



COVID-19: VAPAC observations regarding Rescheduling Stage Productions

In the wake of the close-down of Victorian Performing Arts Centres (and many other public spaces) from mid-March in response to various Government directives, many colleague venues have been asked for rescheduled dates for many performances to later in the year and into 2021.

This paper outlines some of the issues to be considered and makes a number of observations to assist venues in their interaction with promoters, producers and tour coordinators regarding such rescheduling

When is 'too soon'?

At this time, the horizon for prospective reopening of venues is highly uncertain. The demands of 'social distancing' regimes will impact on the normal conduct of a live public performance event. We saw the mandated (ever reducing) size of public gatherings dictate the rate at which our venues closed their doors. The rate at which we will be able to resume operation will be similarly linked to these mandates and our capability to manage 'social distancing' regulations. It is difficult to predict what size gatherings are going to be allowable in future months, what 'social distancing' will be required, what 'social distancing' we can achieve in our venues and to what extent patron behaviour will change in response to these new 'social norms'.

In short, it is very difficult to predict exactly when we are likely to reopen and resume 'normal' business.

All estimates of when 'normal' business will resume are pure speculation at this time and when managing risk, organisations are directed by Federal, State and Local Government as to when we can schedule and communicate this. They are also encouraged to work with their own stakeholders to ascertain risk appetites for re-opening.

Observation: The sooner the rescheduled date of a production is from now, the more venues should probably consider that date to be 'too soon'.

When setting a date for re-opening, re-scheduling or re-contracting, formalising a position regarding 'what happens if we need to cancel again' may be very important.

Please ensure such new contracts have clear clauses in regard to this to provide all parties the ability to withdraw with minimal disadvantage.

This is as important to the promoter/producer/performer as it is to the presenter.

What is good and bad about a rescheduled date?

A rescheduled date is a good outcome in essence. It makes 'good' some of the investment that might have already been made into a production (by a producer/performer and by a presenter) and it gives us (and, more importantly, our audience) hope of recovery. In most cases, it will allow venues and promoters/performers the opportunity to carry forward any deposits paid for contracted obligations and still retain a commitment to fulfil existing contracts at a later date. (Councils will need to implement a clear way of treating pre-payments and deposits so they can be held in trust and rolled over if the later date falls in the next financial year.)

A rescheduled date is helpful especially to the promoter, performer or producer as it gives a prospect for a performance that is simply delayed or postponed, not lost altogether.

However, if the rescheduled date is 'too soon' and venues have to cancel or reschedule again, that could give rise to a number of risks:

- Wasted efforts, cost and administrative work,
- Loss of audience confidence and future damage to reputation,
- Frustration of contracts and possible recourse to damages claims (or cancellation fees).

What are our commitments when we reschedule a production?

Rescheduling a production to a later date is effectively entering into a new contract between the venue as presenter, and the producer/performer or tour coordinator.

Ideally, a contractual arrangement between parties should be entered 'in good faith'. The essential meaning of that is both parties enter the contract with confidence what they undertake to provide can be delivered by them. In the case of a venue hiring its space for a producer to present a work, the producer is confident that they can provide the performance they have described, and the venue commits to provide the venue for the purposes of the performance (and any other services laid out in the contract.). In the case of the presenter buying the work, we are saying we commit to having a venue ready for presenting the work on this date and will make payment accordingly.

Observation: The sooner a rescheduled date is from now, the more likely it is a venue may not be able to fulfil its obligations in a contract (because of potential further extension of 'close down' provisions.)

What are we committed to do when we reschedule a production?

When we commit to rescheduling a production and enter into a contract for a new date, we then (usually) commit to sell tickets to the event, market and promote the event, prepare to roster staff and technical provisions for the event and ultimately host the event as prescribed.

In the light of the current COVID-19 crisis, each venue will need to assess exactly WHEN it has resources available to fulfil these expectations. Each venue will assess when normal operational capacity will resume, and current evidence suggests this will be later rather than sooner.

In short, when rescheduling a production, venues need to assess if they are ready to have new shows on sale (including having resources to work with customers to reallocate existing ticket bookings into new dates)?

Observation: If the venue has any doubt the time frame of a rescheduled performance may leave them unable to provide the associated lead-up and delivery services required for a performance to take place, then a contract to reschedule should probably not be entered into at that time. (Though it may well be OK to commit to a 'venue pencil booking' until the situation becomes more assured for both parties.)

What are the risks of rescheduling a production?

