



THE AUSTRALIAN FITNESS INDUSTRY RISK MANAGEMENT MANUAL



Fitness Australia[®]
THE HEALTH & FITNESS INDUSTRY ASSOCIATION

Fitness Australia (Major Industry Partner)



Sports Medicine Australia (Minor Industry Partner)



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Foreword

The research undertaken to develop this manual has been funded by an Australian Research Council Linkage Grant LP120100275, and our research partners Fitness Australia and Sports Medicine Australia. The AFIRM team is:

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We are particularly grateful to Professor JoAnn Eickhoff-Shemek for contributing her excellent work on risk management strategies to the Manual.

This Manual is designed to assist fitness industry professionals and fitness businesses to:

- Identify and manage risks
- Understand the principles, processes and frameworks that inform the risk management environment.
- Understand the legal environment within which fitness environments in Australia operate.

The Manual assembles policies and guidelines from a variety of sources with the intention of providing a package of responses to the risk management challenge. As a first edition, we welcome your feedback on how the Manual can be improved. Please direct your feedback to Professor Patrick Keyzer, Lead Chief Investigator of the AFIRM Project, at the following address: p.keyzer@latrobe.edu.au.

This publication provides general commentary aimed at emphasising the law as it applies to fitness businesses, to assist fitness professionals to effectively manage risks. It is not to be relied upon to address specific circumstances that will vary from site to site and jurisdiction to jurisdiction, and should not be used as a substitute for professional advice. The law is constantly evolving – whilst best efforts have been undertaken to ensure the information provided in this manual was correct at the time of writing, it is possible that some material herein may not reflect current practices or requirements. The authors, their employers and the research sponsors expressly disclaim all liability to any person in respect of this publication and any consequence arising from its use by any person in reliance on the whole or any part of this publication.

Executive Summary

The **Australian Fitness Industry Risk Management (AFIRM) Project** was set up to explore the operation of rules and regulations for the delivery of safe fitness services.

This document, the **Australian Fitness Industry Risk Management Manual**, provides the fitness industry with materials that will help fitness facility operators, fitness professionals and fitness service users navigate their legal risk management and risk management obligations.

In **Part One (Chapters 1-4)**, we provide a general introduction to the topic of risk management in the fitness industry.

In **Chapter One**, we provide an overview of the regulatory context affecting the Australian fitness industry, sources of liability, and legislative requirements. We also outline the top six safety concerns identified by focus group participants in the AFIRM Focus Group Research. Our **AFIRM Focus Group Research** in four States identified the following most important concerns:

1. the competency of fitness professionals;
2. the effectiveness of pre-exercise screening and management of de-conditioned clients;
3. poor supervision of fitness service users and incorrect use of equipment;
4. fitness trainers failing to remain within their scope of practice;
5. equipment misuse (as distinct from incorrect use); and
6. poor fitness training environments.

The focus group research was used to develop the **AFIRM National Survey** to determine how widespread these concerns are across the whole fitness industry in Australia. This research has been published in the *Journal of Law and Medicine* in an article entitled “Legal Risk Management and Injury in the Fitness Industry: The Outcomes of Focus Group Research and a National Survey of Fitness Professionals”. To summarise, the National Survey identified three key challenges for the fitness industry:

1. Management, implementation and monitoring of safety policy.
2. Implementation of client training / education in exercise programmes.
3. Maintenance, design and operation of the facility / equipment.

To supplement the focus group research and national survey research, the AFIRM Project will in due course publish evidence drawn from physical audits of facilities by suitably trained assessors.

The top safety concerns in the Australian fitness industry

Focus group research conducted by the AFIRM team in January and February 2013¹ involved fifty-eight fitness professionals sampled from seven urban and regional locations across four Australian States (Queensland, New South Wales, Victoria and South Australia).² Many participants were members of Fitness Australia (a not-for-profit, member-based industry association representing the interests of over 26,000 registered exercise professionals, fitness service providers and industry suppliers Australia-wide), others were sourced from the Yellow Pages or Young Men's Christian Association (YMCA). Participants were selected to ensure inclusion of fitness facility owner/operators, employees (full-time, part-time or casual) and contractors.

The Nominal Group Technique (NGT) was used in the focus groups. In an NGT session,³ participants provide responses to a particular issue or question, list them in their order of importance, pool their responses, and then conduct a secret ballot to list and rank the most important issues drawn from the pool.⁴ In essence, the NGT technique produces a rank ordering of the various problems identified by individual group members that is anonymous and thus unaffected by the personality attributes/allegiances of those in the group.

The 58 fitness professionals participating in the focus groups identified the following as their top six most important concerns.

Education, competency, knowledge and courses

Participants expressed concern that some fitness professionals are 'under-educated', and expressed dissatisfaction with fitness trainer courses, which were seen to be too short and/or too easy. Concern was expressed that there is minimal or inadequate training in risk management in current educational offerings. Participants said that fitness professionals often lack experience, that there was a lack of support for new trainers, and that there was also a need for further, post-qualification professional training and development to ensure that people have the necessary skills to be effective and manage risks.

Pre-exercise screening and management of de-conditioned clients

Participants expressed concern about the adequacy of pre-exercise screening in the fitness industry, particularly in relation to unconditioned or de-conditioned clients. Participants expressed a lack of confidence that pre-existing injuries or conditions were being captured. Some participants complained

that there was no uniform pre-exercise screening tool (despite there being one available in Australia) and that the tools that do exist are not easy to implement.

Poor supervision and incorrect use of equipment

Participants expressed concern about what they regarded as the generally low degree of supervision of clients undertaking exercise in fitness facilities. Concern was also expressed that some facilities may be inadequately staffed and that trainer fatigue might create risks in fitness facilities. Participants also identified 'improper use of equipment' by clients as a significant issue. Participants commented that risks in fitness facilities can arise from client performance of incorrect techniques or failure to follow instructions, and also poorly educated fitness trainers teaching incorrect techniques.

Scope of practice, nutrition and managing client expectations

Participants expressed concern that personal trainers and fitness facility employees often operate outside their scope of practice and expertise, e.g., providing advice about diet or speaking with clients about personal problems. Concern was also expressed that fitness professionals might give inappropriate or misleading information in this context. Concern was expressed that some fitness professionals may not manage the (often unrealistic) expectations of their clients properly, creating a risk of injury and adverse health outcomes.

Equipment

Participants identified a number of issues in their discussion of the topic of 'equipment': expressing concern about the lack of maintenance of equipment, faulty equipment or the poor quality of equipment, equipment hygiene (machines not being wiped down or cleaned), and problems related to the positioning of equipment too close to other equipment or hazards.

Environment

Participants identified a number of issues including lack of space in gyms and hazards created by clients (e.g. leaving bags or weights lying around, creating tripping hazards), concern about poor layout of fitness equipment in fitness facilities (specifically, space, overcrowding and ventilation issues), and concerns about the risks posed by using outdoor areas as venues for the provision of fitness services, e.g. the provision of services on wet or uneven ground, and/or in weather that was too cold, too hot or too wet.

At the conclusion of Chapter One we identify the steps that Fitness Australia is taking to address these research findings.

In **Chapter Two**, we identify the risks that affect the fitness industry. We introduce the concepts of *incident preparedness* and *operational continuity management*, identify elements of a *design for a framework to manage risk*, and set out contemporary quality frameworks, safety tools and codes of practice for risk management in the fitness industry.

In **Chapter Three**, we introduce the concept of *scope of practice*. In a nutshell, scope of practice means that fitness professionals should not provide advice they are not qualified to provide. Fitness Australia's

Scope of Practice is a draft national position statement that aims to define the scope of practice for Registered Exercise Professionals in Australia. It provides clarity about their role, responsibilities and professional boundaries and reinforces many of the existing exercise professional standards and policies. The Scope of Practice provides information detailing the minimum vocational and educational requirements of each, and states what is expected of them as part of their professional obligations. Prominent amongst these is safety and risk management and assessment. All persons working in the fitness industry should be mindful to identify and minimise risks whenever possible.

In **Chapter Four** we talk about *pre-exercise screening* and its significance in risk management in the fitness industry.

In **Part Two**, the **AFIRM Manual** summarises the legal regulation of negligence, contract and consumer law, workplace health and safety, criminal liability, and liability for discrimination and bullying.

In **Part Three**, we consider risk management issues relating to the use, misuse and maintenance of equipment (**Chapter 10**), keeping safe premises (**Chapter 11**), and emergencies (**Chapter 12**).

Finally, in **Part Four (Chapter 13)**, we consider material that will assist fitness service operations and fitness professionals in the development of their risk management plans, and materials relating to the implementation, monitoring and evaluation of those risk management plans.

Part One

Risk Management in the Australian Fitness Industry

Chapter One

Introduction to the Australian Fitness Industry Risk Management Project

1.0 Overview

Over 3.1 million people in Australia use fitness services,⁵ reflecting a 32% increase since 2005-06.⁶ According to the most recent Australian Bureau of Statistics Sport and Physical Recreation survey,⁷ amongst all adults aged 15+ years, 9.4% of males and 15.7% of females participate in aerobics/fitness activities. In 2009, the Australian Sports Commission reported that the organised activity with the highest total participation rate was aerobics/fitness, with an estimated 1.3m people aged 15 years and over participating in this activity in an organised environment at least once in the year preceding the research survey.⁸ This participation rate was over twice that of football, and also more than football (excluding Australian rules football) and netball combined.⁹ Aerobics and fitness also had the highest regular participation rate, with an estimated 557,000 people aged 15 years and over participating in this activity in an organised environment at least 3 times per week.¹⁰

This ranks aerobics/fitness activities as the second most common physical recreation activity undertaken in Australia, exceeded only by walking. Many Australians (including people who fall into higher risk groups with chronic health conditions) join gyms to maintain or improve their health and fitness and to lose weight.¹¹

Another group of people who are using fitness facilities and services are children. Childhood obesity has increased in prevalence during the last two to three decades in Australia.¹² Physical activity should form a significant part of prevention measures.¹³ Non-pharmacological approaches should be the foundation of obesity treatments, but especially for children.¹⁴ The NSW Department of Tourism, Sport and Recreation have produced helpful guidelines for conducting fitness programs for children in gyms. The resource can be found at: <http://www.dsr.nsw.gov.au/assets/pubs/industry/kidsingyms.pdf>

The fitness industry in Australia is certainly growing. In September 2012, Fitness Australia published a report prepared by Deloitte Access Economics that noted that 24/7 fitness facilities were growing at a rate of over 11%. This report also predicted that over 7M people will participate in fitness activities by 2020.¹⁵

The fitness industry in Australia is also diverse:

- Service providers range dramatically in size.
- Business models and structures vary enormously (partnerships, companies, sole traders).
- Some fitness facilities offer equipment for member use, some do not.
- Some facilities offer constant supervision, some do not.
- An increasing number of fitness service providers operate in public places.¹⁶

The Australian fitness industry has a diverse range of services and products, including: aerobics, aqua boot camps, Body Balance™, boxing classes, circuit training, crossfit, outdoor group exercise, personal training, Pilates, spin classes, yoga, Zumba® and many more.

Some fitness activities are high intensity, and as a result, involve higher risks of adverse health outcomes or injury. High intensity fitness activities, and even low-intensity activities when undertaken by de-conditioned clients can raise significant risk management and legal liability issues.

The size of the industry, growth of the industry and diversity of the industry and the services it offers increases the complexity of risk management. Yet uncertainty about relevant risk management policies and practices in some fitness environments can increase the risk of adverse health outcomes and injury, and may expose fitness professionals and businesses to the risk of legal liability.

Risk management has been identified as a key challenge by peak bodies and researchers because of the importance of supporting active and healthy lifestyles in Australia's efforts to combat diseases.¹⁷ Fitness activity can help people reduce the risk of: -

- Type 2 diabetes;18
- Cardiovascular disease;19
- Certain types of cancers;20
- Osteoarthritis;21
- Inflammatory diseases;22 and
- Neurodegenerative and neuromuscular diseases.23

Improved risk management practices in fitness environments will help people adhere to their exercise programs and achieve their fitness objectives. Better practice can also reduce adverse health outcomes and injuries. This has flow on effects, creating direct savings in health care costs to governments, and economic benefits from increased labour supply and productivity.²⁴

However while regular physical activity can help prevent obesity and reduce the risk of inactivity-related diseases, overly vigorous exercise can *trigger* adverse health events, especially in deconditioned clients.²⁵ There are particular dangers related to managing such clients. Even a single repetition of an exercise can cause injury. A striking example of this is provided by the decision of the New South Wales Court of Appeal in *Belna Pty Ltd v Irwin*.²⁶

Belna Pty Ltd v Irwin

Irwin was a member of a Fernwood Fitness Centre operated by Belna. A Fernwood employee had produced an exercise program for Irwin, which included lunges. However, on her first attempt at a lunge with her left leg, it gave way and she fell to the floor. She was taken to hospital where it was discovered she had dislocated her left knee.

Some programs offered by fitness providers can increase the risk of injury.²⁷ Take plyometrics, for example. Plyometrics are 'specialised, high-intensity training techniques designed to increase athletic power'.²⁸ As such, they should only be attempted by highly trained athletes. When performed by beginners with low skill and fitness levels, plyometrics can lead to a variety of injuries.²⁹

Some facilities offer exercise and rehabilitative programs for special populations, such as people over the age of 50 years, and people with cardiovascular diseases or chronic lower back pain.³⁰ However research in Queensland has highlighted that even fitness facilities that offer such specialist services show room for improvement in their compliance with emergency plans pre-activity screening procedures, and safety equipment availability.³¹ Inadequate safety risk management practices have also been documented in Victorian facilities.³²

1.1 The regulatory context affecting the Australian fitness industry

Fitness facilities are governed by a complex web of legislation (Commonwealth, State and Territory), common law and State and Territory-based fitness industry codes (some of which are mandatory and have legal status as statutory instruments, and some of which are not). Failure to comply with a mandatory industry code may result in compliance orders being made to remedy the contravention.

Generally speaking, a failure by fitness facilities to comply with reasonable and acceptable industry standards of service provision can give rise to legal liability in negligence to compensate for personal injuries that have been caused by the failure.³³ Following changes to Australian law in 2002, recreational service providers, including fitness businesses, have been given the right to contract out of their duty of care to their customers by using exclusion clauses that can waive or limit liability for negligence or breach of warranty that services would be provided with reasonable care and skill.³⁴ Membership applications and pre-screening tools used by fitness businesses typically include exclusion clauses. Common use of such clauses has raised concerns that fitness businesses may decline to invest in injury prevention practices and thereby risk the safety of their consumers.³⁵ As JoAnn Eickhoff-Shemek has observed:³⁶

Waivers should never be relied upon as the sole risk management strategy. They do nothing to help prevent injuries and the subsequent claims and lawsuits that may follow...it is the ultimate responsibility of co-ordinators, managers, and owners of health fitness facilities to ensure that their staff members are adhering to an acceptable industry standard of service provision on a daily basis (emphasis added).

Despite legislative reforms, contractual exclusion clauses can be ineffective in limiting or excluding legal liability for injuries caused to clients³⁷ and an adverse event can still lead to legal fees associated with defending a claim even if it is abandoned or settled.³⁸ Contractual exclusion clauses may therefore provide a false sense of security to fitness businesses that rely on them.

Other recent changes to the law as a result of the nationally adopted *Australian Consumer Law* further complicate the legal regulation of exclusion of liability and may make it even more difficult to rely on contractual exclusion clauses to limit or exclude legal liability, because of provisions dealing with unfair contracts.³⁹

In addition, injuries caused to employees resulting from a failure to ensure safety training can result in liability claims, as in *Gale v New South Wales*.

Gale v New South Wales

Gale was employed part time to supervise a prison gymnasium. A weight machine became stuck, and Gale injured herself attempting to free the weights. Gale sued her employer alleging that the machine was not well maintained, and that the defendant should have foreseen that if the machine broke down the appellant would attempt to fix it. The Court of Appeal agreed that the

risk of such an accident was foreseeable, and awarded compensation (lawyers often refer to a compensation payout as ‘damages’).

As noted above, in Australia, fitness facility operators are responsible under Work Health and Safety (WHS) law to ensure that their employees are not exposed to risks to their health and safety. WHS laws create mandatory obligations relating to workplace safety and failure to comply with the requirements can attract prosecution. Damages to a person resulting from fitness business non-compliance with WHS law and regulations would almost always not be covered by insurance, which typically contains clauses prohibiting an insurance claim by a person who has behaved illegally.

Legal liability exposure is not limited to physical injury to customers and employees, but can also extend to psychological hazards.⁴⁰ Legal liability exposures can also emerge via State, Territory and Federal laws that, for example, prohibit sexual harassment, disability discrimination and racial discrimination. In addition, there are an increasing number of international conventions that are relevant to health and health promotion that should be considered in any effort to develop a comprehensive approach to risk management. People enjoy rights under these conventions that create important obligations that should inform industry practices.⁴¹

Although many fitness businesses and professionals understand that there are important laws and regulations that affect them, many may be unaware of the risks. In addition, many may not seek legal or other professional advice to assist them in managing these risks, and may not know where to obtain relevant safety risk management resources. A Victorian study showed that multipurpose recreational facilities lacked safety policies and practices for gymnasium and group exercise activities.⁴² It was demonstrated that WHS requirements provided little practical guidance for service providers, and there was a need for comprehensive, relevant and accessible industry specific safety benchmarks and standards to promote injury prevention.

Australia’s growing health challenges and the complexity of the legal environment highlight the need for better resources to equip fitness professionals with the tools they need to ensure that they understand the effect that regulations have on their work. Such an understanding will help reduce the risk of adverse health outcomes and injury *and* the legal liability associated with those risks. There has been a long history of the benefits of using regulatory approaches towards managing injury risks, and hence to support safety risk management strategies, particularly in the context of road safety and workplace safety. It is somewhat surprising, therefore, that there have been few studies exploring the role of rules and regulations for delivery of safe fitness services.⁴³

In 1994, injury prevention was designated as one of the first four National Priority Health Areas.⁴⁴ In 1997, the National Sports Safety Framework (NSSF) strongly advocated that an injury risk management approach be adopted to reduce the risk of adverse health outcomes associated with physical activities, including in health and fitness facilities.⁴⁵ Since this time, industry codes of practice have emerged and industry stakeholders have produced accreditation frameworks. But the complexity and diversity of legal liability exposures remains significant. Moreover, injuries continue to occur to people who use fitness facilities and services, suggesting that current preventive efforts are sub-optimal.

The NSSF specifically recommended that physical fitness facilities and sporting clubs adopt formal injury risk management audit processes.⁴⁶ Since then, a valid safety audit tool has been developed for Australian sports clubs,⁴⁷ and used to assess the range and extent of safety policies and practices in that setting.⁴⁸ A Victorian study that assessed the safety risk management practices of health and fitness facilities indicated some areas where improvement could be made.⁴⁹ This study also described the sorts of people who undertake their physical activity in these facilities, their physical activity-related injury attitudes in general, and their views on safety in those facilities.⁵⁰ Recent state-wide research in Queensland showed significant problems with safety⁵¹ and legal risk management practices in health and fitness facilities,⁵² and the legal liability issues that arise within this context.⁵³

In support of the need to develop comprehensive, relevant and accessible safety and risk management standards for the Australian health and fitness industry, industry leaders have acknowledged the need to develop research alliances to minimise the risk of adverse health outcomes and associated legal liability.⁵⁴ The combination of legal research approaches with those of social science researchers in this field has been identified as a significant research need.⁵⁵ The AFIRM Project was designed to meet this need, and this Manual and the research that informs it is a first step toward the development of comprehensive, relevant and accessible safety and risk management information for fitness businesses and professionals.

1.2 Sources of liability

The purpose of this Manual is to provide fitness industry professionals with information that can be used in order to manage the legal risks associated with operating fitness centres and/or providing fitness services to the public. Obviously, personal injuries can follow from any physical activities that involve some risks of harm. Failure to adopt and put in place adequate safety measures to protect your clients will have legal consequences for you. People who suffer injuries as a result of your actions may sue you. If your actions (or failures to act) violate a regulation, a government agency may fine you. In some instances, if you wilfully violate workplace health and safety laws for example, you could even go to jail. It is critically important that you understand that as a fitness industry professional, you have legal obligations to your clients to provide for their safety and wellbeing when they are under your instruction, using your facilities and equipment, or otherwise in your care. Three examples of how legal liability may apply are as follows: -

- A fitness instructor conducts a group aerobics exercise on a hardwood gymnasium floor. Although the clients are provided with exercise mats, sweat nevertheless gets on the floor. The instructor notices, but does not stop the session to wipe up the sweat. A client slips and falls, injuring her back. In this instance, both the instructor and the facility could be legally liable for the injury.
- An employee of a fitness centre has received complaints that the seat on a stationary exercise bicycle is loose. He means to check it, but forgets and goes off shift without mentioning it to his supervisor. The next morning a client using the bicycle is injured when the seat comes off. The client sues the fitness centre for failing to adequately maintain the equipment.

- A personal trainer signs up a new client for an intensive strength-conditioning course. During a session, the client advises the instructor that the weight being used is too heavy. The instructor tells the client to push through the pain. The client suffers a serious muscle injury and sues.

Where do these legal obligations come from? (Please note that the following discussion does not constitute legal advice, but merely seeks to explain certain legal concepts.)

In general your legal obligations arise under the common law, contracts, and statutes.

Common Law	Contract Law	Statutory Law
<ul style="list-style-type: none"> • Court cases • Judge-made law 	<ul style="list-style-type: none"> • Membership Agreements • Express terms • Implied terms 	<ul style="list-style-type: none"> • Australian Consumer Law • State Fair Trading Acts • Industry Codes of Practice

Under the general or common law, you are presumed to owe a duty of care to those with whom you may come into contact in the course of your daily activities. If you drive a car, you owe a duty to other drivers and pedestrians. If you have a swimming pool at your house, you have a duty to put up a fence to keep neighbouring children from falling into it. If you breach this duty, and someone is injured as a result of your breach, you may be liable under what is called tort law, specifically the **tort of negligence**. Most states and territories have now codified the law of negligence in legislation, adopting most, but not all, common law principles. See, for example, the *Civil Liability Act 2003* (Qld).⁵⁶

Traditionally, the law of negligence was made up of ‘common law’, or judge-made principles developed in the courts in response to injury claims made by people in particular cases.⁵⁷ Legislatures undertook a limited role, restricting their law-making in this area to procedural matters associated with personal injury litigation, such as regulating the time within which an accident claim must be made (‘limitations statutes’).

After a number of high profile negligence lawsuits in the 1990s and 2000s, insurance companies lobbied the NSW government to make changes to the law to ensure their business model would remain economically viable.⁵⁸ Premier Bob Carr announced his intention to ‘restore sense and balance in the law of negligence’⁵⁹ and convened a panel chaired by Justice David Ipp with the objective ‘to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal death and injury.’ The Ipp Committee made recommendations that were later implemented in each State and Territory.⁶⁰

It is important to note that research analysing national trends in personal injury litigation before and after the civil liability reforms recommended by the Ipp report demonstrated that ‘contrary to widespread belief, litigation rates had not, generally, been increasing in the period leading to the Ipp Review’ and, further, that there was ‘no empirical foundation for the premises underlying tort law reform as a strategy for addressing the insurance crisis of 2002.’⁶¹

Alternatively, if you enter into a contract with one of your clients allowing them to use your exercise facility, it is an implied term that your facility will be fit for the purpose for which you are allowing its use. If you are running an aerobics class, and your floor surfaces are hard and slippery, your facility may not be fit for purpose. If someone slips and falls while exercising, they may sue you for your injuries. This is an example of **contractual liability**.

Practical example relating to contractual liability: John's gym provides showers for customers. When John was fitting out the showers, he wanted to save money so he did not install slip-resistant surfacing in the shower stalls. A client slips and falls while taking a shower, and sues John, claiming his showers are not fit for purpose because they do not have anti-slip flooring.

You may also owe a **statutory duty** under the *Australian Consumer Law*.⁶² For example, if you are providing services to a client as a personal trainer, you are guaranteeing under the Act that you will render these services with due care and skill.

Practical example relating to statutory duty: Yoga instructor Susan reads an article that states that yoga classes for pre-school children is the next big thing. She begins offering children's classes despite having no knowledge of child physiology or age appropriate exercises. A child suffers a neck injury during one of her classes. The child's parents sue Susan, claiming she did not exercise due care and skill in the conduct of her classes.

Managers

It is important to understand that as the owner or operator of a fitness centre and/or the provider of fitness services, you are potentially legally liable for the fitness services you provide to the public. You are also potentially liable for the delivery of those services by your employees and contractors. You should read the sections below and familiarise yourself with the law of negligence, and the liability you could be facing under contract and consumer law as well. You should make sure your employees and contractors understand that they too are potentially liable for the services they provide.

Employees and Contractors

You should also familiarise yourself with the legal concepts discussed below. By working in the fitness industry, you face potential liability for the services you supply to the public. It is important that you know your responsibilities and that actively participate in your employers' risk management strategy. As an employee or contractor, you are likely to be your organisation's first line of defence when it comes to identifying possible risk exposures.

1.3 Why risks should be managed – the legislative requirements

Risk should be managed not only because you aim to act dutifully to minimise the occurrence of incidents in your environment, but also because there is a legal requirement to do so.

The Australian ‘harmonised’ work health and safety (WHS) Act⁶³ states the following:

WORK HEALTH AND SAFETY ACT 2011 - SECT 17

Management of risks

A duty imposed on a person to ensure health and safety requires the person:

- (a) to eliminate risks to health and safety, so far as is reasonably practicable; and**
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.**

WORK HEALTH AND SAFETY ACT 2011 - SECT 19

Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

- (a) workers engaged, or caused to be engaged by the person; and**
- (b) workers whose activities in carrying out work are influenced or directed by the person; while the workers are at work in the business or undertaking.**

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

WHS legislation is not restricted to staff safety, but requires ‘persons conducting a business or undertaking to ensure all persons who may be effected’ by the business or undertaking are ‘safe’. The measures that management take to protect employees generally apply to clients of fitness businesses too. Therefore, managing risk effectively aids in minimising risks of injury to staff and clients of fitness facilities, as well as to the general public.⁶⁴ This may, in turn, assist in reducing fines or public liability claims being made. As the legislation outlines, all fitness services providers have a responsibility to ensure minimisation of risk in the workplace, not just management.

If a breach of WHS legislation is found to have taken place, significant penalties apply (though they can vary from State to State and Territory to Territory, depending on whether they have enacted the

harmonised law.). Maximum penalties for a corporation are \$3M in NSW for instance, or between \$300,000 and \$600,000 and/or 5 years imprisonment for individuals.⁶⁵

1.4 The top safety concerns in the Australian fitness industry

Focus group research conducted by the AFIRM team in January and February 2013⁶⁶ involved fifty-eight fitness professionals sampled from seven urban and regional locations across four Australian States (Queensland, New South Wales, Victoria and South Australia).⁶⁷ Many participants were members of Fitness Australia (a not-for-profit, member-based industry association representing the interests of over 26,000 registered exercise professionals, fitness service providers and industry suppliers Australia-wide), others were sourced from the Yellow Pages or Young Men's Christian Association (YMCA). Participants were selected to ensure inclusion of fitness facility owner/operators, employees (full-time, part-time or casual) and contractors.

The Nominal Group Technique (NGT) was used in the focus groups. In an NGT session,⁶⁸ participants provide responses to a particular issue or question, list them in their order of importance, pool their responses, and then conduct a secret ballot to list and rank the most important issues drawn from the pool.⁶⁹ In essence, the NGT technique produces a rank ordering of the various problems identified by individual group members that is anonymous and thus unaffected by the personality attributes/allegiances of those in the group.

The 58 fitness professionals participating in the focus groups identified the following as their top six most important concerns (in order of importance):

1. The competency of fitness professionals;
2. The effectiveness of pre-exercise screening and the management of de-conditioned clients;
3. Poor supervision of fitness service users and incorrect use of equipment;
4. Fitness trainers failing to remain within their scope of practice;
5. Equipment misuse (as distinct from incorrect use); and
6. Poor fitness training environments.

The focus groups were recorded, and the key themes raised in discussion in the focus groups were as follows:

Education, competency, knowledge and courses

Participants expressed concern that some fitness professionals are 'under-educated', and expressed dissatisfaction with fitness trainer courses, which were seen to be too short and/or too easy. Concern was expressed that there is minimal or inadequate training in risk management in current educational offerings. Participants said that fitness professionals often lack experience, that there was a lack of support for new trainers, and that there was also a need for further, post-qualification professional training and development to ensure that people have the necessary skills to be effective and manage risks.

Pre-exercise screening and management of de-conditioned clients

Participants expressed concern about the adequacy of pre-exercise screening in the fitness industry, particularly in relation to unconditioned or de-conditioned clients. Participants expressed a lack of confidence that pre-existing injuries or conditions were being captured. Some participants complained that there was no uniform pre-exercise screening tool (despite there being one available in Australia) and that the tools that do exist are not easy to implement.

Poor supervision and incorrect use of equipment

Participants expressed concern about what they regarded as the generally low degree of supervision of clients undertaking exercise in fitness facilities. Concern was also expressed that some facilities may be inadequately staffed and that trainer fatigue might create risks in fitness facilities. Participants also identified 'improper use of equipment' by clients as a significant issue. Participants commented that risks in fitness facilities can arise from client performance of incorrect techniques or failure to follow instructions, and also poorly educated fitness trainers teaching incorrect techniques.

Scope of practice, nutrition and managing client expectations

Participants expressed concern that personal trainers and fitness facility employees often operate outside their scope of practice and expertise, e.g., providing advice about diet or speaking with clients about personal problems. Concern was also expressed that fitness professionals might give inappropriate or misleading information in this context. Concern was expressed that some fitness professionals may not manage the (often unrealistic) expectations of their clients properly, creating a risk of injury and adverse health outcomes.

Equipment

Participants identified a number of issues in their discussion of the topic of 'equipment': expressing concern about the lack of maintenance of equipment, faulty equipment or the poor quality of equipment, equipment hygiene (machines not being wiped down or cleaned), and problems related to the positioning of equipment too close to other equipment or hazards.

Environment

Participants identified a number of issues including lack of space in gyms and hazards created by clients (e.g. leaving bags or weights lying around, creating tripping hazards), concern about poor layout of fitness equipment in fitness facilities (specifically, space, overcrowding and ventilation issues), and concerns about the risks posed by using outdoor areas as venues for the provision of fitness services,

e.g. the provision of services on wet or uneven ground, and/or in weather that was too cold, too hot or too wet.

The focus group research was used to develop a national survey instrument to determine how widespread these concerns are across the whole fitness industry in Australia. The research is referred to in this Manual and has been published in the *Journal of Law and Medicine* in an article entitled “Legal Risk Management and Injury in the Fitness Industry: The Outcomes of Focus Group Research and a National Survey of Fitness Professionals”.

Following the focus group work, the national survey identified three key challenges for the fitness industry:

- Management, implementation and monitoring of safety policy.
- Implementation of client training / education in exercise programmes.
- Maintenance, design and operation of the facility / equipment.

Fitness Australia is presently reviewing the research findings and in late 2014 and early 2015, in continuing work with the AFIRM Team, will develop a suite of training materials and best practice guides and checklists to address the six most important safety concerns identified above. This work will be supported by further research material to be published by the AFIRM Team, including in-depth interviews and observational audits of fitness facilities.

1.5 Key concepts

This chapter has provided an overview of risk management in the fitness industry, outlining that in Australia over 3 million people participate in the fitness industry. Each of these participants is exposed to some level of risk as a fitness industry professional, working in the sector there is a responsibility to understand and help mitigate these risks.

Risk management looks at identifying the risk and making modifications to industry practices to minimise the chance of occurrence. This is important, as there are legal ramifications for failure to do so as seen in section 17 and 19 of the Work Health and Safety Act 2011.

The use of exclusion clauses in contracts can limit the liability of the corporation or individual worker, but does not reduce the risk to clients. Use of these clauses should not be relied upon as a sole risk management strategy as they do not prevent injuries and defending them in court can be more costly and time consuming than implementing prevention strategies.

Effective risk management creates a safer environment for everyone in the industry, improved ability to meet client's needs, long term cost saving, increased participation and an improved image of the facility or operator, leading potentially to an increase in clientele.

