



This Digest replaces an earlier version dated 12 March 2008, including some additional contextual material.

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008

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Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008

Date introduced: 21 February 2008

House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs
portfolio

Commencement: The day after Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The four Schedules of this Bill amend a range of Acts in order to, variously:

- enable pay-TV services which broadcast more than the specified amount of R18+ material to be prevented from offering the service in certain ‘declared’ areas of the Northern Territory;
- enable pornographic material to be transported legally across areas of the Northern Territory (currently its presence for any purpose is prohibited);
- reintroduce elements of the permit system in the Northern Territory which will require visitors to certain aboriginal areas to first seek permission to enter the area; and
- allow the community store regime to be extended to certain roadhouses.

Background

In May 2007 the Federal Government was given a copy of *Ampe Akelyernemane Meke Mekarle “Little Children are Sacred”: The Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, authored by Pat Anderson and Rex Wild (the Anderson/Wild report).¹ In response to this report the then

1 Pat Anderson and Rex Wild, *Ampe Akelyernemane Meke Mekarle “Little Children are Sacred”: The Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 30 April 2007, http://www.nt.gov.au/dcm/inquiriesaac/pdf/bipacsa_final_report.pdf accessed 9 March 2007.

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Prime Minister, Mr John Howard, MP, and the then Minister for Families, Community Services and Indigenous Affairs, Mr Mal Brough, MP, announced certain ‘emergency’ initiatives on 21 June 2007,² and on 7 August 2007 a package of five Bills was introduced into the Parliament (the collection of Bills and the subsequent Acts are referred to here as ‘the intervention’ or the ‘intervention package’).³

The Parliamentary debates excited considerable interest but were conducted in an unusually short time frame. The second reading debate in the House of Representatives occurred cognately (all five Bills were debated together), and they were passed on the evening of the date of introduction.⁴

Numerous submissions to the two-day Committee Inquiry into the intervention package made frequent reference to concerns regarding

- the short time frame for consideration of the changes
- the government’s changes to the permit system and
- the overturning of provisions of the *Racial Discrimination Act 1975* (the RDA).⁵

2. The Hon Mal Brough, Minister for Families, Community Services and Indigenous Affairs, ‘National emergency response to protect Aboriginal children in the NT,’ *Media Release*, 21 June 2007, http://www.facsia.gov.au/internet/Minister3.nsf/content/emergency_21june07.htm

3. Northern Territory National Emergency Response Bill 2007, see *Bills Digest* no. 28, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd028.pdf>

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007, see *Bills Digest* no. 21, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd021.pdf>

Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007, see *Bills Digest* no. 27, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd027.pdf>

Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007-2008, see *Bills Digest*, no. 24, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd024.pdf>

Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007-2008, see *Bills Digest* no. 25, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd025.pdf>

4. The House of Representatives, *Debates*, 7 August 2007, pp. 1–18 and 45–84, <http://www.aph.gov.au/hansard/reps/dailys/dr070807.pdf> accessed 2 March 2008.

5. Of the first 70 submissions to that Senate Standing Committee on Legal and Constitutional Affairs Committee inquiry http://www.aph.gov.au/Senate/committee/legcon_ctte/nt_emergency/index.htm, 67 had concerns with the Bill and felt it needed further work and consultation or that the package should be rejected out of hand. Of the three favourable submissions, who had no concerns over consultation, one was strongly in favour of ending the permit system (Mr Chris Tangey,

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Further background to the initial Bills can be seen from the various Bills Digests.⁶

The Opposition moved several amendments to the legislative package relating to the *Racial Discrimination Act 1975*, the permit system, and the need for a review after one year. However, the then Opposition leader, Mr Kevin Rudd, MP, stated that the ALP broadly supported the Bills.⁷ The Bills were passed unamended by the Senate.⁸

In August of 2007 the previous administration introduced amendments to the package in an identically titled, but differently dated Bill: the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2007.⁹

The two Bills do not contain much in common, however the amendments in the current Bill's Schedule 4 are in identical form, and the amendments in Schedule 1 share some of the provisions with the earlier Bill's Schedule 1. Both Schedules aim to regulate the pay-TV available in prescribed areas. The earlier Bill proposed a blanket ban, while the current Bill introduces more complex provisions, allowing the Minister to be more selective and to involve communities in deciding whether the additional bans are appropriate. The earlier Bill never progressed past its introduction.

Committee consideration

The Bill is not currently before a Committee for consideration. As noted above, the initial package of Bills went before the Senate Legal and Constitutional Committee for a short time,¹⁰ however attempts by the Democrats and Greens to refer one of the Bills (the Social

Submission No. 1), and two were in favour of the ban on pornography, although they believed it should go further (Australian Christian Lobby, Submission No. 2 and Festival of Light, Submission No. 37).

6. See details in footnote 3.
7. Annabel Stafford, 'Labor gets behind NT intervention', *The Age*, 8 August 2007, p. 8.
8. All five Bills received Assent on 17 August 2007.
9. For further information on the earlier Bill see Sue Harris Rimmer and Bronwen Jagers, Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2007, *Bills Digest*, no. 55, 12 October 2007, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd055.pdf>.
10. The report was tabled within two working days of the receipt of reference, with further information being tabled by the Committee a few days after.

