

LIABILITY ARISING FROM CONTRACT AND UNDER THE AUSTRALIAN CONSUMER LAW



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Summary of Key Points

Fitness services are generally supplied under contracts of service entered into between the providers of the services and the participants/clients (or their guardians). Such contracts govern the relationships of the parties, and may contain express terms dealing with safety matters. **[2.0]**

Where fitness services are supplied to a consumer in trade or commerce, the **Australian Consumer Law** imposes a statutory guarantee that a provider must render such services with **due care and skill**. **[3.0]-[3.2]** A provider will be liable to compensate a consumer for any loss or damage suffered as a result of a breach of such guarantee.

In determining whether a provider has been careless, the various state and territory Civil Liability Acts are applicable. Various defences contained in state and territory Civil Liability Acts will also continue to apply to claims for breaches of the statutory guarantee. **[3.2]**

The guarantee that services be rendered with due care and skill cannot be excluded by the parties to a contract unless the contract is one for **recreational services**, which is broadly defined. **[3.3]-[3.4]**

Under state and territory Fair Trading Acts, different **Fitness Codes of Practice** apply to the fitness industry. These Codes **are not uniform**. Some Codes are **voluntary**, some are **mandatory**. **[4.1]-[4.2]** Apart from the Code of the ACT, the mandatory Codes do not generally deal with health and safety matters. **[4.3]**

The differences between the various Codes highlight the need for uniform national standards and a nationally adopted Fitness Code.

[1.0] Introduction

In most circumstances, fitness services are provided under a contract of service between the provider and the participant, or perhaps his or her parent or guardian if the participant is a minor. Such a contract can either be in writing (signed or unsigned) or oral, or consist of a combination of written and oral terms. It must be noted that under the various Fitness Industry Codes, discussed at **[4.0]**, fitness centre 'membership agreements' are required to be in writing and signed. Obviously, a contract may cover a range of matters, including periods of membership of fitness centres, the range of facilities and services that are available, the costs of any extra activities or services, and the responsibilities of the customers and fitness providers

respectively. The contract will often include exclusion clauses, or 'waivers' or 'disclaimers' of liability, which exclude or limit liability for personal injury or other damage in certain circumstances (see [3.3] and Report 3). The parties to a contract must perform the positive obligations contained in its terms and a failure to comply gives rise to an action for breach of contract. The usual remedy for such an action is compensation for the loss suffered as a result of the breach.

Not all fitness services are provided under a contract. In order for fitness services to be governed by a contract, there must be an agreement for the provision of the services, between the person participating in the activities and the person providing such services or organising such activities or, more usually, their (often corporate) employer. Such agreement must include some 'consideration', or something of value, provided by the participant in return for such services, usually a money payment.¹ If the services are provided gratuitously, then no contract arises. If P goes to free beach yoga classes offered by a local council and instructed by FI, then generally no contract will exist in such circumstances. A duty of care in tort will still exist, however, between the instructor (and perhaps the council) and P, so that P would still be able to sue either FI or the council in the law of negligence for any personal injury caused by the negligence of FI or of the council.

Where a contract for fitness services exists, consumer protection laws will also apply. Contracts are governed by the Australian Consumer Law (ACL) which impose statutory guarantees in relation to services *supplied* to a *consumer* in trade or commerce and therefore mandate certain quality standards. A failure to fulfil those statutory obligations may be a further source of potential liability of the *supplier* to the consumer participant. The operation of the ACL and the statutory guarantees is considered in more detail below, as are the Fitness Industry Codes that exist in all states and the ACT but not the Northern Territory.

Many contract disputes arise because of an alleged failure on the part of a service provider to comply with the terms of the contract or with consumer guarantees. Most such disputes concern matters *other than* ones of personal health and safety.

¹ See, eg, N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th ed, LexisNexis Butterworths, Australia, 2008, 'Overview of Contract Law', [1.26] - [1.29].

We are not concerned with such contract disputes, about membership terms, payments, dissatisfaction about inadequate services or poor facilities, disappointed expectations and the like. Similarly, although the ACL provides for damages (s 236) to consumers who have suffered harm as a result of misleading or deceptive conduct in trade or commerce in breach of s 18 ACL, such remedy is not available for personal injuries under s 137C *Competition and Consumer Act 2010* (Cth) ('CCA'), at least where Commonwealth jurisdiction applies.² Our focus is on acts or omissions of fitness service suppliers that may be in breach of the service suppliers' contracts or in breach of the applicable statutory guarantees *and that result in personal injury*.

[2.0] The Terms of the Contract: Express Terms and Implied Terms

A contract of service consists of the terms of the agreement that set out the respective rights and obligations of the parties. Some of these terms will be express, that is the parties have put those terms in writing or expressly stated them. In some cases, express terms may be minimal, such as 'I will instruct client for a one hour yoga class in return for \$15.' Other contracts may be detailed and consist of many pages of terms that set out both parties' rights and obligations. Contracts also include terms that are implied as a matter of fact (from the circumstances of the case) or by law. The more minimal the express terms of the contract, the more likely it is that certain terms will be implied into the agreement. It is not proposed to set out the law as to the circumstances in which, and on the basis of what principles, terms are implied into contracts.³ It suffices to say that at common law, contracts for services contain an implied promise or term to exercise reasonable (or 'due') care

² It appears that if a consumer sues for breach of s 18 of the ACL under some state jurisdictions, then in theory, such a claim could be for personal injury: eg, under s 5D of the *Fair Trading Act 1989* (Qld), personal injury is included within the definition of harm. However, the *Civil Liability Act 2003* (Qld) limitations and principles applicable to calculating personal injury damages would still apply in such circumstances (see s 4(1) and s 50), so that there would be no real advantage to bringing an action on that basis. It is uncertain whether provisions of the Civil Liability Acts ('CLA's) dealing with liability and defences also apply, but this is unlikely since the matters that need to be proved to show misleading conduct do not require proof of carelessness. For example, a statement that 'that equipment is safe for that purpose' may be misleading if it is *inaccurate*, irrespective of whether the maker of the statement was careless.

³ See, eg, Seddon and Ellinghaus, [1.67] – [1.71]; [10.36] – [10.61].

and skill in the performance of the services,⁴ unless such term has been excluded. However, such an implied term is not relevant for our purposes, since it is mirrored by, and thus made largely unnecessary as a result of, the ACL statutory guarantees of due care and skill, discussed below. Further, any claim brought for breach of implied terms of due care and skill would require proof of carelessness and would therefore in any case be governed by the various Civil Liability Acts ('CLA's). Therefore, the same principles considered in Report on Negligence would apply. This is because the CLAs apply as long as a duty of care in contract is 'concurrent and co-extensive' with a duty of care in tort.⁵ Although in theory, a plaintiff injured as a result of a service provider's conduct can still seek to prove a breach of an express or implied term of a contract, alongside possible claims in negligence or under the ACL, there is no need to consider this theoretical possibility further.

It must be reiterated that the existence of a contract is important, however, since absent a contractual basis for the provision of services, the ACL guarantees do not apply, since non-contractual (that is, gratuitous) services are not *in trade or commerce*.⁶ If a person demonstrates some new fitness exercises to her friend, she will *not be subject* to consumer law guarantees, though she will almost certainly owe a duty of care in tort.

[3.0] The Australian Consumer Law and statutory guarantees

[3.1] Introduction

The new Australian Consumer Law came into effect on 1 January 2011. Its stated aim was to 'create a single national consumer law'.⁷ The ACL is the response to the perceived shortcomings of the previous, 'relatively fragmented landscape' of

⁴ See *Henderson v Merrett Syndicates* [1994] UKHL 5; [1995] 2 AC 145 at 193-194 per Lord Goff of Chieveley; approved in *Astley v Austrust Ltd* [1999] HCA 6; (1999) 197 CLR 1 at 22 [46]-[47] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

⁵ See, eg, the Schedule definition of 'duty' in the CLA (Qld): 'duty of care means a duty to take reasonable care or to exercise reasonable skill (or both duties)' appears to cover differently worded formulae.

⁶ See, eg, *E v Australian Red Cross Society* (1991) 27 FCR 310; 99 ALR 601.

⁷ Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill No 2 2010, p 3.

Commonwealth and state and territory consumer protection laws.⁸ Australia now has a uniform set of rules across all jurisdictions in relation to consumer protection and a uniform articulation of acceptable conduct in the commercial sphere. There are, however, exceptions to this uniformity, as will be seen below. The laws are a complex exercise of co-operative federalism, with the CCA inserting the ACL as Schedule 2 of the CCA. Section 131 and Part XI of the CCA applies the ACL as a law of the Commonwealth in relation to ‘corporations’. Part XIAA of the CCA provides for the application of the ACL as a law of the states and territories. All states and territories have applied the ACL under their relevant Fair Trading Acts (‘FTAs’).⁹ It will take some time for the full implications of these changes to be understood.

Although the ACL is therefore a national law, it comes into effect by the activation of separate jurisdiction of the Commonwealth and states and territories. Commonwealth jurisdiction applies where a consumer enters into a contract with a ‘corporation’, as defined in s 4, or whose conduct otherwise falls within the more extended operation of the CCA under s 6, which defines corporation to *extend* to natural persons in certain contexts. That extended jurisdiction applies in circumstances including where a person provides goods or services in the territories, or in interstate trade or commerce (s 6(2)(c) CCA). For convenience, we will use the label ‘corporation’ to include this extended jurisdiction. Hence, if a ‘corporation’ supplies services in trade and commerce to a consumer (or otherwise engages in conduct caught by the ACL) it is bound by the ACL as a law of the Commonwealth via

⁸ A Bruce, *Consumer Protection Law in Australia*, 2011, LexisNexis Butterworths, Australia, p 1. The reforms implement the recommendations of the Productivity Commission in its *Review of Australia’s Consumer Policy Framework*, Report No 45, Canberra, 2008.

