



2 – CONSUMER PROMOTIONS

2.1 Introduction

There are numerous federal, state and territory laws and regulations that govern the conduct of trade and consumer promotions involving the giving away of prizes in Australia. State and territory lottery laws will apply if there is any element of chance in a promotion, and permits may be required to conduct the promotion.

Additionally, all promotions (not just prize draws or competitions) in Australia are subject to consumer protection requirements under the Australian Consumer Law (ACL) as found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). Relevantly under the ACL, a person must not, in trade or commerce, engage in conduct that is misleading or deceptive (Section 18), make a false or misleading representation about goods or services (Section 29) or offer any rebate, gift, prize or other free item with the intention of not providing it at all or as offered (Section 32).

2.2 Types of Promotions

Games of Skill

A game of skill is one where the distribution of prizes is not dependent on chance. Each entry in a game of skill must be individually judged according to the criteria set out in the terms and conditions (and/or any advertising for the promotion), such as creativity, literary merit and artistic merit. A game of skill does not require lottery permits nor need it comply with other state or territory requirements relating to trade promotion lotteries as set out in the lottery legislation.

Although games of skill are not regulated by the lottery legislation, games of skill must comply with the

Competition and Consumer Act 2010 (Cth). In particular, care must be taken to ensure that the promotional material relevant to the game of skill is not misleading or deceptive. Games of skill also require terms and conditions to ensure that entrants are informed of all relevant information and limitations in respect of the

promotion at time of entry and to afford legal protection to the promoter.

Examples of a game of skill:

- Describe in 25 words or less why you like our new product. The entry judged to be the best will win a prize.
- Send us your funniest photograph. The funniest photograph, as determined by the judges, will win a prize.

However, the below are not games of skill, as it is likely that more than one entry will contain the correct answer.

- Who won this year's Best Actress award at the Oscars? or
- Fill in the blanks: R_GBY L_ _GUE

The question does not allow the promoter to distinguish between entries. The judging criterion must allow the judges to subjectively determine the winning entry or entries with no possibility of a tie or, if there is the possibility of a tie, the tie determinant must be a game of skill in order for the promotion itself to be deemed a game of skill.

For instance, where a winner is determined to be the first entrant to correctly guess the average number of people that cross the Sydney Harbour Bridge each day, there is the possibility that more than one entrant could submit the correct answer at the same time, and as a result a game of skill tie determinant (i.e. one that involves a judging) is required to ensure the promotion is a game of skill.

Games of Chance

A game of chance is a promotion that contains any element of chance in the determination of winner(s).

Examples of games of chance:

- Purchase a specially marked product during the promotional period, complete the entry form and place it into the entry box to enter the draw for your chance to win a prize.
- Purchase a specially marked product during the promotional period to receive a scratch card and scratch the card to determine if you are an instant winner.
- The first 50 valid entries received by the promoter will win a prize.

2.3 State Permits

If a promotion contains any element of chance, the promotion must comply with the lottery laws in each state and territory in which the promotion is conducted (in addition to the Australian Consumer Law). Lottery laws vary between each state and territory and therefore national promotions must comply with the individual lottery laws in all states and territories.

Some states and territories require the application and issuance of permits before the advertising for the promotion and the promotion itself commences

(depending on the entry mechanism and prize value of the promotion), whilst other states and have 'standing' permits that allow the promotion to proceed provided it complies with certain standing requirements.

All trade promotion lotteries conducted nationally require a permit in New South Wales and may require a permit in the following States and Territories:

- South Australia if the total prize pool value in South Australia exceeds \$5,000 or if the promotion is instant win; and
- Australian Capital Territory if the total prize pool value in the Australian Capital Territory exceeds \$3000; and
- Northern Territory if the total prize pool value in the Northern Territory exceeds \$5,000 and if a permit is not required in any other Australian State or Territory.

Queensland, Western Australia and Tasmania do not require permits for trade promotion lotteries.

