
AUSTRALIAN CAMPS ASSOCIATION

Cancellations due to COVID-19: A general legal guide and FAQs

Please note this document contains general information only and is not a substitute for seeking legal advice on your specific business contracts and circumstances. Each contract and the best course of action for your business should be evaluated on a case-by-case basis, taking into account the potential financial, operational, legal and reputational risks and impacts on the business, while maintaining customer and industry goodwill.

What is in this document

Many of our members have contacted us with valid concerns about the appropriate legal and practical response to cancellations of bookings. In particular, our members have received various requests for refunds arising from the COVID-19 (Coronavirus) pandemic and government restrictions affecting both our members and customers' ability or willingness to proceed with prior camp and accommodation bookings.

This guide provides a general overview of key legal issues, guidance and examples of the frequently asked questions (**FAQs**) from our members. In the current COVID-19 context, each member will be affected differently, due to varying state government restrictions and health directives, as well as different customer booking terms and conditions and cancellation policies. As the liability and rights of parties arise primarily from these individual contractual arrangements and specific circumstances (and is subject to different state and federal COVID-19 legislation and restrictions), this document can only provide general guidance and suggestions.

We know our members care about maintaining their customer relationships and industry goodwill in these unprecedented circumstances. Accordingly, when considering the most appropriate response for your business to customer requests, we recommend that you carefully balance your specific financial and legal obligations (including any applicable contract terms or cancellation policy) with long term potential relationship and reputational impacts in order to find fair, practical and ideally mutually agreed solutions for all parties concerned.

CONTRACTS: KEY CONCEPTS

Force Majeure Events, Frustration of Contracts and Cancellation Policies

In legal terms, there are a few key concepts that will determine how you must deal with contractual obligations in an environment where a party to the contract is prevented from performing the contract due to:

- a **'force majeure'** event (like the Coronavirus pandemic); or
- a situation where a contract may be **'frustrated'**; or
- other circumstances in which your **cancellation policy** may apply.

Set out below are the common questions and issues facing our members, with FAQs and answers to provide general guidance. However, we appreciate that each of our members have differing contract terms and cancellation policies and are dealing with a wide range of customer circumstances and requests. We have assumed for the purpose of this guide that each member has some form of written booking terms (albeit varying in content). Accordingly, we have set out in **Schedule 1** the key principles relating to *Force Majeure Events, Frustration of Contracts and Cancellation Policies* for your reference and application to your particular circumstances.

Specific Camp and Accommodation COVID-19 Cancellation FAQs

Set out below are some common questions we are receiving from members. You may also wish to suggest customers **check their travel insurance policy** (if any) to see if cancellations are covered - this will vary depending on each customer's relevant circumstances and policy terms.

Q: We had a booking for a school camp and the school has asked to cancel because of Department of Education recommendations for schools to cancel due to COVID-19 (but before government restrictions on social and group gatherings etc). Do we have to provide a full refund or can we just postpone to a later date?

This will depend on the terms and conditions of the booking and any cancellation policy as to whether deposits or bookings are non-refundable, and if cancellation fees apply. The terms may, for example, state that a cancellation fee is payable, particularly where the cancellation is through no fault of the accommodation provider (ie. it is still open and it is still lawful for the school to attend). See below for slightly different circumstances of 'frustration' of contract where both the school and provider are *prevented* from fulfilling the contract due to the government's COVID-19 'shut down' or health directives.

Also, be aware of unfair contract laws which in some circumstances may be considered 'unfair' and void where a business is permitted to retain the full deposit or payment without having delivered any goods or services. Ask yourself whether it is reasonably necessary to retain the full amount to protect legitimate business interests? It is unlikely to be unfair if you are covering costs you have incurred (e.g. charging a reasonable administration fee).

Q: After the government introduced restrictions on social and group gatherings, a school with a group booking requested that we cancel their accommodation booking and receive a full refund. Technically we are still open as the shutdown of places of public gatherings from 12noon Monday 23 March 2020 does not apply to the accommodation section of hotels, motels and resorts, and in our view we have sufficient space to comply with social distancing requirements. What are our options?

