SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

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

These amendments are to the provisions in the bill relating to R 18+ programs and access to Aboriginal land.

**R 18+ programs**

Amendments will make minor workability improvements to the *Broadcasting Services Act 1992* amendments in the bill. Firstly, there will be provision for a subscription television narrowcaster to self-declare a service. Such a service will become subject to the new licence condition inserted by the bill, which prohibits the provision of the service to a declared prescribed area. Secondly, the record-keeping rules will be refined: to provide that the rules do not apply until a prescribed area has been declared; to allow pre-broadcast data, including data in electronic form, to satisfy the record-keeping requirements; and to provide that records are not required for services that are self-declared, unless the Australian Communications and Media Authority determines otherwise.

**Access to Aboriginal land**

An amendment will ensure that an authorisation by the Minister under the *Aboriginal Land Rights (Northern Territory) Act 1976* for a person to enter or remain on Aboriginal land may not extend to a sacred site. A further amendment will allow a candidate for election as a member of a local government body in the Northern Territory to enter or remain on Aboriginal land without needing a permit.

**Financial impact statement**

The amendments relating to the *Broadcasting Services Act 1992* will reduce the administrative burden and associated regulatory compliance costs to subscription television narrowcasting service providers captured by the measure. Otherwise, there is no financial impact from any of the amendments.
NOTES ON AMENDMENTS

R 18+ programs

Amendments (1) and (2) will amend item 3 of Schedule 1 to the bill to provide for merits review by the Administrative Appeals Tribunal (AAT) of the following decisions:

(a) a decision by the Communications Minister to refuse to approve the making of a licensee’s self-declaration that it is a declared subscription television narrowcasting service pursuant to proposed subclause 12(6A) (see amendment (13) below);

(b) a decision by the Australian Communications and Media Authority (ACMA) under proposed subclause 12(16A) to refuse to approve an electronic format, or a publication, in relation to a subscription television narrowcasting service; and

(c) a decision by the ACMA under proposed subclause 12(16A) to revoke the approval of an electronic format, or a publication, in relation to a subscription television narrowcasting service.

The decisions specified above will also be subject to judicial review.

Amendments (3) to (8) will amend subclause 5(3A) of Schedule 2 to the Broadcasting Services Act 1992 (Broadcasting Services Act) (see item 5 of Schedule 1 to the bill) to clarify that a licensee’s record-keeping obligations under subclause 5(3A) do not commence until the Indigenous Affairs Minister has determined, by legislative instrument, that a specified prescribed area is a declared prescribed area pursuant to section 127B of the Northern Territory National Emergency Response Act 2007 (see item 16 of Schedule 1 to the bill).

Amendment (5) will provide that the record-keeping obligations under subclause 5(3A) apply only to a service that is not exempt from the application of that subclause, unless the ACMA otherwise determines (see amendment (9) below). An exempt service refers to a licensee that is the subject of a self-declaration made under proposed subclause 12(6A) (see amendment (13) below). Amendments (6) and (7) will make consequential amendments to the note to subclause 5(3A). Amendment (8) will insert a new note 2, which cross-references subclauses 12(16A) to (16C). Subclauses 12(16A) and (16C) will have the effect of allowing a licensee to use pre-broadcast data for the purposes of satisfying its record-keeping obligations under subclause 5(3A) (see amendment (20) below).
Amendment (9) will, inter alia, replace subclause 5(3B) of Schedule 2 to the Broadcasting Services Act (see item 5 of Schedule 1 to the bill) with new subclause 5(3B). The omission of old subclause 5(3B) is consequential to proposed amendments (20) and (21) below.

New subclause 5(3B) will specify those services which will be exempt from the record-keeping obligations under subclause 5(3A). Unless the ACMA determines otherwise, exempt services will be those services that are the subject of a declaration under proposed subclause 12(6A) (see amendment (13) below). A declaration under subclause 12(6A) will be made by a person who provides a subscription narrowcasting service under a class licence and, with the written approval of the Communications Minister, declares that the service is a declared subscription narrowcasting service.

Amendment (9) will also provide the Communications Minister with the power to give the ACMA a written direction in relation to the exercise of the ACMA’s powers to determine that a service is not exempt from the record-keeping obligations under subclause 5(3A) (proposed subclause 5(3BA) refers). The ACMA will be obliged to comply with a written direction made by the Communications Minister under subclause 5(3BA) (proposed subclause 5(3BB) refers).

This will allow the Communications Minister to direct the ACMA to require a service to comply with the record-keeping obligations under subclause 5(3B), notwithstanding the making of a valid declaration in relation to that service under subclause 12(6A). Such a direction may assist the Communications Minister in determining whether to revoke a declaration under subclause 12(6A) if, for example, the service is no longer providing R 18+ programs in excess of the 35 per cent broadcast hours quota. The Communications Minister may direct the ACMA to make information contained in records available to him/her for the purposes of facilitating the exercise of a power, such as the revocation power, conferred by clause 12 of Schedule 2 to the Broadcasting Services Act (subclause 12(15) refers).

