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The Acting Secretary
Senate Community Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Crowley

Submission to Inquiry into Petrol Sniffing and Substance Abuse in Central Australia

The Gilbert + Tobin Centre of Public Law (the Centre) is pleased to contribute to the Committee's important ongoing work in relation to petrol sniffing and other substance abuse in Central Australia.

Overview

We recently reviewed submissions to the Committee's current inquiry and saw that leading community-based organisations such as the Central Australian Youth Link Up Service (CAYLUS) and the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPYWC) advocated legislation as a means of pressing home the gains made to date through the roll-out of OPAL fuel. We also saw, in the 2006 report on petrol sniffing, that the Committee itself is interested in a strategic and comprehensive approach to the roll-out of OPAL and in the elimination of barriers to that roll-out.[1] The *Review of the First Phase of the Petrol Sniffing Strategy* prepared for FaHCSIA in June 2008 said: 'It should be noted that there is no Commonwealth, State or Territory legislation in place that allows the Government to mandate Opal'.

[1] Senate Community Affairs References Committee, *Beyond Petrol Sniffing: Renewing Hope for Indigenous Communities* (2006), paragraphs 6.54, 6.56 and 6.58 including Recommendation 18.

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The Centre's submission targets a question where those views overlap: ***is there a constitutional barrier to the enactment of Commonwealth legislation requiring the replacement of standard unleaded fuel with low aromatic fuel (OPAL) in Central Australia?***

In our submission the answer is no.

The Legislative Assembly of the Northern Territory (NT) may lack the power effectively to bind fuel suppliers that operate beyond the borders of the Territory but close enough to be accessed by Territorians who sniff. Neighbouring States may run into similar extra-territorial limitations on their capacity legally to address the supply of standard unleaded fuel in cross-border locations. We note that regional co-operation in the 'tri-state area' is a recognised part of the Petrol Sniffing Strategy and the NPYWC submission to the Committee's Inquiry has appended some legal advice on the use of State and Territory laws in a complementary fashion. This submission focuses on the alternative of using Commonwealth legislation. We submit that ***the Commonwealth has the constitutional capacity to prohibit the stocking of standard unleaded fuel, and thus promote its replacement with OPAL, in areas within or near the Territory.***

The Commonwealth's ability to enact such legislation could draw support from several sources of power under the Constitution. Its authority to legislate for the government of the Territories in section 122 of the Constitution is the most obvious source.

Option 1: The Territories Power

The Commonwealth Parliament has a wide power to make laws for the government of a Territory. On many occasions the High Court (and Privy Council) has called it a 'plenary power'.[2] There is no doubt in our view that a Commonwealth law prohibiting fuel retailers located inside the NT border from supplying standard unleaded fuel would be authorised by section 122.

We are aware, however, that petrol sniffing is a *regional* problem that does not respect State and Territory borders. The supply of standard unleaded fuel from suppliers across the border in Western Australia, South Australia or Queensland can compromise the effectiveness of the OPAL roll-out. ***We submit that the Territories power in section 122 would support a Commonwealth law about the supply of standard unleaded fuel, even if the suppliers are located at significant distances interstate***.

[2] For example *Lamshed v Lake* (1958) 99 CLR 132, 153 (Kitto J); *Attorney-General (Cth) v The Queen* (1957) AC 288, 320 (Privy Council); *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492, 514 (Stephen J) and 526 (Mason J). Chief Justice Barwick said that it is 'as large and universal a power of legislation as can be granted': *Spratt v Hermes* (1965) 114 CLR 226, 242.

The reason we say that is that the High Court has repeatedly confirmed that a Commonwealth law relying on the Territories power can operate effectively inside the boundaries of a State.[3] If there is a conflict between the Commonwealth law and a State law that might otherwise apply to the fuel supplier, the Commonwealth law would prevail.[4]

The key to constitutional validity is a sufficient connection between government of the NT and the operation of a law inside a State such as Western Australia or South Australia.[5] In the immediate context that means demonstrating the following proposition: ***regulating fuel supply in these cross-border locations is practically relevant to the effectiveness of supply restrictions within the Territory***. We believe, on the evidence presented to the Committee and elsewhere, that the necessary practical, geographical connection exists – indeed, it underpins the regional strategy adopted by governments.

The attraction of the Territories power is that, on the argument presented above, it would effectively apply to all those who supply fuel in a wide region of Central Australia. The only legal limitation to consider is the practical question of at what point the supply of fuel interstate ceases to be relevant to the integrity of supply controls over petrol sniffing in the Northern Territory. It is worth noting that in the *WA Airlines* case, the Territories power authorised a commercial flight by TAA between Perth and Port Hedland because including that leg of the flight was conducive to the efficiency and profitability of running air services from Perth to Darwin. In other words, ensuring the *efficiency* of an aspect of governing the Territory (in that case securing adequate transport links) was enough to authorise activity deep inside the neighbouring State of Western Australia.

Assuming there may ultimately be some geographical limitation to the use of the Territories power, we have included another base upon which a law effectively mandating OPAL in Central Australia could be constitutionally supported.

Option 2: The Corporations Power

The breadth of the corporations power was most recently affirmed in the *Work Choices* decision of the High Court in 2006. Every challenge by the States and the union

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[3] *Lamshed v Lake* (1958) 99 CLR 132, 141-142 (Dixon CJ, Webb J agreeing), 154 (Kitto J); *Newcrest v Commonwealth* (1997) 190 CLR 513, 599 (Gummow J); *New South Wales v Commonwealth (the Work Choices case)*(2006) 229 CLR 1, 158 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[4] *Lamshed v Lake* (1958) 99 CLR 132, 148 (Dixon CJ); *Newcrest v Commonwealth* (1997) 190 CLR 513, 599 (Gummow J).

