

## Chapter 4

# Legislation for Low Aromatic Fuel

### The need for legislation

#### *Gaps in the current approach*

4.1 Evidence from numerous Indigenous witnesses and organisations spoke about the fact that even though their own communities stocked low aromatic fuel, sniffable fuel was being obtained from retailers in proximity to those communities.<sup>1</sup> Mr Lance McDonald, an elder from Papunya, a community that has a low aromatic fuel bowser, expressed deep concern about the ongoing presence of sniffable fuel at Tilmouth Well:

Tilmouth Well is the only frightening one for us, because we are living on the same road that it is on. Tilmouth Well is in the middle of where three tribes are mixed up. There is Anmatjere tribe this side, Warlpiri and us mob—Luritja Pintubi tribe. We think that Tilmouth Well needs to change because we do not want to go backwards. We want to go forwards.<sup>2</sup>

4.2 This fear is underscored by recent experiences at Papunya and Kintore where sniffing outbreaks have spread rapidly:

[T]here was recently a boy from South Australia who came up for a funeral and got left behind when the other mob left. They left him there with extended family, but he was falling through the safety net a bit. He started sniffing and he started other people sniffing, and then there were 12 people sniffing in Papunya. That boy's father turned up and took him to Kintore and the sniffing died down there. The youth workers got really involved with them. At Papunya the other 11 stopped. But then he started up another 15 in Kintore. So you really cannot underestimate what one person can do.<sup>3</sup>

4.3 The majority of submissions were deeply concerned that the actions of a few retailers that still supply RULP and do not stock low aromatic fuel had frustrated the comprehensive rollout of low aromatic fuel in affected regions for several years and in some cases more than five years.

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1 Ms Lisa Sharman, Community Leader and Youth Worker, Titjikala, *Committee Hansard*, 24 July 2012, p. 34; Mr Lance McDonald, Papunya, *Committee Hansard*, 24 July 2012, p. 37; Ms Susie Low, CEO, Warlpiri Youth Development Aboriginal Corporation, *Committee Hansard*, 24 July 2012, p. 18; Mr Willie Bookie, Lake Nash, *Committee Hansard*, 24 July 2012, p. 42; Mr James Billy, Lake Nash Night Patrol, *Committee Hansard*, 24 July 2012, p. 42.

2 Mr Lance McDonald, Papunya, *Committee Hansard*, 24 July 2012, p. 37.

3 Mr Blair McFarland, CAYLUS, *Committee Hansard*, 24 July 2012, p. 38; see also Ms Lisa Sharman, Community Leader and Youth Worker, Titjikala, *Committee Hansard*, 24 July 2012, p. 34.

4.4 The Warlpiri Youth Development Aboriginal Corporation (WYDAC) argued that the campaign to eradicate petrol sniffing was at a crossroads because the progress that had been achieved so far was under threat:

[W]e stand at an important juncture in Central Australia, where a new generation of children in much of the region have grown up free of sniffing culture, however due to the irresponsible decisions of a few of retailers, sniffing culture appears to be once again rearing its head in some sites. We know from hard experience that sniffing, once established in an affected community can rapidly spread. Sniffing once accepted by a few as something that's too hard to deal with quickly becomes viewed this way by all. We stand at this juncture now in Central Australia but it seems to us that governments still have the capacity to act and there are still straight-forward steps that can be taken. We encourage the federal government to take a lead on this issue and for the various political parties to work collaboratively with them. Voluntary roll out of Opal has been a good thing, but the time has come to finish the job.<sup>4</sup>

### **Stakeholder arguments in favour of Commonwealth legislation**

4.5 A majority of stakeholder submissions were in favour of Commonwealth legislation for low aromatic fuel and the main arguments put forward in support of a legislative approach are presented below.<sup>5</sup>

4.6 A legislative approach that prohibited retailers in designated regions from selling RULP was seen as a necessary step towards closing the gaps in the current program. The voluntary scheme was deemed insufficient for dealing with the petrol sniffing that has been to the historical resistance of a few retailers to stocking low aromatic fuel.<sup>6</sup>

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4 Warlpiri Youth Development Aboriginal Corporation, *Submission 11*, p. 3; see also NPY Women's Council, *Submission 7*, p. 3.

5 The submissions from BP Australia (*Submission 15*) and Shell Australia (*Submission 20*) were impartial on the bill and are discussed later in this chapter in the section on stakeholder concerns.

6 National Indigenous Drug and Alcohol Committee, *Submission 2*, p. 1; Public Health Association of Australia, *Submission 4*, p. 4; Aboriginal Peak Organisations Northern Territory, *Submission 5*, p. 2; NPY Women's Council, *Submission 7*, pp. 2–4; CAYLUS, *Submission 8*, p. 3; Barkly Shire Council, *Submission 9*, pp. 2–3; Central Land Council, *Submission 10*, p. 1; Warlpiri Youth Development Aboriginal Corporation, *Submission 11*, pp. 1–3; Jumbunna Indigenous House of Learning, UTS, *Submission 14*, p. 2; National Aboriginal Community Controlled Health Organisation, *Submission 16*, p. 3; Alcohol and other Drugs Council of Australia, *Submission 18*, pp. 2–4. The Office of the Children's Commissioner Northern Territory, *Submission 6*, pp. 2–3 expressed concern that children were being exposed to sniffable fuels in their communities and supported the legislation to prohibit RULP. The Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, pp. 2–3 noted the resistance of a few retailers towards stocking low aromatic fuel could undermine the viability of the Opal strategy.

