FAMILIES, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (EMERGENCY RESPONSE CONSOLIDATION) BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP)
OUTLINE

This bill provides for several minor policy measures to consolidate the government’s response to the national emergency confronting the welfare of 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

As part of the government’s emergency response in the Northern Territory, this bill amends the Broadcasting Services Act 1992 to prohibit the provision of R 18+ television programs in prescribed areas of the Northern Territory.

Schedule 2 – Residential tenancies

Where the Commonwealth has become a landlord under a residential tenancy agreement that relates to premises on land leased as part of the emergency response, Northern Territory legislation relating to residential tenancies will be disapplied and the Commonwealth will not be subject to certain obligations under existing tenancy agreements.

Schedule 3 – Defence Housing Australia

The bill amends Defence Housing Australia’s (DHA’s) additional functions under the Defence Housing Australia Act 1987 so that it will be possible for DHA to assist the Department of Families, Community Services and Indigenous Affairs to deliver housing to remote Indigenous communities. This will be subject to certain requirements intended to ensure that the provision of housing and housing-related services to the Defence Force and the Department of Defence remains DHA’s first and primary responsibility. The bill also makes some technical and cosmetic amendments to the DHA Act.

Schedule 4 – Land rights

This bill makes minor amendments to the Aboriginal Land Rights (Northern Territory) Act 1976 and the Northern Territory National Emergency Response Act 2007. For example, certain powers of the Minister will be clarified, certain new functions conferred on Land Councils, and provision made for the Executive Director of Township Leasing to be appointed on a part-time basis.
**Schedule 5 – Acquisition of rights, titles and interests in land**

Minor improvements are made to several provisions in Part 4 of the *Northern Territory National Emergency Response Act 2007*. Amendments are also made to allow the Commonwealth and certain persons to agree on amounts to be paid in respect of the five-year leases and certain other payments, and other minor and technical amendments made.

**Schedule 6 – Community stores**

This bill will make sure that, if a roadhouse effectively takes the place of a community store in a remote area, it is properly treated as a community store in having to meet the new licensing standards.

**Financial impact statement**

There is no financial impact from this bill in 2007-08.
NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Act 2007.

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:

- ‘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

As part of the government’s emergency response in the Northern Territory, this Schedule amends the Broadcasting Services Act 1992 (Broadcasting Services Act) to prohibit the provision of R 18+ television programs in prescribed areas of the Northern Territory.

Background

Research published in the Little Children are Sacred report by the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse noted that subscription-based R 18+ programs provided by Austar United Communications Ltd (Austar) appeared to be readily accessible to children in Northern Territory Indigenous communities. The government has received similar reports that confirm this research from field workers since the emergency response commenced.

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.

Some of Austar’s subscription television narrowcasting services provide subscribers who pay an additional fee with access to R 18+ programming. Currently, 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 to see.

As part of the Northern Territory national emergency response, the amendments discussed below will prohibit any subscription television narrowcasting service from providing television programs that are rated R 18+ to subscribers who receive the service in prescribed areas, as defined in section 4 of the NT NER Act. This would be achieved through the addition of a new licence condition in Part 7 of Schedule 2 to the Broadcasting Services Act.
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 3 below.

**Item 3** 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. A subscription television narrowcasting licence is a category of class licence.

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

The first of the new clauses will impose an additional licence condition that applies only to particular subscription television narrowcasting services that provide services to a subscriber who is in a prescribed area of the Northern Territory (subclause 12(1) refers).

**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 faced by many children in the Northern Territory. It is appropriate to enable this emergency response 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 exempt from disallowance by Parliament under section 42 of the Legislative Instruments Act 2003.

**Exemption from disallowance for ministerial repeal instrument**

Exemption from parliamentary scrutiny and possible disallowance is appropriate for the following reasons:
A similar non-disallowable ministerial repeal instrument was recently approved by Parliament when passing the NT Amendment Act. That Act inserted section 114 into the Classification (Films, Publications, and Computer Games) Act 1995 to enable the repeal of Northern Territory emergency response measures that prohibit the possession or supply of prohibited material (that is, pornography) in prescribed areas of the Northern Territory.

