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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

STRONGER FUTURES IN THE NORTHERN TERRITORY
(CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2011

EXPLANATORY MEMORANDUM

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

STRONGER FUTURES IN THE NORTHERN TERRITORY (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2011

OUTLINE

This Bill contains savings and transitional provisions associated with the repeal of the *Northern Territory National Emergency Response Act 2007*. This Bill also makes amendments to existing principal legislation as part of the Stronger Futures in the Northern Territory framework.

In particular, this Bill:

- repeals the *Northern Territory National Emergency Response Act 2007*;
- contains savings provisions in relation to the land measures, consequential upon the repeal of the *Northern Territory National Emergency Response Act 2007*;
- contains savings provisions in relation to the transitioning of areas, declarations, liquor licences, and permits for the tackling alcohol abuse measure;
- contains transitional provisions in relation to the community stores licences in place under the *Northern Territory National Emergency Response Act 2007* immediately prior to its repeal;
- contains consequential amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* in relation to the repeal of the provisions for the grant of leases for five years in the *Northern Territory National Emergency Response Act 2007* and other matters;
- amends the *Classification (Publications, Films and Computer Games) Act 1995* to add a sunset and review date to the provisions in Part 10 of that Act, amongst other things;
- amends the *Crimes Act 1914* to insert certain exceptions to the rules that prevent consideration of customary law or cultural practices in bail and sentencing for certain offence provisions (relating to entering, remaining on or damaging cultural heritage, or damaging or removing a cultural heritage object) for both Commonwealth and Northern Territory offences; and
- makes minor consequential amendments to Part 3B of the *Social Security (Administration) Act 1999* (income management regime), to remove references to the *Northern Territory National Emergency Response Act 2007*.

Financial impact statement

This Bill has nil financial impact.

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NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

- **Classification Act** means the *Classification (Publications, Films and Computer Games) Act 1995*.
- **Commonwealth Minister for Indigenous Affairs** means the Minister for Families, Housing, Community Services and Indigenous Affairs.
- **Crimes Act** means the *Crimes Act 1914*.
- **Land Rights Act** means the *Aboriginal Land Rights (Northern Territory) Act 1976*.
- **NTNER Act** means the *Northern Territory National Emergency Response Act 2007*.
- **relevant time** means, if the Commonwealth Minister for Indigenous Affairs, by legislative instrument under subclause 4(1), determines a day that is on or after the commencement of the Act but before 17 August 2012 – the beginning of that day; or otherwise – the end of 17 August 2012.
- **Schedule** means a Schedule to the new Act.
- **Stronger Futures in the Northern Territory Act** means the *Stronger Futures in the Northern Territory Act 2011*.

Clause 1 sets out how the new Act is to be cited, namely, as the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2011*.

Clause 2 provides a table setting out the commencement dates for the various sections in, and Schedules to, the new Act. The Schedules to the new Act all commence at the same time as section 3 of the Stronger Futures in the Northern Territory Act. That Act will commence on Proclamation, to allow rules to be made under the new legislation to stipulate essential application matters, such as the areas in which the new measures will apply. If no earlier Proclamation is made, then section 3 of that Act commences six months and one day after Royal Assent.

Clause 3 provides that each Act specified in a Schedule is amended or repealed as set out in that Schedule and that any other provision in a Schedule has effect according to its terms.

Clause 4 defines the terms that are used in the new Act. In this explanatory memorandum, the defined terms will be addressed in the context in which they appear.

Schedule 1 – Repeal of the *Northern Territory National Emergency Response Act 2007*

Summary

Schedule 1 will repeal the NTNER Act and make certain saving and transitional provisions in relation to leases granted and Commonwealth interests acquired under sections 31 and 47 of the NTNER Act respectively as well as transitional provisions in relation to alcohol and community store licences.

Background

It is the Commonwealth's intention that the NTNER Act be repealed and be replaced by the Stronger Futures in the Northern Territory Act. Despite its repeal, there are provisions of the NTNER Act that will be saved or transitioned by this Bill.

In relation to the land provisions, the savings provisions enable the compulsory five-year leases to continue with expiry no later than 17 August 2012, to manage the transition to alternative voluntary leasing arrangements. The items provide for certain saving provisions for leases granted under section 31 of the NTNER Act (the compulsory five-year leases) and Commonwealth interests acquired under section 47 of the NTNER Act. The Bill also ensures that provisions relating to compensation for acquisition of property and payment of agreed amounts or rent for the compulsory five-year leases and other acquisitions under Part 4 of the NTNER Act continue in force. Additionally, the relevant appropriation will be saved for amounts payable before or after the relevant time including, for example, rent yet to be paid by the Commonwealth to landholders affected by the compulsory five-year leases that were legislated for under section 31 of the NTNER Act.

In relation to the tackling alcohol abuse measure, there are transitional provisions relating to the areas in which the alcohol restrictions apply. The provisions ensure that any areas that were 'prescribed areas' under the NTNER Act will become 'alcohol protected areas' and legislative alcohol restrictions continue to apply.

In addition, this Bill provides for various other matters to continue to operate under the Stronger Futures in the Northern Territory Act. For example, this Bill provides for the transition and continued operation of certain declarations made under section 12 of the NTNER Act (such as declarations that certain defences, that is, the recreational boating defence, are or are not available), restrictions and conditions imposed in relation to liquor offences (under subsections 13(4) and (5) of the NTNER Act) and conditions in relation to liquor permits (under subsections 14(2) and 14(3) of the NTNER Act).

In relation to food security, the provisions in Part 4 are to ensure that licences granted under the current NTNER Act are able to continue under the new arrangements in place under the Stronger Futures in the Northern Territory Act.

