

ACCC and ACL Regulators best practice guidance for the Travel Industry for COVID-19 related travel cancellations

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The ACCC and state and territory Australian Consumer Law regulators (ACL Regulators) are mindful of the significant consequences of COVID-19 for businesses operating in the travel industry. Many businesses are struggling to manage cancellations and to manage the financial implications of the COVID-19 pandemic. That said, many consumers are also experiencing financial hardship and so it is important to recognise and balance the concerns of both business and consumers.

Notwithstanding these challenges, businesses need to remain conscious of their legal obligations in their dealings with consumers and to continue to treat consumers fairly. The reputation of the travel sector and goodwill towards it will depend on the response by businesses to the pandemic. The ACCC and ACL regulators have developed this best practice guidance to assist the industry in their dealings with consumers.

This best practice guidance relates primarily to circumstances where travel services have been cancelled as a result of the COVID-19 pandemic (rather than, for example, where a travel service will still proceed but a consumer has decided to cancel their booking). These circumstances are referred to in this guidance as **COVID-19 Cancellations**. However, businesses should continue to have regard to their legal obligations and continue to act fairly in all their dealings with consumers.

Australian Consumer Law obligations

Where travel services cannot proceed due to the actions of a third party, such as restrictions on travel imposed due to the COVID-19 pandemic, the consumer guarantees in the Australian Consumer Law (**ACL**) are unlikely to apply.

However, other consumer protections contained in the ACL continue to apply during the COVID-19 pandemic. The pandemic does not permit businesses to engage in misleading, deceptive or unconscionable conduct, in contravention of the ACL. Nor does it excuse such conduct.

The ACCC and ACL Regulators will continue to enforce the ACL to protect consumers during this period.

Relevantly, businesses **must not**:

- engage in conduct that is misleading or deceptive
- engage in conduct that is, in all the circumstances, unconscionable
- make false or misleading statements about the services they promote or supply, including about:
 - the terms or conditions on which such services are to be supplied, or have been supplied,
 - the rights of consumers – including their entitlement to refunds – in the event that services contracted for are not supplied, or
 - the likelihood of future travel within certain timeframes.

In particular, businesses need to take care to ensure that they do not mislead or deceive consumers about the operation of the terms and conditions of bookings or tickets.

For example, businesses **must not**:

- misrepresent the legal effect of any terms or conditions of the ticket or booking that relate to cancellation (or the legal effect of the absence of such terms)
- impose restrictions (such as requiring consumers to accept credit notes instead of refunds), except where expressly permitted to do so by applicable terms and conditions
- deduct fees, except where expressly permitted to do so by applicable terms and conditions
- represent that a contract contains terms or conditions that would relieve them from honouring refund clauses, where this is not the case
- represent that any money paid by a customer has already been provided to third party suppliers, when this is not the case
- represent that particular terms apply as a result of the COVID-19 pandemic, where this is inconsistent with the terms of the contract as a whole, or
- purport to retrospectively impose terms and conditions that did not apply at the time the booking or ticket was purchased.

Businesses should also be aware that under the ACL unfair contract terms are void. A term may be unfair where it causes a significant imbalance in the parties' rights and obligations arising under the contract, and causes detriment to the consumer if relied upon, and where it is not reasonably necessary to protect the legitimate interests of the business. This may include terms that allow a business to:

- unilaterally change the terms of the contract, or
- unfairly penalise a consumer in the event of a cancellation.

COVID-19 Cancellations - broader expectations for the travel sector

While the travel sector must comply with ACL obligations, including those highlighted above, the ACCC and ACL Regulators are conscious that the ACL forms only part of the broader legal and practical context in which businesses in the travel sector operate.

In these circumstances, given the unprecedented impact of the COVID-19 pandemic on the travel sector, the ACCC and ACL Regulators have broader expectations for how the sector should manage COVID-19 Cancellations. By setting out these expectations, the ACCC and ACL regulators hope to assist the travel sector to achieve fair outcomes for both consumers and businesses.

Accordingly, the ACCC and ACL Regulators are unlikely to have concerns where businesses manage COVID-19 Cancellations in accordance with these expectations.

That said, these are broad expectations only and do not displace other legal obligations applying, for example under contract or other laws. Businesses should ensure that they comply with all legal obligations in their dealings with individual customers, and obtain legal advice where necessary.

Businesses to provide appropriate remedies

As highlighted above, under the ACL businesses must not mislead consumers about the operation of the terms and conditions of bookings or tickets, or their entitlement to refunds.

