

**Electoral Commissioner**

Mr Daryl Melham MP
Chair
Joint Standing Committee on Electoral Matters
Department of the House of Representatives
PO Box 6021
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Mr Melham

COMMONWEALTH ELECTORAL AMENDMENT (TOBACCO INDUSTRY DONATIONS) BILL 2011

I refer to your letter dated 21 October 2011 in which you seek the views of the Australian Electoral Commission (AEC) on the Commonwealth Electoral Amendment (Tobacco Industry Donations) Bill 2011 (the Bill). Your letter notes that the Bill, introduced by Senator Bob Brown on 15 June 2011, proposes amendments to the *Commonwealth Electoral Act 1918* to make it unlawful for political parties to accept donations from manufacturers or wholesalers of tobacco products, or their agents. I understand that the Joint Standing Committee on Electoral Matters is considering the Bill as part of its inquiry into the funding of political parties and election campaigns.

In response to the first question raised in your letter, the AEC cannot provide you with legal advice on the Bill and, as a general practice, the AEC does not seek advice on constitutional matters. Rather, the Department of Finance and Deregulation, as the responsible agency under the Administrative Arrangements Order, seeks any such advice. Under the *Legal Services Directions 2005*, constitutional advice is sought in consultation with the Attorney-General's Department and the Australian-Government Solicitor and may in the end be provided by the Solicitor-General.

The paper prepared by Dr Anne Twomey in November 2008 entitled *The reform of political donations, expenditure and funding* (copy attached) provides her view on the likely constitutional issues of banning and capping political donations and may be of some assistance to the committee. While the main focus of Dr Twomey's paper is on the Constitution of New South Wales, Dr Twomey's paper suggests that a complete ban on a specific industry from making donations may give rise to questions of constitutional validity at the Commonwealth level (see pages 14 to 17, 19 to 21).

In regard to the second question raised in your letter, the AEC anticipates that there may be some administrative issues in establishing how far the term 'agent of a manufacturer or wholesaler of tobacco products' would extend in the context of the bill. The AEC is of the view that it would be much clearer if

a definition of 'agent of a manufacturer or wholesaler of tobacco products' was included in the bill.

As mentioned earlier a complete ban of donations by a specific industry group may give rise to questions of a constitutional validity. If that were the case, it is likely to lead to significant legal costs and resource implications for the Commonwealth if proceedings challenging the constitutional validity of the provisions were commenced, even if the challenge was unsuccessful or withdrawn. If proceedings were commenced, it may make it difficult to administer the provisions until the matter is finalised.

If the Bill is to proceed as a stand-alone bill there is a risk that it will not have the protections previously provided when first proposed as amendments to the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (the Political Donations Bill). For example, the Bill does not cover the circumstances where the receiver of a donation from a manufacturer or wholesaler of tobacco products or the agent of a manufacturer or wholesaler of tobacco products returns the donation within a specified timeframe. The Political Donations Bill, currently before the Senate, includes a provision for gifts that are returned within 6 weeks after its receipt and a provision so that the Commonwealth may not recover the amount of a gift twice.

If the Bill does not include similar provisions to the Political Donations Bill, the AEC is of the view that it would be easier to administer the Bill if it included clear guidance on when it is determined that a person or entity 'receives' a donation.

Finally, consideration could also be given to making the penalty for a breach of the provisions an administrative or civil penalty rather than a criminal offence. This approach would reflect the relatively low penalties proposed for a breach of the provision.

Yours sincerely



Ed Killesteyn

29 October 2011