Obviously, our greatest risk is we may still be prevented by regulation or practice from operating as usual because of COVID-19 (ie 'Too soon'). Effectively, what if we reach the new rescheduled date and the venue is still not able to open (or operate fully) because of COVID-19 regulations?

The associated risk is a venue is put in a situation where the producer is FULLY able and ready to fulfil their part of the contract (to deliver the show) but the venue is not in a position to meet its end of the agreement, because outside pressures and demands make it difficult to deliver their part of the agreement. These may be localised limitations such as that Local Government instructing continued closure, unavailability of key staff, unavailability of the venue while it is being used for another critical purpose, or unavailability of other key resources.

The difficulty in this instance is frustration of the contract outcome could be seen to be caused by the venue, not the producer, which could leave the venue vulnerable to claims of compensation for loss by the producer. (Generally, Force Majeure applies when BOTH parties to a contract are unable to fulfil their obligations because of MAJOR external forces coming to bear on both, at which time both parties are freed from their obligations under a contract)

Putting a new date on sale and transferring existing tickets to a new date usually requires a new contract (or at least a variation to an existing contract.) Venues might need to consider their certainty in being able to deliver the services their part of the contract promises.

Observation: When we reschedule a production If either party has any doubt they MIGHT not be able to do what they promise, they perhaps should not 'in good faith' enter a contract with each other.

If a new contract is entered it would reduce risk if it could include a well-considered clause that would provide both parties with relief should there be subsequent frustration affecting EITHER party.

What are the benefits and risks of holding over ticket payments for a rescheduled production?

There may be some appeal in the idea of holding ticket payments over to a rescheduled date and issuing new tickets without further payment by the customer. For some, this might be more attractive than simply cancelling and refunding the ticket and allowing the purchaser to re-purchase for the rescheduled date.

The benefits are found in locking in the transaction and the revenue against the future date, especially when the economic conditions around the new date might be uncertain. The risk is that customers may initially choose to have their payment transferred to the new date and then at the later date, still choose to cancel. This leads to multiple ticket handling for no revenue.

If the production is cancelled or rescheduled again, these paid tickets become an even greater burden, customers become even more uncertain and dissatisfied and there is a greater risk of administrative error occurring.

The longer you are expected to carry over these advance payments, the greater the challenge, particularly if the final choice of the customer, well down the track, is cancellation anyway. Customers may view either the promoter or the venue (or both) as being 'opportunistic' by holding onto their payments for a long time.

Additionally, the prevailing economic conditions around the ultimate date of presentation might recommend some special pricing or packaging offer to encourage purchases in 'tough times'. Holding a number of tickets to the show at the earlier ticket price may provide challenges to this strategy being possible and reduce marketability of any tickets still available.

Observation: It is simpler and 'cleaner' when a show needs to be rescheduled, to simply cancel and refund all sales. Although it might not seem so, this is often better for the promoter also and venues may like to offer this as the preferred option. (Your data base will still allow you to approach the same customers when you are confidently ready to put the show on sale again and offer them an 'early bird' or guaranteed re-seating option.)

Summary of these points:

- Rescheduling shows is probably preferable to cancellation but be cautious about your commitment to a rescheduled date when you come to contract the new date. Can you say you enter the contract 'in good faith' if you are in fact still uncertain whether the venue will be available on the new date?
- You probably should have some reasonable confidence the new date is going to be possible before entering a new contract. Until you have that confidence, it might be better to treat a rescheduled date as a 'pencil hold', delay contracting and do not sell tickets for the performance until it is a contracted booking.
- Failure to provide your venue for a show because of COVID-19 conditions may NOT always invoke relief under 'Force Majeure' and by simply rescheduling the

first time you may be making a commitment you could be held to, or cause you to have to provide compensation if you cannot deliver.

- Rescheduling a show may cause your venue to be required to be delivering services to the producer in advance of that new date, and COVID-19 conditions might be leaving you without the necessary personnel or resources to do so at that time.
- In most cases, it may be better and simpler for a rescheduled show to fully refund tickets to the cancelled show and leave the customer to rebook for the new date once it is confirmed.

This information represents the considered opinion of the authors and the VAPAC Executive and is not intended to be taken as 'advice' or instruction by VAPAC inc. It is shared purely in the interests of collegiate discussion between members. Before enacting any of these observations, it is important to ensure that your key stakeholders are in agreement and that your own unique procurement and policy requirements are incorporated.

*Authors: Rob Robson, Joel McGuinness, David Lloyd
(on behalf of VAPAC Inc. Executive)*