The ACCC and ACL Regulators expect that businesses will provide consumers with free-of-charge refunds where consumers are entitled to one.

This includes where the consumer:

- is entitled to a free-of-charge refund under the terms and conditions of their ticket or booking (as those terms and conditions stood at the time of purchase)
- purchased a ticket which was promoted as being “fully refundable” or similar
- has previously been informed by the business that they will receive a free-of-charge refund (even if the policy of the business with respect to refunds later changes), or
- has a right to a free-of-charge refund otherwise arising under state or territory legislation or the common law.

In particular, the ACCC and ACL Regulators expect that businesses will honour the terms and conditions of their contracts with consumers and provide remedies in accordance with those terms and conditions.

This means that, where it is specified in the booking terms and conditions:

- the payment of a refund may be contingent on the recovery of funds from a third party (for example, a supplier)
- a business may charge a cancellation fee or retain amounts relating to expenses incurred (this is discussed below in the “Cancellation fees” section), and
- the available remedy may be a ‘credit note’ or similar, rather than a refund in these circumstances (this is discussed further below in the “Credit notes” section).

The “Credit notes” section below sets out the ACCC and ACL Regulators expectations for providing credit notes, where applicable. Even where the booking terms or conditions specifically provide for credit notes (rather than refunds), businesses should still consider providing refunds in cases of hardship or other exceptional circumstances. See the “Hardship and special circumstances” section below.

Where the booking terms and conditions do not specify the remedy available to a consumer in these circumstances, or the terms and conditions are unclear whether a consumer is entitled to a refund, the ACCC and ACL Regulators expect that businesses will act in accordance with the following framework.

Agents or Intermediaries

Consumers may purchase travel services through an agent or an intermediary (eg. tour operator), rather than from primary suppliers directly. These agents or intermediaries book travel services for consumers with primary suppliers (eg. airlines, cruise operators, accommodation providers), and pass funds paid by consumers on to those primary suppliers.

If a business was engaged by the consumer as an agent or intermediary provider, they should:

- take active steps to seek to recover funds from suppliers to pass on to the consumer
- where a supplier returns funds, remit those funds to the consumer as soon as possible in the circumstances, even in circumstances where the agent or intermediary is still attempting to recover, or has been unable to recover, funds from other suppliers involved in the consumer’s booking
- where a supplier advises it will not return funds, or it appears unlikely that a supplier will return the funds, offer an attractive remedy to the consumer in lieu of a refund. See the “Option of refund or credit note” section below regarding potential value adds to credit notes
- regularly keep the consumer informed of the steps being taken in this process and also the outcome, and

- consider providing refunds in cases of hardship or other exceptional circumstances. See the “Hardship and special circumstances” section below.

These businesses may also offer the consumer the *choice* of accepting a credit note instead of the businesses returning funds recovered from suppliers (where it has been able to recover such funds). However the choice of accepting a credit note in these circumstances lies entirely with the consumer.

Primary Suppliers

Primary suppliers are businesses that supply travel services directly to consumers and any funds paid to them by consumers are retained by them and not passed on to any other businesses.

Businesses that are the primary supplier of the travel service should:

- offer the consumer the choice of either a refund or an attractive remedy in lieu of a refund. See the “Option of refund or credit note” section below regarding potential value adds to credit notes, and
- consider providing refunds in cases of hardship or other exceptional circumstances. See the “Hardship and special circumstances” section below.

Businesses should be aware that consumers may have other statutory, contractual or common law rights (such as those governing the frustration of contract) entitling them to an unqualified refund, and may take legal action to enforce these rights.

Cancellation fees

Businesses should take care not to mislead consumers about the extent of any entitlement they may have to charge cancellation fees or to retain amounts for expenses incurred.

Businesses proposing to charge a cancellation fee, or to retain an amount to cover expenses, should:

- clearly communicate to consumers at the time the remedy is offered:
 - that the cancellation fee will be charged
 - the reasons or circumstances in which the fee is being charged, and
 - the amount of the fee to be charged
- expressly identify for consumers the legal source of their right to the fee or amount to be retained; and
- on request, provide an itemised breakdown justifying the amount charged or retained.

The ACCC and ACL Regulators expect that:

- only a single fee or deduction will be applied to a booking; that is, fees and deductions will not be made on an individual passenger or individual service basis, and
- in most circumstances, any amount charged or retained for this purpose will be a nominal sum relating to reasonable administrative expenses incurred.