1.6 Frequently asked questions

- Q. In terms of risks, are there other areas of concern for the fitness industry than just the six mentioned in this chapter of the manual?**
- A. This chapter outlined six of the most prominent issues raised by fitness industry professionals. However, the list is not exhaustive and fitness professionals should always be looking for other areas of potential risk in their business that could be improved.
- Q. I haven't had any problems for years, why should I change now?**
- A. Unfortunately just because someone has not been injured in the past, this does not mean they won't be in the future. Fitness professionals must always manage risk to reduce the chance of clients (or themselves) getting injured. However, even in the best managed facilities incidents occur, but by managing risk appropriately, there is less chance of any legal ramifications falling on the fitness professional.
- Q. Why shouldn't I just use an exclusion clause to remove or limit any legal liability I might have to my staff or clients?**
- A. Exclusion clauses can limit liability but they do not stop an injury from occurring. Whilst these clauses can be effective in removing or reducing liability, they must be enforced in court, which can lead to costly legal fees and a poor public image. It's much more effective to reduce the risk in the first place and avoid having to go to court.
- Q. People undertaking exercise should know they can be injured, shouldn't they take some responsibility? Where does my risk start and end?**
- A. When people come into a fitness centre or are being trained, they come under the care of that facility. It is the duty and responsibility of the centre or trainer as per the Work Health and Safety Act 2011 to eliminate or minimise all risks as is reasonably practicable.
- Q. As an employee do I need to manage risk or is that the centre's job?**
- A. As an employee, it is very important for you to be included in the risk management program of a fitness facility to effectively manage risks and protect the health and safety of your clients. As the person who has the most interaction and control over what your clients do, it is your responsibility to implement risk management strategies. If a client gets injured, you want to ensure that you have reasonably done everything in your power to minimise or eliminate that risk.

Chapter Two

Risk Management

2.0 What is risk and what type of risks affect the fitness industry?

'Risk' is defined in the AZ/NZS ISO 31000:2009 as the 'effect of uncertainty on objectives'.

Defined in this way, 'risk' is neither positive nor negative, it simply occurs because a person or entity is trying to achieve an objective. For instance, in the fitness industry when a person is being trained on a treadmill by a fitness instructor, the client is exposed to a number of risks, including the risk of the treadmill malfunctioning, the skill of the trainer in terms of providing instruction, risks created by the user's behaviour or technique, and the behaviour of other clients exercising on treadmills or other equipment nearby. These risks are simply present due to the objective of engaging in a fitness activity. The only way to eliminate all risk would mean it is no longer possible to achieve the objective. Fitness businesses, fitness professionals and clients each have a role to play in determining acceptable levels of risk in order to achieve particular objectives.

Traditionally, accidents have been predominately attributed to human error, and seen as a failure of planning on the part of people to whom the error is attributed.⁷⁰ However, Sidney Dekker has persuasively argued that "human error is not an explanation for failure, but instead demands an explanation". Dekker's summary of the "new" approach to occupational safety "has three fundamental tenets:"⁷¹

First, human error is a symptom of something deeper (e.g. personality or work design). Second, system safety is not inherent. That is, people have to create safety because work systems are not always in concert with the multiple goals that employees pursue simultaneously. Lastly, "human error can be systematically connected to features of people, tools, tasks, and operating environments".⁷²

For fitness professionals, Dekker's observation that people create safety is pertinent.

Adopting the methodology developed in Professor Ian Coyle's off-cited article "Safety Climate",⁷³ the AFIRM project has generated new data about risk attitudes and practices in the Australian fitness industry.⁷⁴

It is well known that many physiological and psychological benefits come from participation in regular physical activity and exercise.⁷⁵ However, as briefly demonstrated above, risks are also associated with physical activity and exercise. Two main categories of risks exist for those who undertake activity in the health/fitness field: health risks and injury risks. Health risks are medical conditions and/or risk

factors that can lead to problems such as cardiac arrest, stroke, or an insulin reaction. Injury risks are conditions or situations that can lead to problems such as back injury, fractured bones, or cuts/abrasions that cause bleeding. Both types of risks can result in medical emergencies.

Some medical emergencies are a result of inherent risks, meaning they are inseparable from the activity and can happen as a result of participation. These types of injuries may be no one's fault, for example, spraining an ankle while playing basketball or tearing a muscle while lifting a weight. This does not mean that such injuries are inevitable, however, and injury prevention strategies can prevent many of them.

Medical emergencies can also be related to *negligence*: the fault of the participant (e.g., misusing a piece of exercise equipment) or the fault of fitness professionals (e.g., failing to inspect exercise equipment, or failing to provide safe instruction). Negligence is introduced in Chapter 5 but is discussed throughout this Manual. The case law examples in this Manual provide details of negligence claims and other lawsuits that participants have brought against fitness professionals and fitness businesses.

In addition, medical emergencies can also be caused by product defects, for example, defects or deficiencies in exercise equipment. In such cases, the manufacturer of the equipment could be liable for the participant's injury. Medical emergencies can also be caused by unsafe environments (e.g., slippery floor surfaces).⁷⁶

Most risks are obvious, because they will have a consequence, which has previously been experienced, or there is research to show the likelihood of such consequences. Other risks will be more difficult to identify and will be found through the undertaking of effective risk assessment.

The major goals of risk management are to prevent medical emergencies from occurring in the first place and to respond properly to them (e.g., appropriate first aid) when they do occur.⁷⁷

2.1 What is meant by managing risk?

'Managing risk' means identifying and appreciating risks in your fitness environment and making modifications to your work, environment and organisation to remove risks or reduce risks to acceptable levels. Risk management describes 'coordinated activities to direct and control an organisation with respect to risk (AS/NZZ ISO 31000:2009). Risk management involves choosing the right risks to take and then making sure they are well managed. In a nutshell, it means making optimal decisions in the face of uncertainty.

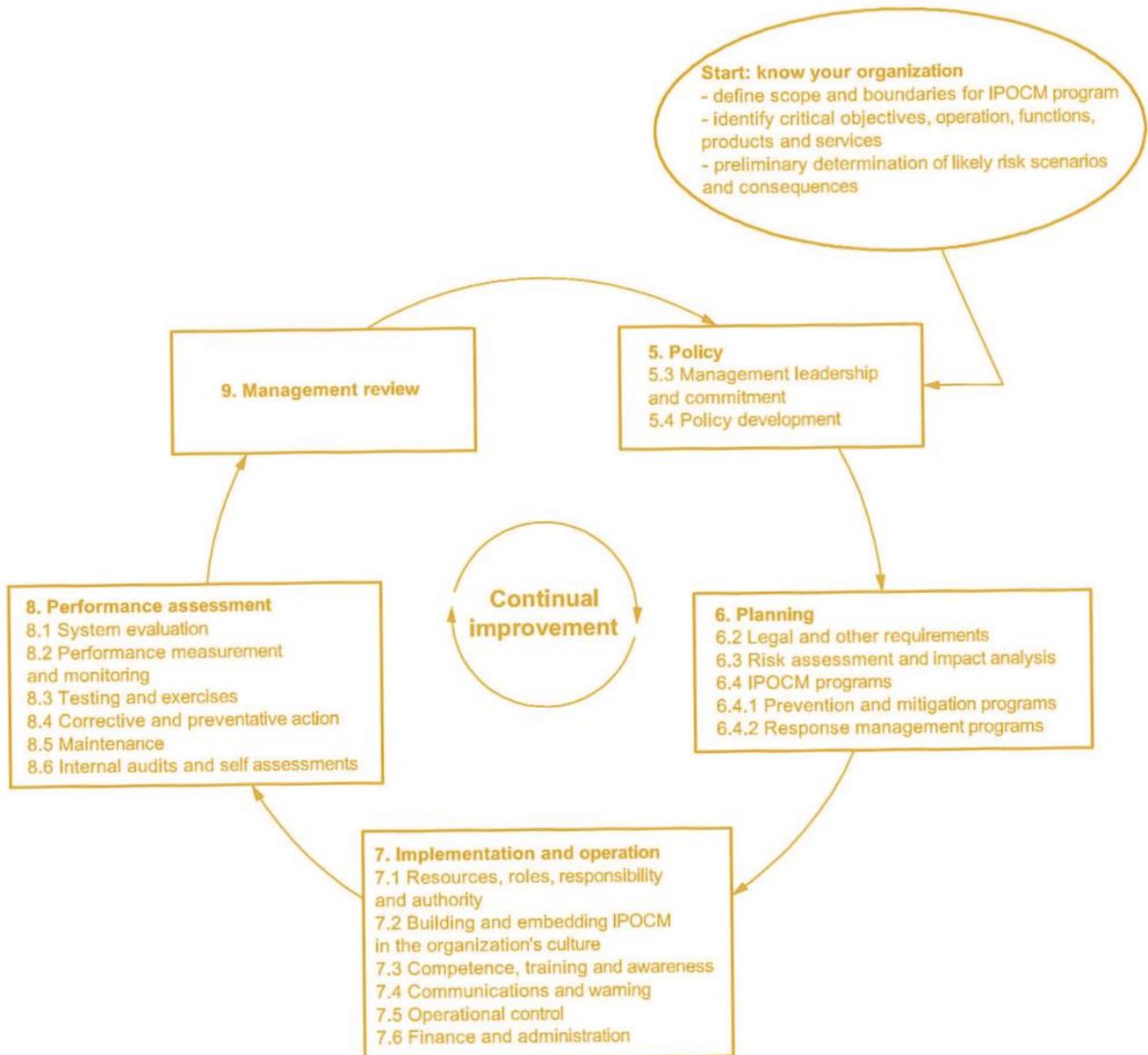
Risk management not only involves identification of risks and taking steps to eliminate or reduce those risks in order to prevent negative consequences, but it involves efforts to transfer those risks that cannot be eliminated or reduced through various mechanisms such as through the use of waivers or liability insurance.⁷⁸ Additionally, risk management is an ongoing and fluid process that involves

constant monitoring and review to ensure continual improvement. The following diagram provides an illustration of risk management:



2.2 Incident preparedness and operational continuity management

Incident preparedness and operational continuity management (IPOCM) is an approach where there is ongoing process and continual improvement to ensure an organisation can respond well to incidents. It is a framework for allowing your organisation to respond to changes in internal and external factors. All levels in the organisation should accept responsibility for working to achieve incident preparedness and operational continuity improvements. The diagram below depicts the process:⁷⁹



Using this framework to build an incident and operational continuity culture within your team requires:

- Senior management championing the framework.
- Integration into the governance of the organisation.
- Consultation with all staff members.
- Incorporation into staff recognition and reward processes.
- Identification of roles and responsibilities.
- Training
- Monitoring and review.

2.3 Design of a framework to manage risk

A risk management framework provides the basis for effectively managing risk. The framework should consider the governance and management within the organisation, as well as the relevant legislation and detail components that are centred on quality and adequacy to ensure that effective risk management processes and procedures can be implemented and monitored. An effective risk management framework considers organisation-wide involvement, and that personnel involved in managing risk are well trained and rewarded, to aid in managing risk well.

In order to design a framework to manage risk, the external and internal environment affecting an organisation's objectives should be understood. In order to evaluate an organisation's external environment, the following, non-exhaustive list, may be considered:

- External stakeholders – relationships, perceptions and values.
- Trends – key drivers impacting on organizational objectives.
- General macro environmental factors – economic climate, legal and political conditions, government regulations, technological, financial and the competitive environment locally, nationally or internationally.

Looking internally, again though not an exhaustive list this may include evaluating:

- Capabilities – resources and knowledge of personnel, including systems, processes and technology.
- Communication systems – the formal and informal flow of information and decision-making processes.
- Guidelines and standards – models for operation utilised by the organisation
- Organisational culture.
- Organisational governance, structure, roles and responsibilities.
- Policies and procedures – including the organisation's strategy and objectives
- Stakeholders – perceptions, values and relationships with internal stakeholders.

There are a number of existing risk management frameworks available for use by the fitness industry. The choice of framework depends on the internal and external factors affecting the organisation and as such, existing frameworks may require modification. In this context, four frameworks to help manage risk in the fitness industry are now discussed.

2.4 Fitness industry national draft quality framework

Fitness Australia produced a Fitness Industry National Quality Framework (Draft v7) which incorporates key components for fitness business' to consider when aiming to achieve best practices or 'quality'. The framework's components include:



Within the 'safety' component of the framework, risk is considered extensively. The safety component in the framework considers the safe delivery of programs and services through comprehensive risk management. It also looks at high standards for facilities and equipment. The risk management areas within the 'safety' component of the framework suggest fitness organisations implement:

- An active risk management policy for the organisation
- Risk assessment for all exercise programs in each delivery environment
- Pre-exercise screening and risk assessment for all clients
- Client referrals to health professionals according to risk assessment outcomes
- Tailored assessments and exercise programs for clients, in line with risk assessments or ability

- Information delivery to clients about the program and risks and their consent sought
- Monitoring and supervision in all exercise areas
- Well documented safety and emergency protocols and procedures
- A well maintained and clean facility including equipment

Managers

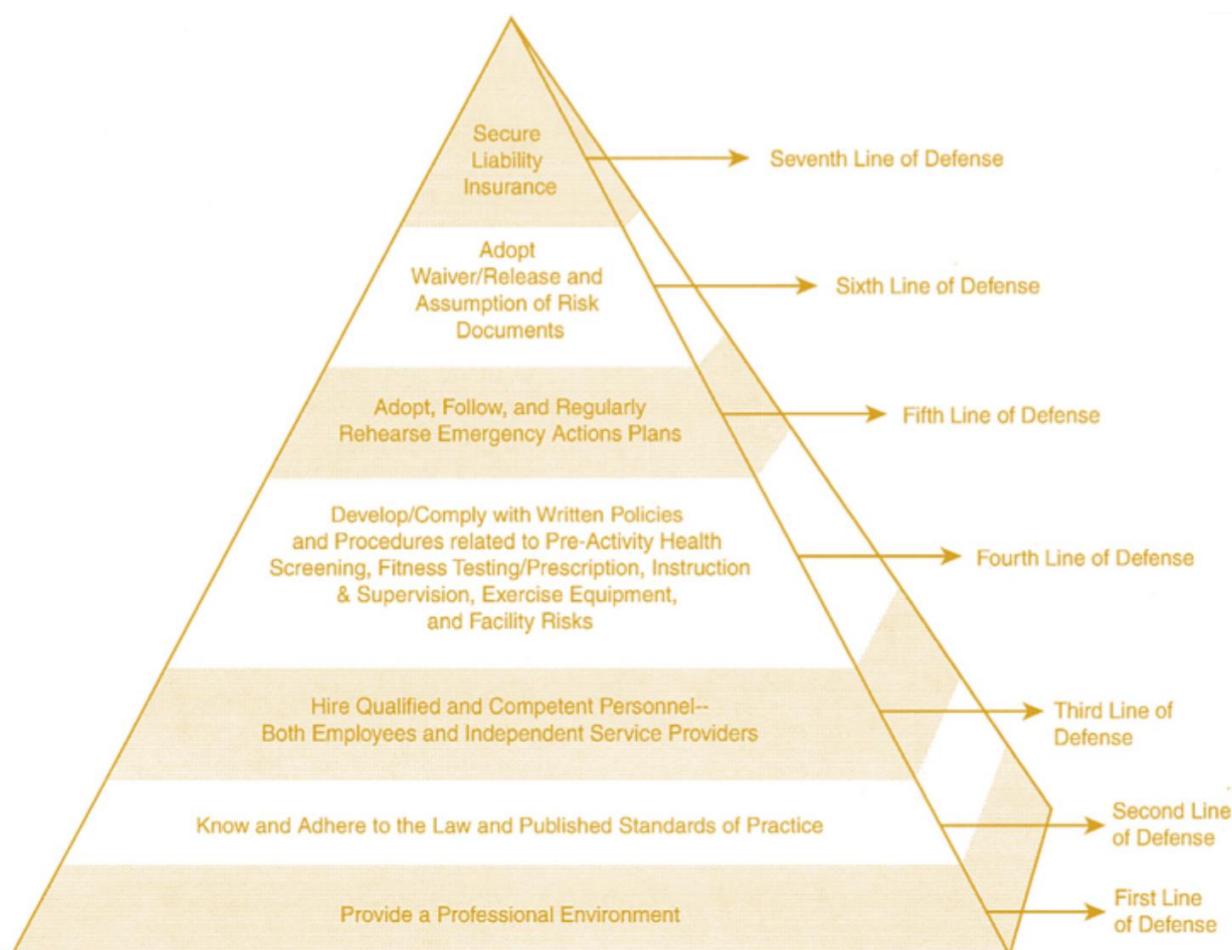
As a Manager, the development of a framework to manage risk may incorporate the areas mentioned above. A well-considered risk management framework, tailored for the organisation's internal and external environment will assist in developing policies, procedures and protocols to ensure that where risks are identified, risk management steps can be taken in order to promote safety and minimise harm. The framework reflects a commitment to providing a 'duty of care' to staff, contractors and clients.

Employees or Contractors

As an employee or contractor working in the fitness industry, it is important that you are provided with a safe work environment, and so are your clients. The risk management framework developed by the organisation in which you work, will help minimise risk and will contribute to an overall professional approach the organisation takes to managing risk.

2.5 Risk management pyramid

The risk management framework that the organisation develops forms a structure or 'layers of defense' to help fitness professionals and facilities minimise risk and the legal liability related to negligence. Professor JoAnn Eickhoff-Shemek of the University of South Florida and David Herbert, J.D. developed a risk management pyramid that illustrates the concept.



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First Line of Defense: Risk managers and liability insurance experts have known for many years that a genuinely friendly, caring, and professional environment will help minimise not only the occurrence of injuries that can lead to negligence claims and lawsuits, but the actual assertion of claims/lawsuits as well.

Second Line of Defense: Research has shown that a significant number of health/fitness professionals do not know, understand, appreciate, or adhere to the law and published standards of practice. Health/fitness facilities must adhere to the law and should comply with published standards of practice. These standards reflect established benchmarks of expected behaviour for the profession and can be used to evaluate and judge the care that is provided in the event of an injury that results in a negligence claim/lawsuit.

Third Line of Defense: Because all programs and services in any health/fitness facility are provided through personnel, the basic core for any facility's service delivery system will always be evaluated through those persons. Only qualified and competent personnel - be they employees or independent contractors - should be hired to deliver service.

Fourth Line of Defence: Based upon the law and published standards of practice, all health/fitness facilities should adopt written policies and procedures dealing with pre-activity health screening, health/fitness assessment and prescription, and instruction and supervision provided to participants as well as a variety of issues related to exercise equipment and the fitness facility. Compliance to these policies and procedures not only helps to prevent injuries in the first place but also can help to successfully defend against any negligence claim/lawsuit by being able to demonstrate that no legal duties were breached.

Fifth Line of Defence: If an injury does occur, it is important that a written Emergency Action Plan (EAP) be in place to be properly carried out by staff members in order to meet the standard of care. To help make sure that these steps are properly carried out, staff members should practice all aspects of the EAP periodically throughout the year and possess current certifications, e.g., CPR/AED and first-aid.

Sixth Line of Defence: If a court rules that a participant's personal injury or wrongful death was caused by the negligence of a health/fitness facility or its personnel, a properly written and administered waiver/release can protect the health/fitness facility from any liability for "ordinary" negligence in most states. If it is determined that a participant's injury was due to the inherent risks (that is, not based upon negligence or in those circumstances in which waivers/releases are not effective), a written document such as an express assumption of risk, agreement to participate, or informed consent can help strengthen the assumption of risk defence.

Seventh Line of Defence: If a negligence claim/lawsuit is filed, applicable liability insurance will provide a defence. In addition, if a facility is found liable for negligence, liability insurance will pay for the damages up to the amount of coverage allowed in the policy, thus protecting the financial assets of the facility. Both general and professional liability insurance should be considered to provide this protection.

Managers

Building layers of defence into a risk management framework will aid in providing a foundation for a thorough risk management plan, ensure the risk management plan is carried out effectively, that compliance with the law is maintained, prevent medical emergencies from occurring, help defend staff and the facility in the event of a medical emergency, that protective legal documents (like waivers) are used and that relevant liability insurances are in place.

Employees or Contractors

As an employee or contractor, the layers of defence that management build into the risk management framework in your organisation, will help reduce any liability for negligence you may be exposed to if a medical emergency occurs in the workplace.

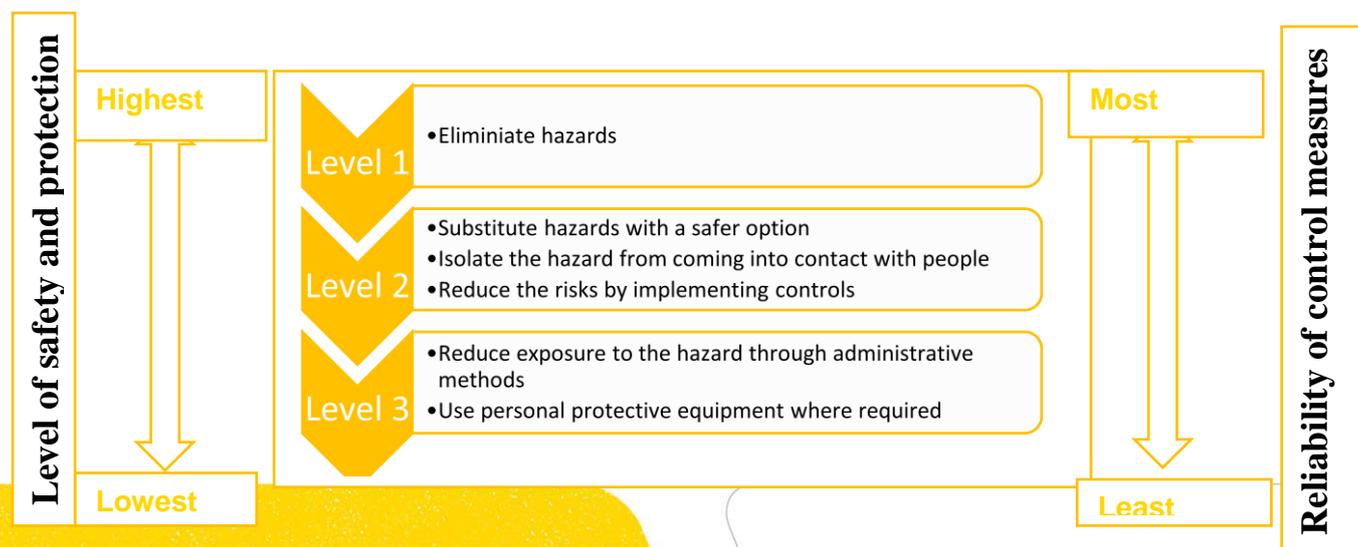
2.6 The Safe Work Australia Code of Practice

Safe Work Australia was established in 2009 as a government authority. It is a national, policy-making agency whose purpose is to improve work health and safety. The Safe Work Australia Code of Practice on how to manage work health and safety risk is found under section 274 of the *Work Health and Safety Act* (WHS Act). A code of practice applies to anyone who, in the circumstances described by the Code, has a ‘duty of care’. Specifically, the Code “provides practical guidance for persons who have duties under the WHS Act and Regulations to manage risks to health and safety”.⁸⁰ A duty is placed on persons conducting a business or undertaking, including employers, self-employed, principal contractors, people with management or control of a workplace, designers, manufacturers, importers and suppliers of plant, substances or structures that are used for work.

This Code applies to all types of work and all workplaces covered by the WHS Act. Other approved codes of practice should be referred to for guidance on managing the risk of specific hazards.⁸¹ Other Codes of Practice potentially applicable to fitness businesses include *First Aid in the Work Place*⁸² and *Managing the risk of Falls at Workplaces*.⁸³

The Code sets out a four step framework for managing risks:⁸⁴

- Hazard identification – examine the operation of the fitness environment and work out what hazards have the potential to cause harm. This would include, but not be limited to, examining the actual work environment, the equipment used, tasks undertaken and method of performance.
- Risk assessment – what sorts of harms could occur as a result of the hazard? The seriousness of the harm (i.e. how many people, who might be affected and for how long) and the likelihood of it happening should be assessed.
- Control risks – Put into place measures that can control risks (such as safe work procedures or training), which are as reasonable and as practical as possible considering the circumstances. Risks can be ranked from high to low. It is suggested that a person who is managing risk under the WHS Regulations should work through a hierarchy as follows:
- Review the control measures – Ensure the control measures are working as planned. This may be undertaken for example if a new risk is identified, before a change in the workplace occurs (such as a new piece of equipment being installed), or if a consultation shows that a review is necessary. Record keeping is important so that control measures can be reviewed and improved.



Managers

Consultation with staff and employees is important (in fact, under the WHS Act consultation is mandatory) for the successful implementation of this framework. Depending on the size of the organisation, consultation could involve surveys with employees and contractors, or face to face interviews to find out what health and safety issues they may have encountered in the workplace but have not reported for example. There are optimal methods of consulting (note the use of nominal group technique in the research methodology outlined above – this is a technique that provides rigorous data). Consultation throughout each of the four steps will enhance organisational uptake and involvement.

Employees or Contractors

The Safe Work Australia Code of Practice is applicable to all fitness industry professionals. The WHS Act and Regulations state that you have a duty to manage risk, by doing whatever you can to eliminate risks as far as possible.

2.7 Risk management approaches

Having considered four frameworks aimed at managing risk, we now discuss an approach to the risk management decision-making process. Professor JoAnn Eickhoff-Shemek⁸⁵ outlines four steps.



The first step is to know the laws, regulations, standards and guidelines that apply to the fitness sector (this Manual is an attempt to summarise that information). This material can be placed in a hierarchy of importance. At the apex is the law: the statutes and case law that describe the legal obligations owed to clients by fitness businesses and fitness professionals. Next are the Fitness Industry Codes, which, as noted before, have legal force in some jurisdictions but not in others. Even in those jurisdictions where the Fitness Industry Codes are not mandatory, they identify best practice that should be followed. Following this, standards and guidelines are published by fitness professional organisations (such as Fitness Australia and Sports Medicine Australia). Equipment manufacturers and other stakeholders

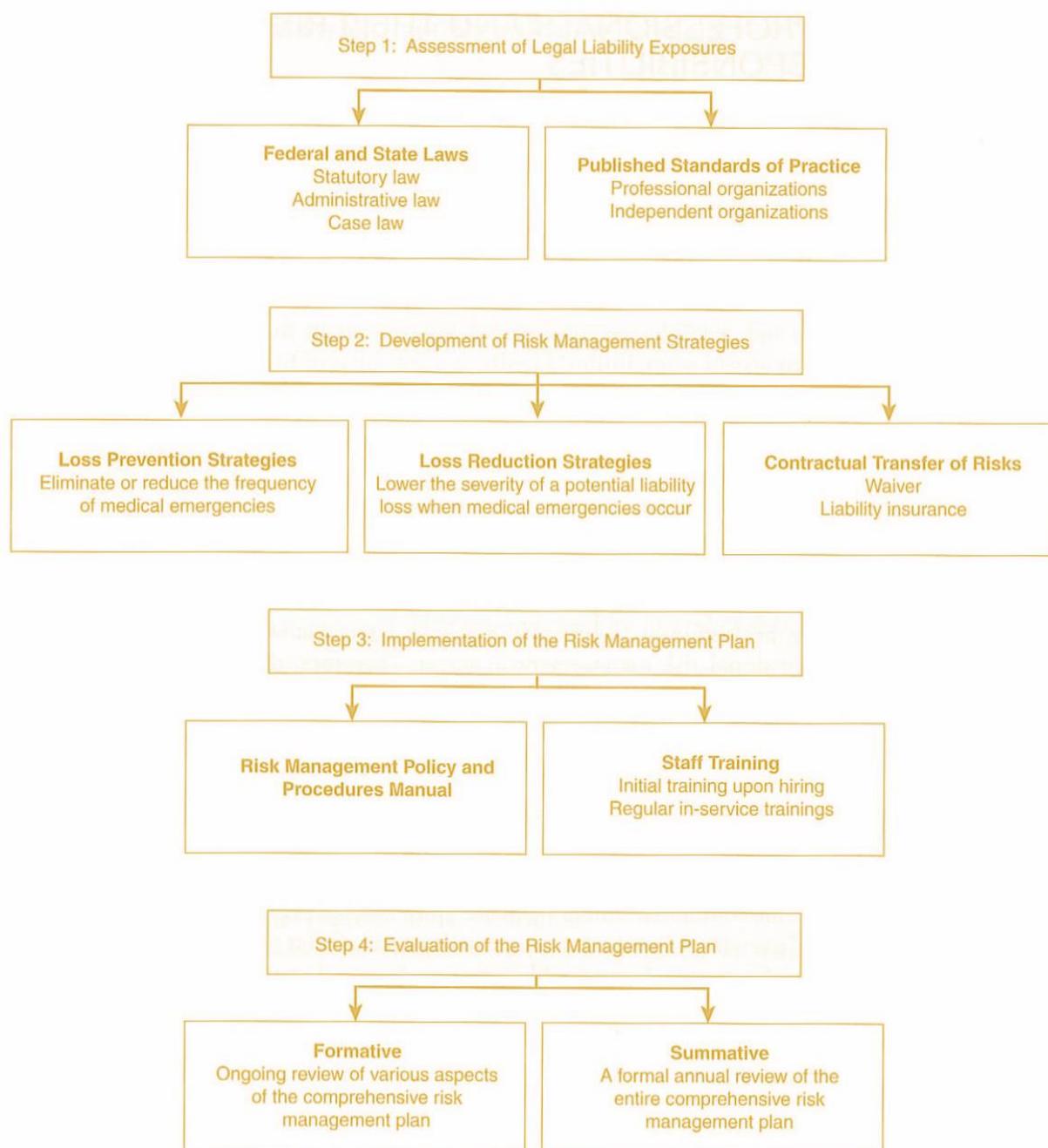
publish standards and other relevant material that can be incorporated into the daily operations of fitness business and professionals. Research on medical and injury risk management is constantly being published, and informs the risk management task.

Step two is to develop risk management strategies. Summaries of a number of different approaches are set out above. In the fitness industry context these strategies will include measures that: assist to reduce the frequency of medical emergencies occurring, called loss prevention, such as undertaking pre-exercise screening; lower liability losses, called loss reduction, such as staff members being trained to provide appropriate emergency care and manage contractual transfer of risks, such as having waivers in place.

Risk management strategies often require the development and implementation of documentation. Use of these documents shows your adherence to the law and the standard of care you show for your clients.

The third step is to develop a repository of policies and procedures such as a Manual where all risk management strategies are documented for personnel to access. For instance, the manual may contain a step-by-step procedure for the pre-exercise screening process. The policy and procedures manual should be used by all staff and for new staff inductions.

Step four details the final evaluation of the risk management plan. It considers evaluation undertaken throughout the year on an as needed basis (formative evaluation).⁸⁶ Additionally, a formal annual review of the entire risk management plan should be undertaken (summative evaluation).⁸⁷ Both these types of evaluation allow for revisions to the risk management plan to be undertaken, facilitating continual improvement. The components of the steps described are depicted in the chart below.



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Managers

As a Manager (particularly in a larger fitness business), you may wish to establish a risk management advisory committee, to help guide the advancement of the four steps outlined in the risk management process set out above. The risk management advisory committee could be comprised of experts such as lawyers, insurers, medical professionals and exercise scientists.

Employees or Contractors

As an employee or contractor, you may wish to be involved in your organisation's risk management advisory committee, so you can provide input into the development of the organisation's risk management strategy and plan. You will also want to understand the laws, regulations and published standards of practice applicable to your profession, to ensure that your work is safe.

2.8 Elements of risk

Risks arise from many different sources. These include, but are not limited to; the underlying causes of risk (such as the weather which could affect clients' training in group, outdoor exercise classes), an event or incident occurring (like an injury being triggered and affecting training), the outcome of consequences, general uncertainty as to whether risk will arise, and the actual occurrence rate of events which lead to consequences.⁸⁸

2.8.1 Assessing Risk

In a practical sense, assessing risk in a fitness business means detecting potential hazards that may occur as a result of providing fitness services. Risk assessment takes place at every part of the risk management process: when identifying risk, undertaking an analysis of practices designed to remove or reduce risks to acceptable levels, and when following up with evaluation.