A repeal instrument that ‘sunsets’ legislation is analogous to a proclamation commencing legislation, and so should similarly not be disallowable by Parliament.

If Parliament were to disallow the repeal instrument, it would create confusion and uncertainty for subscription television licensees and subscribers who are affected by the licence condition concerned, to the extent that disallowance would ‘revive’ the licence condition and the rights and obligations that it entails.

The remaining clauses 13 to 15 will protect people (such as the licensee or the Australian Communications and Media Authority) who do things in relation to the additional licence condition from particular causes of action.

**Racial Discrimination Act 1975**

New clause 13 in Part 7 of Schedule 2 to the Broadcasting Services Act will declare the licence condition in clause 12 (above) and related provisions of the Broadcasting Services Act to be a ‘special measure’ for the purposes of the Racial Discrimination Act 1975 (Racial Discrimination Act).

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 government’s 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 protecting the vulnerable people there from exposure to television programming that is often degrading, violent, and generally unsuitable for vulnerable children to see. 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.

Clause 13 will also exempt acts done under or in relation to the licence condition from the operation of Part II of the Racial Discrimination Act (which contains the prohibitions against racial discrimination).

Since the licence condition is needed to address a serious problem in certain communities in the Northern Territory, so too is subclause 13(2), which would allow the emergency response to proceed without delay and with certainty. In the absence of this subclause, a subscription television narrowcasting licensee would be vulnerable to a racial discrimination claim in relation to any action the licensee took to comply with the licence condition (for example, varying or terminating the service agreement with the subscriber in the prescribed area). The Australian Communications and Media Authority would be similarly vulnerable in relation to any action it took to enforce compliance with the licence condition. The proposed exemption from Part II of the Racial Discrimination Act is reasonable since it is limited to the period of no more than five years of the emergency response, with the Minister able to shorten the exemption period by making a legislative instrument.

**Exclusion of some Northern Territory laws**

New clause 14 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 15 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 special licence condition and related provisions of the Broadcasting Services Act.
Schedule 2 – Residential tenancies

Summary
Where the Commonwealth has become a landlord under a residential tenancy agreement that relates to premises on land leased as part of the emergency response, Northern Territory legislation relating to residential tenancies will be disapplied and the Commonwealth will not be subject to certain obligations under existing tenancy agreements.

Background
Section 31 of the NT NER Act provides for a lease to be granted to the Commonwealth over specified land in the Northern Territory. Where a lease is granted under section 31, section 34 of the NT NER Act preserves any existing right, title or other interest in the land and provides that, where a right, title or interest was granted by the owner of the land, it will have effect as if granted by the Commonwealth. The effect of these provisions will be to cause the Commonwealth to be a ‘landlord’ for some of the premises located on the leased land.

This Schedule makes amendments to the NT NER Act that will exclude any residential tenancy agreement involving the Commonwealth from the operation of the Residential Tenancies Act (NT) (the RTA) and the Tenancy Act (NT) (the Tenancy Act). The amendments will also provide that the Commonwealth is not required to comply with obligations arising under those agreements that relate to the condition and the repair or maintenance of the premises.

Although the Commonwealth will be intending to upgrade the housing in the relevant communities, and bring it up to the standard required by the RTA, the Commonwealth will be unable to comply initially with these obligations because, in many cases, the housing in the communities is in a poor state of repair. The intention of these amendments is to ensure that the Commonwealth can proceed with the upgrade of the housing in the communities and implementation of the emergency response as intended.

The Commonwealth is committed to bringing the quality of housing in remote communities to acceptable standards as quickly as practicable and will only charge rents that recognise the actual condition of the premises.

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

Explanation of the changes

Item 1 inserts into Part 4 of the NT NER Act, new Division 3A – Residential tenancies.
New section 59A sets out a number of definitions that are relevant to the provisions contained in new Division 3A. **RTA** is defined as meaning the Residential Tenancies Act of the Northern Territory. **Tenancy Act** is defined as meaning the former Tenancy Act of the Northern Territory as continued in force by section 160 of the RTA. **Tenancy agreement** and **ancillary property** are defined as having the same meaning as provided for in the RTA.