4.7 Retailers in the Central Australian Region currently stock low aromatic fuel voluntarily and continued adherence to this agreement is crucial to the success of the scheme. Several organisations were very concerned that there is no guarantee that one retailer will not revert to RULP, potentially leading to a 'domino' effect where the voluntary agreement collapsed.<sup>7</sup> Legislation was seen as the best way to prevent the unravelling of a voluntary agreement:

Currently all retailers in Alice Springs use Opal voluntarily. Maintenance of this outcome is crucial to the success of Low Aromatic Fuel initiatives in the Central Australian Region. However, if any individual retailer decided to stop stocking Opal and make other types of fuel available for sale - thereby breaching the status quo - it is likely that other retailers would follow suit, in order to avoid any potential commercial disadvantage. The proposed legislation would provide a strong deterrent to prevent this happening and would also provide a path for action should such a situation occur in Alice Springs or in any other site crucial to the effectiveness of the Low Aromatic Fuel initiative.<sup>8</sup>

4.8 Dr John Boffa argued that a mandatory approach is essential because a large part of the success achieved with the voluntary rollout in Central Australia can be attributed to the unique level of grass-roots inter-agency collaboration and hard work in that particular region, and that this level of collaboration does not exist in other regions:

[W]e have achieved a comprehensive rollout here ... largely ... because of CAYLUS and the interagency collaboration and the partnerships and the constant talking to outlets and educating them, which has got people to do the right thing voluntarily, but there are still a few outlets that have not. But in other parts of the country they have got nowhere near that comprehensive commitment.<sup>9</sup>

4.9 The committee also heard that previous strategies to address petrol sniffing such as the renowned Mount Theo program that had originally succeeded in overcoming petrol sniffing could no longer be applied today. Although the comprehensive program of care provided at Yuendumu is an essential element of overcoming petrol sniffing, WYDAC expressed grave concern about the re-emergence of petrol sniffing and urged the government to mandate Opal fuel:

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7 CAYLUS, *Submission 8*, p. 11; Public Health Association of Australia, *Submission 4*, pp. 4–5; Warlpiri Youth Development Aboriginal Corporation, *Submission 11*, p. 3; National Aboriginal Community Controlled Health Organisation, *Submission 16*, p. 4; Alcohol and other Drugs Council of Australia, *Submission 18*, p. 4.

8 Public Health Association of Australia, *Submission 4*, pp. 4–5; see also CAYLUS, *Submission 8*, p. 12; Warlpiri Youth Development Aboriginal Corporation, *Submission 11*, p. 3.

9 Dr John Boffa, Public Health Medical Officer, Central Australian Aboriginal Congress, *Committee Hansard*, 24 July 2012, p. 25.

We know that Opal fuel has proven effective but, unless the sale of Opal is mandated, and across the broader region, there is a real danger of sniffing outbreaks and devastating consequences.

The gains achieved to date through the rollout of Opal fuel are crucial but they are also fragile. We currently have a generation of children in much of the region who have grown up free of a sniffing culture. However, due to what we believe are the irresponsible decisions of some retailers, the sniffing culture appears to be once again rearing its head in some sites. We know from hard experience that sniffing, once established in an affected community, can rapidly spread. It is an epidemic we do not wish to relive.

We stand at a junction in Central Australia now and we cannot afford to go back. Our program is known for its hard earned success over many, many years. We cannot emphasise too strongly to this inquiry that the way we tackled sniffing in the Warlpiri communities would not be permitted today ... Increased scrutiny on process and regulations means that the successful strategies that Mount Theo used in the early days would not be considered acceptable. We have welcomed a higher level of accountability and scrutiny. However, we despair at the possibility of a resurgence of petrol sniffing, especially given that our original successful strategies could not be applied today.<sup>10</sup>

4.10 CAYLUS pointed out that by consolidating the progress that has been achieved with the voluntary rollout of low aromatic fuel, legislation would provide communities with the security to focus on community development without having to contend with recurrent petrol sniffing episodes.<sup>11</sup>

4.11 CAYLUS summed up the views expressed by many community organisations by stating that:

We have often said that if this legislation was in place you may never have to use it. But if you ever did have to use it you would be really glad you had it, as opposed to 'here we are again and we are 12 months away from even getting it written'. We know that we can fix sniffing through the Opal strategy. This legislation consolidates that victory and makes it possible to replicate that victory anywhere. It does seem like a no-brainer to me.<sup>12</sup>

4.12 Adjunct Professor Michael Moore observed that the campaign to tackle petrol sniffing has much in common with previous successful public health campaigns:

It is important to remember that successful public health campaigns are never about one thing; they are about a whole series of things. They are about individual responsibility but they are also about tackling underlying causes and operating within particular settings. There is a snowball impact

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10 Ms Susie Low, CEO, Warlpiri Youth Development Aboriginal Corporation, *Committee Hansard*, 24 July 2012, p. 17.

11 CAYLUS, *Submission 8*, p.3.

12 Mr Blair McFarland, CAYLUS, *Committee Hansard*, 24 July 2012, p. 49.

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for effective campaigns—that is, you begin to get everybody on side and it reaches a point where you cannot get the last few, and that is when it is time for legislation.

