

COVID-19: Disrupted travel, events and trade



The COVID-19 virus has had a significant impact on both consumers and businesses, with disruptions to travel, trading and events. The virus has many wondering what their rights and obligations are in these situations.

This fact sheet outlines some of the legal principles that apply to these situations. When applying these principles the Commerce Commission also encourages businesses and consumers to treat each other fairly, taking into account the circumstances that they each face.

Businesses must not mislead consumers about their right to a refund or the right of the business to retain payments the consumer has made. Misleading consumers about their rights is likely to breach the Fair Trading Act.

The main factor that will determine each party's rights or obligations will be the terms and conditions that were agreed to at the time of the booking or transaction.

Consumers who have purchased travel insurance should speak with their provider to check if they are covered in these circumstances.

Where the business or the contract gives the consumer the choice of a refund or credit, the consumer should consider what is the best option for them personally. They may wish to support a local business by taking a credit rather than a refund. However, consumers also should be aware that any credit is dependent on the business continuing to trade, so there may be some greater risk with a credit than a refund.

This fact sheet relates to bookings and transactions covered by New Zealand law. Bookings made with overseas websites, airlines or providers may be subject to the laws of other countries.



General guidance

In general, a consumer's legal entitlement to a refund or credit when travel or an event cannot take place will be determined by the terms and conditions of their ticket or booking. Some contracts will provide rights to a refund; others may state that a credit will be provided, allowing the consumer to rebook at a later date, or allowing an event to be held at another time. Contracts for the supply of goods or services may also explain what happens when the goods or services can not be provided as planned.

When consumers are looking at their contract terms and conditions they should look for a clause that explains what happens when there are events beyond human control (often called *force majeure* events) or when the contract is "frustrated". Some contracts may even specifically reference pandemic.

Consumers and businesses may wish to take legal advice on their specific position, taking into account these general legal principles, because circumstances can differ from contract to contract. We also encourage businesses and consumers to discuss the situation with one another to work out a solution that best fits the circumstances of their relationship.

When is a contract "frustrated"?

A contract becomes frustrated when, without fault by either party, the contract is impossible to perform, because the circumstances in which performance would occur are radically different from those contemplated by the contract.

The contract must be incapable of being performed, not just difficult, expensive or inconvenient to do so.

The New Zealand Government from late March 2020 announced border restrictions and a lockdown which prohibited non-essential businesses from operating and consumers from leaving their homes for non-essential reasons. Many other governments internationally imposed similar restrictions.

In these circumstances, events outside either party's control such as restrictions imposed by Government will prevent some contracts from being able to be performed and this means that some contracts will be frustrated.

Where a contract is "frustrated" the Contract and Commercial Law Act 2017 (**CCL Act**) applies. It provides that the terms and conditions agreed by the parties will determine what happens, if those terms deal with frustration. If the contract is silent on what happens if the contract is frustrated, the CCL Act says that the consumer is entitled to a refund, but that the business may retain its reasonable expenses and overheads incurred in relation to the contract before the date of frustration (we call these the "**allowable expenses**").

Under the CCL Act the consumer is not obligated to pay the business any amounts that remain unpaid. Businesses can breach the Fair Trading Act if they demand or accept payments when they do not reasonably believe they will be able to provide the goods or service. They can also breach the Fair Trading Act if they insist that consumers are obliged to make payments that they are not obliged to make.

It is possible, but the Commission considers it unlikely, that standard form consumer contract terms providing for frustration remedies will be "unfair contract terms" for the purposes of the Fair Trading Act. Circumstances where the term might be "unfair" (within the narrow Fair Trading Act meaning of that word) include where the term provides a disproportionately disadvantageous or harsh consequence for the consumer, for an event that the consumer could not control.

Contracts that were cancelled before Government restrictions

The outcome for the consumer may differ in circumstances where the consumer or business cancelled the contract before the relevant Government restrictions were in place. Some contracting parties will have done so, in the expectation that the contract would become impossible for one reason or another. The legal question will be whether the contract was frustrated or cancelled, because different remedies can apply if the contract was cancelled when it still could have been performed at the time it was cancelled.

With frustrated contracts, the consumer receives a refund under the CCL Act.

With cancelled contracts, the cancelling consumer is not usually entitled to a refund (and may have an obligation to pay more if more is due under the contract) – but this depends on what the contract terms say about cancellation.