Timing of refunds

Where a consumer is entitled to a refund, the refund must be paid within a reasonable time. The ACCC and ACL Regulators appreciate that, in the circumstances of the COVID-19

pandemic, it may take longer than usual for businesses to be able to process the volume of cancellations and refunds.

Where a business has received funds from a supplier or third party that are due to be returned to a consumer, the business must remit those funds to the customer as soon as possible in the circumstances.

Businesses should communicate regularly with consumers about the timing of any refunds.

Credit notes

As discussed above, a 'credit note' or similar, rather than a refund, may be the appropriate remedy in certain circumstances.

Businesses should also advise consumers upfront about the terms that govern the use of any credit notes.

The ACCC and ACL Regulators expect that any credit notes provided should have the features set out below.

- Any credit note should have, at a minimum, the same value as the amount paid for the booking.
- Any credit note should have an expiry date that will allow the consumer a reasonable period in which to use the credit after the COVID-19 restrictions are lifted. Alternatively, businesses may wish to offer credit notes with no expiry date.
- Businesses should be prepared to extend any expiry period to take into account the extension of any travel restrictions, to allow the consumer a reasonable period in which to use the credit after the COVID-19 restrictions are lifted, or to otherwise receive a refund. Alternatively, businesses may wish to provide credit notes with expiry periods that do not start to run until after the COVID-19 restrictions are lifted.

The ACCC and ACL Regulators expect that businesses will permit consumers to redeem service or product specific credit notes on alternative products or services, in the event that the original product or service is not available after the COVID-19 pandemic has ended.

Option of refund or credit note

Businesses may wish to offer consumers who are entitled to a refund *the option* of accepting a credit note instead. In these circumstances, the choice between accepting a credit note or refund lies entirely with the consumer.

Consumers may be more likely to accept a credit note instead of a refund where the credit:

- has a value higher than the value of the original ticket or booking
- can be used for any product or service offered by the business (rather being restricted to products or services similar to the original ticket or booking)
- has a very long, or no, expiry date
- is transferrable within a broader family group, or
- is convertible to a refund, at the consumer's discretion, after a fixed period.

Although a business may offer consumers the option of a credit note instead of a refund, and may incentivise that option, business should take special care not to mislead consumers regarding the circumstances in which they are *required* to accept a credit note rather than a refund.

Businesses should take care to advise consumers upfront about any terms and conditions that govern the use of any credit note offered so that consumers can make an informed decision about which option they will choose.

Ultimately, if a consumer who is entitled to a refund opts for a refund instead of a credit note, the refund must be paid. Failure to provide a refund in those circumstances may involve a breach of contract and/or contravention of the ACL or other legislation.

Hardship and special circumstances

The ACCC and ACL Regulators expect businesses in the travel industry to also take into account individual consumers' circumstances in exceptional cases, such as those who are experiencing particular hardship as a result of the COVID-19 pandemic, when processing COVID-19 Cancellations.

Businesses should consider providing refunds even where the contractual entitlement is to credit only, including in cases where:

- consumers are unlikely to be in a position to use the credit note before its expiry,
- consumers experiencing financial hardship as a result of the COVID-19 pandemic (for example through loss of, or reduced, employment),
- consumers may not be able to travel while there is still any risk of COVID-19, for example, if they are immunocompromised, or
- the reason the travel was booked was to attend an event that due to its nature was a one-off event not capable of being carried out again.

In these cases, businesses should also consider whether it's appropriate to waive any entitlement they may have to retain amounts to cover expenses.

Future cancellations

A number of travel service providers have not yet cancelled future travel services in circumstances where there is uncertainty as to whether the services will proceed. This is causing confusion for many consumers who would like the certainty of cancelling their booking and receiving a remedy now. The remedies available to a consumer who chooses to cancel their travel may be different to those available where the travel service is cancelled by the travel service business or supplier. This is the case even where the travel service is later cancelled due to pandemic restrictions.

Where a travel service has not yet been cancelled, but there is a reasonable possibility that it will be cancelled in the future because relevant travel restrictions will not be lifted, businesses should advise consumers of the following:

- The approximate date on which the business will be able to confirm whether the travel service will proceed or will be cancelled. This date should provide reasonable notice to the consumer prior to the date of the travel service.
- Both the remedies available to the consumer under the business' terms and conditions if they cancel now and the remedies that would be available to the consumer under the business' terms and conditions in the event that the travel service is later cancelled by the business or supplier due to pandemic restrictions, and
- That, depending on their individual circumstances, the consumer may prefer not to cancel their travel, pending confirmation from the business as to whether or not the travel service will proceed.