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Senate Standing Committees on Community Affairs
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

Dear Dr Holland

Submission on Low Aromatic Fuel Bill 2012

I appreciate the opportunity to make a submission to the committee regarding the Low Aromatic Fuel (LAF) Bill. I make this submission in my capacity as a member of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. I am solely responsible for its contents, though I acknowledge the comments and advice of several of my colleagues in the Faculty. The main points of the submission are:

1. In general the approach in the Bill, as far as it goes, appears legally sound.
2. The existing reliance on the corporations power as the constitutional basis for the Bill is likely to be effective in regulating the conduct of at least a high proportion of fuel suppliers in a given area of Australia.
3. Given that a prime motivation for the legislation is to regulate the conduct of a minority of suppliers who are resisting the rollout of LAF, consideration should be given to extending the constitutional basis of the Bill. If there are commercial suppliers of fuel which are not 'trading corporations' for the purposes of the Constitution, the Bill could regulate them if it were extended to rely on other Commonwealth powers in the Constitution.

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4. In extending the constitutional basis of the Bill beyond the corporations power, a policy question arises about the extent to which the Bill should regulate supply by entities other than a trading corporation. Any extension beyond trading corporations requires caution and careful drafting.
5. The attribution of criminal responsibility for offences committed by employees and agents may require closer attention. Additional attention will need to be paid to this issue if amendments are made to hold non-corporate entities responsible for contraventions of the Act.

Introduction

Before explaining each of those points I start by clarifying my standpoint in making a submission.

This is an issue in which the Centre has taken an interest since we established contact with Central Australian Youth Link Up Service (CAYLUS) in 2008 and the roll-out of Opal fuel came to our attention. Clearly, winning over retailers and consumers to a change in the consumption of a basic household staple like car and other engine fuel has been a major challenge and all those involved deserve great credit for what has been achieved to date, in terms of reduced supply, complementary measures such as enhanced youth services and most importantly the reported reduction in petrol sniffing in Central Australia.

For some time CAYLUS has expressed its concern to us that while the rollout of Opal with a Commonwealth subsidy had been largely successful in areas such as Alice Springs, holes in the net exist at the retail level which impair the effectiveness of this important supply-side measure. I also understand that if 'holdout' behaviour succeeds in this first rollout region of Central Australia it may signal the viability of such a strategy to others who are inclined to resist LAF in areas where further rollouts are attempted in the future.

I am aware that the possibility of legislation to mandate the stocking of LAF fuel has been contemplated for some time. While the ultimate merit of that proposal is for others to decide, for our purposes, minimum preconditions clearly exist for taking the proposal very seriously. As this Committee knows better than most, the LAF Bill does not, for example, represent a rush to legislation. The Commonwealth and others have persisted for some time with a non-legislative approach to substituting unleaded fuel with LAF in Central Australia. The issue of non-cooperation by a small number of retailers was identified several years ago as a problem and apparently it has not yet yielded to non-legislative responses. This Committee unanimously urged the Commonwealth to take steps in the direction of legislating to mandate the stocking of LAF in its 2009 Report.[1] The question of a legislative mandate has been subjected to a cost-benefit analysis funded by the Australian Government and it returned a positive result.[2] And it appears

[1] Senate Community Affairs Committee, *Grasping the opportunity of Opal: Assessing the impact of the petrol sniffing strategy* (2009), Recommendation 5.

[2] South Australian Centre for Economic Studies, *Cost Benefit Analysis of Legislation to Mandate the Supply*

universally recognised that, as the Australian Government itself has said, Opal is a highly effective supply reduction measure.[3]

To apply legal terminology to a public policy debate, it might be said that cumulatively these factors shift the onus to those who resist legislation to justify why it is not appropriate at this point to proceed with a statute authorising mandatory stocking of LAF in designated zones. As we also said in our submission to the Committee in 2008 and others have emphasised in their submission to the present inquiry, a supply-side measure such as replacing regular unleaded fuel with LAF can only succeed as part of a comprehensive package which includes complementary measures such as enhanced youth services.

General observations

There are a number of features which contribute to the general legal soundness of the Bill. The prohibitions are expressed in clear and plain language. The Bill creates exceptions for emergency situations and where the Minister makes a reasoned determination that specific conduct should be exempted and is unlikely to impair the harm-reduction object of the Bill. Before making a determination that will have an impact on corporations and the wider community the Minister must reach a state of satisfaction about matters which are appropriate, clear and directly referable to the object of the legislation. The Minister must also consult appropriately. The Bill sensibly provides for periodic review and preserves the operation of compatible State and Territory legislation.

I note that the term 'low aromatic fuel' is not defined in the Bill and suggest that, unless the Committee receives persuasive technical or other evidence to the contrary, such a definition be added to s 5 to ensure clarity.