Explanation of the changes

Part 1 – Northern Territory National Emergency Response Act 2007

Item 1 provides that the whole of the NTNER Act is repealed.

Part 2 – Saving provisions relating to land

Item 2 is a savings provision in relation to land and, in accordance with **subitem 2(1)**, only applies if the Act commences before 17 August 2012 and when the **relevant time** (as defined in clause 4) does not occur on the day of commencement.

Subitem 2(2) enables the compulsory five-year leases to continue no later than when they were due to expire under their original NTNER Act timeframe to manage the transition to alternate voluntary leasing arrangements. Subitem 2(2) is a saving provision which, by continuing the application of relevant provisions under the NTNER Act, enables leases granted under section 31 of the NTNER Act to continue until the relevant time or until the end of 17 August 2012 (the day on which the leases acquired under the NTNER Act expire in accordance with paragraph 31(2)(b) of that Act). The Commonwealth Minister for Indigenous Affairs may, by legislative instrument, determine the relevant time that these savings provisions, and therefore the leases, will cease. The relevant time can be on the day that the Stronger Futures in the Northern Territory Act commences, or any day from commencement until the end of 17 August 2012. The possible continuation of leases until 17 August 2012 is to assist the transition of arrangements under these leases to voluntary land tenure arrangements.

Item 3 is a savings provision which relates to rights, titles and interests in land that were vested in the Commonwealth under section 47 of the NTNER Act as a result of any Commonwealth acquisition of property, such as the area of land covered by the Ilpeye Ilpeye town camp. Item 3 also relates to existing rights and interests that, at the time of any acquisition, are preserved under section 48 of the NTNER Act and are not therefore rights, titles and interests acquired by the Commonwealth.

As provided under item 3, despite the repeal of the NTNER Act, sections 3, 48, 49, 50, 51, 53, 54, 55, 56, 58 and 59 in Part 4 and all of Part 8 of the NTNER Act continue in force in relation to property acquired by the Commonwealth under section 47 of the NTNER Act, as do any instruments made under those provisions. This is to help ensure that these provisions can still be used to facilitate arrangements being put in place for the purpose of meeting objectives related to the acquisition of property under section 47 of the NTNER Act.

Item 4 provides that, notwithstanding the repeal of the NTNER Act, sections 60, 61, 62 and 63 of the NTNER Act are saved and continue to apply to those matters under subitems 4(1), (2) and (3).

Subitem 4(1) provides that, despite any repeal of sections 60 and 61 of the NTNER Act, those sections continue to apply in relation to property the Commonwealth acquired either through the operation of Part 4 of the NTNER Act or through an act referred to in paragraph 1(b) or (c) in section 60 of the NTNER Act, which occurred before the relevant time. These provisions provide that, in relation to such property, the Commonwealth is liable to pay reasonable compensation to the owner of the acquired property. Should the Commonwealth and the owner be unable to reach agreement on the amount of compensation, the owner may initiate proceedings in a court of competent jurisdiction for the recovery, from the Commonwealth, of a reasonable amount of compensation as determined by the court. In making a determination, the court must take into account amounts paid or payable by the Commonwealth, in accordance with section 61 of the NTNER Act.

Subitem 4(2) provides that, despite any repeal of section 62 of the NTNER Act, that section will continue to apply, in accordance with subitem 2(2), to agreements made under section 62 and to rent that is payable in relation to leases granted under section 31 of the NTNER Act.

Because amounts payable under the saved sections 60, 61 and 62 of the NTNER Act will still need to be validly appropriated from the consolidated revenue fund, **subitem 4(3)** saves the effect of section 63 of the NTNER Act, which provides for the appropriation, as required for this purpose.

Part 3 – Transitional provisions relating to alcohol

Subitem 5(1) provides that any area that was subject to alcohol restrictions under the NTNER Act, immediately before its repeal, is taken to be an area specified in a rule made under subclause 27(1) of the Stronger Futures in the Northern Territory Act. That is, the area in question remains subject to alcohol restrictions, but now under the Stronger Futures in the Northern Territory Act.

Subitem 5(2) provides that, if subitem 5(1) has effect (that is, if a rule is taken to have been made under subclause 27(1) of the Stronger Futures in the Northern Territory Act), then a rule can be made under subclause 27(2) of the Stronger Futures in the Northern Territory Act revoking the first rule (that is, the alcohol restrictions that would otherwise apply in respect of an area can be lifted).

Subitem 6(1) provides that any declaration made by the Commonwealth Minister for Indigenous Affairs under subsection 12(8) of the NTNER Act (that is, a declaration that certain defences against alcohol offences are not available), which is still in force immediately before that Act's repeal, remains in force as if it had been made under subsection 75D(1) of the Northern Territory's Liquor Act (as inserted by clause 8 of the Stronger Futures in the Northern Territory Act).

Subitem 6(2) provides that any declaration made by the Commonwealth Minister for Indigenous Affairs under subsection 12(8A) of the NTNER Act (that is, a declaration that certain defences against alcohol offences are not available), which is still in force immediately before that Act's repeal, remains in force as if it had been made under subsection 75D(2) of the Northern Territory's Liquor Act (as inserted by clause 8 of the Stronger Futures in the Northern Territory Act).

Subitem 7(1) provides that any determination made by the Commonwealth Minister for Indigenous Affairs under subsection 13(4) of the NTNER Act (that is, a determination about what is not authorised by a liquor licence), which is still in force immediately before that Act's repeal, remains in force as if it had been made under subclause 12(4) of the Stronger Futures in the Northern Territory Act.