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Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007) to the Community Affairs Committee were defeated.¹¹

It is arguable the short time frame for consideration of the earlier legislative package was discernible in the subsequent need for early amendments.¹²

History of amendments

This Bill's suggested amendments have not excited the passions that the original intervention ignited, but nor are they quite so radical or far-reaching. In a sense the debates have now been rehearsed, with some of the amendments flagged during the election campaign. Generally commentary has been muted, although the Opposition has accused the government of going soft on pornography and rolling back the intervention in a manner which they will oppose.¹³

The Northern Territory (NT) intervention has been the on-going topic of debate, with various interest groups and commentators providing on-going reactions. During the election campaign a member of the NT Government, Ms Scrymgour, gave a strong speech against the intervention's approach.¹⁴ This was the cause of some political disruption, with

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11. Senators Bartlett, Siewert, Barnett & Campbell, 'Referral to Committee', Senate, *Debates*, 8 August, 2007, pp. 144-150, <http://www.aph.gov.au/hansard/senate/dailys/ds080807.pdf> accessed 2 March 2008.
 12. *Northern Territory National Emergency Response Amendment (Alcohol) Act 2007*. This Act addressed problems that had earlier been identified in submissions to the Senate Committee's Inquiry.

See also the conclusion of the Bills Digest for the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2007, which simply commented 'The speed of the passage of the package of 'emergency response' bills through the Parliament has brought about the need for substantial amendments within a few months.' op. cit, p. 13.
 13. Patricia Karvelas, 'Coalition to fight for intervention', *The Australian*, 5 March 2008, <http://www.theaustralian.news.com.au/story/0,25197,23321306-5006790,00.html> accessed on 7 March 2008.
 14. In the 2007 Charles Perkins Oration at the University of Sydney Ms Marion Scrymgour, the then NT Community Services Minister, condemned the intervention in no uncertain terms, describing it as the 'black kids' Tampa', labelling Canberra's approach as 'vicious new 'McCarthyism'' and saying 'Aboriginal territorians are being herded back to the primitivism of assimilation and the days of native welfare... It has been a deliberate, savage attack on the sanctity of Aboriginal family life.' (Ashleigh Wilson, 'Issue beyond ambition,' *The Australian*, 27 October 2007, <http://www.theaustralian.news.com.au/story/0,25197,22655160-28737,00.html>). See also the transcript at http://www.koori.usyd.edu.au/news/2007_Scrymgour_transcript.pdf accessed on 9 March 2008.

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Mr Rudd reportedly angry that the intervention was being criticised,¹⁵ although he distanced himself from suggestions he had intervened to achieve a retraction.¹⁶ Ms Scrymgour has not been the only critic,¹⁷ and there has also been a High Court challenge to the legislation, which is due to be heard in March.¹⁸

During the election campaign the ALP offered support to aspects of the intervention, while undertaking to reinstate the permit scheme, a modified version of the Community Development and Employment Program (CDEP) scheme and reviewing the intervention after a year.¹⁹

The Opposition has been reported as deciding to, effectively, force the government to wait until July when the balance of power in the Senate shifts, before it can achieve passage of the Bill as it stands.²⁰

A closer examination of the background for each of the Schedules is necessary, because each makes independent adjustments to different legislative provisions.

Background to Schedule 1: Regulatory framework for Pay-TV services

The original NT intervention legislation introduced various prohibitions against pornographic material such as videos and DVDs. The prohibitions were primarily contained in the *Families, Community Services and Indigenous Affairs and Other*

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15. Nicolas Rothwell, 'Clare on the back foot,' 27 October 2007, <http://www.theaustralian.news.com.au/story/0,25197,22655161-28737,00.html>
 16. AAP, 'Rudd says unaware of pressure on NT Aboriginal minister,' 29 Oct 2007.
 17. For example, AAP, 'Church criticises NT intervention', 17 October 2007.
 18. Annabel Stafford, 'High Court challenge to NT intervention,' *The Age*, December 8 2007, <http://www.theage.com.au/news/national/high-court-challenge-to-nt-intervention/2007/12/07/1196813026893.html>
 19. Matthew Franklin and Ashleigh Wilson, 'Labor softens stand on intervention,' *The Australian*, 27 November 2007, <http://www.theaustralian.news.com.au/story/0,25197,22827308-601,00.html> accessed on 9 March 2008. See also Patricia Karvelas, 'Friction over indigenous intervention', *The Australian*, 28 November 2007, <http://www.theaustralian.news.com.au/story/0,25197,22834181-11949,00.html> accessed on 9 March 2008.
 20. Adam Gartrell, 'Opposition to oppose govt moves to reinstate indigenous permits', AAP, 11 March 2007. See also Patricia Karvelas, 'Coalition to fight for intervention', *The Australian* 5 March 2008, <http://www.theaustralian.news.com.au/story/0,25197,23321306-5013172,00.html> accessed 9 March 2008.

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Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (the FNTNERA).

Schedule 1 of the current Bill deals with the regulation of narrowcasting services (colloquially known as pay-TV). It allows the Minister to declare an area of the NT in which services broadcasting R18+ for more than 35% of their broadcasting time can be prohibited from supplying their service. There are conditions on the 'declaration' of an area which are designed to ensure that residents are involved in the decision making. This means that the current provisions may be more likely to satisfy the requirements for a 'special measure' under the RDA.

Special Measures in the Racial Discrimination Act 1975

There is a general legislative prohibition on racial discrimination contained in the *Racial Discrimination Act 1975* (the RDA). The general prohibition has always contained a recognition that 'special measures' are legitimate to promote the position of members of a particular race when that race is disadvantaged. Special measures are also referred to as 'affirmative action' or 'positive discrimination.' Subsection 132(1) of the *Northern Territory National Emergency Response Act 2007* (the NTNERA) defined all the provisions of the Act as special measures under the RDA and subsection 132(2) excluded it from the operation of Part II of the RDA. Similar and related provisions were included in the associated legislation. This has been the subject of some community concern.