If I can draw just a very quick analogy: when our community tackled motor car related morbidity and mortality, we began a process of trying to explain about accidents and the power of cars and trying to get people to drive sensibly and lower their speeds. Then a whole series of things happened. There was legislation to improve motor cars, to change the speed limits and particularly to prevent driving under the influence of alcohol, and seat belts requirements and so on. And each one of those steps combined was done, first of all, with general understanding in the community, which was then followed at the last bit by legislation. I think what is happening here is applying the same sort of principles, and that is why the Public Health Association is supportive of the Low Aromatic Fuel Bill 2012.

4.13 The committee raised the issue that banning a product may lead to potentially unintended consequences. Mr Moore pointed out that the PHAA does not advocate banning substances, but rather advocates imposing restrictions 'to try to change attitudes'. Mr Moore noted that the most successful health campaigns have removed a dangerous substance and replaced it with a safer alternative. He believed that the bill fits within this broad approach by removing RULP and replacing it with a low aromatic alternative.<sup>13</sup>

## **Current Northern Territory legislation**

### ***Northern Territory Volatile Substance Abuse Prevention Act***

4.14 The benefits and limitations of existing Northern Territory legislation were examined in order to determine firstly, whether the operation of such legislation in conjunction with the voluntary rollout of Opal and the operation of the eight point plan is sufficient to achieving the objective of eliminating petrol sniffing, and secondly, whether the addition of Commonwealth legislation would have a greater impact than the legislation that currently exists.

4.15 The *Northern Territory Volatile Substance Abuse Prevention Act* (the Act) was introduced in February 2006, and amended in 2010, in an attempt to reduce the harmful effects of abuse of volatile substances such as petrol, paint and glue.<sup>14</sup>

4.16 Under the Act, police and authorised persons<sup>15</sup> are empowered to remove and dispose of volatile substances from somebody who is inhaling, intends to inhale, or

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13 Mr Michael Moore, CEO, Public Health Association of Australia, *Committee Hansard*, 24 July 2012, p. 10.

14 Northern Territory Government Department of Health and Families, *Volatile Substance Abuse Prevention Act*, Fact Sheet, p. 2, accessed 7 September 2012, [http://www.health.nt.gov.au/library/scripts/objectifyMedia.aspx?file=pdf/16/40.pdf&siteID=1&str\\_title=NT+Volatile+Substance+Abuse+Prev](http://www.health.nt.gov.au/library/scripts/objectifyMedia.aspx?file=pdf/16/40.pdf&siteID=1&str_title=NT+Volatile+Substance+Abuse+Prev)

has recently inhaled a volatile substance, and take them to a 'place of safety' or into protective custody.<sup>16</sup>

4.17 The Act also provides for assessments of people at risk of volatile substance abuse to be carried out. Assessment findings can trigger a recommendation to the Chief Health Officer to apply to the local court for a treatment order. Court-ordered treatment programs can run for up to 16 weeks and be extended if necessary. If a person fails to participate in a court-ordered program, they may be subject to a warrant to compel them to attend treatment.<sup>17</sup>

#### *Community Management of Volatile Substances*

4.18 Community members and Shire Councils are also able to apply to the Minister for a certain area in their community or a whole community area to be declared a management area under the Act:

A management plan is then developed for the area to establish rules for possession, supply and use of volatile substances. Delegates of the Minister hold community meetings, explaining the workings of management plans and consequences for the communities with such plans. The delegates also assist and guide communities through the making of the plan.<sup>18</sup>

4.19 Community members must agree to the area and the plan. Signs must be erected at entry points to the community advising that the community is subject to a management plan. The police are empowered to enforce the management plan.

#### *Unlawful supply*

4.20 The Act provides that a person must not 'supply a volatile substance to another person if the supplier knows, or ought to know, that the other person intends to inhale the substance.'<sup>19</sup>

4.21 Likewise a supplier must not give a person a volatile substance if the supplier '... knows, or ought to know, that the recipient intends to give the substance to

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15 Authorised persons have to be individually approved by the Minister and can be, for example, health workers, youth workers, councillors, or elders (see Northern Territory Government Department of Health and Families, *Volatile Substance Abuse Prevention Act*, Fact Sheet, p. 3).

16 Northern Territory Government Department of Health and Families, *Volatile Substance Abuse Prevention Act*, Fact Sheet, p. 2.

17 Northern Territory Government Department of Health and Families, *Volatile Substance Abuse Prevention Act*, Fact Sheet, p. 3.

18 Northern Territory Government Department of Health and Families, *Volatile Substance Abuse Prevention Act*, Fact Sheet, p. 4.

19 Northern Territory Government Department of Health and Families, *Volatile Substance Abuse Prevention Act*, Fact Sheet, p. 4.

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another person for inhaling.’<sup>20</sup> Unlawful supply is an offence under the Act and is punishable by a fine or imprisonment.

### ***Limitations of the Volatile Substance Abuse Prevention Act***

4.22 Given the existence of the Act, the committee sought evidence on whether the Act was sufficient to control sniffing in the NT, and whether this model could be used in other jurisdictions to control petrol sniffing.

4.23 The committee notes that two recent coronial inquests that reported in October 2011, one completed in WA and another in SA, recommended the implementation of a law similar to the NT Volatile Substance Abuse Prevention Act in their respective jurisdictions.<sup>21</sup>

4.24 CAYLUS noted the positive impacts of the Act in enabling some communities to exert a level of control over sniffing and empowering police to deal with sniffing. Mr McFarland said that the various mechanisms within the act including the management plans and the mandatory rehabilitation make it a ‘very powerful act’.<sup>22</sup>

4.25 However, CAYLUS drew attention to limitations in the Act regarding the extent to which a management plan can exercise control over fuel outlets in the surrounding area. The three community examples given below demonstrate that the Act is insufficient to remove petrol sniffing.