Subitem 7(2) provides that any determination made by the Commonwealth Minister for Indigenous Affairs under subsection 13(5) of the NTNER Act (that is, a determination about the conditions on a liquor licence), which is still in force immediately before that Act's repeal, remains in force as if it had been made under subclause 12(5) of the Stronger Futures in the Northern Territory Act.

Subitem 8(1) provides that any determination made by the Commonwealth Minister for Indigenous Affairs under subsection 14(2) of the NTNER Act (that is, a determination about what is not authorised by a liquor permit), which is still in force immediately before that Act's repeal, remains in force as if it had been made under subclause 13(2) of the Stronger Futures in the Northern Territory Act.

Subitem 8(2) provides that any determination made by the Commonwealth Minister for Indigenous Affairs under subsection 14(3) of the NTNER Act (that is, a determination about the conditions on a liquor permit), which is still in force immediately before that Act's repeal, remains in force as if it had been made under subclause 13(3) of the Stronger Futures in the Northern Territory Act.

Part 4 – Transitional provisions relating to community store licences

Subitems 9(1) and (2) ensure that any current community store licence under the NTNER Act continues under the new arrangements provided by the Stronger Futures in the Northern Territory Act. It provides that a NTNER Act Part 7 community store licence that was in force immediately prior to the commencement of the Stronger Futures in the Northern Territory Act, in relation to a store whose premises are located in the food security area, will continue to be in force (and may be dealt with) as if the licence had been granted under the Stronger Futures in the Northern Territory Act. It also provides that any conditions that were imposed on the licence under section 103 of the NTNER Act continue as if they had been imposed under the Stronger Futures in the Northern Territory Act.

Subitem 9(3) ensures that, for the purpose of subclause 59(1) of the Stronger Futures in the Northern Territory Act, any breaches of transitioned licence conditions, or offences against the NTNER Act committed by the owner, manager or person involved in the store before commencement, or licences obtained improperly, are to be treated as if occurring under the Stronger Futures in the Northern Territory Act. This will allow transitioned licences to be revoked under the relevant provision of the Stronger Futures in the Northern Territory Act for these reasons.

Subitem 9(4) provides that a notice relating to a proposed decision to revoke or refuse to vary a licence under the NTNER Act continues in force on and after commencement as if that notice had been issued under subclause 108(2) of the Stronger Futures in the Northern Territory Act.

Subitems 10 and 11 confirm that appointments of authorised officers made and identity cards issued under the NTNER Act immediately before commencement of the Stronger Futures in the Northern Territory Act continue in force under the Stronger Futures in the Northern Territory Act.

Schedule 2 – Amendment of the *Aboriginal Land Rights (Northern Territory) Act 1976*

Summary

Schedule 2 amends the *Aboriginal Land Rights (Northern Territory) Act 1976* to ensure that its operation is consistent with the repeal of the NTNER Act, including the repeal of leases granted under section 31 of the NTNER Act. Schedule 2 also repeals Part IIB of the Land Rights Act, and introduces an additional function for Land Councils to provide assistance to community living area landowners, in relation to dealings in their land.

Background

Part 1 of Schedule 1 to this Bill repeals the NTNER Act. Schedule 2 to the Bill therefore amends the Land Rights Act to ensure that its operation is consistent with the repeal of the NTNER Act. The consequential provisions in relation to the NTNER Act in Schedule 2 primarily cover provisions in the Land Rights Act concerning land covered by leases granted under section 31 of that Act. If the NTNER Act is repealed before 17 August 2012, Part 2 of Schedule 1 to this Bill provides, despite any repeal of the NTNER Act, for the continuation of leases granted under section 31 of the NTNER Act from the date of commencement up until 17 August 2012.

To manage the transition to alternate voluntary leasing arrangements beyond the date the NTNER Act is repealed, item 10 provides certain saving provisions in relation to items 5, 8 and 9 of this Schedule. These items have effect if this Bill commences before 17 August 2012 and if leases granted under section 31 of the NTNER Act continue after commencement of this Bill (until no later than 17 August 2012), as determined by the Commonwealth Minister for Indigenous Affairs for the purposes of clause 4 (definition of ***relevant time***).

Schedule 2 also provides for the repeal of Part IIB of the Land Rights Act. Part IIB of the Land Rights Act – containing the Statutory Rights provisions – was inserted by Schedule 3 to the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*. This provided a mechanism for the Commonwealth, Commonwealth authorities, the Northern Territory and Northern Territory authorities to retain an interest in buildings and infrastructure constructed or upgraded on Aboriginal land with government funds. It was intended that this would allow for future government investment on Aboriginal land to be protected.

The Statutory Rights provisions under Part IIB of the Land Rights Act provide that any government interest would only be created with the consent of the Land Council. The Land Councils have not used these provisions. Further, these provisions were intended to be used as a transitional arrangement, as the Statutory Rights provisions included a good faith obligation for holders of statutory rights and the relevant Land Council to negotiate a lease under section 19 of the Land Rights Act.

The Statutory Rights provisions have not been used, and any future use would not be consistent with the Commonwealth Government's voluntary leasing agenda that was outlined in the Stronger Futures in the Northern Territory Discussion Paper. They are therefore being repealed.

Schedule 2 also provides for an additional function to be performed by Land Councils, namely to provide assistance to owners of community living areas, if requested to do so, in relation to negotiating dealings in the relevant land at the Land Council's expense. It is intended that this include providing or arranging for legal or administrative assistance. Part 3 of the Stronger Futures in the Northern Territory Act provides for a regulation-making power that will enable the modification of Northern Territory legislation in relation to a community living area, to facilitate the granting of individual rights or interests and promote economic development.

