

# Spearing | Waite

Good Company

July 2008

## Newsletter



The Company Commercial department can assist with any aspect of your business but particularly want to hear from you if: -

- You have long thought about regulating your shareholders and partners but have still not done that partnership or shareholder agreement;
- You are selling or buying a business;
- You are restructuring your business;
- You are incentivising employees and thinking about a share option agreement.

Despite the credit crunch we have been busy recently being involved in:

- Drafting a full set of documents to comply with the Consumer Credit Act;
- Selling a bathroom display company;
- Buying a domiciliary care company;
- Doing shareholders agreements for a plastics manufacturing company and an estate agent;
- Doing an EMI employee share option scheme for an engineering consultancy company.

Contact [kate.blank@spearingwaite.co.uk](mailto:kate.blank@spearingwaite.co.uk) if we can help with any of the above.

### Data Protection Act 1998

The Criminal Justice and Immigration Act 2008 has made some changes to the Data Protection Act 1998, in relation to the knowing or negligent procurement or disclosure of personal data. The sanctions have been increased and the Information Commissioner's Office (ICO) can now directly proceed against the wrongdoers.

Under the 1998 Act, any person who knowingly or recklessly obtains or discloses personal data without the consent of the data controller (the person in your organisation who determines how personal data is to be used) is guilty of an offence with limited exceptions (s.55).

Previously the offence was only punishable by a fine up to the statutory maximum but under the 2008 Act, the offence is now

also punishable by imprisonment of up to 2 years upon indictment.

Further, if the breach of the Act is of a kind likely to cause substantial damage or distress, the ICO can now directly issue penalty notices and fines to data controllers who seriously breach any of the data protection principles, without having to go through the courts.

### Data Protection Principles

Anyone who processes personal information must ensure that the information is:

1. fairly and lawfully processed;
2. processed for limited purposes;
3. adequate, relevant and not excessive;
4. accurate and up-to-date;
5. not kept for longer than necessary;
6. processed in line with consumer rights;
7. secure; and
8. not transferred to other countries without secure protection.

Whilst the above is to be noted, it must not be forgotten that the biggest practical consequence of any breach of the data protection laws is the damage to the goodwill of a business that inevitably follows the bad publicity of a data security breach.

Unbelievable Price!

Buy One Get One Free!

Limited Time Only!

### Consumer Protection from Unfair Trading Regulations 2008

The Consumer Protection from Unfair Trading Regulations 2008 came into force on 26th May 2008 and aim to protect consumers from unfair commercial practice. A "commercial practice" is widely defined as any activity (act or omission) linked to the promotion, sale or supply of goods/services by businesses to

consumers. The Regulations affect all commercial practice before, during and after a commercial transaction. Please note that the Regulations do not affect private transactions between two consumers.

The Regulations protect consumers against traders who carry out any of the following practices:

1. 31 blacklisted practices which are automatically unfair; and
2. practices which impact consumer behaviour, such as:
  - a) misleading acts and omissions
  - b) aggressive practices
  - c) general unfair conduct

### (1) Blacklisted Unfair Practices

The Regulations ban 31 practices which are deemed unfair in all circumstances. Examples include:

#### **Unbelievable price!**

A trader may not invite consumers to purchase goods/services at a specified price if the trader has reasonable grounds to believe that he will not be able to offer those goods/ services at that price. Such grounds must be disclosed;

#### **Limited time only!**

A trader may not falsely state that goods/services will only be available for a very limited time (or on particular terms for a very limited time) to elicit an immediate decision;

#### **Unique offer?**

A trader may not present rights given in law to consumers as a distinctive feature of the trader's offer; and

#### **Is it really free?**

A trader may not describe goods/services as 'free', 'without charge' or similar, if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and paying delivery costs. For example, "buy one get one free" should not be used - better to say "two for the price of one".

### (2) Practices which Impact Consumer Behaviour

Practices are gauged against the standard of an average consumer under this category, ie. a consumer who is reasonably well-informed, observant and circumspect.

A commercial practice is unfair if it causes the consumer to take a transactional decision that he would not have otherwise taken. A "transactional decision" would include, for example, the average consumer choosing to buy an item he would not otherwise have bought, or buying from one trader when he would have bought from another.

- **Misleading Behaviour:**

Broadly speaking, a commercial practice is misleading if it contains false or unclear information or it omits material information. Financial loss is not required for misleading behaviour to be unfair. The customer must be provided with the main characteristics of the goods/services, such as price, delivery and availability (taking into account limitations of space or time).

- **Aggressive Commercial Practices:**

Aggressive commercial practices are those which significantly impair the average consumer's freedom of choice or conduct through the use of harassment, coercion or undue influence. Physical force is not required in order for behaviour to be considered aggressive and therefore unfair under this category. A trader must also not threaten to take any legal action which cannot be taken.

Examples of prohibited aggressive commercial practices include: threatening a consumer with criminal liability for a debt when non-payment of debts only attracts civil liability, and the use of aggressive techniques to prevent

consumers from cancelling a subscription or seeking a refund.

- **General Prohibition:**

The Regulations introduce a general prohibition not to trade unfairly which acts as a catch-all for all unfair commercial practices which are not caught by the specific prohibitions above. A trader must not knowingly or recklessly contravene the requirements of professional diligence, ie. breach honest market practice or general principles of good faith in the trader's field of activity.

The Regulations also protect the more vulnerable consumers, such as children, the elderly or the infirm. Commercial practices targeted at a certain group of consumers will be judged from their impact on an average member of that group of consumers. Certain practices, such as pestering children to buy advertised toys, will be automatically unfair and prohibited under the Regulations. Traders cannot evade the unfairness rules by specific practices that would only fool particularly vulnerable consumers even if those practices cannot be proven to target that group.

#### **Penalties and Enforcement**

Businesses who fail to comply with the Regulations face harsh potential penalties, including fines of up to £5000, or in extreme cases, imprisonment.

The Local Authority Trading Standards Service (TSS) and the Office of Fair Trading (OFT) are the bodies who have the responsibility for enforcing the Regulations. Consumers who suffer detriment as a result of unfair trading practices cannot bring a claim against the wrongdoing trader directly but must rely on the TSS and OFT for redress. This has led to concerns that the Regulations will not be as effectively policed as they were meant to, as the TSS and OFT will need to balance their duty to enforce the Regulations with their duty to allocate their resources according to public interests.

#### **Concerns for Brand Owners**

Brand owners had previously hoped the ban on certain misleading marketing practices (for example, the ban on promoting a product in a way similar to an existing product, so as to deliberately mislead the consumer into believing that the product is made by the same manufacturer) would result in better protection against copycat products. However, given the lack of a direct right of action to enforce this ban, the Regulations may not offer as much assistance in this respect as previously hoped.

#### **What does this mean for my Business?**

With the help of a commercial lawyer, you must fully assess whether a change in your current business practices (promotional practices and customer facing processes) is required in the light of this legislation.

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