

Senate Finance and Public Administration Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
ADDITIONAL BUDGET ESTIMATES 2011-2012

Finance and Deregulation Portfolio

Department/Agency: Australian Electoral Commission

Outcome/Program: 1/1.2

Topic: Definition of “gift” and discounts

Senator: Abetz

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Question:

To take on notice the technical issue of how the value of discounts would fit within the definition of “gift”. In the example, it was hypothetical. But let's say business A, for example, buys 10 TV spots and the TV station says to business A, 'Well done, we'll give you two free spots.' Now business A is very sympathetic to political party Z and says, 'All right those two free spots will be given to political party Z. I didn't buy them for anything, there is no commercial value.'

Answer:

The starting point is to examine the definition of “gift” contained in section 287(1) of the *Commonwealth Electoral Act 1918* (Electoral Act). This provides, in part, that:

“**gift** means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration”

There are several elements that would need to be examined to determine whether the hypothetical scenario outlined in the question would give rise to a reporting obligation under the Electoral Act.

The first element is whether there has been a “disposition of property”. Subsection 287(1) also defines the phrase “disposition of property” as:

“**disposition of property** means any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property, and includes:

- (a) the allotment of shares in a company;
- (b) the creation of a trust in property;
- (c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property;

- (d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property;
- (e) the exercise by a person of a general power of appointment of property in favour of any other person; and
- (f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the person's own property and to increase the value of the property of any other person."

It is not immediately clear that the on-forwarding of a discount by business A to political party Z that was part of a commercial contract between a TV station and business A amounts to "disposition of property" as defined in subsection 287(1). It is also not clear whether such a hypothetical situation could even arise given the nature of the privity of the contract that would apply between the TV station and business A and therefore whether political party Z would be legally able to take advantage of the free spots that were the subject of the commercial arrangements that were entered into between the TV station and business A.

If it was legally possible for business A to transfer the discount that it received from the TV station so that the TV station was required to provide those discounted services to party Z, then it may be possible to argue that this amounts to a "disposition of property".

The second element is to identify who are the relevant two persons involved in the disposition of property that is required to amount to a "gift". The hypothetical example would appear to result in the relevant property being the services of the TV station. Noting again that these services were contracted to be supplied by the TV station to business A and that party Z was not a party to that commercial arrangement. If the TV station were aware that business A entered into the commercial arrangement for the purpose of benefiting party Z, then the two relevant persons would appear to be the TV station and party Z. However, if the TV station had no knowledge of the arrangements between business A and party Z, then business A and party Z would appear to be the two relevant persons. The terms of the commercial arrangement between the TV station and business A would need to be examined to assist in determining the knowledge of the parties.

The third element is to examine whether or not there has been consideration. The hypothetical example appears to be based on there being a commercial arrangement at arm's length between the TV station and business A. On the basis that the commercial arrangement involves the granting of a discount (the two free spots), then this would suggest that there was full consideration paid for the disposition of property between the TV station and business A. If the hypothetical example is that only the two free spots provided by the TV station to business A were somehow legally able to be transferred from business A to party Z, then it may be possible to argue that business A has made a disposition of property to party Z. However, the total value of the services to be provided by the TV station has already been paid for by business A to the TV station as part of the overall contract. As the value of the two TV spots that were offered as part of the overall agreement between business A and the TV station is described as being "free", then this gives rise to the issue of whether a transfer of those rights between business A and party Z requires any consideration as the value of the services has been valued by the TV station as "nil" as they have already been provided with full consideration for those spots by business A. Again exact details of the various arrangements between the TV station, business A and party Z would need to be closely examined.

The fourth element is to examine who would have a reporting obligation under the Electoral Act. It is possible to argue that as the value of the services to business A was “nil” and that it was not diminishing its own property in transferring the right to obtain those services to party Z, then business A would not have any reporting obligation under section 305B of the Electoral Act. However, the receipt of that property by party Z could give rise to a reporting obligation under section sections 314AB and 314AC. It is noted that the term “amount” contained in subsection 314AB(2) which is required to be included in the Annual Returns lodged by registered political parties is defined in section 314AA as including “the value of a gift, loan, or bequest”. In this hypothetical scenario it could be argued that the value of the TV spots would be calculated not on the discounted rate provided to business A, but rather at the savings to party Z in not having to purchase those TV spots themselves at the full commercial rate.