This additional function of the Land Councils will ensure that owners of community living areas are able to use Land Council resources to assist with dealings in land, including those that have been enabled by Part 3 of the Stronger Futures in the Northern Territory Act or by Northern Territory legislative reform. This will ensure that the owners of community living areas are able to access similar support and assistance to traditional owners of Aboriginal land under the Land Rights Act.

Explanation of the changes

Item 1 inserts a new definition of *community living area* into section 3 of the Land Rights Act. This ensures that the definition of community living area is consistent under both the Land Rights Act and the Stronger Futures in the Northern Territory Act.

Item 2 repeals the existing definition of community living area in subsection 20CA(5) of the Land Rights Act, substituting it with the new definition inserted by item 1.

Item 3 repeals Part IIB of the Land Rights Act, which pertains to certain rights vested in the Government or Government authorities, in relation to buildings or infrastructure constructed with the assistance of government funding. Part IIB was added to the Land Rights Act by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* as part of the Northern Territory National Emergency Response legislation package enacted in 2007. No rights or interests have been vested in government or government authorities under Part IIB.

Item 4 inserts paragraph 23(1)(eb) into the Land Rights Act, which provides that, if a request is made by a community living area owner, Land Councils have the function of giving assistance, including legal, other administrative and support assistance, to the owner of a community living area, which is situated in the area of that Land Council, in relation to dealings in the land. This may include the negotiation of leases and the granting of other interests in the land. This provision is to help community living area landowners to take advantage of any future opportunities arising in relation to home ownership and economic development on their land. The Land Council is obliged to provide assistance at its own expense once a relevant community living area landowner has requested that assistance. Land Councils receive administrative funding from the Aboriginals Benefit Account established under the Land Rights Act.

Item 5 repeals paragraphs 23(1)(fb), (fc) and (fd) of the Land Rights Act. These paragraphs oblige the Land Council to represent Land Trusts or other land owners in negotiations for agreed payments for leases granted under section 31 for the purposes of subsection 62(1G) of the NTNER Act. Subject to subitem 10(2), these provisions have no further effect on commencement of this Bill.

Item 6 repeals subsection 33B(1) of the Land Rights Act, which covers the fees that a Land Council may charge in relation to carrying out its functions under paragraphs 23(1)(fb), (fc) and (fd) of the Land Rights Act (to be repealed on commencement of this Bill).

Item 7 is consequential to item 6 and omits from subsection 33B(3) reference to subsection 33B(1).

Item 8 amends, subject to subitem 10(3), subsection 35(4) of the Land Rights Act by omitting from the operation of section 35(4) reference to payments made in relation to section 60 or 62 of the *Northern Territory National Emergency Response Act 2007*. Subsection 35(4) concerns, among other things, the receipt and distribution of payments by the Land Council, in relation to leases and licences that are granted in Aboriginal land.

Item 9 amends paragraph 70(2C)(a) of the Land Rights Act, by repealing the existing paragraph and substituting:

(a) the land (the **relevant land**) the person entered or remained on is part of land (the **leased land**) that is leased under section 19A; and

Subject to subitem 10(4), this removes as a defence for the purposes of subsection 70(1) of the Land Rights Act, land that is leased under section 31 of the NTNER Act.

Item 10 provides certain saving provisions in relation to items 5, 8 and 9 of this Schedule, which have effect if this Bill commences before 17 August 2012 and if leases granted under section 31 of the NTNER Act continue after commencement of this Bill (until no later than 17 August 2012), as determined by the Commonwealth Minister for Indigenous Affairs for the purposes of clause 4. Should the leases continue after commencement, item 10 ensures that payments made under those leases, and the receipt and distribution of those payments, continues. Similarly, item 10 ensures that the defence under paragraph 70(2C)(a) of the Land Rights Act, for the purposes of subsection 70(1) of that Act, continues until the leases cease.

Items 11 and 12 provide for the repeal of paragraph 70(8)(e) of the Land Rights Act because of the repeal of Part IIB of the Land Rights Act.

Items 13, 14 and 15 repeal subsection 70E(17) of the Land Rights Act. For roads to which subsection 70E(1) of the Land Rights Act applies, this removes the Commonwealth Minister for Indigenous Affairs' power to impose, by written determination, temporary restrictions on the entry or remaining on a road covered by a lease granted under section 31 of the NTNER Act for the purpose of protecting public health or safety.

Items 16, 17 and 18 repeal subsection 70F(14) of the Land Rights Act. For common areas to which subsection 70F(1) of the Land rights Act applies, this removes the Commonwealth Minister for Indigenous Affairs' power to impose, by written determination, temporary restrictions on the entry or remaining on a common area covered by a lease granted under section 31 of the NTNER Act for the purpose of protecting public health or safety.

Items 19 and 20 repeal paragraph 71(3)(e) of the Land Rights Act because of the repeal of Part IIB of the Land Rights Act.

Item 21 repeals subsection 76(1A) of the Land Rights Act because of the repeal of Part IIB of the Land Rights Act.

Schedule 3 – Amendment of the *Classification (Publications, Films and Computer Games) Act 1995*

Summary

Schedule 3 makes amendments to the *Classification (Publications Films and Computer Games) Act 1995* (Classification Act) to add a sunset and review date to the provisions in Part 10 of that Act and to make certain other minor amendments.

The purpose of Part 10 of the Classification Act is to allow special measures to be taken to protect children living in Aboriginal communities in the Northern Territory from being exposed to material that is, or would likely be, Refused Classification or classified X18+. The restrictions on prohibited material imposed through the Classifications Act will continue in prohibited material areas. A prohibited material area is an area that has been declared as such by the Commonwealth Minister for Indigenous Affairs in a legislative instrument. Part 10 will sunset after 10 years and will be subject to independent review after seven years of its operation.