4.26 CAYLUS stated that they had worked with Anmatjerre Council in 2008 to apply for a management plan under the Act in the hope of being able to force the nearby Ti Tree roadhouse to switch to low aromatic fuel. The NT government advised that the powers under the Act were insufficient to compel a private business outside the management area to stop selling sniffable fuel.<sup>23</sup>

4.27 The Indigenous community at Lake Nash sells low aromatic fuel and has a management plan. However, unleaded fuel comes into the community from the nearest roadhouse at Urandangi across the Queensland border that does not stock low aromatic fuel, a jurisdiction over which the Lake Nash management plan has no control.<sup>24</sup> CAYLUS also pointed out that it would be unfair to arrest people in Lake

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20 Northern Territory Government Department of Health and Families, *Volatile Substance Abuse Prevention Act*, Fact Sheet, p. 4.

21 Australian government, *Submission 19*, p. 5.

22 Mr Blair McFarland, CAYLUS, *Committee Hansard*, Wednesday 25 July 2012, p. 51.

23 CAYLUS, *Submission 8*, p. 10.

24 Mr Blair McFarland and Mr Tristan Ray, CAYLUS, *Committee Hansard*, Tuesday 24 July 2012, p. 51.

Nash for having RULP in their fuel tank when cars coming into the community via Urandangi have no choice but to refill with sniffable fuel.<sup>25</sup>

4.28 The community at Titjikala elected not to have a management plan because even though the nearby fuel outlet at Maryvale station does not sell RULP, it does sell premium unleaded. Although Titjikala sells low aromatic fuel, cars that need to refuel at Maryvale on a Sunday when the Titjikala outlet is closed bring sniffable fuel back into the community. Titjikala decided that a management plan would be unenforceable, firstly, because there would be occasions when vehicles would be coming into the community with sniffable fuel in their tanks purchased from Maryvale, and secondly, because there are no police in Titjikala to enforce a management plan.<sup>26</sup>

4.29 Dr John Boffa suggested that ongoing sniffing in certain areas was a clear indication that the Act alone was not enough to solve the problem and that further legislation was required. Responding to the suggestion that further legislation was unnecessary, Dr Boffa said:

It is a furphy. If that were the case, you would not have petrol-sniffing in Lake Nash, Yirrkala and Katherine at the moment. If that act were enough, without Opal being mandated, then we would not have that problem. It is a good act, it is an important contribution, but by itself is not enough. It is no reason not to do this as well. Western Australia, South Australia—they should all have a similar act; but, even if they did, it is absolutely not a reason to not go ahead with this legislation as well.<sup>27</sup>

4.30 Dr Howard Bath acknowledged the beneficial provisions within the Act, in particular the ability to generate community-based approaches to volatile substance abuse:

In the Northern Territory we have the Volatile Substance Abuse Prevention Act, under which there is a comprehensive process where areas can approach the government and asked to be declared a management area for volatile substances. There is a consultation and they can develop a management plan for the area which is an enforceable plan. It does cover issues broader than just fuel and fuel supply. That is more possible in a jurisdiction like the Northern Territory. Trying to get coordination across several different jurisdictions we recognise would be extremely hard. We think the ideal would be that, in addition to imposing restrictions on fuel and the supply of Opal fuel—low aromatic fuel—it is important also that

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25 Mr Blair McFarland and Mr Tristan Ray, CAYLUS, *Committee Hansard*, Tuesday 24 July 2012, p. 51.

26 Mr Blair McFarland and Mr Tristan Ray, CAYLUS, *Committee Hansard*, Tuesday 24 July 2012, p. 51.

27 Dr John Boffa, Public Health Medical Officer, Central Australian Aboriginal Congress, *Committee Hansard*, 24 July 2012, p. 31.

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there are local management approaches to the difficulties around sniffing or solvents.<sup>28</sup>

4.31 However, recognising the difficulties of coordinating approaches across jurisdictions, the position of Dr Howard Bath was that Commonwealth legislation that enforced the prohibition of RULP and controlled PULP would complement the Act.<sup>29</sup>

### **The constitutional capacity for Commonwealth legislation**

4.32 This section considers whether the Commonwealth government possesses the constitutional capacity to legislate across several jurisdictions with regard to RULP and low aromatic fuel.

#### ***The Corporations power***

4.33 Section 51(xx) of the Constitution (Corporations power) gives the Commonwealth Parliament the power to make laws with respect to trading, financial and foreign corporations.

4.34 The SACES report found that the Commonwealth could use the Corporations power to enact legislation and that the legislation would be effective, would very likely be upheld by the courts, and would have relatively low compliance costs. There would, however, be some risk that a small number of unincorporated outlets may not be controlled by the scheme.<sup>30</sup>

4.35 Noting that the bill is based on the Commonwealth Corporations power, Mr Sean Brennan stated that the Bill appeared 'legally sound' and 'is likely to be effective in regulating the conduct of at least a very high proportion of fuel suppliers in a given area in Australia'.<sup>31</sup> Professor Larissa Behrendt endorsed the conclusions of the SACES report and the Gilbert and Tobin Law Centre submission to the 2009 inquiry regarding the sound constitutional basis for Commonwealth legislation.<sup>32</sup>

4.36 However, the SACES report, the Gilbert and Tobin Law Centre, and the Jumbunna Indigenous House of Learning all noted that other Constitutional powers could be used to supplement Commonwealth legislation based on the Corporations power. Mr Brennan and Professor Behrendt suggested that consideration be given to

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28 Dr Howard Bath, *Committee Hansard*, Wednesday 25 July 2012, p. 35.

