

When customers cancel

Guidance for tourism businesses

When guests cancel remember; they may be a customer in the future. In most cases, they cancel for a reason that is genuine and important. You may be able to negotiate something to suit you both.

In a crisis such as a bushfire, you and your staff will be operating under pressure. Remember that the crisis will pass and your business is for the long term. If you keep the goodwill of your customers in difficult times, it can pay off in the future.

You can avoid many potential problems by including a cancellation policy in a written booking agreement.

Your cancellation policy and the law

When you take a booking from a customer, you enter into a contract which includes terms and conditions. Ensure that these are fair, because the Australian Consumer Law (ACL) prohibits unfair contract terms. For example, if a contract lets you cancel an accommodation booking in any circumstances without notice, it could be regarded as unfair.

Unfair contract terms are void and you cannot enforce them against customers.

You may want to include specific terms and conditions about fees, deposits or cancellation charges. If you do include these, make customers aware of them before they book. Failure to disclose these conditions could also be considered unfair, due to a lack of transparency.

Make sure any fees or charges reflect your reasonable costs. If you don't, they may be seen as penalties, which you generally cannot enforce.

Deposits greater than 10 per cent of the total cost of a booking may be considered to be prepayments, which your guests may not have to forfeit if they cancel their booking. Consider whether or not you need more than 10 per cent as a deposit (see 'Cancellation fees').

We recommend you have written agreements with your customers. It becomes your proof of what was agreed and helps to prevent ambiguity or misunderstanding. It can also stop either party forgetting or changing the terms later.

Your cancellation policy should spell out what happens if you or the customer cancels a booking.

When the contract can't be performed

BUSHFIRE CANCELLATIONS

A crisis such as a bushfire may lead some guests to postpone or cancel their visit. For example, if a Code Red fire danger rating is issued, the area in which your business is located is not safe to enter. For more information on fire danger ratings, see cfa.vic.gov.au/restrictions/aboutfiredangerratings.htm.

Your rights and obligations will depend on the situation.

You are both released from the contract if, for example:

- the accommodation has been destroyed
- access roads have been closed
- the authorities have advised that the area is not safe to enter.

There may also be other circumstances in which you or your customers are required to leave an area, or are prevented from entering.

EXAMPLE: CAMP CANCELLATION

A company specialising in running outdoor adventure activities has scheduled a three-day hike for a group of tourists in a state park. Temperatures of 40 degrees and over have been forecast across the state for the duration of the hike.

The Department of Sustainability and Environment has indicated it will close access to parks in high-risk areas, even if a Code Red fire danger rating is not issued.

Given the potential difficulties in relocating the hike to a different state park in these circumstances, the company notifies the hikers that they can choose from a list of alternative camp options; or if this is not suitable, they may cancel and receive a full refund of the purchase cost of the hike.

Such instances would trigger a 'frustrated contract' under the *Australian Consumer Law and Fair Trading Act 2012*, which means it is impossible to perform or carry out a contract due to events beyond all parties' control.

In the above scenario, the customer would be entitled to a refund of any payments already made. However, the law may also entitle you to any reasonable expenses you incurred before the customer cancelled.

A contract is not frustrated if the situation means that it is only inconvenient, difficult or expensive to carry out.

For example, if your facility is still open for business but there is a lot of smoke, which may cause your guests discomfort, customers may feel that they won't be able to do all the things they had planned and so would prefer not to come at all. In this instance, the contract is still valid and if the customer chooses to cancel, you can apply your cancellation policy.

Your risk management plan may include a number of potential evacuation triggers, meaning you may choose to close the business and leave the premises even without a Code Red fire danger rating or similar.

As a result, you may cancel bookings in situations that do not trigger a frustrated contract. This could be seen as a breach of contract and may entitle your customers to a refund of their deposit and potentially other amounts covering other bookings that may be affected, such as car hire or activity costs. (See 'When you cancel')

In this situation, clearly advise your customers, in advance, of any circumstances in which you may cancel their stay – for example, by an explicit term or condition in your contract.

If you choose this option, you must ensure that any terms or conditions are fair within the meaning of the ACL. They must also be clearly drafted and brought to the customer's attention when the booking is made, as this will affect your ability to legally cancel a booking. You should also ensure that such terms or conditions do not take away any rights that may arise as a result of the contract being frustrated.

Bad weather

Generally, a guest is not entitled to a refund due to poor weather, as this would be unlikely to frustrate performance of the contract and prevent the booking from going ahead. For example, you cannot be held responsible for external environmental conditions outside your control such as:

- no snow on a ski trip
- rain during a weekend getaway at the beach
- colder weather than expected on a summer camping expedition.

Sometimes, however, weather conditions may be integral to the nature of the service being provided and determine whether a contract can be performed. You may wish to address these situations through a specific contractual term or condition, as previously described. Keep in mind that any rights arising as a result of a potentially frustrated contract should not be limited by this term or condition.

