



PRIZE PROMOTIONS AROUND THE WORLD

Australia



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ABOUT

Welcome to the fourth edition of DLA Piper's popular Guide to Prize Promotions Around the World. Prize promotions remain a popular marketing tool used globally by businesses to attract customers. The internet and various social media platforms make this an attractive, cost efficient means of reaching a large, multi-jurisdictional customer base; but it is not without its legal challenges.

This handbook is designed to equip our clients with a useful tool to assist them with the management of the early development stages of a promotion, and to bring potentially problematic issues to their attention as soon as possible.

NEW FEATURES AND TRENDS

In response to client demand, this fourth edition of the Guide has been expanded to cover 39 jurisdictions which count among the most significant for our clients, with the addition of Denmark, Hungary, Nigeria and Turkey.

As our interactive map shows, the extent of regulation and sanctions in this area is on the rise, with the most noticeable change being brought about by the introduction of GDPR across the EU. GDPR extends obligations around handling promotion entrants' personal data (eg for winner publicity, use of promotions to generate marketing leads and use of UGC entries containing personal data), and introduces the possibility of huge fines for breaches of those obligations.

ABOUT OUR GLOBAL ADVERTISING AND MARKETING TEAM

The DLA Piper global advertising and marketing team is well-versed in handling complex, frequently multi-jurisdictional compliance projects. This includes advising on compliance aspects of international prize promotions, which we are often asked to clear across large numbers of jurisdictions, while working to short deadlines.

More broadly, our global advertising and marketing team is able to support the full range of advertising-related work, from copy clearance to dealing with advertising regulators and litigation, to negotiating advertising and sponsorship deals, to e-privacy issues and ad-tech. Our advertising and marketing lawyers offer deep understanding of the advertising and media industries, and combine this with a sophisticated approach to cross-border working.

DISCLAIMER

This Guide is not a substitute for legal advice. Nor is it intended to be an exhaustive guide to all rules and regulations relating to promotions in the jurisdictions covered, or to cover all aspects of the legal regimes surveyed, such as specific sectoral requirements. Rather, it aims to simplify what are often complex provisions into a more manageable summary and to highlight areas of potential concern to promoters. It is current as at the last modified date stated in each section.

PRIZE PROMOTIONS AROUND THE WORLD

AUSTRALIA



Last modified 21 December 2018

GOVERNING LAW

What are the main applicable governing laws or codes for prize promotions?

In Australia, Prize Promotions are governed by State and Territory legislation. The laws and codes that will apply to a prize promotion will depend on where the Prize Promotion is advertised and made available to entrants. If a Prize Promotion is to be advertised nationally, the promoter will need to ensure compliance with the laws and codes in each State and Territory. A promoter may be required to obtain permits in more than one State or Territory.

Australian Capital Territory

Name	Law or Code?
Lotteries Act 1964 (ACT)	Law
Gambling and Racing Control (Code of Practice) Regulation 2002	Law

New South Wales

Name	Law or Code?
Lotteries and Art Unions Act 1901 no 34 (NSW)	Law
Licensing and Registration (Uniform Procedures) Act 2002 (NSW)	Law
Lotteries and Art Unions Regulation 2007 (NSW)	Law

Northern Territory

PRIZE PROMOTIONS AROUND THE WORLD

Name	Law or Code?
Gaming Control Act 2000 (NT)	Law
Gaming Control (Community Gaming) Regulations 2011 (NT)	Law
Northern Territory Code of Practice for Responsible Gambling	Code

Queensland

Name	Law or Code?
Charitable and Non-Profit Gaming Act 1999 (QLD)	Law

South Australia

Name	Law or Code?
Lottery and Gaming Act 1936 (SA)	Law
Lottery and Gaming Regulations 2008 (SA)	Law

Tasmania

Name	Law or Code?
Gaming Control Act 1993 (TAS)	Law
Gaming Control Regulations 2004 (TAS)	Law

Victoria

Name	Law or Code?
Gambling Regulation Act 2003 (VIC)	Law
Gambling Regulation Regulations 2005 (VIC)	Law

PRIZE PROMOTIONS AROUND THE WORLD

Gambling Regulation Amendment Regulations 2012 (VIC)	Law
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WA

Name	Law or Code?
Gaming and Wagering Commission Act 1987 (WA)	Law
Gaming and Wagering Commission Regulations 1988 (WA)	Law

Australia

Name	Law or Code?
Australian Consumer Law (ACL), set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth)	Law
Privacy Act 1988 (Cth)	Law
Spam Act 2003 (Cth)	Law
Do Not Call Register Act 2006 (Cth)	Law

EXTRA-TERRITORIALITY

Do national regulators enforce rules against entities operating abroad?