29 Office of the Children's Commissioner Northern Territory, *Submission 6*, pp. 3–4.

30 South Australian Centre for Economic Studies 2010, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia*, Report commissioned by the Australian Government Department of Health and Ageing, Adelaide and Flinders Universities, pp. 14–15.

31 Mr Sean Brennan, Director Indigenous Legal Issues Project, Gilbert and Tobin Centre of Public Law, UNSW, *Committee Hansard*, 25 July 2012, p. 10; see also Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*.

32 Jumbunna Indigenous House of Learning, UTS, *Submission 14*, p. 3.

extending the bill to rely on other Commonwealth powers in the Constitution in order to capture commercial suppliers of fuel which are not trading corporations for the purposes of the Constitution, and also to support the rollout of low aromatic fuel in areas beyond the Northern Territory.<sup>33</sup> Two of these powers, the Territories power and the Races power, are considered below.

### ***The Territories power***

4.37 Under section 122 of the Constitution, the Commonwealth has the power to make laws for the government of a Territory.

4.38 Given that petrol sniffing is a regional problem that traverses state boundaries, the key question regarding the Territories power is whether that power can operate in state jurisdictions beyond the Northern Territory.

4.39 The SACES report found that the Territories power could not target sniffing activity outside the Territory, but that 'a prescribed region could extend beyond the Territory into areas which have an impact on efforts to reduce sniffing in the Territory'.<sup>34</sup>

4.40 In his submissions to both the 2009 and 2012 inquiries, Mr Brennan cited legal precedent<sup>35</sup> in noting 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'.<sup>36</sup> The High Court has also indicated that in the event of conflict between Commonwealth law and state law, the Commonwealth law would prevail.<sup>37</sup>

4.41 Mr Brennan cited two cases<sup>38</sup> to argue that:

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33 Mr Sean Brennan, Director Indigenous Legal Issues Project, Gilbert and Tobin Centre of Public Law, UNSW, *Committee Hansard*, 25 July 2012, p. 10; see also Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 4; Jumbunna Indigenous House of Learning, UTS, *Submission 14*, p. 3.

34 South Australian Centre for Economic Studies 2010, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia*, Report commissioned by the Australian Government Department of Health and Ageing, Adelaide and Flinders Universities, p. 13.

35 *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 WorkChoices case)* (2006) 229 CLR 1, 158 (Glesson CJ, Gummow, Hayne, Heydon and Crennan JJ).

36 Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 5.

37 Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 5.

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

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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.<sup>39</sup>

4.42 Based on the cases cited above, Mr Brennan said that the use of a law based on the Territories power within a state such as Western Australia, South Australia or Queensland would be constitutionally valid based on the following proposition:

*... regulating fuel supply in these cross-border locations is practically relevant to the effectiveness of supply restrictions within the Territory.*<sup>40</sup>

4.43 Mr Brennan believed that this proposition is supported by 'the evidence presented to the Committee and elsewhere, that the necessary practical, geographical connection exists – indeed, it underpins the regional strategy adopted by governments'.<sup>41</sup> Summing up, Mr Brennan indicated the legislation 'would effectively apply to all those who supply fuel in the relevant sense in a wide region of Central (and, if necessary, northern) Australia'.<sup>42</sup>

4.44 The conclusions drawn by Mr Brennan about the constitutional validity of extending the bill to draw on the Territories power were endorsed by Professor Behrendt.<sup>43</sup>

### ***The Races power***

4.45 Section 51(xxvi) of the Constitution gives the Commonwealth Parliament the power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws.

4.46 Opinions differ on the desirability of using the Races power to augment the Corporations power on which the bill is based. The SACES report noted that the 'use of Race power to impose restrictions on groups is clearly discriminatory and largely undesirable from a public policy perspective'.<sup>44</sup>

4.47 Mr Brennan was cautious about the use of the Races power but 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

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39 Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 5.

40 Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 5, emphasis original.

41 Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 5.

42 Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 5.

43 Jumbunna Indigenous House of Learning, UTS, *Submission 14*, p. 3.

44 South Australian Centre for Economic Studies 2010, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia*, Report commissioned by the Australian Government Department of Health and Ageing, Adelaide and Flinders Universities, p. 16.

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.<sup>45</sup>

4.48 Professor Behrendt states that 'the legislative scheme would clearly be a law "benefitting the people of any race", noting that the communities targeted by the regulatory scheme are predominantly Aboriginal'. Conceding that the scheme would be discriminatory, Professor Behrendt argues that it would be permissible because the limitations are 'legitimate, necessary and proportionate'. Regarding the findings made in the SACES report about the undesirability of discriminatory provisions within legislation, Professor Behrendt recommends that those concerns 'can be addressed by strengthening the requirements for consultation under the Act'. Professor Behrendt concludes that the benefit of drawing on the Races power 'is that the law would be capable of consistent application throughout the country and in relation to all people'.<sup>46</sup>

### ***Referral of powers***

4.49 Under section 51(xxxvii) of the Constitution, a state or states may refer powers to legislate on particular matters to the Commonwealth.