New section 59B provides that new Division 3A applies to land that is covered by a lease granted to the Commonwealth under section 31 of the NT NER Act.

New section 59C provides that neither the RTA nor the Tenancy Act applies to tenancy agreements in respect of premises on land that is leased to the Commonwealth under section 31 of the NT NER Act. This will have the effect that, where the Commonwealth is a landlord in respect of premises on leased land, neither the Commonwealth nor the tenants will be subject to obligations arising under the RTA or the Tenancy Act. The Commonwealth, therefore, will be excluded from statutory obligations such as those requiring that a landlord ensure that premises are habitable, meet health and safety requirements, are secure, and remain in a reasonable state of repair. The Commonwealth will also not be subject to provisions of the RTA that may prevent it entering into new tenancy agreements.

The Commonwealth is unable to comply initially with these requirements as many of the premises acquired will be below RTA standard. Inadequate tenancy and property management practices by previous landlords may be responsible for the condition of the premises. It is the Commonwealth’s intention to bring residential premises up to the standard required by the RTA and the Tenancy Act. However, because the Commonwealth will be unable to comply with these requirements in the short term, if the RTA and the Tenancy Act were to continue to apply, they may have the effect of requiring the Commonwealth to evict tenants to ensure that it is not in breach of its legislative responsibilities as a landlord. Therefore, without these amendments, houses could remain vacant until significant repairs could be undertaken, thereby further exacerbating the housing crisis in remote Indigenous communities. In the short term, the government is intending to undertake the repairs necessary to provide a safe environment but will not be immediately able to undertake the repairs that may be required to meet the standards required by the RTA and the Tenancy Act.

The Commonwealth is committed to bringing the quality of housing in remote communities to acceptable standards as quickly as practicable and will only charge rents that recognise the actual condition of the premises.
Where the Commonwealth has taken over the role of landlord in the communities under lease, the government is intending to enter into new residential tenancy agreements. These new agreements will provide for normalisation of the residential tenancy arrangements. They will reflect many of the obligations contained in the RTA, as they apply to both landlords and tenants, and will also ensure that tenants have a formal mechanism to exercise their rights, including providing for an appropriate response time to all future maintenance requests, quiet enjoyment, and security and access restrictions. The rents charged under these new agreements will be appropriate for the actual condition of the premises.

New section 59D provides that the Commonwealth will not be subject to obligations arising under existing tenancy agreements that relate to the condition and repair or maintenance of the premises. This provision is necessary to allow time for the Commonwealth to terminate any existing arrangements that may exist and enter into alternative residential tenancy agreements. This provision is intended to exclude the Commonwealth from obligations similar to those provided for in the RTA and the Tenancy Act and that the Commonwealth would be excluded from under new section 59C.

Tenants will continue to enjoy other rights under the relevant tenancy agreements, including the right to quiet enjoyment, but only to the extent that this is consistent with the exclusion of the Commonwealth's obligations in relation to the condition of the premises. The proposed amendment will ensure all positive rental practices, including timely payment of rent, continue while the Commonwealth completes the residential housing upgrade. As mentioned above, the Commonwealth will only charge rents that recognise the actual condition of the premises.

New section 59E provides for the Minister to declare that the RTA or the Tenancy Act, or specified provisions of those Acts, applies to tenancy agreements in premises with respect to specified leased land. This provision will allow the Minister to provide for the reapplication of the RTA and the Tenancy Act where it is considered appropriate for them to apply. Therefore, when premises in a community are brought up to the standard required under the RTA and the Tenancy Act, the RTA and the Tenancy Act will be able to be reapplied in that community.