If a promotion is only to be conducted in certain States or Territories (and is only advertised in those States and Territories), only the requirements of those States and Territories need to be considered.

Upon lodgement of a permit application, a permit fee is required to be paid to the lottery department in each state or territory in which a permit must be obtained (with the exception of the Northern Territory, where there is no fee). The permit fee is calculated based on the total maximum recommended retail value including GST (Goods and Services Tax) of all prizes to be awarded in the applicable state or territory.

Any electronic drawing systems used to randomly draw winners in a promotion will require prior approval from the South Australian lottery department if the promotion is conducted in that state. Once an electronic drawing system is approved, it can be used for all future promotions that use the system to draw winners. The New South Wales lottery department also requires the promoter to obtain certain electronic draw procedure reports if the promotion is conducted in that state, which may be called upon at any time by the authorities.

2.4 Requirements & Restrictions

It is a general requirement of the lottery legislation of each State and Territory that promotions are conducted fairly and in accordance with the terms and conditions as approved by that lottery department and in accordance with the lottery legislation of that State or Territory. Each entry in a promotion must have an equal chance of winning. Further, pursuant to the *Competition and Consumer Act 2010* (Cth), promotions must be conducted in accordance with any representations made to consumers. If there is a conflict between what has been advertised and the approved terms and conditions, you should seek legal advice.

Prohibited Prizes

The following prizes are prohibited in a trade promotion lottery:

- tobacco;
- firearms, ammunition and prohibited weapons; and
- surgery.

There are also restrictions on awarding alcohol prizes (see "Alcohol" below)

Free Entry

The lottery laws in Australia require that entry into a sales promotion be free. However, the promoter may require entrants to purchase their product at the recommended retail price in order to enter the promotion. The promoter may also require entrants to enter the promotion via a communication mechanism (such as mail, telephone or SMS) at a cost not exceeding 55 Australian cents including GST (except in Victoria, where the maximum entry cost is \$1.00 including GST).

Advertising

The various State and Territory lottery legislation contain requirements for advertising of trade promotion lotteries. All advertising for a promotion must disclose any and all significant conditions or limitations in respect of the promotion, as required under lottery legislation and the *Competition and Consumer Act 2010* (Cth).

Such conditions may include the permit numbers, promotional period, entrant eligibility, how to enter, any restrictions on entry (ie. 1 entry per purchase), any onerous conditions (ie. retain proof of purchase), draw date, time and place, publication medium and date, prize details, values and any restrictions and the total maximum prize pool value. Care must be taken to ensure that the advertising is not misleading or deceptive. Further, there are some industry and product specific codes applicable to particular types of promotions that may also be relevant to advertising. Certain specific requirements commonly encountered with promotions are set out below.

Alcohol

The number of alcoholic drinks that entrants can purchase in order to gain entry into an on premise promotion is limited as follows:

- New South Wales – maximum of 1 standard drink per day, in accordance with the New South Wales liquor promotion guidelines.
- All other States and Territories – maximum of 4 standard drinks per day, in accordance with the National Health and Medical Research Council national guidelines for alcohol consumption.

The Northern Territory prohibits the awarding of alcohol as a 'principal' prize in a promotion. If you wish to give away alcohol that is valued at more than half of the total

prize pool value for the promotion, you will therefore need to award another prize or cash in lieu of the alcohol to Northern Territory winners (if any) or exclude Northern Territory residents from entering the promotion. If however the total value of the alcohol awarded is less than half of the total prize pool value for the promotion, then it is likely that the promotion will be permitted in the Northern Territory. Please note however that each promotion will need to be considered on its own merit and guidance may need to be sought from the Northern Territory lottery department on this issue.

New South Wales prohibits the awarding of over 20 litres of alcohol (ie. over 2 cartons of beer or 24 bottles of wine/spirits) as part of the total prize pool in a single promotion. If you wish to award over 20 litres of alcohol in a single promotion, you will therefore need to limit the amount claimable by New South Wales residents or exclude New South Wales residents from entering the promotion.