Accepted special measures have been policies or actions by organisations or governments which recognise that the past or present disadvantage suffered by certain groups based on their race has affected their access to equality of opportunity and basic human rights. Consequently measures which differentiate on the basis of race may be appropriate.

The Human Rights and Equal Opportunities Commission (HREOC) has used the restriction of sales of alcohol to some Aboriginal people in the Northern Territory as a classic example of an appropriately implemented special measure. The agreement they refer to was established between the local Pitjantjajara people, the relevant roadhouse proprietor and the federal Race Discrimination Commissioner and was in response to a request from the Pitjantjajara Council to the Commission to seek assistance in dealing with the escalating problem of alcohol abuse within its community. It is important to note that this special measure was made with the acceptance, and at the request of, the community involved.²¹

Special measures are generally kept in place until the group affected has been able to reach 'substantive' equality with other members of the community.

21. Human Rights and Equal Opportunity Commission, 'Frequently asked questions: What are 'special measures' and why do we have them?', <http://www.humanrights.gov.au/faqs/general.html#5>, accessed on 13 August 2007.

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The RDA was designed to implement the UN's *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).²²

Article 1(4) of CERD, from which the RDA's special measures were taken, provides as follows:

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 Australian courts have interpreted this definition as containing four elements:

- a special measure must confer a benefit on some or all members of a class;
- the membership of the class must be based on race, colour, descent, or national or ethnic origin;
- a special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and freedoms; and
- the circumstances of the special measure must provide protection to the beneficiaries which is necessary in order that they may enjoy and exercise human rights and freedoms equally with others.²³

Furthermore a special measure must not be continued after the objectives for which it was taken have been achieved.

Looking at these criteria we see a central question is whether the measure confers a benefit on some or all members of a class. The class to be benefited must be a racial group, or individuals belonging to the group. In making this assessment, courts have looked to both the benefits of a measure and any costs or disadvantages borne by the beneficiaries of the measure.

22. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969. Australia ratified on 30 Oct 1975.

23. *Gerhardy v Brown* (1985) 159 CLR 70 at 126, as adapted, and quoted by the Human Rights Commission,
http://www.hreoc.gov.au/social_justice/sjreport04/Appendix2RDAandSRAs.html

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This Bill proposes to exclude its provisions from the operation of section 132 of the NTNERA (i.e. the provisions will not rely on the Act's definition of itself as containing special measures). It will rely on the fact that benefits are to be gained by individuals in the relevant indigenous communities (especially children).²⁴ The beneficial nature of the arrangements will also be evidenced by the request for the special prohibitions on services with a high level of R18+ material. The government argues through the Replacement Explanatory Memorandum that this will be sufficient to classify the measure as a 'special measure.'²⁵

Were a court to conclude that there was, in fact, no, or insufficient, benefit conferred, it would be inconsistent with the character of a special measure. Difficult issues of fact could arise here, and close scrutiny of the arrangement and its impact would be required to consider such an argument. The Explanatory Memorandum draws attention to the limited time frame for the provisions (i.e. the sunset clause and the limited nature of the declarations), however only a court can determine whether these provisions and arrangements constitute an acceptable 'special measure'.

A special measure must have the sole purpose of securing adequate advancement of the beneficiaries. There are a number of sources from which the purpose of a special measure can be discerned. The purpose of a measure is discerned from its terms and from the manner in which it will practically operate. The 'objects' provision in the Bill is presumably designed to contribute to a determination that the measures in the Schedule qualify as a special measure.²⁶

The purpose of securing adequate advancement for a racial group is not necessarily established by showing that the person who takes the measure does so for the purpose of conferring a benefit, if the group does not seek or wish to have the benefit. In *Gerhardy v Brown*, Brennan J stated that the 'wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement'. Brennan J went on to state:

The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes.

24. The Replacement Explanatory Memorandum makes a special call to the provisions of the International Convention on the Rights of the Child.

25. Replacement Explanatory Memorandum, pp. 2-9.

26. **Item 16 of Schedule 1** would insert **proposed section 127A – Objects** into the NTNERA.

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'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.

The difference between land rights and apartheid is the difference between a home and a prison.²⁷

The terms and conditions upon which the benefit is conferred have been relevant to the court's assessment of the purpose of the agreement. The wishes of the Indigenous community with whom the agreement is made will also be relevant.²⁸ Difficult issues have arisen for a court's consideration where the wishes or views of the Indigenous community are not uniform. While Schedule 1's provisions do not immediately confer a 'material benefit', it may be seen as giving a benefit to those women and children who would otherwise suffer the side-effects of the proximate consumption of pornography – certainly the Replacement Explanatory Memorandum argues that it will.²⁹

Regulating Pornography: a material benefit?

The Anderson/Wild report had concluded that pornography was one of the main factors that:

lead inexorably to family and other violence and then on to sexual abuse of men and women and, finally, of children.³⁰

The report noted that:

children in Aboriginal communities are widely exposed to inappropriate sexual activity such as pornography, adult films and adults having sex within the child's view. This exposure can produce a number of effects, particularly resulting in the "sexualisation" of childhood and the creation of normalcy around sexual activity that

27. *Gerhardy v Brown* (1985) 159 CLR 70 at 135.