Most contracts provide for the legal consequences of cancellation by one party. If the contract does not, the CCL Act explains what happens.

If the contract was cancelled when it was foreseeable that the contract was likely to be frustrated by Government restrictions, it is possible that the frustration laws would apply instead of the cancellation remedies.

If the contract was cancelled earlier, and at that time Government restrictions were not likely to be imposed, then the cancellation terms are likely to apply.

Consumers and businesses that cancelled contracts before they were frustrated by Government restrictions may wish to take legal advice on their specific position. We also encourage businesses and consumers to discuss the situation with one another to work out a solution that best fits the circumstances of their relationship.

Travel FAQs

Q: I had accommodation booked in New Zealand during the lockdown period. The provider won't give me a refund or credit or allow me to change the date, can they do that?

A: You should check the terms and conditions of your booking. If the contract provides for a refund or credit then this is your entitlement.

If your contract does not include terms setting out what happens when it is frustrated, the provider is obliged to refund your money, less its allowed expenses.

It will often be in both parties' interests to try to rearrange a travel booking to another date, although this discussion may need to be had when the situation regarding travel restrictions is clearer. Parties should deal with each other in good faith, and try to provide a fair outcome for each party.

Q. My airline has offered me a credit valid for 12 months. I would prefer a refund; can I get one?

A. The terms and conditions of your ticket (also referred to as Conditions of Carriage) will set out the remedies available to you in the event that your flight has been cancelled due to the virus. In many instances this will provide for the value of the ticket to be held in credit for use within a certain period of time. In some situations, you may be entitled to a refund but this will depend on the conditions of your ticket.

In the unlikely event that your ticket terms and conditions do not set out what your remedies are, you should have a right to a refund under the CCL Act.

We have been asked if the Civil Aviation Act 1990 provides a remedy. We think this is unlikely. An airline is liable for damages caused by delay, but this does not apply where the airline is acting under lawful directions, or there is an external event that makes it impossible for the flight to proceed.

International travel will often be governed by different laws (and terms and conditions) depending on where the airline is based. These may provide for different remedies.

Q: I made my booking through a third party (travel agent or website such as Expedia) and now can't go because of the lockdown. They won't give me a credit or a refund, can they do that?

A: You should check the terms and conditions of your booking. Some terms and conditions will provide rights to a refund; other contracts may state that a credit will be provided.

If your contract is subject to New Zealand law and does not include terms setting out what happens when services are impossible to perform, then the provider should give you a refund less their allowable expenses.

If you have travel insurance you should also check with your provider to see whether you are covered for these circumstances.

Q: My original terms and conditions said I could get a refund, but the business changed their policy and are now saying I can only have a credit. Can they do this?

A: Businesses cannot usually change the terms of the contract, except by agreement with you.

If you had a right to a refund under the terms and conditions at the time you purchased the ticket or made the booking, a business should not change the terms later to deny you a refund.

Businesses also cannot lawfully develop a policy that contradicts your contractual entitlement, and they may breach the Fair Trading Act if they misrepresent your rights to you.

Event FAQs

Q: I had tickets to a concert/show that has been cancelled as a result of the lockdown and border restrictions. Am I entitled to a refund?

A: In most circumstances the terms and conditions of event tickets will provide for a refund or other remedy, such as a credit or voucher. Where these terms and conditions provide a right to a refund, businesses are not permitted to change the terms at a later time to deny consumers a refund.

If your contract is subject to New Zealand law and does not include terms setting out what happens when services are impossible to perform, then the provider should give you a refund less their allowable expenses.

Q: I had tickets to an event which has been 'postponed' but no new date has been announced. They are holding onto my money until they set a new date. Can I ask for a refund?

A: This depends on the terms of your contract. If there are contract terms dealing with what happens when services are impossible to perform, and these terms permit the retention of ticket payments until a new date is set, those terms will apply. The promoter will be able to retain the price of the ticket until the new date is set.

However, if the contract also does not obligate the promoter to take steps to set a new date, and therefore allows them to hold the price of the ticket indefinitely, it is possible that this could be an "unfair contract term" under the Fair Trading Act.

If the contract has no clause dealing with what happens when services are impossible to perform, then the provider should give you a refund, less any allowable expenses.