The laws and codes apply where a prize promotion is advertised to, or entry is otherwise available to, persons located in the relevant state or territory, regardless of where the promoter is based.

Given the significant challenges in enforcing penalties against foreign entities, whether the laws and codes are likely to be enforced by the regulators against a foreign promoter is likely to turn on the structure of the promoter, whether the promoter operates in a highly scrutinized industry and the severity of the non-compliance and penalty. Breaches of the laws and code are more likely to be enforced where the foreign promoter has Australian operations or assets, the promoter is in a highly regulated industry (e.g. utilities, financial services or airline), where it is perceived that a multi-national has operated a promotion out of its offshore operations to avoid enforcement of local requirements or where the nature of the infringement is particularly objectionable (e.g. fraud or flagrant repeat non-compliance).

Please note that a foreign entity must have an ABN (Australian Business Number) in order to obtain a

PRIZE PROMOTIONS AROUND THE WORLD

permit in NSW and the prize must be drawn in Australia. In the ACT, the foreign entity must also have an address in Australia. Additionally, for those states and territories that require entities to obtain a permit, their terms and conditions will be subject to the discretion of the relevant regulatory body.

SKILLS COMPETITIONS

Can a prize promotion be run that is based on skill?

Prize promotions based on skill are permitted in all Australian States and Territories.

Importantly, any such skill competition must comply with Australia's national consumer law, the Australian Consumer Law (ACL) included in Schedule 2 of the Competition and Consumer Act 2010 (Cth). Under s.18 of the ACL, an entity can be held liable for misleading and deceptive conduct if terms and conditions are not clearly explained and displayed to a customer. To avoid this, the conditions of the promotion must be prepared prior to the commencement of the competition and be clearly displayed for all participants to see during the course of the event. The promotion must then be conducted in accordance with those conditions.

Please see below further requirements particular to each state and territory.

Australian Capital Territory

When the determination of the prize winner involves skill only (i.e. no element of chance is involved), an approval and permit is not required.

In this context, 'skill' means any competition that involves a decision or input by the participant, such as guessing a sound or number or weight, submitting a description of an item or activity or describing or stating reasons for liking something. Skill may also include any event or competition that is judged by people qualified in a field relevant to the event or competition.

New South Wales

A permit is not required for a game of skill whereby the winners are determined by qualified or expert judges, the decision is judged against set criteria and there is no element of chance involved.

Northern Territory

A permit is not required if the promotion involves a game of skill which has no element of chance.

Queensland

A game of skill which has no element of chance is not regulated and therefore not subject to the Charitable and Non-Profit Gaming Act 1999 (QLD).

However, guessing competitions are considered to be games of chance.

South Australia

A competition in which the winners are determined by skill does not come under the Lottery and Gaming Act 1936 (the Act), and therefore does not require a permit. If, however, there is any random element to the prize draw (even where an entrant has answered a game of skill question first, but a

PRIZE PROMOTIONS AROUND THE WORLD

winner is then drawn from all correct entries) a permit is required.

Tasmania

A permit is not required if the promotion is a game of skill which has no element of chance.

Victoria

A game of skill with no element of chance is not regulated and therefore the Gambling Regulation Act 2003 (VIC) would not apply.

Western Australia

A game of skill with no element of chance is not regulated and therefore the Gaming and Wagering Commission Act 1987 (WA) would not apply.

PRIZE DRAWS

Can a prize promotion be run where there is an element of chance in the selection of the winner?

Trade promotions that involve an element of chance are permitted in all States and Territories of Australia. See below for specific requirements.

Australian Capital Territory

A permit is required if the promotion involves distribution of prizes determined by any means that includes an element of chance or a mixture of skill and chance, and entry must be free.

A permit is not required if the only prizes offered are rebates or discounts off goods sold by the business holding the promotion and the promotion is open to all customers of that business (i.e. a 'private lottery') or if the total prize value does not exceed:

- A\$3,000 (approx. US\$2,077) for a Trade Promotion Lottery;
- A\$2,500 (approx. US\$1,731) for a Raffle;
- A\$1,000 (approx. US\$693) for a Housie session; and
- A\$1,000 (approx. US\$693) for a Calcutta event.