2.8.2 Practical approaches to assessing risk

There are various practical approaches that have been documented to help an organisation assess risk. Some of these include: activity flowchart development, analysing internal incident data or sector data, using checklists, preparing fault-finding diagrams, and research using focus groups, interviews and surveys.

Once risks have been identified, the next step is to implement one or more of the previously mentioned, practical approaches to assessing risk. A particularly useful and well researched method is to employ a simple nomogram that produces a risk rating taking into account the frequency and possible consequences of various activities. Originally developed by Dr Fine in the 1970's this technique has been simplified by Risk Logic/Fitness Australia.⁸⁹ The simplified version is called Risk Assessment for Fitness Businesses and has been included in Appendix A of this publication. Risk Logic and Fitness

Australia have also Developed risk rating table (outlined in AS/NZS ISO 31000:2009 Risk Management Principles and Guidelines) so that risks can be located and addressed, with the objective of dealing with risks in order of priority. Risk rating is ascertained by undertaking an assessment of:

- the magnitude of the consequences of a risk, and
- the likelihood/possibility that those consequences will occur

The risk rating table is provided below.

1 Estimate of Consequence (Severity of Impact)		
Level	Descriptor	Examples of Description
1	Insignificant	Minimal or no injury; or very low financial loss
2	Minor	First aid treatment; minor medical treatment but no lost time; or minor financial loss
3	Moderate	Medical treatment required; lost time injury; less than four weeks off work
4	Major	Extensive or multiple injuries; major back, neck, arm, leg, face or internal injury; extended absence of one or more employees; external investigation by WST; lost time over one month
5	Catastrophic	Death; or permanent or severe health effects for one or more employees; public/media outrage; potential for huge financial loss

2 Estimate of Likelihood		
Level	Descriptor	Examples of Description
1	Rare	The event may occur only in exceptional circumstances; rare exposure to risk; very low probability of damage
2	Unlikely	The event could occur at some time; infrequent exposure to risk; low probability of damage; little or no history at this site
3	Moderate	The event should occur at some time; regular or occasional exposure to risk; moderate probability of damage
4	Likely	The event will probably occur in most circumstances; frequent exposure to risk; substantial probability of damage; some history of occurrence
5	Almost certain	The event is expected to occur in most circumstances; constant exposure to risk; high probability of damage; clear history of occurrence

3 Estimated Level of Risk (Risk rating = Consequences x Likelihood)						
		Consequences				
Likelihood		Insignificant 1	Minor 2	Moderate 3	Major 4	Catastrophic 5
Rare	1	1 L	2 L	3 M	4 S	5 S
Unlikely	2	2 L	4 L	6 M	8 S	10 H
Moderate	3	3 L	6 M	9 S	12 H	15 H
Likely	4	4 M	8 S	12 S	16 H	20 H
Almost certain	5	5 S	10 S	15 H	20 H	25 H

L = LOW risk; acceptable risk perhaps, manage by routine procedures
M = MODERATE risk; attend to in medium term, allocate management responsibility
S = SIGNIFICANT risk; attend to in short term, senior management attention needed
H = HIGH risk; immediate action detailed research and management planning required at senior levels

The above table is reprinted with permission from Fitness Australia and is found at [http://www.fitness.org.au/visageimages/2012_Online_Forms/Work Health & Safety Guidelines August 2012.pdf](http://www.fitness.org.au/visageimages/2012_Online_Forms/Work_Health_&_Safety_Guidelines_August_2012.pdf)

Managers

As a manager of a fitness business, you may wish to initiate the development of risk assessment checklist or table if you don't have one already, or evaluate the checklist you have in place to ensure its currency and relevance. The health and safety of employees and clients is of paramount importance and is the responsibility of the manager. Your leadership in undertaking risk assessments to identify, assess, control and monitor workplace risk hazards will assist in building a safe place of work and safe fitness environment.

Employees or Contractors

As a fitness professional, best practice means taking a pro-active approach to risk management in order to ensure you meet your legal obligations.

2.9 Risk Management Policy

A risk management policy is a statement that guides management and personnel by setting requirements that need to be met. The document can be brief but should set out the organisation's objectives in respect to its intention to manage risk. The statement should aim to provide:

- Reasons for the organisation's commitment to managing risk.
- A risk management policy that addresses organisation's objectives and policies.
- Responsibilities and accountabilities for managing risk.
- Measures to deal with conflicting interests.
- Resource allocation to ensure those accountable and responsible for managing risk can act accordingly.
- Details on measuring and reporting on risk management performance.
- An assurance to undertake periodic reviews and improve the risk management policy and framework, in response to changes in circumstances.

As with any policy, in order to be effective, the risk management policy should be well communicated both within the organisation and to any relevant stakeholders.

Managers

As a Manager, the development of a risk management policy demonstrates a commitment to providing a safe work environment for staff, employees, contractors and clients. Effective communication and consultation with staff and contractors about the policy will enable personnel to be better aware and engaged with health and safety matters in the workplace.

Employees or Contractors

As an employee or contractor working in the fitness industry, if your manager hasn't provided you with a copy of the risk management policy, you should request one, to ensure you are aware of your responsibilities and accountabilities.

A risk management policy's headings may include: Background, Policy, Responsibilities, Stakeholders, Monitoring and Review and Further Information. One example of a risk management policy statement can be found at http://www.starmites.com.au/pdf/policies/risk_management_policy_5.pdf

2.10 Responsibility and accountability

To develop a strong risk management culture it is necessary to ensure:

- Accountability – Determine who is accountable for developing, implementing and maintaining the risk management framework.
- Authority – Identify those who have the authority (and accountability) to manage risk.
- Responsibilities – Assess the risk management responsibilities of personnel within the organisation at all levels.
- Performance measurement – Set up internal and external reports on risk management performance and processes for escalating matters when needed.
- Recognition and reward – Establish a system for recognising and rewarding personnel for their commitment to risk management in order to encourage organisation-wide involvement.

Depending on your business structure, it will typically be the case that senior management will take responsibility for determining policy, ensuring that an organisation acts in the best interests of staff and clients and ensuring that legal requirements are met. The WHS Act imposes a duty on officers of organisations to ensure that PCBU's fulfil their WHS duties. Section 27 of the WHS Act states (in part);

27 Duty of officers

If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

Managers

In relation to risk management senior management should:

- Establish the policy and criteria for managing risk in the organisation.
- Allocate adequate resources to ensure effective risk management can be undertaken.
- Monitor and manage risk. This should include assessment of risk management implementation as part of performance reviews.

Having undertaken these tasks, the Board or senior management should have quality controls in place and the organisation's risk management performance should be enhanced. 'Due diligence means taking 'reasonable steps that will support a health and safety culture, accountability, the allocation of resources and development of appropriate policies',⁹⁰ According to the Australian governmental agency Comcare, 'in demonstrating due diligence, section 27 of the WHS Act requires management to show that reasonable steps have been taken to:

- Acquire and update their knowledge of health and safety matters
- Understand the operations being carried out by the person conducting the business or undertaking (PCBU) in which they are employed, and the hazards and risks associated with the operations
- Ensure that the person conducting the business or undertaking has, and uses, appropriate resources and processes to eliminate or minimize health and safety risks arising from work being done
- Ensure that the person conducting the business or undertaking has appropriate processes in place to receive and respond promptly to information regarding incidents, hazards and risks
- Ensure that the person conducting the business or undertaking has, and uses, processes for complying with duties or obligations under the WHS Act'.⁹¹

Employees or Contractors

As an employee or contractor you will need to ascertain what responsibilities have been assigned to your particular role and to whom you report in relation to risk management. You may require instruction, training or supervision to ensure you can contribute to the effective management and monitoring of risk in the organisation.

2.11 Integration and implementation

In order for risk management to be adopted by everyone within the organisation it will need to underpin all business practices and processes in a way that is effective, efficient and relevant. As mentioned, it

should be part of policy, strategic plans and management processes. Appropriate resources will very often need to be allocated to ensure that risk management can be well integrated. Additional resources may need to be allocated to information systems, procedures, steps in the risk management process and training programs, for example. Communication and reporting mechanisms both internally and externally are equally important to ensure well-integrated risk management.

Managers

As a Manager, you should establish internal and external communication and reporting mechanisms to encourage risk management integration by all personnel and stakeholders. This may include communicating the risk management framework, setting up reporting procedures on the framework's effectiveness and outcomes, establishing processes for consultation with internal and external stakeholders, reporting on compliance with legal requirements and providing feedback to internal and external stakeholders.

Employees or Contractors

As an employee or contractor, integrating the organisation's risk management requirements into your work practices could include one or more of the following; reading and understanding the risk management policy, participating in team meetings concerning risk management and being aware of the organisation's risk management framework.

In terms of implementing a framework for managing risk, an organisation should consider:



If your organisation already has a framework for managing risk, a review should be considered to ensure it reflects the AS/NZS ISO 31000:2009 and the current needs of the fitness business in its environmental context. A review may include examination of current risk management policy, risk management systems in place, integration of risk management principles across the organisation, legislative compliance and resource constraints.

Risk management should be applied at all levels and become the daily practice of the business.

2.11.1 Management of risk

Managing risks in your fitness facility involves the process of modifying or controlling risks. It will involve considering risk management options and then balancing costs of implementation (both in terms of time and financial outlays) with the benefits gained from managing the risk. Risk management options may include:

Options	Explanation
Accept	Based on an informed decision, risk is accepted. It involves allowing an outcome to occur without trying to prevent it, and may occur because an efficient way of reducing the risk may not be apparent in the situation. As such, this option usually applies to 'low risks.'
Avoid	This option aims to avoid the possibility of risk occurrence, such as not continuing with an activity or developing waivers for example.
Control	Taking actions to reduce the likelihood of an incident happening or the consequences, by identifying what activities are prone to causing certain consequences. By controlling or modifying the features of an activity, the consequences can be experienced on a less frequent basis.
Change	Undertaking investigation to determine what range of consequences are possible, and having contingency plans in place so that the potential consequences of an event can be modified or changed.
Reduce	Actively lowering risk through a series of activities including removing the source of risk.
Transfer	Sharing or moving the risk from one party to another, allows risk to be minimized such as using an insurer for example. Remember that transferring risk does not mean the risk will go away.

A number of management options are often used in combination to effectively manage risk. In order to implement this effectively, a risk management plan may be needed. The risk management plan considers the priority of the risk and how risk management will be implemented, simply put it is a plan of how you will respond to potential risks. The management plan should include:

- Accountabilities – including who will be responsible for implementing the plan and who will approve it.
- Actions – showing what actions will be taken and what will they involve.
- Performance measures – to ensure the outcome is in line with what was intended.
- Program – detailing treatment priority timeframes in a schedule.
- Rationale – including the anticipated benefits and how this will affect the risk.
- Resources – mapping out financial and time resource requirements.
- Reporting – documenting requirements and monitoring to ensure effectiveness.

A risk management plan can be documented simply in a tabular format including headings such as; risk in priority order from the risk register, risk management options, preferred options, risk rating after treatment and so on. One example of a risk management plan using these types of headings can be found at <http://www.leoisaac.com/ris/top455.htm>

A risk management plan can and should be used in conjunction with a risk register, which is a log used to document all risks identified by an activity or organisation, it may include such items as the probability of risk, the impact or consequences of risk, counter measures and whether to treat the risk or not.

2.11.2 Examples of risk management options

Two case examples of how risk could be managed using the options outlined above, are now presented.

Case Study Example: A fitness facility wants to expand its services and considers offering spin and aerobics classes in areas of the facility which can be modified into two suitable rooms. The flooring of the rooms is polished wood and rooms are of a moderate size. The facility decides to control risk by modifying the floor surfaces in each of the rooms, limiting the number of exercise bikes placed in the spin class room, and capping the class sizes to a maximum of 15 participants. Controlling the risk in this manner, the instructor may more effectively supervise a smaller class size and the chance of an incident occurring, such as a participants bumping into each other, is reduced.

Case Study Example: In a multi-level gym, the free weights area is located on level two, in a room off to the side. Using a staircase is the only way to access level two and three of the gym. Not only is it difficult for staff to supervise all levels of the gym completely but it is difficult to see inside the weights room from the main gym floor on level 1. If an incident occurred in the free weights area, such as someone dropping a heavy weight and injuring themselves, it may be some time before staff were alerted and were able to respond. By introducing a roster for staff to visit each level of the gym at regular intervals, installing CCTV cameras on each level and in a variety of locations, installing phones on each level to alert fellow staff members and the emergency medical service, the direct consequences of not being able to respond to an incident quickly would be reduced. Also, ensuring all staff visiting each floor level are trained in first aid/CPR, may positively change/affect the response time and direct consequences if an emergency was to occur.

Managers

General communication can be a form of risk management in itself. For instance in your staff newsletter and social media, you may wish to make personnel aware of potential hazards in the facility and provide information on safe work practices.

Employees or Contractors

Should you be assigned risk management responsibilities within your organisation, it is important that you feel comfortable with the tasks that have been assigned. Make sure you receive training, if required, to undertake set tasks and that you understand the timeframes and correct reporting procedures for undertaking what has been requested. Where possible, have a colleague who works with you in this area, so that a 'back up' member of staff is available if you are not.

2.11.3 Practical approaches to assessing risk

Fitness businesses, just like other businesses, need to operate within budgets in order to remain financially viable. Therefore, at some point there is a trade-off that needs to be made between the costs and benefits of managing risk. A cost benefit analysis, calculates the benefits and costs of managing a risk. It determines if risk management is justifiable or reasonable, by looking at the state that will occur if management takes place. It also provides a basis for comparing risk management options. This involves examining the expected cost of each option against the total anticipated benefits, to see if the benefits are greater than the costs, and if so, by how much. A cost benefit analysis will also look at the time that it takes to manage the risk and organisational culture considerations, such as the potential management of a particular risk leading to a misinterpretation that the risk has been eliminated and staff relaxing their behaviour towards controlling risk.

2.14 Monitoring and review

Ensuring that risk management continues to support the organisation's performance and that it is effective, an organisation will need to: set performance measures, measure progress in respect to alignment with the risk management framework, report on how well risk management is being undertaken and review the effectiveness of the risk management framework. The difficulty here is that accidents where someone is injured are statistically improbable events. Accordingly, there can be and usually is considerable latency or lead-time between doing or failing to do something to mitigate risk and seeing the results-be they positive or negative. For every injury requiring hospitalisation there are a number of near misses that are orders of magnitude higher. For arguments sake, having regard to fatalities, some evidence indicates that there are thousands of near misses for each fatality. This may be conceptualised and is often referred to as the iceberg theory: most of the iceberg cannot be seen. More precisely, it is referred to as Heinrich's Law. Bearing this in mind it is necessary to record incidents that involve near-misses or failures to follow documented safety procedures to effectively monitor risk management.

Monitoring and review will need to consider both internal and external factors affecting the organisation, for example changes to the law (an external factor) could result in the risk management framework needing modification. By undertaking ongoing monitoring and review of the framework, the opportunity to continually improve risk management programs arises. Any data collected during the monitoring process will need to be carefully analysed to ensure that the review is well documented and proves to be a valuable input into the risk management plans of the fitness business. When monitoring and reviewing activities, priority needs to be given to risks which are classified as 'high risks', controls which are relied upon to modify risk (to ensure they don't fail), unfavourable audit findings, environmental factors which change often (to ensure these factors are contingency planned) and developments in technology which could be used to more effectively manage risks.

Managers

Embedding monitoring and review activities into the organisation may require staff to formally undertake regular checking and monitoring of equipment, activities, procedures and protocols in the facility. It may also require reviews being undertaken by you as a manager and your line managers. Additionally, internal and external auditing processes can help identify any issues and improve performance in this area.

Employees or Contractors

Contributing to regular monitoring and reviews in terms of risk within your facility, not only helps create a safe workplace for you, but a safe environment for your clients too. It allows you to contribute towards best practice standards and continual improvement, growing your skills in the area of risk and reflecting positively on you as a professional in the industry.

2.15 Key concepts

A risk management framework provides a basis for effectively managing risk. When designing a risk management framework, ensure that the internal and external environmental factors have been evaluated, taking into account how they affect the organisation's objectives. The National Quality Assurance Framework has extensive information regarding risk management and suggestions for fitness organisations to implement in their risk management framework.⁹²

The risk management pyramid illustrates the concept of a risk management framework creating layers of defences that minimise risk and legal liability. These layers are in order of importance, with the most important concept being a professional environment and the least important, or concept of last resort being that of Liability Insurance.

Safe Work Australia's *Model Code of Practice-How to manage work health and safety risks code of practice* has been established to improve work health and safety and applies to anyone who has a duty of care. This duty is placed on persons conducting a business or undertaking including employers, self-employed, principal contractors, management or those in control of a workplace.

Having considered the different frameworks aimed at managing risk, how to approach risk management considers the following steps:

1. Assessment of legal liability exposures
2. Development of risk management strategies
3. Implementation of the risk management plan and
4. Evaluation of the risk management plan.

There is no one element of risk and as a result, you must be constantly assessing the potential risks in your business by detecting potential hazards. Fitness Australia together with Risk Logic have created a table which compares the possibility of an event occurring against the severity of the consequence of it occurring to give an event a risk rating. The higher the risk rating the more important it is for steps to be taken to mitigate the risk.

Having a risk management policy is useful in setting requirements which need to be met to guide management and personnel; it can be brief but should set out the organisations objectives in respect to its intention to managing risk.

When endeavouring to manage risk, it is often management's responsibility to ensure that there is a certain level of competency within the organisation and that personnel can act with authority and that they are accountable.

Managing risks identified in the workplace will involve considering the different management options and balancing the cost of implementation against the benefits gained by managing the risk. These options are generally - accept, avoid, control, change, reduce, transfer, and not all of these options will be appropriate for each risk due to either their effectiveness or their cost. The use of a cost benefit analysis (that is, comparing cost versus the benefit) to decide which approach is most appropriate should be used when managing a risk.

Risk management is not a once off process, and should be continually monitored and reviewed to ensure that it supports the organisations performance, just as a sales and marketing management are not one-off processes. They need to be monitored and refined to ensure that the business remains viable: so does risk management. The internal and external factors affecting the organisation such as a change in laws could require the risk management framework to be modified. Risk management strategies are developed to ensure there is a process for regularly reviewing and updating risk assessments and that specific actions are put into practice.

2.16 Frequently Asked Questions

- Q. Of the risk management frameworks provided, how do I know which is right for my organisation?**
- A. This will depend on the evaluation of your organisation's external and internal environments. It may ultimately be necessary to modify one of the existing frameworks to deal with any unique risks faced by your particular facility.
- Q. What is the best way to approach risk management?**
- A. As a manager, it is a good idea to establish a risk management advisory committee with independent members to work through the guide outlined at 2.8. For an employee or contractor, it is important to provide management with advice on perceived risks, and to better understand your personal responsibilities and duties.
- Q. Once I have identified a risk in my facility, how do I address it?**
- A. Fitness Australia in conjunction with Risk Logic, has released a risk-rating table. The table can be used to grade and prioritise identified risks, with the result that the highest-priority risks can be addressed sooner. A copy of the table can be found at 2.9.2.
- Q. On a practical level, who should take responsibility for what risks?**
- A. This will change depending on the type of risk and facility, but it is absolutely necessary to ensure that all management and staff are fully informed of the scope of their duties. It is important to communicate on issues of accountability and to seek instructions if you are uncertain about part of the risk management policy to ensure risk is managed effectively at all times.

- Q. As an employee or contractor, what is my role when it comes to risk management? Isn't that something for management?**
- A. As an employee or contractor you are more likely to be aware of the particular risks in your facility, and you are often in a better position to point out shortcomings in policy. It is important that you take a proactive approach to risk management to create a safe environment for you, your clients, and facility users.
- Q. As a facility manager, I am concerned about the time and money involved in implementing risk management frameworks and policies. How much will it cost to manage the risks in my facility?**
- A. The cost of managing risks can be sizable depending on the nature of your facility and the work needed. It is a good idea to undertake a cost-benefit analysis and weigh the expected benefits of reducing risk against the costs and time taken to address the risks themselves. Consider initially, the development of a budget to treat high-risk issues.
- Q. My facility already has a risk management framework in place. Is this enough?**
- A. It is important that risk management is continuously monitored, reviewed and upgraded. For example, this can involve goal setting, performance measurement, and consideration of the changing internal and external environments of the facility.
- Q. In practice, what can I do to ensure my risk assessments are effective?**
- A. It is important to employ structure when dealing with risk. Risk management strategies allow for constant review and specific, practical actions that can be taken to guard against particular risks. There are several topic-specific risk management strategies discussed in later chapters.

Chapter Three

Scope of Practice

3.0 General

Liability in the legal sense is an inclusive term that describes the state of potentially or actually being subject to a legal obligation. Primary liability is an obligation where one person is directly responsible; joint liability is where more than one person is responsible and secondary liability involves the responsibility of another if the party directly accountable fails or refuses to satisfy their obligation.⁹³

Liability arises from failure to take reasonable care. All fitness professionals have a 'duty of care' to their clients when providing instruction or advice, to ensure that reasonable steps are taken so that harm that could reasonably be expected to occur is avoided. Fitness Australia provides policies and guidelines to help registered fitness industry professionals to maintain best practice standards when working with clients. As a fitness industry professional, the potential implications of the terms of 'liability' and 'duty of care' are important to consider when we talk about risk management. Fitness Australia's website states, "If a Registered Exercise Professional is alleged to have breached their duty of care, we will examine their compliance with our standards and guidelines".⁹⁴

3.1 Scope of practice

Fitness Australia's Scope of Practice is one place where fitness industry standards and guidelines can be found. The Scope of Practice is a national position statement that aims to define the scope of practice for Registered Exercise Professionals in Australia. It provides clarity about their role, responsibilities and professional boundaries and reinforces many of the existing exercise professional standards and policies.⁹⁵

Registered Exercise Professionals include personal trainers, gym instructors, group exercise instructors and group exercise leaders. The Scope of Practice provides information detailing the minimum vocational and educational requirements of each, and states what is expected of them as part of their professional obligations. Prominent amongst these is safety and risk management and assessment. All persons working in the fitness industry should be mindful to identify and minimise risks whenever possible.

Other professional obligations of Registered Exercise Professionals include: -

- Pre-exercise health screening for clients.

- Application of first aid to clients where required.
- Fitness assessment and analysis in accordance with knowledge and skill obtained through qualification and/or continuing education.
- Development of safe, effective and appropriate exercise programs tailored to client or group needs.
- Exercise delivery inclusive of demonstrating, instructing, monitoring, reviewing and modifying program content including technique, method and progression.
- Working within professional limitations to provide basic healthy eating information and advice through the application of nationally endorsed nutritional standards and guidelines.
- Provision of general nationally endorsed public health information that will educate and support positive client health outcomes.

Registered Exercise Professionals must also agree to abide by the Fitness Australia Code of Ethics.

Managers

As a manager, you should ensure that your employees meet the minimum vocational and educational standards found in the Scope of Practice, and that they comply with the appropriate professional standards applicable to their positions.

Employees or Contractors

As an employee or contractor, you should make sure you meet the minimum vocational and educational standards set out in the Scope of Practice. You should familiarise yourself with Scope of Practice and comply with it in all of your professional activities.

3.2 Good mental health in gyms

People take up fitness careers and engage fitness activities to improve their health, well-being and appearance. One important aspect of good health that seldom attracts attention in the fitness research literature is good mental health. Yet it is widely recognised that mental health issues will affect almost half of the Australian population at some stage in their life, and that mental health issues are experienced by a very significant proportion of the Australian population generally.

So what can fitness businesses and fitness professionals do to help ensure their colleagues and clients can undertake their work and fitness activities in a healthy environment?

More research about mental health issues in the fitness industry is required, but the material that follows points to the need for fitness business owners and fitness professionals to develop risk management

protocols and referral pathways for their colleagues and clients who are experiencing mental ill health. Three topics shall be briefly considered: first, what we know about the prevalence of mental health issues in the general population; second, a case study of how depression is managed in a particular professional group that yields significant findings for the fitness industry; and third, an overview of recent research relating to mental illnesses associated with the pathological overuse of fitness facilities: muscle dysmorphia and anorexia.

One piece of research which is relevant to mention, though its title may cause one to leap to the incorrect conclusion that it is irrelevant, is a report by the Brain and Mind Research Institute of the University of Sydney called *Courting the Blues: Attitudes towards depression in Australian law students and legal practitioners*.⁹⁶ As the title indicates, this was a study of depression in the legal profession. Remarkably, 40% of the respondents in a large study of 2421 law students (741), solicitors (924), and barristers (756) in New South Wales indicated that they were or probably or definitely likely to seek the assistance of a personal trainer, exercise manager or relaxation instructor if they thought they were experiencing depression.⁹⁷ The study also gauged the experience of respondents who had experienced depression, and found that 12% of respondents had received assistance from their personal trainer, exercise manager or relaxation instructor.⁹⁸ This research also found the majority of law students, solicitors and barristers believed to be seeking assistance from a person who is not a doctor, psychologist, psychiatrist or counsellor would result in no improvement (25.9%) or that they might feel worse (35.6%).

The same research produced the interesting result that 97.1% of law students, solicitors and barristers believed it would be helpful for their depression to become more physically active and 82.5% believed it would be helpful to change their diet. These lifestyle changes were seen as the most helpful, and more helpful than taking anti-depressants or, remarkably, undertaking either brief or long-term counselling psychotherapy.

This data is telling us that, at least with this group of professionals, people:

- Are experiencing depression;
- See more physical activity as helpful;
- Seek assistance from fitness professionals;
- And while they acknowledge that they are most likely to receive assistance from a qualified professional such as a psychologist;
- A significant proportion of people seeking assistance for depression are receiving assistance from fitness professionals.

Of course it must be acknowledged that this is just one study about one professional group, and more research is required about the topic before one can reach definite conclusions. However, there is no doubt that these findings raise “scope of practice” issues for fitness professionals. Fitness facilities are

not mental health services and do not hold themselves out to be. Rachel Clements, Director of Psychological Services for the Centre for Corporate Health, argues the mental health of the workforce is 'a significant business risk that is vital to address.'⁹⁹ The Mental Health Council of Australia has reported that 45.5% of the Australian population will experience a mental health disorder at some point in their lifetime.¹⁰⁰ It is estimated that the failure to provide early intervention strategies for employees at work with mental health conditions can cost Australian businesses over \$6.5bn a year.¹⁰¹

Workers compensation statistics relating to claims for psychological injury are increasing in frequency, amount and size.¹⁰² For workers who do not make claims, an employee's mental health issues can be manifest in high turnover, high absenteeism, 'presenteeism' (where someone is physically present but psychologically absent, poor performance, customer complaints, workplace conflict, increases in accidents, and episodes of bullying and harassment.¹⁰³ Denial, fear of reprisal or negative consequences for careers, fear of upsetting or burdening orders and even shame and guilt can cause employees to avoid discussing their mental health with their employer.¹⁰⁴ It has been recommended that mental health awareness and strategies for ensuring mental health in workplaces needs to be embedded into the very fabric of organisations, 'including into human resource strategies teaching and development, and through to ongoing wellbeing programs.'¹⁰⁵ WHS legislation requires employers to identify any foreseeable stressor or risk that may arise from employment that has the potential to harm the health and safety of an employee or other person, and once a mental health risk is identified, the employer has a duty of care to take action to assess and manager the risk.¹⁰⁶

Fitness industry code of practice

Another source of industry standards and guidelines is the Industry Code of Practice.

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, or under the *Commonwealth Competition and Consumer Act* ("CCA"). There is at present no federal Fitness Industry Code under the CCA.¹⁰⁷

There are currently seven (7) Fitness Industry Codes of Practice in place across Australia covering the jurisdictions of the States and Territories of Australia with the exception of the Northern Territory. Some of the Codes of Practice have elements that are directly linked to government regulations.

These Codes of Practice have been developed in various jurisdictions throughout the last decade and have not been subject to significant review. During this time, the fitness industry has undertaken significant expansion, growth, change and diversification. As a result, the Industry Codes of Practice are out-dated and in need of reform.

Fitness Australia is currently in the process of revising and drafting a proposed uniform Code of Practice. The purpose of the Code revision process is:

1. To seek national consistency, uniformity and harmonisation of industry standards, regulations and guidelines across all jurisdictions in Australia; and

2. To ensure that Code is relevant across all sectors of the contemporary industry and that it provides information about the standards of conduct that should apply across the range of services, business models and settings that consumers access).¹⁰⁸

The first step in this review process has been the development of a set of overarching Principles that constitute best practice within the fitness industry. These Principles will be underpinned by a series of guidelines and recommendations.

Principles based guidance will sustain the diversity of current State and Territory regulatory environment for fitness businesses, but with better and more effective outcomes. This will enable Fitness Australia to increasingly support businesses to undertake incremental quality improvement processes that are outcome focussed rather than detailed rules prescribing how outcomes must be achieved.

Once the Principles are established, Fitness Australia will seek to harmonise the State and Territory Codes of Practice to achieve consistency across jurisdictions, especially in relation to the fair trading regulations that are specific to the fitness industry.

3.2.1 State and Territory codes of practice

All states and territories other than the Northern Territory have adopted Fitness Industry Codes. While each contains similar provisions, there are some significant differences. The Australian Capital Territory ('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.¹⁰⁹

These Codes set out to ensure:

- Appropriate standards of training are maintained within the fitness industry.
- Consumer confidence in the industry is promoted.
- Services provided by the industry are provided ethically and in the best interests of consumers.
- The fitness industry is supported.
- People are encouraged to participate in fitness activity.
- Rights and obligations between suppliers and services are established.
- Suitable procedures to handle complaints resolution are developed.

Managers

As a manager, you are likely to be considered a supplier of fitness services, which include fitness assessments; the development of fitness and exercise programs; the instruction and/or supervision of an individual or group fitness program; and/or the provision of fitness equipment for use by clients. As such, you have a duty to comply with all of the requirements found within the Code of Practice. Failure to comply can lead to penalties under the relevant legislation, and also expose you to individual liability should you be sued.

Employees and Contractors

The Code of Practice is primarily intended for suppliers of fitness services, who are not employees. It does apply to managers, owners and individual contractors. If you are a personal trainer working with clients, you are a supplier of fitness services and obliged to comply with the Code. As an employee, while you may not be obliged under it, you should still familiarise yourself with the Code, as it is evidence of best practice. You can assist your managers and the contractors who provide services to your clients to comply with their obligations under the Code. This provides for a safer fitness environment.

While the Industry Code of Practice does not contain specific language addressing discrimination, as part of the Standards of Professionalism, fitness professionals are expected to comply with the Fitness Industry Code of Ethics (discussed above), which proscribes discrimination in the industry.

3. Professionalism

3.3 A supplier shall ensure that Registered Exercise Professionals are compliant with the Code of Professional Ethics any other applicable industry standards and guidelines; (Fitness Industry Code of Practice)

Links to State/Territory Codes of Practice

State	Weblink
ACT	http://www.fitness.org.au/visageimages/act_fitness_industry_code_of_practice.pdf
NSW	http://www.fitness.org.au/visageimages/nsw_fitness_industry_code_of_practice.pdf
QLD	http://www.fitness.org.au/visageimages/qld_fitness_industry_code_of_practice.pdf
SA	http://www.fitness.org.au/visageimages/sa_fitness_industry_code_of_practice.pdf
TAS	http://www.fitness.org.au/visageimages/tas_fitness_industry_code_of_practice.pdf
VIC	http://www.fitness.org.au/visageimages/vic_fitness_industry_code_of_practice.pdf
WA	http://www.commerce.wa.gov.au/consumerprotection/PDF/Publications/Fitness_industry_code_of_practice.pdf



The following table summarises the basic differences between the State Codes: (Table taken from Joachim Dietrich’s report for the AFIRM Project, *Liability Arising Under Contract and ACL*, pp 22-30)

COMPARATIVE OVERVIEW OF FITNESS INDUSTRY CODES IN EACH AUSTRALIAN JURISDICTION

Area	Type	Scope	Non-compliance consequences
ACT	Mandatory: <ul style="list-style-type: none"> ■ Fair Trading (Fitness Industry) Code of Practice 2009 ('the Code') ■ s23 Fair Trading Act 1992 (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 section 36 <i>Act</i>.¹¹⁰ ■ 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.¹¹¹ If an undertaking is not given, or is not met, then the Commissioner can apply under section 25 of the Act for relevant orders, a failure to comply with which can lead to penalties (subs (5)).