Memberships for leisure activities FAQs

Leisure facilities such as gyms, golf clubs and swimming pools have been required to close during the lockdown. After-school activities such as gymnastics, swimming and music lessons have also been required to stop providing services. Consumers are also restricted from leaving home to attend "non-essential" activities. Many people are wondering what this means for membership subscriptions.

Q: Do members need to keep paying membership fees?

A: Members should consult the terms and conditions of their membership contract. Look for terms dealing with what happens when the services cannot be provided for reasons outside the parties' control.

If the contract does not deal with frustration or what happens when it is impossible to provide services, then the CCL Act will apply and you can stop making payments for the period when you cannot receive the services.

The Fair Trading Act prohibits businesses from demanding and taking payments if, at the time of doing so, they do not have reasonable grounds to believe that they can supply the services at the specified times.

Businesses should not be invoicing customers for services that they cannot provide during the lockdown period. Equally, consumers do not need to keep making regular payments for services that are not being provided.

The parties should discuss what will happen during any period that services can not be provided and be clear about the membership terms that will apply after things get back to normal, including the price for membership at that time.

Q: What if I have paid upfront for my membership?

A: You should check the terms and conditions of your membership. Look for terms that outline what happens when it is impossible for your provider to provide its services to you.

If your contract does not include terms setting out what happens when services are impossible to perform, then the provider should give you a refund less its allowable expenses.

We understand that many facilities are not charging for memberships while they are closed, and are extending the duration of “paid in advance” memberships by the duration of the period when they were closed. We encourage businesses to be flexible in offering solutions to their customers.

Q: What if payments have already been deducted?

A: If the service cannot be provided because of Government restrictions, then the contract is likely to be frustrated.

As a result, whether the payments must be refunded to the customer depends on what the membership contract says.

If the contract provides for what happens to payments made, when the contract is later frustrated, the contract terms will apply.

If the contract does not deal with this situation, then payments made for the period in which the service was closed are refundable to the member under the CCL Act, less any allowable expenses.

Once the Government restrictions were in place, traders in the “non-essential” category should not be continuing to demand or receive payments for services that they do not have reasonable grounds to believe they can supply.

Q: Do I still have to keep paying for my gym membership if it offers online classes and services instead?

A: Check the terms and conditions of your membership to see if they allow the gym to provide alternative services to those services you signed up for.

If not, and if you don’t wish to receive the reformatted services, you should be entitled to cancel or suspend your contract without penalty.

Some gyms are also allowing membership to be suspended during the period that services are not available.

The parties should discuss what will happen during any period that services can not be provided and be clear about the membership terms that will apply after things get back to normal, including the price for membership at that time.

Wedding FAQs

Q: My wedding was due to be held during the lockdown so has had to be cancelled. Can I get my deposit back from the venue?

A: If the wedding can no longer be held due to the lockdown, check the terms and conditions of your contract with the wedding venue.

Some contracts may deal with disruption to the event without fault by either contracting party. The contract may entitle you to a full or partial refund, or to reschedule your booking.

If your contract does not include terms setting out what happens when services are impossible to perform, then the provider should give you a refund less any allowable expenses.

Q: My wedding has been cancelled. Am I entitled to a refund of the deposit I've paid vendors for products or services that I no longer need (eg, florist, photographer, live band, etc)?

A: Check the terms of your contract with each vendor, as each contract may be different.

Some contracts may deal with disruption arising without fault by either contracting party. The contract may entitle you to a full or partial refund, or to reschedule your contract for performance on a later agreed date.

If your contract does not include terms setting out what happens when services are impossible to perform, then the provider should give you a refund less any allowable expenses. For example, a caterer may have already purchased some of the food for the event which cannot be returned or reused.

Penalties for not complying with the law

Where a business makes a false or misleading representation about a consumer's right to a refund or their own right to retain payment, it is likely to breach of the Fair Trading Act and significant penalties can apply. For more information see our [website](#).

Where to get help

If you think a business has misled you about your rights or you think that your contract contains an unfair contract term please contact us by filling out the [complaint form](#) on our website or phoning 0800 943 600. You will need to provide us with a copy of the terms and conditions of your contract.

You can take a case to the Disputes Tribunal if you believe a business is not complying with the terms of the contract, you can find more information on that on their [website](#).

The information provided here is intended as guidance only. You may also wish to seek independent legal advice from a community law centre or a lawyer.