However if the prize value exceeds A\$3,000 (approx. US\$2,077), the business will need to obtain a permit from the ACT Gambling and Racing Commission.

New South Wales

A permit is required for all trade promotion lotteries and games of chance conducted in NSW.

Entry must be free. Accordingly, entry into the trade promotion lottery cannot be gained by participants providing anything that has intrinsic value. For example, participants cannot redeem loyalty or reward

PRIZE PROMOTIONS AROUND THE WORLD

points for entry into a trade promotion lottery. However, a trade promotion lottery for which entry is gained by purchasing goods or services at their normal retail value (for example, where proof of purchase is required) is still allowed.

An entrant or other person must not be required to call or message a telephone service on more than one occasion to provide personal information or particulars, or to answer questions, or for any other reason in order to obtain a right to a valid entry into the proposed trade promotion lottery.

Please note it is inappropriate for business directors, management and employees, their immediate families, their retailers, suppliers, associated companies and agencies to participate in a game of chance conducted for their own business –unless the lottery is specifically conducted as an 'in house' lottery (for example among sales staff). Only members and guests of a registered club should participate in a lottery aimed at promoting the business of the club.

Northern Territory

A permit is required for the conduct of a 'major' trade lottery (ie where the total prize value is greater than A\$5,000 (approx. US\$3,463).

Additionally, the Northern Territory recognizes permits issued by other Australian states and territories. If the promoter holds a current permit to run the promotion in New South Wales for example, it will not need to obtain a Northern Territory permit.

Each entry must have an equal probability of winning the major prize.

No employees of the business or family members of those employees may participate in the trade promotion lottery.

Queensland

No permit is required but the promotion must comply with certain requirements if it is a game of chance.

A person is not eligible to enter if the person is:

1. A member of the management committee of the eligible association conducting the art union; or
2. Directly engaged in conducting the draw of the art union; or
3. The eligible association conducting the art union; or
4. A member of the immediate family of a person mentioned in (1) or (2).

South Australia

A permit is required for a 'major' trade promotion lottery which is where the total value (nationally) of all prizes in the lottery exceeds A\$5,000 (approx. US\$3,643), or the prizes include both instant and drawn prizes (regardless of the value of the prizes).

A permit is not required for 'minor' trade promotion lotteries (ie "where the maximum prize value is less than A\$5,000 (approx. US\$3,643)), however they must comply with the minor trade promotion lottery rules.

PRIZE PROMOTIONS AROUND THE WORLD

Tasmania

No permit or approval is required for trade promotions.

However, if making a purchase is necessary to enter a trade promotion, the following conditions apply:

- the cost of the goods or services must not exceed the prevailing market price; and
- determination of the market price lies with the Commission.

Victoria

No permit or approval is required. However, trade promotion lotteries must comply with conditions set out in Gambling Regulation Act 2003 (Vic) and related regulations.

Please note that a members' draw is considered a trade promotion lottery and involves the drawing of a member's number from a pool of numbers. Terms and conditions should be available at the place of entry and to all members. The conditions of entry only require the member to be present at the draw if the entry and draw are to occur on the same day. If a member enters the draw through buying goods or services throughout the week, then the member does not need to be present at the time of the members' draw.

Western Australia

A permit is not required if the trade promotion lottery complies with the terms and conditions of the blanket permit published on the Department of Racing, Gaming and Liquor's website (see [here](#)). Otherwise a permit will need to be obtained to be able to vary these terms and conditions.

SELECTION OF WINNERS

Are there any requirements for the selection of winners and award of prizes?

There are slightly different requirements in different States and Territories. We have considered these different requirements for each State and Territory and prepared below a high watermark list of the requirements. There are also a small number of requirements which are specific to certain States and Territories and these follow at the end of the common high watermark requirements.

Conduct of draw

The draw must occur within 12 months of the issue date of the permit unless approval has been provided by the relevant authority.

The determination of the winner must be undertaken in a transparent manner with each participant having an equal chance of winning the competition.

If more than one prize is being determined at a draw, the major prize must be drawn first unless winning entries of lesser prizes are eligible to be redrawn.