Area	Type	Scope	Non-compliance consequences
NSW	<p>Voluntary:</p> <ul style="list-style-type: none"> ■ The NSW Fitness Industry Code of Practice ('the Code') ■ Members of Fitness NSW¹¹² 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 <p>Requirement to maintain public liability insurance and professional indemnity insurance;</p> <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.

Area	Type	Scope	Non-compliance consequences
VIC	Voluntary: <ul style="list-style-type: none"> ■ The Fitness Victoria Business Member Code of Practices ('the Code') ■ Financial members of Fitness Victoria¹¹³ must comply with the Code BUT membership is optional. 	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; ■ 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>	<ul style="list-style-type: none"> ■ Review by the Executive Committee [<i>presumably of Fitness Victoria – that is how section 46 of the Code reads but it does not 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: section 47 of Code.¹¹⁴ The Committee will seek to resolve the dispute by counselling and assisting the fitness centre with compliance. ■ 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 section 53.

Area	Type	Scope	Non-compliance consequences
TAS	Voluntary: <ul style="list-style-type: none"> ■ The Fitness Tasmania Code of Practice for Fitness Facilities ('the Code'). Business members of Fitness Tasmania¹¹⁵ must comply with the Code BUT membership is optional. 	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; ■ 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>	<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 censure a non-complying Supplier; ■ Suspension or expulsion of membership of Fitness Tasmania.
QLD	Mandatory: <ul style="list-style-type: none"> ■ Fair Trading (Code of Practice – Fitness Industry) Regulation 2003 ('the Code') ■ s88A Fair Trading Act 1989 (Qld) ('the Act') 	Scope does not deal with safety issues, but rather matters such as <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 <i>Act</i> on remedies for non-compliance with an Industry Code have been omitted from the <i>FTA</i>, seemingly inadvertently. See above n XX.</p>

Area	Type	Scope	Non-compliance consequences
WA	Mandatory: <ul style="list-style-type: none"> ■ Fair Trading (Fitness Industry Code of Practice) Regulations 2010 ('the Code') ■ s 42 Fair Trading Act 2010 (WA) ('the Act') 	Scope does not deal with safety issues, rather matters such as: <ul style="list-style-type: none"> ■ sales tactics, misleading advertising; ■ Disclosure ■ Requirements for member-ship agreements, including 48 hour cooling off period ■ Termination of member-ship 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	Mandatory: Fair Trading (Health and Fitness Industry Code of Practice) Regulations 2007 (NB: section 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.	<ul style="list-style-type: none"> ■ Covers requirements of membership agreements only. Does not include a cooling off period. <p>Largely similar to NSW, Tasmanian and Victorian Codes</p>	<ul style="list-style-type: none"> ■ s 3 Code: contravention of the Code may result in the maximum penalty of \$1250. ■ 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.

3.3 Key concepts

This chapter has provided an insight into liability in the fitness industry. The concept of 'scope of practice' was discussed and Fitness Australia's Scope of Practice document offers a range of fitness industry standards and guidelines. It provides clarity and defines the scope of practice for Registered Exercise Professionals in Australia.

The Scope of Practice provides information on minimum educational requirements, and identifies safety and risk management and assessment as the primary responsibility for Registered Exercise Professionals. It also provides for the following obligations: (1) Pre-exercise health screening; (2) application of first-aid; (3) fitness assessment and analysis; (4) development of safe and appropriate exercise programs; (5) exercise delivery techniques, including demonstrating, instructing, monitoring, and reviewing; (6) provision of basic healthy eating information; and (7) provision of general nationally-endorsed public health information.

3.4 Frequently asked questions

- Q. I'm just an employee/contractor, do I have to know about the Code and Scope of Practice?**
- A. While the Fitness Australia Code and Scope of Practice have much more significance for facility managers, it is highly recommended you familiarise yourself with the documents. If you are aware of the facility and manager responsibilities, you can assist in providing compliant services, which often leads to a safer and more attractive facility for clients, and improved job security flowing from the stability of the workplace.
- Q. I have heard the term 'exercise prescription'. Is that a term that I can use or is it outside my 'scope of practice'?**
- A. Yes, you can use the term 'exercise prescription' in respect to developing a fitness program for a client to help improve general health and fitness. However, if you were to 'prescribe' exercise to treat a medical condition, you would be operating outside your 'scope of practice'.
- Q. Do I have to follow my State's Code of Practice?**
- A. This is dependent on the State in which you provide services. The Australian Capital Territory, Queensland and Western Australia Codes are mandatory. New South Wales, Tasmania and Victoria have implemented only voluntary Codes. SA has adopted both a limited mandatory code and a broader voluntary code. There is currently no code for the Northern Territory. However, it is sound business practice to comply with the relevant code/s of practice in your State or Territory.

Chapter Four

Pre-Exercise Screening

4.0 Pre-exercise screening and risk minimisation strategies

Facility owners and operators, managers, personal trainers, other fitness industry professionals and their employees all face a number of risks in providing fitness services to the general public. Although it is important to be aware of the risks, it is equally important to put the risks—especially the liability risks—in perspective. Although each client poses a potential risk (a risk exposure) to the fitness industry professional, the chances of any particular risk materialising is likely to be relatively small, provided the fitness business and the fitness professional takes the steps necessary to reduce the risk the client faces by implementing a risk minimisation strategy.

As you will see throughout this Manual, different risks call for different risk management strategies. To minimise liability risks related to the provision of fitness services to the general public, the use of pre-exercise screening is essential. Pre-exercising screening has been considered a fitness industry best practice in the United States and Canada for more than two decades. In Australia, the major fitness industry associations have worked together to produce the Adult Pre-Exercise Screening System (APSS) tailored to meet the needs of the Australian population.

4.1 The case for pre-exercise screening

The majority of people in developed countries such as Australia are becoming increasingly sedentary at work and at home, have low energy expenditure in leisure time pursuits and have low participation rates in active transport. This means that the capacity or ability of the average Australian to undertake prolonged moderate or vigorous exercise is poor. It is not uncommon for some people to go for many months or even years without undertaking any planned or structured physical activity. When these people decide to alter lifestyle patterns, join a gym or begin regular physical activity they are often unsure about how to be active. Unfortunately, through inappropriate exercise prescription or knowledge of the principles of progressive overload, many people do too much too soon. The result may be extreme muscle soreness or joint problems. In rare cases they may place themselves at higher risk for acute cardiac events and kidney failure due to rhabdomyolysis¹¹⁶ (sometimes referred to as ‘muscle meltdown’). For many people, medical or injury problems occasioned by involvement in exercise undermines motivation and is related to the high dropout rates typically found for these new programs.¹¹⁷

It is irrefutable that across the population the health benefits of physical activity outweigh the risks by a very considerable margin. However, it is also recognised that for some individuals there may be an unacceptably high acute risk associated with starting a vigorous fitness program or substantially increasing their level of activity.¹¹⁸

While the overall risk of a cardiovascular or cerebrovascular event (for example, heart attack, stroke or sudden death) increases during physical activity in the acute phase, there is a protective effect over the longer term for those who regularly exercise. The main cause of these specific adverse events in adults is prior pathologies often related to atherosclerotic arterial disease. Regular physical activity reduces the build-up of fatty plaques that lead to atherosclerotic disease as well as increasing blood vessel compliance, capillary density and myocardial size and strength. There are other acute problems that may occur in some people who have other pathologies. These are typically related to the respiratory and metabolic systems but may occasionally involve other physiological systems. If fitness professionals can easily gather more information about the state of health or disease of a person, it might help to reduce the possibility of a problem occurring during exercise. There are no guarantees that an adverse event might not occur. However, this prior knowledge will assist in appropriate exercise prescription and can significantly reduce the probability of serious injury or life-threatening incidences.

4.2 Adult pre-exercise screening system

Exercise and Sport Science Australia [ESSA], Fitness Australia [FA] and Sports Medicine Australia [SMA] have collaborated on a new pre-exercise screening system called the APSS (Adult Pre-Exercise Screening System).

Through use of the APSS fitness industry professionals are able to gather detailed important information about the health or disease of new clients or members in a way that is consistent with nationally recognised professional practice and in accordance with the most current evidence about exercise risk.

Adopting the new APSS system enhances your risk management strategy in the following ways:

- By reducing the risk of serious injuries or incidents.

Accurate client knowledge will support appropriate exercise prescription and can significantly reduce the likelihood of a serious injury or incident occurring as a result of your professional advice.

- Evidence of compliance with Duty of Care

The Australian professional standards and codes of practice set down by SMA, ESSA and Fitness Australia “recommend that client screening is undertaken as an essential component of

exercise prescription. The inclusion of client screening is therefore a significant consideration during legal cases concerning personal injury sustained through an exercise session or program.”¹¹⁹

4.2.1 Adult Pre-exercise Screening Tool

The purpose of the Adult Pre-Exercise Screening Tool is to identify those individuals with a known disease, or signs or symptoms of disease, who may be at a higher risk of an adverse event during physical activity/exercise. It consists of three parts. Part 1 is completed by the fitness client, while Parts 2 and 3 are completed by the appropriate fitness professional. It is important that the fitness professional from whom the client is seeking instruction explains to the client the importance of answering each question accurately and honestly. The client should be encouraged to participate as an active stakeholder in his or her own fitness program. Working cooperatively with the fitness service provider beginning from the pre-exercise screening stage will optimise the client’s fitness outcome.

The Adult Pre-Exercise Screening Tool is provided in Appendix B.

4.2.2 The PAR-Q

In Canada, the Canadian Society for Exercise Physiology has developed a pre-exercise screening system known as the Physical Activity Readiness Questionnaire, or PAR-Q. The PAR-Q satisfies the pre-activity screening device requirements of the International Health, Racquet and Sports club Association (IHRSA), a major trade association serving the health and fitness industry primarily in North America. IHRSA publishes Standards that can help minimise risk in fitness facilities.

4.3 Health/fitness assessment and prescription

Health-related fitness tests are conducted in fitness facilities with clients as opposed to clinical tests, which are usually undertaken by the medical or allied health profession with patients to identify or rule out medical conditions.

Health assessments conducted in a fitness facility are designed to provide information about a participant’s fitness level and compare it to the norms and standards of people of the same gender and age, develop/prescribe exercise programs to suit a client’s needs and abilities, motivate clients to stick with training so progress can be re-assessed, and, potentially, identify any health issues that could become apparent during exercise and warrant referral to a medical practitioner.

It is important that fitness professionals are aware of the federal and state laws and standards that may apply to health and fitness assessments to ensure compliance. For example when collecting client's health information, privacy laws may apply such as those found in the *Privacy Amendment (Private Sector) Act 2000*. Additionally if your facility is conducting research (or collaborating with another organisation) that involves human subjects in health related fitness testing or participation, informed consent is required by administrative law.

Operating within your 'scope of practice' as a fitness industry professional means you avoid 'diagnosing'/making a medical judgement, 'treating', 'prescribing' or counselling a client. This is something that should be undertaken by a medical or allied health professional.

4.3.1 Risk management strategies

In respect to health/fitness assessment and prescription, risk management strategies should also aim to address the law and any published codes/standards of practice. Additionally, when actioning these risk management strategies, fitness professionals must not only be qualified but must also know how to apply their knowledge, skills and experience to safely attend to a client's characteristics such as age, gender, fitness level and health status. Strategies may include:¹²⁰

1. Comply with federal laws, applicable state and local laws and codes/standards of practice.
2. Have only qualified fitness professionals conduct and interpret health and fitness assessments.
3. Have only qualified fitness professionals discuss health and fitness assessment results with participants.
4. Set up safety procedures for health-related fitness testing such as a health history questionnaire and selection of appropriate protocols given the health history of the individual.
5. Establish written 'scope of practice' guidelines for fitness professionals who provide fitness assessments and prescriptions, e.g., it would be inappropriate to have someone conduct fitness testing and prescribe exercise who has had no formal education and assessment of their practical skills in testing/prescription.
6. Establish written 'scope of practice' guideless for health/fitness professionals who provide nutrition or weight management education.
7. Have only 'advanced' qualified fitness professionals (e.g., those with credentials such as a master's degree in clinical exercise physiology) provide fitness assessments and advice to high risk populations, as well as ensuring medical advisory committee advice has been taken into consideration.

8. Create a secure, confidential and private documentation management system for data obtained in health and fitness assessments and prescription.
9. Undertake and document continuing education and training programs for fitness professionals as well as keeping records of established scopes of practice and testing protocols used.
10. Establish written 'scope of practice' guidelines for fitness professionals that provide health and wellness coaching services in person and over the Internet.

Managers

As a Manager, you could start by consulting your risk advisory committee to help develop strategies that suit your particular business and fitness services offered. Developing written 'scope of practice' procedures and communicating these well to personnel in your facility will help minimise any potential legal liability.

Employees or Contractors

As an employee or contractor, you should operate within your 'scope of practice' at all times and if you are uncertain, ask your supervisor or refer your client to a medical or allied health professional.

4.4 Cardiovascular screening

Undertaking cardiovascular screening by medical professionals is suggested as a way to plan and prepare for a potential cardiovascular event in your facility. This is recommended because research shows, "the incidence of a cardiovascular event during exercise in persons with cardiac disease is estimated to be 10 times that of otherwise healthy persons. Adequate screening and evaluation are important to identify and counsel persons with underlying cardiovascular disease before they begin exercising at moderate to vigorous levels".¹²¹ Facilities offering exercise services and/or equipment should ensure all new clients undertake pre-exercise screening, as outlined in chapter 3 of this Manual. Using pre-exercise screening questionnaires such as the APSS ensures questions relating to known medical conditions and/or signs or symptoms of diseases are uncovered. These may include existing heart or circulatory conditions, or indicators of problems such as unexplained dizziness, abnormal blood pressure or chest pain exertion. These questions may help to stratify individuals on the bases of risk of adverse events occurring during exercise, typically into low, moderate, or high-risk categories. The pre-exercise screening responses may therefore help to identify 'red flags' or high-risk clients as well as specific areas which may require further clarification in respect to a client's potential cardiovascular issue. At this point, referral to a medical practitioner or other allied health professional to undertake further cardiovascular checks is highly encouraged.

The process of referring a high-risk client to a medical practitioner for further cardiovascular evaluation or where other medical conditions such as pregnancy are present, can be simply facilitated by having a set form that the client takes to their practitioner. This form is to seek expert opinion on the suitability of the

client to undertake an exercise program. It is not a 'clearance' form per se since, this is not something most medical practitioners will do, but rather an opportunity for more qualified medical professionals to offer further information or clarification and guidance about the types of exercise/activities that might be avoided or included in the client's program. Fitness Australia provides an example of a template form that can be used by fitness professions to seek medical guidance/information in respect to a client. The form can be found at <https://fitness.org.au/exercisereferrals.html> and is provided in Appendix C.

Persons with known cardiovascular disease who do not wish to undergo cardiovascular screening may be excluded for participating in fitness facility's exercise program to the extent permitted by the law.

When a client has undergone pre-exercise screening, it may not be apparent that they have any history (as they may not identify it) or symptoms of cardiovascular disease. While referral for cardiovascular screening by a medical professional is certainly a good way to minimize risk across the board in this area, it may simply not be practical to send every client to a doctor for cardiovascular screening. This is when obtaining a client's signature on a release or waiver comes into play in terms of reducing potential liability. Again, as noted above, waivers cannot solely be relied upon as a risk management strategy and they certainly do not reduce the risk of a cardiovascular event occurring.

Before decisions are made to exclude participants who choose not to participate in the screening process or before having them sign a release/waiver if they choose not to participate in screening procedures, it is important to discuss these issues with your legal advisor.

Remember, by undertaking pre-exercise screening and referring a client to a medical practitioner for cardiovascular screening when you have reasonable cause to do so, you are demonstrating a 'duty of care' and in so doing, are reducing risk and potential liability.

4.5 Insurance

A number of Australian insurance companies offer policies covering fitness industry professionals. Third party liability insurance is a way to minimise the financial impact on you as a provider of fitness services, should you be found liable in a negligence claim or under contract. Many people tend to think of insurance as protection *against* liability, but this is incorrect. Insurance does not protect you from liability. If a person injured through your conduct succeeds in pursuing a claim against you, you are liable, even if you have insurance. Your insurance provider has two separate but related duties to: (a) defend you when a claim is made against you, and (b) protect you from potential financial loss stemming from your liability. While it is important to have third party liability insurance in place—in some instances it is required—insurance is a part of, and not a substitute for, an overall risk management strategy.

Managers

As a manager or owner in the fitness industry, chances are you already have an insurance policy covering your facilities and operations. It is important that you do not think that having insurance means

you do not have to implement a risk management strategy. Insurance is only part of risk management, and does not eliminate the need to explore other avenues to limit potential risk exposures. A comprehensive risk management strategy will place downward pressure on your insurance premiums.

Employees and Contractors

As an employee, you are likely to be covered for liability by your employer's policy, but this does not mean you should not be actively involved in helping your employer reduce risk. As an independent contractor providing fitness services, your contracting agreement probably requires that you have a third party liability policy in place. Even so, you should still take steps to minimise your potential risk exposures.

4.6 Key concepts

There are a number of recommended strategies that help to minimise risk for fitness services providers. First, there is pre-exercise screening. By screening a client to understand their health and possible diseases, it allows a better, tailored service to be provided, and can minimise the probability of life-threatening complications or injuries during exercise.

Fitness Australia, in conjunction with Sports Medicine Australia and Exercise and Sport Science Australia, have produced a new pre-exercise screening system: Adult Pre-Exercise Screening System (APSS). The APSS enables fitness services providers to gather information in a way that is consistent with nationally-recognised best practice, and enhances your facility's risk management strategy by reducing the risk of serious injuries or incidents and providing evidence of you carrying out your duty of care.

Some recommended pre-exercise screening tools include:

- The Fitness Australia, SMA and ESSA Adult Pre-Exercise Screening Tool for use by industry professionals is an industry standard, allowing a quick assessment of a client that can help gather all relevant health information, available at https://fitness.org.au/visageimages/adult_pre_exercise_screening_tool_1.pdf
- Likewise, overseas organisations such as the AHA and ACSM have produced a one-page Health/Fitness Facility Pre-Participation Screening Questionnaire with similar applications, available at http://mymultisportfitness.com/yahoo_site_admin/assets/docs/Health_Screening_Questionnaire.82145700.pdf
- See also the Canadian Society for Exercise Physiology's PAR-Q screening tool at <http://www.csep.ca/cmfiles/publications/parq/par-q.pdf>

As discussed above, third-party liability insurance is one way to minimise the financial impact of an adverse legal action. However, it is important to recognise that an insurance policy is just one facet of a

risk management strategy, and not a standalone defence. Your insurer will often aid you in reducing your level of risk, as this give rise to a mutually-beneficial outcome – you are less likely to be presented with injuries, and your insurer is less likely to have to pay a claim.

4.7 Frequently Asked Questions

Q. Which pre-exercise screening tool is best?

A. This too comes down to individual factors that may be present at each facility. They are all suitable tools for pre-exercise screening: they provide a written record of the screening process which may be useful in showing you have reached your legal obligations, and the tools help you provide a better service by understanding your client's background and health considerations. However, the Adult Pre-Exercise Screening Tool is the most recent of the tools developed, and is accepted as the industry standard pre-exercise screening system in Australia.

Q. The fitness industry faces so many unique risks - are there any insurers with particular fitness industry experience?

A. Many insurers offer particular policies for the fitness industry, including Guild Insurance, Marsh and JLT Sport. Guild has partnered with Fitness Australia and runs the RiskEquip website (at www.riskequip.com.au) which offers a number of resources and advice for managing risk in the fitness industry.

Part Two

Summary of the Law Governing the Australian Fitness Industry

Chapter Five

Negligence

5.0 Torts: negligence

Many 'accidents' are the result of a failure on the part of one or more persons to take adequate care when engaging in conduct that posed a risk to the safety of others. Where a person suffers an injury which was, at least arguably, the result of the careless conduct of another, the injured person can seek compensation for the other person's **negligence**.¹²²

Practical example relating to negligence: Carl cleans the gym floor, but forgets to put away the mop. A customer trips over it and injures themselves. Carl was negligent in failing to put away the mop.

In order for an injured person, such as a client of a fitness service provider,¹²³ to successfully claim in the tort of negligence against another person, such as the fitness service provider (the 'defendant'), for compensation for the harm or loss suffered, the injured person (the 'plaintiff') must prove the following elements:¹²⁴

- i. a duty of care owed by the defendant to the plaintiff;
- ii. breach of that duty of care, in that the conduct of the defendant was inconsistent with what a 'reasonable person' 'would do by way of response to the foreseeable risk'; ... and
- iii. injury 'which was caused by the defendant's carelessness'.

Duty of Care

The notion of a **duty of care**:

i. concerns the relationship between the plaintiff and defendant, and whether the relationship gives rise to a legal responsibility on the part of the defendant to consider the safety and interests of the plaintiff when engaging in particular conduct that causes harm. Although this question can raise considerable difficulties of law in new categories of cases, the relationships between fitness instructors, fitness centre operators and the like, and their clients, fall within a number of established duty relationships which the law recognises as satisfying element.

ii. 'Established' duty relationships that are relevant include one or more of the following: a contractual or consensual relationship such as service provider and client; occupier of premises and entrant; and instructor and student. As one Supreme Court judge has observed, 'in the case of recreational activities, those who teach or instruct others owe a duty to take reasonable care for their student's safety'.

Managers

As a manager, you have a duty of care to provide a safe environment for your clients. You also have a duty to ensure that your employees and contractors meet the qualifications for the fitness programs they run.

Employees and Contractors

As the provider of fitness services, you have a duty of care to ensure your clients' safety. This means prescribing exercises and routines that match their level of fitness. It also means making sure any exercise equipment is well maintained and used properly.

Standard of Care

Of critical importance in deciding the question of whether the defendant was negligent is the **standard of care** that can be expected of the 'reasonable' person *in the defendant's position*.

The concept of a reasonable standard of care sets an *objective* test, of how the *hypothetical* reasonable person would respond to the particular risk. It takes into account the context and all the relevant circumstances of the activity that the defendant was engaged in. Hence, the knowledge, expertise and experience that the '*ordinary*' fitness operator would *ordinarily* have is relevant in determining whether the defendant should have acted differently. This sets the minimum, objective standard that the defendant must meet.

Take equipment failure as an example. If evidence suggests that the reasonable, 'ordinary' fitness operator (such as the owner of a fitness centre that has free-standing weight machines) has experience and information about the danger of a particular piece of equipment failing if it is not regularly checked and maintained, then reasonableness requires regular (e.g. monthly) checks. If, however, this risk is not

generally known about in relation to that piece of equipment, then it may be reasonable not to check the equipment as frequently.

Since the objective standard depends on the particular circumstances of the defendant, it may *require more* of a particular operator who, for example, owns a large number of the particular equipment items, and who has observed regular failures and 'near misses'. In such a case, the specific knowledge that the defendant has may require that he or she take more precautions than other fitness operators in order for that defendant's conduct to be judged reasonable.

Obviously, what is considered to be a response of a reasonable person to a risk depends on factors such as the nature and type of the fitness activity. For example, relevant factors include whether the activity occurred in a large centre, in a small gymnasium, or during an individual instructor-led outdoor recreational class, whether any supervision, instruction or advice was given, what equipment was used, the type of clientele, etc.

The place in which the activities occur is particularly important, because one aspect of the relationships between defendant and plaintiff that the law considers specifically is that of occupier of premises and entrant to those premises. Most fitness service providers operate out of premises that they lease or own and of which they thus have possession and control. Such fitness service operators would fit into the category of 'occupier'. The law places a duty of care on occupiers to ensure that premises are reasonably safe for the purposes for which they are used, as safe as reasonable conduct can make them.¹²⁵ Occupiers are liable for any defects that reasonable conduct of the operator or its employees¹²⁶ could have avoided, such as uneven or slippery floor surfaces (as a result of cracks or holes, or water or spillage), difficult to manage stairs (for example, because of the absence of hand railings), or damaged furniture or equipment.

A case example of liability for a fitness services provider for injury as a result of unsafe premises is the case of *Marshbaum v Loose Fit Pty Ltd and Anor.*¹²⁷

Marshbaum v Loose Fit Pty Ltd

Mrs Marshbaum was descending a flight of stairs in the Loose Fit (the gym) premises. There was no handrail on the stair case, the steps were constructed of pale coloured polished timber without contrasting nosings, and the steps were constructed with differing riser heights and varying tread depth. She fell and suffered serious, lasting, debilitating injuries to her shoulder. As an occupier, Loose Fit owed Mrs Marshbaum a duty of care, and the court found Loose Fit had ample time to identify the risk and take simple remedial action, and a reasonable person in Loose Fit's position would have seen the obvious need for a handrail on the stairs.

Mrs Marshbaum's damages were assessed at \$441,441.57 AUD, a reflection of the seriousness of her injury and the impact on her quality of life. This outcome for Loose Fit should serve as a study in the importance of providing safe and fit premises. This might include provision of safety glass/mirrors, non-slip floor surfaces, secure storage of loose/free weights, and careful positioning of machines, as well as overcrowding. It should also be noted that Loose Fit was only leasing the premises and was able to obtain 50% of the cost from the owners in the subsequent case of *Loose Fit Pty Ltd v Marshbaum*.

Note that inexperience is not taken into account when assessing the standards of care a person professing a particular qualification must exercise. Even a newly qualified fitness instructor or personal trainer will be expected to adhere to the standard of the 'reasonably competent professional personal trainer', as was noted in *Wilson v Nilepac Pty Ltd t/as Vision Personal Training*.¹²⁸

Wilson v Nilepac Pty Ltd t/as Vision Personal Training

In that case, a newly qualified fitness trainer required a 40 year-old client to undertake a medicine ball exercise. As a result of that exercise, the client suffered injury to his lumbar spine and filed a claim against the personal trainer and the employer who was held vicariously liable. It was held that the exercise, though designed to 'push the [client] reasonably hard', was unsuitable for a client who did not have sufficient abdominal strength. A reasonable trainer would have satisfied himself of the client's strength before proceeding. Indeed, the trainer in question had no knowledge as to whether particular clients could cope with the added challenge of the exercise but had 'thought that it would be okay to do' because he had seen other trainers use the exercise.

Injury

The negligent act of the defendant must have caused the **injury** to the plaintiff. In most cases, this will be fairly straightforward, and will not pose any analytical problems. If a weight machine is carelessly maintained and the weights fall on a client because of a fault that proper maintenance would have remedied, then the negligent act of failing to maintain the machine can be said to have *caused* the harm. All the consequences that flow from, or are caused by, that harm must be compensated. Consequences that can be said to flow from such harm include loss of income from an inability to work for a period, medical expenses, therapy and rehabilitation costs, and pain and suffering.

The plaintiff needs to prove causation and therefore needs to tender sufficient evidence to allow a court to determine that the injury was caused by the particular negligent act of the defendant.

Under the *Civil Liability Act*, for example, the plaintiff must prove that:

- a. the breach of duty was a necessary condition of the occurrence of the harm (factual causation);
and
- b. it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability).

The ‘factual causation’ test in the Act requires a consideration of the ‘but for’ test of causation.¹²⁹ This test poses a hypothetical question: what would have happened to the plaintiff ‘but for’ the defendant’s negligence or, to put it another way, what would have happened if the defendant had not been negligent and had taken appropriate precautions? If the incident would still have occurred and the plaintiff would still have suffered the same injury, then the defendant’s negligence has not caused the plaintiff’s injury. For example, if an appropriate reasonable maintenance check would not have discovered the fault in the weight machine, then the failure to carry out such an inspection has not caused the weights to fall on the plaintiff.

There may be problems in proving causation where there is evidentiary uncertainty as to why a particular injury occurred, that is, whether the specific act of carelessness of the defendant is relevant to that injury. Let us take the example of a client/plaintiff who suffers a serious heart attack while exercising. In such a case it may be difficult to determine whether the heart attack was caused by carelessness, if any, of the defendant. Such a plaintiff may allege that the exercise regime was too vigorous for someone of that age and fitness level. The plaintiff would then need to show that the heart attack was suffered as a *result* of undertaking that vigorous exercise. Obviously, if the heart attack occurred during or shortly after such exercise then this may be relatively easy, subject to any medical evidence supporting or contradicting such a causal link. The *cause* of the heart attack might have been the vigour of the exercise; but it might also have been an unknown heart defect that would have triggered a heart attack from any day to day physical activity. In other words, if it was more likely than not that even mild exercise may have triggered the heart attack, then the plaintiff will not be able to prove that the *negligently* prescribed exercise was a cause of the harm.

In such a scenario, the plaintiff may then focus on another aspect of the defendant’s conduct and allege that *such* conduct was both negligent and the cause of the harm. For example, the plaintiff might try to show that proper screening for potential health problems should have been in place, and that such a reasonable screening process would have potentially identified such a defect. If reasonable screening would not have discovered the defect, however, then again, the defendant’s carelessness in failing to screen would not be considered to be a cause of the injury.

It should be noted that in most cases of injuries in the fitness context, causation issues will not arise, meaning that in most cases the cause of the incident will be easily determined.

Defenses

There are two defences originating at common law that apply generally in negligence claims:

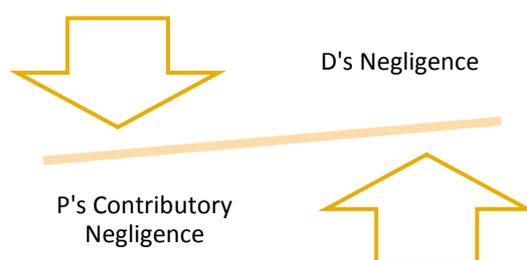
- Contributory negligence.
- Voluntary assumption of risk.

There is also one new statutory defence – the ‘good samaritan’ exemption – that also applies in all jurisdictions.

Contributory negligence

Contributory negligence is a failure on the part of the plaintiff to take care of his or her own wellbeing, by engaging in conduct that is reckless or careless, or otherwise endangers his or her own safety.¹³⁰

The plaintiff’s negligence may either be a contributing factor to the incident, or may have caused the injury to become more severe. It is not a complete defence; it only allows for an *apportionment* between the plaintiff and defendant of the loss suffered and thus reduces the damages payable. The apportionment of loss is done by an allocation of responsibility for an injury as between the defendant and plaintiff according to what is ‘just and equitable’.¹³¹ For example, it may be determined that the plaintiff was 60% responsible for his or her own injury, and will thus have their damages reduced by 60%. If the plaintiff’s loss was assessed at \$1,000,000, such a plaintiff will only get an award of \$400,000.



Examples of contributory negligence would be where a client fails to wear safety gear that is prescribed for particular fitness equipment, for example, the stop strap on a treadmill; or fails to take recommended rest periods; or fails to take care on a slippery floor. In such cases, both the plaintiff’s carelessness, as well as the defendant’s carelessness—for example, not properly maintaining the machinery; prescribing the exercise regime without adequate supervision; failing to ensure the floor is not slippery, respectively—will have contributed in causing the plaintiff’s injuries.

Voluntary assumption of risk

The following material is taken from Dietrich, J, p. 25. The defence of voluntary assumption of risk applies where a plaintiff has by words or conduct, freely and voluntarily agreed to accept a particular risk.

Assumption of risk requires that the plaintiff be fully informed of the risk.¹³² Unlike contributory negligence, assumption of risk is a complete defence. If argued successfully, it denies the plaintiff's claim. Other than in situations where a plaintiff has entered into a contract which excludes liability for certain risks, the defence is very difficult to prove and rarely succeeds, at least under the common law.¹³³

Good Samaritan exception

Another defence, albeit of limited application, that may nonetheless be of relevance to fitness providers, arises in relation to rescuers or 'good samaritans'; this is the description given to persons who come to the aid of others in an emergency. Consider the situation where a client, through no carelessness on the part of the fitness business, has a heart attack while exercising at the fitness centre. If an employee of the fitness business attempts to provide first aid, but does so carelessly, could that employee, or his or her employer, be held liable for the careless assistance if it increases the injuries or harm which the client has suffered?

