COVID-19: (AUSTRALIA) CANCELLATIONS, GUARANTEES AND OTHER STATEMENTS: AUSTRALIAN CONSUMER LAW OBLIGATIONS DURING COVID-19

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IN BRIEF

- The COVID-19 pandemic is evolving at a breakneck speed, forcing businesses to calibrate their operations at a rapid pace without compromising their legal obligations.
- This article is another in our series and uses a FAQ format to guide businesses during this unprecedented time. It is based on the key Australian Consumer Law (ACL) issues that our clients have encountered (**click here** to read our earlier insight regarding industry collaboration during COVID-19).
- Competition Law and ACL will continue to apply during the COVID-19 pandemic. Maximum corporate penalties of **the greater of AUD10 million, three times the gain** or benefit, or **10% of annual turnover** will remain applicable for each established breach.
- The ACCC has established a COVID-19 Taskforce, which is monitoring and gathering daily intelligence about emerging legal issues. This includes seeking to ensure that businesses understand their rights and obligations to consumers when dealing with service disruptions or cancellations due to COVID-19.
- While the ACCC will adopt a pragmatic approach to avoid over-enforcement, businesses should watch out for the following ACL priority enforcement areas:
    - **Consumer guarantees -** It is important to note that consumer guarantees cannot be abrogated or excluded by contract. In particular, businesses should be aware of their obligation to comply with consumer guarantees relating to the supply of products/services within a reasonable time in the context of events cancellation and delay of supply orders due to COVID-19.
    - **Misleading or deceptive conduct -** Businesses should be cognisant, particularly in the context of determining whether to allow for a refund, in correctly representing consumer guarantees rights and any other consumer contractual rights.
    - **Unconscionable conduct and unfair contract terms -** The ACCC will prioritise enforcement efforts on any price-gouging behaviour. In particular, businesses should not artificially inflate the price of essential products or enforce unfair contract terms with other suppliers.

SCENARIO Q&AS

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Services and Events Cancellation

Q: I cancelled or have to cancel an upcoming event due to COVID-19. What ACL obligations do I have?

Generally, if an event is cancelled unilaterally by the event organiser, it is likely to constitute a major failure for the supply of services under consumer guarantees, and consumers are entitled to a full refund under the ACL.

However, if the event cancellation occurred as a result of government restrictions, such as to comply with gathering size limits, it is unlikely that the consumer will be entitled to a refund under consumer guarantees. However, we strongly recommend the event organiser consider providing alternative remedies to consumers as part of reputational considerations and good stakeholder management.

Key factors that event organisers should take into account in deciding what remedy, if any, to provide potentially unhappy consumers following an events cancellation is set out below:

- **Any outward-facing contractual terms and conditions and key internal documents prepared for the event such as event playbooks -** Event organisers should have regard to the abovementioned documents, particularly in respect to cancellation and change policies. Whenever possible, event organisers should adopt, at a minimum, the most favourable consumer rights set out in their documents to avoid engaging in misleading or deceptive conduct.
- **Other oral representations made to consumers -** Even in the absence of a written contract, event organisers should still seek to honour any representation they may have made to consumers about how they will handle the consumers' deposit or upfront payment if there is a change or cancellation to the consumers' booking.
- **No retrospective change of terms and conditions for events allowed under the ACL -** Even if there was an actual contractual term conferring an express contractual right for the event organiser to do so, this could be construed as an unfair contract term and be declared void and unenforceable against the consumer.
- **Possibility of offering alternative remedies to consumers -** Where possible, event organisers should consider offering one of the following alternative remedies in place of a full refund to the consumer, including (but not limited to):
  - providing a partial refund, credit note or voucher (with a reasonable expiration date)
  - postponing the service until a later date when possible
  - reducing fees for the service (where a deposit has been made)
    or
  - exploring options to host the event in an online format if possible.

Q: I have already incurred cost for the cancelled event and want to limit my financial loss and not provide full refunds. Can I do so and what should I consider besides consumer guarantees?

As discussed above, whether an event organiser can seek to not provide full refunds for a cancelled event

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depends on the cause of cancellation. If the event was cancelled due to government restrictions, subject to the above factors, an event organiser does not need to provide full refunds.

Q: I am a service provider and my ability to provide services to consumers has been disrupted by COVID-19. What should I do under the ACL?

Service providers should be vigilant about adopting an appropriate approach on refunds or fees to postpone or delay a service. The ACCC has publicly indicated it has already contacted subscription service providers such as gyms regarding this issue and will no doubt closely monitor commercial activity in this space going forward.

The ACL prohibits businesses from taking payments for services where there are reasonable grounds to believe that the services won't be supplied. This applies regardless of whether the contract allows payments to be suspended.

Unless the service provider can offer a reasonable alternative to their consumers, such as providing online gym classes to replace face-to-face gym training sessions, they should not charge consumers for any services which they cannot provide. This may be in the form of freezing charges on consumers' accounts or refunding consumers' subscription fees on a pro-rata basis.

It is important to note that, where the pausing of membership accounts was necessitated by a government restriction, the ACCC expects that businesses will not charge 'account freezing fees'.

Supply Chain Disruptions

Q: I am worried about being able to fulfil consumer orders on time. What should I do?

COVID-19 has precipitated significant business disruptions, including uncertainty regarding product delivery timeframes due to unprecedented demand for certain products and logistics services.

Suppliers are expected to continue to uphold all consumer guarantees during COVID-19, including relevantly, providing goods 'within a reasonable time' where a supply time period has not been set.

In light of the above, responsible suppliers should carefully consider whether to accept consumer orders in circumstances where they are unsure that the relevant products will arrive on time. Suppliers should clearly set out the potential for delay before the consumer finalise their order and where possible, stating the maximum delay period so that consumers can make an informed purchasing decision.

Q: I am a supplier who has previously ordered stock prior to COVID-19 but now no longer need the stock due to customer cancellations. What should I do?

Suppliers may find themselves in situations where they have ordered stock prior to COVID-19 but have now decided that they no longer need the stock (i.e. due to customers legitimately cancelling the order). In these situations, it may not always be possible for suppliers to cancel their order. We recommend that suppliers seek to negotiate alternative arrangements with traders to find a viable workaround for the duration of COVID-19.

Shifting Business Models

Q: My business model has been directly affected by government restrictions. What should I be aware of when shifting my business model to pursue other commercial opportunities in light of COVID-19?

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While businesses are free to adapt and shift their business model to adjust to emerging commercial opportunities, they should always ensure they are engaging in fair commercial practices.

As a starting point, suppliers and service providers should not charge consumers for fees that they have not agreed to or are not aware of. Where businesses need to change the nature of their product/service offering and are considering new payment models, they should ensure that consumers clearly understand the nature of any new service/products and cost implications. Further, businesses should provide consumers with a reasonable opportunity to make an informed decision on whether to opt in or opt out of any new proposed models.

Recently, some businesses have started to supply essential high demand products, such as face masks and hand sanitisers, even where these businesses do not supply such products in the ordinary course of business. While businesses can generally charge what they want based on supply and demand dynamics, businesses should be wary about setting excessive prices for essential products. In particular, where the product is considered to be critical to the health or safety of vulnerable consumers. This may amount to unconscionable conduct under the ACL and invite consumer scrutiny if they perceive the business model to be operating at the expense of exploiting the vulnerable. Moreover, businesses should be cautious about not making misleading claims regarding the reason for any price increases.

For businesses who may want to shift their operations, either entirely or significantly to online platforms, they should be aware of complying with all of their existing ACL obligations in addition to any data/privacy considerations.

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