The Government considers this measure to be a special measure within the meaning of subsection 8(1) of the *Racial Discrimination Act 1975* (Racial Discrimination Act). The amendments are being enacted to address specific Aboriginal disadvantage and help Aboriginal people to enjoy their human rights equally with others in the Australian community. The object of Part 10 of the Classification Act, provided at section 98A, reflects this intention. The Bill is intended to operate, and to be construed, consistently with the Racial Discrimination Act.

Background

The Classification Act ban on prohibited material, introduced in 2007, was aimed at reducing the risk of children being exposed to sexually explicit and very violent material, as well as the potential risk of child abuse and problem sexualised behaviour. The provisions prohibit the possession and supply of sexually explicit or very violent material distributed as publications, films or computer games. Communities can move to have the prohibitions lifted.

The prohibited material measure was discussed during the 2011 Stronger Futures in the Northern Territory consultations. Communities expressed the view that the restrictions should continue.

Part 10 of the Classification Act will apply to prohibited material areas that are determined by the Commonwealth Minister for Indigenous Affairs. The measure continues as a special measure for the purposes of the Racial Discrimination Act.

Part 10 of the Classification Act will be subject to an independent review after seven years in operation and will sunset after 10 years of operation. The Commonwealth Minister for Indigenous Affairs can, at any time before the sunset of the Part, determine that some or all of the Part will cease to have effect.

Explanation of the changes

Item 1 changes the title of Part 10 of the Classification Act from ‘Material Prohibited in Prescribed Areas’ to ‘Material prohibited in certain areas in the Northern Territory’ to reflect the new name for areas in which the Part is to apply.

Item 2 repeals the definition of *prescribed area*, which currently draws on the definition in the NTNER Act.

Item 3 inserts a new definition into section 99 of the Classification Act of *prohibited material area*. Prohibited material area is defined as an area in the Northern Territory in relation to which a determination under subsection 100A(1) of the Classification Act has been made by the Commonwealth Minister for Indigenous Affairs.

Item 4 repeals the current sections 100A and 100B of the Classification Act and inserts a new section 100A – Prohibited material areas.

The new subsection 100A(1) provides that the Commonwealth Minister for Indigenous Affairs, may, by legislative instrument, determine that an area is a prohibited material area. If the Commonwealth Minister for Indigenous Affairs determines an area to be a prohibited material area, then the prohibited material restrictions would apply to that area.

Subsection 100A(2) provides that the Commonwealth Minister for Indigenous Affairs may, by legislative instrument, revoke or vary a determination of an area being a prohibited material area.

Paragraphs 100A(3)(a) and (b) provide that the Commonwealth Minister for Indigenous Affairs may make a determination regarding prohibited material areas on his or her own initiative or after a request from a person who is ordinarily a resident in an area to which the determination relates.

Subsection 100A(4) provides that the Commonwealth Minister for Indigenous Affairs must ensure community consultation takes place in relation to a determination being made under subsection 100A(1) or 100A(2). Prior to making a determination, the Commonwealth Minister for Indigenous Affairs must ensure that community consultation takes place. Subsection 100A(4) lists what must occur during community consultation; including the provision of information setting out the proposal and the consequences of making a determination and providing a reasonable opportunity to people in the community to make submissions to the Commonwealth Minister for Indigenous Affairs about the proposal to make a determination, the consequences of making a determination and the circumstances and views of those affected by a proposal.

Subsection 100A(5) provides that a failure to consult in relation to subsection 100A(4) does not affect the validity of a determination by the Commonwealth Minister for Indigenous Affairs either to determine an area to be a prohibited material area or to vary or revoke such a determination.

Subsection 100A(6) provides that, in making a determination under subsection 100A(1) or 100A(2), the Commonwealth Minister for Indigenous Affairs must have regard to:

- the object of Part 10;
- the wellbeing of people living in the area, whether people in the area are victims of violence or sexual abuse and whether people have expressed concerns about being at risk of violence or sexual abuse;
- whether children living in the area have been exposed to prohibited material;
- the extent to which people in the area have expressed the view that their wellbeing would be improved if this Part continues to apply, and submissions made in relation to paragraph 100A(4)(b);
- the views of relevant law enforcement authorities; and
- any other matters the Commonwealth Minister for Indigenous Affairs considers relevant.

Subsection 100A(7) provides that, if the Commonwealth Minister for Indigenous Affairs makes a determination under 100A(1) to determine that an area is a prohibited material area, and then revokes or varies that determination, Part 10 will continue to apply in relation to things done or omitted to be done before the revocation or variation took effect.

Item 5 provides that the references in section 100C to sections 100A and 100B are removed and replaced with a reference to the new section 100A.

Item 6 changes the heading of section 101 of the Classification Act to 'Possession or control of level 1 prohibited material in prohibited material areas' to reflect the new name for areas in which the Part is to apply.

Item 7 replaces the term 'prescribed area' with 'prohibited material area' in paragraph 101(c).

Item 8 changes the heading of section 102 of the Classification Act to 'Possession or control of level 2 prohibited material in prohibited material areas' to reflect the new name for areas in which the Part is to apply.

Item 9 replaces the term 'prescribed area' with 'prohibited material area' in paragraph 102(c).

Item 10 changes the heading of section 103 of the Classification Act to 'Supplying prohibited material in and to prohibited material areas' to reflect the new name for areas in which the Part is to apply.

Item 11 replaces the term 'prescribed area' with 'prohibited material area' in paragraphs 103(1)(b) and (2)(b).

Item 12 replaces the term 'prescribed area' with 'prohibited material area' in subsection 103(3).