Winning must not be contingent on the participant being present at the drawing of the lottery except for lucky-badge draws. It is acceptable to offer bonus prizes if the winner is present as long as the bonus prize does not exceed the value of the base or initial prize.

PRIZE PROMOTIONS AROUND THE WORLD

Where a computerized system is used to decide the winners of prizes (including a device used in connection with a 190-telephone service, an SMS telephone facility, an MMS telephone facility or the Internet) the permit holder must obtain two reports:

1. Appraisal Report; and
2. Draw Procedure Report.

For trade promotion lotteries involving instant win prizes, additional conditions are required to be met, including printing and lodging requirements.

Notifications of winners and publication

The results must be available within 7 days of the determination of the prize winners, if requested.

The name and address of each winner of a prize valued at over \$250 (approx. US\$173) must be published within 30 days of the draw:

- published within 30 days of the draw;
- in a newspaper circulating generally throughout the State;
- if the lottery has only been advertised in a particular magazine, newspaper, newsletter or other publication (whether electronic or otherwise) or on a particular website, in that magazine, newspaper, newsletter or other publication or on that website;
- if entry in the lottery is only permitted on a particular website, on that particular website; and/or
- on the internet for a minimum period of 28 days.

Redraw

All prizes in the lottery must be distributed or allocated as approved.

If, despite every reasonable effort, a prize-winner cannot be contacted, the prize must be retained for 3 months after the draw. At the end of 3 months, if the prize remains unclaimed, the promoter should write to the relevant authority body requesting approval for a redraw.

However, if a prize is perishable (for example, a meat tray), the prize may be sold or otherwise disposed of in a way that the entity considers will bring a reasonable price. The money realized (after deducting the reasonable costs of sale or disposal) must be held in trust by the entity or the organization for the winner of the unclaimed prize.

Australian Capital Territory

All winners must be notified directly, by written means (email, mail, fax or SMS) within 21 days of the results.

The method, date, time and place of the redraw must be stated in the terms and conditions of the lottery.

New South Wales

PRIZE PROMOTIONS AROUND THE WORLD

For prizes worth more than A\$10,000 (approx. US\$6,926), the draw and the announcement of the prize winner(s) must be scrutinized by an independent person unless otherwise approved by the Department (unless the promotion involves an instant win).

Northern Territory

Prizes unclaimed for more than 3 months after the date of the draw must be surrendered to the Director of Licensing.

The names of the major prize winners must be published in a local or a national newspaper.

Queensland

If a prize is an antique, a gem, memorabilia or a work of art the prize winner must be given a current written market valuation from an appropriate valuer for the antique, gem, memorabilia or work of art.

If a prize is an animal, the prize winner must be given:

- A certificate from a veterinary surgeon about the distinguishing characteristics and markings, health and physical condition of the animal; and
- A current written market valuation from an appropriate valuer for the animal.

If a prize is a second hand motor vehicle, the prize winner must be given the following documents for the motor vehicle:

- A current certificate of road worthiness;
- A current written market valuation from an appropriate valuer;
- A warranty for a period of three months after the day it is delivered to the winner; and
- A security interest certificate under the Motor Vehicles Securities Act 1986.

If a prize is a thing, other than a motor vehicle, that is second hand, the prize winner must be given a current written market valuation from an appropriate valuer for the prize.

An existing prize with a value of more than A\$5,000 (approx. US\$3,463) must be insured against loss or damage for an amount equal to its current valuation for the period from when tickets for the art union go on sale to the day the prize is delivered to the winner.

If the prize is not claimed within one year the eligible association may apply the prize or its sale proceeds to the association's purposes.

South Australia

A participant cannot be restricted to winning only one prize if they are permitted to submit multiple entries.

The participants in a trade promotion lottery cannot be required to be present at the drawing of a trade promotion lottery in order to win a prize. Therefore, a prize cannot 'jackpot' if the winner is not present or a redraw conducted because the winner is not present.

PRIZE PROMOTIONS AROUND THE WORLD

If a prize is not delivered to its winner at the time the lottery is drawn, the winner must, within 14 days of the draw, be notified in writing of the prize he or she has won and the particulars of how the prize is to be delivered or collected.

Under the Regulations, a minor trade promotion lottery must not be drawn electronically unless the system has been approved by the Minister.