28. Considerable amounts of the above material have relied on the Human Rights and Equal Opportunities Commission's material, particularly from ATSIJJC Social Justice Report 2004 at http://hreoc.gov.au/social_justice/sjreport04/Appendix2RDAandSRAs.html

29. Replacement Explanatory Memorandum, p. 7.

30. Anderson/Wild report, op. cit., p. 6.

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may be used to engage children in sexual activity. It may also result in sexual “acting out”, and actual offending, by children and young people against others.³¹

The report concluded that the availability of pornography and children’s exposure to it is the result of ‘poor supervision, overcrowding in houses and acceptance or normalization of this material’.³²

However, it is noteworthy that, while Austar and SBS television channels are nominated as problematic,³³ the report’s recommendation in relation to pornography is to conduct education campaigns in communities about the film classification system, the illegality of exposing children to indecent material, and the harm that such exposure produces.³⁴

Commentary/Reaction to the Schedule’s Proposals

Of all the issues dealt with by the intervention, its regulation of pornographic material seems to have the fewest public detractors. Ms Scrymgeour, now the NT Indigenous Affairs Minister and Deputy Chief Minister, who has strongly criticised aspects of the intervention,³⁵ has endorsed the ban on pornography.³⁶ Professor Marcia Langton has also argued passionately in favour of the ban,³⁷ while a range of others have voiced their support, with Graham Ring summarising the matter, ‘Yes, bans on pornography and alcohol will be widely welcomed.’³⁸ The support, however, is not universal,³⁹ and

31. *ibid.*, p. 65.

32. B. Johnstone and C. Grahame, ‘No progress on stamping out porn in NT’s black towns’, 26 July 2007, <http://www.nit.com.au/news/story.aspx?id=12164>.

33. Anderson/Wild report, *op. cit.*, p. 199.

34. *ibid.*, p. 200.

35. See above, footnote 12.

36. The ABC reported her as commenting ‘The measures that came out of the intervention, such as the extra police, the alcohol restrictions, the ban on pornography, that we don’t want to see a roll-back of those things, those things have to stay,’ ABC Indigenous News, ‘Scrymgeour wants intervention funding maintained’, 7 December 2007, http://www.abc.net.au/message/news/stories/ms_news_2112480.htm accessed on 9 March 2008.

37. Marcia Langton, ‘Real change for real people’, *The Australian*, 26 January 2008, <http://www.theaustralian.news.com.au/story/0,25197,23109644-5013172,00.html> accessed on 9 March 2008.

38. Graham Ring, ‘Review of flaws NT policy a priority,’ *The Canberra Times*, 13 December 2007, <http://canberra.yourguide.com.au/news/opinion/opinion/review-of-flawed-nt-policy-a-priority/1104276.html> accessed on 7 March 2008.

39. The ABC’s Indigenous News reported that ‘Walter Shaw, and about 40 others from Northern Territory Indigenous Communities, met parliamentarians in Canberra last week to lobby for a

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concerns have been raised regarding the Commonwealth's approach to the matter on the grounds that it does not address the central issues which should be focussed on in order to circumvent the problems being experienced in NT communities:

A central Australian community leader [Leo Abbott from the Ilpurla community] says the Federal Government's anti-porn bill will be useless if it is not backed up with education in remote communities.⁴⁰

There are also more specific concerns being raised by the Opposition, who believe that the Bill is not 'hard' enough on pornography. Both Dr Nelson and Mr Abbott have expressed concerns, with Dr Nelson reported as having criticised Labor's 'shift on pornography.' 'We are very concerned that Labor is going soft on the trafficking of pornography in some indigenous areas.'⁴¹

Mr Abbott also said there should be a blanket ban on pornography in indigenous communities, not the 'voluntary' ban envisaged by the Government. Mr Abbott is reported by *The Australian* as saying:

We will seek to amend the legislation to restore the original intervention so we will be seeking to scrap the permit system in respect of the townships themselves, and we will be seeking a blanket ban on pay-TV porn... We are entitled to insist upon the intervention in its purity, given that it was a very popular measure and received general support.⁴²

The imposition of a non-consultative blanket ban on pay-TV porn would certainly resurrect the problem of possible inconsistencies with the RDA.

Background to Schedule 2: Carriage of pornography through prescribed areas to be legal

As detailed above, there is significant support for the prohibition on pornographic material in prescribed areas, however, the practical difficulties of transporting materials around prescribed areas, rather than through them, have led to these proposed amendments which will allow pornographic material to be transported through prescribed areas. As the

reversal in policies, including the ban on pornography.' Mr Shaw is reported as commenting that '[t]here's a big blue sign sitting outside my town camp and it states there's no alcohol or pornography to be brought on to the town camp - our basic human rights have been taken away from us.' ABC Indigenous News, 'Indigenous group calls for faster policy reversals,' 19 February 2008, http://www.abc.net.au/message/news/stories/ms_news_2166345.htm accessed on 7 March 2008.

40. ABC, 'Call for education to go hand-in-hand with anti-porn bill,' 22 February 2008, http://www.abc.net.au/message/news/stories/ms_news_2169819.htm

41. Patricia Karvelas, 'Coalition to fight for intervention', op.cit.

42. *ibid.*

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Replacement Explanatory Memorandum documents, the Stuart Highway passes through prescribed areas,⁴³ and the difficulties of discovering an alternative, legal, route for those in the industry would seem significant (there is an existing exemption for mail services⁴⁴). While the Opposition have said they will oppose the Bill, they have nominated the permit system and the non-blanket nature of the regulation of pay-TV as the areas of concern, so the provisions in this Schedule may not be the object of significant opposition.