The constitutional basis of the Bill

The general principle is that in order to be constitutionally valid a law must have a sufficient connection to the subject matter of a Commonwealth power. Specifically, to be valid the LAF Bill as currently drafted must have a sufficient connection to trading corporations. The *Workchoices* decision of the High Court indicated that a law is valid under s 51(xx) of the Constitution if it regulates the activities of a trading corporation and also if it imposes obligations on a corporation and it can extend to regulating the conduct of those through whom the corporation acts. The Commonwealth's power also extends to matters which are reasonably incidental to the subject matter.

The key operative provisions of the LAF Bill are ss 8, 10 and 12 which impose prohibitions and obligations on defined corporations. These are in the central area of the

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of Opal Fuel in Regions of Australia (2010).

[3] *Combined Australian Government Response to Two Senate Community Affairs References Committee Reports on Petrol Sniffing in Indigenous Communities* (2010) <www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/petrol_sniffing_substance_abuse08/index.htm> 3.

power in s 51(xx). I submit that the remaining provisions of the Bill, such as the power of the Minister to designate areas and to determine requirements that will apply to LAF and other fuels, to consult prior to the making of such determinations, to exempt conduct and so on are either in the central area of the power as well or necessary and incidental to the imposition of the key legal obligations and prohibitions on constitutional corporations. On this basis I submit that it is a valid exercise of the Commonwealth's power with respect to trading corporations in s 51(xx) of the Constitution.

I believe that the definition of corporation in s 5 is effective, together with the operative provisions of the Bill, to engage the Commonwealth's constitutional power. But it would be more consistent with existing Commonwealth legislation to use the term 'constitutional corporation'. If, however, the constitutional basis for the Bill, and hence its scope, is extended in the way proposed in this submission then I suggest a different approach, retaining use of the term 'corporation', removing the definition of the term in s 5 and adding relevant subsections to ss 14 and 15.

Extending the constitutional basis of the Bill and its reach

I suggest there are two reasons to consider extending the constitutional basis for the Bill and thus the reach that it has. The first is to better secure its effectiveness in the initial rollout area in Central Australia and the wider Northern Territory. I refer here in particular to explicit reliance on the Territories power in s 122 of the Constitution. The second reason is to support, if necessary, the voluntary rollout of LAF in areas well beyond the Northern Territory through the potential imposition of prohibitions and mandatory obligations authorised by Commonwealth law. I refer here to possible reliance, in addition to the corporations power, on the races power in s 51(xxvi) or the replacement power referring to Aboriginal and Torres Strait Islander people should that constitutional provision be changed at a near referendum in the future.

The Territories Power

The Centre made a submission to the Committee in 2008 concerning use of the Territories power to support the mandatory stocking of Opal fuel and related measures (referred to in the Committee's report on petrol sniffing in 2009).[4] I reiterate those submissions here.

The Commonwealth Parliament has a wide power in s 122 of the Constitution to make laws for the government of a Territory. On many occasions the High Court (and Privy Council) has called it a 'plenary power'.[5] There is no doubt in my view that a

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[4] Senate Community Affairs Committee, *Grasping the opportunity of Opal: Assessing the impact of the petrol sniffing strategy* (2009), p 49.

[5] 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. This descriptor was left undisturbed by the Chief Justice of the High Court's finding in 2009 that s 122 is qualified by the guarantee of just terms for the acquisition of property in s 51(xxxi): *Wurridjal v Commonwealth* (2009) CLR 309, 347-348 (French CJ).

Commonwealth law imposing on corporations the prohibitions and obligations contained in the Bill would be authorised by s 122, where conduct occurs inside the Northern Territory border and that applies to the incidental measures referred to earlier as well.

I am aware, however, that petrol sniffing is a *regional* problem that does not respect State and Territory borders. The supply of regular unleaded fuel from suppliers across the border in Western Australia, South Australia or Queensland can compromise the effectiveness of the LAF roll-out in the Northern Territory. I submit that the Territories power in s 122 would support the Bill's regulation of fuel supply and incidental measures, even if the suppliers are located at significant distances interstate.

The reason 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.[6] 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.[7]

The key to constitutional validity is a sufficient connection between government of the Northern Territory and the operation of a law inside a State such as Western Australia, South Australia or Queensland.[8] 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*. I 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 the relevant sense in a wide region of Central (and, if necessary, northern) 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.

The Races Power (or its replacement)

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[6] *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).

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

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

I approached the question of reliance on the Commonwealth's races power in s 51(xxvi) of the Constitution with caution. But I concluded that on balance it was appropriate in this instance to resort to the power. In this respect I have been assisted by the debate which has unfolded over the last 18 months or so regarding constitutional reform in respect of Australia's first peoples. It is clear that the Expert Panel which reported to the Australian Government in January 2012 on constitutional recognition of Indigenous Australians strongly supported the maintenance of a power to make national laws with respect to Aboriginal and Torres Strait Islander people, conditioned by the presence of a non-discrimination clause. This is a position which I support. The retention of a national power to make Indigenous-specific laws seems to enjoy widespread endorsement.