⁹ *Fair Trading (Australian Consumer Law) Act 1992* (ACT) Part 2, Division 2.2, inserted by the *Fair Trading (Australian Consumer Law) Amendment Act 2010* (ACT); *Fair Trading Act 1987* (NSW) Part 3, Division 2, inserted by the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW); *Consumer Affairs and Fair Trading Act* (NT), s 26, inserted by the *Consumer Affairs and Fair Trading Amendment (National Uniform Legislation) Act 2010* (NT); *Fair Trading Act 1989* (Qld) Part 3, Division 2, inserted by the *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld); *Fair Trading Act 1987* (SA) Part 3, Division 1, inserted by the *Statutes Amendment and Repeal (Australian Consumer Law) Act 2010* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas), Part 2, Division 2; *Fair Trading Act 1999* (Vic) Part 2, Division 2, inserted by the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic); *Fair Trading Act 2010* (WA) Part 3, Division 2.

s 131 and Part XI CCA. In relation to natural persons, the applicable law is that of the relevant state jurisdiction in which the services were supplied.¹⁰

Does jurisdiction matter? For the most part, for current purposes, it does not, especially given both Federal and state courts can exercise jurisdiction to hear matters arising under the ACL (Div 8 of Pt XI CCA). Since the ACL has been adopted as a law both of the Commonwealth and the states, it does not matter which jurisdiction, Commonwealth or state, applies and, in the latter case, *which* state's law applies. That is so at least in those circumstances in which the ACL is uniform. However, jurisdiction does matter to the extent to which the ACL is not uniform. Importantly, the ACL's uniformity is seriously undermined in one context, namely, a failure to comply with the guarantee that services are supplied with due care and skill, where such failure results in personal injury (or other foreseeable losses, such as property damage).

As a minor aside, there are other provisions of the ACL that may provide an avenue for legal redress, but these will not be considered as their likely application is remote. For example, damages for personal injury are available for 'contravention' of the ACL's unconscionable conduct sections (Part VIB CCA, s 87E), but it is difficult to foresee circumstances where this may a likely source of legal recourse.

[3.2] ACL Service Guarantees

One of the advantages of the ACL is that the ACL applies to all service providers, whether a corporation or not, requiring that *all services* in trade or commerce be supplied in accordance with statutory guarantees, such as due care and skill. Under the previous *TPA*, the implied terms that services be performed according to certain standards was not contained in all states' FTAs.¹¹

¹⁰ Indeed, corporations are subject both to state jurisdiction as well as Commonwealth jurisdiction. State and territory laws operate 'concurrently' with the CCA, so far as they are 'capable' of so operating: s 140H CCA. If they are incapable of operating concurrently, then Commonwealth law will prevail by virtue of s 109 of the Constitution. This is of little consequence, except where there are differences between state and Commonwealth laws, in which case issues of inconsistency then arise. See [3.4] below.

¹¹ Specifically, in Queensland and Tasmania, a defendant who was not caught by Commonwealth jurisdiction was previously not subject to any 'due care' implied term. In those two states, where a

A person who is a consumer and who is negligently injured in the course of fitness-related activities may sue the defendant suppliers of such services for failure to comply with one of the statutory guarantees contained in the ACL (alongside claims either in the tort of negligence, or for breach of contract ([3.2])). Such services must have been supplied in 'trade or commerce'. Trade or commerce clearly includes services supplied by the fitness industry. A person is a consumer in relation to a supply of services if the amount paid or payable for the services does not exceed \$40,000 or, if it exceeds that amount, the services 'were of a kind ordinarily acquired for personal, domestic or household use or consumption' (s 3(3) ACL). The definition in relation to the purchaser of goods is to similar effect. Under this definition, contracts between fitness providers and their clients/members/participants will be consumer contracts. There are two statutory guarantees that are relevant to health and safety issues: that of due care and skill (s 60 ACL) and that of fitness for purpose (s 61 ACL).¹²

Due Care and Skill

Section 60 of the ACL provides: 'If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.'

Importantly, since s 60 creates a statutory guarantee, plaintiffs can seek damages for failure to comply with the guarantee under s 267 ACL, which specifically deals with services. Section 267(1) states:

267 Action against suppliers of services

(1) A consumer may take action under this section if:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to the consumer; and
- (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and
- (c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:

person was injured by a non-corporate supplier, such suppliers may still have been subject to contract law implied terms of due care and skill, but the contract could exclude such implied terms or exclude or limit liability for breach of such terms.

¹² There is also a guarantee that services be supplied within a reasonable time (s 62 ACL).

- (i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
- (ii) a cause independent of human control that occurred after the services were supplied.

Subsections (2) and (3) of s 267 are not the focus of this Report: they deal with failures to comply with the guarantees that can be remedied (subs (2)); or with failures that cannot be remedied, or are major failures (subs (3), defined s 268), justifying the termination of contracts. These subsections are not of relevance to a failure to safeguard health and safety that leads to personal injury. Subsection (4) is applicable in that context:

(4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure. ...

If the failure to provide services with due care and skill leads to foreseeable personal injury or property damage, then compensation for such personal injury is available under s 267 as reasonably foreseeable 'loss or damage'.¹³ Section 13 ACL includes injury within the definition of 'loss or damage'. Foreseeable injury or damage could well occur in many contexts, for example, the supply of recreational services or repair work of potentially dangerous equipment. Therefore, if a mechanic carelessly performs car repair services to a consumer, causing brake failure, then assuming that personal injury is a foreseeable consequence of such careless repair, damages for such consequential personal injury would be recoverable under s 267 ACL.¹⁴

Similarly, if a fitness instructor fails properly to instruct the client on the appropriate use of safety gear so that the client falls from a climbing wall, a potential claim for

¹³ Questions have been raised about the precise meaning of, and test for, reasonable foreseeability in this context and the appropriate measure of damages. See J W Carter, *Contract and the Australian Consumer Law – A Guide*, 2011, LexisNexis Butterworths, Australia, [2.23]. In particular, one issue is how such a broadly stated test, which allows for the recovery of 'all loss or damage caused by the failure to comply with a consumer guarantee, other than loss which could not have been foreseen' (p 37), can apply to strict duties such as contained in s 61 (see below). Such a broad statement of liability may be too broad where strict compliance is required.

¹⁴ Under the TPA see, eg, *Crawford v Mayne Nickless Ltd (t/as MSS Alarm Service)* (1992) 59 SASR 490, in which case the consumer sued for breach of s 74(2), requiring services to be fit for the particular purposes made known to the supplier by the consumer (cf s 61 ACL, discussed below). The services were not suitable: the supply of a burglar alarm system that could easily be disengaged led to recoverable property losses, specifically the large amount of stock stolen by thieves.

damages under s 267 for breach of s 60 would lie. An example from the previous TPA, *Renehau v Leeuwin Ocean Adventure Foundation Ltd* illustrates the point.¹⁵ In that case the plaintiff participated in training activities on an adventure sail training ship, the *Leeuwin*, owned by the defendant. She suffered injury when she fell off the main mast. It was held that the owner of the ship had failed to supply the services with due care and skill, in not having a system in place to ensure that the plaintiff's belt was properly secured. Importantly, the exclusion clause contained in the contract was held to be void under s 68 TPA and thus the defendant could not rely on it. Hence, the defendant was held liable.

An important question arises in relation to a claim for breach of s 60 and damages under s 267. Despite the promise of greater uniformity as a result of the ACL, ongoing differences between the Civil Liability Acts (CLAs) of the states and territories, and the interaction of the CLAs with the ACL, lead to unnecessary complexity in this field. Do the CLAs apply in relation to establishing the legal requirements for liability and the applicable defences, and in determining the applicable principles for calculating damages (including the various limits contained in the CLAs)? The answer appears to be 'yes'. This is because proof of a breach of s 60 requires the consumer plaintiff to show that the defendant service supplier acted without due care. Therefore, the CLAs on their face seemingly apply, even to statutory claims. All the CLAs set out general principles applying to claims arising *from a failure to take reasonable care*, irrespective of whether such claims are brought in tort, contract *or under statute*.¹⁶ Claims under statute will therefore be

¹⁵ (2006) 17 NTLR 83; [2006] NTSC 4.

¹⁶ CLA (ACT): see Ch 4, s 41 ('negligence claims'). CLA (NSW): see s 5A (Part applies to claims for harm resulting from negligence, regardless of the precise cause of action pleaded to sustain such a claim). CLA (Qld): see Ch 2, Part 1 (most sections apply to 'breach of duty of care', defined to include claims in contract or under statute, though Div 4 on dangerous recreational activities applies only to 'negligence' suggesting that breaches of contractual duties of care *are not within the scope* of the Div: see R J Douglas, G R Mullins and S R Grant, *The Annotated Civil Liability Act 2003 (Qld)*, 2nd ed, LexisNexis, Sydney, 2008, p 167, [19.5]). CLA (SA): see Part 6 (which is limited to claims in negligence, defined as a 'failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care'). CLA (Tas): see s 10 (claims for breach of duty of care); CLA (Vic): see s 44 (negligence claims 'regardless of whether brought in tort, in contract, under statute or otherwise'); CLA (WA): Part 1A purports to apply to all claims for damages for harm caused by the fault of another (s 5A(1)). See J Dietrich, 'Duty of Care' (2005) 13 *Torts Law Journal* 17, 21, for some of the difficulties in relation to the WA provisions.

governed by the relevant state CLA.¹⁷ Importantly, it appears that s 275 ACL allows the continued operation of the state and territory CLAs that apply to the careless supply of services under a contract.