There has been a wide-spread community perception¹³⁴ that rescuers were vulnerable to litigation by disaffected rescued parties. This resulted in each state passing legislation granting immunity from liability to persons engaged in acts of assistance to persons in need as a result of an emergency. These provisions vary considerably from jurisdiction but are wide-ranging and generally exempt even fitness employees from liability if they cause further harm while rescuing an injured client, as long as such rescue was not recklessly carried out (in some jurisdictions, even recklessness will not prevent the defence from applying). Significantly, of relevance to fitness operators, under the CLA (NSW) section 57¹³⁵, and CLA (WA) section 5AD(3)¹³⁶, the defence does not prevent a defendant being vicariously liable for the acts of the rescuer. Therefore, if an employee attempts to rescue a client, and does so carelessly, then the fitness operator in New South Wales and Western Australia may still be held liable for the consequences, such as an exacerbated injury.

For those fitness operators that provide high-risk training and exercise for their clients, some states have a defence that prevents liability for the obvious risks of a dangerous recreational activity. Most fitness centres and their ordinary activities would not be exempted by this defence. A DRA is one that creates a significant risk of (serious) harm. Examples of DRAs include diving into water of unknown depth, kangaroo shooting at night, riding a BMX bike on a skate park; recreational activities that have been held not to be dangerous include touch football and calm water cruising.

5.1 Good Samaritan laws in Australia

In Australia, as highlighted by Eburn (2003, p.7), there has always been widespread anxiety by health-care professionals in particular, about the possibility of legal liability for negligence resulting from the giving of assistance in emergency situations (Cowley-Smith, 1997; Gibson, 2002, p.6189; Ipp et al., 2002). However, the Ipp Committee reported that:

...the Panel is not aware, from its researches or from submissions received by it, of an Australian case in which a good Samaritan (a person who gives assistance in emergency) has been sued by a person claiming that the actions of the good Samaritan were negligent. Nor are we aware of any insurance-related difficulties in this area. (Ipp et al., 2002, p.107)

Therefore, the Ipp Committee did not recommend the introduction of Good Samaritan type legislation in Australian law noting that:

...because the emergency nature of the circumstances, and the skills of the good Samaritan, are currently taken into account in determining the issue of negligence, it is unnecessary and, indeed, undesirable to go further and to exempt good Samaritans entirely from the possibility of being sued for negligence. A complete exemption from liability for rendering assistance in an emergency would tip the scales of personal responsibility too heavily in favour of interveners and against the interests of requiring assistance (Ipp et al., 2002, p.108).

Notwithstanding the aforementioned finding, currently most jurisdictions in Australia have Good Samaritan type legislation (Eburn, 2003). However, there are some differences as to the extent and circumstances in which the immunity is granted. For instance, according to *Civil Law (Wrongs) Act 2002* (ACT) section 5(a) a Good Samaritan does not incur personal civil liability for an act done or omission made honestly and without recklessness in assisting, or giving advice about the assistance to be given, to a person who is apparently injured or at risk of being injured; or in need of emergency medical assistance, and (b) a medically qualified person (i.e. doctor, member of ambulance services) who, acting without expectation of payment or other consideration, gives advice by telephone or another form of telecommunication about the treatment of a person who is apparently in need of emergency medical assistance. Similarly, the *Civil Liability Act 2002* (NSW) section 57, *Personal Injuries (Liabilities and Damages) Act 2008* (NT) section 8, *Civil Liability Act 1936* (SA) section 74, *Civil Liability Act 2002* (WA) section 5AD and *Civil Liability Act 2002* (TAS) section 35B state that a Good Samaritan does not incur personal civil liability for a personal injury caused by an act done in good faith and without recklessness while giving emergency assistance to a person. In Victoria, under *Wrongs Act 1958* section 31B, it suffices for a Good Samaritan to have acted in good faith alone.

In most jurisdictions, except Victoria, Good Samaritan protection is not available if the Good Samaritan's capacity to exercise due care and skill was significantly impaired by alcohol or another recreational drug at the relevant time. According to the *Civil Liability Act 2002* (NSW) the protection from personal liability also does not apply if it is the Good Samaritan's intentional or negligent act or omission that caused the injury or risk of injury. In this context, adherence to risk management practices including pre-activity screening procedures, would play a crucial role to make sure that high risk individuals for sudden cardiac arrest are identified and proper exercise programs are developed in light of their medical practitioners' advice.

In Queensland, the Good Samaritan legislation is limited to doctors and nurses under the *Law Reform (Miscellaneous Provisions) Act 1995*, which was originally enacted under the *Voluntary Aid in Emergency Act 1973*. For the protection from liability to apply, section 16 states that:

[l]iability at law shall not attach to a medical practitioner, nurse or other person prescribed under a regulation in respect of an act done or omitted in the course of rendering medical care, aid or assistance to an injured person in circumstances of emergency...if—

(c) the act is done or omitted in good faith and without gross negligence; and

(d) the services are performed without fee or reward or expectation of fee or reward.

All in all, in states with Good Samaritan legislation it can be implied that a health/fitness professional, who negligently causes injury while using an AED in an emergency situation, would be exempt from liability if they acted in good faith and without recklessness, and, according to Good Samaritan legislation in NSW, his/her intentional or negligent act or omission did not cause the injury or risk of injury. Besides, where there is no Good Samaritan legislation to protect lay rescuers from liability that may arise as a result of rendering first aid or use of AEDs, it is considered almost impossible for a victim to successfully sue an individual who has rendered emergency first aid with good practice and honest intentions, unless the rescuer was grossly negligent (Colquhoun and Martineau, 2000). In two states, NSW and WA, however, fitness facilities may still be vicariously liable for the negligence of their employees, even if those employees are themselves protected against liability by Good Samaritan laws.

5.2 Liability exposures

Liability exposures are evident in all aspects of a fitness business including general operations, the scope of the information provided by instructors, equipment spacing, placement and maintenance, and the physical environment of the premises. Liability in each of these contexts will now be addressed in further detail. Additionally, specific risk management strategies will be presented for consideration by fitness professionals to help minimize liability and help guide the development of risk management strategies which are tailored specifically to the business.

5.3 Instruction and supervision

Offering suitable instruction and supervision during the delivery of fitness programs and services is crucial if fitness professionals are to minimize legal risk. Failing to provide suitable instruction and supervision can lead to fitness professionals being held liable and also, their managers, for being

negligent in their supervision. Further, even if an employer is not negligent in its supervision/instruction, an employer can be held liable for the negligent actions of an employee (or volunteer), when the employee's actions take place within the *scope* of their employment. This is known as vicarious liability.

Referring back to Chapter 1, 'poor supervision' and 'scope of practice' were in the top six issues identified by the Australian fitness industry. While there are no specific laws on exactly how fitness facilities should provide instruction to or supervise clients, there are codes or standards of practice, as mentioned in previous chapters. Additionally, there are cases which have taken place in court, where clients have successfully sued fitness professionals and facilities for unsuitable or improper instruction or supervision.

5.3.1 Instruction

A case example of the failure to adequately instruct a client resulting in liability for a fitness services provider is *Cullen v Tatham*.¹³⁷

Cullen v Tatham

Ms Cullen was an active young woman who excelled at sport and joined a gym. Prior to her injury, she visited the gym 2-4 times each week for about 4 months. She paid \$4.00 per visit. She received no verbal instruction, did not see any instructions or warnings on the walls or on the machines, and had no personal supervision.

One day she used the gym's squat machine for the first time. The weights were lifted by a lever which moved the weights, and the weight was adjusted by the position of the pin in the pin bar. The court found that when Ms Cullen began to use the machine, the pin set the weight at 42kgs, and the shoulder pads were set at a higher position than was appropriate. After Ms Cullen pulled the pin out, the raised shoulder pads fell on her, causing her to fracture her thumb.

Ms Cullen successfully alleged that the gym, in failing to provide preliminary training or safety warnings, and failing to display any warning signs about the safe use of the equipment, caused her injury. This was on the basis that the injury was likely caused by Ms Cullen's thoughtlessness in pulling out the pin when it was supporting a considerable amount of weight, and an instruction or written warning would have substantially reduced the risk that she would have acted in this way. The facility was liable for Ms Cullen's pain and suffering, post care costs, pharmaceutical and travelling costs, past economic losses, plus interest.

Legal cases like this, set precedents or examples of how the courts may choose to rule in similar circumstances.

5.3.2 Instruction

There are three different types of fitness professional supervision identified by Betty van der Smissen. Each of these is described as follows with application to the fitness industry:¹³⁸

- Specific supervision – where the instructor or supervisor is directly involved with a group or individual providing instruction, such as in a group exercise class or in personal training.
- General supervision – where someone is assigned the responsibility for overseeing an activity taking place in the facility, such as a floor supervisor.
- Transitional supervision - involves a staff member changing from specific supervision to general supervision and then back again. This can occur when a fitness professional provides a group with information on how to use exercise equipment during an orientation (specific supervision) then has them exercise on their own while providing general supervision.

Usually in claims of negligence, one party will allege that the other failed to provide suitable instruction and supervision in either the areas of specific supervision (instruction), general and/or transitional supervision.

Supervisors in the provision of physical exercise have a great deal of responsibility to ensure 'reasonable care' of participants undertaking the activity. Having a supervisory plan can act as a good tool to provide guidance in the planning of supervision. John Spengler, Daniel Connaughton and Andrew Pittman suggest the following may be used as a tool:

- Consider the circumstances – Look at the activity, skill and maturity of participants to assess the level of risk.
- Have the correct qualifications – Supervisors should have the required level of education, experience and/or certification.
- Provide safety information first – Instructions should detail safety first and warnings should be given regarding potential risks of an activity or exercise.
- Have a plan for replacements – Ensure there is a suitably qualified and experienced 'back-up' supervisor in the event the primary supervisor is unavailable.
- Plan for progression – Ensure that participants are not placed in situations above their skill level and plan for their progression to higher-risk level activities following advancements in their skill level.
- Consider an emergency action plan – Have a medical emergency plan available and relevant communication, training, certifications and equipment available to support the plan. (Medical emergency plans are discussed further in this chapter).¹³⁹

A case example is *Wilson v Nilepac Pty Ltd (t/as Vision Personal Training)*.¹⁴⁰

Wilson v Nilepac Pty Ltd (t/as Vision Personal Training)

This case involved (a client) Mr Wilson alleging some 15 contractual and tortious breaches of duty against his Fitness Trainer (Mr Draffin), and Mr Draffin's employer, Nilepac Pty Ltd. These breaches consisted of 'failure to provide appropriate risk management in respect to the programme, devising an unsafe and unsuitable training programme, and failing to train/supervise.' The legal proceedings started in the Supreme Court in 2009 and eventually were determined in the Court of Appeal in 2011.

Mr Wilson alleged he was injured while exercising with a medicine ball whilst under supervision from the fitness trainer, Mr Draffin. As a result, a claim was brought against Nilepac Pty Ltd, alleging the failure of Mr Draffin to exercise his duty that was owed to Mr Wilson. As a result, Nilepac Pty Ltd breached the standard of care owed by a 'reasonable' personal training facility, and Mr Draffin breached a standard of care required by a 'reasonable' personal trainer.

On appeal, numerous references were made to Mr Draffin's inexperience as a fitness trainer. As a result, the Court of Appeal ruled in favour of Mr Wilson stating that Mr Draffin was in breach of his duty of care to Mr Wilson. Therefore, Nilepac Pty Ltd was found vicariously responsible for that breach, and an appeal was allowed and sent back for assessing damages in favour of Mr Wilson.

This case is a clear example of the costly litigation process throughout the court system that a fitness facility may be liable for, as well as additional damages they may incur as a result of being vicariously liable for one of their employees. In addition to expensive fees paid to a party's own legal counsel, at the conclusion of the proceeding, costs for conducting the litigation are generally awarded against the losing party,¹⁴¹ resulting in further financial strain.

5.3.3 Instruction

Applying risk strategies to the law and any published codes/standards of practice, in respect to instruction and supervision, will help minimize injuries and potential litigation. Ten strategies are presented for consideration:¹⁴²

1. Have only 'qualified' fitness professionals in supervisory roles.
2. Have only 'qualified' group exercise leaders, personal trainers, instructors and fitness floor/facility supervisors provide programs and services to participants.

3. If your facility serves moderate-high risk clientele, have qualified medical experts who serve on a medical advisory committee to work regularly with the facility's qualified fitness professionals and/or have a professional staff member(s) who possesses "advanced" credentials in clinical exercise such as a master's degree in clinical exercise science
4. Offer a fitness facility orientation for all new participants.
5. Have staff supervision during all operational hours.
6. Establish training programs for all fitness staff members.
7. Conduct job evaluations on all fitness staff members.
8. Set a maximum number of participants in a group exercise class or if large classes exist, provide more than one instructor for proper supervision.
9. Provide proper instruction and supervision for all 'youth/junior' programs and services.
10. Establish procedures for proper documentation related to instruction and supervision such as keeping records of qualifications (credentials) of fitness staff members, dates of facility orientations and participants attending, dates of staff trainings and staff members attending.

24/7 fitness facilities are increasingly common in the fitness industry. 24/7 fitness facilities offer cost and convenience benefits, but create new risk management challenges. The absence of supervision can increase risks associated with inappropriate use of equipment, improper exercise techniques, and in exceptional circumstances, medical emergencies. For these reasons, a 24/7 fitness facility will need to make extensive use of waivers, exclusions clauses, and other contractual techniques to minimize risk exposure.

Operators of a 24/7 fitness facility need to advise potential customers that they will be joining a facility that may not have staff present at all times. Customers need to understand how this would impact them in the event that they suffered a cardiac event or other medical emergency. Potential clients must be informed both verbally and in writing. The waiver or exclusion clause must be drafted carefully, specifically addressing the liability that the fitness centre seeks to exclude. Waivers or clauses, i.e., for negligence or serious breach of contract, do not work unless the words are unambiguously and clearly stated.

Professor Joachim from the AFIRM Project analysed the following example of a badly worded exclusion clause in *Limiting or Excluding Liability in the Australian Fitness Industry* at p 5. The example is found in *Belna Pty Ltd. v. Irwin*.¹⁴³

It is my expressed interest in signing this agreement, to release “X” Fitness Centre, its Directors, Franchises, Officers, Owners, Heirs and assigns from any and all claims for professional or general liability, which may arise as a result of my participation, whether fault may be attributed to myself or its employees. I understand that I am totally responsible for my own personal belongings whilst at the Centre. I also understand that each member or guest shall be liable for any property damage and/or personal injury while at the Centre.

The judgment of Justice Ipp devoted little time to the interpretation of this clause, in part because it failed on so many fronts adequately to exclude liability. The use of the term ‘release’ was inappropriate: it is a technical legal term that generally applies to a plaintiff ‘releasing’ another for a liability that has already occurred, rather than one that applies to exclusion of future liability that may occur. Other difficulties included the use of the phrase ‘my expressed interest’ which the Court considered to be a concept of ‘indeterminate meaning’; and the phrase ‘claims for professional or general liability’ did not necessarily encompass negligence.

The Court ultimately found that the clause was “not merely ambiguous, it is likely unintelligible” and it was “so vague as to be meaningless.”

When a court is going to pass judgment on an exclusion clause or waiver, it will interpret the terms in the clause in a technical way, giving them their legal, strict or narrow meanings, even though it may have been drafted (perhaps deliberately) using broad and loose language.

Managers

As a Manager it is important to ensure that the personnel you hire are well qualified and experienced to provide proper instruction to clients. Additionally, training and supervising your personnel will help ensure they are carrying out their duties in respect to instruction and supervision in a safe manner. Having a risk management strategy in place in respect to instruction and supervision may assist in the reduction of injuries, maximize participant success and help reduce potential litigation.

Employees or Contractors

As an employee or contractor you are authorised to act on behalf of your employer and as such, you are partially entrusted with the business of your employer. Your conduct is crucial in the scope of work you undertake and you have an essential duty, because of the nature of your work, to supervise clients who are involved in undertaking exercise programs or services. Continuing to update your skills by attending conferences, workshops and in-house training will help keep you at the forefront of the industry in this area.

5.4 Key concepts

As the provider of fitness services, you owe what is called a “duty of care” to your clients. This is a legal duty to guard against reasonably foreseeable risks arising out of all facets of the relationship between a supplier of fitness services and a client. Breaching this duty may result in liability under the tort of negligence. However, you may be able to defend a negligence action by showing the plaintiff contributed to their harm, or that they freely and voluntarily accepted the particular risk leading to the injury.

5.5 Frequently asked questions

- Q. As a provider of fitness services, what specifically do I have to do to carry out my duty of care to my clients?**
- A. This will depend on a number of factors, e.g., the type of service offered, the location of the services, and the role of the fitness service provider. However, in general terms, facility managers are required to provide a safe environment, and ensure employees and contractors are qualified for their roles. As an employee or contractor, your duty is to ensure your clients’ safety by ensuring the prescribed exercise matches their fitness level. If you are unsure of your obligations, you should seek legal advice.
- Q. How can 24/7 fitness facilities manage their risk exposure in light of research that places a premium on supervision to correct poor exercise technique, inappropriate use of equipment and a speedy and appropriate response to medical emergencies?**
- A. A 24/7 fitness facility needs to make extensive use of waivers, exclusion clauses, and other contractual techniques to minimise its risk exposure. Operators of 24/7 fitness centres need to verbally inform each potential customer that they will be joining a facility that is unstaffed, and what that could mean to them in the event that they suffer a cardiac event or other medical emergency. It is important that potential clients be informed both orally and in writing. It is important that the waiver or exclusion clause be drafted very carefully, and that it specifically addresses the liability it seeks to exclude. There must not be any doubt that the client was fully informed of potential risks of exercising at a 24/7 fitness facility before they signed the agreement.¹⁴⁴
- Q. Can I, as an owner of the facility, be liable for the mishaps of my employee or manager?**
- A. Yes, you may be held liable for the negligence of your employees.
- Q. If a client joins my facility to work out on their own and not participate in any programs like Personal Training or group exercise, do I have a duty to instruct or supervise these individuals?**
- A. Yes. There have been court cases where clients have injured themselves, claiming they haven’t been given proper instructions on how to use a piece of fitness equipment. You have a duty to instruct participants on the proper use of equipment, warn them of any potential risks and supervise them properly.

Chapter Six

Liability Arising Under Contract and Consumer Law

6.1 Liability arising from contract and under ACL

The following material is taken from Professor Joachim Dietrich's report, *Liability arising from contract and under the Australian Consumer Law*, Which s available on the Fitness Australia website. 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, 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 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.¹⁴⁵ If the services are provided gratuitously, then no contract arises. If a person goes to free beach yoga classes offered by a local council and instructed by a fitness instructor, then generally no contract will exist in such circumstances. A duty of care in tort will still exist, however, between the instructor and the person, so that the person would still be able to sue the instructor in the law of negligence for any personal injury caused by the negligence of the instructor.

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.

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, such as complaints about membership fees and services. Obviously, such disputes are not going to arise in the context of free activities provided by councils etc.

Contract: implied and express 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 'Fitness Instructor 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.¹⁴⁶ It suffices to say that at common law, contracts for services contain an implied promise or term to exercise reasonable (or 'due') care and skill in the performance of the services,¹⁴⁷ unless such term has been excluded. 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 principles of negligence discussed above would apply.

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*.¹⁴⁸ If a person demonstrates some new fitness exercises to her friend, for example, she will *not be subject* to consumer law guarantees, though she will almost certainly owe a duty of care in tort.

The Australian Consumer Law and statutory guarantees

The new Australian Consumer Law came into effect on 1 January 2011. Its stated aim was to 'create a single national consumer law'.¹⁴⁹ 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.

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.

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). 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'.¹⁵⁰ 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 skill¹⁵¹ and that of fitness for purpose.¹⁵²

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 section 60 creates a statutory guarantee, plaintiffs can seek damages for failure to comply with the guarantee under section 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:

(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.

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 section 267 as reasonably foreseeable 'loss or damage'.¹⁵³ 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.

For example, 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 damages under section 267 for breach of section 60 would be possible. An example from the previous *Trade Practices Act (TPA)*, *Renahan v Leeuwin Ocean Adventure Foundation Ltd* illustrates the point.¹⁵⁴

Renehan v Leeuwin Ocean Adventure Foundation Ltd

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 invalid under section 68 TPA and thus the defendant could not rely on it. Hence, the defendant was held liable.

Fitness for purpose

The second ACL guarantee is fitness for 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.

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.¹⁵⁵ 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.

6.1 Limiting or excluding liability in the fitness industry

The concept of risk management in the fitness industry can refer to at least two, quite different, mechanisms for minimising risk.¹⁵⁶ One of these is what we have discussed above and throughout this Manual: controlling programmatic risks such as incidents or injuries that can arise from the fitness services provided by fitness businesses and professionals. The most desirable means of controlling programmatic risks for fitness service providers is through the minimisation of the accidents and injuries by providing reasonably safe services in line with the best practices in the fitness industry.

The second type of risk management mechanism is to control the financial risks pertaining to the costs of legal claims in negligence resulting from the occurrence of programmatic risks, in other words, minimising the financial consequences that may flow from programmatic risks. This is commonly done by either or both of two means. First, one can minimise the financial risks of accidents or injuries by minimising the *likelihood* of *legal* liability being imposed after an injury. This can be done by means of contract terms that exclude or limit legal liability, that is, contractual exclusion clauses, or 'waivers' or 'disclaimers' as they are commonly called in the fitness and recreation industry (though the strict legal meanings of these terms differ to their more common usage and the most accurate *legal* descriptor of contract terms that exclude or limit liability is 'exemption' or 'exception' clauses).

The use of exclusion clauses carries risks in and of itself. Unless carefully drafted and appropriately provided to a client, such clauses may not in fact exclude, avoid or limit the legal liability, even where the law permits such exclusion clauses.¹⁵⁷

Secondly, it is possible to minimise the financial risks of legal liability by means of third party liability insurance (see below) to cover the financial impact of 'successful' legal claims or actions by injured clients. Indeed, in some jurisdictions, such insurance is compulsory for some fitness providers, as was noted above.

It should be borne in mind, however, that both of these risk management strategies do not do anything to prevent or reduce the number or severity of incidents and injuries. They can only reduce the likelihood of adverse findings of legal liability (that is, by means of exclusion clauses) or else reduce the financial impact of such legal liability (by means of insurance).¹⁵⁸ Even where they are successful in achieving those aims, there are still potentially negative consequences that may result from adverse health outcomes from incidents, in particular from accidents caused by negligence. In particular, the goodwill and reputation of a business or even a whole industry may be negatively affected, leading to loss of existing and prospective clients and eventually less profitability. For example, if serious incidents frequently occur from white-water rafting adventure tours or from boot camp activities, either individual providers of such services may become unprofitable, or the industry as a whole may become

unprofitable. There are also other potential negative consequences resulting from unsafe services, such as increased insurance premiums and prosecutions under workplace health and safety laws. Furthermore, expense is involved in defending legal claims, even when those legal claims are unsuccessful.

For these reasons, although it is desirable that the fitness industry use the two financial risk-management strategies discussed here, they in no way reduce the need for adopting industry best practices and implementing risk management strategies to provide reasonably safe services. It is important to develop a comprehensive risk management strategy, and not to rely on any one particular strategy as a silver bullet. It is worth recalling the Risk Management Pyramid found at 2.3. You will note that liability insurance is the seventh, or last line of defence, while waivers and contractual exclusions of liability are the sixth. While important, risk management in the fitness industry involves much more than attempting to exclude or otherwise limit liability.

6.2 Key concepts

As most fitness services are provided under contract with a client, it is possible you may be liable under contract for breaches of any terms of that contract. In addition to any express terms, it is also likely in some cases that terms will be implied into the contract.

There are also several statutory duties that you may owe under the *Competition and Consumer Act 2010* (CCA). Part of the CCA includes the new *Australian Consumer Law*, which is likely to impose several duties on a fitness services provider, most relevantly a duty to provide those services with due care and skill.

While the best and foremost defence to these types of legal liability is risk management and control as discussed in previous chapters, there are other secondary means to control financial risks associated with fitness injuries. The first is to incorporate waivers and exclusion clauses into the terms of the contract, which reduces the likelihood of legal liability following an injury to a client, though these must be drafted carefully and made available to the client to be effective. The second means of managing this type of financial risk is through third party liability insurance, which would defend against the financial impact of a successful legal action by a client. However, it must be emphasised that risk management must take precedence over these two mechanisms, as they do nothing for the reputation and goodwill of a particular business, and perhaps even the industry. When a client has suffered a catastrophic injury and has no right to compensation, it may be more damaging to the fitness services provider in the long-term in the court of public opinion.

Chapter Seven

Workplace Health and Safety

7.0 Criminal Liability under work safety laws

Fitness industry professionals need to be aware that they can face criminal prosecution for conduct they engage in as part of their business activity, regardless of their knowledge or their intentions.

Consider the following section of the *Work Health and Safety Act 2011* (Cth):

19 Primary duty of care

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person; while the workers are at work in the business or undertaking.

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

According to the Act,¹⁵⁹ a person conducts a business or undertaking ('PCBU')

Whether the person conducts the business or undertaking alone or with others; and

Whether or not the business or undertaking is conducted for profit or gain.

In the fitness industry, the term 'PCBU' should be taken to have a very broad meaning. Any person running any business providing fitness services, whether as an incorporated company, as a franchisee, or as a sole trader would be considered a 'PCBU' for the purposes of the Act.¹⁶⁰

In addition, a fitness business operator who has contracts with other industry professionals, such as personal trainers, providing services on their premises directly to the clients of the personal trainer, will still, in most cases,¹⁶¹ be considered a PCBU in relation to the health and safety of those personal trainers or (non-employees of whatever status) as well as in relation to the clients of the independent contractors.

Employees of a fitness provider would not be considered PCBU's, but in the case where the operator of a fitness provider engages third parties (such as fitness instructors, or yoga teachers etc.) or facilitates operations on the provider's premises, it is probable that *both* the fitness provider *and* the individual instructor operate as PCBUs. The Australian WHS system has long anticipated that multiple persons can owe a duty in relation to the same person or operation. To use another similar illustration, if a gym operator were to facilitate the provision of fitness training by a personal trainer as an independent contractor, to a client of the gym, both the trainer and the gym operator would owe a WHS duty to that client. This will be despite the fact that all of the training is provided by the trainer and the gym's involvement may amount only to the provision of the facilities used in the training. Just because the gym has no further direct involvement in how the client is trained, does not diminish their duty towards that person.

As the Act makes clear, the duty is owed not only to the PCBU's employees, but also to **anyone** who may be put at risk to their health and safety by the conduct of the business or undertaking. In the context of the fitness industry, 'other persons' includes clients.

Generally speaking, all duty holders under the Act are *required* to comply with the duties imposed by the Act and Regulation in their jurisdiction.

In addition, it is important to note that, in no circumstance can a fitness centre, gym operator, personal trainer or any other PCBU in anyway delegate its duty to its employees, to independent contractors, or to clients, nor is it in any way able, for instance, to seek a waiver or guarantee from the trainer in relation to the client's safety in relation to any potential breach of the Act: WHS duties are non-delegable.¹⁶²

Work health and safety violations are criminal offences. As such, persons convicted of WHS offences can face prison time (in addition to considerable fines) for the more serious categories of offence (see below).

31 Reckless conduct—Category 1

(1) A person commits a Category 1 offence if:

- (a) the person has a health and safety duty; and
 - (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
-

(c) the person is reckless as to the risk to an individual of death or serious injury or illness.

Penalty:

(a) In the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)—\$300 000 or 5 years imprisonment or both.

(b) In the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—\$600 000 or 5 years imprisonment or both.

(c) In the case of an offence committed by a body corporate—\$3 000 000.

(2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

This is one of the main reasons why PCBU duties are non-delegable¹⁶³ – one cannot delegate out of criminal responsibility for wrongful acts (Butler, J., pp 4-5).

Although the above discussion primarily concerns owners and operators of fitness facilities and fitness instructions companies, the legislation also imposes duty (to which criminal liability attaches), to other persons at the workplace:

29 Duties of other persons at the workplace

A person at a workplace (whether or not the person has another duty under this Part) must:

(a) take reasonable care for his or her own health and safety; and

(b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and

(c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act.

This section acts to confer liability on other persons at the workplace, and extends to employees or independent contractors.

The following material is taken from Assistant Professor Joel Butler's report for the AFIRM Project, p 9. Like PCBU, the term 'workplace' has a very broad meaning. Any place where work is carried out can constitute a 'workplace' for the purposes of the Act. This means that the 'workplace' is not limited to the main premises where fitness services may be offered to clients, but could also be any place where fitness services are delivered. This can include public spaces such as parks where training is undertaken.

The duty is owed to anyone who could be affected by work carried out at the workplace. This would probably extend liability to anyone who was affected by training exercises carried out in a public place – whether an employee of a fitness provider, the client of a fitness provider, or a member of the public who is affected by the training carried out in the public area. For instance, if a member of the public was knocked over and injured during the provision of boot camp training, this could render the PCBU responsible for the training to be liable for the injury. If the PCBU's conduct was reckless, he or she could be facing prison time.

7.1 Liability for criminal acts of third parties

As a general rule, Australian law does not hold persons liable for the criminal acts of third parties. However, there are some exceptions. Owners and operators of fitness facilities could find themselves liable for the criminal actions of their employees, or if an employee is injured by a criminal act in the workplace. They could also be liable for certain types of crimes occurring on their premises. The key issue is to what extent the owner/operator exercises control over the third party criminal. Should such crimes occur, the victim—whether a client, employee, or member of the public—could sue.

Although specific crimes and instances of criminal behaviour can be difficult to predict, it is possible for fitness industry professional to take steps to minimise the occurrence and severity of criminal activity on their premises. It is crucial to provide a secure environment for both your employees and clients.

7.1.1 Employees

The following text is taken from Assistant Professor Joel Butler's report for the AFIRM Project. Workers¹⁶⁴ – whether employees or other workers – have a responsibility to ensure their own health and safety at a workplace and the health and safety of others in a workplace. However, the failure of a worker to ensure his or her own health and safety, or that of another person, will not release an owner or operator from liability under the Work Health and Safety Act. In other words, even if an employee or other worker (e.g. an independent contractor fitness trainer) is liable for a breach of the Act, this will not release the PCBU from liability for what effectively constitutes the same Act. This is even the case in instances of negligence on the part of the worker. The Australian WHS regime has long anticipated that workers may be negligent, foolhardy or careless in undertaking their work. Since this can be anticipated

by a PCBU, it should be in their consideration when they plan and implement their risk management strategy. One of the most obvious risk management techniques is to conduct criminal background checks on prospective employees. Another would be to obtain—and contact—references of would-be independent contractors.

It is only in the case of very gross negligence, or a worker causing malicious harm, that a PCBU may escape liability, since it is not generally considered that it is reasonably foreseeable that an employee would act in such a way.

Owners and operators of fitness facilities also have an obligation to protect their employees from the criminal acts of third parties. Traditionally, the position at law has been that ‘that one man is under no duty of controlling another man to prevent his doing damage to a third’.¹⁶⁵ However, in *Modbury Triangle Shopping Centre Pty Ltd v Azil*,¹⁶⁶ Chief Justice Gleeson noted that:

‘there are circumstances where the relationship between two parties may mean that one has a duty to take reasonable care to protect the other from the criminal behaviour of third parties, random and unpredictable as such behaviour may be. Such relationships may include those between employer and employee (emphasis added).