If it is or becomes unlawful to host the group due to health directives and government restrictions on social or group gatherings, the contract will likely be frustrated as neither party can honour the booking. This would mean no cancellation fee would apply - that would be unfair in the circumstances. Technically if you are still open, the question is whether the 'frustration' is on the part of the school (e.g. are they unable to attend due to restrictions on public gatherings and groups). As an overarching principle, it is important to be aware of and avoid potentially unfair or unconscionable conduct, which is prohibited under the Australian Consumer Law, when dealing with customers in these circumstances.

Q: We have had a private group booking request a refund because the campground is now closed due to government restrictions relating to COVID-19. Do we have to give them their money back or can we postpone to a later date?

If the customer agrees to postpone, you can give them a credit note or book them in for a later date. If the campground is closed for the relevant dates of their booking, the contract is frustrated (as you cannot perform the accommodation services) and the customer is entitled to a refund. You may wish to offer them the options of a refund, credit note or voucher, but be careful not to mislead them as to their entitlement to a refund as that would be an offence under Australian Consumer Laws.

Q: A family has notified us that they have decided not to attend our accommodation during their school holiday booking due to concerns regarding regional travel, social distancing and other COVID-19 recommendations now enforced by the government (ie. the cancellation was before laws were introduced and enforced). Are they entitled to a refund?

Usually, if the family merely does not want to attend, that would be considered ‘change of mind’ and they would not be entitled to a refund, subject to any applicable booking terms and conditions or cancellation policy. For example, some booking terms and cancellation policies make accommodation fees fully refundable if cancelled within x period of time prior to the booking date.

If the family *cannot* attend the accommodation due to government directed closures, travel and other social distancing restrictions, the contract would be frustrated (and the obligation to pay discharged).

The timing of this is key, as they may not have been entitled to a refund initially, but in the event of stricter ‘lock downs’, the contract would be frustrated and a refund may apply. Of course, a better practical outcome would be for the parties to agree to put the contract into ‘hibernation’ and postpone the booking date until after the restrictions are lifted.

ACCC AND AUSTRALIAN CONSUMER LAWS

The Australian Competition & Consumer Commission (**ACCC**) has indicated that it is alert to any instances of unfair or unconscionable conduct on the part of businesses in dealing with consumers during the COVID-19 crisis. The ACCC has encouraged all businesses to treat consumers fairly during this time and has issued some general guidance on booking cancellations due to COVID-19 which may be of use to members (see **Schedule 2**).

Businesses should be mindful of their obligations under the Australian Consumer Law (**ACL**), which include:

- to **not mislead** customers, including about what the customer is entitled to under the business’ terms and conditions or in relation to consumer guarantees and other ACL rights such as rights to a refund;
- to **not act unconscionably** when dealing with customers;
- to not seek to rely on **unfair terms** in standard form contracts with customers.

Businesses should also be aware that in many circumstances, small businesses are also defined as consumers (and so consumer rights and the ACL will apply), especially in relation to dealing with large businesses and for the purpose of unfair contract laws.

Exceptions to ACL consumer guarantees

Consumers’ rights are not limitless and the consumer guarantees under the ACL do not require you to provide a remedy unless one of the guarantees has not been met.

For example, you may not be required to provide a remedy if:

- a consumer simply changes their mind, decides they do not like the purchase or has no use for it;
- discovers they can buy the goods or services more cheaply elsewhere.

Accordingly, cancellations in early March prior to the government's travel / gathering restrictions merely because the customer had concerns about COVID-19 may be treated as a 'change of mind', depending on the timing and circumstances. Customer entitlements to a full or partial refund, credit note or voucher would also depend on your booking terms and cancellation policy. Of course, where the government restrictions and health directions in your state have subsequently changed and if a party is now unable to perform the contract (due to lockdown, restrictions on public gatherings or otherwise), the contract law principles of frustration will apply (see **Schedule 1**).