Background to Schedule 3: Restoration of a permit system for aboriginal land

The FNTNERA made amendments to the access arrangements of Aboriginal land in the Northern Territory. Previously the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) had provided for a permit system on Aboriginal land in the Northern Territory. It was an offence for a person to enter or remain on Aboriginal land except (among other things) in accordance with the ALRA or with a law of the Northern Territory. The Northern Territory Legislative Assembly had power to make laws regulating or authorising entry onto Aboriginal land, but any such laws must provide for the right of Aboriginals to enter such land in accordance with Aboriginal tradition. The Administrator of the NT, on the recommendation of a Land Council, was able to declare an area of Aboriginal land or a road to be an ‘open area’ or ‘open road’ which can be entered without a permit.

Reform of the permit system was first recommended in *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (August 1998), known as the ‘Reeves report’. In the years that followed, there were few other public challenges to the wisdom of the permit system, but it was questioned by a magistrate in 2002.⁴⁵ In 2006 the then Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, announced a reconsideration of the permit system. The Minister put the view that increased external scrutiny would be in the interests of vulnerable persons in what are ‘closed’ communities, and that liberalisation would also bring economic benefits that would help to promote the self-reliance and prosperity of Aboriginal people in remote communities.⁴⁶

43. Replacement Explanatory Memorandum, p. 10.

44. Section 105 of the FNTNERA provides that the offence provisions against the possession of prohibited material in prescribed areas does not apply to ‘to anything done in the normal course of the provision of a postal service.’

45. ‘Court ruling challenges Aboriginal land exclusion rights’, *The World Today*, ABC Radio, 20 November 2002, <http://www.abc.net.au/worldtoday/stories/s731220.htm>.

46. Hon. M. Brough, Minister for Families, Community Services and Indigenous Affairs, ‘Answer to a question without notice: Indigenous Communities’, House of Representatives, *Debates*, 12 September 2006, p. 16.

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A discussion paper was issued and the problem of the current arrangements was presented as follows:

The permit system is a vestige of the former protectionist system of Aboriginal reserves under which entering or leaving Aboriginal lands was restricted. While Aboriginal people are now of course free to leave, entry restrictions for non-Aboriginal people remain. While the current system was put in place with the best of intentions, its maintenance is no longer appropriate. With modern communications having broken down many of the barriers of remoteness, the current permit system of permits is increasingly anachronistic and ineffective. It is clear that, despite its restrictions, the current permit system has not prevented the scourge of drug trafficking or violence and abuse occurring in many communities.

...[T]he permit system is not an alternative to adequate policing. Arguably the permit system serves only to restrict those inclined to respect the law – not those who already flout the law and operate in spite of the permit system...⁴⁷

The then Minister argued that a new system regulating access to Aboriginal land should operate to:

- ensure the normal interactions of society can occur, including external scrutiny
- allow individual Aboriginal people to engage with and benefit from the market economy without hindrance
- distinguish between ‘communal or public space’ and ‘private space’ on Aboriginal land
- ensure open access to ‘public space’, including townships and related roads
- protect the privacy of ‘private space’, including residences and most Aboriginal land
- respect Aboriginal culture on traditional lands, particularly in the support it gives to protection of sacred sites and to ceremonies
- continue to allow for effective land management by Aboriginal groups, and
- be simple to administer, preferably by government, to ensure transparency and accountability.⁴⁸

47. Department of Families, Community Services and Indigenous Affairs, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for Change? Discussion Paper*, Canberra, 2006, http://www.oipc.gov.au/permit_system/docs/Permits_Discussion_Paper.pdf, p. 4.

48. *ibid.*, p. 5.

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Some submissions to the discussion paper, resubmitted to the Senate inquiry regarding the intervention package, argued that the permit system was not a major contributor to community underdevelopment and social dysfunction, that its scrapping was not one of the recommendations of the Wild/Anderson Report, and that it would only make the control of alcohol, drugs and outside predators even more problematic.⁴⁹ The Law Council of Australia argued:

There is no evidence presented in the discussion paper that the permit system unnecessarily impedes media access to Aboriginal lands, or has contributed to the economic and social isolation of Aboriginal communities. The prevailing view among experts in this area is that the poor economic and social outcomes for Indigenous Australians remain tied to poor service delivery, lack of housing, lack of employment opportunities, lack of education and training, poor health and life expectancy and serious drug and alcohol problems affecting Indigenous populations in both metropolitan and regional areas.⁵⁰

The Police Federation of Australia goes further in support of the current system:

Operational police on the ground in the Northern Territory believe that the permit system is a useful tool in policing the communities, particularly in policing alcohol and drug-related crime. It would be most unfortunate if by opening up the permit system in the larger public townships and the connecting road corridors as the Government intends, law enforcement efforts to address the 'rivers of grog', the distribution of pornography, and the drug running and petrol sniffing were made more difficult.⁵¹

A comprehensive [report](#) on the permit system was prepared by Professor Jon Altman, who found no evidence that the partial abolition of the permit system would reduce child sex abuse, and that the arrangements which were to be enacted by the package may be unworkable in practice.⁵²

The removal of the permit system, which has only been fully effective since 17 February 2008, has been the subject of various concerns.⁵³ Graham Ring provides a summary of

49. See for example, the Combined Aboriginal Organisations of the Northern Territory, Submission No. 125.

50. Law Council of Australia, Submission no. 52, see especially Attachment B.

51. Submission no 24, p. 3.

52. Professor J. Altman, "National Emergency" and Land Rights Reform: Separating fact from fiction. An assessment of the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976. Briefing paper for Oxfam Australia', 7 August 2007, <http://www.oxfam.org.au/campaigns/indigenous/docs/land-rights-altman.pdf>.

