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SUBMISSION TO THE LIQUOR AND GAMING BOARD OF NEW SOUTH WALES August 2016

PUBLIC CONSULTATION ON REVIEW OF CURRENT LAWS RELATING TO PRIZE PROMOTIONS AND LOTTERIES.

PromoVeritas are the the Independent Promotional Verification Service – we ensure that prize promotions run by any of our hundreds of clients are run fairly and in accordance with the laws and regulations of the local market. Although based in London, England, our work for major brands is truly global in in 2015 we completed projects in over 70 countries using our own legal knowledge and hand selected promotional law experts in all the main countries of the world.

In Australia we work for brands such as ASOS, Kelloggs, Pringles, Cadbury and more – drafting their terms & conditions, obtaining the necessary permits and then conducting fair and secure prize draws or quality judging for competitions. We have a team members based in NSW who acts on our behalf for our client projects.

Note : Our experience and interest is solely in what you are calling Trade Promotions, so we have confined our responses to just Trade Promotions.

Some definitions of words to assist our views:

- Trade Promotions - activities conducted by businesses aimed at increasing awareness or sales amongst consumers
- Prize Draws- games of chance. Come in many forms, including simple postcard in a box, or a message or golden ticket inside a branded product, or a code entered by text or on a website
- Competition – a game of skill or judgement, eg submitting a photo or answering a question. Winner selection should generally be via a judge or panel of judges and based on subjectivity or accuracy, not luck.
- Hybrid – typically something that asks a question so simple that no one is likely to get it wrong, resulting in the winner having to be chosen at random, ie by luck !
- Prize Promotions – the generic title for all of the above.
- Free entry – the definition of this has caused much debate in other countries. The view adopted by the Gambling Act 2005 in Great Britain is that Free is either
 - without any payment,
 - or if there is payment it is for the purchase of the promoted product, at its normal price (so if a bottle of coke is £1, and they run a 'look behind the label to see if you have won' promotion, as long as the price remains at £1 (subject to normal trade pricing regulations) this is allowed, because the £1 pays, is not to enter the promotion, it is for the drink, and the promotion is a free bonus. There are controls

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- built in to prevent unscrupulous promoters selling say envelopes with the possibility of winning a prize for an inflated price of say £10 !
- and/or it is the necessary cost of submitting an entry, so the cost of a standard phone call, or a standard text or a postage stamp (because the promoter is not actually gaining financially from this cost to the consumer).

Around the world there is a huge variety in the way in which prize draw and prize promotions in general s are regulated. Some countries regard them as the first step on the road to gambling and heavily regulate them, others seek to limit their ability to compete with lucrative national or state lotteries and also impose restrictions, but increasingly there has been a liberalization and a recognition that properly executed consumer prize promotions are not evil and have a role to play in an open economy. Countries such as Germany and Sweden that used to ban them, now allow them and even in the USA only three states still require pre-notification, and then only if the prize is over a certain value.

The USA model is of course similar to that in existence in Australia, with individual States deciding their own laws. So Western Australia and XXXX allow them without authorisations, whereas permits are required in XXX and of course in NSW. This may have been viable when everything operated within States, but brands are now national or international and campaigns are now able to operate across and over borders and national barriers through the power of the internet and social media sites. For this reason the NSW Consultation is welcomed by PromoVeritas.

However it is important that public confidence is maintained and that prize promotions are run fairly and that everybody has an equal and fair chance of winning. It is of course possible for the organizer of a draw for a car to manipulate the result to ensure that a family member or favoured customer wins the prize. Or for them to award no prize at all. This is totally unacceptable and needs to be prevented..

Some Problems with the Proposed Legal Changes for NSW:

Purchase Linked. Although the new proposals will 'allow Trade Promotions designed to promote goods and services' they do not appear to allow entry to be linked to a product purchase, just those that are 'free to enter'. We think that this is wrong, and that a purchase link should be allowed. We suggest that the definition of 'free to enter' is broadened to include a purchase provided that the base price of the promoted product is not inflated as a result of the promotion.

Licence Required if total prize value exceed \$10,000 in any 12 month period. This restriction seems to be either based on the premise that prize draws are evil, and need to be kept small, or that if you keep prize funds small, then the price of products in the shops will stay low. Neither is based on reality and we see no reason for a Government to legislate on this matter. Promoters should be able to decide what the right level is – what will work for them and what will attract the

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consumer. That is certainly the model adopted by Queensland – where there is no limit – and we would be interested to know whether the lack of a limit has caused problems in Queensland.

