

20 July 2012

The Secretary
Senate Community Affairs Committee
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Dear Secretary,

**RE: SUBMISSION TO THE INQUIRY INTO THE LOW AROMATIC FUEL (LAF) BILL
2012 ("the Bill")**

We are pleased to comment on the *Low Aromatic Fuel Bill 2012* introduced by Senator Rachel Siewart.

As you may be aware, Jumbunna Indigenous House of Learning, University of Technology Sydney ("Jumbunna") is an Indigenous research unit which undertakes research and advocacy on Indigenous legal and policy issues of importance to Indigenous people, their families and their communities. Our current projects explore, inter alia, issues related to Indigenous people's contact with the criminal justice and legal system. Throughout this work, Jumbunna researchers have observed first-hand the severely damaging effects of petrol sniffing within Aboriginal and Torres Strait Islander communities, in particular on the young.

Jumbunna recognises the comprehensive research and on-the-ground evidence that shows the damage that can be caused as a result of the availability of fuel in Aboriginal communities and we believes that the Commonwealth has an obligation to address these issues through the implementation of Commonwealth legislation to regulate the supply and transport of such fuel.

Background to the current inquiry

Evidence shows that since the Government subsidised roll out of Opal began in 2005, there has been a 70% reduction in petrol sniffing, and in areas where the roll-out of Opal has been more thorough, a reduction of up to 94% has occurred.¹ Proximity to supplies of regular unleaded petrol has proven to be a key factor that influences sniffing rates in communities.²

We note that the Western Australian and Northern Territory Governments,³ along with community stakeholders and organisations including CAYLUS and Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council have indicated their support for the Bill and have called upon the Federal Government to address the issue. Of particular importance is the need to respond to the cross-border nature of the petrol supply and sniffing problem.

¹ Peter d'Abbs and Gillian Shaw 2008, *Executive summary of the Evaluation of the Impact of Opal Fuel*,

([http://www.health.gov.au/internet/stoppetrolsniffing/publishing.nsf/Content/U708AC851B8897457CA2579A40006F5C0/\\$File/opalimp.pdf](http://www.health.gov.au/internet/stoppetrolsniffing/publishing.nsf/Content/U708AC851B8897457CA2579A40006F5C0/$File/opalimp.pdf))

² Access Economics Pty Limited, *Optional Cost Benefit Analysis: Report by Access Economics Pty Limited for the Opal Alliance*, 23 February 2006, http://waru.org/organisations/npwyc/Opal%20Report%20FINAL%2005_02_23.pdf.

³ Debbie Guest, 'State looks to federal solution to cut petrol-sniffing', The Australian (Online),

<<http://www.theaustralian.com.au/news/nation/state-looks-to-federal-solution-to-cut-petrol-sniffing/story-e6frg6nf-1225904664772>

Notwithstanding the success that has been shown in the use of non-aromatic fuel to combat petrol sniffing, in February this year, the Federal Department of Health and Ageing advised a Senate Committee that eight fuel outlets across the Northern Territory, South Australia and Queensland were “persistently refusing” to supply Opal fuel.⁴ It is reported that these refusals have been linked to ongoing sniffing in some communities.⁵

Whilst disappointing, such a situation was contemplated in 2009 when the Senate Standing Committee on Community Affairs Inquiry into Petrol Sniffing and Substance Abuse in Central Australia recommended that if all relevant petrol outlets in the Petrol Sniffing Strategy Zone had not voluntarily adopted Opal within 6 months, legislation should be drafted to make the sale of Opal mandatory.⁶ Notwithstanding the delay that it has taken, we support the introduction of Commonwealth legislation to do so.

In our view, there can be no justification to failing to act. There is no question as to the either the damage that is caused to communities from petrol sniffing, or the effectiveness in alleviating this damage through the stocking of non-aromatic fuel. The central question for consideration is; whether or not the Federal Government considers the voices of the few private interests of the venders to be weightier than those of the more than 80 Aboriginal communities who are benefiting from the Opal roll out across the region?⁷

It is baffling that the Government might prioritise the interest of a few individual traders over the interest of Aboriginal communities, particularly when the protection of families, communities and children has been the basis advanced by the Government for the far more punitive measures in the Northern Territory Intervention and Stronger Future measures. And unlike the Stronger Futures example, in this case there is not only a compelling and clear evidence-base for the effectiveness of the legislation, but also overwhelming support within affected communities for the measure. To fail to act is to put lie to the oft-claimed priority of the health and safety of Aboriginal communities, families and youth.