Section 275 ACL

Section 275 states that state or territory laws that apply 'to limit or preclude' liability for a failure to comply with a term of a contract or a statutory guarantee continue to apply.¹⁸ The section is very complex.¹⁹ To simplify, the section makes the CLAs applicable to statutory claims under the ACL. The likely effect of s 275 ACL is that the various CLAs that *directly* limit or preclude liability for careless conduct, including breaches of the statutory guarantee of due care and skill, will be valid. This conclusion follows from a decision of the High Court in the case of *Insight Vacations Pty Ltd v Young*²⁰ ('*Insight*'), dealing with a previous version of s 275 ACL under the TPA (s 74(2A)).²¹ It was held that s 74(2A) TPA gave effect to state laws that directly

¹⁷ This is subject to the general exclusions to the operation of each Act, but those exclusions are not relevant for current purposes.

¹⁸ One issue that arises is that the relevant law is that of the state or territory that is the 'proper law of contract', but this may not be the same as the place where the tort is committed.

¹⁹ In full, s 275 states:

275 Limitation of liability etc.

If:

(a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and

(b) the law of a State or a Territory is the proper law of the contract;

that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.

Some of the difficulties of the terminology used in it cannot be explored here.

²⁰ (2011) 243 CLR 149; [2011] HCA 16 (11 May 2011); dismissing the appeal against the decision of the New South Wales Court of Appeal in *Insight Vacations Pty Ltd v Young* (2010) 268 ALR 570; [2010] NSWCA 137.

²¹ The wording of s 275 is almost identical to that of the previous s 74(2A) TPA, other than seemingly minor changes to the wording to reflect the change from implied terms to statutory guarantees. Section 74(2A) was introduced in 2004 for the express purpose of allowing *state* provisions that limit liability for contravention of the implied term of due care to operate. See Consideration in Detail Speech to the Treasury Legislation Amendment (Professional Standards) Act 2004 and the Supplementary Explanatory Memorandum to that Act [1.1]-[1.5], set out in *Insight Vacations Pty Ltd v Young* (2010) 268 ALR 570; [2010] NSWCA 137, [43]-[45] in Spigelman CJ's judgment. But for this section, a plaintiff could have otherwise sought to circumvent all the various restrictive sections of the CLAs, by pleading the case as one of breach of an implied term of s 74 TPA and then meeting the restrictive provisions with a claim that s 68B rendered such state restrictions void.

Certainly, the assumption of the legislators is that s 275 will be to like effect. See [7.136]-[7.139] in Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010:

[7.136] The States and Territories currently have laws that allow providers of recreational services to exclude or limit their liabilities in respect of implied conditions and warranties in consumer contracts. It is expected that the States and Territories that currently have such laws

limit liability of parties to a contract. If the High Court's reasoning in relation to the TPA applies equally to s 275 ACL, and there appear to be no reasons why it should not, then important consequences follow for the overall scheme of the ACL and the uniformity of that scheme.

This means, given that the CLAs differ between jurisdictions, that there is no uniformity in the determination of precisely the circumstance in which liability arises as a result of s 60, in relation to personal injury (or for that matter, property damage). The lack of uniformity (and hence, diversity of legal approaches) is endorsed by s 275 ACL.

As a result of s 275, it is therefore likely that individual state provisions that restrict liability continue to operate in each jurisdiction. These would apply equally to *corporate* suppliers. Restrictions on liability include general defences, such as contributory negligence and voluntary assumption of risk, which are probably only effective as a result of s 275.²² These defences, though broadly similar in the different CLAs, are not dealt with in an entirely uniform way. Further, specific defences adopted in some jurisdictions, such as those dealing with 'obvious risks' and dangerous recreational activities, also only operate via s 275. Here, the lack of uniformity is most pronounced. To take an example: where a consumer of a supplier of services is injured while the consumer was engaged in dangerous recreational activities, the supplier can plead such defence and potentially defend such a claim in New South Wales, even where such supplier was negligent; whereas in Victoria, it cannot.

in place will choose to have similar laws that exclude liability in respect of consumer guarantees.

[7.137] The ACL provides [via s 275] for such laws to have effect to limit the guarantees provided for in Chapter 3, Part 3-2, Division 1, Subdivision B of the ACL [ie ss 60-63, including the 'due care' guarantee].

²² If s 275 did not apply state laws, then a contributorily negligent consumer, for example, injured by the supplier's careless supply of services, could ignore a claim in tort and proceed under s 267, arguing that any state law restrictions are inconsistent with the rights created under the ACL (and s 131 CCA), at least so far as corporate supplier of services are concerned.

Under the previous TPA claims for breach of the implied term of due care and skill were not, *it would appear*, subject to contributory negligence defence, though I am not aware of any authoritative decision on point. See, eg, in *Renehan v Leeuwin Ocean Adventure Foundation Ltd* (2006) 17 NTLR 83; [2006] NTSC 4, discussed above. No contributory negligence defence was considered to be available in the circumstances of that case, though the reason for this was not clearly explained.

That consumer protection is sufficiently important to warrant uniformity is understandable; why consumers of *services* should be subject to the vagaries of individual state laws is not clear, though politics and a lack of consensus among governments may be the underlying cause. Of course, it is desirable that claims for carelessly caused injuries are dealt with consistently, irrespective of whether they are brought in negligence or for breach of s 60. The technicality of bringing such a claim under ss 60 and 267 should not alter that need for consistent treatment. But that consistent treatment *within* states and territories of all claims for carelessly caused injuries leads to *inconsistency* and lack of uniformity *between* different states and territories. Ultimately, that lack of uniformity is a result of the failure of the states to agree on a uniform civil liability regime (as noted in Report on Negligence), and that is a regrettable state of affairs. It is interesting that the new ACL has not circumvented this inconsistency.

The practical upshot of this is that when determining whether a supplier has failed to supply services with 'due care', it is necessary to go to the CLA of the particular state or territory in which the services were supplied and to apply the relevant statutory rules and defences discussed in the Report on Negligence.

Fitness for purpose

Of lesser relevance, but still potentially applicable to fitness services, is the guarantee that services are fit for their purpose.

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

(a) a person (the **supplier**) supplies, in trade or commerce, services to a consumer; and

(b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose. ...

Sub-section (2) is similar in effect as ss (1) but in relation to consumers making known 'the result that the consumer wishes the services to achieve'. The guarantee does not apply if the consumer did not rely, or it was unreasonable for the consumer to rely, on the skill and judgement of the supplier.

A breach of the guarantee that services are fit for their purpose (if a particular purpose is made known) would not usually be based on a finding of carelessness, but instead on a failure of the services to fulfil that purpose, even in the absence of carelessness. In those more unusual circumstances, a statutory claim under the ACL has an advantage in that there is no need for the plaintiff to prove a lack of care. Instead, a failure to comply imposes strict liability, irrespective of fault. In such a case, the CLA provisions dealing with liability and defences would not apply, even if the claim is for personal injury since, as noted above, these only apply to claims arising from a failure to take reasonable care.²³ It is difficult to find realistic examples of how unfitness for purpose can lead to physical injury. One might be where a consumer seeking exercises to alleviate back pain is given exercises that in fact exacerbate the back pain or lead to back injury. In such a case, it would not matter whether the prescription of the exercise was carelessly made or not; and the different CLAs would not apply in determining whether such a breach has occurred.

[3.3] Can you exclude statutory guarantees?

The statutory guarantees cannot *generally* be excluded as a result of s 64 ACL:

64 Guarantees not to be excluded etc. by contract

(1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the provisions of this Division; or
- (b) the exercise of a right conferred by such a provision; or
- (c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.

(2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this

²³ Presumably, however, the calculation of personal injury damages and any caps or limitations on these, under the CLAs, would still apply, since those parts of the CLAs are not limited in their application to claims for a failure to take reasonable care. The personal injury damages provisions are also not identical from jurisdiction to jurisdiction.

Division unless the term does so expressly or is inconsistent with the provision.²⁴

The impact of the non-excludability of statutory terms is illustrated by *Renehan v Leeuwin Ocean Adventure Foundation Ltd* discussed above, brought under the previous TPA for breach of the implied terms under that Act.²⁵ In that case an exclusion clause contained in the contract was held to be void under s 68 TPA and thus the defendant could not rely on it. Critically, however, it is possible now under the CCA to exclude the guarantees in relation to services in one context which is of particular relevance to the focus of this project, namely recreational services.

The exception of recreational services

In December 2002, as part of the Federal Government's response to the perceived insurance and torts law 'crisis',²⁶ s 68B was inserted into the TPA. This earlier provision allowing for the exclusion of liability has now been replaced by s 139A CCA, which is to the same effect. Before we explain the relevant provision in detail, it is worthwhile to consider why recreation was considered to require special treatment.

The stated purpose of s 68B was to 'permit self-assumption of risk by individuals who choose to participate in inherently risky activities, and [to] allow them to waive their rights under the' TPA.²⁷ The section allowed for the exclusion of the implied term of 'due care' where 'recreational services' were provided.

In relation to recreation, at least two factors appear to have driven calls for reforms to allow operators of recreation businesses to restrict their liability and, conversely, for participants in such activities to 'take' responsibility for their own actions and any consequent injuries. First, a number of high profile torts cases, in which plaintiffs

²⁴ Note, however, s 64A(2) ACL which allows some *limitation* of liability for contracts of service other than for personal, domestic or household use. Fitness services would generally be for personal use unless they are part of a corporate program for employees.

²⁵ (2006) 17 NTLR 83; [2006] NTSC 4.

²⁶ For a background to the so-called crisis and events leading up to it, see, eg, The Honourable Justice J Spigelman, 'Negligence and insurance premiums: Recent changes in Australian law' (2003) 11 *TLJ* 291; the Honourable Justice P Underwood, 'Is Ms Donoghue's snail in mortal peril?' (2004) 12 *TLJ* 39. One aspect of the crisis was said to be the increasing cost of third party liability insurance. Some statistics as to the costs of insurance at the time are available at <http://www.accc.gov.au/content/index.phtml/itemId/321637>, viewed on 7/6/2012.