A scrutineer is required to attend a draw where the total value of all prizes (nationally) in the draw equals or exceeds A\$20,000 (approx. US\$13,852).

Tasmania

There must be no cost of entry, though it may be a condition of entry that goods or services must first be purchased in order to participate. If making a purchase is necessary to enter a trade promotion:

- The cost of the goods or services must not exceed the prevailing market price; and
- Determination of the market price lies with the Department of Liquor and Gaming and Department of Treasury and Finance.

If in doubt as to whether the amount charged exceeds the market price, details may be submitted to the Department for determination. If it is determined that the amount being charged exceeds the market price of the goods or services, the scheme would be deemed a lottery and would be unlawful.

Victoria

The winners of prizes must be advised in writing of the prize.

The winner of a prize must not incur a cost to accept a prize (other than a trivial cost).

The prize must be paid or transferred to the winner within 28 days after the draw.

A prize may only be substituted if the substituted prize is of the same or greater value than the original prize and the winner either agrees in writing, or the original prize is unavailable due to circumstances beyond the control of the person conducting the trade promotion lottery and reasonable attempts are made to reach agreement with the winner that are unsuccessful.

Western Australia

The draw must be conducted within one month of the closure of the lottery.

Where practicable, members of the public must be afforded the opportunity to witness the draw.

Where not practicable, audit records confirming the prize draw must be made available to an authorised officer of the Gaming and Wagering Commission or a Police Officer upon request.

All advertising must provide a description of the prizes and must contain the terms of the lottery or direct contestants to where the terms can be found.

JUDGES

Are there any particular requirements in relation to judges or judging for skills competitions?

PRIZE PROMOTIONS AROUND THE WORLD

No.

However, for the ACT and NSW, skill competitions may include judges who are qualified in a field relevant to the event or competition but this is not obligatory.

PRIZES

Are there any restrictions on the prizes awarded?

As a general rule, prizes awarded must be as described in their marketing communications, pursuant to Australian Consumer Law otherwise the business could be found guilty of deceptive and misleading conduct.

In general, if a prize involves travel, all relevant information must be included in the terms of entry (eg destination, class of travel, name of accommodation, duration etc).

Where participants are under the age of 18 years, an application must not include any unlawful or inappropriate prizes eg liquor products, tobacco products or dangerous goods, will not be approved.

The below list includes prohibited prizes in all States and Territories except for Tasmania (additional prohibitions specific to each state and territory are listed below).

Prohibited prizes:

- Tobacco products in any form;
- Firearms or ammunition;
- Explosives;
- Weapons;
- Cosmetic surgery or other procedure designed to improve personal appearance;
- Liquor prizes – more than 20 litres of liquor with an alcohol content not exceeding 20% by volume or more than 5 litres of liquor with an alcohol content exceeding 20% by volume; and
- Any other item by which the sale or acquisition is restricted by legislation of the State or Commonwealth.

New South Wales

Where a lottery is being conducted on the premises of a hotel (excluding general bar licenses), registered club or a casino, it is a condition of a permit that cash prizes cannot be awarded between 10:00pm and 8:00am the next day.

If you propose a money prize greater than A\$2,000 (approx. US\$1,385), the prize winner must be paid the amount exceeding A\$2,000 (approx. US\$1,385) by a crossed cheque made out to the winner (or by EFT if the winner so requests). The full prize amount can be paid in this manner, if desired.

Queensland

PRIZE PROMOTIONS AROUND THE WORLD

Prohibited prizes: A ticket or other chance in a game that is not approved under a gaming act.

South Australia

Prohibited prizes: Liquor within the meaning of the Liquor Licensing Act 1997 is prohibited from being offered as an inducement to enter or participate in the lottery. It is not prohibited for participants to purchase liquor to enter the lottery or to be given by the trader as a prize in the lottery.

Tasmania

Prohibited prizes: Nil.

Victoria

Prohibited prizes: Prostitution services.

REGISTRATION REQUIREMENTS AND FEES

Are there any registration requirements, or any fees/taxes payable?

Registration Requirements

Australian Capital Territory (ACT)

A permit must be obtained from the ACT Gambling and Racing Commission. The fee to apply for a trade permit will depend on the prize value. As at the 21 December 2018, the fees can range from A\$211 (approx. US\$146) to A\$3,372 (approx. US\$2,335).