Summary

We hope this guide is of use to our members. If you have any questions or are unsure of the best approach in your circumstances, we strongly recommend you seek specific legal advice. As a general principle, it is in the interests of our industry to balance the financial position, legal and contractual obligations of your business with the impacts on long term reputation and customer goodwill in order to reach a mutually agreeable outcome for all parties. On that basis, and subject to your individual legal and contractual rights and obligations and considerations set out above, our suggestion is to, where possible, offer customers a credit for future booking dates OR a refund (especially where you are closed and unable to provide the service).

Pete Griffiths

CEO, Australian Camps Association

7 April 2020

If you require legal advice for your specific circumstances, please contact Suzie Leask, Associate Director or Iain Rennie, Managing Director at Australian Business Lawyers & Advisors on suzie.leask@ablawyers.com.au, iain.rennie@ablawyers.com.au or 1300 565 846 for a confidential discussion and fee estimate. You can also access further legal guides and articles in the COVID-19 Resources Hub at www.ablawyers.com.au/COVID-19-Hub.



AUSTRALIAN BUSINESS
Lawyers & Advisors

SCHEDULE 1 - KEY LEGAL CONCEPTS

1. What is a Force Majeure Event?

A Force Majeure Event is usually defined as an ‘act of God’ or some other extraordinary event that is outside the control of the parties. Firstly, you should check your customer contract (or relevant booking terms and conditions) to confirm:

- (a) if it contains a force majeure clause providing relief from non-performance or delayed performance; and
- (b) whether or not the Coronavirus pandemic falls within the contract’s definition of force majeure event in order to access the protections offered by the clause.

Typically, a person whose performance of a contract is hindered or prevented by a force majeure event is relieved from their obligations and liabilities to the extent they are unable to perform the contractual obligations due to the occurrence of that force majeure event. This can be a complete or partial excusing of obligations or liabilities often due to specific events which are outlined in the contract clause, sometimes by way of a definition. Sometimes the clause will include a right to terminate the Contract following the continued occurrence of a force majeure event for a certain period.

Practical Tips

Contract interpretation: Read your contract carefully to see what circumstances are covered. For example, a force majeure clause may be narrowly drafted with reference to specific types of events such as war, strikes, natural disasters, or more relevantly: ‘*pandemics*’, ‘*acts of government*’, ‘*changes in law*’ etc. Alternatively, the clause may be broadly drafted in general terms, for example, ‘*as a result of unforeseen circumstances beyond the party’s control*’ or words to similar effect. You may need to seek legal advice to determine how broadly a force majeure clause can be interpreted to confirm whether the Coronavirus pandemic is covered.

Notice and timing: If you do have a force majeure clause in your customer terms and conditions or other type of contract (and COVID-19 is covered), it is important to also check for any technical notification obligations or relevant time periods which apply to exercising your force majeure (and any termination) rights.

No force majeure clause: If you don’t have a force majeure clause in your contract, it may be possible to rely on the common law doctrine of ‘frustration’, however this is quite a high bar.

2. When is a Contract ‘Frustrated’?

The common law principles of ‘frustration’ acts to relieve parties of liability where, due to the occurrence of an unforeseeable, supervening event beyond the control of the parties, there is a radical change in the circumstances in which a contract is to be performed. The simple alteration of circumstances in which a contract is to be performed is not enough. The event must have a substantial impact.

Importantly, the ‘frustrating’ event must have been unforeseeable at the time the contract was entered into. The event must not have been caused by the fault of either party to the contract. As with force majeure, if alternative arrangements can be made in order to perform the contract then the doctrine of frustration cannot be invoked. It will be difficult for a party to rely on the frustration principle merely because it has been let down by one of its suppliers or employees, change of mind, delays or if performance of the contract has simply become more expensive.

Certain legislation addresses some of these issues. For example, in NSW the *Frustrated Contracts Act 1978* (NSW) addresses what happens in the case of frustration and the mechanisms controlling it. If, for example, a party performed a service before the frustrating event, the other party must pay them based on the performance. Similarly, if a contract is frustrated and a party pays money before the performance of the obligation, then the money is to be returned (note frustration is a higher standard than mere cancellation).

What is the effect of frustration on a contract?