4.50 SACES found that a referral of powers by the States to the Commonwealth would provide 'a strong legal foundation' for the scheme, be 'highly effective in controlling legitimate supply activity', and be relatively straightforward for suppliers to comply with. The disadvantage is that a referral requires not only agreement by the States, but also ongoing support because the SACES report found that States can terminate a referral.<sup>47</sup>

4.51 Mr Brennan noted that a further disadvantage of the referral approach is that it 'slows to the pace of the slowest moving state or territory in order to achieve the overall legislative outcome that you want'.<sup>48</sup> Professor Behrendt observed that referral might be a preferred response both legally and symbolically, but notes the danger that

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45 Gilbert and Tobin Centre of Public Law, UNSW, *Submission 17*, p. 6.

46 Jumbunna Indigenous House of Learning, UTS, *Submission 14*, p. 4.

47 South Australian Centre for Economic Studies 2010, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia*, Report commissioned by the Australian Government Department of Health and Ageing, Adelaide and Flinders Universities, pp. iii, 16–17.

48 Mr Sean Brennan, Director Indigenous Legal Issues Project, Gilbert and Tobin Centre of Public Law, UNSW, *Committee Hansard*, 25 July 2012, p. 14.

governments can change during the negotiation process and that a referral could be rescinded.

## State legislation

4.52 Besides considering the Commonwealth capacity to legislate on low aromatic fuel, the SACES report also examined the potential for state legislation. Subject to the Australian Constitution, the SACES report noted that the states have the capacity to regulate the sale of petroleum products and regulate controlled substances.

4.53 However, the SACES study found that State legislation 'has more uncertain prospects of success, greater potential for delay, and greater risks of differences in the specifics of the law from jurisdiction to jurisdiction'.<sup>49</sup> In contrast, the Commonwealth has a clear capacity to legislate in this area. The SACES study concluded that leaving the regulation of this issue to the states was the least preferred option, an opinion with which Mr Brennan agreed.<sup>50</sup>

4.54 Evidence from other organisations also suggested that a comprehensive state-based approach would be much more difficult to achieve.<sup>51</sup>

### *Position of WA, SA and NT on state legislation*

4.55 The committee is aware that three jurisdictions have made statements regarding the possibility of State and Commonwealth legislation.

4.56 The previous Northern Territory Labor government made a submission to the 2009 inquiry supporting the introduction of Commonwealth legislation that would allow the prohibition of sniffable fuel 'in identified areas of geographical concern'.<sup>52</sup>

4.57 The Western Australian Minister for Mental Health, the Hon Graham Jacobs was quoted in *The Australian* on 13 August 2010 stating that Commonwealth legislation to mandate the sale of Opal was necessary to address the problem of petrol sniffing:

It's my belief that we need to have some overarching legislation. We cannot deal with this problem . . . by ad hoc state by state (laws).<sup>53</sup>

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49 South Australian Centre for Economic Studies 2010, *Cost Benefit Analysis*, p. iv.

50 Mr Sean Brennan, Director Indigenous Legal Issues Project, Gilbert and Tobin Centre of Public Law, UNSW, *Committee Hansard*, 25 July 2012, p. 14.

51 See for example Mr Michael Moore, CEO, Public Health Association of Australia, *Committee Hansard*, 24 July 2012, pp. 7–8; CAYLUS, *Submission 8*, p. 9; Warlpiri Youth Development Aboriginal Corporation, *Submission 11*, pp. 2–3.

52 Northern Territory government, *Submission 20*, Inquiry into petrol sniffing and substance abuse in central Australia, Senate Standing Committee on Community Affairs, March 2009.

4.58 The South Australian Minister for Mental Health and Substance Abuse, the Hon John Hill, praised the effectiveness of the current voluntary scheme in the APY lands, but did note that 'some retailers in the far north of South Australia, outside of the APY lands, continue to stock regular unleaded fuel'.<sup>54</sup> Minister Hill also states that the South Australian government will contribute to the FaHCSIA evaluation of the PSS and will determine its position on a potential legislative approach in light of that evaluation and the current Senate inquiry into the bill.

### *Committee view*

4.59 The committee notes the strong support for legislative action from organisations in central Australia, organisations involved in drug and health issues, and individuals from affected communities. It also notes that previous studies have identified legislative intervention as cost effective.

4.60 The committee has concerns about an act relying solely on the corporations power to implement a scheme. It is possible that this could even encourage smaller outlets to avoid incorporation in order to avoid being captured by the scheme, though it received no evidence one way or the other on this matter. The committee notes that witnesses seemed unsure of whether all existing fuel outlets were incorporated.

4.61 The use of the territories power appears prudent and would be likely to cover the main cases of non-cooperation with the scheme that have been raised to date with the committee. The use of the race power presents important policy questions. The committee accepts the valid arguments put by the Gilbert and Tobin Centre of Public Law and Jumbunna Indigenous House of Learning, but believes further consultation with Indigenous communities, particularly those outside the Northern Territory, would be necessary before also seeking to ground legislation in that power.

### **Recommendation 2**

**4.62 The committee recommends that a legislative scheme for low aromatic fuel not be confined to reliance upon the corporations power.**

### **Other aspects of the bill**

4.63 The submissions from BP Australia and Shell Australia both support the objective of the bill to reduce the potential harm to the health of people living in areas where petrol sniffing has occurred.<sup>55</sup> However, they raised some concerns.

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53 Ms Debbie Guest, 'State looks to federal solution to cut petrol-sniffing', *The Australian*, 13 August 2010, accessed 12 September 2012, <http://www.theaustralian.com.au/news/nation/state-looks-to-federal-solution-to-cut-petrol-sniffing/story-e6frg6nf-1225904664772>

54 The Hon John Hill MP, SA Minister for Mental Health and Substance Abuse, letter to the Hon Warren Snowden MP, Federal Minister for Indigenous Health, 23 August 2012, Senate Standing Committee on Community Affairs, Low Aromatic Fuel Bill 2012, Correspondence.