Other cancellation rights

Your guests also have certain rights in the form of consumer guarantees under the ACL. Essentially, accommodation must be fit for any purpose specified by the customer. If it is not, the guest may be able to cancel the booking and obtain a refund (less any amount for any services already provided), depending on whether the problem with the accommodation is major or cannot be fixed easily or within a reasonable time.

If you also make claims about accommodation that you can't fulfill (for example, if it does not live up to any representations you have made about it) the guest may have access to a range of other remedies under the ACL, or misleading or deceptive conduct.

Cancellation fees

Your ability to claim cancellation costs from a customer depends on certain factors. If you charge a cancellation fee, booking fee or administrative charge, it should not be excessive otherwise it may be regarded as an unfair contract term. You should consider limiting the fee to the reasonable costs associated with making the booking and, if relevant, preparing the accommodation for the customer's arrival, or reserving services for their use.

If the guest has paid you a deposit, then cancels the booking without a good reason (for example, if they just change their mind), you will usually be able to keep the deposit depending on the terms of the contract. Generally, a fair deposit would not be more than 10 per cent of the total cost of the accommodation or service booked, unless your potential loss or inconvenience justifies a higher amount. Otherwise, such a higher amount may be seen as a pre-payment. Pre-payments are refundable, minus any actual or reasonable costs you may have incurred before the booking was cancelled.

Cutting your losses

Before applying your cancellation policy, take into account the likelihood that losses can be limited by re-booking another guest. While the chances of re-booking get smaller closer to the booking date, you should make reasonable efforts. If you re-book the accommodation for the same price, it may be difficult to argue that you have the right to impose a cancellation fee, except for costs already incurred.

If the contract allows you to reclaim losses from a customer, without taking reasonable steps to avoid them, it may be deemed unfair under the ACL. This could include any terms that allow you to claim the total cost of accommodation from a guest regardless of when they cancel the booking.

Deducting cancellation fees from credit cards

If you record credit card details when confirming a booking by phone, advise customers at the time that their card will be charged if they cancel – and ensure they accept that condition. If you don't, it may be considered an unauthorised transaction under the Australian Securities and Investment Commission's ePayments Code. To be safe, give reservations staff a script to follow.

By issuing a written confirmation, you can also prove to the credit card company that you met their conditions.

When you cancel

You will be in breach of contract if you cancel a booking you have already accepted, unless you are legally permitted to do so (for example, under a valid term of the contract or if performance of the contract is frustrated as described earlier).

The customer may be entitled to claim damages from you as compensation for any loss they suffer as a result of your actions.

It is always better to find an outcome that satisfies both you and your customer, without expensive legal processes.

Credit notes

If the customer is entitled to a refund, you cannot insist that they accept a credit note. For example, this would be where the accommodation does not meet the consumer guarantee of fitness for purpose or any services have not been provided with due care and skill, and the problem with the services is major or cannot be fixed easily or within a reasonable time.

If the guarantees have been met, and a credit note is appropriate under the circumstances, you will need to decide:

- the validity period of the credit note
- if it is transferable
- if it can be used for other services
- any other special conditions
- how to account financially for new bookings that extend into a new financial year.

Transferring bookings

Your customer may be willing to postpone their visit. You should have a clear policy about what happens if:

- the new date is in high season and more expensive
- the customer makes repeated requests for different dates
- the customer's booking is associated with a function (for example, a wedding) to be held on or near your business premises.

If your business is part of a group, such as a motel chain, you might offer an alternative to the customer that meets their needs. A hotel chain may be able to offer rooms in a different location; a resort could offer a different venue for a function. Ensure you are offering a good alternative, so your customers feel that they are getting a good service and not being 'shunted around' or penalised.

Remember that, in some instances, a customer may be entitled to a refund as it may not be appropriate to transfer or postpone their booking.

EXAMPLE: FUNCTION CANCELLATION

A country homestead is hired out for a wedding function. On the day of the wedding, the area experiences flash flooding, which leads to the local river bursting its banks and submerging surrounding access roads. Neither the wedding party, nor any guests, are able to get to the property.

The homestead owner rings other venues in the area to determine whether the function can be relocated. Luckily, one is able to accommodate; being more upmarket, however, there is an additional cost of \$3,000.

The homestead's contract states that, in the event that a booking needs to be modified (for example, because of an extreme weather incident) the customer is liable for any extra costs.

In this instance, the flash flood would have frustrated performance of the contract by the homestead owner, entitling the bride and groom to cancel their wedding, should they have wished. In that instance, they would have been entitled to a refund, minus any reasonable costs already incurred by the homestead owner, such as the cost of any catering or wages paid to staff.

However, they indicated that they were prepared to relocate the function to the alternative venue secured by the homestead owner and therefore agreed to pay the extra charge.

As well as the guidance in this document, you can read more at www.consumerlaw.gov.au

Published October, 2012

This factsheet aims to explain the law in simple language and provides general information and examples. However, it should not be relied upon as a substitute for professional legal advice. Tourism Victoria and Consumer Affairs Victoria disclaim any liability for any errors or for any loss or other consequence, which may arise from any person relying on any information in this publication.