[5] *Lamshed v Lake* (1958) 99 CLR 132. *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

movement to the use of the power to support numerous provisions of that industrial relations law was rejected by the Court.[6]

Section 51(xx) of the Constitution gives the Commonwealth Parliament the power to make laws with respect to trading, financial and foreign corporations (referred to in shorthand terms as 'constitutional corporations'). The *Work Choices* decision confirms that a law that imposes a legal obligation on a constitutional corporation is valid. For example, effectively requiring a constitutional corporation to stock low aromatic fuel by prohibiting the supply of standard unleaded fuel would be a valid use of the power in section 51(xx), whether the corporation was in the Northern Territory, South Australia, Western Australia or Queensland.

The critical constitutional issue for the law here is not a practical or geographical connection to the Northern Territory. It is whether a given petrol retailer subjected to the OPAL law is a constitutional corporation or not (specifically in this context, a 'trading corporation'). The High Court has indicated the threshold requirement: does the corporation engage in trading operations that are substantial or a significant aspect of its overall activities?[7] There is some room for subjective judgment in the application of this test and individual judges have applied it in different ways. But if a corporation makes money from selling petrol we would expect it to fall comfortably within the parameters of the power.

The attraction of the corporations power is that there can be no doubt after *Workchoices* that imposing a legal obligation, such as forbidding the sale of a particular fuel by a petrol retailer, is valid, provided the retailer is a trading corporation. We would expect that at least most of the suppliers of fuel in the Central Australian region would be a) incorporated and b) carrying on sufficient business to be classified as a trading corporation. However, it is possible there are fuel suppliers in the region that fall outside one of these requirements. That is, they are either unincorporated (eg sole traders or partnerships) or, although incorporated, their trading activities are not substantial nor a significant part of their overall activities. It is for this reason that, despite the wide coverage of the corporations power, we have placed this constitutional option alongside the Territories power.

Other powers

There may be other constitutional powers available to the Commonwealth to support a law of this kind. One method to cater to that possibility is to include statements in

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[6] *New South Wales v Commonwealth (the Work Choices case)*(2006) 229 CLR 1 (see the majority joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, for example at 114).

[7] *R v Federal Court of Australia; ex parte WA National Football League (Adamson's case)*(1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.

the preamble and/or objects of the legislation that indicate the broader context to the legislation, in particular the importance of maintaining the integrity of controls over the supply of standard unleaded fuel in the Northern Territory and the regional impact of standard unleaded fuel supplies on Central Australian Aboriginal communities. A prohibition regarding the stocking of standard unleaded fuel would apply in broad terms to suppliers of fuel, in a geographical area designated by the Minister, with some fall-back drafting to save the maximal operation of the law should any of it be found beyond constitutional power. The drafting of the Ministerial discretion to apply the law to a given area may require some attention to the constitutional issues (perhaps a reference to fulfilment of the Act's objects) if the Act was to apply to non-trading corporations beyond the borders of the NT.

Summary

The model put forward in our submission relies on direct Commonwealth regulation of the supply of fuel that contributes to the petrol sniffing problem in Central Australia. A key point to make about the constitutional options canvassed in this submission is that they are cumulative. In other words, the Commonwealth law prohibiting the supply of standard unleaded fuel and promoting low aromatic fuel, would rely on a range of overlapping powers which, in our view, would be sufficient to cover the field. This is a common drafting technique used by the Commonwealth to maximise the constitutional reach of its legislation and to save the valid reach of the law should one aspect of it go too far. It is a technique which has been upheld by the High Court on many occasions.

There would, no doubt, be various drafting methods by which a Commonwealth law could achieve the necessary connection to the constitutional powers listed above. Care would need to be taken with the specific wording, both to tailor the law well to the practical circumstances on the ground as well as the necessity to remain within the scope of the nominated constitutional powers. One method would involve four steps:

1. a preamble to the Act and an objects clause that explain the context for its introduction, including the need for an effective regime of control over standard unleaded fuel supplies in the Northern Territory and the regional impact of standard unleaded fuel supplies on Central Australian Aboriginal communities
2. the imposition of a legal obligation regarding standard unleaded fuel on a supplier of petrol
3. a reduced definition of a petrol supplier in a serial fashion so as to pick up nominated constitutional heads of power in an overlapping fashion, to which the law could default should the broadly expressed obligation be found in excess of power for example:

- suppliers of fuel located within a Territory
- suppliers of fuel that are constitutional corporations.

4. the capacity for the Minister to impose the legal obligation on fuel suppliers in a selected geographical region.

Conclusion: the need for complementary demand- and supply-side measures

We understand that in the area of petrol sniffing, as with other areas of substance abuse, there is no single cause and there are no simple solutions. We also believe that the intelligent use of law, policy and resources can make a difference, particularly when they are coupled with solutions that have credibility and ownership at a community level. Common sense as well as empirical evidence suggests that the most effective approaches tackle both demand and supply factors simultaneously. We know that the Committee itself espouses the need for a holistic approach and we are aware that the Petrol Sniffing Strategy is premised on tackling the problem on a range of fronts at the same.

Nonetheless, resources are always a critical problem. We believe that much more can be done to support complementary measures that take advantage of the window of opportunity created by supply-side measures such as the roll-out of OPAL fuel. We note the material put in front of the Committee in its present inquiry by organisations like CAYLUS and NPYWC, about the need for better investment in community development models that promote positive life choices for young Aboriginal people in Central Australia – such as the good practice model for delivery of youth services appended to the NPYWC submission. We urge the Committee to continue pressing governments to increase their support for effective complementary measures that enjoy ground-level ownership and legitimacy.

Yours sincerely

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