²⁷ Explanatory Memorandum provided with the Trade Practices Amendment (Liability for Recreational Services) Bill 2002. For a more detailed consideration of the background to the legislative changes, see Anthony Haly, 'The Trade Practices Amendment (Liability for Recreational Services) Act 2002: Complete solution or deficient response?' (2003) 11 *Competition and Consumer Law Journal* 1.

engaging in inherently risky activities successfully sued for damages, received considerable media publicity. For example, in *Swain v Waverley Municipal Council* (unreported, NSWSC SC20261/00) a body surfer successfully sued the council for failing to warn of the possibility of shifting sandbars under the water between the flags at an ocean beach. There was much media and political debate generated by the decision in New South Wales. The decision was ultimately upheld on appeal: *Swain v Waverley Municipal Council*.²⁸ Secondly, one manifestation of the insurance crisis had been increasing liability insurance premiums. From the period June 2001 to May 2002, for example, premium increases averaged 22%.²⁹ Some industries, such as outdoor sport and recreation, were particularly hard hit, facing premium increases in the range of 100 to 500 per cent.³⁰

Section 139A allows for the exclusion of the statutory guarantees in relation to services contained in the ACL, in particular, ss 60 and 61. Such a term is not void under s 64 ACL to the extent that it 'excludes, restricts or modifies' such a statutory guarantee (s139A(1)), so long as such exclusion is limited to liability for death or physical or mental injury. Injury includes the acceleration or aggravation of injury or a disease (subs (3)). The definition of recreational services is as follows:

Terms excluding consumer guarantees from supplies of recreational services

....

- (2) **Recreational services** are services that consist of participation in:
- (a) a sporting activity or a similar leisure time pursuit; or
 - (b) any other activity that:
 - (i) involves a significant degree of physical exertion or physical risk; and
 - (ii) is undertaken for the purposes of recreation, enjoyment or leisure.

Importantly, subs (4) contains an important limitation: 'This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.' Recklessness is defined as follows:

²⁸ (2005) 220 CLR 517; [2005] HCA 4.

²⁹ Australian Competition and Consumers Commission, *Second insurance industry market pricing review*, September 2002, p viii.

³⁰ Office of Small Business – Department of Industry, Tourism and Resources, *Submission to the Senate Economic References Committee Inquiry into the impact of public liability and professional indemnity insurance cost increases*, May 2002, p 4.

- (5) The supplier's conduct is **reckless conduct** if the supplier:
- (a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and
 - (b) engages in the conduct despite the risk and without adequate justification.

A number of important points need to be made about this section.

First, s 139A allows for contractual exclusion of liability for failure to meet the 'due care' statutory guarantee for services. If an exclusion clause (or 'waiver') *effectively* excludes liability for conduct contravening s 60, it will almost certainly also exclude liability for any negligence claims in *tort*, that is, for breach of a duty of care, as between the parties to the contract. If an exclusion clause is not effective in excluding liability for contravention of s 60, either because it has not been validly incorporated into a contract or its meaning does not extend to exclude liability in the particular circumstance in which the accident eventuated,³¹ then a claim for damages for losses arising from contravention of s 60 will be available against a defendant service provider.³² These issues are discussed in more detail in Report on Limiting Liability.

Secondly, although it allows for contractual exclusion clauses, s 139A CCA does not set out how an exclusion clause is to be effectively worded and incorporated into a service contract. Hence, the common law principles of contract apply as to the incorporation of terms and their interpretation. The problem of the uncertainties and difficulties of contract law are discussed in the Report on Limiting Liability. It suffices to say that leaving such important questions to the vagaries of contract law is not necessarily satisfactory, a position at least partly recognised in Victoria, where the exclusion provision is more proscriptive as to the steps that a service provider needs to take before an exclusion clause is effective. Specifically, such an exclusion must be in the prescribed form set out in the Schedules to the *Fair Trading*

³¹ See, eg, *John Dorahy's Fitness Centre Pty Ltd v Buchanan* (unreported CA(NSW) 18 December 1996, No 40386/94, BC9606183); *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200; *Belna Pty Ltd v Irwin* [2009] NSWCA 46.

³² An exclusion clause may also, in exceptional circumstances, operate as a general defence to a negligence claim, such as voluntary assumption of risk or contributory negligence. For example, if knowledge of the exclusion clause is evidence of contributory negligence on the part of the plaintiff (eg because it alerts the plaintiff to certain risks) or there is otherwise contributory negligence, then such defence is applicable to a claim for damages under s 267, via s 275 of the ACL.

(Recreational Services) Regulations 2004 and must have been brought to the attention of the consumer (s 32N(2) FTA (Vic)).

Thirdly, the section introduces a new distinction that ordinary negligence can be excluded, whereas ‘recklessness’ cannot. Obviously, this restriction on the excludability of the s 60 guarantee has merit, in that it precludes the most serious carelessness from going unremedied; but it adds a new complication to the law. Although a definition of recklessness is given in the statute, this does not overcome the problems created when *degrees* of negligence are introduced. Hence, if a consumer suffers loss through a supplier’s carelessness, a further issue that then needs to be considered is whether the conduct was ‘reckless’ within the definition of s 139A. If the supplier was ‘reckless’ then the exclusion of liability will not operate; if the supplier was *careless*, but *not reckless*, then the exclusion clause may operate to exclude liability (subject to the matters noted, secondly, above).

Perhaps more problematically, even if the supplier’s conduct was not reckless, but merely negligent, nonetheless s 139A *may not* apply if the exclusion clause *purports* to exclude recklessness. Section 139A(4) states that the section does ‘not apply’ if the exclusion clause ‘would apply’ to serious injuries caused recklessly. On a narrow interpretation, at least, even if the specific loss was caused by ordinary negligence, a widely worded exclusion clause that potentially covers reckless conduct would contravene subs (4). Section 139A thus would ‘not apply’. Hence, under s 64 the exclusion clause would then be void altogether.³³ The only way for a defendant to avoid this uncertainty would be to insert a proviso in the exclusion clause to the effect that the exclusion does not exclude liability for recklessness as defined.

[3.4] The problem of inconsistency between State and Commonwealth law

One complication that arises from s 139A CCA is the issue of potential inconsistency between the CCA in its operation as a law of the Commonwealth, and provisions of the states’ FTAs. Where a state law is inconsistent with a law of the Commonwealth,

³³ Better drafting could easily have avoided this uncertainty. Compare s 32N(3) FTA (Vic), which states that a person ‘*is not entitled to rely*’ on the exclusion clause if the act or omission causing the loss was reckless. This formulation leaves no doubt about the validity of the exclusion clause.

the former will be invalid under s 109 Constitution to the extent of such inconsistency.³⁴ Such potential exists despite the presence of s 275, which seeks to give effect to state laws, because of *Insight*,³⁵ dealing with the previous law on recreational services. It was there held that the previous section 74(2A) does not allow inconsistent state laws that allow for the parties to a contract to exclude liability by means of contract. In *Insight*, the plaintiff was injured while on a bus tour during an overseas holiday. The injury was caused by the driver's negligence, which amounted to a breach of the defendant's contract of the implied term of 'due care' under s 74 TPA. An exclusion clause in the contract sought to exclude liability in the circumstances. Under s 5N CLA (NSW), exclusion clauses are permitted to exclude the obligation of 'due care' for 'recreational services' supplied 'in connection with or incidental to the pursuit of any recreational activity' (ss (4)).³⁶ Recreational activity is broadly defined to include 'any pursuit or activity engaged in for enjoyment, relaxation or leisure' (s 5K, para (b) of definition). It was accepted by the High Court that the bus tour came within such definition of services 'in connection with or incidental to the recreational activity of tourism as an "activity engaged in for enjoyment, relaxation or leisure"'.³⁷

Under the TPA, however, 'bus tours' fell outside the narrower definition of recreation services contained in s 68B (and now in s 139A CCA). Hence, s 68B *did not* operate to allow exclusion of liability. Accordingly, the exclusion clause would be void, unless s 74(2A) 'picked up' s 5N and applied it as Federal law, thus allowing the NSW provisions to operate.³⁸ The unanimous joint judgment of French CJ, Gummow, Hayne, Kiefel and Bell JJ held that it did not. They concluded that s 74(2A) operated

³⁴ See P Keyzer, *Principles of Australian Constitutional Law*, 3rd ed, Lexis Nexis, 2010, Ch 21.

³⁵ (2011) 243 CLR 149; [2011] HCA 16 (11 May 2011); dismissing the appeal against the decision of the New South Wales Court of Appeal in *Insight Vacations Pty Ltd T/ v Young* (2010) 268 ALR 570; [2010] NSWCA 137.

³⁶ For criticism of the New South Wales provision, see John Carter and Elizabeth Peden, 'A contract law perspective of the *Civil Liability Amendment (Personal Responsibility) Bill 2002* (NSW) (2002) 54 *Plaintiff* 19.

³⁷ (2011) 243 CLR 149; [2011] HCA 16, [19].

³⁸ (2011) 243 CLR 149; [2011] HCA 16, [7].

to pick up and apply ‘as surrogate federal law’³⁹ only a state law that *of itself*, applies to limit or preclude liability⁴⁰ but not a law such as s 5N.⁴¹

The ongoing relevance of the inconsistency issue

This conclusion has ongoing relevance to the ACL scheme assuming, of course, that the same conclusion that the High Court reached in relation to s 74(2A) TPA applies equally to s 275 ACL. There is no reason that it should not. Under the CCA and the ACL scheme, s 131 CCA applies the ACL as a law of the Commonwealth to contraventions of Chapters 2, 3 and 4 of the ACL by a ‘corporation’. Claims for damages for losses caused by contravention of the statutory guarantees fall under Commonwealth jurisdiction in such cases. A corporate defendant can, of course, exclude liability by relying on, and coming within the ambit of, s 139A CCA. However, where the defendant is a corporation, state law also potentially governs its conduct. Hence, state and Federal provisions in relation to exclusion clauses have an overlapping sphere of operation.