In fact, we are certain that NSW imposing a restriction is wrong – the current laws, with their current cap causes us (and our clients) problems, because a brand domiciled in say Victoria, and running an on pack prize draw for say a car, will not be able to have free movement of stock across State borders because of the limits that you have imposed in NSW. They will have to have a special pack run for NSW without the promotion, and this will increase their costs, and cause logistical difficulties. ASOS is an ecommerce company – if they want to run a prize promotion with a \$15,000 prize, State borders have little meaning to them. In addition it may be impossible to reconcile the demands of two States, eg NSW and Victoria, both of whom want the draw conducted in their own State, under their supervision ! The situation is made even worse if, as is often the case, ASOS wish to run a global promotion, with Australians being just one of many nationalities eligible to enter. Whose jurisdiction does it operate under, what communication of it would be allowed NSW if say it was not licenced and not drawn within NSW ?

In addition the proposed limit will create challenges.

What is the limit to be based on – retail or trade prices. How do you value a Money Can't Buy Experience such as a \$100 concert ticket that included a Meet and Greet with Elton John ?

What is the limit attached to -take Cadbury. Would it be the legal entity of Cadbury Australia, or would it be attached to each brand, so Cadbury Dairy Milk would have its own \$10,000 limit, and Cadbury Wispa another \$10,000 limit, but what about Cadbury Dairy Milk 200g is that to be treated as separate to CDM 5 x 100g multipack. And ASOS Clothing – they have separate divisions for Mens, Women and Childrens clothing, would each have its own limit.

We have seen this type of control attempted in countries such as Holland, and it is problematic and prone to abuse.

Fairness and Integrity. Where we are in total agreement with the proposed NSW rules is the section on 'operated with fairness and integrity'. This is the basis of most rules in EU. Specifically in the UK, for Games of Chance ie Prize Draws the rules are:

8.24 Promoters of prize draws must ensure that prizes are awarded in accordance with the laws of chance and, unless winners are selected by a computer process that produces verifiably random results, by an independent person, or under the supervision of an independent person.

But there are additional rules for those running games of skill, ie competitions

8.26

In competitions, if the selection of a winning entry is open to subjective interpretation, an independent judge, or a panel that includes one independent member must be appointed. In either case, the judge or panel member must be demonstrably independent, especially from the competition's promoters and intermediaries and from the pool of entrants from which the eventual winner is picked. Those appointed



to act as judges should be competent to judge the competition and their full names must be made available on request.

And let us not forget that other type of promotions exist, such as Instant Wins, eg Willy Wonka, in practice also a game of chance:

8.25 Participants in instant-win promotions must get their winnings at once or must know immediately what they have won and how to claim without delay, unreasonable cost or administrative barriers. Instant-win tickets, tokens or numbers must be awarded on a fair and random basis and verification must take the form of an independently audited statement that all prizes have been distributed, or made available for distribution, in that manner.

Licencing. If you insist on requiring licences for those activities with high prize values, there must be a simple and fast way of obtaining the licence (preferably online and at low cost to the promoter). In addition, even a promotion issued a licence, is a potential disaster unless there are checks done on the integrity of the draw process. This could be very straightforward where there is one draw at the end of say a three month period for one prize. But what if the promotion is an instant win, linked to codes that are entered online. There will be algorithm built into the website that wil have to check the validity of the code, then decide whether it is a winner or not. This could be in the basis of the code itself, the time entered or a 1 in X,000 model, and this could run for many months. At what point would the Government seek to conduct its checks – at the start, the middle or the end. And what are they looking for – can they read scripts and computer programmes ? Or one common format is a prize draw, but this is conducted every hour = again this hardly seems an easy job for the State to do.

Our last point is about an area not apparently covered by the review and that is clarification of the status of prizes in terms of taxation – primarily income tax for the winner. In th USA, prizes of \$300 are liable for tax (via end of year self assessment forms), in Italy, the promoter has to pay up to 40% tax on the prizes, upfront, and in Spain it is 10%, whilst in Greece, the 10% tax is deducted from the amount given to the prize winner. Although not directly part of the law under review, some reference to the status of prizes under current tax laws would be beneficial.