Item 13 replaces the term 'prescribed area' with 'prohibited material area' in paragraph 106(a).

Item 14 repeals the current sections 114 and 115 of the Classification Act and substitutes new sections 114, 115 and 116.

New section 114 provides that the Commonwealth Minister for Indigenous Affairs must cause an independent review of the first seven years of the operation of Part 10, with a report provided before the end of eight years after commencement of this Part. The review must assess the effectiveness of the special measures in Part 10 and consider any other matter specified by the Commonwealth Minister for Indigenous Affairs. The Commonwealth Minister for Indigenous Affairs must table a copy of the review report in both Houses of the Parliament within 15 sitting days of it being received.

New section 115(1) provides that the Commonwealth Minister for Indigenous Affairs may, by legislative instrument, determine that some or all of Part 10 ceases to have effect. Subsection 115(2) provides for the Commonwealth Minister for Indigenous Affairs to revoke, by legislative instrument, a determination under subsection 115(1). Prior to making a determination, the Commonwealth Minister for Indigenous Affairs must ensure that community consultation takes place. Subsection 115(3) lists what must occur during community consultation, including: providing information setting out the proposal and consequences of making the determination; and providing a reasonable opportunity to people living in the area to make submissions to the Commonwealth Minister for Indigenous Affairs about the proposal to make the determination, the consequences of making the determination; and the circumstances and views of those affected by the proposal.

New subsection 115(4) provides that failure to consult does not affect the validity of a determination by the Commonwealth Minister for Indigenous Affairs either to determine an area to be a prohibited material area or to revoke such a determination.

New subsection 115(5) requires that, before making a determination under subsection 115(1) or 115(2), the Commonwealth Minister for Indigenous Affairs must have regard to:

- the object of Part 10;
- the wellbeing of people living in the area, whether people in the area are victims of violence or sexual abuse and whether people have expressed concerns about being at risk of violence or sexual abuse;
- whether children living in the area have been exposed to prohibited material;
- the extent to which people in the area have expressed the view that their wellbeing would be improved if this Part continues to apply, and submissions made in relation to paragraph 115(3)(b);
- the views of relevant law enforcement authorities; and
- any other matters the Commonwealth Minister for Indigenous Affairs considers relevant.

New subsection 115(6) provides that, if the Commonwealth Minister for Indigenous Affairs makes a determination under 115(1), then Part 10 continues to apply after the determination takes effect, in relation to things done or omitted to be done before the determination takes effect.

New section 116 is a sunset provision. Part 10 will cease to have effect 10 years after the Stronger Futures in the Northern Territory Act receives Royal Assent.

Item 15 provides that any areas declared as prescribed areas under the NTNER Act immediately before its repeal, or determined under the Classification Act to be subject to prohibited material restrictions immediately before commencement, will, on commencement, be taken to be a prohibited material area for the purposes of new subsection 100A(1) of the Classification Act. A determination referred to in **subitem 15(1)** can be revoked or varied under the new subsection 100A(2) of the Classification Act.

Item 16 provides that amendments made by Schedule 3 apply to acts or omissions done or made on or after commencement in relation to material that was classified before, on or after commencement.

Schedule 4 – Amendment of the *Crimes Act 1914*

Summary

Schedule 4 amends the *Crimes Act 1914* to continue measures currently in place under the NTNER Act, which will be repealed, that relate to bail and sentencing decisions for offences against Northern Territory law. The amendments enable customary law and cultural practice to be considered in bail and sentencing decisions for offences against Commonwealth and Northern Territory laws that protect cultural heritage, including sacred sites or cultural heritage objects

Background

Under the Crimes Act, customary law and cultural practice must not be taken into account in bail and sentencing decisions for offences against Commonwealth laws. Sections 90 and 91 NTNER Act provide cultural law and customary practice cannot be taken into account for offences against Northern Territory laws. This requirement ensures that customary law and cultural practice cannot be taken into account as a mitigating factor in bail and sentencing decisions. In particular, this requirement is intended to prevent customary law and cultural practice being used to mitigate the seriousness of any offence that involves violence against women and children. This gives effect to the Council of Australian Governments' agreement of 14 July 2006 that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse.

Section 90 of the NTNER Act also sets out requirements to ensure that the potential implications of granting bail for witnesses and victims are considered. Schedule 4 will provide for the continued operation of the requirements under sections 90 and 91 of the NTNER Act after that Act is repealed, by extending the operation of the relevant sections of the Crimes Act to Northern Territory offences.

The requirement that courts and other bail authorities must not consider customary law or cultural practice has had unintended adverse consequences for offences that protect cultural heritage, including sacred sites, and cultural heritage objects. One of the reasons that these types of offence apply is the significance of a place or object under customary law or for cultural reasons. As a result, otherwise relatively minor criminal behaviour, such as entering a particular site, is more serious by virtue of the significance of that site according to customary law or cultural practice.

This issue was highlighted by the Northern Territory Supreme Court's decision in *Aboriginal Areas Protection Authority v S & R Building and Construction Pty Ltd* [2011] NTSC 16 (10 January 2011). The facts of the case involved a building company (the defendant) constructing a pit toilet on a sacred site. The defendant was charged under section 34(1) of the Northern Territory's *Northern Territory Aboriginal Sacred Sites Act* with carrying out unauthorised work on an Aboriginal sacred site. The defendant pleaded guilty to the offence and was fined \$500 by the sentencing magistrate. The custodians of the site appealed against the decision to the Northern Territory Supreme Court on the grounds that the sentence was manifestly inadequate. In considering the question of whether the magistrate had failed to take into account Aboriginal law and cultural practice when determining the extent of the damage caused by construction on the site, Justice Southwood noted that customary law could not be taken into account, due to the requirement under section 91 of the NTNER Act that customary law and cultural practice not be considered in sentencing. Ultimately, the judge found that the \$500 fine imposed by the sentencing magistrate was not manifestly unjust.