At present, however, only Victoria has legislated to allow for the exclusion of liability for non-compliance with the statutory guarantees. Although the provisions *are in similar terms* as the CCA, they are more onerous in setting out *how* a supplier can exclude liability, that is, they are *narrower* than s 139A. Specifically, such an exclusion must be in the prescribed form set out in the Schedules to the *Fair Trading (Recreational Services) Regulations 2004* and must have been brought to the attention of the consumer (s 32N(2) FTA (Vic)). The question that therefore arises is as follows: what if a defendant corporation seeks to exclude its liability for negligence for recreational services provided to a consumer in Victoria, but has not complied with these presumed requirements? Section 139A CCA would allow the defendant to exclude such liability but the Victorian legislation, which also governs, would not. Is there an inconsistency between the two provisions such that s 139A will prevail, or does s 275 ACL pick up the Victorian legislation? *Insight* does not

³⁹ *Ibid.*

⁴⁰ *Ibid* [12], [35]-[36].

⁴¹ The joint judgment stated that s 5N CLA (NSW):

in its terms does not limit or preclude liability for breach of contract. In terms, 5N does no more than permit the parties to certain contracts to exclude, restrict or modify certain liabilities... (*ibid* at [26], footnotes omitted).

necessarily deal with this because it deals with the indirect exclusion of liability in *broader* circumstances. Thus, in the light of the High Court's decision, it is not clear whether the Victorian provisions are inconsistent with s 139A.⁴²

Interestingly, although the narrowly stated purpose of s 275 ACL was to give effect to state

laws that allow providers of recreational services to exclude or limit their liabilities in respect of implied conditions and warranties in consumer contracts [and it was] expected that the States and Territories that currently have such laws in place will choose to have similar laws that exclude liability in respect of consumer guarantees,⁴³

this has not occurred outside of Victoria. Neither the CLA (NSW) (s 5N) nor the CLA (WA) (s 5J) has as yet been amended to change its exclusion provisions, which are still drafted in terms of the exclusion of liability *for breach of implied contractual terms* (rather than the new *statutory* guarantees under the ACL). Until such time as they are amended, the issue of inconsistency will not arise in those states.

[4.0] Fitness Industry Codes

[4.1] Overview

Industry Codes are detailed regulatory frameworks that set industry standards in relation to a range of matters, either under the state and territory Fair Trading Acts,⁴⁴ or under the Commonwealth CCA. There is at present no Fitness Industry Code under the CCA. However, all states and territories other than the Northern Territory have Fitness Industry Codes. Importantly, there is a major difference in the scheme adopted by the different jurisdictions. The Australian Capital Territory

⁴² Section 139A CCA allows for the contractual exclusion of liability and thus reinstates the common law contract principles (namely freedom of contract) that are otherwise disallowed by s 64 ACL. Arguably, then, the Victorian legislation only places a limit on the *common law* right generally to exclude liability. Once the s 139A threshold has been met, it could be argued that it is not inconsistent with s 139A to place further requirements to the exclusion of liability. Obviously, however, the issue remains an open one.

⁴³ See [7.136], p 208 in Explanatory Memorandum to *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*.

⁴⁴ *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Fair Trading Act 1999* (Vic); *Fair Trading Act 2010* (WA).

(‘ACT’), Queensland and Western Australia (‘WA’) have adopted mandatory codes, whereas New South Wales (‘NSW’), Tasmania and Victoria have implemented voluntary codes, and South Australia (‘SA’) has adopted a mandatory code of quite limited scope, as well as a more comprehensive voluntary code. The relevant codes in each state and the ACT are as follows: *Fair Trading (Fitness Industry) Code of Practice 2009* (ACT); *Fitness Industry Code of Practice* (NSW); *Fair Trading (Code of Practice – Fitness Industry) Regulation 2003* (Qld); *Fair Trading (Health and Fitness Industry Code of Practice) Regulations 2007* (SA); *Fitness Tasmania Code of Practice for Fitness Facilities*; *Fitness Victoria Business Code of Practice*; *Fair Trading (Fitness Industry Code of Practice) Regulations 2010* (WA). For convenience we will use the abbreviations *Qld Code* etc for the mandatory codes, and *NSW Code* etc, for the voluntary codes.

NB! Fitness Australia has proposed a draft Fitness Code for adoption in all jurisdictions but consultation on the draft is still ongoing. Until such a uniform code is adopted, it is necessary to set out the current and different positions in each state and the ACT.

Importantly, the different codes are not uniform between the jurisdictions (1) as to what is included within the definitions of ‘fitness service’ and associated terms such as ‘supplier’, ‘fitness centre’ and ‘client’/‘consumer’; (2) as to what matters they deal with; (3) as to the consequences for non-compliance. Indeed, the lack of uniformity ranges from significant to trivial matters; an example of the latter is that the codes do not even spell fitness ‘centre’ consistently.

One common feature of all the codes, whether mandatory or voluntary, is that agreements for *membership* of ‘fitness centres’ are required to be in writing. However, there are no uniform definitions of the terms ‘membership agreement’ or ‘fitness centre’; indeed, the definitions of the former are imprecise and circular. For example, in the *WA Code*, *ACT Code* and the *NSW*, *Tasmanian* and *Victorian* voluntary codes (that is, all codes except Queensland and SA), ‘membership agreement’ is defined as (to paraphrase) an agreement between a supplier and a client/consumer, despite the definition of ‘consumer’ or ‘client’ including those who

do not, or have not yet, signed up to a membership agreement.⁴⁵ The ACT *Code* and Victorian and Tasmanian Codes do, however, define membership agreement as an agreement ‘for membership of a fitness centre for a specified period’. The last two words preclude that definition from being entirely circular, but the ‘specified period’ is not defined. Presumably, it does not include a one-off visit for a specified sum.⁴⁶ The Qld *Code* encompasses fitness service contracts with ‘clients’ within its definition of ‘membership agreement’ (s 3: agreement ‘for the supply of fitness services ... at a fitness centre’), and the *Code* then draws the distinction between a ‘casual’ client, meaning someone who ‘pays the supplier for a fitness service at a fitness centre each time the fitness service is used’ and who has not entered a membership agreement,⁴⁷ and clients.

The definitions of ‘fitness centre’ also differ, with some jurisdictions focussed only on indoor activities (eg, ACT *Code* s 2), and others not clearly spelling this out and therefore seemingly extending to supervised outdoor activities (for example, NSW *Code* s 3).

Obviously, the requirement that membership agreements be in writing, under the voluntary codes, imposes such obligation only binding on those suppliers who sign up to that code and, even in that case, the sanctions for non-compliance may be limited (as discussed below).

[4.2] Mandatory and voluntary Codes

Queensland, SA, WA and the ACT have mandatory codes. Non-compliance with these codes may lead to certain consequence, albeit not necessarily serious ones. A summary of the consequences for non-compliance is set out in the table below. The

⁴⁵ Some key differences on the definitions in other codes: the WA *Code* does not exclude casual clients from the definition of ‘client’ and includes within the definition a person who makes enquiries, or has made enquiries, about entering into a membership agreement; the ACT *Code* and the NSW, Tasmanian, and Victorian voluntary codes do not have a definition of ‘client’ and instead provide a definition of ‘consumer’. Similarly, however, the definition of ‘consumer’ in each instance does not exclude casual clients and includes within the definition of ‘consumer’ a person who makes enquiries preparatory to deciding whether to enter a membership agreement. The SA *Code* excludes casual clients from its definition of membership agreements.

⁴⁶ See ACT *Code* s 2. See similarly s 3 Victorian Code and s 1.6 Tasmanian Code. The NSW Code definition is also similar to that of the ACT *Code*, without reference to a ‘specified period’. The SA *Code* has the clearest definition, drawing a distinction between a one-off supply where payments made are only for that visit, and other agreements: s 2.

⁴⁷ See Schedule definitions.

WA *Code* has the strictest compliance regime, with the possibility of injunctions (s 100), compensation orders (s 105), and orders to cease, or rectify the consequences of, contraventions (s 47). Although s 5 of the Qld *Code* states that compliance is mandatory, there do not appear now to be any remedial mechanisms in the *Code* or under the *Fair Trading Act 1998* (Qld) through which to enforce compliance. Therefore, under the Queensland *Code*, there may be no consequences at all for non-compliance. The reason for this is because the relevant remedial provisions of the *Fair Trading Act 1998* (Qld) were removed as part of the ACL reforms, inadvertently, it seems!⁴⁸

All the codes apply to a broadly-defined range of 'fitness services'. Although the definitions are not the same, they are largely similar. Section 4 of Queensland's *Code* provides a good example, defining the key term of 'fitness service', in the following terms:

- A fitness service includes the following:
- (a) an exercise consultation;
 - (b) a supervised or unsupervised exercise program; a
 - (c) group exercise program;
 - (d) a fitness program;
 - (e) fitness equipment at a fitness centre for use by clients.

The *Code* then goes on to state what is not included. To simplify, examples of exclusions are: a service supplied by a doctor, physiotherapist, sporting club/organisation (playing/training for competitive sport), or an educational institution (where part of curriculum); the use of a spa bath, sauna, swimming pool (where no other fitness service is supplied); fitness equipment at a hotel fitness centre (where no other fitness service is supplied); medical rehabilitation; unsupervised outdoor activity; and the hire of a court or other facility for playing sport. The *Code* also has a wide definition of 'suppliers' of fitness services.