New South Wales

A permit must be obtained from the Office of Liquor, Gaming and Racing. The fee to apply for a trade permit will depend on the prize value and will range from A\$80 (approx. US\$55) to A\$2,185 (approx. US\$1513). These are the fees as at 21 December 2018 and are subject to change.

Northern Territory

A permit is required for a major trade lottery where prizes total more than A\$5,000 (approx. US\$3,463). No fee is required to obtain the permit.

Please note that no permit is required if it has been already obtained elsewhere.

South Australia

A permit must be obtained from the Office of the Liquor Gambling Commissioner for a 'major trade' promotion lottery, that is if the total value of all prizes in the lottery exceeds A\$5,000 (approx. US\$3,463).

A permit is also required for trade promotion (instant prize) lotteries.

The fee to apply for a 'major trade' or 'instant prize' permit will depend on the prize value but will range from A\$195 (approx. US\$135) to A\$3,938 (approx. US\$2,727). There is also a premium fee to speed

PRIZE PROMOTIONS AROUND THE WORLD

up the application process which ranges in price from A\$391 (approx. US\$271) to A\$7,867 (approx. US\$5,449). These are the fees as at 21 December 2018 and are subject to change.

Queensland

Permit is not required.

Tasmania

Permits are not required.

Victoria

Permits are not required.

Western Australia

A permit is not required but the promotion must comply with the WA blanket permit conditions (see [here](#)).

Taxes Payable

No taxes payable in any Australian jurisdiction.

OTHER LOCAL REQUIREMENTS

Are there any other key local requirements?

There are slightly different requirements in different States and Territories. We have considered these different requirements for each State and Territory and prepared below a high watermark list of the requirements. There are also a small number of requirements which are specific to certain States and Territories and these follow at the end of the common high watermark requirements. Any advertising material and/or lottery rules should include the following:

- The permit number;
- The conditions of entry (including the minimum age of the participants);
- The closing date and time for the receipt of entries in the lottery;
- The place, date and time of the lottery draw;
- How prizes will be awarded;
- The method for claiming prizes (including any requirement for entrants to be present at the draw);
- How prize-winners will be notified;
- How the results of the lottery will be published;

PRIZE PROMOTIONS AROUND THE WORLD

- The promoter's name, address and telephone number; and
- Details of the prizes and their value (including conditions, if any, relating to receiving, accepting or using the prizes).

All advertisements of a major trade promotion lottery on television, radio or at the cinema must contain the following information:

- The permit number;
- How a person may enter the lottery;
- The nature and value of the prizes to be won;
- How and where to get a copy of the full terms and conditions of the lottery; and
- For the majority of states, no advertising of a trade promotion can commence until a permit/approval has been granted.

For multiple lottery permits, the types of contests, promotions, prize giveaways, etc. that are planned or intended to be conducted under the authority of the permit should be included.

Where entry is made into a promotion by telephone, SMS or MMS, the cost to the caller must not exceed A\$0.55 (approx. US\$0.38) (including GST) and the cost should be included on the promotional material.

Keep records in relation to finances, entries and prizes for three years.

Northern Territory

Information that must be included in the promotional material:

- If the promoter advertises, gives information or issues publicity about the lottery before a permit is granted, the promoter must state in the information or publicity that the lottery is subject to the grant of a permit and will not proceed if a permit is not granted.

Victoria

- Ensure the lottery is conducted in a manner that is not offensive or contrary to the public interest.
- Ensure prize winners are not required to incur any cost to accept a prize (other than a trivial cost).
- Only substitute an advertised prize if the winner agrees in writing and the substituted prize is of the same or greater value than the original prize.

Western Australia

- If entry is via the Internet, there must be no additional cost to the participant to register his/her name other than the cost paid by the participant to access the web site via the internet service provider.

PRIZE PROMOTIONS AROUND THE WORLD

TIMING

Is time required to ensure compliance (other than reviewing the terms and conditions)?

For States and Territories which require permits, including New South Wales, Western Australia, Northern Territory and the Australian Capital Territory, 2-3 weeks should be allowed from the finalization of terms and conditions to commencement of promotion since the permit approval process can take up to a few weeks.

TRANSLATIONS

Are the terms required to be translated by law?

No (for all states and territories).

PENALTIES FOR NON-COMPLIANCE

What are the penalties for non-compliance?