The Commonwealth envisages that this will occur through a staged approach, community by community, over the five-year lease period. In addition, under provisions introduced through the NT Amendment Act, where consent from the owner (the Land Council on behalf of the Lands Trust) has been given for the Commonwealth to build housing or substantially upgrade it (over $50,000), the Commonwealth will have a statutory right to use and control the use of these buildings, while the buildings exist or until a lease is put in place.
Where agreement has been reached on a section 19A lease (99-year lease) or a section 19 lease (being a lease granted under section 19 or 19A of the Land Rights Act), the Commonwealth (or the Northern Territory Government) becomes the leaseholder and has housing and management rights and responsibilities consistent with the lease. Where these lease arrangements exist, an individual can purchase a house and have the rights of a homeowner, for the period of the lease, though the inalienable owner still owns the land and fixtures thereon.

Where neither a lease nor a statutory right exists, the ownership of the housing, or, more correctly, the ability to control the housing, will return to the communal owners.

*Racial Discrimination Act 1975*

These measures will be covered by section 132 (Racial Discrimination Act) of the NT NER Act. This will mean that the provisions and any acts done under or for the purposes of the provisions will be excluded from the operation of Part II of the *Racial Discrimination Act 1975* (Racial Discrimination Act).

The government’s 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 contained in this Schedule are intended to allow for the government to take appropriate action to advance Indigenous Australians and protect children from abuse by improving the condition of the housing in the communities on land under lease to the Commonwealth. In many cases, the standard of housing in these communities is not up to the standard of the housing elsewhere in the Northern Territory. The government will be taking steps to address these different standards. These provisions are necessary in order to allow the government to undertake the improvements that are required and to bring the housing in these communities up to an appropriate standard. When that objective is achieved, it is intended that the RTA and the Tenancy Act will be reapplied.
**Schedule 3 – Defence Housing Australia**

**Summary**

This Schedule amends Defence Housing Australia’s (DHA’s) additional functions under the *Defence Housing Australia Act 1987* (DHA Act) so that it will be possible for DHA to assist the Department of Families, Community Services and Indigenous Affairs (FaCSIA) to deliver housing to remote Indigenous communities. This will be subject to certain requirements intended to ensure that the provision of housing and housing-related services to the Defence Force and the Department of Defence remains DHA’s primary responsibility. The Schedule also makes some technical and cosmetic amendments to the DHA Act.

**Background**

Part of the Australian Government’s response to the national emergency confronting the welfare of Aboriginal children in the Northern Territory will involve reforming and improving living arrangements in remote communities.

In addition, in the 2007-08 Budget, the Australian Government announced a major new Indigenous housing program, Australian Remote Indigenous Accommodation (ARIA), aimed at addressing the backlog in housing needs in remote Indigenous communities. Through ARIA, the Australian Government will be investing $1.3 billion in remote Indigenous communities across Australia over the next four years.

Both ARIA and the emergency response will essentially involve constructing new houses and associated infrastructure and upgrading existing houses and associated infrastructure in remote locations across Australia.

To achieve these outcomes, FaCSIA is putting in place a range of strategies that reflect the challenges and special needs of providing high quality, cost effective housing in remote Australia.

It is envisaged that DHA could potentially play a key role in assisting to implement these strategies, given its experience and expertise in providing housing and housing-related services. The amendments in this Schedule allow for the possibility of DHA assisting in the delivery of housing to remote Indigenous communities, which currently would not be within DHA’s functions.

This builds on amendments to the DHA Act made by the *Defence Housing Authority Amendment Act 2006*, which expanded the scope of services DHA can provide to enable DHA to expand its operations to include the provision of services to Australian Government agencies other than Defence.

At the same time, the Australian Government recognises that DHA’s primary responsibility is to provide housing and housing-related services to the Defence Force and the Department of Defence.
Accordingly, this bill retains and builds on existing provisions in the DHA Act that are intended to safeguard the interests of the Defence Force and Department of Defence and to ensure that DHA maintains its primary Defence focus.

The Schedule also makes some technical and cosmetic amendments to the DHA Act.

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

**Explanation of the changes**

**Item 1** inserts into subsection 3(1) a definition of *Agency* in order to avoid the need to state repeatedly that definition in section 6, which sets out DHA’s additional functions. *Agency* has the same meaning as in the *Financial Management and Accountability Act 1997*.