53. Sara Everingham, 'Govt to roll back NT intervention's permit laws', transcript of ABC PM, 20 February 2008, <http://www.abc.net.au/pm/content/2008/s2168101.htm> accessed 2 March

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many attitudes when he comments that, while elements of the intervention were welcome, the indigenous communities’

wish-list never included the unilateral acquisition of their townships, or the emasculation of the permit system which provides them with a measure of protection against grog-runners, carpetbaggers and sexual predators.⁵⁴

The Bill proposes to remove the provisions enacted by the former Government, but will retain the capacity of the Commonwealth Minister to permit selected individuals or classes of individuals to enter any specified aboriginal land. The second reading speech specifies that this provision will be used to give access to journalists.⁵⁵ The Media Entertainment and Arts Alliance (MEAA) is reported as being ‘confident of securing changes to the permit system for Aboriginal communities in favour of journalists.’ The MEAA’s federal secretary, Mr Christopher Warrn, has been reported as saying:

The Alliance has drafted a journalist code of conduct to improve access onto Aboriginal land... the code is being considered as part of the Federal Government's proposed changes to the Aboriginal Land Rights Act...

There's has been a long term debate about the role of the media in being able to get access to report on issues of public interest on Aboriginal lands without unnecessary restrictions and hopefully we are getting towards a point where the concerns of Aboriginal people are appropriately balanced with the needs to a free media.⁵⁶

Background to Schedule 4: Roadhouses can be a community store

The NTNERA introduced a licensing regime applicable to persons who operate ‘community stores’ in indigenous communities in the Northern Territory.⁵⁷ According to section 92 of the NTNERA a business is a ‘community store’ if one of the main purposes

2008. The provisions came into operation on the first day after the end of the period of 6 months beginning on the day on which the Act received Royal Assent, which was on 17 August 2007 (i.e. 17 February 2008).

54. Graham Ring, op. cit..

55. Ms Tanya Plibersek, Minister for Housing and Minister for the Status of Women, ‘Second Reading Speech’ Families, Housing, Community Services And Indigenous Affairs And Other Legislation Amendment (Emergency Response Consolidation) Bill 2008, House of Representatives, *Debates*, 21 February 2008, p. 8, <http://parlinfoweb.parl.net/parlinfo/Repository/Chamber/Hansardr/Linked/5717-3.PDF> accessed on 26 February 2008.

56. ‘Journos’ union confident of Indigenous reporting changes,’ ABC Indigenous News, 12 March 2008, http://www.abc.net.au/message/news/stories/ms_news_2187149.htm, accessed 12 March 2008.

57. Part 7 of the NTNERA.

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of the business is the provision of grocery items and drinks (and the business is carried out in one of the specified locations).⁵⁸ Existing subsection 92(2) specifically excludes ‘a roadhouse’ from the definition of ‘community store’.

The reasons for this exclusion are somewhat convoluted and involve the definition of a ‘prescribed area’ which would naturally exclude a ‘roadhouse’ – in fact the Explanatory Memorandum of the original Bill specified that roadhouses were excluded from the definition of ‘community store’ to ensure that these businesses were not covered by the licensing scheme.⁵⁹

The current Bill’s provisions will allow a roadhouse, which effectively performs the function of a community store for those communities in the Northern Territory which are located on or near major highways, to become a licensed community store when a community is substantially dependent upon the roadhouse for the provision of grocery items and drinks.⁶⁰

The requirement for a ‘community store licence’ was intended to address a number of concerns that some stores in indigenous communities are poorly managed and have low quality goods sold at high prices.⁶¹ In addition, the community store licensing scheme

58. Subsection 92(b) specified that the store must be in a prescribed area or the premises or location must be the subject of a legislative instrument issued by the Minister.

59. Subparagraph 92(1)(b)(i) provides that one of those specified locations for a community store is a ‘prescribed area’.

The definition of ‘prescribed area’ is set out in section 4 of the Act. The areas are:

- (a) an area covered by paragraph (a) of the definition of Aboriginal land in subsection 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976*; and
- (b) any roads, rivers, streams, estuaries or other areas that:
 - (i) are expressly excluded under Schedule 1 to that Act; or
 - (ii) are excluded from grants under that Act because of subsection 12(3) or (3A) of that Act and
- (c) land granted to an association under subsection 46(1A) of the *Lands Acquisition Act of the Northern Territory* (including that land as held by a successor to an association) ...

According to the Explanatory Memorandum to the original Bill, by the application of paragraph 4(2)(b) roadhouses were excluded (Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007, p. 55).

60. Replacement Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007, p. 14.

61. Replacement Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007, p. 3. See generally S. McDonnell and D. Martin, ‘[Indigenous community stores in](#)

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allows for quarantined welfare payments to be held by licensed stores under the ‘income management regime’ which is established by the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*.

Allowing roadhouses to become licensed community stores will extend the operation of the licensing regime – thus making it easier for the Government to manage its income management regime in those communities.

The Bill does not contain a definition of ‘substantially dependent’. It will presumably fall to those seeking licensing as ‘community stores’ to prove to the satisfaction of the Secretary, or his/her delegate, that the local indigenous community is sufficiently dependent on them for the provision of grocery items and drinks to warrant the granting of a community store licence. Since this licence carries with it some potentially onerous duties of accountability and performance to be monitored by the Secretary,⁶² and include the possibility that the Commonwealth could acquire the assets and liabilities of the community store,⁶³ the incentives of participating in the welfare scheme are presumably strong enough to warrant participation in the scheme.