Schedule 4 will address these unintended adverse consequences by enabling customary law and cultural practice to be considered for certain offences.

Explanation of the changes

Item 1 inserts a definition of the term ***cultural heritage***. New subsection 3(1) defines cultural heritage to have the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999* and includes sacred sites. Cultural heritage is defined under the *Environment Protection and Biodiversity Conservation Act 1999* to take the same definition as that in the *Convention Concerning the Protection of the World Cultural and Natural Heritage 1972*. Under Article 2 of the Convention, the following is considered to be cultural heritage:

- natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
- geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; and
- natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The definition to be inserted by item 1 will apply to the regulation-making powers that will be inserted by the Bill. These powers will enable customary law and cultural practice to be considered in bail and sentencing decisions that relate to additional offences prescribed by regulation. In order to be prescribed by regulation, the offence must relate either to entering, remaining on or damaging cultural heritage, or to damaging or removing a cultural heritage object. Item 2 will insert a definition of the term cultural heritage object.

Item 2 inserts a definition of the term ***cultural heritage object***. New subsection 3(1) defines a cultural heritage object to mean an object that is important for cultural, religious, ethnological, archaeological, historical, literary, artistic, scientific or technological reasons. The definition to be inserted by item 2 will apply to the regulation-making powers that will be inserted by the Bill. These powers will enable customary law and cultural practice to be considered in bail and sentencing decisions that relate to additional offences prescribed by regulation. In order to be prescribed by regulation, the offence must relate either to entering, remaining on or damaging cultural heritage, or to damaging or removing a cultural heritage object. Item 1 will insert a definition of cultural heritage.

Item 3 amends subsection 15AB(1) of the Crimes Act by inserting the words 'Northern Territory'. Currently, subsection 15AB(1) of the Crimes Act only applies to Commonwealth offences. The amendment will result in the subsection applying to both Northern Territory and Commonwealth offences. Under item 3, the matters to be considered by bail authorities for Northern Territory offences will be those set out in section 15AB of the Crimes Act. These matters are the same as those currently under section 90 of the NTNER Act.

In particular, bail authorities applying Northern Territory laws will still need to:

- consider the potential impact of granting bail on victims and potential witnesses;
- consider whether or not a person is living in or located in a remote community; and
- not consider customary law and cultural practice.

Item 4 inserts new subsection 15AB(3A) after subsection 15AB(3). Subsection 15AB(3A) will provide that the prohibition on considering customary law and cultural practice in bail decisions under paragraph 15AB(1)(b) of the Crimes Act does not apply to particular Commonwealth and Northern Territory offences. Under paragraph 15AB(1)(b) of the Crimes Act, bail authorities must not take customary law or cultural practice into account in determining whether to grant bail and in determining bail conditions. New subsection 15AB(3A) creates a series of exceptions to this prohibition, and provides that bail authorities can take customary law and cultural practice into account in bail decisions for offences against the following Commonwealth and Northern Territory laws:

- section 22 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;
- sections 15A, 15C, 17B, 22A, 27A, 74AA, 142A, 142B, 207B, 354A, 355A and 470 of the *Environment Protection and Biodiversity Conservation Act 1999*;
- section 48 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*;
- sections 69 and 70 of the Land Rights Act;
- section 30 of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*;
- sections 33, 34 and 35 of the *Northern Territory Aboriginal Sacred Sites Act* of the Northern Territory;
- paragraph 33(a) of the Heritage Conservation Act of the Northern Territory;
- section 4 of the Aboriginal Land Act of the Northern Territory; and
- sections 111, 112 and 113 of the Heritage Act of the Northern Territory.

Each section referred to contains an offence or offences where all parts of the criminal behaviour could involve entering, remaining on or damaging cultural heritage and/or damaging or removing cultural heritage objects.

New subsection 15AB(3A) will enable bail authorities to take customary law and cultural practice into account for offences against the laws specified, in considering the seriousness of an alleged offender's criminal behaviour when determining whether to grant bail or the conditions on which bail should be granted. The current prohibition on considering customary law in bail decisions will continue to apply for offences against other Commonwealth and Northern Territory laws, including those relating to violence against women and children.

Paragraph 15AB(3A)(j) will create a regulation-making power to enable additional laws to be prescribed by regulation. This will enable customary law and cultural practice to be considered in bail decisions for offences against additional laws that are prescribed by regulation. In order to be prescribed, the law must relate to entering, remaining on or damaging cultural heritage or damaging or removing a cultural heritage object.

The purpose of the regulation-making power is to enable further offences to be prescribed at a later date, for example, if new Commonwealth or Territory laws are made. Definitions of cultural heritage and cultural heritage object will be inserted by items 1 and 2 respectively.

Item 5 is consequential to the insertion of new subsection 15AB(3A) by item 4, and amends subsection 15AB(4) to refer also to new subsection 15AB(3A). Subsection 15AB(4) provides that section 15AB does not otherwise affect any other matters that a bail authority must, must not or may take into account when determining whether to grant bail and subject to what conditions. This means that, except where subsection 15AB(1) or (2) provides to the contrary, the matters that a bail authority must consider, such as the requirements under section 24 of the Northern Territory's Bail Act, are not affected. The effect of the amendment of subsection 15AB by item 5 will be that the matters a bail authority must, must not, or may take into account will not be affected, except to the extent that new subsection 15AB(3A) requires that customary law and cultural practice be considered in relation to certain offences.

