



May 2020

Government restrictions, frustrated contracts, force majeure, and the impacts of COVID-19

COVID-19 (coronavirus) has affected consumers and businesses throughout Australia. Many industries have been significantly impacted by the restrictions governments have introduced to slow the spread of the virus.

Where these government restrictions have limited the goods and services which businesses are able to supply to consumers, some contractual obligations between businesses and their customers may have been impacted.

This document provides general information about what those possible impacts may be. **It is not legal advice.** It should also be noted that the laws regarding these subjects differ between states and territories in Australia. This information is provided for Queensland. It is recommended you contact a solicitor for legal advice specific to your situation.

In most cases the restrictions made due to COVID-19 are out of the control of both the business and the consumer involved in the contract. When this occurs, the contract may be referred to as *frustrated*.

Goods or services I have purchased cannot be provided due to COVID-19 restrictions, what are my rights?

It is recommended that you contact the trader to see what remedy they can offer. Many traders have made public statements that they are helping their customers by providing remedies like:

- full or partial refunds
- credit notes
- vouchers.

Where a business must cancel the provision of goods or services because of a government ruling made **after** the goods or services were sold but **before** they are due to be provided, this may impact your rights under the Australian Consumer Law (ACL).

Why doesn't the ACL cover this situation?

The ACL covers all consumer transactions. For example, it is an offence under the ACL for a trader to accept payment from a consumer for goods or services if they don't supply them on the date promised, or if the date to supply wasn't set, within a reasonable time. However, the ACL provides that traders have a defence against prosecution if the failure to supply was not their fault.



In the COVID-19 situation, where a consumer has paid for goods or services and the trader can't provide them because of a government ruling, the trader won't have breached the ACL.

While the ACL may not have been breached, a consumer may wish to see if they can instead rely on their contractual, civil, rights.

To do this, a consumer should check the terms and conditions of their contract with the business or supplier. Some contracts may have a specific clause on pandemics, for example stating that in the case of a pandemic the business will not be held liable for any loss incurred as a result. Some contracts have similar wording for terrorist events and wars. Some contracts have a *force majeure* clause covering specific events outside the control of the consumer and supplier.

What is a 'force majeure' or 'act of God' clause?

Some contracts include a force majeure clause that covers events outside the control of the consumer and trader. This clause may allow parties to pause or terminate the contract when it can no longer be performed due to circumstances outside their control. Force majeure is not generally recognised as common law in Australia, rather it is something that is, or is not, specifically written into a contract.

Force majeure clauses, where they exist, vary from contract to contract. The parties involved in the contract have the freedom to negotiate the clause as they see fit before they enter into the agreement or any money is paid towards the purchase.

Examples of events that might be considered to result in a force majeure situation could include natural disasters, government action or interference, national emergencies or acts of war.

The effect of force majeure is that, if it is upheld, the 'non performing party' won't be liable for failing to comply with the contract. The 'non-performing' party could be either the business or the consumer, or both, depending on the situation. For example, a business which has been paid by a consumer to deliver a good or service on a certain day but is prevented from doing so by a new government law, may not be liable. Conversely, in a situation where a business has invested time and effort in preparing to deliver a particular good or service on a particular day, for which the consumer has not yet paid, it is the consumer that is the 'non performing party' and may not be liable.

Does force majeure apply to COVID-19?

To determine whether force majeure applies to COVID-19, read the terms and conditions of the contract to see if it includes force majeure, and if it does, it may also include a definition which might describe what has happened in the COVID-19 event. Examples might include terminology such as 'pandemic', 'infectious disease', 'epidemic' or something similar.



If there is no force majeure clause, or other term or condition about pandemics to determine the outcome, but the contract has been affected by the pandemic, or restrictions due to the pandemic, it may be a *frustrated contract*.

What is a frustrated contract?

A frustrated contract occurs when an event outside the control of the parties to the contract has arisen (such as rules changed by government as a result of COVID-19) which results in contractual obligations not being met. If a trader cannot fulfil their obligations outlined in a contract due to COVID-19 restrictions, both the consumer and trader should try to reach a resolution so neither party is unfairly advantaged or disadvantaged. It is recommended that you contact the business directly to request a refund, credit note or voucher.

If you are unable to receive an appropriate remedy, you may need to obtain independent legal advice to understand your legal rights. All businesses are encouraged to work with their customers and treat them fairly under these exceptional circumstances.

How can I find out if a frustrated contract or force majeure clause applies to my contract?

This is a complex area of law. It will depend on the terms and conditions of your contract. In situations where a business and a consumer cannot agree to a solution only a Court or Tribunal can decide what the appropriate outcome will be. Every matter is determined on a case by case basis. Whether or not a matter should be pursued through Court should be determined by a legal professional.

Where can I go for legal help?

The OFT conciliates complaints between consumers and traders, attempting to achieve a suitable outcome for the parties. You can lodge a complaint [online](#) or by calling 13 QGOV (13 74 68) for information.

The OFT is not permitted to provide legal advice and it cannot force a trader to provide redress. If you are not satisfied with the outcome OFT achieves in your matter and you wish to pursue it further, you will need to seek legal advice.

The [Queensland Law Society](#) can help you find a solicitor or law firm. The [Bar Association of Queensland](#) can help you find a barrister. The following legal assistance services are available to vulnerable and disadvantaged Queenslanders:

- [Legal Aid Queensland](#)
- [Community Legal Centres Queensland](#)
- [Aboriginal and Torres Strait Islander Legal Service \(Qld\) Ltd](#)
- [Queensland Indigenous Family Violence Legal Service](#).