If you intend to run a liquor promotion in Queensland, you will also need to be aware that all external advertising of the liquor promotion is prohibited (with the exception of bottle shops). Further restrictions apply to the Brisbane City Council area.

If the product being promoted is alcohol, entrants are required to purchase alcohol to enter the promotion and/or the prize includes alcohol, then entry must be limited to persons aged 18 years or older. This requirement must be clearly stated in the terms and conditions as well as in the advertising for the promotion.

Telephone / SMS / MMS facilities

Promoters may wish to utilise 1900 telephone numbers or standard or premium SMS / MMS numbers as part of the entry mechanic for a promotion.

The lottery departments will only permit the use of a premium service device on the following conditions:

- The cost of the 1900 telephone call, SMS or MMS must not exceed 55 cents (incl. GST) per call / message (except for Victoria where it may not exceed \$1.00 including GST).
- A statement in relation to the cost of the 1900 telephone call, SMS or MMS must appear in the terms and conditions and in all advertising material where the telephone / SMS / MMS number is displayed.

There are also additional conditions that pertain New South Wales, the Australian Capital Territory and Queensland as set out below.

New South Wales:

- The telephone / SMS / MMS facility must not be linked to the provision of further information (such as the terms and conditions) or the provision of numbers or symbols (for instance

which a person marks or scratches off a game card or otherwise matches with other numbers or symbols hidden or displayed on another game card or other publication).

- An entrant must not be required to call or message a telephone service more than once in order to enter the promotion. An entrant must not be required to call or message a telephone service at all to obtain information or particulars about the promotion.
- An entrant must not incur any cost if the telephone service sends a message to their mobile telephone in connection with the promotion.

Australian Capital Territory:

- The full telephone number or contact method must be stated in the terms and conditions.

Queensland:

- The promoter conducting the promotion (whether directly or indirectly) must not receive any of the cost to call a 1900 telephone number or send a SMS or MMS.

If you are intending to use a 1900 telephone or standard SMS or MMS facility for a promotion, you must include on the advertising material for the promotion for compliance with the above lottery department requirements and the Telephone Information Services Standards Council (TISSC) code of practice (if applicable for 1900 numbers):

- the full phone number and contact method;
- the actual cost of each call or connection (e.g. max SMS cost 55c per msg sent); and
- the required format for SMS (if applicable) (e.g. <NAME> <UNIQUE CODE>).

Terms and Conditions

The Australian Consumer Law and lottery laws also require that all relevant information on a promotion, including the rights of the promoter and limitations on entry and prizes, must be disclosed to entrants at time of entry into the promotion via a set of 'terms and conditions' or 'conditions of entry'. The terms and conditions for a promotion must be readily accessible by entrants before they enter the promotion in order to be enforceable pursuant to contract law and the Australian Consumer Law. Entrants must also not be charged to access the terms and conditions.

For promotions involving an element of chance, the terms and conditions must be approved by the lottery departments in each state and territory in which a permit is required to conduct the promotion. Additionally, if the promotion involves any electronic element and is conducted in Western Australia, the final terms and conditions must be provided to the Western Australia lottery department prior to the start of the promotion.

Making Amendments

If any amendments are required to be made to the terms and conditions of a promotion after the permit application has been submitted to the New South Wales, Australian Capital Territory, Victoria, South Australia, Northern Territory and/or Western Australia lottery department(s) (as applicable), the lottery department(s) must be notified of the proposed amendments. If the permit application has already been processed and permit approval granted by the New South Wales, Australian Capital Territory, and/or South Australia lottery department(s) (as applicable), an amendment application must be lodged and amendment fees are payable to these departments.

Once a promotion has commenced or its advertising is in the market, lottery departments will not generally allow any amendments to a promotion and the promotion must therefore be run in accordance with the representations and disclosures made to consumers via the promotional advertising for compliance with the Australian Consumer Law and the terms and conditions originally approved by the lottery departments.