55 BP Australia, *Submission 15*; Shell Australia, *Submission 20*.

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### ***Mandate and consumer education***

4.64 BP Australia and Shell Australia note that the bill would essentially amount to a mandate for Opal fuel in particular areas. BP Australia and Shell Australia both 'generally oppose mandates due to the market distortions and unintended consequences' they can create, but both companies appreciate the need for governments to create appropriate policy responses to public health matters. As such, both companies are 'impartial' on the bill's policy mechanism.<sup>56</sup>

4.65 Both BP Australia and Shell Australia raise concerns about the ongoing importance of stakeholder acceptance in any future Opal rollout. BP Australia states that:

Significant time and resources are required prior to a launch of Opal fuel into a community. Objectives of this stage include gaining community support and developing technical understanding in key stakeholders.

The success of these pre-launch steps may be diminished where introduction of Opal fuel is driven by mandate rather than a whole-of-community demand and complete stakeholder acceptance.

Any decision to mandate Opal fuel will need to accommodate existing Opal rollout plans and not assume an 'immediate fix' will be in place once the Minister makes a declaration.<sup>57</sup>

4.66 Similarly, Shell Australia states that:

Mandates however do not equal consumer acceptance and regardless of the outcome of the Bill, we would certainly encourage the work by the Department of Health and Ageing to continue in rolling out plans to gain community and stakeholder acceptance of low aromatic fuels.<sup>58</sup>

4.67 In addition, both BP Australia and Shell Australia concur with other stakeholders (and with the committee) that the other aspects of the eight point plan are essential complementary aspects of a holistic approach to tackling petrol sniffing.

4.68 The bill also contains provisions whereby suppliers may be subject to certain requirements in low aromatic fuel areas and fuel control areas such as promotion and the provision of information. Shell raised concerns about the extent to which companies may be required to promote and provide information:

Shell supports the current programme conducted by the Department to work with local communities on education and acceptance of low aromatic fuel prior to roll-out. Shell does not support the proposal for companies to take on sole responsibility for consumer education. Shell sees that fuel manufacturers and suppliers are a support to the Department on technical

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56 BP Australia, *Submission 15*, p. 1; Shell Australia, *Submission 20*, pp. 1, 3.

57 BP Australia, *Submission 15*, p. 3.

58 Shell Australia, *Submission 20*, p. 1, emphasis original.

and fuel quality matters but that Government should take a leading role in consumer/community/customer education and the implementation of complementary initiatives to support health outcomes.<sup>59</sup>

4.69 The committee asked DoHA to respond to Shell's queries, including in relation to information and consumer education. The Department noted that these decisions would be a matter for consideration by government and could not comment further.<sup>60</sup>

4.70 The SACES report addressed the specific issue of prohibiting RULP as opposed to mandating low aromatic fuel. The legislative options evaluated in the SACES report did not mandate, nor contained any provision to mandate, the sale of any low aromatic product, but instead focussed on the control of aromatic fuels:

[T]he sale of Opal is not mandated, nor is there a power to mandate it or indeed to mandate the sale of any other non-aromatic product. This is because it would be an unusual intrusion on individual rights for a government to require an individual to sell petrol of any sort. Instead the decision to sell non-aromatic petrol is a commercial decision to be taken by the prospective supplier. Obviously the uptake of a non-aromatic product is likely to be boosted by controls on the sale of aromatic petrol (especially if the control is prohibition). Governments may also choose to subsidise the supply of a non-aromatic alternative.<sup>61</sup>

4.71 The committee notes that the bill contains provisions for prohibiting the sale of RULP in designated zones and controls on the storage and supply of other fuels such as PULP.<sup>62</sup> While such provisions might essentially amount to a mandate for low aromatic fuel in prescribed regions, the committee sees that the bill does not mandate the sale of low aromatic fuel. The decision to sell a low aromatic fuel would still be a commercial decision to be taken by the retailer.

4.72 The committee further notes that the bill does not use a 'blanket' approach to designating regions, but rather places the power in the hands of the Minister to determine particular regions as low aromatic or fuel control areas.<sup>63</sup>

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59 Shell Australia, submission 20, p. 2.

60 Answer to question on notice #9 from Department of Health and Ageing, received 17 September 2012.

61 South Australian Centre for Economic Studies 2010, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia*, Report commissioned by the Australian Government Department of Health and Ageing, Adelaide and Flinders Universities, p. 9.

62 Low Aromatic Fuel Bill 2012, Clause 9(1).

63 Low Aromatic Fuel Bill 2012, Clauses 14 and 15.

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### *Scope of powers to regulate fuel*

4.73 Clause 11 of the bill would allow regulation of the supply, transport, possession or storage of any fuel. Shell expressed concern about this provision:

Shell does not support the broad powers set out in Section 11 which could allow the Minister to limit supply of premium fuels. Shell would like clarity over the right for companies to maintain the overall product mix on sites, including premium fuels which have previously not been affected by the roll out of Low aromatic 91.<sup>64</sup>

4.74 The committee notes this concern, but also notes that in some locations, the supply of premium fuel is already regulated voluntarily (for example through locks on pumps), while in other locations, the availability of premium fuel has been identified as a source of problems with sniffing.<sup>65</sup>

4.75 BP Australia themselves indicated that premium fuel cannot be ignored as part of the equation, for a number of reasons:

Positive engagement of fuel distributors and retailers has been fundamental to the success of Opal implementation.