When employees are found liable for injuries to their employees caused by the criminal acts of third parties, it is usually because of their failure to implement a safe work environment in situations where it was reasonably foreseeable that their failure to do so exposed the employee to an increased risk of injury. It is the very nature of the non-delegable duty of care of an employer to his or her employees that gives rise to that duty which does not exist in the ordinary neighbour situation where there is no general duty to prevent third parties doing harm to another.¹⁶⁷

7.1.2 Employees

Drug use or “doping” in fitness facilities is a risky activity and fitness business managers and fitness professionals need to take concerted steps to address it. Doping is not restricted to professional cycling or bodybuilding, but occurs in a wide variety of physical activity environments.¹⁶⁸ A general population survey of non-medical use of steroids in Australia found that 0.3% of Australians over the age of 14 had used steroids for non-medical purposes.¹⁶⁹ Anecdotal evidence indicates that the injection of performance and image enhancing drugs (PIEDS) such as peptides and anabolic or androgenic steroids is increasing.¹⁷⁰

In 2011, the Australian Crime Commission released a report on Organised Crime and Drugs in Sport which drew attention to criminal activity in Australia and risks caused by increased access to, and use of, PIEDS. Generally, PIEDS have one of two enhancement effects. The first is anabolic, to enhance

muscle growth. The second is catabolic, to reduce body fat.¹⁷¹ Commonly, combinations of anabolic and catabolic drugs are used to increase muscle mass whilst reducing body fat, thereby increasing muscle definition.¹⁷²

The National Drug Strategy Household Survey (NDSHS) produces annual data on PIED use, however the data is likely inaccurate for a number of reasons:

- Underreporting (people do not want to admit to using)¹⁷³
- Stigmatisation (people do not want to be thought less of for using)¹⁷⁴
- PIEDs are classified as recreational, illicit drugs.¹⁷⁵

Anex (www.anex.org.au) publishes a pamphlet series entitled “Safer Using” that provides information on how to reduce harms associated with drug use, and tips on how people who inject PIEDs can stay healthy. Steroid users who inject may not appreciate the risk of contracting blood borne diseases and pathogens from unsafe needle use.¹⁷⁶

Fitness facilities should be made aware of the risks associated with unsafe syringe disposal and the serious reputational risks associated with illegal drug use, supply and distribution on site. The provision of harm reduction services and education to people who inject PIEDs is vital, as any drug injecting carries a high risk of hepatitis C virus infection associated with any drug injecting.¹⁷⁷

Drug educators report that there is generally poor knowledge about steroid and peptide use and the risks involved.¹⁷⁸ The ANEX Bulletin have published a ‘Steroid Advice Cut Out’.¹⁷⁹

Notably, injection of PIEDs doubled from 2010 to 2011, and estimates of use continue to rise.

7.1.3 Clients

Crimes against clients range from property crimes to assault. Although it would be impossible to prevent all crimes from occurring, steps can be taken to limit exposure resulting from them.

It is possible to limit exposure to property crimes, such as theft from lockers, through the use of waivers and/or releases and the posting of signs absolving the owners/managers of responsibility for lost or stolen items. Because property crimes are **foreseeable losses** in fitness centre environments, owners, managers and employees will need to take **reasonable steps** to secure the area where clients store belongings.

This is because storing belongings in hired lockers is not bailment (where possession of an object is transferred to someone who is not the owner) as control of the object has not been transferred. Therefore, no liability in negligence for these losses will arise, assuming reasonable security precautions have been taken.

*Greenwood v Municipal Council of Waverley*¹⁸⁰ provides an example.

Greenwood v Municipal Council of Waverley

The NSW Supreme Court held that merely placing clothes in a locker owned by a local council did not make the council liable for the clothes. It had never acquired possession or control of Greenwood's clothes either in fact or in intention. What had happened was that the council had hired him a locker. What he did with it was his business. In law, there was no bailment—there was merely a licence by the council allowing Greenwood to use its property for a specific purpose.

Any potential liability for more serious crimes, such as physical or sexual assault, can be minimised by implementing standard security protocols—locked doors, member ID cards, security cameras, staff training, etc.

Writing in the High Court decision *Modbury*,¹⁸¹ the Chief Justice of Australia, the Honourable Murray Gleeson, stated that:

The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.

While an occupier's duty does not currently extend to preventing physical injury to an entrant to the premises resulting from the criminal acts of third parties over which the occupier has no power to assert control, a prudent fitness centre owner/operator will take steps to ensure client security by providing for locked doors, members-only entrances, security cameras in public areas, well lit external spaces, etc. This is especially critical in unstaffed facilities. Regular security patrols may also help reduce instances of criminal activity at these facilities.

7.2 Incident reports

Recording incidents when they happen in your workplace allows you to accurately identify and describe any previously unidentified risks and plan to minimize the risk of them happening in the future. An incident report could contain:

- The name of the injured party (and name of parent/guardian if person is a minor)
- Injured party's address and telephone number
- Injured party's date of birth
- What happened
- Nature of any injuries that resulted
- Time, date and location of when the incident occurred
- Why the incident occurred
- Who else was involved
- Who witnessed the incident

The report should be written in a factual manner, with no fault directed at the facility or personnel. Incident reports should be completed for incidents that did lead to injury directly as well as 'near miss' incidents, where an injury was avoided. Much can be learnt about risk prevention from 'near miss' incidents. Incident reports should be marked 'confidential' and ideally forwarded to the fitness facility's legal team.

7.3 Conclusion

While it remains true that there is no general duty to prevent the criminal acts of third parties—and no general liability arising from them—recent cases suggest that courts are now looking at to what extent the owner of the premises has control over the criminal. It is increasingly important that facility owners and managers control access to their premises. If a person injured by a criminal act of another can show that:

- A fitness centre owner is, or should be, aware of an emerging danger caused by the presence of a person on the premises.
- They have the power to assert control over such a person.
- It is reasonable in the circumstances for the fitness centre owner to have the potential Plaintiff in mind when determining whether or not to take some form of alleviating action.
- It is reasonable, fair and just to require the fitness centre owner to take that alleviating action.

- The injury would have been avoided if the occupier had acted.
- Then the fitness centre owner would likely be held liable.

If however, in the absence of an established “special relationship”, such as employer/employee, the injury is shown to have been caused by a senseless and random act of violence which could not have been reasonably anticipated by the occupier; the fitness centre owner will likely not be held liable.¹⁸²

Reporting incidents when they occur in your facility is an excellent risk management tool, allowing you to record previously unidentified risks and to address them as soon as possible. Incident reports should be written factually and without bias i.e. without directing fault at the person(s) concerned, facility staff and/or the facility itself.

7.4 Key concepts

The criminal activity which fitness industry managers need to be aware of involves breaches of the *Work Health and Safety Act 2011* (Cth) which could leave them criminally liable. Under this Act any person who conducts a business or undertaking (PCBU) has a duty of care to the people that they put at risk (i.e. employees or clients). These duties are non-delegable, which means that a fitness industry professional cannot protect themselves with a waiver or exclusion clause. A person convicted of Work Health and Safety violations can face prison time and substantial fines for the more serious offenses. These offenses revolve around reckless conduct. This means that if a person who owes a duty of care to another and acts without a reasonable excuse in a reckless manner, exposing the other person to the risk of death or serious injury, then they could be criminally liable.

Employees and fitness instructors also need to be aware that they too have responsibilities under this Act to take care of their own safety as well as the safety of those around them, and to comply with the instructions of their manager. However, a failure of an employee to do this does not release an operator from liability. Employers should anticipate risks associated with negligence and take them into account when creating a risk management strategy. In general, Australia does not hold someone liable for the criminal act of a third party. However, operators can also be liable for the criminal act of a third party where they have failed to implement a safe work environment in situations where it was reasonably foreseeable that their failure to do so exposed the employee to an increased risk of harm.

7.4 Frequently asked questions

Q. How do I know if I am a PCBU?

A. If you conduct the business or under taking alone, or with others, you will be considered a PCBU. It does not matter whether or not the business is for profit or gain. If you are employee of a PCBU you are not yourself a PCBU. However if you are an independent contractor, you would be considered a PCBU and can be jointly liable.

Q. Can I be held criminally liable for the actions of a third party?

A. In general that is not the case in Australia. However, there are certain circumstances where owners or operators of fitness facilities can be liable. The key issue is to what extent the owner/operator exercised control over the third party criminal. Whilst specific acts of criminal behaviour can be difficult to predict, fitness professionals can take steps to minimise the occurrence and severity of criminal activity on their premises.

Q. What should I include in an incident report?

A. An incident report might include any one of a number of details of the incident, but it is ideal to include the names, addresses and telephone numbers of the involved parties, the time, date and location of the incident, and what happened.

Chapter Eight

Criminal Liability

8.0 Criminal law exposures

Up to this point, the discussion of risk management issues within the fitness industry has focused on liability exposures arising under **civil law**, such as negligence or liability under contract. Civil law is the law governing relations between individuals. If a client is injured as a result of slipping on the floor in your fitness centre, he or she may sue you for negligence. This is a **civil action**. Criminal law is the law governing relations between the individual and the state (the government). If you violate a criminal law, you have committed a **crime** and may face **criminal prosecution**. This carries the possibility of criminal penalties, including fines and, in serious and/or repeated offences, prison sentences.

As a fitness professional, your day-to-day work will expose you to civil liability risks, such as negligence, and liability arising under contract. However your work as a fitness professional does not relieve you of the obligation to obey the law generally, including criminal law.

Criminal law exposures can arise in the course of owning or operating a fitness environment, on in providing fitness services to a client. You could be held criminally liable for your own conduct, or in some circumstances, that of your employees.

Sometimes civil law and criminal law intersect. You could, for example, be found to be civilly liable for the criminal acts of others, if they commit a crime on your premises. For example, if you have lockers, and someone breaks into them and steals property belonging to another, the owner of the property may hold you responsible because you did not have adequate security. If one of your employees physically assaults a client, he or she will be criminally prosecuted, but the victim may also bring a civil action against you for negligence for failing to ensure adequate security on the premises.

Some examples of criminal activity that have taken place in fitness facilities include:

- Illegal sale and distribution of performance enhancing drugs¹⁸³
- Possession of dangerous drugs¹⁸⁴
- Theft¹⁸⁵
- Assault¹⁸⁶
- Affray¹⁸⁷
- Kidnapping¹⁸⁸

- Murder¹⁸⁹
- Filming people in showers or toilets without their consent¹⁹⁰
- Lewd acts (people exposing themselves) ¹⁹¹
- Sex offences such as rape¹⁹²
- Participation in a criminal organisation.¹⁹³

In March 2013, Victorian Police Commissioner Ken Lay expressed concerns about police officers becoming involved with bikies (members of criminal organisations) at fitness facilities.¹⁹⁴ Lay said:

"This is becoming a significant problem," Mr Lay said at the time. "We see OMCGs [outlaw motorcycle gangs] moving into gyms and owning gyms. We see our members in there and we are seeing performance-enhancing drugs being used by some of our members."

Sensationally, in October of 2013 the Victorian Police raided ten properties in an effort to crack down on illegal trade in performance-enhancing drugs.

While there is no suggestion that this activity is widespread in the fitness industry, it does indicate the need for fitness business owners and fitness professionals to be cautious and vigilant in their dealings with clients. A comprehensive risk management strategy will recognise that fitness industry professionals face potential criminal exposures, and will seek to put policies in place to reduce the risks.

Managers

As a manager or owner of a fitness facility, you need to be aware of crimes that could take place on your premises. You must protect your employees and clients from reasonably foreseeable harm that might result from these potential criminal acts. Obvious steps to take include to warn clients of the risk of theft, advise them not to keep their valuables unattended, to use a lock on their gym locker, to avoid leaving their valuable unattended in parked cars, and to keep a record of the serial numbers of your property to assist the police in the event of a theft. You must be aware of the circumstances under which you could potentially face criminal liability for your acts and omissions under the applicable Work Health and Safety laws.

Employees or Contractors

You are likely to be aware of potential criminal activity before your managers. Be observant, and take your responsibilities to ensure the physical safety of you clients seriously. Report suspicious activity to your managers. Think about what can be done to make your facility more secure. Always comply with the risk management standards that seek to reduce any potential criminal activity. Also, familiarise yourself with your obligations under the appropriate Work Health and Safety laws. You are responsible for safety in the workplace.

8.1 Individual criminal liability

Unless you are a child below the age of 14 or have a cognitive impairment, you will ordinarily be held responsible for your criminal behaviour. If you, as a fitness instructor, take a client's wallet from their locker, you have committed a crime. If you get into an argument with a fellow personal trainer and punch him in the face, you have committed a crime. Such behaviour is obviously criminal, and we would expect people who commit these acts to be criminally charged and prosecuted. The easiest way to protect yourself from this type of individual criminal liability is to not engage in it. **Engaging in criminal activity is not only illegal but inconsistent with your professional obligations as a fitness industry professional and will ordinarily justify your dismissal from employment.**

8.2 Risk management strategies

Taking reasonable steps in your fitness facility to protect personnel and clients from potential criminal activity such as theft or physical assault is critical to managing risk. Strategies to manage risk in this area may include the following¹⁹⁵:

- Establish a check-in system and facility access rules, to monitor access to distinguish members and visitors from others. Only allow 'authorised' individuals to enter. Patrons providing their photo ID/membership cards to front desk prior to entry, is one method to safeguard entry to the building.
- Installation of security cameras both within the facility and outside the facility including car-parking areas.
- Ensure proper lighting is provided in danger zones both within and outside the facility.
- Consider contracting security personnel to patrol the premises at certain times to establish a 'security' presence on site.
- Installation of signage such as 'no cash kept on premises' and signage to remind patrons to ensure that their belongings are secured in lockers.
- Outdoor group exercise classes held in easy-to-access, well lit, well-frequented areas.

8.3 Key concepts

This chapter focuses on criminal law (the law governing relationships between the state and the individual) and liability. As a fitness industry professional, you will most likely be exposed to civil liability. However, there are a number of criminal law exposures to which you may also be exposed.

Individuals are responsible for their actions. For example, if you were to take your client's wallet, you have committed a crime of theft. This type of activity is likely to leave you criminally liable, resulting in criminal charges and prosecution. The best way to avoid facing criminal charges is to not engage in this type of activity.

Fitness facilities can limit their liability from the theft or damage to client's property with the use of waivers, warning signs and providing of secure lockers. While they cannot use waivers for more serious crimes such as physical assaults, the provision of locked doors, security cameras, member IDs and staff training can help minimise the risk. In the case of unstaffed facilities, the use of regular security patrols can help reduce instances of criminal activity. Things to watch out for are:

- Are locks and gates maintained?
- Are alarm systems utilised and maintained?
- Does the car park have clearly marked speed restrictions?
- Is the car park adequately lit?
- Are parking zones and restrictions clearly identified?

8.4 Frequently asked questions

Q. Can I be liable under both criminal and civil law for the same incident?

A. Yes, there are areas of the law where criminal and civil law intersect and as a fitness industry professional you can be liable in both areas. Certain acts or omissions of negligence can lead to both criminal action from the state and a civil action from the victim.

Q. As an employee can I be held criminally liable?

A. Yes, if you breach your duty of care to your client through reckless conduct, as defined by the *Work Health and Safety Act 2011* (Cth), then you can be held criminally liable.

Chapter Nine

Discrimination and Bullying

9.0 Introduction: what is 'unlawful discrimination'?

Commonwealth, State and Territory laws protect people from discrimination.¹⁹⁶

A definition of discrimination can be found in NSW's *Anti-Discrimination Act*, which defines discrimination as treating someone, on the grounds of race or some other characteristic, less favourably in the same circumstances, or circumstances not materially different treatment, that others not so characterised are treated.¹⁹⁷

The following¹⁹⁸ are potential grounds of unlawful discrimination recognised under Australian law:

- Race, colour, descent or national or ethnic origin
- Gender
- Marital status
- Pregnancy or potential pregnancy
- Family responsibilities
- Disability
- People with disabilities in possession of palliative or therapeutic devices or auxiliary aids
- People with disabilities accompanied by an interpreter, reader, assistant or carer
- A person with a disability accompanied by a guide dog or an 'assistance animal'
- Age

Also falling within the definition of 'unlawful discrimination' is:

- Offensive behaviour based on racial hatred
- Sexual harassment
- Harassment of people with disabilities

NOTE: While it is not a criminal offence to engage in conduct which constitutes unlawful discrimination, such conduct can be an offence under certain circumstances.¹⁹⁹

For discrimination to become a criminal act, it generally requires some form of physically threatening behaviour towards a minority person or group, or the property of a minority person or group.²⁰⁰

There is limited Australian research available on the prevalence of unlawful discrimination in the fitness industry. However there is US research that has demonstrated that the issue is relevant there,²⁰¹ and conscientious fitness professionals should take steps to ensure their colleagues and clients are aware of the issues in this area and create a safety climate that reduces the risk of discrimination taking place.²⁰²

Managers As a manager, you should familiarise yourself with basic prohibitions under federal and state anti-discrimination law. You should ensure your employees and contractors have the same basic understanding. You should develop your own anti-discrimination policies and write them down in a handbook that can be distributed to new employees. You should also conduct anti-discrimination briefings for your employees at regular intervals. Your state human rights agency can provide information on how to implement an anti-discrimination policy. For example, the Victorian Equal Opportunity Human Rights Commission provides free online access to Right Smart Employers Toolkits (<http://www.victorianhumanrightscommission.com/www/home-849>) that can help managers deal with the following issues:

- Sexual harassment
- Disability and work
- Returning to work after injury or illness
- Mature-age workers
- Pregnancy and work
- Parents and carers
- Cultural diversity in the workplace
- Equal opportunity in practice

Employees or Contractors

You should be aware of your own responsibilities under the applicable federal and/or state anti-discrimination laws, and conduct yourself accordingly in all interactions with clients—especially those clients with special needs.

9.0.1 Case study: using Facebook/social media policies

Can a fitness professional be terminated for making inappropriate posts on their Facebook page? Much depends on the facts of the matter. Certainly, if the material communicated breaches discrimination law, then the person making the post can be held liable. Ordinarily, breaching the law, such as by threatening a person on Facebook, would constitute serious misconduct and provide a ground for dismissal. The Full Bench of Fair Work Australia has decided that Facebook “is a device by which users share with others information” and Facebook posts are “in the public domain” in *Glen Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444. Employees owe a duty of fidelity and good faith to their employer, and although the Full Bench of Fair Work Australia remarked in *Stutsel v Linfox* that it was “mindful of the need not to impose unrealistic standards of behaviour and discourse” about employers and workplaces, employees will risk breaching their contractual obligations if they use Facebook to criticise their employer.²⁰³

Claims for defamation can be very serious and result in significant legal expense. Aon Risk Services Australia reports that the most common professional indemnity insurance claims in volunteer organisations are claims for defamation. This means you need to ensure that your organisation’s newsletters, communications, internal disciplinary procedures, media interviews and social media postings are not defamatory or discriminatory.

Every business should have a communications and social media policy that ensures that:

- Employees appreciate the significance of communicating for, on behalf of, or even just about their employer, their colleagues, their place of work, and their clients;
- Employees and clients understand that social media posts are public communications for which they can be legally liable;
- Employees and clients do not defame people, discriminate against them, threaten or abuse them.

9.1 Fitness Australia Code of Ethics

Can a fitness professional be terminated for making inappropriate posts on their Facebook page? Much depends on the facts of the matter. Certainly, if the material communicated breaches discrimination law, then the person making the post can be held liable. Ordinarily, breaching the law, such as by threatening a person on Facebook, would constitute serious misconduct and provide a ground for dismissal. The Full Bench of Fair Work Australia has decided that Facebook “is a device by which users share with others information” and Facebook posts are “in the public domain” in *Glen Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444. Employees owe a duty of fidelity and good faith to their employer, and although the Full Bench of Fair Work Australia remarked in *Stutsel v Linfox* that it was “mindful of the need not to impose unrealistic standards of behaviour and discourse” about employers and workplaces, employees will risk breaching their contractual obligations if they use Facebook to criticise their employer.²⁰⁴

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- Employees and clients do not defame people, discriminate against them, threaten or abuse them.

9.2 Racial discrimination

The Australian Sports Commission's *Racial Discrimination and Harassment Information Sheet*²⁰⁵ provides excellent material on this topic, and which is available on their website.

9.3 Disability discrimination

The United Nations Convention of the Rights of People with Disabilities explicitly identifies sport, recreation and fitness as a right of disability citizenship. However, surveys have shown that people with disability participate in fitness activities at significantly lower rates than other segments of society. According to statistics, one in five Australians has a disability. Major disabilities involve mobility, vision, hearing and learning disabilities. As people age, their disability rates increase. Fitness providers who fail to incorporate disability and senior facilities and services their business will place themselves at a disadvantage, and may also be engaging in unlawful discrimination.²⁰⁶

Disability groups have identified basic access provisions as a significant barrier to participation in fitness activities. Fitness centres, personal training studios and other related facilities need to consider ease of access for people with a disability. This may require having wheelchair accessible toilets, showers, and changing rooms, or it may involve adding hearing augmentation systems for the hearing impaired.

It is also important that those facilities that do provide access to disabled clients market and promote their services to the disabled community. Target marketing can be done through advertising that includes international symbols for access. This advertising can then be distributed to disability organisations for inclusion in their databases, newsletters, and electronic communications, where they will be more readily accessible to those seeking the information.

The most important thing that a fitness services provider can do to ensure participation by the disabled is to develop an access culture within the business. This requires staff training in disability awareness to dispel any fears, aversions, or embarrassment staff may have in dealing with potential customers with disabilities.

Disability awareness training packages specific to the fitness and recreation industry are readily available in video format and online, and should be included in the staff induction process.²⁰⁷

See for example, the Disability Sports Connect Webinar:

https://secure.ausport.gov.au/clearinghouse/Library/videos/webinars_and_podcasts

9.3.1 Disability Discrimination Act

The Australian Sports Commission publishes is about the Disability Discrimination Act on their website.²⁰⁸

9.3.2 Strategies for inclusion

Being inclusive of people with disability is about providing a range of options to cater for people of all ages, abilities and backgrounds in the most appropriate manner possible. Inclusion encompasses a broad range of options in many different settings.

The inclusion spectrum

The following material is from the Australian Sports Commission's Inclusion in Sport Factsheet:²⁰⁹

“A common misconception about inclusion is that it is solely about including people with disability in regular fitness activities without any modification. Inclusion encompasses many different options in different settings. Inclusion in physical exercise can be viewed in terms of a spectrum. Each section of the spectrum is as important as the next, and ideally there would be programs for people with disability available in all sections to choose from”.



The Australian Sports Commission refers to the following “Examples of the inclusion spectrum

- No modifications: a participant with an intellectual disability may train and compete with other participants without intellectual disability at a swimming facility.
- Minor modifications: a vision impaired participant using a rail for support during free-weights training.
- Major modifications: a seated-participant being able to participate using modified training techniques and equipment, along with other participants with disability in a boxing circuit.
- Primarily for people with disability: participants with disability at their local YMCA facility and their able-bodied friends combine to form teams for the purpose of developing a wheelchair basketball competition.
- Only for people with disability: people with vision impairments participating in a yoga class designed exclusively for them.
- Non-playing role: people with disability can be instructors, fitness facility floor supervisors, gym administrators and volunteers.

The following factors will influence the section/s of the spectrum an individual chooses to participate in:

- Their functional ability
- The activity in which they are participating
- The opportunities within their local environment
- Their personal preferences

The inclusion spectrum allows games and activities to be delivered in different ways, with more options. The aim is to encourage higher quality participation by people with disability, both with or away from their able-bodied peers. Fitness centres can provide a range of options by adapting and modifying how fitness activities are offered in different environments.”

9.4 Sex discrimination

Federal law defines gender/sex discrimination in section 5 of the *Sex Discrimination Act 1984*:

(1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;**
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or**
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;**

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(1A) To avoid doubt, breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

In the context of the fitness industry, the Act makes it unlawful for a person who provides fitness services, such as a personal trainer, or who makes a fitness centre available, to discriminate against another person on the ground of the other person's sex,

- a. by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
- b. in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- c. in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.²¹⁰

Note that it does not matter whether or not the person who provided the service or made the facility available received any payment.

Sexual harassment

Sexual harassment is a variety of sex discrimination that is remarkably common in Australian workplaces, with 1 in 5 women and 1 in 20 men experiencing sexual harassment in the workplace. 21% of all complaints to the Australian Human rights Commission are made under the Sex Discrimination Act and 811 of those complaints are related to sex discrimination in the workplace.

The *Sexual Discrimination Act* defines **sexual harassment** in section 28A:

(1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

(2) In this section:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

Section 28A of the Act indicates the conduct must be:

- Unwelcome;

- Of a sexual nature; and
- The conduct must be such that a reasonable person would have anticipated that the victim would feel offence, humiliation or intimidation.

Unwelcome conduct is conduct that was not solicited or invited by the person, and that the person regarded the conduct as undesirable or offensive.²¹¹

Exemptions

The Act specifically exempts from either sex discrimination or sexual harassment the exclusion of persons of one sex from participation in any competitive fitness activity in which the strength, stamina or physique of competitors is relevant.²¹² However, the exemption does not apply in relation to the exclusion of persons from participation in:

- a. the training of persons engaged in any physical exercise activity;
- b. the umpiring or refereeing of any physical exercise activity;
- c. the administration of any fitness activity;
- d. any prescribed physical exercise activity; or
- e. physical exercise activities by children who have not yet attained the age of 12 years.²¹³

The NSW Department of Sport and recreation have published a Sexual Harassment Policy and Guidelines for the NSW Sport and Recreation Community that provides valuable guidance for fitness businesses and fitness professionals. The Policy and Guidelines acknowledge that sexual harassment is unlawful and that employers are required by Commonwealth and State legislation to take every reasonable step to prevent sexual harassment:

“Sexual harassment may involve physical contact; it may be verbal or non-verbal, explicit or implicit. In essence, it can take many different forms including, but not limited to:

- Uninvited touching, massaging, kissing, embracing;
- Demeaning jokes and comments;
- Propositions, promise or threats in return for sexual favours;
- Non-verbal behaviour such as whistling, sexual staring and delecting;
- Displays of sexually explicit or offensive material (posters, graffiti);

- Sex-based insults, taunting, name-calling, innuendos;
- Persistent or intrusive questions about an individual's personal life;
- Repeated requests to go out, especially after prior refusal;
- Offering sexual favours;
- Engaging in behaviour which is sexually embarrassing, humiliating, or intimidating;
- Offensive communications (letters, faxes, e-mail messages, screen saves etc).

It does not matter what the intention, if it is **unwelcome** and, in the circumstances, gives reasonable grounds for a person to feel offended, humiliated or intimidated, then it is an act of sexual harassment, and should stop.”

There are many benefits of establishing a sexual harassment policy, including:

- It is the organisation's best legal defence;
- It is an effective deterrent to sexual harassment in the work or fitness environment;
- It ensures complaints can be dealt with quickly, reasonably and effectively;
- It helps maintain a safe and healthy fitness environment;
- It is good risk management; and
- It helps to establish and maintain a good reputation in the community.

A sexual harassment policy is seen as one step in a wider program to discourage and prevent sexually harassing behaviour. By establishing a policy, the organisation conveys the message that sexual harassment is unacceptable. It also serves to assure those who experience harassment that their complaints will be taken seriously. In some instances employers can be held liable for wrongs committed by employees in the course of the employee's work. This is referred to as vicarious liability. Taking reasonable steps to prevent sexual harassment and by being able to show how an organisation has taken these steps will assist an organisation not to be found liable for the behaviour of an individual.

Other strategies will need to be adopted to translate the policy into practice and to effectively combat sexual harassment in fitness. Some additional strategies are considered further in this document.

The Policy and Guidelines contains a Model Sexual Harassment Policy which is available at the following link: <http://fulltext.ausport.gov.au/fulltext/2000/nsw/wpolicy.pdf>.

9.5 Age discrimination

The current generation of Australian seniors is more likely to be physically active than its parents or grandparents. As more elderly Australians seek advice, instructions and opportunities to enhance their fitness and enjoyment of physical activities, the possibility increases that they may face unlawful discrimination. Discrimination based on age is prohibited by the *Age Discrimination Act 2004*.

The objects of the Age Discrimination Act are to:

- a. to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information; and
- b. to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community; and
- c. to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances; and
- d. to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights; and
- e. to respond to demographic change by:
 - a. removing barriers to older people participating in society, particularly in the workforce;
 - b. changing negative stereotypes about older people;
- f. bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly on Ageing.²¹⁴

The key provisions of the Act affecting the fitness industry are found in the following sections:

27 Access to premises

It is unlawful for a person to discriminate against another person on the ground of the other person's age:

(a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or

(b) in the terms or conditions on which the first-mentioned person is prepared to allow the other person access to, or the use of, any such premises; or

(c) in relation to the provision of means of access to such premises; or

(d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or

(e) in the terms or conditions on which the first-mentioned person is prepared to allow the other person the use of any such facilities; or

(f) by requiring the other person to leave such premises or cease to use such facilities.

28 Goods, services and facilities

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's age:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

Today's fitness industry professionals will recognise that the elderly will comprise an ever increasing proportion of their clientele, and will take steps to ensure that the aged are as welcome in their facilities as the young. It is important that modern fitness centres offer access and programs to potential users of all age groups. This is good practice, and it also serves the needs of the wider community by spreading the benefits of exercise and fitness to the population groups who can benefit the most from it.

9.6 Bullying

Bullying, or workplace harassment (where employees are concerned) is behaviour of a non-sexual nature that is unwanted or unwelcome, occurs repeatedly, and would be seen by a reasonable person to be offensive, humiliating, intimidating or threatening. This definition indicates that there is some overlap with defamation, discrimination and criminal liability, and readers are encouraged to consider the other parts of this manual, and those topics, as need be.

Scenario: A fitness trainer repeatedly requires a client to engage in exercise activity over her objections on the basis of “no pain, no gain.”

Problem: This could be a breach of s 32 of the WHS Act (NSW) and, at any rate, there is no scientific literature to support the idea that you need to experience pain during a workout to achieve benefits.²¹⁵

There is a Workplace Harassment Code and this should be consulted by fitness businesses to counteract bullying in their facilities by adopting preventative measures including:

- Developing a clear anti-bullying policy;
- Training and updating staff;
- Developing a complaint process; and
- Auditing and reviewing processes on a regular basis

Employees

Fitness businesses need to engage in prompt, serious handling of complaints, and issue consistent and appropriate penalties. Fitness professionals should:

- Never bully colleagues or clients;
- Stop bullying if it is taking place (e.g., if a client is bullying another client);
- Ensure that employees in their facility understand their responsibility to stop and report bullying.

Managers

Fitness business owners and managers should do all the things expected of other fitness professionals (listed in the preceding paragraph), and also:

- Respond promptly and fairly to any reports of bullying;
- Ensure complainants are not victimised;

- Create an environment characterised by mutual respect.

9.7 Key concepts

This chapter focuses on the duty to refrain from injuring the dignity of a client, or discriminating against them, by treating them less favourably than another in the same circumstances because of race, gender, disability, or other identifying characteristics.

The Fitness Australia Code of Ethics outlines the way fitness professionals should behave in undertaking their duties and responsibilities, and provides guidance on ensuring professional practice at all times for all fitness professionals. There are also a number of State fitness industry codes of practice that set out to ensure appropriate training standards, consumer confidence in the industry, ethical provision of services, participation in fitness activities, rights and obligations between suppliers and services are established, and dispute resolution mechanisms are developed. Fitness Australia is in the process of drafting a national code of practice, which aims to promote consistency and relevance in the industry.

Racial discrimination and harassment is against the law, with the *Racial Discrimination Act 1975* (Cth) preventing discrimination on the basis of race, colour, origin, descent or background, and the *Racial Hatred Act 1995* (Cth) allowing complaints of racially offensive or abusive behaviour. There are three types of racial discrimination. The first is direct racial discrimination, which involves treating someone differently on the basis of his or her race, colour, origin, descent or background compared to the way someone of a different race would be treated in a similar situation. The second is indirect racial discrimination, which involves treating everyone the same way, but in such a way as to unreasonably disadvantage people of a particular race in the circumstances. The third is harassment, which may be described generally as 'offensive behaviours' carried out in public because of the race, colour or origin of a person or group that is reasonably likely to offend or humiliate another person or group of people.

It is also possible that fitness providers who fail to incorporate disabled and senior facilities and services into their business may be engaging in unlawful discrimination. The *Disability Discrimination Act 1992* makes harassment on the basis of disability unlawful, and prohibits the harassment of parents and carers of people with disability.

The DDA also covers use of goods, services and facilities, and an organisation can receive assistance and financial support from either their state department of sport and recreation or local council to improve access. It may be helpful to utilise the inclusion spectrum to create modified activities and services and encourage higher quality participation by people with disability.

Fitness providers must also take care not to discriminate on the basis of gender/sex. The *Sex Discrimination Act 1984* makes it unlawful to discriminate against a person by treating them less favourably than a member of the opposite sex in similar circumstances. However, there are exemptions from discrimination in respect of the exclusion of persons of one sex in competitive activities in which strength, stamina or physique of competitors is relevant. Take note that this does not apply to activities

for children under 12, and those in non-participatory roles: for example coaching, umpiring, and administration.

