered. If a person breaches such a condition they will no longer be covered by the authorisation.
Item 2 is a transitional provision, which saves authorisations in force immediately before commencement.

Defence to entering and remaining on Aboriginal land in subsection 70(2D)

Consistently with the repeal of sections 70B to 70H in item 6, item 3 repeals subsection 70(2D), which provides a defence if a person enters or remains on premises on certain Aboriginal land with the permission of the occupier. It also consequentially repeals subsection 70(2E), which relates to definitions for the purposes of subsection 70(2D).

Definition of vested Aboriginal land

Item 4 repeals subsection 70A(1). This is consequential to the changes to the access provisions effected by item 6 below.

Definition of community land

Item 5 amends subsection 70A(2) so that the definition of community land is for the purposes of section 70 (refer to item 1 above), rather than for the purposes of sections 70B to 70F (which are to be repealed – see item 6 below).

Provisions allowing public access to certain Aboriginal land

Item 6 repeals sections 70B to 70H. These provisions provided for public access to certain Aboriginal land, and access to vested Aboriginal land for the purpose of attending court hearings.

Item 7 repeals paragraph 73(1)(ba), which related to the power of the Northern Territory Legislative Assembly. This change is consequential to the repeals effected by item 6.

Aboriginal Land Act (Northern Territory)

Item 8 repeals section 74AA of the Land Rights Act. Section 74AA currently overrides subsections 5(5) and 5(6) of the Aboriginal Land Act (Northern Territory) to the extent that they allow a Land Council to revoke a permit issued by the traditional Aboriginal owners and vice versa.

Amendment to the NT NER Act

Item 9 amends subsection 35(1) of the NT NER Act to delete the references to sections 70C to 70G of the Land Rights Act. This change is consequential to the amendments effected by item 6 above.
Schedule 4 – Community stores

Summary

This Schedule makes sure that, if a community is substantially dependent upon a roadhouse for the provision of groceries and drinks, the roadhouse may be licensed as a community store.

Background

The meaning of community store is set out in section 92 of the NT NER Act. Paragraph 92(2)(b) excludes roadhouses from the definition of community store, with the consequence that roadhouses are not subject to the community stores licensing arrangements contained in Part 7 of the NT NER Act.

There are a number of communities in the Northern Territory (located on or near major highways) which are largely dependent on roadhouses for the provision of grocery items and drinks. In these communities, the roadhouse effectively performs the function of a community store. Given paragraph 92(2)(b), it is not currently possible to license those roadhouses which de facto are providing similar services to community stores, and this will make it more difficult to introduce income management in those communities.

The amendments made by this Schedule commence on the day after Royal Assent.

Explanation of the changes

Item 1 amends paragraph 92(2)(b) of the NT NER Act by adding a qualifier, which would mean that a roadhouse can be regarded as a community store, and hence be subject to the licensing arrangements, in circumstances where a particular community is (or communities are) substantially dependent upon the roadhouse for the provision of grocery items and drinks.