Whilst this view has developed from an environment without a mandate mechanism, a future mandate for Opal fuel may simply result in increased PULP availability.

The production of Opal fuel at BP's Kwinana Refinery in Western Australia is part of a complex supply chain that impacts the production of other liquid fuels such as premium fuels (PULP) and diesel.<sup>66</sup>

### *Committee view*

4.76 If a regulatory regime were put in place, it would not be prudent to exclude premium fuel from its scope, in certain circumstances. However, the committee does not believe a case has been made that the legislation should have the scope to apply to every fuel including, for example, diesel or gas.

### **Recommendation 3**

**4.77 The committee recommends that the government consider whether legislation should define more narrowly the fuels to which the bill would apply, but accepts that there should be capacity to regulate the management of premium fuel in some circumstances.**

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64 Shell Australia, *Submission 20*, p. [2].

65 Ms Lisa Sharman, Community Leader and Youth Worker, Titjikala, *Committee Hansard*, 24 July 2012, p. 34; Mr Tristan Ray, CAYLUS, *Committee Hansard*, 24 July 2012, p. 34.

66 BP Australia, *Submission 15*, p. [3].

### *Availability of fuel and consultation*

4.78 It remains clear that supply, storage, and distribution remain challenging aspects of the roll-out of low aromatic fuel. Some aspects, particularly the construction of new storage facilities, are discussed elsewhere in this report, in chapters 2 and 5. The committee notes that the bill would require the Minister to conduct consultations prior to designating a low aromatic fuel area or fuel control area.<sup>67</sup> It also notes that the bill states that the Minister 'must' have regard to the availability of low aromatic fuel in relation to the area<sup>68</sup> when making a decision to designate an area.

4.79 While the bill refers to 'suppliers of fuel' as being amongst those who might be consulted, the committee notes that this might not be taken to include the manufacturers or refiners of fuel. As evidence to the committee has shown, the refining and initial distribution of the fuel is a major element of the supply chain, and one which faces significant potential capacity and cost constraints.

### *Committee view*

4.80 The committee understands the purpose of the consultation provisions, and does not doubt their good intent. It recognises that section 17(1) of the Legislative Instruments Act would be likely to contribute to ensuring that manufacturers or refiners of fuel would be consulted. That section states:

(1) Before a rule-maker makes a legislative instrument, and particularly where the proposed instrument is likely to:

- (a) have a direct, or a substantial indirect, effect on business; or
- (b) restrict competition;

the rule-maker must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken.

4.81 It may help clarify the intention behind the bill if the Explanatory Memorandum indicated that it would be intended that all elements of the supply chain would be considered relevant to consultation when considering declaration of low aromatic fuel areas.

4.82 The committee is also unsure about how the bill would apply in the event that there was a LAF supply problem once a declaration had been made. What would be the consequences if LAF became unavailable to supply to a low aromatic fuel area? On the face of it, it is possible that such a situation would be one to which a Ministerial exemption under clause 17(1) might apply. However clause 17(1)(b) states that a Minister can only exempt corporations from the bill's provisions in a low

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67 Clause 16(1).

68 Clauses 14(3)(f) and 15(3)(f).

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aromatic fuel area or fuel control area provided that 'it is unlikely that the wellbeing of people will be adversely affected by the exemption'. Even if there was a shortage of LAF, the re-introduction of regular unleaded petrol would still be likely to 'adversely affect' the population within the meaning of the bill, so an exemption may not be able to be granted. A more likely outcome would seem to be that the minister would make a further designation effectively removing the low aromatic fuel area altogether. The committee is unsure if that is the intention behind the bill, or whether this is the best way to deal with such a scenario.

#### **Recommendation 4**

**4.83 The committee recommends that there be further examination of the wording of the explanatory memorandum, consultation and exemption clauses, to ensure that fuel manufacturers are properly included, and the bill does not have unintended consequences in the event of supply bottlenecks or disruption.**

#### **Conclusion**

4.84 On 20 July 2012 the Minister for Indigenous Health, the Hon Warren Snowdon MP, wrote to the Northern Territory Chief Minister and the premiers of Queensland, South Australia and Western Australia. He noted the current issues that the government is addressing around storage and distribution issues. He sought their views on the possibility of Commonwealth legislation to control the supply and transport of low aromatic fuel in their jurisdictions. The Minister indicated that, if appropriate, he would 'host a cross-jurisdictional forum to discuss a consistent legislative approach to petrol sniffing including low aromatic fuel'.<sup>69</sup>

4.85 The committee recognises that any legislative action to mandate the supply of low aromatic fuel needs to consider storage and supply issues, complement voluntary roll-out, and prioritise designated petrol sniffing strategy zones. Some of these issues are considered further in chapters five and six.

#### **Recommendation 5**

**4.86 The committee recommends that the Australian Government continue to consult with the relevant state and territory governments on the possibility of national legislation to mandate the supply of low aromatic fuel to ensure that there is agreed and coordinated action to address petrol supply.**

#### **Recommendation 6**

**4.87 In light of the preceding matters, the committee recommends that the current bill not be proceeded with.**

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<sup>69</sup> Additional information received: copies of letters from the Hon Warren Snowdon MP, Minister for Indigenous Health, to state and territory ministers dated 20 July 2012.