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WIN! WIN! WIN

Competitions and prize draws are a powerful marketing tool for retailers, particularly in difficult trading conditions. Used properly, they can increase sales and enhance brand recognition. Further, they can be used to collect information for future promotions.

However, retailers need to be careful. Get it wrong, and you risk not only negative publicity, amplified by the internet and social networking sites, but prosecution too. The secret is to ensure competitions have unambiguous terms and conditions, and that those terms and conditions, together with advertising and other marketing collateral, are not misleading, either in terms of what they include or – more usually – what they leave out. And this means not only words, but pictures too.

What should typically be covered in the terms and conditions? They should cover, in particular:

- Who is eligible to enter? For example, customers who purchase a specific item or items over a minimum value. Or, perhaps, people who provide their contact details, which can then be added to the retailer's database and used for future promotions. There will be exclusions for employees of the promoter and other companies associated with the competition, and their family members.
- How many times participants can enter. Just the once, or as many times as they wish?
- The time period for receipt of entries, when the winners will be drawn, and when and how they will be contacted.
- An accurate description of the prizes – people must not be misled into thinking that what they might win, or their chance of winning, is better than it really is. You might also want to make it clear that prizes cannot be exchanged for cash or substituted for other items and, if the prize is an event, you will want to protect yourself against cancellation or postponement.
- Some wording to meet the requirements of the Privacy Act 1993, such as the purpose for which the information is collected, and the ability of participants to view the information and require corrections.

To get the most out of competitions, businesses could also obtain consent, through the terms and conditions, to use the winners' names (and, depending on the competition, details and photographs) for promotional purposes, and to add the participants' details on to their database for future contact, including by text and email. The latter consent is required for the purposes of the Unsolicited Electronic Messages Act 2007.

Obviously, not all of the terms and conditions need to be included in advertising. However, some concise details should be included, such as eligibility to enter and relevant time limits, so that people are not misled.

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The law

What is the law on competitions? There are two pieces of legislation which are particularly relevant.

First, the Fair Trading Act 1986. Under section 17 of that Act, businesses must not, when promoting or selling goods or services, offer prizes they do not intend to provide, or do not intend to provide as offered.

Secondly, the Gambling Act 2003. That Act will be relevant where, in order to enter a prize competition, participants must purchase goods or services. Unless the competition is a "sales promotion scheme", as defined by the Act, the promoter will need a gambling licence. There are a number of requirements for sales promotion schemes, including:

- the goods or services must not be sold for a price exceeding their usual retail price;
- there is no additional direct or indirect cost or charge (such as an entrance fee) to persons who wish to participate; and
- the start and end dates of the competition are clear.

There are also various prohibited prizes, such as firearms, tobacco products and liquor, and vouchers for those items. For example, a food store, which also sells liquor, could not offer a voucher as a prize if that voucher can be redeemed for both food and liquor.

As well as these Acts, the Advertising Codes of Practice and Codes of Broadcasting Practice might be relevant.

Some examples

The Commerce Commission is responsible for enforcement of the Fair Trading Act and there have been a number of recent settlements and prosecutions involving competitions which provide useful practical examples. I will not repeat names here, as the negative publicity has probably already been sufficient!

- A retailer ran an in-store "be in with a chance to win a Subaru Forester" competition. To enter, customers were required to purchase goods to the value of \$25 and to complete an entry form which was entered into a prize draw. Although the representation was literally true, the clear impression, without explanatory terms and conditions, was that someone would win the car. In fact, the winner of the prize draw simply "won" an opportunity to win the car by choosing one envelope out of 100 envelopes. In other words, there was a chance of a chance. Both the retailer, and the underwriter, admitted breaching the Fair Trading Act and, as part of the settlement with the Commerce Commission, agreed clearly to disclose terms and conditions for all future competitions and to implement compliance programmes.
- Another retailer reached a settlement with the Commission in relation to their "one in 20" prize draw. Based on the advertising, customers might have believed that, if they purchased one of six specific products, they would have a one in 20 chance of winning their money back. However, in the detailed terms and conditions and not repeated in the advertising, it was stated that the promotion continued for three months, and could be cancelled if at least 20 units of each product were not sold during that period. This is a good example of a term being so important that it should have been mentioned in the advertising. Under the settlement, the retailer agreed to hold a prize draw for all

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customers who purchased the products, despite the minimum numbers not having been sold.

- And finally, another example of where the terms and conditions were fine, but the advertising fell short, this time resulting in court proceedings. The charges arose from a competition to promote an in-house brand of cereal. A sticker on the outside of the cereal boxes offered customers the opportunity to enter a competition to win a trip to Australia. The problem was with the competition's closing date; this could only be discovered after the cereal was purchased and a promotional pamphlet inside the box was read. You guessed it: the stickered boxes continued in circulation after the closing date. The problem would have been resolved by removing the boxes or, perhaps even easier, including the closing date on the sticker. This case was, in fact, subsequently overturned since the element of intention, as required by section 17 mentioned above, was not proven but the lesson, for our purposes, remains.

These are all examples of reputable retailers who – inadvertently – got it wrong. Rather than a competition being good for their business, the negative publicity (and the direct and indirect costs of settlements and proceedings) far outweighed any benefit. But there was nothing illegal about the underlying competitions; they just did not pay enough attention to the advertising and underlying terms and conditions. And fortunately this is something which, with some expert assistance, can be easily addressed.

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