If a contract is frustrated, the entirety of the contract will be discharged (ie. no longer binding and the parties released), other than obligations which survive termination or expiry. There is no right for a party to the contract to claim damages (note damages is a different concept to refunds). In other words, losses lie where they fall. No party can claim damages for non-performance because no party is at fault.

Of course if the parties are happy with current arrangements and a contract can remain on foot (e.g. by complying with social distancing and other government COVID-19 legislation or by postponing booking dates) you can effectively avoid frustration of contract issues by agreement.

3. Cancellation Policies

Where your contract does not have a force majeure clause (or it is not drafted broadly enough to cover the Coronavirus pandemic) and the circumstances do not quite constitute 'frustration', you should look to your cancellation policy, if you have one. Assuming it has been appropriately incorporated into the contract with your customer (e.g. in your contract terms, by notice on your website or a tick box style agreement), the cancellation policy may have relevant terms including:

- in what circumstances customers may cancel;
- any timing or notice requirements for cancellations;
- cancellation or administration fees (see unfair contracts section below);
- in what circumstances customers are entitled to a refund (e.g. cancellations at least 7 days prior to the booking date, or such other specified time frames).

SCHEDULE 2 - ACCC Guidance on refunds and cancellations due to COVID-19

The ACCC has issued the following general guidance to assist small businesses to understand their rights and obligations under Australian Consumer Law in relation to refunds and cancellations that may be of particular relevance to members:

My customer's booking will need to be cancelled due to government restrictions on public gatherings. Do I have to provide a refund?

If cancellation occurs due to government restrictions, it is unlikely the customer will be entitled to a refund under the consumer guarantee provisions of the Australian Consumer Law.

A business is still required to honour its existing terms and conditions, including in respect to cancellation and change policies. The relevant terms and conditions are those in effect at the time your customer made their booking, i.e. you cannot retrospectively change these.

The customer may also have rights under contract law where the contract has not been performed.

You may agree to another remedy with the customer, such as providing a partial refund, a credit note or voucher, or postponing the services until a later date if possible.

If you provide a credit note or voucher, it should have an expiration date which is long enough to allow your customer to use the credit note or voucher.

In the event of cancellation, can I rely on a contractual term that allows me to keep my customer's deposit or upfront payment?

In many circumstances, a term allowing a business to retain the full deposit or payment without having delivered any goods or services may be considered unfair under the unfair contract terms provisions of Australian Consumer Law, as it may not be reasonably necessary to retain the full amount to protect legitimate business interests. However, this is unlikely to be the case if you are covering costs you have incurred.

Under the Australian Consumer Law terms in standard form contracts can be declared to be unfair and void by a Court, which means they can't be enforced. An example could be a contract under which one party can decide to cancel without penalty, whereas the other party incurs a significant cost if they cancel.

Customers have ordered services for their function or event that they no longer require. Do I have to provide a refund of their deposit?

If cancellation occurs due to government restrictions, it is unlikely the customer will be entitled to a refund under the Consumer guarantee provisions of the Australian Consumer Law.

Whether your customer is entitled to a refund of their deposit will depend on your contract's terms and conditions at the time of the booking.

The customer may also have rights under contract law where the contract has not been performed.

You may agree to another remedy with the customer, such as providing a partial refund, a credit note or voucher, or postponing delivery of the goods or services until a later date if possible.

If you provide a credit note or voucher, it should have an expiration date which is long enough to allow your customer to use the credit note or voucher.

My customer has cancelled their booking and we have no written contract. Do I have to provide a refund?

You will need to honour any verbal or written representations you made to your customer about how you will handle their deposit or upfront payment if there is a change or cancellation of their booking.

If cancellation occurs due to government restrictions, it is unlikely the customer will be entitled to a refund under consumer guarantee provisions of the Australian Consumer Law.

It may be that you and the customer did not discuss what would happen if there was a change of booking or cancellation. But you may still have an oral contract, and the customer may have rights to a refund under contract law in circumstances where the contract can no longer be performed.

You may agree to another remedy with the customer, such as providing a partial refund, a credit note or voucher, or postponing the services until a later date if possible.

If you provide a credit note or voucher, it should have an expiration date which is long enough to allow your customer to use the credit note or voucher.