Item 6 repeals the current heading of section 16A of the Crimes Act and replaces it with a new heading. The current heading of section 16A of the Crimes Act is not jurisdiction-specific, as currently the section only applies to the Commonwealth. The amendment will make the heading specific to federal offences. This differentiates the section from new section 16AA, inserted by item 8, which contains similar provisions in relation to Northern Territory offences.

Item 7 inserts new subsection 16A(2AA). Subsection 16A(2AA) will provide that the prohibition on considering customary law and cultural practice by courts in sentencing under subsection 16A(2A) of the Crimes Act does not apply to certain offences under Commonwealth law. Under subsection 16A(2) of the Crimes Act, a court must not consider customary law or cultural practice when determining the sentence to be passed or order to be made. Subsection 16A(2AA) will create a series of exceptions to this prohibition. The new subsection will provide that customary law and cultural practice can be taken into account when determining the sentence to be passed or order to be made, in relation to offences against the following Commonwealth laws:

- section 22 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;
- sections 15A, 15C, 17B, 22A, 27A, 74AA, 142A, 142B, 207B, 354A, 355A and 470 of the *Environment Protection and Biodiversity Conservation Act 1999*;
- section 48 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*;
- sections 69 and 70 of the Land Rights Act ; and
- section 30 of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*.

Item 4 of this Schedule provides that customary law and cultural practice can be considered in bail decisions in relation to offences against the same Commonwealth laws. Item 8 of this Schedule inserts a new section providing that customary law and cultural practice can be taken into account when determining the sentence to be passed or the order to be made in relation to certain offences against Northern Territory laws.

New section 16A(2AA) will enable courts to take customary law and cultural practice into account when considering the seriousness of an offender's criminal behaviour where the offence is one related to cultural heritage or cultural heritage objects. The current requirement that courts must not consider customary law and cultural practice in sentencing for other offences, including those relating to violence against women and children would continue to apply.

Paragraph 16A(2AA)(f) will create a regulation-making power to enable an additional law to be prescribed by regulation, where that law relates to entering, remaining on or damaging cultural heritage, or damaging or removing a cultural heritage object. This will enable customary law and cultural practice to be considered in sentencing for offences against additional Commonwealth laws that are prescribed by regulation.

The purpose of the regulation-making power is to enable further offences to be prescribed at a later date, for example if new Commonwealth or Territory laws are made.

Definitions of cultural heritage and cultural heritage object will be inserted by items 1 and 2 respectively.

Item 8 inserts new section 16AA and sets out the matters to which a court must have regard in determining the sentence to be passed or order to be made for offences against a law of the Northern Territory. New subsection 16AA(1) is the same as section 91 of the NTNER Act, repealed by **item 1**, in Part 1 of Schedule 1 to this Bill. The new subsection provides that a court must not taken into account any form of customary law or cultural practice as a reason for:

- excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- aggravating the seriousness of the criminal behaviour to which the offence relates.

In this way, the requirement that courts must not consider customary law and cultural practice in sentencing for other types of offences, including those relating to violence against women and children would continue to apply.

Subsection 16AA(2) provides that the requirement not to consider customary law and cultural practice does not apply to offences against the laws specified in that subsection. The effect of the subsection is that courts can take customary law and cultural practice into account in sentencing decisions for the following offences against Northern Territory laws:

- sections 33, 34 and 35 of the Northern Territory Aboriginal Sacred Sites Act;
- paragraph 33(a) of the Heritage Conservation Act;
- section 4 of the Aboriginal Land Act; and
- sections 111, 112 and 113 of the Heritage Act.

These exceptions are the same as those provided for in relation to bail decisions as a result of the amendments to be inserted by item 4.

Paragraph 16AA(2)(e) will create a regulation-making power to enable additional laws to be prescribed by regulation, where that law relates to entering, remaining on or damaging cultural heritage or damaging or removing a cultural heritage object. This will enable customary law and cultural practice to be considered by courts in determining the sentence to be passed or order to be made for offences against additional Northern Territory laws that are prescribed by regulation. The purpose of the regulation-making power is to enable further offences to be prescribed at a later date, for example if new Commonwealth or Territory laws are made.

Item 8 sets how the amendments to the Crimes Act in Schedule 4 will apply. The amendments made by items 3, 4 and 5 of Schedule 4 will apply to bail proceedings that are initiated on or after commencement of this Bill, provided the proceeding is not an appeal against a decision of a bail authority that was made before commencement.

The amendments made by items 7 and 8 of this Schedule will apply to sentencing proceedings that are initiated on or after commencement, provided the proceeding is not an appeal against a sentence that was imposed before commencement.

Item 9 sets how the amendments to the Crimes Act in Schedule 4 will apply. The amendments made by items 3, 4 and 5 of Schedule 4 will apply to bail proceedings that are initiated on or after commencement of this Bill, provided the proceeding is not an appeal against a decision of a bail authority that was made before commencement. The amendments made by items 7 and 8 of this Schedule will apply to sentencing proceedings that are initiated on or after commencement, provided the proceeding is not an appeal against a sentence that was imposed before commencement.

Schedule 5 – Amendment of other Acts

Summary

Schedule 5 provides for an amendment to the *Social Security (Administration Act) 1999* so that references to the NTNER Act, in relation to income management, are removed.

Background

As the NTNER Act is being repealed, references to the NTNER Act need to be removed. The references were to community stores, which will now be required to be licensed if they are deemed by the Secretary to be an 'important source of food, drink or grocery items'.

Explanation of the changes

Items 1 and 2 repeal certain notes in relation to provisions in Part 3B (income management regime) of the *Social Security (Administration) Act 1999*, which contain references to the NTNER Act.