New subclause 5(3BC) will clarify that a ministerial direction made under subclause 5(3BA) is a legislative instrument. A note will point out that, pursuant to section 44 of the Legislative Instruments Act 2003, a ministerial direction under new subclause 5(3BC) will not be disallowable for the purposes of section 42 of that Act. A further note will point out that Part 6 (sunsetting) of the Legislative Instruments Act 2003 will also not apply to a direction, by virtue of section 54 of that Act. These notes are merely declaratory of the law.

Amendment (10) will make consequential amendments to subclause 5(3D) of Schedule 2 to the Broadcasting Services Act (see item 5 of Schedule 1 to the bill) to clarify that subclauses 5(3BA), (3BB) and (3BC) cease to have effect at the same time as the proposed licence condition under subclause 12(1) ceases to have effect by virtue of the sunset provision under subclause 12(2).
Amendments (11) and (12) will amend new subclause 5(10) of Schedule 2 to the Broadcasting Services Act (see item 9 of Schedule 1 to the bill) by omitting the definition of prescribed area and inserting the definition of declared prescribed area.

Amendment (13) will amend subclause 12 of Schedule 2 to the Broadcasting Services Act (see item 10 of Schedule 1 to the bill) by inserting new subclauses 12(6A) and (6B).

Subclause 12(6A) will provide that, if a person provides a subscription television narrowcasting service under a class licence, the person may, with the written approval of the Communications Minister, declare that the service is a declared subscription television narrowcasting service for the purposes of clause 12. In effect, subclause (6A) will permit a person who provides a subscription television narrowcasting service to identify itself as a declared subscription television narrowcasting service.

The intention is that a declaration made by a service in accordance with subclause (6A) will have the same effect as a declaration made by the Communications Minister under subclause 12(4). Consequently, the service will become subject to the licence condition specified in subclause 12(1), which prohibits the provision of a declared subscription television narrowcasting service in a way that will enable a subscriber in a declared prescribed area to receive the service. The service will also be exempt from the record-keeping requirements of subclause 5(3A), unless otherwise directed by the ACMA (see amendment (9) above).

It is envisaged that a provider of an ‘Adults Only’ service, for example, would want to make such a declaration under subclause 12(6A) on the basis that the total number of hours of R 18+ programs broadcast by the service during any seven-day period exceeded the 35 per cent threshold. The term R 18+ program is defined in subclause 12(17).

The insertion of subclause (6B) will clarify that a declaration made by a subscription television narrowcasting service under subclause 12(6A) could only be revoked by the Communications Minister in accordance with subclause 12(9). The decision to refuse to revoke a declaration that a subscription television narrowcasting service is a declared subscription television narrowcasting service under subclause 12(9) will be reviewable by the AAT (item 3 of Schedule 1 to the bill refers).
Amendment (14) will make a consequential amendment to subclause 12(7) as a result of amendment (13). As such, a declaration made under subclause 12(6A) will not be a legislative instrument. This is merely declaratory of the law, confirming that the instrument is not a legislative instrument for the purposes of section 5 of the Legislative Instruments Act 2003. Copies of declarations made under subclause 12(6A) will be published in the Gazette (see amendment (16) below) for the purpose of notifying affected parties, including subscribers in declared prescribed areas.

Amendment (15) will insert new subclause 12(7A) to provide that the instrument by which the Minister approves a declaration made by a subscription television narrowcasting service under subclause 12(6A) is not a legislative instrument. This is merely declaratory of the law, confirming that the instrument is not a legislative instrument for the purposes of section 5 of the Legislative Instruments Act 2003.

Amendment (16) will amend subclause 12(8) to provide that a copy of a declaration made under subclause 12(6A) is to be published in the Gazette. The Gazette is published on the Internet (www.ag.gov.au/govgazette).

Amendment (17) will amend subclause 12(9) to provide that the Communications Minister may, in writing, also revoke a declaration in force under subclause 12(6A) in relation to a subscription television narrowcasting service. The Communications Minister’s decision to refuse to revoke a declaration under subclause 12(6A) will also be reviewable by the AAT (see item 3 of Schedule 1 to the bill).

Amendment (18) will amend subclause 12(10) so that a declaration made under subclause 12(6A) could not be revoked by the Minister unless he/she were satisfied that the total number of hours of R 18+ programs broadcast by the service during a particular revocation test period is zero or equal to, or less than, 35 per cent of the total number of hours of programs broadcast by the service during that period. For the purposes of subclause 12(10), a revocation test period is a seven-day period that occurs within the 21-day period that ends at the end of the day before the day on which the Minister revokes the declaration.

Amendment (19) will omit subclause 12(14), which provides that, for the purposes of calculating the total number of hours of R 18+ programs broadcast by a service during a particular declaration test period or revocation test period under subclauses 12(5) and (10), certain specified material (including advertising or sponsorship material) should be ignored. In its place, amendment (20) below will allow a service to use in certain circumstances, pre-broadcast data, such as an electronic program schedule, to make these calculations for the purposes of subclauses 12(5) and (10). Incidental material, defined in subclause 12(17) (see amendment (21) below), will be deemed to be part of a program (for example, a movie) for the purpose of making these calculations.
Amendment (20) will insert new subclause 12(16A) with the intention of incorporating the concepts of pre-broadcast data and incidental material, the purpose of which is to ease a licensee’s administrative burden in complying with their record-keeping requirements under subclause 5(3A).