It is noted that there was recent reporting of problems faced by retail outlets which are not participants in the welfare scheme.⁶⁴

Financial implications

The Replacement Explanatory Memorandum states that ‘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.’⁶⁵

[the ‘frontier economy’: some competition and consumer issues](#), *Discussion Paper No. 234*, Centre for Aboriginal Policy Research, Canberra, 2002.

62. NTNERA Subdivision B—Conditions of community store licences, sections 102-105.
63. NTNERA Division 4—Acquisition by the Commonwealth, section 112 ‘Acquisition by the Commonwealth of assets and liabilities of a community store.’
64. Anne Barker, ‘Store owners feeling pressure from intervention welfare system,’ 28 February 2008, ABC’s *PM* <http://www.abc.net.au/pm/content/2008/s2175796.htm> accessed on 29 February 2008.
65. Explanatory Memorandum, p. 2.

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Main provisions

Schedule 1

Summary

This Schedule introduces a slightly complex legislative arrangement to regulate the possible prohibition against certain narrowcasting services providing their services to certain areas in the Northern Territory. The provisions in this Schedule amend two Acts, the *Broadcasting Services Act 1992* (the BSA) and the NTNERA. In the BSA, provisions are made for the monitoring and record keeping regarding material being broadcast to ‘prescribed areas’ of the NT, and for the Minister to use this information to declare a narrowcasting service. A declared narrowcasting service is prohibited from providing its services to individuals in a declared prescribed area.

Amendments proposed to the NTNERA provide the definition of a ‘declared prescribed area’, and the mechanisms by which an area is to be declared. The declaration is subject to certain requirements or legislative exhortations, and the proposed legislative changes also include a sunset clause and an account of when individual declarations will cease to operate. Together these changes to the BSA and the NTNERA are designed, in the words of the Bill’s object clause ‘to protect communities from violence and sexual abuse.’⁶⁶

Details: changes to the Broadcasting Services Act

Item 5 of Schedule 1 would introduce new provisions into Schedule 2 of the BSA. These provisions (**proposed subclauses 5(3A) to 5(3D)**) create a requirement that ‘subscription television narrowcasting services’ capable of being received in a prescribed area, which broadcast R18+ programs, must keep certain records.⁶⁷ These records are to be in the form specified by the Australian Communications and Media Authority (ACMA) and will

66. **Item 16 of Schedule 1, proposed section 127A – Objects**, to be inserted into the NTNERA.

67. A prescribed area is defined to reflect the meaning section 4 of the *Northern Territory National Emergency Response Act 2007*. This includes:

- ‘aboriginal land’ as defined in subsection 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA), as well as roads, rivers, streams, estuaries etc that are excluded by Schedule 1 of the ALRA or those that are excluded because of other provisions in that Act.
- land granted under the *Lands Acquisition Act 1978* (NT).
- town camps declared by the Minister (there is an initial list in Schedule 1, Part 4 of the NTNERA) and
- any other area of the Northern Territory the Minister chooses to declare.

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include a record of the total number of hours of programming broadcast and the total number of hours of R18+ programs broadcast. There is a provision that commercial ads or sponsorship material, promotions or other such material (including news breaks, weather bulletins) are not to be counted in these recording requirements (**proposed subclause 5(3B)** of **Schedule 2** of the BSA).

These records can subsequently be relied on by a Minister utilising the provisions introduced by **item 10** of this Bill, which proposes several new items to be introduced to the BSA's Schedule 2. These proposed provisions create a framework by which the Minister may declare a subscription television narrow-casting service as a 'declared subscription television narrowcasting service.' A declared subscription television narrowcasting service may not allow a subscriber in a declared prescribed area to receive their services (**proposed subclause 12(1)** of **Schedule 2** of the BSA). To do so is made an offence against the BSA by **item 1**⁶⁸ and is added to provisions incurring a civil penalty by **item 2** of the Bill. Provisions are also made by the Bill for the relevant person to appeal to the AAT against the declaration of the service (**item 3**).

Provisions are made by the Bill for the sunseting of the provisions preventing a service from enabling a subscriber in a declared prescribed area to receive the service. This is to occur after five years or a shorter period specified by the Minister⁶⁹ (the specification would be a legislative instrument and thereby subject it to parliamentary scrutiny and/or disallowance).⁷⁰

Before a subscription television narrowcasting service can be declared the Minister must be satisfied that the total number of hours of R18+ programs broadcast in the relevant test period exceeds 35% of the total number of hours broadcast during the period (a seven-day period within a 21-day period before the declaration is made). Similarly the Minister may not revoke a declaration until satisfied that the service is broadcasting R18+ for less than 35% of its programming hour during a revocation test period (a seven-day period within a 21-day period before the revocation is made).

The provisions in the BSA also provide explicitly that they over-ride NT laws dealing with discrimination, although it provides for the Minister to make a determination by legislative instrument that the laws are preserved (which is done by excluding them from the operation of the provisions stipulating that the NT laws have no effect) (**proposed clause 13**).

68. With a penalty provision of 50 penalty units.

69. **Item 10** of the Bill proposes adding **clause 12 to Schedule 2** of the BSA.

70. *ibid*, with **proposed subclause 3** making the provision regarding legislative instruments.

