



Please note that this information is for your specific business and should be evaluated on a case-by-case basis, taking into account the potential financial, operational, legal and reputational risks.

This information is for general information only and is not a substitute for seeking legal advice on a case-by-case basis, taking into account the potential financial, operational, legal and reputational risks to your business, while maintaining customer and industry relationships.

Contracts: Key legal concepts

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 government health orders); or
- a situation where a contract may be **'frustrated'**; or
- other circumstances in which your **cancellation policy** or relevant **contract** provisions may apply.

Critical first steps

It is critical that you work out:

- (a) What COVID-19 government restrictions and health orders apply to you and your business?**
There is a difference between choosing not to deliver goods/services and not being able to deliver.
- (b) What do your contracts say?** Make sure you know, or get advice on, which of the above three concepts (force majeure, frustration or cancellation policy/contract terms) apply in your circumstances, how they interact and that you understand the relevant terms of your contracts so that they can be relied on and/or complied with.

A COVID-19 related shut down of your business may not necessarily mean your contract is frustrated or

place that address the issue such as a force majeure clause, suspension, delay or other cancellation or policy terms. Importantly, review contracts for potential liability, damages and costs claims associated with such delay, suspension or termination.

What if I don't have a contract?

Whether you have written terms and conditions or not, upon a business accepting an order or booking, you create a form of contract between yourself and the other party. Part of that informal contract may be an oral agreement, or set out in a purchase order. It is in the interests of both parties that you have a clear understanding of what those contract terms and conditions are (and generally, the best way to do so is to have written terms and conditions).

You should seek specific advice as to your obligations, as this can be unclear where there are no written terms and the two parties may have differing expectations.

1. What is a Force Majeure Event?

outside the control of the parties. Firstly, you should check your contracts (or relevant terms and conditions) to confirm:

- (a)** if it contains a force majeure clause providing relief from non-performance or delayed performance;
and
- (b)**

obligations due to the occurrence of that force majeure event. 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. 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 giving notice, updates, and exercising your force majeure (and any termination) rights.

No force majeure clause:

to

2. When is a Contract 'Frustrated'?

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.

unforeseeable at the time the contract was entered into.

This becomes relevant where, for example, a booking or order is made after lockdown restrictions are made. The event also 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) (

We have seen a trend toward such cancellation fees being waived following pressure from the regulators during the pandemic and also to maintain loyal customer relationships and encourage return customers in the future once restrictions ease.

Credit notes

should advise consumers upfront about any terms that govern the use of a credit note.

The ACCC and ACL regulators have expressed an expectation that any credit notes provided should have:

- at a minimum, the same value as the amount paid for the booking;
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Practical and Policy Considerations

The revised flexible policies many businesses have adopted to reflect the ongoing uncertainties and to align with best practice are strongly encouraged by regulators. Although financially challenging for small business, we expect this will be a continuing trend to maintain customer loyalty, especially as public policy indicates a preference for businesses and consumers alike to take steps to minimise the spread of coronavirus, even if that means permitting last minute cancellations where customers are unwell or affected by government restrictions.

Communication will be key, and it will be in the interests of businesses to find a balance between protecting obligations to provide refunds in certain circumstances, and incentivising customers to take up a credit note and rebook on appropriately flexible terms. In doing so, businesses will need to be careful to not be misleading about options and rights to refunds vs credit notes. Businesses may also wish to consider adopting a flexible policy which allows for refunds to be granted in special or hardship cases (for example, people who are high risk due to underlying health conditions).

Contact

If you have any questions or are unsure of the best approach in your circumstances or need specific advice on your obligations on how to get out of a contract and minimise your losses, please reach out to our *Commercial Team of The Year 2020* for specific legal advice.

*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,*