

Beyond advertising - keeping your sales promotion within the law

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Promoting a product by running a competition with exclusive prizes is a common way of promoting a new product or of boosting sales for an existing one.

However, unless the competition stays inside a particular set of rules for a type of competition known as a “sales promotion”, the competition could amount to illegal gambling.

Sales Promotion Scheme

A “sales promotion” is defined by the Act as a form of gambling that does not involve a gaming machine and is used by the creator/distributor/vendor of the goods and services, to promote the sales of the same goods and services. A sales promotion must have the following components:

1. A participant enters in the draw by purchasing goods or services promoted at its usual retail price, and no other direct/indirect payment or value are required from the participant to enter;
2. The outcome of the sales promotion is determined either:

3. Randomly or wholly by chance; or
4. Partly by chance and partly by the application of some knowledge or skill from the participant (it doesn't matter whether chance plays a greater or lesser part); and
5. The date/period for the sales promotion and how the outcome for the promotion will be decided are all clearly communicated to the participant at the time and place of sale.

A critical element is that there must be no extra payment to enter - that means simply buying the product or service is enough. If a competition or promotion does not fit within these criteria, it is likely to be considered as either an illegal gambling activity, or another form of gambling where a licence may be required.

Restrictions on Sales Promotion

Retailers need to be aware of the following restrictions on sale promotions:

(1) They cannot charge the participants any price other than the usual retail value of the product/services

Aside from the usual retail price for the goods/services being promoted, they are not allowed to charge any additional fees for the public to take part (whether payable to them or to others), or for the participants to incur any indirect costs for things such as postage, toll calls or text messages. While standard communication costs are unlikely to disqualify the scheme from a sales promotion, it would be prudent to provide would-be participants with toll free number, prepaid envelopes or just entry boxes at the point/place of sale to avoid intervention by the Department of Internal Affairs (which is responsible for administering the Act).

(2) The sales promotion scheme must run within a specified period

When the sales promotion is advertised, a time limit must be specified on any promotional material delivered to the public, and the date on or period over which the outcome of the draw/lottery will be decided must be clear to any participant who purchases the product or service.

(3) The prize being offered must not be prohibited under the Act

It is illegal to offer the following as prizes for a sales promotion:

1. Firearms or explosives;
2. Restricted weapons or airguns;
3. Any form of liquor and alcohol;
4. Tobacco products;
5. Commercial sexual services; and
6. Any object more than 50 years old that related to Maori culture, history or society, and was brought into New Zealand by the Maori people

Any vouchers or entitlement to any of these products or services are also banned under the Act. For example, if winning the sales promotion entitles the winner to award points, coupons or vouchers which can be used to acquire a list of products that includes any of the above items, the scheme will not come within a lawful sales promotion scheme and may be illegal.

(4) The sales promotion must not be conducted from overseas or through remote interactive devices

Under the Act, an overseas-based gambling activity (which includes a sales promotion) cannot be advertised or promoted in New Zealand. This means that any overseas businesses

wanting to advertise its sales promotion need to ensure the actual activity (e.g. prize draw) takes place in New Zealand, and is carried out by a New Zealand-based operator.

The Act prevents any sales promotion scheme from being conducted via the internet, phone or text messaging unless it takes the form of a lottery, or is approved by the Lotteries Commission and the Racing Board. This does not prevent individuals from participating in sales promotion conducted overseas. Foreign companies wanting to extend their sales promotion scheme in New Zealand through viral channels should ensure their website or phone numbers are based outside New Zealand, and refrain from advertising their activities through local media channels within New Zealand.

As some exceptions exist to these restrictions, it is advisable to obtain legal advice.

Other Law and Regulations to Consider

Where advertising is concerned, there are also other relevant regulations which need to be considered regarding the content and methods of an advertisement.

Fair Trading Act 1986

The New Zealand Fair Trading Act 1986 prohibits communications, trade activities or advertising that mislead or deceive or are likely to mislead or deceive the public as to the nature, process, characteristics, suitability or quantity of products/services, as well as any general deceptive conducts in business. Promoters should review their materials to ensure any special terms, restrictions and conditions are highlighted, and not unilaterally alter any key terms and conditions without communicating it to the participants first. It is also an offence under the Act to offer a prize for which there is no intention to deliver (section 17).

Advertising Standards Authority Code of Practice

The ASA Codes of Practice are a set of voluntary, self-regulatory codes which all advertisers agree to comply with. Advertisements should:

1. Comply with the restriction on the sale of various gaming products and particularly age restrictions. The laws of New Zealand have various age restrictions for different gambling activities;
2. Observe a high standard of social responsibility;
3. Not be directed at minors (persons under 18 years of age), have strong or evident appeal to minors, nor portray minors participating in activities in which they are under the legal age. Advertisers should note that despite the restrictions above, it may be permitted for minors to appear in situations in which they would be naturally found (e.g. a family meal), provided there is no direct or implied suggestion in the advertisement that they will participate in such sales promotion. Note: Retailers should keep in mind that under New Zealand law most contracts entered into with a minor are unenforceable. For that reason it may be appropriate for age to be verified before a member of the public can be allowed to participate;
4. Not promote reliance on gaming and prize draws as means of relieving a person's financial or personal difficulties, nor to encourage consumers to participate excessively or beyond their means;
5. Not state or imply that a player's skill can influence the outcome of a game unless that is correct;
6. Not exaggerate the connection between the gaming activity and the use to which the profits may be put;

7. Not mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear. This means that winning claims should be factual and able to be proven, and the chances of winning or the size of the prize should not be exaggerated;
8. Respect the principles of free and fair competition between businesses;

Contract

Standard contract law also applies to the terms and conditions of the competition, and these should be carefully scrutinised before the competition is launched.

Conclusion

While sales promotions and various forms of marketing strategies complement retailers' advertising campaigns, it is important to remember that these great marketing ideas also have legal consequences. Sales promotions should be vetted before implementation. The potential costs for non-compliance can be high, so it is important to consult a legal advisor before proceeding.