In my view the Bill, if appropriately amended, would be capable of drawing support from the amended power recommended by the Panel and as limited by the non-discrimination principle. In those circumstances I believe this would be an appropriate present-day use of the races power. The object of the Act – to reduce potential harm to the health of people living in certain areas from sniffing fuel – could refer specifically to the health of Aboriginal people (and Torres Strait Islanders too should that prove necessary) and in that way constitute an exercise of the races power with general application and for the specific benefit of those people.

Accommodating this extension in the Bill: The precise drafting of such amendments is best left to expert drafters. One idea might be that an additional subs (4) be added to ss 14 and 15 of the Bill. The designation of an area by the Minister as a LAF area or a fuel control area could refer to specific heads of constitutional power. For example, the power in ss 14(1) and 15(1) could be exercised in defined circumstances such as the following:

(a) where the corporation referred to is a corporation to which s 51(xx) of the Constitution applies
(b) where the area designated is either within a Territory or where the regulation of fuels in that area is necessary to achieve the object of the Act in a Territory
(c) where the people referred to in subs (2) are Aboriginal people or Torres Strait Islanders.

This would entail removing the definition of a corporation from s 5 of the Bill.

Confining the Bill to a commercial setting

The Bill is currently framed to apply in a commercial setting. That is, the legal obligations attach to trading corporations. This naturally follows from the Bill's current reliance exclusively on the corporations power. Extending the constitutional basis of the Bill can extend the reach of the Bill in order to maximise its effectiveness in regulating the supply of sniffable fuels from commercial outlets. To some extent that is achieved merely by the kind of amendment suggested above. In other words, for example, a corporation which supplies fuel in the relevant sense but does not, due to its nature and activities, qualify as a trading corporation would be covered. But fully achieving that objective of closing the

net in a commercial sense requires moving beyond a reference to corporations. For example, counterpart provisions to ss 8, 10 and 12 in the Bill could be created with appropriate wording to describe the entities whose conduct is sought to be regulated. Once that is done, an important policy question arises.

How far does the Parliament wish to go in regulating people or entities other than a trading corporation? I submit that the Bill would move well beyond its present design if it was extended, for example, to 'persons' and made referable to the Territories power and the races power. My understanding of the purpose of legislating in relation to LAF is to discourage retail fuel suppliers from resisting or subverting the rollout, based on evidence that a small number of suppliers have not responded positively to non-legislative encouragement. However, it is a very different thing to legislate generally for the criminalisation of conduct by individuals in relation to fuel, an area which is in any case, I understand, already regulated by legislation at the State and Territory level. In my submission it also complicates the issues surrounding reliance on the races power as well as raising questions about effectiveness, community acceptance and viable enforcement.

For those reasons, I recommend that if the constitutional basis to the Bill is extended to incorporate reliance on the Territories power and the races power, the targets for legal regulation be confined to a commercial, business or retail setting. This would be consistent with the cautious and incremental approach to the rollout of LAF and to the introduction of a legislative mandate that has been taken to date.

This approach may entail attention to the definition of 'supply' so as to confine it to a commercial supplier. Alternatively or in addition it may require careful wording of the entities referred to in the counterpart provisions to ss 8, 10 and 12 proposed above. Expert advice from organisations and people on the ground (such as CAYLUS) on what particular supply problems need to be addressed should inform the response to this issue. It may that the terms 'sole trader' and 'partnership' are sufficient.

Principles of criminal liability

Part 2.5 of the Commonwealth Criminal Code deals with corporate criminal responsibility and Divisions 5 and 6 with the fault element, if any, for Commonwealth offences. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*[9] provides guidance to Commonwealth agencies which is relevant to the provisions of this Bill. The legal principles of criminal liability are outside my area of expertise, but I think it is appropriate to flag these issues for the Committee's attention particularly as strict liability offences, for example, cannot be imposed without an express provision to that effect.

The reason for drawing these documents to the Committee's attention is that imposing a standard of strict liability on corporations for offences committed by employees or agents

[9] <www.ag.gov.au/Documents/FINAL+-+A+Guide+to++Framing+Commonwealth+OffencesPDF+version.pdf>

may be an appropriate means of achieving the Bill's object, particularly as there is no penalty of imprisonment in the Bill, it is likely to enhance the integrity of this public health measure and the deterrence regime in the Bill, and corporations will receive adequate advance notice of the legislation. In a situation of strict liability the physical act of an employee or agent supplying regular unleaded petrol in a LAF area, for example, would be sufficient to constitute the offence, provided they are acting within the actual or apparent scope of their employment, or within their actual or apparent authority. If the reach of the Bill is extended beyond corporations, further attention will need to be paid to the question of fault elements in any offence provision.

Yours sincerely

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