Australian Consumer Law(ACL)

The ACL applies nationally and in all States and Territories, promoting fair trading and the protection of consumer rights and interests. The three key elements of the ACL are:

1. A prohibition on misleading and deceptive conduct: A court may award damages where a person is found to have engaged in conduct that is in breach of this provision of the ACL. Conduct can include the making of representations in terms and conditions for, or advertisements promoting, trade promotions so it is important to ensure they are accurate and correct.
2. The imposition of a number of statutory guarantees in relation to the supply of goods and services (eg guarantees as to due care and skill; guarantees as to fitness for purpose; guarantees as to reasonable time for supply): The guarantees imposed under the ACL apply to goods and service which are ordinarily supplied for personal, domestic or household use or which are valued at under A\$40,000 (approx. US\$27,703), so the guarantees will apply to most prizes awarded. The guarantees generally apply even if goods or services are given away, including as prized. The guarantees, and consumers' rights and remedies for breaches of them, cannot be excluded, restricted or modified.
3. The unfair contract terms (UCT) regime that applies to standard form consumer contracts: This regime will apply to trade promotions terms and conditions since they are standard form agreements that are presented on a 'take it or leave it' basis. A provision is unfair if, it would cause a significant imbalance in a party's rights or obligations under the contract, would cause detriment to a party if relied on, is not reasonably necessary to protect the legitimate interest of the party advantaged by them, having regard to the extent to which the term is transparent and the contract as a whole. The ACL and the ACCC note that provisions which are at risk of being unfair include asymmetrical liability regimes, unilateral amendment rights, broad termination rights in favor of one party only and provisions which reserve discretion in favor of one party only.

If a term is found to be unfair, it is void and unenforceable. While the UCT regime doesn't allow the

PRIZE PROMOTIONS AROUND THE WORLD

ACCC to seek pecuniary penalties where a term is found to be 'unfair', the ACCC has successfully relied on other sections of the ACL prohibiting false and deceptive conduct to obtain pecuniary penalties from suppliers in connection with the inclusion of unfair terms in contracts (essentially on the basis that including a term which the supplier knows is likely to be contrary to law and unenforceable is misleading and/or deceptive). The maximum pecuniary penalty which can be awarded is currently the larger of:

- A\$10,000,000 (US\$6,925,960);
- Three times the value of the benefit received; or
- 10% of annual turnover of the entity in the preceding 12 months, if court cannot determine benefit obtained from the offence.

So the possible consequences of including unfair terms are quite severe.

Privacy Act

The Privacy Commissioner is responsible for the enforcement of the Privacy Act and will investigate an act or practice if the act or practice may be an interference with the privacy of an individual and a complaint about the act or practice has been made. Generally, the Privacy Commissioner prefers mediated outcomes between the complainant and the relevant organization. Importantly, where the Privacy Commissioner undertakes an investigation of a complaint which is not settled, it is required to ensure that the results of that investigation are publicly available. Currently, this is undertaken by disclosure through the Office of the Australian Information Commissioner website of the entire investigation report.

The Privacy Commissioner may also investigate any 'interferences with the privacy of an individual' (i.e. any breaches of the Australian Privacy Principles) on its own initiative (i.e. where no complaint has been made) and the same remedies as below are available.

After investigating a complaint, the Privacy Commissioner may dismiss the complaint or find the complaint substantiated and make declarations that the organization rectify its conduct or that the organization redress any loss or damage suffered by the complainant (which can include non-pecuniary loss such as awards for stress and/or humiliation). Furthermore, fines of up to A\$420,000 (approx. US\$290,890) for an individual and A\$2,100,000 (approx. US\$1,454,450) for corporations may be requested by the Privacy Commissioner and imposed by the Courts for serious or repeated interferences with the privacy of individuals.

Australian Capital Territory

Penalties apply for various offences under the Lotteries Act, including fines and/or imprisonment for conducting lotteries that are not approved or exempt from approval. The maximum financial penalty imposed under the Lotteries Act is A\$40,500 (approx. US\$28,050).

New South Wales

If a party does not comply with a permit issued by the Office of Liquor, Gaming and Racing, the Office can take a range of actions, including:

- Prohibit further fundraising or community gaming activities;

PRIZE PROMOTIONS AROUND THE WORLD

- Refer the matter for legal or administration action; or
- Take a range of specific investigation and enforcement activities against charities.