**Item 2** makes a technical amendment to subsection 5(1), which sets out DHA’s main function, to clarify that, in performing the main function, DHA can provide housing and/or housing-related services.

**Item 3** makes substantially the same technical amendment as **item 2**, but in relation to DHA’s first additional function. That is, in performing the first additional function, DHA can provide housing and/or housing-related services.

**Item 4** removes from subsection 6(1) the definition of *Agency* because that definition now appears in the general definitions provision in subsection 3(1) as a result of **item 1**.

**Item 5** gives DHA a new second additional function that would allow DHA to assist an Agency (other than the Department of Defence) in relation to the delivery of a program that involves the provision of housing, or housing-related services, to persons. It would be within the scope of this function, for example, for DHA to assist FaCSIA in relation to the delivery of programs such as ARIA and the Northern Territory emergency response, which involve the provision of housing and housing-related services. However, this new second additional function is made subject to certain existing requirements in the DHA Act that are intended to safeguard the interests of the Defence Force and the Department of Defence and to ensure that DHA maintains its primary Defence focus (see **items 9, 10 and 11**).

**Item 6** amends subsection 6(2) to renumber DHA’s current second additional function as DHA’s third additional function.
**Item 7** amends subsection 6(2), setting out what is now DHA’s third additional function, which is to provide services ancillary to the services mentioned in DHA’s main function and additional functions. The amendment clarifies that DHA is allowed to provide services that are ancillary to assisting an Agency (other than the Department of Defence) in relation to the delivery of a program that involves the provision of housing, or housing-related services, to persons.

**Item 8** removes from subsection 6(2) the definition of Agency because that definition now appears in the general definitions provision in subsection 3(1) as a result of **item 1**.

**Item 9** amends subsection 6(3) so that DHA may perform the new second additional function only to the extent mentioned in a determination made by the Minister for Defence under subsection 6(4). The effect is that DHA may assist an Agency (other than the Department of Defence) in relation to the delivery of a program that involves the provision of housing, or housing-related services, to persons only to the extent approved by the Minister for Defence. Under subsection 6(4), the Minister for Defence may determine to whom services can be provided, the kind of services that can be provided and any other matter, plus new matters inserted by **item 10**.

**Item 10** amends subsection 6(4) to expand the list of matters by reference to which the Minister for Defence may limit the extent to which DHA may perform its additional functions in a determination made under that provision. The effect is that the Minister for Defence may determine the specific Agency and specific programs to which DHA may provide services in performing its additional functions. For example, it would be possible for the Minister for Defence to determine under subsection 6(4) that DHA may perform its second additional function only in relation to FaCSIA and the delivery of the Northern Territory emergency response or ARIA.

**Item 11** amends subsection 6(6), which limits by volume the amount of work DHA can do in performing its additional functions, so that the same limit applies to what is now DHA’s second additional function. The volume is measured by gross revenue of the additional functions as a percentage of DHA’s total gross revenue. The total gross revenue figure is to be determined from DHA’s audited financial statements. The limit is, and will continue to be, no more than 25 per cent but, if the limit is to be less than 25 per cent, it may be varied in the future in the regulations. This is a further safeguard intended to ensure that the provision of housing and housing-related services to the Defence Force and the Department of Defence remains DHA’s primary responsibility.
Schedule 4 – Land rights

Summary

This Schedule makes minor amendments to the Land Rights Act and the NT NER Act. For example, certain powers of the Minister will be clarified, certain new functions conferred on Land Councils, and provision made for the Executive Director of Township Leasing to be appointed on a part-time basis.

Background

The amendments made to the Land Rights Act include amendments to:

- Part IIA to allow the Executive Director of Township Leasing to be appointed on a part-time basis;
- Part IIB to permit the Minister to exercise certain powers where the Commonwealth has statutory rights over infrastructure and to allow the Minister to delegate his powers under Part IIB; and
- section 23 to give Land Councils new functions in respect of negotiating agreed payments on behalf of land owners and certain existing lease holders.