Concerns about a ‘legal minefield’

There is some suggestion by Government ministers that there are ‘legal minefields’ in the introduction of the legislation.⁸ With respect, we do not believe there are any legal impediments to the enactment of such a scheme. It is disappointing that Mr Snowdon did not elaborate on what he believed were the general problems in enacting the regulating scheme, however, noting Mr Snowdon’s statement that “*the states and territories have the power to make the distribution of non-aromatic Opal fuel compulsory in areas where young people are petrol sniffing*”, we presume he is concerned about issues of the Commonwealth Government’s power to enact such laws. In our view there is already abundant material supporting the Government’s capacity to so act.

We note that the legislative options available to the Parliament are outlined in the report provided to the Committee in January 2010 titled *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia: Final Report (“the Analysis”)*. The Analysis was authored by the South Australian Centre for Economic Studies and commissioned by the Commonwealth Department of Health and Ageing and sets out (from page 11) the various available heads of power under which the Commonwealth might enact the regulatory framework. In addition, in October 2008, Gilbert and Tobin Centre for Public Law provided to the Committee a submission which confirmed, in their view, the viability of

4 Evidence to Community Affairs Legislation Committee, 17 February 2012, page 58 (Julia Mansour, Acting Assistant Secretary, Substance Misuse and Indigenous Wellbeing Programs Branch).

5 Mandating the use of Opal Fuel Feb 2012. Central Australian Youth Link-Up Service, Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women’s Council and The Mt Theo Program Feb 2012, Unpublished Discussion Paper

6 Standing Committee on Community Affairs, Australian Senate, *Grasping the opportunity of Opal: Assessing the impact of the Petrol Sniffing*, (2009), page 50.

7 Community Affairs References Committee, Australian Senate, *Beyond Petrol Sniffing: Renewing Hope for Indigenous Communities*, (2006), page 97.

8 Emma Masters, ‘Forced Sales of Opal fuel a ‘legal minefield’’, ABC News (Online), 15 May 2012, <http://www.abc.net.au/news/2012-05-15/snowdon-on-compulsory-opal-fuel-sales/4012702>>.

some of these heads of power, noting that these legislative sources of power were cumulative, rather than exclusive.

We respectively endorse the conclusions of both the Analysis and Gilbert and Tobin Public Law Centre with respect to the Commonwealths legislative sources of power. In addition, we note the following:

The Corporations Power

We note that the Bill appears to rely heavily, arguably exclusively, upon the Commonwealths power under section 51(xx) of the Constitution, with the effect that it applies only to constitutional corporations. By relying solely upon the Corporations Power, the Act will not capture unincorporated traders who will remain able to supply regular unleaded petrol, a consequence noted in the Analysis from page 12. As a result, under the current legislation it is not possible to be sure that the provision of fuel, even within the nominated areas, will cease.

Whilst the Corporations Power is certainly available to the Commonwealth, we believe the Bill should be amended to increase both its resistance to any challenge for validity, and the breadth of its application, by also drawing upon the following additional available legislative powers.

Referral

Given two of the affected states are on the public record in calling for the Commonwealth to act on this issue, a way forward could be for the Commonwealth to negotiate a referral of powers by affected states and/or for States to enact co-operative legislation.

On one hand, this would be the preferred response, curing any issues with legislative competency on the part of the Commonwealth. It would also acknowledge the importance of the issue and the responsibility of both the Commonwealth and the State in addressing it. Finally, it would be a powerful symbolic gesture, prioritising community and family health before politics.

However, such an approach will only fulfil these aims if it can be done quickly. The negotiation and implementation of a referral can take a long time, influenced as it is by a requirement for compromise between state and federal governments, and the danger of changes in Governments during the negotiation period. In addition, much remains uncertain in relation to referrals, for instance, whether they can be rescinded.