THE PROMOVERITAS RESPONSE TO THE SPECIFIC QUESTIONS RAISED IN YOUR CONSULTATION

1. Do the objects of the Act as set out in section 2 remain valid?	Yes, we feel that the objects in Section 2 remain valid, but there needs to be clearer separation between fundraising / charity prize promotions and those run by or for commercial entities. Those conducting the review should keep an open mind and not regard prize promotions / lotteries etc as being evil and the first step on the road to gambling addiction and therefore something that must be controlled for the sake of the health and wealth of the community.
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	<p>They are simply one of a number of marketing tools, designed to increase brand awareness and product sales and need to reflect the increased cross border / global nature of commercial life. Allowing purchase linked prize promotions is important.</p>
<p>2. Does the proposed model at page 10 represent a sensible approach, or, is there another approach that might be more suitable for regulating community gaming and lottery activities in NSW?</p>	<p>Our input is solely on Trade Promotions, and we see no reason why the open approach of Queensland should not be considered by NSW. No licence required, No cap on value of prizes. The only requirement is fairness and integrity in the operation of the activity.</p> <p>Trying to impose caps on prizes limits creativity, creates blocks on free trade, will deprive NSW residents of opportunities that will be available in other States, makes no account of the prevalence of internet advertising and social media communication that will carry messages for high value prize draws to NSW residents from places where are no such restrictions.</p> <p>One example of the mess that this type of legislation causes is Canada, where out of all the States, Quebec alone imposes some tough rules. The result is that the terms of most promotions specifically exclude residents of Quebec from participating, thus avoiding the need to follow their rules, much to the annoyance of Quebecans who are deprived of many great prize opportunities!</p>
<p>3. Does the proposed model adequately address the risk of harm to the community arising from community lotteries and trade promotions?</p>	<p>We believe that for Trade Promotions it sets the barrier too high, it is still operating from an outdated view that prize promotions are bad, and corrupting, and therefore need to be controlled. The \$10,000 rule is a business constraint that will cause Promoters problems, or they will seeks ways around it.</p>
<p>4. What measures could be taken to reduce the regulatory burden placed on providers of community lotteries and trade promotions activities, without sacrificing the integrity and probity of those activities?</p>	<p>In many European countries, the first line of defence for oversight of marketing activities is industry self regulation – in the UK www.asa.org and in the EU via EASA members. However the move to a Principle based regime in Australia is a viable substitute provided that :</p> <ol style="list-style-type: none"> 1. The marketing industry is given sufficient notification of changes to adapt their process 2. The marketing industry is given sufficient education so that all levels of staff know and understand their obligations

	<p>3. These should primarily relate to every activity having a comprehensive set of Terms & Conditions that are followed and that all prize selections, whether via a draw, via instant win or via judging, are conducted or at least overseen by an independent entity</p> <p>4. That the state facilitates but does not actually provide these independent entities. So perhaps companies such as PromoVeritas are licenced, annually, and are then able to conduct their work freely, subject only to occasional checks. The names of the independent verifier for a promotion, would be required to be included in the Terms and Conditions to ensure compliance.</p>
<p>5. Are there any additional services or service improvements that Government could provide to assist organisations and businesses conducting lottery activities and trade promotion lotteries to understand and meet their regulatory obligations?</p>	<p>As mentioned above, we believe that the private sector should own and manage the process, just as they do with financial auditing or annual checks on cars. But these entities could themselves be licenced, annually, provided they can demonstrate their integrity, independence and adequate systems for ensuring fair winner selection. Beyond that the Government should back away – the growth of ecommerce, regional / multi country brands makes State legislation a barrier to trade rather than an enabler.</p>
<p>6. Should consideration be given to a civil penalty regime? If so, which of the current criminal offences, if any, should be addressed via civil penalties?</p>	<p>Yes, there does need to be a legal backstop of meaningful sanctions, and the ability to charge individuals, as well as the Promoting corporations, could be a powerful incentive for full and complete compliance. The money raised could then be used to fund education of the marketing sector and the licencing regime of independent overseers.</p>
<p>7. Are there any other matters that should be considered in this review of the Act and regulations</p>	<p>Several.</p> <p>The first is that trade promotions are not inherently evil. They are part of the marketing mix, and just as TV adverts or price reductions do not require licencing, nor should prize promotions. What evidence does the Government have of the corrupting power of a brand offering prize draw with a car as a prize.</p> <p>Secondly, you need to cexpand your leniency to those trade promotions that are linked to a product purchase – eg buy this bottle of Coke to get a code to enter the prize draw. Provided the price of the Coke has not been altered, most</p>



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	<p>Western European laws do not regard this as a 'payment to enter'.</p> <p>Thirdly the imposition of restrictions on the value of prizes that can be offered (prior to a licence being obtained) is wrong. Brands will find ways around it, it inhibits free trade across State and country borders and does not reflect the values of enterprise and commercial freedom.</p> <p>Finally, whatever rules you impose do need to consider the new formats that exist for running promotions - such as simply posting a comment on facebook (hosted in the USA but perhaps promoted to Australians) as well as Code based promotions, where codes might be issued inside boxes of cereals, and the code might be a predetermined winner (with no prize awarded if that code is thrown away by a consumer) or post-determined, where the codes have no inherent value other than to enter the consumer into a version of electronic roulette, where perhaps 1 in X,000 will win a prize. And finally Competitions – games of skill. Your new rules must be very clear as to the definition of skill, and whether they can be both free to enter and linked to a purchase. Is a competition that asks 'what is the name of the Queen' a genuine game of skill. Where do you draw the line.</p>
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