This Schedule also inserts a new section 33B, which allows Land Councils to charge the Commonwealth a fee for reasonable expenses they incur in performing the new functions.

The Schedule also makes an amendment to the NT NER Act to provide that these fees are payable from the Consolidated Revenue Fund, which is appropriated under section 63 of that Act.

The amendments also insert into the Land Rights Act a new section 70J to ensure that the Director of National Parks can continue to regulate activities in areas leased to the Director, despite the application of new access measures in sections 70B to 70G.

Most of the amendments made by this Schedule commence on the day after Royal Assent (but not items 20 and 21 – see below).

Explanation of the changes

Amendments to the Land Rights Act

Executive Director of Township Leasing

Item 1 repeals and substitutes section 20E to provide that the Executive Director may be appointed on a part-time basis.
Item 2 repeals and substitutes section 20H to provide that, where an Executive Director is appointed on a part-time basis, he or she may not engage in outside paid employment that would conflict with the proper performance of his or her duties.

Item 3 repeals and substitutes section 20K to provide that, where the Executive Director is appointed on a part-time basis, the Minister may grant a leave of absence on the terms and conditions determined by the Minister.

Item 4 repeals and substitutes section 20M to provide that, where the Executive Director is appointed on a part-time basis, the Governor-General may terminate the appointment of the Executive Director if he or she engages in paid employment that conflicts or could conflict with the proper performance of his or her duties.

**Statutory rights over buildings and infrastructure**

Items 5 and 8 repeal and substitute subsections 20Y(1) and 20ZJ(1) to provide that, where the Commonwealth has statutory rights, the Minister may, on behalf of the Commonwealth and in writing, permit a person to exercise the statutory rights.

Items 6 and 9 repeal and substitute sections 20ZA and 20ZL to provide that, where the Commonwealth has statutory rights, the Minister may, on behalf of the Commonwealth, agree with a Land Council to vary the area over which the statutory rights apply.

Items 7 and 10 repeal and substitute subsections 20ZE(1) and 20ZP(1) to provide that, where the Commonwealth has statutory rights, the Minister may, on behalf of the Commonwealth, determine that the buildings or infrastructure to which statutory rights apply are no longer required by the Commonwealth.

**Functions of Land Councils**

Item 11 makes a technical change to each of paragraphs 23(1)(a), (b), (ba), (c), (d), (e), (ea), (f) and (fa).

Item 12 inserts new paragraphs 23(1)(fb), (fc) and (fd) to give Land Councils additional functions. New paragraph 23(1)(fb) gives a Land Council the function of negotiating agreed payments under new subsection 62(1G) of the NT NER Act in respect of the grant of a lease under section 31 of that Act on behalf of a Land Trust.

New paragraph 23(1)(fc) gives a Land Council the function of negotiating agreed payments under new subsection 62(1G) of the NT NER Act in respect of the grant of a lease under section 31 of that Act on behalf of owners of land who fall within paragraph (b) or (f) of the definition of relevant owner in section 3 of the NT NER Act, if requested.
New paragraph 23(1)(fd) gives a Land Council the function of negotiating agreed payments under new subsection 62(1G) of the NT NER Act in respect of the suspension of a lease under section 40 of that Act on behalf of the holder of the suspended lease, if requested.

**Item 13** inserts a new paragraph 23(1)(i) to provide that the regulations may prescribe additional functions for Land Councils.

**Fees**

**Item 14** inserts new section 33B to permit a Land Council to charge certain fees. New subsection 33B(1) permits the Land Council to charge the Commonwealth a fee for reasonable expenses incurred in performing functions referred to in new paragraph 23(1)(fb), (fc) or (fd) (which relate to the negotiation of agreed payments under new subsection 62(1G) of the NT NER Act). New subsection 33B(2) permits the Land Council to charge the Commonwealth a fee for reasonable expenses the Land Council incurs in providing services prescribed by regulations. New subsection 33B(3) provides that the fee charged must not amount to taxation. New subsection 33B(4) ensures that nothing in new section 33B prevents a Land Council charging the Commonwealth a fee under existing section 33A (which permits a Land Council to charge a fee for prescribed services).