The Territories Power

We endorse the conclusions of previous experts to the effect that the territories power provided by section 122 of the Constitution would authorize Commonwealth legislation that regulated the sale and supply of opal fuel both within the Northern Territory, and within adjoining states where such inter-state regulation has a '*sufficient connexion or nexus with the good government of the Territory*' or '*a rational connexion with the government of the territories*'.⁹

In our view, it is clear that, to a degree, in order for successful regulation of the sale and supply of aromatic fuel, it is necessary to regulate those vendors who are geographically proximate to the borders of the Northern Territory. We acknowledge that there will be a point at which the distance of the vendor from the areas of regulation produces a connection so distant as to make the connection insufficient. However, such a situation will likely be 'captured' by reliance on the alternative heads of power.

⁹ *Minister for Justice of Western Australia (ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission and the Commonwealth* (1976) 138 CLR 492 per Mason J at 526 and Murphy at 531; *Australian Capital Television Pty Ltd v The Commonwealth of Australia* [No. 2] (Matter No. S5 of 1992); *The State of New South Wales v The Commonwealth of Australia* [No. 2] (Matter No. S6 of 1992) (1992) 177 CLR 105).

The Races Power

In our view the legislation is also empowered by section 51 (xxvi) (the “Races Power”), and we note that enactment under that power was considered by the Analysis (page 16). In our view, the legislative scheme would clearly be a law “benefiting the people of any race”, noting that the communities targeted by the regulatory scheme are strongly predominantly Aboriginal.¹⁰

Further, whilst discriminatory, in our view it is likely that the measures would:

1. Be a permissible limitation, in that they are legitimate, necessary and proportionate; and
2. May constitute special measures, particularly when enacted with the ‘free, prior and informed consent’ of the affected communities. It is arguable that the removal of a right cannot be a special measure because it is not positive treatment or affirmative action. In our view this objection can (and should) be addressed by ensuring that the measures are only enacted in those communities which have expressed support for, and a desire for, the measures. Such an approach also accords due respect to the self-determination of Aboriginal communities. With respect to whether such legislation can constitute a benefit, we note:
 - (a) That special measures can extend to laws which have a special nature because of a ‘special threat or problem’¹¹ or because it ‘discriminates in favour of those people by its operation upon the subject matter to which it relates’ (per Brennan J at 325 *Tasmanian Dam Case*). In our view this would be the case in the current scenario; and
 - (b) It is unclear why the Government may believe the measures are not special measures given the Government’s view that the prohibitions on alcohol and pornography under the Intervention are special measures. We do not believe the *Stronger Futures* measures can be considered to be Special Measures, given the lack of evidence for their effectiveness and the lack of proper consultation that was undertaken. Neither of those concerns arise here, particularly if the nominated or regulated areas were to take place in accordance with, and conditionally upon, consultations conducted in accordance with the Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act* (11 November 2009).

The benefit of utilising this approach is that the law would be capable of consistent application throughout the country and in relation to all people and would involve relatively low complexity for traders.

We note the concerns raised in the Analysis at page 17 to the effect that the ‘Use of Race Power to impose restrictions on groups is clearly discriminatory and largely undesirable from a public policy perspective’. With respect:

- (a) The Federal Government has shown no such disinclination in enacting far more significantly punitive legislation in the form of *Stronger Futures*;
- (b) These concerns can be addressed by strengthening the requirements for consultation under the Act. A genuine consultation process with affected communities (and we note the substantial level of support for the measures amongst affected communities)

¹⁰ Deane J in *Commonwealth v Tasmania (Dam Case)* (1983) 158 CLR 1, cited in *The State of Western Australia v Commonwealth of Australia; The Worora Peoples and Anor v The State of Western Australia* (1995) 183 CLR 373, BC9506415 at 64.

¹¹ Stephen J in *Koowarta v Bjelke-Petersen* (1983) 158 CLR 1 at 202, 319 and cited in *Western Australia v The Commonwealth (Native Title Case)* per Mason CJ, Brennan J, Deane J, Toohey J, Gaudron J and McHugh J at 460.

will not only address these concerns generally, but will also bolster the case for such measures constituting special measures.

Conclusion

Whilst we commend the introduction of the Bill, and believe it to be in the interests of Aboriginal communities, we believe amendments should be made to the Bill to enlist the additional heads of power identified above in order to both increase the Bill's effectiveness and strengthen its validity in the case of a legal challenge.

Yours Sincerely,

Professor Larissa Behrendt.

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