Importantly, for our purposes, the SA and WA *Codes*, although mandatory, do not deal with issues relating to health and safety risks. Indeed, the SA *Code* is narrow in its scope, but that state also has a voluntary code that deals with a greater range of

⁴⁸ The *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld) amendments to the *FTA* (Qld), removed and did not replace the relevant enforcement provisions, namely ss 91I (undertakings), 98 (injunctions) and 100 (compensation and other orders). The ACL makes no reference to Industry Codes and so there is no direct avenue in the ACL through which to enforce compliance.

matters. For the most part, these codes deal with matters relating to membership agreements and to the negotiations of such agreements.

We will not consider the mandatory *SA Code* and *WA Code* any further. A summary of their scope is provided in the table below. Further, the *Queensland Code* only alludes to one issue that is relevant to health and safety risks, namely pre-exercise questionnaires (PEQ), which are dealt with below. Apart from this aspect, the *Queensland Code* will also not be considered further.

The mandatory *ACT Code*, importantly, does contain standards that relate to health and safety matters and a failure to comply can lead to consequences under the *Code*. Specifically, the Commissioner of Fair Trading can exercise powers to investigate and inspect fitness service suppliers for non-compliance. Further, the Commissioner can then seek undertakings from the supplier that it stop certain conduct, comply with the *Code* in future, or rectify consequences of non-compliance. If undertakings are not complied with, the Commissioner can seek orders under s 25, further non-compliance with which can lead to penalties being imposed. There is no scope under the *Code* for private actions as such by aggrieved consumer.⁴⁹ Of course, where an industry standard has been set, particularly in the form of a regulatory instrument, then a failure to comply with such may provide evidence of a breach of an acceptable standard *of care* by a fitness service provider. Failure to comply with the *ACT Code's* requirements could therefore lead to a finding of negligence.

Four states have voluntary Fitness Industry Codes. In NSW, SA, Tasmania and Victoria, the Fitness Industry Code of Practice is published as an industry code administered by Fitness Australia.⁵⁰ These differ in a number of ways from the mandatory codes. First, although the definitions of fitness services are not entirely uniform,⁵¹ the codes are limited in their application to service 'suppliers' *who are members of Fitness*

⁴⁹ Under s 55 of the Act, the Commissioner may begin or defend legal proceedings on behalf of a consumer if a complaint is made or referred to the Commissioner. The consumer must have a cause of action (for example, for breach of contract, or under the ACL) or a good defence to a proceeding, or it must otherwise be in the public interest (subs (3)). Also the Commissioner must obtain the written consent of the consumer and the Minister before doing so (s 56).

⁵⁰ Three of the codes themselves refer to bodies described as 'Fitness NSW', 'Fitness Tasmania' and 'Fitness Victoria', though the Fitness Australia website does not list separate contact details for each State-based organisation, it only list contact details for Fitness Australia itself. Further, the NSW Fair Trading website refers to Fitness Australia only, not Fitness NSW.

⁵¹ The Tasmania and Victorian application and definition provisions are largely identical, however.

Australia ('FA') and only members of FA are bound to comply with the terms of the codes. Further, a failure to comply does not lead to onerous consequences. Relevantly for our purposes, a supplier may need to modify equipment, facilities or services in order to comply with the code standards, or may have their membership of FA terminated. Obviously, the latter could be an embarrassment for fitness service suppliers who are concerned about their standing and reputation, but may have little impact on others.

Like the ACT *Code*, the four voluntary codes deal with a range of matters that relate to risks in health and safety. Specifically, they set standards in relation to the following matters:

1. There are requirements that consumers complete pre-exercise questionnaires;
2. They set certain standard and safety requirements for fitness centres;
3. They require appropriate staff qualifications;
4. They require that suppliers maintain public liability insurance and professional indemnity insurance.

The precise content of these requirements differs between the various voluntary codes, however, as well as with that in the ACT. We will consider each of these four topics in more detail below. First, however, it is useful to summarise the overview of the different codes in the table below. The table considers the four codes that deal with health and safety matters first.

COMPARATIVE OVERVIEW OF FITNESS INDUSTRY CODES IN EACH AUSTRALIAN JURISDICTION

Jurisdiction	Mandatory voluntary?	Scope	Non-compliance consequences
ACT	Mandatory: <ul style="list-style-type: none"> • <i>Fair Trading (Fitness Industry) Code of Practice 2009</i> ('the Code') • s23 <i>Fair Trading Act 1992</i> (ACT) ('the Act') 	The Code deals with a number of important matters going to health and safety risks: <ul style="list-style-type: none"> • Requirement that consumer complete pre-exercise questionnaire; • Standard and safety requirements for fitness centre; the most detailed of all the codes in this regard • Appropriate staff qualifications • Requirement to maintain public liability insurance and professional indemnity insurance; It also deals with matters unrelated to safety, similar to NSW below. NB: A supplier of fitness services can apply for exemption from <i>Code</i> .	<ul style="list-style-type: none"> • s 18 <i>Code</i>: If supplier does not comply with <i>Code</i>, the Commissioner can exercise powers under s 36 <i>Act</i>.⁵² • s 36 <i>Act</i>: Commissioner of Fair Trade may appoint an investigator. An investigator has powers to enter premises and inspect and seize records and evidence (see ss 39 – 54). • s 24 of the <i>Act</i>: undertaking to: <ul style="list-style-type: none"> stop the conduct; and/or comply with the code in the future; and/or take action to rectify any consequence of non-compliance.⁵³

⁵² The reference in s 18 of the *Code* to s 36 of the Act appears to be a reference to a previous version of s 36, as noted, eg, in *Pashalidis t/as Bodyworks Fitness Clubs v Commissioner for Fair Trading* [2004] ACTSC 23, [8]. (The current s 36 and sections following deal with the appointment of an investigator to enter premises, seize records etc which seems disproportionate when the non-compliance might be something as basic as the failure to provide a signed copy of the membership agreement to the client, for example.) The relevant enforcement provisions that should be referred to are now contained in s 24, in Part 3 of the Act, incorporating ss 21 to 27, which deal with industry codes of practice and the Commissioner's ability to request and enforce undertakings.

⁵³ However, s 24 states in subs (1)(d) that:

- d. In considering whether to require a person to give an undertaking under subsection (1), the commissioner must have regard to any dispute resolution process stated in the approved code.

The ACT Code, however, does not really have a specific dispute resolution process other than under s17 where, if a consumer complaint is made which cannot be resolved by the supplier directly, or a complaint is made by a supplier against another supplier, the complainant can request in writing that the complaint be dealt with by the Commissioner of Fair Trading.

Jurisdiction	Mandatory voluntary?	Scope	Non-compliance consequences
			If an undertaking is not given, or is not met, then the Commissioner can apply under s 25 of the Act for relevant orders, a failure to comply with which can lead to penalties (subs (5)).
NSW	<p>Voluntary:</p> <ul style="list-style-type: none"> The NSW Fitness Industry Code of Practice ('the Code') Members of Fitness NSW⁵⁴ must comply with the Code, BUT membership is optional. NB: however the <i>Fitness Services (Pre-Paid Fees) Act 2000</i> (NSW) which governs the pre-payment of fees under a fitness service agreement (NB: 'fitness services' has a different definition in this Act to that in the Code) 	<p>The Code deals with a number of important matters going to health and safety risks:</p> <ul style="list-style-type: none"> Requirement that consumer complete pre-exercise questionnaire; Standard and safety requirements for fitness centre; Appropriate staff qualifications Requirement to maintain public liability insurance and professional indemnity insurance; <p>It also deals with matters unrelated to safety, including</p> <ul style="list-style-type: none"> Misleading advertising or marketing practices; Disclosure of information prior to entry into membership; Requirements for membership agreements, including 7 day cooling off period (where membership agreement >3 months); Termination of membership agreements; Complaints handling procedures. 	<ul style="list-style-type: none"> Corrective action including of particular relevance: modification of equipment, facilities or services to meet the standards in the Code; Fitness NSW may issue warnings or censure a non-complying Supplier; Suspension or expulsion of membership to Fitness NSW.
Vic	<p>Voluntary:</p> <ul style="list-style-type: none"> The Fitness Victoria Business Member Code of 	<p>The Code deals with a number of important matters going to health and safety risks:</p> <ul style="list-style-type: none"> Requirement that consumer complete pre-exercise questionnaire; 	<ul style="list-style-type: none"> Review by the Executive Committee [<i>presumably of Fitness Victoria – that is how s 46 of the Code reads but it does not</i>

⁵⁴ NB: See, however, above n 50.

Jurisdiction	Mandatory voluntary?	Scope	Non-compliance consequences
	Practices ('the Code') <ul style="list-style-type: none"> Financial members of Fitness Victoria⁵⁵ must comply with the Code BUT membership is optional. 	<ul style="list-style-type: none"> Standard and safety requirements for fitness centre; Appropriate staff qualifications Requirement to maintain public liability insurance and professional indemnity insurance; <p>It also deals with matters unrelated to safety, similar to NSW above.</p>	<p><i>expressly say</i>] or, where a complaint (by consumer or another supplier) is actually made, the Complaints Resolution Committee [a sub-committee appointed by Fitness Victoria: s 47 of Code.⁵⁶ The Committee will seek to resolve the dispute by counselling and assisting the fitness centre with compliance.</p> <ul style="list-style-type: none"> Failing this process, the ultimate sanction is of termination of Fitness Victoria membership. However the former member is able to reapply for membership at any time. If the Complaints Resolution Committee determines that a supplier has breached the Code, the Committee must bring the breach to the attention of Fitness Victoria with recommendations as to appropriate sanctions to apply: see s 53.
Tas	Voluntary: <ul style="list-style-type: none"> The Fitness Tasmania Code of Practice for Fitness Facilities ('the Code'). Business 	The Code deals with a number of important matters going to health and safety risks: <ul style="list-style-type: none"> Requirement that consumer complete pre-exercise questionnaire; Standard and safety requirements for fitness centre; 	<ul style="list-style-type: none"> Corrective action including of particular relevance: modification of equipment, facilities or services to meet the standards in the Code; Fitness Tasmania may issue warnings or

⁵⁵ NB: See, however, above n 50.