As it currently stands, the bill requires a licensee to keep records (in a form approved by the ACMA) of the:

(a) total number of hours of R 18+ programs broadcast by the licensee during a day; and

(b) total number of hours of programs broadcast by the licensee during that day (subclause 5(3A) refers).

In addition, subclause 5(3B) provides that when calculating the percentage of R 18+ program hours broadcast, certain material should be excluded, such as advertisements and sponsorship announcements.

It is apparent that the provisions, as currently drafted, would be onerous for licensees to the extent that it would require them to remove the excluded material from their calculations. It would also require them to keep post-broadcast records of the material broadcast on a particular day. The intention of amendment (20) is to change the formula for assessing the proportion of R 18+ programs broadcast by a licensee. The new formula will allow a licensee to rely on pre-broadcast data, such as an electronic program guide, to calculate the number of hours of R 18+ material broadcast and the total number of hours of material broadcast.

According to subclause 12(16A), pre-broadcast data refers to a schedule of the programs to be broadcast by a subscription television narrowcasting service on a particular day. Pre-broadcast data may be in electronic form or in a publication, such as a printed TV guide and will need to include the classification and time information necessary to calculate the hours of R 18+ material broadcast and the total number of hours of material broadcast. The schedule of programs to be broadcast on a particular day, as set out in the pre-broadcast data, will be taken to have been broadcast by the service on that particular day in accordance with that schedule.
Subclause (16A) will allow a service to use *pre-broadcast data* for the purpose of satisfying their record-keeping obligations under subclause 5(3A). *Pre-broadcast data* could also be used for the purposes of subclauses 12(5) and (10), that is, to calculate the total number of hours of R 18+ programs broadcast by a service during a *declaration test period* or a *revocation test period*. On the basis of this data, the Minister may declare, or refuse to declare, that a service is a *declared subscription television narrowcasting service* under subclause 12(4). The Minister may also use this information for the purposes of subclauses 12(9) and (10) in deciding whether to revoke a declaration made under subclause 12(4) or a self-declaration made under subclause 12(6A) (see amendments (17) and (18) above).

It should be noted, however, that the form in which the *pre-broadcast data* is made available by a service will need to be approved in writing by the ACMA for the purposes of subclause 5(3A) and clause 12. A decision by the ACMA to refuse to approve, or revoke its approval of (see subsection 33(3) of the *Acts Interpretation Act 1901*), *pre-broadcast data* in an electronic format, or a publication, in relation to a subscription television narrowcasting service will be appealable to the AAT (amendment (2) refers).

Generally, *pre-broadcast data* does not separately identify material incidental to programs, such as advertising or sponsorship announcements. Therefore, to enable *pre-broadcast data* to be used for the purpose of calculating the percentage of R 18+ programs broadcast, proposed subclauses 12(16B) and (16C) will deem such *incidental material* as part of a substantive program for the purpose of calculating the number of hours broadcast. Consequently, *incidental material* deemed to be part of a *substantive program* will be given the same classification as that *substantive program*. Note that this deeming provision applies for the purposes of subclause 5(3A) and clause 12 only.

For the purposes of subclause 5(3A) and clause 12:

(a) an item of *incidental material* broadcast during a break in a *substantive program* will be taken to be part of the *substantive program* (subclause 12(16B) refers); and

(b) one or more items of *incidental material* broadcast during the period beginning at the end of the first *substantive program* and ending immediately before the start of the next *substantive program* is taken to be part of the first *substantive program*.

The operation of subclauses 12(16B) and (16C) may result in some non-R 18+ material being classified as R 18+ for calculation purposes but it will, nevertheless, allow the *pre-broadcast data* to be used and avoid the need for licensees to keep separate and more detailed records of material broadcast.
*Incidental material* will be defined in subclause 12(17) (see amendment (21) below). *Substantive program* will mean a program other than *incidental material*, such as a movie (see amendment (22) below).

Amendment (21) will include a definition of *incidental material* into subclause 12(17). The concept of *incidental material* has application to the use of *pre-broadcast data* for the purposes of calculating the percentage of R 18+ program hours broadcast by a licensee (see amendment (20) above).

Amendment (22) will insert the definition of *substantive program* into subclause 12(17). *Substantive program* is defined to mean a program other than incidental material.

**Access to Aboriginal land**

Amendment (23) inserts a new item into Schedule 3 to the bill. The new item will expand on paragraph 70(2A)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976* so that candidates for election as members of local government bodies in the Northern Territory have a defence against the prohibition on entering or remaining on Aboriginal land. The defence will operate while candidates are on campaign.

Amendments (24) and (25) amend an existing item in Schedule 3 to the bill to ensure that the Minister may not authorise entry to a sacred site under subsection 70(2BB).