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Details: changes to the NTNERA

Other changes are made to the NTNERA and deal with the declaration of a prescribed area. The Minister must declare a prescribed area as a ‘declared prescribed area’ by legislative instrument (**proposed subsection 127B(1)**). There are certain requirements which must first be satisfied, including that someone who lives in the prescribed area has requested the Minister to make the declaration (**proposed subsection 127B(2)**). There is a legislative provision for the Minister to undertake effective community consultation (**proposed section 127C**), however failure to conduct the consultation is of no legal effect (**proposed subsection 127C(2)**). **Proposed subsection 127C(2)** is presumably aimed at disregarding insignificant failures to comply with the provisions, although it is worded quite broadly. The requirement for the Minister to ‘have regard’ to certain matters is unqualified, and includes, in particular:

- the well-being of people in the area
- whether there is reason to believe there are victims of violence or sexual abuse (for the preceding 12 months) living in the area
- the extent to which those in the community, particularly women and children, have expressed their concerns at these matters
- whether there is reason to believe children may have viewed R18+ material supplied on subscription television narrowcasting service (for the preceding 12 months) (**proposed section 127D**).

The legislation also has provisions for the cessation of a determination, which can either happen 12 months after it came into force or earlier if the declaration specifies or if the Minister determines (**proposed subsections 127E(2)** and **(3)**). It also provides for the Minister to make on-going determinations that the area should remain as a prescribed area (**proposed subsection 127E(5)**).

Finally in an interesting provision, the new Part is to be excluded from the operation of the exemption of the legislation from the *Racial Discrimination Act 1975* (RDA) (**item 17**). As discussed above, the original legislation defined everything done by the legislation as a special measure and excluded it from the operation of Part II of the RDA.⁷¹ The measures enacted in the current Bill would seem to satisfy significant elements in the domestic and international standards for justification of a special measure. By foregoing the protections offered by the NTNERA’s ‘special measures clause’ these amendments could be open to challenge in the courts.

71. Section 132 of the NTNERA.

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Schedule 2

The FNTNERA introduced offence provisions into the *Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act), which prohibited certain materials from being brought into prescribed areas of the Northern Territory.⁷² The prescribed areas did not generally include the main population areas but covered indigenous community areas. The materials prohibited are:

Pornography [which was defined as] films (including DVDs and videos) or publications that have been classified by the Commonwealth Classification Board according to the Classification Code as RC (Refused Classification), X18+ (sexually explicit material) and Category 1 or Category 2 Restricted material, as well as unclassified material likely to be classified in those categories.⁷³

The amendments proposed in Schedule 2 of this Bill do not seek to alter the fundamental arrangements, but, simply introduce a broad based exemption for those who bring the material into a prescribed area for the sole purpose of transporting it somewhere outside the prescribed area. **Items 1-5** modify the offence provisions (sections 101-103 of the Classification Act) to include the defence that materials were being transported elsewhere (and include notes clarifying that the defendant will bear the legal burden of proving the defence⁷⁴). **Items 6-9** modify the seizure and forfeiture provisions of the Classification Act (sections 106, 108 and 109) so that the material is not subject to seizure, and, if it is, the magistrate is bound to return the materials.

Schedule 3

The provisions of the Bill repeal most of the ‘permit provisions’ introduced by the FNTNERA. There is a list of individuals who are entitled to enter aboriginal land which

72. See generally Sue Harris Rimmer et al, Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007, *Bills Digest* no. 21, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd021.pdf> accessed on 2 March 2008.

73. *ibid.*, p. 12.

74. The provisions cite section 13.4 of the *Criminal Code*, which specifies:

13.4 Legal burden of proof—defence

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

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has been left untouched (including Commonwealth public servants⁷⁵) and the Minister continues to have a broad discretion to authorise specified people to enter onto all or particular Aboriginal land (**proposed subsection 70(2BB)**), a provision which, as mentioned above, the second reading speech tells us will be used for the purposes of allowing journalists access to Aboriginal communities.⁷⁶

Item 2 of the Schedule specifies that current authorisations would continue under the new provisions and the rest of the Schedule consists of repeals of the current arrangements which recently came into operation and which have provided significantly less restricted access to aboriginal land.

Schedule 4

The NTNERA introduced a definition of community store which entirely excluded roadhouses from qualifying as a community store (section 92). This Bill introduces a modified definition which will allow a road house to qualify as a community store when a community is substantially dependent on it for grocery items and drinks. The definition of a community store is used within the framework of the community store licensing scheme, through which the government assesses the practices of stores, including

- the capacity to comply with the income management regime introduced by the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*.
- the quality, quantity and range of groceries and consumer items, with an express inclusion of healthy food and drink
- the business practices of the store, including pricing and other financial aspects (such as wages), and
- other matters considered relevant at the Minister's discretion.⁷⁷

Concluding comments

The provisions of the Bill are varied and likely to elicit different reactions from different sections of the community. While the restoration of the permit system may excite some antagonism from some commentators there would seem to be a strong sense from many residents of the relevant communities that they wish to maintain the system. The provisions on pornography, while not as comprehensive as those advocated by the

75. *Aboriginal Land Rights (Northern Territory) Act 1976* subsection 70(2A).

76. Ms Tanya Plibersek, Minister for Housing and Minister for the Status of Women, 'Second Reading Speech' op. cit.

77. Section 93 of the NTNERA.

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Opposition may nevertheless attract support, including support precisely because of their participative/voluntary nature.

By subjecting the decisions to restrict access to pornographic material to some form of community involvement the government may be bringing the legislative arrangements within the purview of the RDA rather than relying on a specialised/stipulative definition of what constitutes a 'special measure'. The outcomes of such a move are yet to be seen, but it is interesting to see the government making an attempt to balance the countervailing considerations in the area.

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