⁵⁶ The Complaints Resolution Committee is empowered in its investigation of any complaint to request production of documents and to inspect the fitness centre: see ss 48 – 50 Code.

Jurisdiction	Mandatory voluntary?	Scope	Non-compliance consequences
	members of Fitness Tasmania ⁵⁷ must comply with the Code BUT membership is optional.	<ul style="list-style-type: none"> • Appropriate staff qualifications • Requirement to maintain public liability insurance and professional indemnity insurance; <p>It also deals with matters unrelated to safety, similar to NSW above (with 24 hour cooling off).</p>	<p>censure a non-complying Supplier;</p> <ul style="list-style-type: none"> • Suspension or expulsion of membership of Fitness Tasmania.
Qld	<p>Mandatory:</p> <ul style="list-style-type: none"> • <i>Fair Trading (Code of Practice – Fitness Industry) Regulation 2003</i> ('the Code') • s88A <i>Fair Trading Act 1989</i> (Qld) ('the Act') 	<p>Scope does not deal with safety issues, but rather matters such as</p> <ul style="list-style-type: none"> • sales tactics, misleading advertising; • Disclosure; • Requirements of membership agreements, • Termination of membership agreements; • Complaints procedures. 	<ul style="list-style-type: none"> • s 5 Code: compliance mandatory <p>However, the relevant sections of the Act on remedies for non-compliance with an Industry Code have been omitted from the FTA, seemingly inadvertently. See above n XX.</p>
WA	<p>Mandatory:</p> <ul style="list-style-type: none"> • <i>Fair Trading (Fitness Industry Code of Practice) Regulations 2010</i> ('the Code') • s 42 <i>Fair Trading Act 2010</i> (WA) ('the Act') 	<p>Scope does not deal with safety issues, rather matters such as:</p> <ul style="list-style-type: none"> • sales tactics, misleading advertising; • Disclosure • Requirements for membership agreements, including 48 hour cooling off period • Termination of membership agreements; • Complaints procedures. 	<ul style="list-style-type: none"> • s 4 Code: compliance mandatory. • s 47 Act: cease contravention order; and rectify contraventions; • s 100 Act: injunctions; • s 105 Act: compensation or other remedial order.
SA	<p>Mandatory:</p> <ul style="list-style-type: none"> • <i>Fair Trading (Health and Fitness Industry Code of Practice) Regulations</i> 	<ul style="list-style-type: none"> • Covers requirements of membership agreements only. Does not include a cooling off period. 	<ul style="list-style-type: none"> • s 3 Code: contravention of the Code may result in the maximum penalty of \$1250.

⁵⁷ NB: See, however, above n 50.

Jurisdiction	Mandatory voluntary?	Scope	Non-compliance consequences
	2007 (NB: s 3) (‘the Code’) Voluntary: The voluntary part of the Code refers to itself as the ‘Fitness Australia Fitness Industry [sic – Code?] of Practice’: see s1.	Largely similar to NSW, Tasmanian and Victorian Codes	<ul style="list-style-type: none"> • Corrective action including: modification of equipment, facilities or services to meet the standards in the Code; • The Fitness Australia Regional Industry Council may issue warnings or censure to non-complying Code signatories; • Suspension or expulsion of membership of Fitness Tasmania.

[4.3] Health and safety provisions of the Codes

It is appropriate to consider some of the provisions dealing with health and safety risks in more detail.

Pre-exercise Questionnaire (‘PEQ’)

The WA and SA mandatory *codes* do not require fitness centres to use PEQs. Similarly, the Qld *Code* does not mandate the use of PEQs; however, it requires that membership agreements alert clients to their obligations, including informing centres about health risks if a client believes that there is such a risk (s 17(b)). Further, s 9 requires that fitness centres place a prominent sign at their entrance to alert clients of the need to inform the centre in writing about any risks to health that a client believes may exist.

The use of PEQs by health/fitness facilities in Australia is only *mandated* for *all* fitness service providers in the ACT, which has the most onerous obligations.

According to the ACT *Code*, ss 9 and 10:

- 1) A supplier shall not enter a membership agreement with a consumer unless the consumer completes a pre-exercise questionnaire, provided by the supplier, in relation to the consumer's risk in participating in the fitness service.

2) Where answers to a pre-exercise questionnaire indicate, in the opinion of the supplier, that a consumer may be at risk from participating in a particular fitness service, the supplier shall not supply any fitness service to the consumer unless the consumer:

(a) provides evidence from; or

(b) states in writing that he/she has received advice from;

a medical practitioner or an appropriate health professional to the effect that the consumer is, in the opinion of the practitioner or the health professional, not at risk from participating in the proposed fitness service.

3) Where a consumer provides evidence that they may be at risk from participating in a fitness service under subclause (2) a supplier shall not provide a fitness service until an appropriately qualified person has provided advice to the consumer in relation to an appropriate fitness program.

(4) Subclause (1) does not apply to a casual user as per clause 10.

Visits to fitness centre by casuals

10 (1) A supplier shall, before providing a fitness service to a casual user, inquire whether the casual knows, or has reasonable grounds to believe, that he or she may be at risk from participating in the fitness service.

(2) A supplier may, after making an inquiry under subclause (1), require a casual to put in writing that they believe they are not at risk from the activity, before the casual participates in a particular fitness service.

As stated in subs (2) it is left to the supplier's personal judgement to determine the level of risk of a person participating in a particular activity. Further, a service provider can supply any fitness service to persons who simply states in writing that they have received advice from a health professional that they are 'not at risk in participating in the proposed fitness service.' The requirement of a PEQ only applies to *persons entering membership agreements*, and not casual users of fitness facilities.

In the four states with voluntary Fitness Industry Codes of Practice (NSW, SA, Tasmania and Victoria) the standards are only applicable to fitness suppliers who, by their membership of FA, have signed onto the codes. The consequences for failing to comply for such members are also not that significant. Despite the fact that these codes are similar, certain differences exist in relation to pre-exercise screening procedures.

According to s 26 NSW Code, a health/fitness facility must not provide a fitness service to a casual user or enter into a membership agreement with a consumer unless the consumer completes a PEQ and it is assessed by a registered fitness

professional. According to s 27 of the Code, if the result of a PEQ reveals that a consumer may be at risk from participating in a fitness service, the facility must not supply any fitness service unless the consumer states that he or she has received advice from a medical practitioner or any appropriate health professional. Further, s 28 Code states that:

[w]here a Fitness Centre receives evidence that the Consumer may be at risk from participating in a Fitness Service under Clause 26, a Supplier must not provide that service until an appropriately qualified person has provided advice to the Consumer in relation to an appropriate fitness program.

Section 24 of the Victorian Code similarly states that a fitness facility must not provide a fitness service to a casual visitor or enter a membership agreement with a consumer unless the consumer completes a PEQ in relation to the consumer's risk in participating in a fitness or exercise service. The Victorian Code differs from the NSW Code in stating that a fitness facility can provide services if the consumer states not only that they have received advice and clearance from a medical practitioner or any appropriate health professional, but also from 'any appropriate fitness professional'. However, the inclusion of 'any appropriate fitness professional' into the statement leads to uncertainty and may put the customers under more risk as the extent of knowledge, education and skill that a fitness professional has cannot be expected to be at the same level as a medical practitioner or an appropriate health professional.

Only the Tasmanian Code indicates what a health/fitness facility should do according to the level of risk of a person which has been determined as a result of a pre-exercise screening. Section 2.20 of the Tasmanian Code states that:

[c]ustomers who have been identified as being at "MODERATE RISK" must either sign a waiver that they have been cleared by their treating Doctor to commence an exercise program or provide a written referral from their Doctor to that effect.

This statement does not explain which risk stratification method fitness facilities should use while identifying individuals as being at 'moderate risk'.⁵⁸ This gap in information could be an obstacle for health/fitness facilities in adapting the Code.

⁵⁸ Given the way the 'MODERATE RISK' is referred to, it does give the appearance that it would be defined somewhere. Perhaps it is in the 'Physical Activity Readiness Questionnaire (PARQ)' (as the PEQ is specifically referred to in the Tas Code) itself, although despite the lofty title given, it is

In any case, asking ‘moderate risk’ individuals to provide a written referral from their doctor may cause unnecessary exclusions. Assuming that the risk stratification used in the Code is intended to be similar to those that have been adopted by other fitness industry standards, then ‘moderate risk’ suggests that such individuals may safely engage in low to moderate intensity physical activities without the necessity for medical examination and clearance.

Under the South Australian voluntary Code, ss 19 – 21, consumers (including casuals) must complete a PEQ; if the answers indicate that the consumer is at high risk, then they must provide written confirmation from an appropriate health professional confirming there is minimal risk before the service will be provided. Qualified employees are to assess the questionnaire and advise an appropriate fitness programs.