Penalties also apply for offences against the Lotteries and Art Unions Act, including severe penalties for serious offences such as misappropriation of funds or prizes or fraudulent conduct. The maximum financial penalty imposed under the Lotteries and Art Unions Act is A\$5,500 (approx. US\$3,809).

Northern Territory

Depending on the nature of the non-compliance and the findings of any investigations by the director, the outcome could include directions being issued by the director to either:

- Invalidate the draw and direct another draw to be undertaken under the supervision of the director and under appropriate conditions;
- Cancel the lottery or game of chance and undertake appropriate actions as required by the director;
- Direct the organizer to adopt, vary or cease practice in the conduct of the lottery or game of chance.

Serious breaches of the act or regulations may result in severe penalties, including fines and imprisonment. Under the Gaming Control Act, the maximum penalty that can be imposed is a fine of up to A\$13,175 (approx. US\$9,125) as well as a term of imprisonment of up to 2 years.

Queensland

There are various penalty provisions in the Charitable and Non-Profit Gaming Act, including failure to comply with the rules of the promotion and failing to comply with various record-keeping requirements. A range of monetary penalties may be imposed depending on the breach (up to a maximum of A\$26,110) (approx. US\$18,084) as well as a term of imprisonment of up to 2 years.

South Australia

Penalties may be imposed under the Lottery and Gaming Act and Regulations. Serious breaches of the Act and Regulations may attract penalties up to 2 years imprisonment and more than A\$10,000 (approx. US\$6,926) in fines.

Tasmania

Penalties may be imposed for breaching the Gaming Control Act 1993, noting that trade promotions are not regulated. Serious penalties apply for conducting unauthorised lotteries, including large fines, some in excess of A\$159,000 (approx. US\$110,123) and imprisonment for up to 2 years for some offences, although these generally relate to gambling related activities and wagering.

Victoria

Monetary penalties apply for breaches of the Gambling Regulation Act. The maximum penalty for a first time offence is A\$9,671 (approx. US\$6,698). For subsequent offences, the maximum penalty is A\$16,119 (approx. US\$11,164). Other disciplinary action may also be taken, including suspension or withdrawal of the trade promotion permit.

PRIZE PROMOTIONS AROUND THE WORLD

Western Australia

Various penalties apply for breaching Western Australian trade promotions regulations. For example, monetary penalties apply for:

- failing to ensure that every ticket or chance is included in the draw; and
- failing to hold the draw within one month of the closure of the lottery.

Penalties can include fines up to A\$10,000 (approx. US\$6,926) or 2 years imprisonment

RESTRICTIVENESS OF REGULATIONS

How restrictive are the legal obligations applicable to prize promotions?

The Australian laws in relation to trade promotions and games of chance are State and Territory based and as a result care must be taken to ensure compliance if a promotion is to be run nationally. For example, permits are not required in Queensland, Tasmania, Victoria and Western Australia while trade promotion lotteries in New South Wales and the Australia Capital Territory require a permit. Permits are required in the Northern Territory and South Australia only if the total prize pool value exceeds A\$5,000 (approx. US\$3,463).

It is however, comparatively simple to avoid the gaming / lotteries legislation by running promotions as a game of skill.

REGULARITY OF SANCTIONS

How frequently does the regulator impose serious sanctions for non-compliance?

With the Australian States that have stringent rules surrounding trade promotions, powers exist for government officers to investigate concerns.

For example in New South Wales, concerns can be lodged with the Office of Liquor Gaming & Racing whose enforcement policy involves promoting voluntary compliance while applying escalating enforcement action that target industry participants who demonstrate more serious, repeat or sustained contraventions or other misconduct inconsistent with community expectations and the public interest.

If the incident is not a repeated occurrence, it would appear that imprisonment is an unlikely sanction. Usually, a fine is imposed which ranges depending on the gravity of the crime. For example, in 2015, online gambling company Bet365 was fined with a A\$2,750,000 (approx. US\$1,904,640) penalty after being found guilty of breaching the ACL and deceiving Australian consumers with a false 'free bets' offer. Another example occurred in 2014-2015 which involved the NSW Office of Liquor, Gaming and Racing issuing a fine of A\$5,500 (approx. US\$3,809) to various bars for irresponsible alcohol promotions and enforcing restrictions such as banning beer keg prizes and banning Barbie themed cocktails which could appeal to minors.

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