**Item 15** makes a consequential amendment to subsection 34(1A) to require a Land Council to notify the Minister of the fees it expects to receive under new section 33B.

**Item 16** makes a consequential amendment to subsection 34(4) to define *administrative costs* as including the expenses for which the Land Council can charge a fee under new section 33B.

**Item 17** makes a consequential amendment to paragraph 35(1)(b) to provide that a Land Council must spend any amounts it receives under new section 33B for its administrative or capital costs.

**Item 18** amends subsection 35(4) to clarify that a Land Council does not have to disburse payments it receives under existing section 33A (fees for prescribed services) or under new section 33B. Instead, subsection 35(1) requires a Land Council to spend these amounts in meeting its administrative or capital costs. **Item 18** further amends subsection 35(4) to provide that a Land Council must distribute payments it receives under sections 60 and 62 of the NT NER Act for the benefit of traditional owners.

**Item 19** inserts a new paragraph 37(2)(c), which provides that the annual report of a Land Council under section 9 of the *Commonwealth Authorities and Companies Act 1997* must specify the total fees the Land Council received under section 33B during the financial year on which it is reporting.
Access to land leased to the Director of National Parks

**Item 20** amends subsection 70F(2) to provide that the right of a person to enter and remain on a common area that is within community land applies to common areas which are the subject of a lease to the Director of National Parks granted under section 19.

**Item 21** inserts a new section 70J to provide that the access rights in sections 70B to 70G (which provide a right to enter and remain on certain areas of Aboriginal land) may be subject to regulation under the *Environment Protection and Biodiversity Conservation Act 1999* and regulations under that Act.

**Items 20 and 21** commence immediately after the commencement of item 12 of Schedule 4 to the NT Amendment Act. Because that item is to commence on proclamation, and the proclamation has not yet happened, there is no retrospectivity involved in these new amendments.

**Delegation**

**Item 22** inserts a new subsection 76(1A) to permit the Minister to delegate any of his or her functions or powers under Part IIB (statutory rights over infrastructure) to: a Secretary or SES employee (including an acting SES employee) within the Minister’s Department; a Secretary or SES employee (including an acting SES employee) in another Department; or the General Manager of Indigenous Business Australia.

**Amendments to the NT NER Act**

**Item 23** repeals subsection 52(8) of the NT NER Act. This repeal is consequential to the amendment made by **item 18**, which makes subsection 52(8) unnecessary.

**Item 24** inserts new paragraph 63(1)(f) into the NT NER Act to provide that an amount payable by the Commonwealth under new section 33B of the Land Rights Act (inserted by **item 14**) is payable from the Consolidated Revenue Fund, which is appropriated under section 63 of the NT NER Act.

This extension of the existing special (standing) appropriation under section 63 of the NT NER Act is appropriate because amounts payable by the Commonwealth under new section 33B, and the timing of those payments, cannot be predicted in a way that would make an annual appropriation suitable.
Schedule 5 – Acquisition of rights, titles and interests in land

Summary

This Schedule makes minor improvements to several provisions in Part 4 of the NT NER Act. It also makes amendments to allow the Commonwealth and certain persons to agree on amounts to be paid in respect of the five-year leases and certain other payments, and other minor and technical amendments.

Background

The amendments this Schedule include minor improvements to sections 38 (Canteen Creek), 51 (native title) and 52 (grants by Land Trusts). There are also amendments to section 62 to allow the Commonwealth and certain persons to agree on amounts to be paid in respect of the five-year leases and certain other payments, and other minor and technical amendments.

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

Explanation of the changes

Five-year leases

Item 1 makes a minor amendment to subsection 35(2) to take account of changes to section 62 (see items 12 to 16 below).

Item 2 repeals and substitutes subsections 38(1) and (2) to ensure that, if, following the grant of a five-year lease of Canteen Creek, the Commonwealth grants interests over that land, such interests will be valid despite section 67A of the Land Rights Act and will not affect the traditional land claim to Canteen Creek.

