

**Senate Community Affairs Committee**

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

**Q. Why is the operation of section 49 of the *Northern Territory (Self-Government) Act 1978* to be excluded by proposed clause 14 of Schedule 2 to the *Broadcasting Services Act 1992* (item 10 of Schedule 1 to the Bill refers).**

Proposed clause 14 of Schedule 2 to the *Broadcasting Services Act 1992* would exclude the operation of section 49 of the *Northern Territory (Self-Government) Act 1978* (the Self-Government Act) in relation to the operation of proposed clause 12 of Schedule 2 (and related provisions).

Section 49 of the Self-Government Act guarantees free trade, commerce and intercourse between the Northern Territory and the States. It is a legislated version of section 92 of the Commonwealth Constitution which guarantees free trade, commerce and intercourse among the States.

Proposed clause 14 is substantially the same as the previously enacted section 131 of the *Northern Territory National Emergency Response Act 2007*, and section 3 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*. Both section 131 and section 3 exclude section 49 of the Self Government Act from the operation of entirety of those two Acts.

In the context of the bill's proposed amendments to the *Broadcasting Services Act*, clause 12 of Schedule 2 contains the licence condition that would prohibit the supply of subscription television narrowcasting services declared by the Communications Minister to prescribed areas as determined by the Indigenous Affairs Minister.

Clause 12 of Schedule 2 (and related provisions) enables a restraint to be imposed on trade between subscribers located in the Northern Territory and the subscription television company located interstate.

Consistent with the exclusion provisions in the other Northern Territory Emergency Response laws, the exclusion of section 49 of the Self-Government Act proposed by this bill is designed to avoid any potential difficulties presented by the Self-Government Act to the implementation of this element of the Northern Territory Emergency Response.

In the absence of proposed clause 14, proposed clause 12 (and the related provisions) may be vulnerable to challenge on the basis that it infringes section 49 of the Self-Government Act.

**Q. Clarify the distinction between 'channel' and 'service' with regard to the 35% provision and with reference to page 3 of the Explanatory Memorandum**

The provisions in the Bill apply to individual subscription television narrowcasting services. Section 17 of the *Broadcasting Services Act 1992* (BSA) provides that subscription narrowcasting services are broadcasting services whose reception is limited and only available on payment of a subscription fee. Subscription television narrowcasting services may be considered limited because they are, for example, targeted at special interest groups or provide programs of limited appeal.

The 35% of broadcast hours threshold proposed in new subclause 12(10) of the BSA set for determining which subscription television narrowcasting services should be declared by the Communications Minister applies to broadcast hours of individual subscription television narrowcasting services, not the total number of broadcast hours produced by all of Austar's subscription services. In other words, each individual subscription television narrowcasting service is considered separately. Each service can be separately declared if each reaches the 35% R18+ content threshold.

Austar offers subscribers monthly or session based access to two discrete programming streams (or channels) of Adult erotic entertainment which are collectively marketed as 'Adults Only'. This service is identical content-wise to that offered by Foxtel. The Australian Broadcasting Authority (now the Australian Communications and Media Authority) has previously determined that Foxtel's two 'Adults Only' channels represent two subscription television narrowcasting services.

'World Movies' is an example of an Austar subscription television narrowcasting service that is delivered on a single channel.

The level of 35% was agreed on following industry consultation (with the Australian Subscription Television and Radio Association and Austar) to determine an appropriate level to ensure the R18+ measure captures services that consist almost entirely of R18+ content. Since each Austar 'Adults Only' service currently exceeds the 35% threshold set out in proposed clause 12 of Schedule 2 to the Bill, they would each potentially be subject to the licence condition.

Austar has advised that a percentage less than 35% may capture its 'Box Office' service, which is designed to make available movies that have been successful at the cinema or are likely to be of interest to a large section of its customer base. Austar has also advised that the 'Box Office' service may from time to time screen a new release movie with an R18+ classification. Because the Box Office service often repeats movies to suit viewer demands, it is possible that the 35% threshold may be approached. The R18+ measure is not designed to capture this type of service.

**Q. What would be the cost of implementing the R18+ measure?**

It is not possible to provide information on the likely cost of this measure to Austar and ACMA, which in accordance with its role as the broadcasting regulator, will be responsible for monitoring compliance with the licence condition and record-keeping obligations. New subclause 12(15) of the BSA provides that ACMA may also be required to provide the Communications Minister with any information he requires to make a declaration under new subclause 12(4) of the BSA proposed legislation.

Austar has advised that it would need to make technological changes to its customer care and conditional access systems in order to stop the broadcast of affected services (i.e. system design, software development, implementation and testing). It has indicated that the cost is likely to be significant and will be directly influenced by the scope of the ban.

In its submission to the Committee, Austar also expressed concern about the cost of the record-keeping requirement contained in the measure as neither it nor the subscription television narrowcasting services it carries currently keep detailed records of the air-time for incidental material shown within and at the start and end of programs.

Austar has advised that, as the Bill is currently drafted, in order to respond to an inquiry from ACMA about the level of R18+ content on its services, it will be required to keep detailed records of programming and incidental material broadcast on all its narrowcast services, such as 'World Movies' and 'Box Office' that may occasionally show R18+ programs, and its 'Adults Only' services. It has suggested that this is likely to be unduly onerous and such narrowcast services are likely to pass on the increased cost burden to Austar.