Discrimination based on age is also prohibited by the *Age Discrimination Act 2004*, which makes it unlawful to discriminate against a person on the basis of age by, for instance, denying access to premises or goods, services and facilities. Today's elderly are much more active than previous generations and today's fitness industry will find it beneficial to welcome the senior populations as much as the young in their facilities.

9.8 Frequently asked questions

Q. What if I say something, or act in a way which may be perceived as discriminatory, but I just meant it as a joke?

A. In general, this should not take place. Remember, not everyone sees behaviour the same way, and in the event an allegation of discrimination is made, the focus is on whether the behaviour could reasonably have been expected to offend, not the intention of the harasser. Fitness industry professionals must be sensitive to the way their public behaviour is received.

Q. What happens if an employee of my facility discriminates unlawfully?

A. It is likely that in those circumstances the employer will be liable. For example, both the DDA and RDA operate vicariously, so a facility or organisation can be held responsible for the discriminatory actions of its employees and members.

Q. Is there any difference in our obligations as a manager/employee/contractor?

A. No. The aforementioned pieces of legislation apply equally to all people in all public places. Your behavioural obligations are the same regardless of whether you are a manager, employee or contractor, and they even apply to clients. In general though, employees and contractors will be interacting the most with facility clients, and extra care might be taken in these first interpersonal exchanges.

Q. What should I do if I see or hear one of my clients acting in a potentially discriminatory way to another client in the facility?

A. As a fitness industry professional, you have a duty of care to your clients, a failure to act in this instance may place you in breach of this duty. Your facility's risk management protocols manual (RMPPM) should provide guidance so that you are able to handle an incident of this nature in a professional manner.

Part Three

Equipment, Premises and Emergencies

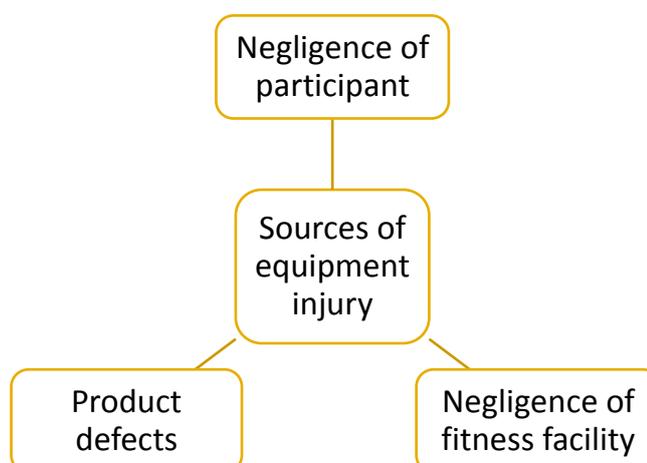
Chapter Ten

Equipment

10.0 General

Ensuring that equipment in your facility is in good working order is important to maintaining the safety of your clients. Instructing participants on how to properly use and care for the equipment (such as wiping down machinery after use), how to properly wear equipment (such as weight belts) and ensuring it is appropriate for the physical size/skill level of the participant, as well as retaining manufacturer's instruction documents, and undertaking and documenting equipment safety inspections in both a formal and informal manner, according to manufacturer recommendations, is key in managing risk. A great deal of negligence claims in the fitness industry are related to a participant's use of equipment. Incorrect use of equipment is one of the top six risk issues identified by Australian fitness industry professionals.

There are three common sources of responsibility for equipment related injuries.²¹⁶



Aiming to minimize exercise equipment related injuries across all these areas through effective risk management strategies will reduce resultant claims and lawsuits.

Manufacturers and distributors of commercial exercise equipment provide equipment training, maintenance and placement/layout suggestions for your fitness facility. Several manufacturers and distributors offer such services:

Manufacturer	Services Offered	Weblink
Distributor		
Cybex	Design your gym with a gym planner. The gym planner looks at your facility's layout and where to place Cybex equipment for optimal workout spacing.	http://www.cybexintl.com/solutions/design/
Precor	Design and support services for the placement of Precor exercise equipment and in your fitness facility. Precor outline some key factors to consider in the facility's layout such as: usage trends, footfall and member flow, energy efficiency, floor finishes, accessibility, flexibility for future equipment rotations or expansion, and areas of personal training instruction.	http://www.precor.com/en-au/why-choose-precor/planning-design
Life Fitness	Offers a training facility called 'Life Fitness Academy' which offers training on the key features and benefits of their equipment, in addition to how best to instruct clients for improved exercise prescription and how to minimise equipment servicing needs.	http://www.lifefitness.com.au/images/pdf/LFA_08.pdf
Synergy Fitness	Formerly a Calgym distributor, now distributes a range of commercial fitness equipment including Cybex. In terms of equipment, their consultancy services include site selection and evaluation, floor layout and facility design. They don't charge for these service and have an online form for logging service and repairs.	http://www.synergyfitness.com.au/page/11/Consultancy
Australian Barbell Company	Offer online assembly instruction manuals for all their products.	http://www.australianbarbellco.com/barbellsPublic/downloads/instruction-manuals.html
Concept 2	Specialising in rowing machines, they provide information online for each of their products including updates regarding product	http://www.concept2.com/service

faults or recalls, assembly, warranty information, manuals and e repair videos.

Guild Insurance have also developed a practical checklist of things to do to help prevent equipment breakdown and minimise any potential losses which may occur.

- Ensure equipment is installed correctly.
- Follow the manufacturer's instructions for installation, operation, storage, maintenance and cleaning.
- Invest in quality 'power surge' protection for equipment and electrical switchboards.
- Invest in periodic thermal scanning of electrical switchboards to identify 'hot spots'.
- Consider installing an uninterrupted power supply for critical equipment.
- Keep equipment well ventilated.
- Invest in backing up your business information.
- Implement an equipment replacement program.
- Ensure you understand your insurance cover.
- Keep 'pest control' programs up to date.
- Train staff in the safe use and maintenance of equipment to identify early warning signs of equipment failure.
- Encourage employees to report any equipment problems immediately.
- Promote a safety culture to reduce the chance of injuries and workplace accidents.

10.0.1 Risk management strategies

Exercise equipment related risk issues can be managed by following standards of practice and procedures. Techniques and strategies can be used in an effort to reduce risks as follows:²¹⁷

1. Use care in the selection of exercise equipment.
2. Assemble, install, inspect and test exercise equipment properly before use.
3. Place exercise equipment signage, including warning labels at eye level.
4. Provide appropriate instruction and supervision for exercise equipment use.

5. Inspect and maintain exercise equipment and remove from use if it needs repair.
6. Keep exercise equipment clean and disinfected.
7. Comply with exercise equipment recall/repair/warranty notices.
8. Ensure equipment is properly stored and not left lying around.
9. Maintain exercise equipment records such as cleaning, inspections, and maintenance.

In addition, it is important to appoint an experienced and properly trained member of staff to take responsibility for maintenance activities.

Managers

As a Manager you should ensure that all exercise equipment in your Facility is assembled, maintained and repaired in accordance with the manufacturer's recommendations. Equipment maintenance, cleaning and service is also important. Equipment and related maintenance records should be maintained, along with incident reports, in-line with the risk management plan of your facility. These records may serve as a defence for your facility if required, demonstrating that 'duty of care' was carried out. This is especially true in unstaffed fitness centres.

As the manager of a 24/7 fitness facility, you will need to inspect, service and maintain equipment and facilities on a regular basis. Providing security to the facility is especially important, and should include measures such as swipe cards, surveillance cameras and panic buttons. Surveillance cameras should be installed in all public areas, and copies of the recordings kept on file. In addition to reducing the risk of criminal activity, surveillance camera footage can help show if an injury to a client was the result of faulty equipment or contributory negligence on the part of the client.

Employees or Contractors

Ensuring all clients of the gym are properly introduced to each piece of equipment is important to minimize risk. Instruction and supervision at all times is crucial, as is the need to point out and explain any safety or warning signs. Ensure you check with management to find out where equipment and incident records are kept, so that you can update them as instructed.

Chapter Eleven

Premises

11.0 General

In Australia, building regulations control the standards that must be met when designing or constructing a facility, or modifying an existing building. As such, when planning to undertake any form of building work on a fitness facility, experts should be consulted early to ensure guidelines, standards, laws and regulations which may affect your facility are considered.²¹⁸

The Building Code of Australia (BCA) is determined by the Australian Building Codes Board (ABCB) and is adopted into the regulatory systems of each jurisdiction by state and territory governments who are also responsible for implementation. The BCA is a performance-based regulatory regime with a strong emphasis on technical evidence to inform building requirements.

In order to provide an example of how Building Code of Australia requirements may apply when converting existing premises for use as fitness facility, you may wish to consider some of the following factors:

Sanitary facilities:	The Building Code of Australia Part F2.3 stipulates indoor fitness facilities must meet a prescribed number of sanitary facilities including showers, based on design occupancy numbers. Additionally, all facilities must comply with wet area requirements Part F.1 such as damp-proofing and waste water requirements.
Ventilation:	Ventilation can be mechanical or natural, but must be able to cope to offer thermally comfortable environments. Mechanical ventilation systems must comply with the Australia Standard 1668.2 “Mechanical Ventilation for Acceptable Indoor Air Quality” (As 1668.2) and the ASHRAE standard “Thermal Environmental Conditions for Human Occupancy”.
Exits and fire safety:	Part D1 Provision for Escape, in the Building Code of Australia requires that no point on a floor must be more than 20 metres from an exit or a point from which travel in different directions to 2 exits is available, in which case the maximum distance to one of those exits must not exceed 40 metres.
Disabled access:	Provisions to ensure equality of access for disabled people have been added to the Building Code of Australia. Potential requirements may include: installation of a lift, car parking provision for disabled clients, installation of access ramps, widening doorways and installing disabled toilets.
Acoustics:	Minimum acoustic performance is required under the Building Code of Australia. Additionally the environmental protection agency or authority in each state

generally regulates noise emitted from buildings. Acoustic reports may be requested by local authorities which may require measures such as double glazing installation, or sealing of gaps.

General: These are just a snapshot of some key Building Code of Australia requirements that are likely to impact the feasibility of converting existing premises. There will be other requirements to consider when changing the use of a building. (Taken from our/Urbanista report)

Ensuring you have complied with the Building Code of Australia requirements minimises the risk of a breach and potential financial ramifications.

In 2013, the AFIRM Project published a report by Rebecca Richardson and Jacqui Salter called Planning and Building Regulation for Fitness Businesses which provides information about planning and building control frameworks, planning and building requirements for fitness operations (including information on starting a new fitness facility, taking over or altering an existing fitness facility, starting a fitness business from home, and conducting a fitness business in a public place. The report is available on the AFIRM Project website.

11.0.1 Facilities fit for purpose

Even if your fitness facility is complying with the relevant planning and building standards, in order to reduce the risk of injury it is important to ensure that the premises are maintained in a condition that is fit for the purpose that they are being used. This includes ensuring safe access to the premises, overall cleanliness, as well as appropriate fit-out and maintenance of the interior.

Under Australia's workplace health and safety legislation, such as the *Work Health and Safety (National Uniform Legislation) Act 2011* and *Work Health and Safety (National Uniform Legislations) Regulations (2011)*, there is a 'duty of care' that applies to a person who conducts a business or undertaking (PCBU), which is defined as:

Whether the person conducts the business or undertaking alone or with others; and
Whether or not the business or undertaking is conducted for profit or gain.

Broadly speaking, this 'duty' applies to everyone providing a service in a fitness facility to ensure the facilities are fit for purpose and that you do *all that is reasonably practicable* to ensure the health and safety of those that may be effected.

Provision of safety glass/mirrors, slip resistant floor finishes, secure storage of loose/free weights, and careful positioning of fitness equipment and machines to avoid overcrowding are some things to keep in mind. Fitness professionals who conduct exercise in outdoor areas in public spaces, should be alert to the impact of other users and other activities, not only so that you do not adversely impact them, but as they may represent a risk to you, your employees or clients.

Formal, regular facility inspections may serve to assist in reducing risk. As a guide, the higher the risk, the more frequent inspections should occur, such as checking daily for standing water/water deposits left by clients travelling from the pool in the fitness facility to another floor area. Periodic inspections should be conducted to determine if facilities are compliant with all code requirements for equipment such as fire extinguishers and emergency lighting.

The development and use of an inspection checklist report not only serves to monitor and improve potential risk issues in terms of building maintenance, but if faced with litigation serves to prove the facility has been sufficiently inspected for risks and may prevent or reduce liability. Maintenance scheduled regularly is another element of providing a reasonably safe environment, as regular maintenance assists in reducing risks that may not have been identified during inspection.

Beyond any formal health, building or planning requirements, maintaining the premises in a manner that is fit for purpose may have implications on the validity of your insurance policy, compliance with workplace health and safety legislation, as mentioned previously, and general 'duty of care' under the law.

11.0.2 Inspection checklists

Inspection checklists used to monitor the condition of a facility should be designed in conjunction with staff, management and ideally specialists such as a workplace health and safety professional or accredited building certifier (to ensure compliance with any Building Code of Australia requirements). It may be prudent to forward your checklist onto your facility's legal representative to ensure it is as comprehensive as possible in terms of aiming to create a reasonably safe environment.

Inspection checklists can be generalised for the entire fitness facility or focus on certain areas. For instance, you may develop specific checklists for restrooms and locker rooms which are often a common place for injury risks due to floors becoming slippery or hairdryers left near sinks, creating risk of electrocution for example. Entry and exit ways to the facility can also often be overlooked and may require a specific checklist (see Appendix A).

Another checklist of 'housekeeping' relating to building conditions has some additional items:

- Are there procedures for immediate cleaning of accidental spills or leakages?
- Are premises free of sharp objects?
- Are the premises free of tripping hazards (e.g., torn carpet)?
- Are aisles and hallways clear and unobstructed?
- Do all stairs have anti-slip features that are properly maintained?
- Are electrical cords tucked away?

(Adapted from 'Risk Management Tool for Volunteer Involving Organisations').

In order to assist you in with the development of an inspection checklist for your fitness facility, as mentioned in Chapter 2.9.2, the Risk Logic/Fitness Australia Risk Assessment for Fitness Businesses is provided in Appendix A.

11.1 Facility risk management strategies

The physical premises/location of your fitness business can impact on the risk issues for your clients (as well as personnel). The Building Code of Australia details areas with which fitness facilities must comply. Risk management strategies which may assist to minimise risk in respect to premises may include the following:²¹⁹

- Comply with the Building Code of Australia or your lease, as appropriate.
- Follow facility design and construction specifications.
- Develop and implement regular facility inspection schedules.
- Develop and implement maintenance and cleaning schedules.
- Post and maintain facility signage.
- Provide and maintain proper floor surfaces.
- Plan carefully for outdoor and off-premise activities.
- Maintain records of all facility installations, inspections, maintenance and cleaning schedules.

Chapter Twelve

Emergencies

12.1 Emergency action plans

There is both a professional and legal need to have medical emergency plans in place. Types of medical emergencies include:

- Health risks such as medical conditions which lead to cardiac arrest for example, and
- Injury risks such as situations or conditions which lead to back injuries, bone fractures, tissue damage etc.

Fitness business and professionals have a legal obligation to plan for and provide appropriate emergency care when these situations occur.

Potentially life threatening injuries may occur without warning and knowing what to do in a medical emergency may significantly improve the outcome. Therefore, a well thought out, documented, medical emergency action plan (EAP) that considers all legally foreseeable medical emergencies and is well communicated to facility personnel, is critically important to managing risk.

A client suffering a cardiac arrest (heart attack) while exercising, is one example of a potentially life threatening injury which can occur without warning. Although rare, there is compelling “evidence to indicate that vigorous physical activity acutely increases the risk of cardiovascular events among young individuals and adults with both occult (no symptoms) and diagnosed heart disease”.²²⁰

Planning and preparing for a potential cardiovascular event in your fitness facility may include:

- Having a medical professional inform fitness instructors of the signs to look for in the event a client may be suffering a potential cardiac arrest, such as chest pain and shortness of breath. These are typically covered in first aid and CPR courses.
- Undertaking pre-exercise screening incorporating client referrals for cardiovascular screening by medical professionals.
- Having athletes who train in your facility, with known cardiac conditions, evaluated by a medical professional before they train to compete.
- Ensuring staff are trained in managing cardiac emergencies, with a specified plan and appropriate resuscitation equipment including effective placement and use of Automated External Defibrillators (AEDs), particularly if the gym membership is larger, (for example, where total gym exposure hours

are greater than 500,000 per year) if programs for the elderly are available and in unsupervised exercise rooms (allowing public access to defibrillators).²²¹

- Ensuring that clients who exercise regularly have their exercise programs modified depending on their exercise capacity over time and their usual physical activity levels.

12.1 Automated external defibrillators (AEDs)

Scientific evidence shows an increased survival rate for individuals who receive electrical defibrillation in the first few minutes after a sudden cardiac arrest (SCA). In the last decade automated (rhythm-detecting) external defibrillators (AEDs) have become available that are portable and affordable (around \$2500 per unit and \$700 for a wall mounting bracket and hard case). Automated External defibrillator training is now common during first-aid/CPR training although they have been designed to allow even untrained people to be able to use them in emergencies.

Although still relatively rare, there is still the potential that SCA may occur when a person undertakes physical activity and this risk increases as the intensity of the activity increases. Consequently, health and fitness centres are increasingly recognised as higher risk sites that may benefit from placement of AEDs.

There are no laws in Australia requiring fitness centres to install AEDs. However, several international and professional organisations have 'strongly encouraged' larger centres to install AEDs.²²²

Automated External defibrillator placement in a fitness centre is particularly important if the clientele are older or have a 'high-risk' profile, for example, clients with cardiovascular, respiratory or metabolic disease. International negligence case law and duty of care principles suggests the standard of care required in health/fitness centres may be increasing. Therefore, it may be wise to install AEDs in larger centres and those in which higher risk groups are physically active.²²³

There may be concerns from Fitness Facilities regarding the use of AED's in the event the AED has a malfunction issue, or that training employees to operate AED's might expose the operator and/or facility to liability, should the client not fully recover. However, in Australia, there are 'Good Samaritan-style' laws that recognise this concern and aim to protect rescuers who use AED's from lawsuits.

In health/fitness facilities, where staff members have been recruited to use an AED, managers must ensure that their staff have received adequate training from accredited education providers in order to show good practice in case of an emergency situation.²²⁴ Furthermore, research suggests that it is crucial that the staff receive re-training and refresher courses obtained from accredited education providers in order to ensure the retention and knowledge in skills required to use AEDs (Madden, 2006; Mahony et al., 2008). As a final remark, it is also advised that the AEDs should be well maintained in accordance with the manufacturers' recommendations, local laws and regulations.

12.1.1 Risk management strategies

All AED equipment related risk issues can be managed and minimised by undertaking the following actions:

1. Discuss liability issues with your facility's legal adviser (and risk management committee). AED purchases should meet their approval and should be included in the facility's EAP.
2. Contact your insurance company to find out about potential coverage issues specific to your current insurance policy.
3. Maintain the AEDs in accordance with the manufacturer's specifications and the requirements of the *Work Health and Safety Act 2011* and *Managing Risks of Plant in the Workplace 2012*.
4. Establish and maintain a record keeping system of staff qualifications, competencies and training undertaken in respect to AED use.
5. Ensure accredited, appropriate training for safe use of AED equipment is provided to staff, with at least annual refresher training scheduled and access to re-certification made available.
6. Review the use of the AED(s) in your facility and ensure each incident requiring AED is documented.
7. Ensure the AED is well secured to as much as possible minimise the risk of machine theft, but still allowing immediate access when required.
8. Create a system to provide post-incident support to the operator of the AED.

Managers

As a Manager you should seek an accredited provider to deliver AED training to your nominated AED responders/personnel and that refresher courses are offered regularly. Ensure that AED equipment is well signed and maintained in-line with the manufacturer's instructions, that the AED is safely secured in the premises, that it can be accessed with ease and that the AED is incorporated into your facility's EAP.

Employees or Contractors

If you have been nominated as an AED responder in your fitness facility, be sure that you have received training from an accredited provider, that you are fully competent in its use and that your knowledge in respect to safe AED operation is current.

12.2 DRSABCD action plan

The St John's Ambulance offers an easy guide to administering first aid, involving the acronym DRSABCD. In an event of an emergency they recommend calling triple zero (000) for an ambulance and suggest first aid can be applied as follows:

- **D**anger – ensure the area is safe for yourself, others and the person injured.
- **R**esponse – ask the person's name and squeeze shoulders, if there is no response, send for help. If there is a response, make the person comfortable, check for injuries and monitor their response.
- **S**end for help – call 000 for an ambulance or ask someone else to call.
- **A**irway – open the mouth, if there is foreign material present place the person in the recovery position and clean the airway with fingers. Open the airway by tilting the head with a chin lift.
- **B**reathing – check for breathing by looking, listening and feeling. If the person is not breathing, start CPR. If they are breathing place them in the recovery position, monitor breathing, manage injuries and treat for shock.
- **C**PR – 30 chest compressions, 2 breaths until help arrives or the patient recovers.
- **D**efibrillation – apply the defibrillator if available and follow the voice prompts.²²⁵

Incorporating DRSABCD into your medical emergency action plans allows staff to have an easy reference point for the process of administering first aid.

12.3 Safe Work Australia – first aid in the workplace Code of Practice

Earlier in this chapter we discussed first aid as it applies to medical emergencies. Additionally, the provision of first aid requires a fitness facility to have certain equipment, signage and facilities incorporated as part of its design, in order to comply with the 'Code of Practice' requirements as set by Safe Work Australia.

In order to determine the first aid requirements for your workplace the Code suggests²²⁶ assessing the nature of the work and workplace hazards such as manual tasks (like moving plate weights, causing muscular strain), machinery or equipment (such as potentially being hit by weights being dropped, causing fractures or amputations) to determine what first aid may be required.

It stipulates that first aid kits should be kept in prominent, accessible locations which can be retrieved promptly by personnel.²²⁷ Installing first aid signage in your workplace will assist in its location, in addition to signage for AEDs.²²⁸ It is suggested that eye wash or shower equipment may be permanently fixed or portable depending on the workplace and that first aid rooms be established in a workplace if a risk assessment shows it may be difficult to administer appropriate first aid if a dedicated room wasn't available.²²⁹ The First Aid in the Workplace Code of Practice provides a variety of practical information and for further information can be viewed at:

http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/693/First_aid_in_the_workplace.pdf

Managers

Reviewing and implementing the First Aid in the Workplace Code of Practice into the design of your facility will assist in ensuring suitable signage, accessible and relevant equipment and/or a first aid treatment room is available. Compliance with the Code will aid in risk reduction as well as meeting 'duty of care' requirements.

Employees or Contractors

Ensuring you are aware of the location and correct use of all first aid equipment in your facility is imperative. Be sure to familiarise yourself regularly with your facility's equipment, and report to management any issues with signage or location accessibility.

12.4 Creating a medical emergency action plan

A medical emergency action plan needs to be tailored to your facility and the programs you offer, as each fitness program has unique aspects such as location, participants, staff and expected response time of local medical emergency services. As a guide, in the development of a medical emergency action plan, you may wish to consider the following:

- Build a planning team – to identify medical emergencies that may arise in the organisation. This may require consultation with experts, reviewing trends and studying the organisation's accident reports.
- Flexibility – to ensure the plan can adapt to any medical emergency while still being comprehensive and practical (such as which staff are assigned duties).
- Facility issues – to outline the location of medical equipment, telephones, emergency exits, elevators and emergency medical services meeting locations.
- Equipment issues – to list the equipment available to assist with medical emergencies such as first aid kits and AEDs.
- Communication issues – to identify which personnel makes what phone calls, in what order and how to make the phone calls (phone number and information to provide), including instruction on where to locate communication equipment.
- Post-emergency issues – to evaluate your facility following a medical emergency in order to determine why the emergency occurred, how the situation was handled and how it could be improved. Completion of an incident report is important in this step.
- Testing the plan – to simulate a medical emergency and to evaluate it and adjust accordingly. The medical EAP should then be forwarded to all staff so they can be trained properly to follow it.

- Media interaction – ensure a staff spokesperson is available to work with the media following a medical emergency. Persons should be nominated to decide on what information should be released.²³⁰

No physical activity can be completely risk free, and so developing and regularly reviewing an EAP that is appropriate for the programs run by your fitness facility is important. In absence of an EAP or an EAP that is not properly followed, there may be a basis for negligence claims and this could also mean the difference between life and death of a participant.

In addition to medical emergencies which may pose an immediate risk to health, fitness facility managers may wish to give consideration to working with local authorities to plan for other types of emergencies or crises such as environmental (e.g.. floods), property (e.g.. fire) and life (e.g. terrorist activity or bomb treat). Crisis management plans for these events may incorporate the development of an evacuation plan and conducting evacuation drills.

12.5 Key concepts

Being prepared for medical emergencies is crucial in reducing risk and potential liability. Your facility should have a well thought out, medical emergency action plan, identifying foreseeable emergencies and how to approach such emergencies. These plans should be tailored to your facility and programs offered by your facility. First aid action plans are available from St John's Ambulance utilising the acronym DRSABCD (danger, response, send for help, airway, breathing, CPR and defibrillation). This helps in providing your facility an easy guide to administering first aid. Automated External Defibrillators (AEDs) used in the first few minutes of individuals suffering a sudden cardiac arrest (SCA) have been found to increase survival rates. While not a legal requirement in Australia, it is recommended that the installation and use of AEDs should at least be considered by fitness facilities with high-risk groups. In order to plan first aid requirements for your facility, you must assess your facility, (machinery, equipment and manual tasks) which will provide a tailored approach to first aid. Complying with Safe Work Australia's 'Code of Practice' is mandatory to all fitness facilities.

12.6 Frequently asked questions

- Q. What happens if I use an AED to assist a client who is unconscious and appears to be having a cardiac arrest and he/she doesn't recover? Am I liable?**
- A. If you acted in good faith, with good practice and without recklessness while providing help to a person in need of emergency assistance, it would be unlikely you could be successfully sued for providing first aid. Only if it were shown that you were grossly negligent could you potentially be sued. It is important if you are AED trained, that you have been educated by an accredited provider so you can show good practice in the event of an emergency.

Part Four

Risk Management Planning, Implementation, Monitoring and Evaluation

Chapter Thirteen

Implementation, Monitoring and Evaluation

13.0 General

Implementing a risk management plan requires a strategic approach to ensure an organisation-wide uptake. Prior to implementing the risk management plan, it is important to ascertain what risk management strategies are already in place in your fitness business, and what other areas in respect to risk management need addressing. The use of frameworks, the risk rating table and risk assessment for fitness businesses are tools to help get started in terms of assessing risk and formulating a plan. Enhanced risk management involves the implementation of risk management strategies that take into account any applicable laws and standards of practice. Implementation of the strategic risk management plan should involve health/fitness managers, professional staff members, and the risk management advisory committee. Monitoring, reviewing and evaluating your fitness facility's risk management plan will help assess whether or not the plan has met its goals and objectives, aiding in quality assurance and continual improvement.²³¹

13.1 Implementation

A strategic plan is a set of decisions, goals and objectives that are designed to achieve a future direction. A strategic plan looks at what initiatives will take place, why and how they will be undertaken. In a strategic plan, some decisions will be prioritised over others and due to your fitness facility's circumstances your own risk management strategies will need to be prioritised for implementation. Having a medical emergency action plan (as discussed in 4.4) should be one of the first priorities.

Strategic planning for an enhanced risk management plan can be a complex task, but the benefits can be significant. Strategic planning for enhanced risk management takes a proactive rather than reactive approach, and as such, assists in reducing potential crises and legal liability.

JoAnn Eickhoff-Shemek outlines a basic, strategic planning model for applying risk management²³². The steps include:

1. Mission identification
2. Goals selected and set
3. Objectives identified
4. Specific risk management strategies set
5. Specific action steps for each risk management strategy
6. Persons responsible specified and applicable timeframe ascertained
7. Evaluation

Steps 1 and 2 are discussed in the following section under Risk Management Protocols Manual and Step 7 is discussed under Monitoring and Evaluation. Steps 3 to 6 can be implemented by utilising a document or template, which is set up in a tabular format and can be updated or changed as required. An example of implementing a risk management plan for 'selected' risk management strategies involving pre-exercise screening is provided below. This example does not provide all pre-exercise screening strategies, but is offered as a sample.



Risk Management Strategic Planning Template: Sample Using 'Selected' Pre-Exercise Screening Strategies				
Objective	Risk Management Strategy	Action Steps	Person Responsible	Timeframe
To implement pre-exercise screening procedures	Select the pre-exercise screening device to use or develop own	Review applicable laws and published codes of practice as well as existing pre-exercise screening devices	Health/Fitness Director and Personal Trainer Coordinator	June 2014
			Same	July 2014
	Develop written medical clearance procedures	Establish criteria from the pre-exercise health screening device that warrants medical clearance using published codes of practice	Same	July 2014
		Decide "who" in the facility has authority to interpret data and make decisions regarding medical clearance	Same	July 2014
		Develop a medical clearance form	Same	July 2014
		Establish instructions on "how" medical clearance will be obtained	Same	July 2014
	Develop written procedures for participants who refuse to complete pre-exercise health screening procedures	Review the federal Disability Discrimination Act 1992 and establish guidelines for staff members to follow when this occurs	Same	August 2014
		Develop a written draft describing the above risk management strategies—to be reviewed by all health/fitness professionals in the facility	Set up a staff meeting for discussion and feedback on the "draft" procedures Revise draft based on feedback	Same and all professional staff Same
	Obtain approval of above procedures from Risk Management Advisory Committee	Send final draft to committee, set up meeting for Advisory Committee to discuss and approve	Same and Risk Mgmt Advisory Committee	September 2014
	Include above procedures into the facility's Risk Management Protocols Manual (RMPM) and train staff	Insert the procedures into the appropriate section of the RMPM Conduct an in-service training for staff	Same	October 2014
Same			October 2014	

Professional staff members should lead the development of risk management strategies and action steps. The draft may then be reviewed by fitness facility team members, followed by the risk advisory committee. As the written procedures are approved they should be included in the facility's Risk Management Protocols Manual.

13.2 Risk management protocols manual

A risk management protocols manual (RMPM) is another important step in the implementation of the risk management plan. Protocols are the official system of rules and procedures including the correct code of conduct to follow. An example of a protocol rule might be "it is a rule of this fitness facility that all fitness instructors must conduct a pre-exercise screening questionnaire with new members, prior to undertaking exercise that reflects a duty of care". The procedures would then be written as action steps that describe what staff members have to do to undertake pre-screening effectively. Procedures for inclusion in the manual should be written sequentially in a concise manner, be easily understood and not reflect too much detail, so that they can be implemented easily. Once risk management strategies are completed and approved by the facility's risk management advisory committee, they should be inserted into the RMPM in an organised manner: for example, in a folder with tabs denoting protocols relating to pre-exercise screening, medical emergency action plans and so on. The RMPM represents the enhanced risk management plan of the business and should also include sections on 'why' the protocols should be followed to ensure staff understand why it is critical that the legal duties of the facility are adhered to and how staff could be liable. A statement at the front of the document to note that the RMPM is an internal copyrighted document is also important²³³.

13.3 Staff training

A risk management protocols manual (RMPM) is another important step in the implementation of the risk management plan. Protocols are the official system of rules and procedures including the correct code of conduct to follow. An example of a protocol rule might be "it is a rule of this fitness facility that all fitness instructors must conduct a pre-exercise screening questionnaire with new members, prior to undertaking exercise that reflects a duty of care". The procedures would then be written as action steps that describe what staff members have to do to undertake pre-screening effectively. Procedures for inclusion in the manual should be written sequentially in a concise manner, be easily understood and not reflect too much detail, so that they can be implemented easily. Once risk management strategies are completed and approved by the facility's risk management advisory committee, they should be inserted into the RMPM in an organised manner: for example, in a folder with tabs denoting protocols relating to pre-exercise screening, medical emergency action plans and so on. The RMPM represents the enhanced risk management plan of the business and should also include sections on 'why' the protocols should be followed to ensure staff understand why it is critical that the legal duties of the facility are adhered to and how staff could be

liable. A statement at the front of the document to note that the RMPM is an internal copyrighted document is also important²³⁴.