The various requirements for PEQs under the voluntary codes appear to have been overtaken, or supplanted by, the new ‘Adult Pre-Exercise Screening Tool’ forming part of Fitness Australia’s ‘Australian Pre-Exercise Screening System’. Fitness Australia is promoting the new ‘Australian Pre-Exercise Screening System’ on its website. This includes links to questionnaire itself (the Screening Tool) as well as a factsheet, FAQs and ‘Pre-Exercise Screening Textbook’. These can all be downloaded from the Fitness Australia website.⁵⁹ The first part of the questionnaire is compulsory, even for casual clients. It is self-administered and evaluated by the client in the sense that it is designed to be completed by the client alone and at the completion of Stage 1 the questionnaire advises:

IF YOU ANSWERED ‘YES’ to any of the 7 questions, please seek guidance from your GP or appropriate allied health professional prior to undertaking physical activity/exercise

IF YOU ANSWERED ‘NO’ to all of the 7 questions, and you have no other concerns about your health, you may proceed to undertake light-moderate intensity physical activity/exercise

referred to only once (s 2.18) and there is no indication that there is a pro-forma ‘PARQ’ which should be appended to the Tas Code. See, however, now the Fitness Australia Adult Pre-Exercise Screening Tool discussed below.

⁵⁹ See at http://fitness.org.au/visageimages/adult_pre_exercise_screening_tool_1.pdf ; the user guide is at: http://fitness.org.au/visageimages/adult_pre_exercise_screening_user_guide.pdf .

The client is required to sign and date the questionnaire at the conclusion of Stage 1, and presumably return it to the supplier, although this is not specified and there is no express requirement on the supplier to evaluate or follow up the information provided by the client in Stage 1 of the questionnaire.

Stage 1 aims to screen for those at high risk of an adverse event during physical activity/exercise. Stages 2 and 3 of the questionnaire are designed to 'screen for those at moderate or low risk, and in both instances the person can safely begin moderate intensity activity without further guidance from a medical or allied health professional'. However these parts of the questionnaire, although recommended, are not mandatory. Further, it is not clear whether Fitness Australia requires its members to adopt the Australian Pre-Exercise Screening System (at least Stage 1) or whether it is just promoting it as best practice. Certainly, reference to it has not found its way into the voluntary (nor the mandatory) codes but perhaps this will happen in time.⁶⁰

Standard Safety Requirements for Fitness Centres

The ACT *Code* imposes mandatory standards relating to the safety requirements in fitness centres. Some of these are quite general; others are quite specific. It is worthwhile setting out these in full, as they are largely self-explanatory.

Standard of fitness center (sic)

13 (1) A supplier shall ensure that all wet areas are effectively cleaned on a daily basis or more frequently if required.

(2) A supplier shall ensure that all equipment:

- (a) conforms to safety standards established by Standards Australia;
- (b) is mechanically sound;
- (c) is installed and operating in accordance with the manufacturer's instructions; and
- (d) is serviced adequately, efficiently and regularly to ensure

continued

user safety.

(3) A supplier shall, display an adequate warning notice, stating that a hazard potential exists if the equipment is misused, at the entrance to any area where fitness equipment is located.

⁶⁰

(4) A supplier must ensure that employees who advise consumers how to operate the equipment are adequately trained in the operation of the equipment

(5) A supplier shall:

(a) restrict the number of people in floor classes to a maximum of 1 person for every 3 square metres of effective exercise area; and

(b) ensure that dedicated resistance training areas contain adequate safe working space and that user numbers do not hinder safe and effective use of the training equipment.

(6) A supplier shall provide ventilation adequate to ensure the comfort of the maximum number of people that a particular area accommodates at any time.

(7) A supplier must provide a fully equipped first aid kit located in a prominent, easily accessible position, and ensure that all staff members know its location.

The NSW, SA, Tasmanian and Victorian voluntary codes are identical to each other in relation to safety matters, but differ from the ACT *Code* in that (A) they do not deal with the matters contained in subs (3), para (5)(b) and subs (6); and (B) deal with the matters in para (5)(a) in more general terms (ensure that ‘exercise areas contain adequate safe operating space and that user numbers do not hinder safe and effective use of the training equipment’). They do, however, (C) deal with matters in subss (1), (2), (4) and (7) of the ACT *Code*, albeit in similar, but not identical, terms.

Staff Qualification and Requirements of Supervision

The mandatory Qld *Code*, SA *Code* and WA *Code* do not deal with issues relating to staff qualification. The ACT *Code* does, however, have fairly detailed requirements on staff qualifications. Similarly, the voluntary codes of NSW, SA, Tasmania and Victoria have fairly detailed provisions dealing with these issues. Again, the provisions are similar, but not uniform. Minor differences exist between all the codes. One common feature of all four voluntary codes as well as the ACT *Code* is that they require that all employees be ‘familiar’ with the terms of the codes (SA *Code* s 9; Tas *Code* s 2.7; ACT *Code* s 6(11) and NSW *Code* s 13 (‘aware of and understand’); Vic *Code* s 11 (‘aware’)). The focus of the codes is on the required qualifications of employees. These requirements differ subtly between jurisdictions. It is easiest to set out the requirements by means of the table on the following tables.

Comparative Table of Fitness Industry Codes: Qualification of staff and requirements of supervision

ACT Code	NSW Code	SA 'Voluntary' Code	Tasmanian Code	Victorian Code
<p>s 6: A supplier must ensure:</p> <p>subs (7): an employee who provides a fitness service is qualified to provide the service.</p> <p>subs (8): there is available, at all times during which fitness services are provided at a fitness centre, an appropriately qualified person to supervise the provision of each service.</p> <p>s 14 Code:</p> <p>subs(1): a supplier must not represent to a consumer that an employee who is to provide a fitness service is qualified to provide the service if the employee is not so qualified.</p> <p>subs (2): A person who is gaining experience to become registered must be supervised by a person who is qualified to provide the service at the appropriate level.</p>	<p>s 9 Code: A supplier must ensure that an employee who provides a fitness service is a Registered Fitness Professional and that the Fitness Centre and all Registered Fitness Professionals comply with any applicable Fitness Industry Guidelines.</p> <p>s 3: <i>'Registered Fitness Professional'</i> means "a qualified fitness professional currently recognised by and registered with the national peak fitness industry body Fitness Australia, or other equivalent body approved by the Code Administration Committee".</p> <p><i>'Fitness Industry Guidelines'</i> means 'any government supported guidelines specifically adopted by Fitness NSW for inclusion in the Code and set out in Schedule 1.'</p> <p>s 10: a supplier must ensure</p>	<p>s 6: Any employee who provides a fitness service must be a qualified fitness leader.</p> <p>s 7: 'There must be an appropriately qualified employee available at all time fitness or exercise services are provided.'</p> <p>s 35: 'Any unqualified employees in training must be supervised by a qualified fitness leader, and consumers made aware that a trainee is providing the service.'</p> <p>s 36: 'Employees who provide a fitness service must have a recognised fitness qualification, current Senior First Aid and a CPR certificate.'</p> <p>s 37: 'During all hours of operation there must be a qualified Fitness Leader</p>	<p>s 2.4: A supplier must ensure that an employee who provides a fitness service is eligible for registration with Fitness Australia as a Fitness Instructor or Fitness Trainer and at the level of registration according to the duties they perform.</p> <p>s 2.5: A supplier must ensure that at least one staff member is on site with current first aid training, with a minimum standard of Workplace Level 2, at all times that the centre is open for business and that the facility has a procedure and appropriate staff training in incident and emergency procedures.</p> <p>s 2.34: A trainee who is gaining experience to become a registered fitness instructor or trainer must be supervised by a person who is qualified to provide the</p>	<p>s 7 of the Code: A supplier must ensure that an employee who provides a fitness service is a current Registered Fitness Leader.</p> <p>NB: 'Registered Fitness Leader' is not defined.</p> <p>s 8: a supplier must ensure that there is available at all times during which fitness or exercise services are provided at a fitness centre, an appropriately qualified person.</p> <p>s 40: a supplier must not provide a fitness or exercise program without a duly qualified person.</p> <p>s 41: a person is qualified to provide a fitness service if the person is currently registered by Fitness Victoria.</p> <p>s 42: a supplier must ensure that during all hours of opening there is a Registered</p>

ACT Code	NSW Code	SA 'Voluntary' Code	Tasmanian Code	Victorian Code
<p>subs (3): An employee is qualified to provide a fitness service if the employee is registered by Fitness Australia and provides service at a level appropriate to that registration.</p>	<p>that a Registered Fitness Professional is available at all times when a Fitness Centre is open for business.</p> <p>s 41: a supplier must not misrepresent to a consumer that the provider of a fitness service or allied fitness service is qualified to provide that service.</p> <p>s 42: A person who is gaining experience to become a Registered Fitness Professional must be supervised by a person who is qualified to provide the Fitness Service at the appropriate level. Consumers must be advised where a trainee is providing Fitness Services.</p> <p>s 43: A person is qualified to provide a Fitness Service if the person is a Registered Fitness Professional.</p>	<p>on the premises.'</p>	<p>service at the appropriate level. Consumers must be advised that a trainee is providing services.</p> <p>s 2.35: A Fitness Instructor must only provide instruction in areas that they have received specific training and only provide instruction to consumers in situations at their level of qualification as per Fitness Australia guidelines (Appendix C).</p>	<p>First Aider (Level 1) on the fitness centre premises.</p> <p>s 43: a person who is gaining experience to become a registered fitness leader must be supervised by a person who is qualified to provide the service at the appropriate level. Consumers must be advised that a trainee is providing services.</p>

Insurance

The *ACT Code* as well as the voluntary *NSW, SA, Tasmanian and Victorian Codes* require that suppliers maintain and provide evidence of public liability insurance and professional indemnity insurance. All of these codes, except the *Tasmanian Code*, provide that such insurance must be based on 'accepted industry standards'. There is no further elaboration of what is meant by this or any express reference to the minimum level of insurance required. *Fitness Australia* also provides no guidance in this regard.

The *WA and Qld Codes* set no requirement for insurance cover.

Therefore, in theory at least, fitness service providers in *WA and Queensland*, and fitness service suppliers in *NSW, SA, Tasmania and Victoria* who are not members of *Fitness Australia*, can carry on business without any indemnity insurance.