Item 3 makes a consequential amendment to subsection 38(3).

Town camps

Item 4 makes a technical amendment to subsection 47(2).

Item 5 amends paragraph 51(1)(c) to ensure that, if the Commonwealth, the Northern Territory or an Authority (as defined in the Land Rights Act) grants interests, within the five-year period, in relation to land that has been resumed or land in respect of which a lease has been forfeited, the ‘future act’ provisions in the Native Title Act 1993 do not apply. (The non-extinguishment principle will apply by virtue of subsection 51(2).)
Item 6 amends paragraph 51(1)(d) to ensure that, if the Commonwealth, the Northern Territory or an Authority (as defined in the Land Rights Act) grants interests in relation to land in which a Commonwealth interest exists, the ‘future act’ provisions in the Native Title Act 1993 do not apply. (The non-extinguishment principle will apply by virtue of subsection 51(2).)

**Grants of interests by Land Trusts under the Land Rights Act**

Item 7 adds a note after subsection 52(1) to cross-refer to new subsection 52(4A).

Item 8 inserts new subsection 52(4A) to permit Land Trusts to continue to grant interests (not being leases), of a kind prescribed in regulations, over land leased under section 31. This gives flexibility in case it is appropriate to allow Land Trusts to grant particular interests despite the five-year leases.

Item 9 repeals and substitutes subsection 52(5) to clarify that only interests referred to in subsections 52(1) and (4A) can be granted by Land Trusts while a five-year lease is in place.

**Effect of other laws in relation to land covered by Part 4 of the NT NER Act**

Item 10 makes technical changes to paragraphs 53(1)(c), 54(1)(c), 58(1)(c) and 59(1)(c).

**Agreed payments**

Item 11 makes a consequential amendment to paragraph 61(a) following the expansion of section 62 (see below).

Item 12 inserts new subsections 62(1A) to (1H). New subsection 62(1A) provides for the Minister and a relevant owner (other than the Northern Territory) of land covered by a five-year lease to agree on an amount that will be paid by the Commonwealth, whether or not any liability to pay arises. New subsection 62(1B) provides that such amounts may be one-off or periodic payments. (In the latter case, these are paid while the lease under s31 is in force.) New subsection 62(1C) provides for the Minister to request that the Valuer-General of the Northern Territory determine an indicative amount for the purposes of negotiations.

New subsection 62(1D) provides for the Minister and a person who had a registered lease which has been terminated under paragraph 37(1)(b) to agree on an amount that will be paid by the Commonwealth, whether or not any liability to pay arises.
New subsection 62(1E) provides for the Minister and a person whose lease has been suspended under section 40 to agree on an amount that will be paid by the Commonwealth, whether or not any liability to pay arises. New subsection 62(1F) provides that such amounts may be one-off or periodic payments. (In the latter case, these are paid while the lease is suspended.)

New subsection 62(1G) provides that the Commonwealth must pay an amount agreed under new subsection 62(1A), (1D) or (1E).

New subsection 62(1H) provides that, where the Land Council is not representing the other party, the Commonwealth must pay the reasonable expenses incurred in representing the other party in negotiations under new subsections 62(1A), (1D) or (1E). These expenses may include the costs to the other party of hiring a person to represent them. (Amendments are also being made to the Land Rights Act to allow Land Councils to represent parties: see Item 12 of Schedule 4.)

Items 13 to 15 amend subsections 62(2) to (4) to take account of requests to the Valuer-General under new subsection 62(1C).

Item 16 amends subsection 62(5) to refer expressly to payment of amounts determined by the Valuer-General under subsection 62(1). There is no obligation on the Commonwealth to agree to pay an indicative amount that the Valuer-General has determined under new subsection 62(1C).
Schedule 6 – Community stores

Summary

This Schedule will make sure that, if a roadhouse effectively takes the place of a community store in a remote area, it is properly treated as a community store in having to meet the new licensing standards.

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 Indigenous 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 licence 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 Indigenous community (or communities) is substantially dependent upon the roadhouse for the provision of grocery items and drinks.