13.4 Monitoring and evaluation

Monitoring your risk management plan means continually checking to identify if any changes are required. Monitoring within the context of the fitness industry should include keeping an eye on:

- New government policy announcements.
- New legal precedents (examples), set by case law outcomes as a result of injuries in the fitness industry.
- Incident records to identify any risk issues which need further attention.
- Progress with the implementation of the risk management plan.
- Risk controls in the facility to identify if they are working as they should be.

Evaluation of a fitness facility's risk management plan takes place to determine its suitability and effectiveness in achieving what it's supposed to. There are two models of evaluation, formative and summative.²³⁵

Formative evaluation is undertaken throughout the planning and implementation of the plan, to determine if any modifications and adjustments are required. This means that during the stages where risk management strategies are being reviewed by management, fitness professionals and the risk management advisory committee, questions may be posed to ascertain if the strategies meet the legislative requirements and published codes of practice for example. Formative evaluation can take place in a range of situations including:

- After an in-house risk management training session, to determine if improvements in the session content could be made and if key messages have been understood.
- Checking the content of staff induction training in respect to risk management.
- When a supervisor observes an employee performing incorrectly (such as failure to complete the daily equipment inspection log) and informal feedback is given.
- After a medical emergency to review and determine if incident reports were completed, that procedures were followed and any areas for improvement.

Summative evaluation involves formally reviewing the entire risk management plan and outcome measurement, to ensure the goals of the plan have been reached. On at least an annual basis this can be undertaken by management, fitness professionals and the risk management committee. Summative reviews include:

- Annually reviewing the stakeholders involved.
- Bi-annually reviewing internal and external auditor's findings.
- Looking at the quality and structure of communication with stakeholders.

Examples of ways to measure whether the risk management plan has met its goals may include:

- Goal 1 - Reduce liability exposures and injuries: Review incident reports to determine if there have been fewer and less severe medical emergencies in comparison to the previous year(s). This information should be shared with staff and other stakeholders and also the facility's insurance provider. If there have been fewer injuries and claims, the insurance provider be able to lower the annual liability insurance premium for the facility.
- Goal 2 - Enhance the quality of programs offered to participants: Survey clients after they have participated in group fitness classes and personal training programs to determine their satisfaction level and implement further training programs for staff (if needed) to improve client satisfaction levels.
- Goal 3 - Increase operational efficiency: Assess time spent solving risk issues/fighting fires versus time spent on continued improvement and the expansion of programs and services. Procedures to assist operational efficiency may take time to establish, but in the long run mean that time can be allocated to important issues, employee productivity improvements and a decrease in job-related stress.

In terms of monitoring and evaluation of the risk management plan and its related activities, focus should be given initially to high risk areas, controls which are relied upon strongly to modify risk and evidence of control failures such as incidents or unfavourable audit findings. Monitoring and evaluation usually takes place either by; continual monitoring (on a daily basis), self-assessments by line management, or audits (both internal and external to ensure policy and compliance with standards). Ideally a monitoring and evaluation program should include elements of all of the above.²³⁶

13.4.1 Audits

Auditing is a way to systematically examine particular aspects of an organisation and assess areas which are effective and those which may require improvements. Audits undertaken by external parties offer an unbiased perspective and should be planned for. Whether undertaken internally or by external parties, audits may focus on procedures, compliance or legislative requirements. However, audits shouldn't be relied upon solely to identify risks or seek quality assurance. Any results from audits should look at the underlying causes and even positive audits do not necessarily mean that risk management is being undertaken in the most effective way possible.

13.4.2 Post incident analysis

Incidents which occur in a fitness facility offer the opportunity to review the effect of the control systems in place, even if the incident outcome is positive i.e. a near miss event. This allows for the risk management process to be strengthened overall. Risk incident investigations need to involve the parties concerned in the incident and be undertaken in a transparent, unbiased manner. Participants should be informed of the reasons for the investigation, open questions be posed, records be kept and potentially, legal advice sought by the parties involved, to ensure fairness of the proceedings. Post incident investigations look at:

- What happened and when.
- The conditions at the time.
- The controls in place in the organisation.
- Data of incidents of the same or similar nature in (and outside) the organisation.
- How risks had been assessed.
- The root cause of the incident.
- Ways to address the cause.
- Changes which may need to be made.
- Identification of the persons who may need to learn lessons from the incident.
- Appropriate ways to disseminate the information.

13.5 Performance measurement

Risk management performance measurement allows organisations to look at their performance indicators and make assessments to ascertain if goals have been reached. These performance indicators often translate into the performance of the staff working in a fitness facility and hence can be measured by the outputs of individuals, in regard to risk management. Outcome related indicators focus on the end result and require looking at the company's current risks to ensure they are fully understood, and that the significance of risks have been evaluated. Attribute related indicators look at the way an organisation acts in respect to risk management.

Attribute indicators which enhance risk management may include:²³⁷

- Continual improvement – to ensure the individual performance of staff and management is measured against the organisation's goals. An annual review may take place and business processes, systems and skills of personnel may be modified to suit.
- Accountability – for risks, controls and risk treatment tasks, ensuring they are fully defined and accepted by the individuals involved. The designated staff should be adequately skilled and resourced to ensure they can check and improve controls and monitor risks and communicate with stakeholders involved. These accountabilities should be indicated in a position description.
- Communication – which is undertaken on a continual basis and includes all stakeholders to facilitate a two way communicative process, ensuring informed decisions can be made about risk levels and treatment. Frequent internal and external reporting on risk management should be undertaken as part of the organisation's good governance.
- Integration – allowing risk management to be part of the organisation's governance system which may include elements such as an endorsed strategic plan, the organisation's charter document, a controlling board, policies in line with the charter, annual reporting and appropriate records of decisions. As such, integration of risk management allows it to become central to the organisation's management processes and objectives.

Managers

Risk management performance measurement can be undertaken in your fitness business by ensuring staff position descriptions have risk management performance indicators built into them, and staff performance is reviewed (at least annually). Ensuring regular reporting and continual communication with stakeholders will also facilitate performance measurement, allowing modifications to be made where required, assisting in the meeting the organisation's goals.

Employees and Contractors

Risk management performance indicators may be written into your position description by management. Ensure you are aware of your accountabilities and seek guidance and training to allow you to meet the risk management requirements of your role.

13.6 Record keeping for enhanced risk management

In order to enhance risk management monitoring and evaluation, risk management activities need to be well recorded in order to make them traceable. In the event of an incident, these records may prove critical to demonstrating that your facility/personnel has taken all reasonable steps to maintain a safe environment, thereby reducing your exposure to liability in the matter. Well-kept records also serve to improve processes, tools and methods involved in risk management. The PCBU has a duty to take record/report certain types of workplace incidents and hazards under WHS law.

Maintaining records in your fitness facility will require you to consider access controls and retrievability, length of time you will keep the records before they are discarded, back-up and sensitivity of information. As mentioned in section 2.10, a risk register serves to document the risk descriptions, existing controls, likelihood of consequences and treatment priorities, and is an effective tool for keeping risk management record keeping. When designing the risk register consideration should be given to how the information will be used (i.e. for planning) and how access will be granted. Depending on the size of your organisation, a number of risk management registers may be required with 'Head Office' keeping a record of the highest risk issues and controls which are most critical.

Sensitive information will most likely appear in the risk register and hence, access rules and protocols should be established. Maintaining the register to ensure it is kept up-to-date and current is prudent. This may require allocating a central, shared computer storage drive for access by certain personnel and syncing risk register reminder tasks to the outlook/email calendar of those accountable.

In 13.4.2 post incident analysis is discussed. In terms of recording post incident analysis, again the use of a register and/or database is ideal. Even recording incidents which could be classified as 'near misses' is beneficial to ensure the risks surrounding 'near misses' are attended to early. By capturing post incident analysis in a register and/or database, the information serves to provide input into future risk assessments and design of controls, facilitate learning, investigation and defend claims and identify recurrent risk issues. Post incident registers/databases also require consideration in terms of their design and accessibility to ensure the security of data, that adequate electronic storage space is available so that records can be added (such as the attachment of medical documentation and photographs) and potentially that software is used to alert managers to an incident

entry, when one is entered in to the database, so that managers can be aware of frequency of occurrence or activity related risk issues. Incident databases should also be backed-up regularly.²³⁸

13.7 Key concepts

A strategic approach is required when implementing a risk management plan and it is advisable to involve all stakeholders including the risk management advisory committee in order to ensure an organisation-wide uptake. Enhanced risk management considers applicable laws and codes of practice in the implementation of risk management strategies. A basic strategic planning model for applying risk management includes the following steps:

1. Mission identification
2. Goals selected and set
3. Objectives identified
4. Specific risk management strategies set
5. Specific action steps for each risk management strategy
6. Persons responsible specified and applicable timeframe ascertained
7. Evaluation

Development of a Risk Management Protocols Manual (RMPM) is an important way to aid in the implementation of the risk management plan. It sets out rules and action steps for staff to follow in respect to risk in every aspect of running a fitness business including services delivery, facilities, the environment, equipment and personnel. The RMPM should also include sections as to why protocols should be followed, detailing the legal duties of the facility and personnel, and how liability may apply.

Monitoring a risk management plan requires continually checking to identify if changes are required due to economic, environmental, legal, political, or internal factors, as these factors can all change. Formative evaluation of the risk management plan generally occurs during the stages where risk management strategies are being reviewed. Summative evaluation involves a formal review of the entire risk management plan and outcome measurement to ascertain if the plan's goals have been achieved. Internal or external auditing is a way to systematically look at aspects of the fitness business and assess which areas need improvement. Auditing shouldn't be relied upon solely to identify risks. Post incident

analysis, offers a way to review control systems in place and make modifications to strengthen the risk management process.

Risk management performance measurement involves looking at performance indicators and undertaking analysis to determine if goals have been reached. Performance indicators are generally linked to the performance of staff, and can be measured by the individual's output. Outcome related indicators look at the end result, ensuring the significance of each risk has been evaluated. Attribute related indicators look at the actions the organisation takes in respect to risk management.

Enhanced risk management should involve well maintained record keeping. A risk register is one way to record the description of risks, controls currently in place, likelihood of consequences and treatment priorities. A post incident register and/or database can be used to record 'near misses' as well as major incidents. Both the risk register and post incident register/database should be kept up-to-date, be backed-up and consider issues such as access, storage space, security of data, and integration into in-house software packages to notify management of entries into the registers. In addition to improving processes, tools and methods involved in risk management, well-kept records may prove vital in the event of an incident and may serve to reduce your exposure to liability.

13.8 Frequently asked questions

Q. What is required for implementing a risk management plan?

A. It is advisable to involve all the key stakeholders including the risk management advisory committee to ensure an organisation wide uptake. Applicable laws and industry-wide codes of practice should also be considered.

Q. What is a RMPM?

A. A Risk Management Protocols Manual sets out rules and action steps for staff to follow in respect to risk in every aspect of running a fitness business. It is an important way to aid the implementation of the risk management plan.

Q. Will I need to train my staff?

A. It is probable that your staff will need training in respect to the law and risk management. This can be done in three ways, internally, externally or via e-learning.

Q. How often should I monitor my risk management plan?

A. Risk management plans require continual monitoring, due to economic, environmental, legal, political, or internal factors. Internal or external auditing is one way to systematically look at aspects of the fitness business and assess which areas need improvement.

Q. What does risk management performance measurement involve?

A. It involves looking at performance indicators in your fitness business and making assessments to see if the set goals have been reached. Indicators are generally linked to staff performance. Outcome related indicators look at the end result. Attribute related indicators look at the actions the organisation takes in respect to risk management.

Q. Do I need to record incidents?

A. Yes, all near misses or major incidents should be recorded. Well-kept records may prove vital in the event of an incident and may serve to reduce your exposure to the liability.

Glossary of Key Terms

Adult Pre-Exercise Screening System (APSS)—APSS was developed by Fitness Australia, in conjunction with Sports Medicine Australia and Exercise and Sport Science Australia, to enable fitness service providers to gather information in a way that is consistent with nationally-recognised best practice. This enhances a facility's risk management strategy by reducing the risk of serious injuries or incidents and providing evidence of that their duty of care has been satisfied.

Audit—An audit is a systematic examination of particular aspects of an organisation in order to assess areas which are effective and those which may require improvements.

Australian Consumer Law (ACL)—The ACL is a federal law governing relations between consumers and providers of services in trade and commerce. In the context of the fitness industry, it means those who provide fitness services (defined broadly) to the general public. The ACL requires that all services be supplied in accordance with statutory guarantees, such as due care and skill.

Automated External Defibrillator (AED)—An AED is a portable electronic medical device that automatically diagnoses a sudden cardiac event (heart attack) and is able to treat it through defibrillation (an electrical therapy that restores normal heart rhythm).

Civil Law—The law governing relations between individuals. If someone sues you for negligence, he or she will bring a civil action (a lawsuit) against you.

Code of Practice—Industry-specific guidelines setting out what constitutes best practice within the industry. Adhering to a Code of Practice can help reduce potential risks, and provide evidence of a Duty of Care.

Common Law—The law as interpreted by courts, that is, judge-made law. It is called the common law because it is the law in all parts of a state or country.

Competition and Consumer Act (CCA) - An Australian federal law regulating a variety of commercial transactions between businesses and consumers. It applies to the fitness industry. The Australian Consumer Law is part of the CCA.

Contractual Liability—A legal obligation arising from an agreement, such as a contract to provide fitness instruction.

Contributory Negligence—Failure of a plaintiff to take reasonable care for his or her own safety. A plaintiff’s contributory negligence may reduce the legal liability of a defendant.

Criminal Law Exposure—A risk arising from either your own unlawful conduct, or the unlawful conduct of another (a third party).

Criminal Law—The law governing relations between individuals and the state or government. Breaking the criminal law (committing an unlawful act) is a crime.

Defendant—A person who is being sued in a lawsuit.

Direct Discrimination—Treating a person less favourably on account of a certain characteristic than someone who does not have the characteristic.

Disability—An impairment or permanent injury that affects a person’s mobility, vision, hearing, or cognitive function.

DRSABCD—St John’s Ambulance’s easy guide to administering first aid. **D**anger, **R**esponse, **S**end for help, **A**irway, **B**reathing, **C**PR, **D**efibrillation.

Duty of Care—A legal obligation to protect another against any potential harm resulting from one’s activities. Fitness instructors have a duty of care to their clients to provide services that are appropriate for the client’s level of fitness.

Employee—A person working for pay, and under the control and supervision of another, within the fitness industry.

Evaluation—Evaluating a risk management plan means determining its suitability and effectiveness in achieving what it’s supposed to do.

Exclusion Clause—See Waiver.

Express Term—In contract law, an express term is a provision of contract that is stated explicitly, whether in writing or orally.

Factual Causation—The legal requirement that a person’s injuries were caused by the actions (or negligent inactions) of another. Usually established by the “but for” test: But for the plaintiff’s actions, the defendant would not have been injured.

Fit for Purpose—A facility is fit for purpose if it complies with the relevant planning and building standards. This means ensuring safe access to the premises and overall cleanliness, as well as appropriate fit-out and maintenance of the interior, in order to reduce the risk of injury.

Fitness Facility—Any premises in which fitness services are provided, or fitness instruction takes place. Can include a fitness centre, gymnasium, sports complex, etc.

Fitness Services—Fitness services include exercise instruction and supervision, memberships and access to fitness facilities.

Fitness Services Provider—The owner and/or operator of a fitness facility, a manager, an independent contractor (fitness instructor, personal trainer), or an employee are all providers of fitness services. You can be a provider of fitness services whether or not you are paid for your services.

General Supervision—where someone is assigned the responsibility for overseeing an activity taking place in the facility, such as a floor supervisor.

Good Samaritan—A person who comes to the aid of another in an emergency.

Harassment/Offensive Behaviour— Doing an act in public because of an identifiable characteristic (such as race, age or sexual orientation) of a person or group of people that is reasonably likely to offend, insult, or humiliate another person or a group of people.

Hazard—Anything that exposes an organisation to risk.

Health Risk—Health risks are medical conditions and/or risk factors that can lead to problems such as cardiac arrest, stroke, or an insulin reaction.

Health/Fitness Assessment—Health related fitness tests, conducted in a fitness facility, are designed to provide information about a participant's fitness level and compare it to the norms and standards of people of the same gender and age, in order develop/prescribe exercise programs to suit a client's needs and abilities.

Implementation—Taking the necessary steps to put a risk management strategy into effect.

Implied Term—In contract law, an implied term is a provision implied or read into a contract 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.

Incident—The occurrence or materialisation of a risk (such as an injury to a client) is called an incident.

Incident Preparedness and Operational Continuity Management (IPOCM)—A risk management approach where there is ongoing process and continual improvement to ensure an organisation can respond well to incidents.

Incident Report—An incident report is a written record of an event that results in injury. Incident reports allow fitness industry professionals to accurately map any previously unidentified risks and plan to minimise the risk of a similar incident happening in the future.

Independent Contractor—A person who provides fitness instruction or consulting to the public at a fitness facility under contract to the owner or operator. An independent contractor generally does not work under the direction and control of another.

Indirect Discrimination—Treatment that can appear on the surface to be fair or neutral, but which has an unequal effect on people with a particular characteristic.

Injury—Loss or harm suffered by a person as the result of another's action. Can be physical or psychological.

Injury Risks—Injury risks are conditions, hazards, practices or situations that can lead to problems such as back injury, fractured bone, or cut/abrasion that causes bleeding.

Legal Liability—Accountability at law for your actions or inactions. Fitness industry professionals can face legal liability for the operation of fitness facilities and the provisions of fitness services.

Legislation—Laws and statutes passed by federal and state Parliaments.

Liability Insurance—Also known as Third Party Liability Insurance. Liability Insurance helps protect individuals against the financial impact of a successful liability claim or action brought by an injured client. Some States require that fitness service providers carry liability insurance.

Manager—A person who has the responsibility of administering a fitness business. Includes those who supervise employees or contractors.

Managing Risk (Risk Management)—Means identifying and eliminating or reducing potential risk. In the health and fitness industry, the major goal of Risk Management is to prevent medical emergencies from occurring in the first place, and to respond properly to them (e.g., appropriate first aid) when they do occur. Risk Management not only involves identification of risks and taking steps to eliminate or reduce those risks in order to prevent negative consequences, but it involves efforts to transfer those risks that cannot be eliminated or reduced through various mechanisms such as through the use of waivers or liability

Medical Emergency Action Plan (EAP)—A documented, well-thought out plan of what to do in the event of a medical emergency, such as a cardiac arrest. An effective EAP considers all legally foreseeable medical emergencies and is well communicated to facility personnel.

Monitoring—Monitoring your risk management plan means continually checking to identify if any changes are required.

Negligence—Failure to exercise a legal Duty of Care.

Occupational Health and Safety—See Work Health and Safety Regulations.

PCBU—Person Conducting a Business or Undertaking. In the context of the work health and safety in the fitness industry, fitness facility owners/operators and their managers are PCBUs, as are personal trainers and fitness instructors who operate as independent contractors.

Plaintiff—The person who files (initiates) a lawsuit.

Post-Incident Analysis—Reviewing incidents after they occur. The process involves looking at what happened and when, the conditions at the time of the incident, the controls in place in the organisation, data of incidents of the same or similar nature in (and outside) the organisation, how risks had been assessed, the root cause of the incident, ways to address the cause, changes which may need to be made and identification of the persons who may need to learn lessons from the incident and appropriate ways to disseminate the information.

Pre-Exercise Screening—A risk management technique within the fitness industry whereby fitness service providers assess a client's fitness level and readiness for exercise in order to provide appropriate instruction and minimise the risks of adverse medical outcomes.

Premises—A building and its adjoining land and outbuildings. In the context of the fitness industry, the fitness facility itself (including locker rooms, showers and toilets), its parking lot, exterior walkways, etc. are part of the premises.

Product Liability—The responsibility of a manufacturer for defects or deficiencies in their products that result in injury to consumers. In the fitness industry context, a manufacturer of fitness equipment will be held liable if defects in its equipment cause injuries to a customer at a gym.

Protocols—Protocols are the official system of rules and procedures including the correct code of conduct to follow.

Reasonably Foreseeable—A risk that can be identified and anticipated by a hypothetical “reasonable” person. Reasonable foreseeability is an objective standard for determining liability in negligence.

Reckless Conduct—Conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness.

Risk—Risk means the effect of uncertainty on objectives. In layman's terms, it means the probability of an adverse or negative outcome to any undertaking, resulting in harm of some sort (e.g., a physical injury or financial loss). In the health and fitness industry, there are generally two types of risk to people who participate in exercise or fitness activities: Health risks and injury risks. Both types of risks can result in medical emergencies occurring in health/fitness facilities.

Risk Exposure—The potential for loss resulting from any particular activity.

Risk Management—See Managing Risk.

Risk Management Framework—The basis for effectively managing risk.

Risk Management Performance Measurement—The process whereby organisations look at their performance indicators and make assessments to ascertain if goals have been reached.

Risk Management Policy—A form of statement that guides management and personnel by setting requirements for risk management which need to be met, and sets out the organisation's objectives with respect to its intentions to manage risk.

Risk Management Protocols Manual (RMPM)—A written record of an organisation's risk management protocols, compiled and organised in a systematic fashion, for easy access and review.

Risk Treatment—The process of modifying risks. Also known as risk control.

Specific Supervision—Where the instructor or supervisor is directly involved with a group or individual providing instruction, such as in a group exercise class or in personal training.

Stakeholder—A person who can affect, or is affected by, an organisation or industry. In the fitness industry, employees, instructors, contractors, investors, equipment manufacturers, active clients and potential customers are all stakeholders.

Standard of Care—The minimum, objective standard that can be expected of the 'reasonable' person in the defendant's position. Used to establish whether or not a defendant is negligent.

Transitional Supervision—involves a staff member changing from specific supervision to general supervision and then back again. This can occur when a fitness professional provides a group with information on how to use exercise equipment during an orientation

(specific supervision) then has them exercise on their own while providing general supervision.

Vicarious Liability—Legal responsibility for the actions of another The legal doctrine under which an owners/operators of fitness centres who are employers are held liable for the negligent actions of employees (or volunteers), when the employees' actions take place within the scope of their employment.

Vilification—Any act or form of behaviour that happens publicly, as opposed to privately, which could incite others to hate, threaten, ridicule, insult or show contempt towards another person on the basis of that person's identifiable characteristic.

Voluntary Assumption of Risk—A defence in negligence whereby the defendant argues that the defendant has by words or conduct, freely and voluntarily agreed to accept a particular risk.

Waivers—A waiver, also known as an Exclusion Clause, is a contractual term that seeks to exclude or limit legal liability resulting from the participation in an activity or undertaking.

Work Health and Safety Regulations—Government (either State or Federal) rules intended to promote and protect the safety of employees on the job, but that also require employees to ensure that all visitors to the workplace are safe.

Workplace—Any place where worked can be carried out. In the context of health and fitness, this can include the premises where fitness services are offered to clients and where the fitness services are provided, such as a gymnasium. Public places, such as parks can also be a workplace, if exercise instruction is provided there.

Appendix A

Sample Risk Assessment for Fitness Businesses

http://www.fitness.org.au/visageimages/2012_Online_Forms/Work_Health_&_Safety_Guidelines_August_2012.pdf

Safety Hazard	Source Risk Rating	Your Risk Rating	Control Measures	Comments
Transfer of information between trainers (eg. if one trainer fills in for another and is not familiar with the group/individual)	Moderate		<ul style="list-style-type: none"> Ensure an effective means to transfer all key information (eg. individual health condition and limitations, training program and status, etc.) between trainers. 	
Exposure to hazardous substances	Low		<ul style="list-style-type: none"> Where possible, substitute safer materials for hazardous substances (eg. replacing harsh cleaning chemicals with milder ones). Ensure MSDS are readily accessible where employees are working with chemicals. Ensure employees are familiar with the safe storage, handling and use of hazardous substances. A hazardous substances book should be kept on site in the Centre. Relevant and necessary PPE (Protective Equipment) should be provided and used in accordance with MSDS (Material Safety Data Sheets). 	
General – indoor facilities				
Electrical equipment hazards	High		<ul style="list-style-type: none"> Implement regular testing and tagging of electrical equipment with the frequency required by the manufacturer. Ensure all electrical fittings comply with relevant statutory requirements including correct use of cables, wiring extension cords and loading capacities. 	
Tripping hazards including obstacles on floor, loose carpets or tiles, electrical cords, etc.	Significant		<ul style="list-style-type: none"> Provide adequate storage to eliminate storage on floor. Ensure carpets and tiles are in a good condition. Monitor and regularly inspect for loose cables and wires. Monitor and regularly inspect for need for extended power cords. Secure any electrical cabling so they do not extend into walkways. Regularly monitor trip hazards through informal and scheduled inspections. Implement procedures/contract arrangements to ensure that adequate health and safety practices are maintained by contracted persons. 	
Hazards relating to contracted services (eg. massage, juice bar, etc.)	Moderate		<ul style="list-style-type: none"> Ensure that an adequate number of charge rooms, showers, etc. are provided, they conform to appropriate building standards and are well maintained. Check maintenance and hygiene regularly as part of hazard identification, recording and reporting change control/facilities. Record the date, time and initials of employees on the checklist. 	
Change room/toilet facilities	Low		<ul style="list-style-type: none"> Ensure adequate lighting in all areas. Check regularly as part of hazard identification. 	
Lighting hazards	Low			

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Safety Hazard	Sample Risk Rating	Your Risk Rating	Control Measures	Comments <i>(e.g. level of priority, effectiveness of implementation)</i>
Office ergonomics hazards	Low		<ul style="list-style-type: none"> Provide ergonomic office chairs that have a full range of adjustability to ensure optimal postural support. Ensure that office staff are aware of how to properly adjust their workstation including seating, keyboard and monitor adjustments. 	
Exercise Area				
Health risk to members due to over exertion	High		<ul style="list-style-type: none"> See health precautions listed under "General – All Fitness Businesses" section. Ensure members are informed of the health risks related to over exertion during the initial induction. Monitor the use of equipment for all new members to ensure that they are using equipment properly and at an appropriate exertion level for their level of fitness. Provide a clock in the cardio area to allow members to keep track of the time they are using the machine. Provide drinking fountains or other source of water nearby to prevent dehydration. 	
Injury due to improper use of machinery	High		<ul style="list-style-type: none"> Provide guidance to all members in the use of gym equipment. Provide clear descriptions on the correct use of equipment on each machine. Equipment which is not operational should be marked "Out of Order" or removed from the floor if possible. Have an established maintenance plan and procedures which are implemented & checked regularly. 	
Exercise machines obstructing the walkway/being struck by the movement of machines	Moderate		<ul style="list-style-type: none"> Ensure that adequate space is provided between machines, including the space required to accommodate the machine's range of movement. Ensure that the machines do not intrude into the walkway when in use. Ensure signage to highlight any hazards that cannot be removed (e.g. steps/windows/walkways etc.) 	
Trip hazard from weights and other equipment left on floor	Moderate		<ul style="list-style-type: none"> Use appropriate signage to remind members to replace weights onto weights rack after use. Ensure staff regularly monitor the presence of trip hazards and take corrective actions as required. 	
Risk of infection from unhygienic conditions (eg. sweat on gym equipment)	Moderate		<ul style="list-style-type: none"> Provide appropriate wipe down dispensers with disinfectant solution. Install signage to remind members to wipe down equipment after use. Require all members to use a towel and to place it over machinery before use. Require all members to wear proper clothing and closed shoes. 	
Excessive noise	Moderate		<ul style="list-style-type: none"> Ensure that noise levels (eg. from loud music) are kept to a level that does not risk hearing damage (especially for staff exposed to the noise for extended periods). Be aware of excessive noise levels or specific times that may cause complaints from neighbouring businesses or residences (including noise from air conditioning or other equipment). 	
Ventilation in gym area	Low		<ul style="list-style-type: none"> Ensure adequate ventilation, especially in areas where there is strenuous physical activity (e.g. with fans, air conditioning, windows, etc.) Provide drinking fountains or other source of water nearby to prevent dehydration. 	

Safety Hazard	Sample Risk Rating	Your Risk Rating	Control Measures	Comments <i>(eg. level of priority, date of review of implementation)</i>
Group Exercise Studios				
Health risks associated with group exercise classes	High		<ul style="list-style-type: none"> See health precautions listed under "General – All Fitness Businesses" section. Provide separate classes for different levels of fitness. Use rostering systems that protect instructors from overuse injuries by ensuring adequate rest. Use slip resistant and/or impact absorbing flooring as required for the activity. 	
Flooring in studio is not appropriate for the exercise being performed	Moderate		<ul style="list-style-type: none"> Ensure any equipment is positioned so that it does not present an obstruction or trip hazard. Ensure mirrors are constructed of safety glass and securely mounted. 	
Injury due to coming into contact with equipment and other items while exercising.	Moderate		<ul style="list-style-type: none"> Limit the number of people in a class to suit the room and type of class. Ensure that the number of people do not exceed applicable standards or any fire restrictions for your buildings. Ensure adequate clearance is available between members during exercise programs. 	
Space requirements to perform activities	Low			
Emergency Management				
Emergency exit requirements	High		<ul style="list-style-type: none"> Ensure areas around emergency exits are kept clear at all times. Ensure that exits are clearly signed. Ensure all emergency exits are fitted with fast release door locks. 	
Emergency lighting to facilitate the evacuation process	High		<ul style="list-style-type: none"> Ensure that approved emergency lighting is installed. Ensure that emergency lighting is checked on a regular basis to ensure that it is working properly. 	
Evacuation procedures	Significant		<ul style="list-style-type: none"> Develop emergency procedures for all potential scenarios. Establish and train a warden team to ensure the safe evacuation from the facility. Install evacuation diagrams that indicate the emergency evacuation route and assembly area. (Warden teams and evacuation maps may be done in conjunction with the building management if leasing space). Ensure regular (twice per year) staff training/ drills to ensure procedures will be carried out in case of an emergency. 	
Security				
Security risk for staff working late at night or early in the morning	Significant		<ul style="list-style-type: none"> If possible, ensure that no staff member is working alone late at night or early in the morning. Develop procedures to minimise the risk to those working alone. If possible, install an emergency "panic button" at Reception. Ensure staff have ready access to emergency contact numbers. Ensure staff are familiar with Emergency Procedures. 	

Safety Hazard	Sample Risk Rating	Your Risk Rating	Control Measures	Comments (eg. level of priority, time, utility cost of implementation)
Security risk to staff and members using car park	Moderate		<ul style="list-style-type: none"> Ensure the car park area is adequately lit. If possible, install surveillance equipment in car park area and use appropriate signage that warns of the monitoring system in place. 	
Harassment to staff/members by irate/aggressive members	Low		<ul style="list-style-type: none"> Develop procedures to deal with irate or aggressive members and ensure staff are trained in the correct use of this procedure. Restrict gym access to members or approved guests 	
Locker/change room				
Floors may be slippery when wet	Moderate		<ul style="list-style-type: none"> Use anti-slip mats in showers or other areas that may become wet. Use warning signs if floors are wet. Perform regular change room checks and, where necessary, mop up excess water. 	
Toilets (eg. undrain sinks, overflowing bins, empty soap dispensers)	Moderate		<ul style="list-style-type: none"> Ensure toilet facilities are maintained and kept clean at all times. Check maintenance and hygiene regularly as part of hazard identification. 	
Fire hazard relating to hair dryers or other electrical equipment	High		<ul style="list-style-type: none"> Ensure maintenance checks are performed regularly. Ensure that hair dryers and other electrical equipment in locker rooms are tested and tagged every 6 months. Use appropriate signage to warn members of fire hazard. 	
Members or staff using cameras in change room area	Moderate		<ul style="list-style-type: none"> Ensure a strict policy is in place which prohibits the use of cameras in the club Where possible, have a policy which also prohibits use of mobile phones (due to cameras) 	
Sauna/Steam Room				
Health risks associated with the use of saunas (eg. heat stroke, dehydration)	High		<ul style="list-style-type: none"> See health precautions listed under "General—All Fitness Businesses" section. Post signs warning against use if medical conditions exist or if under the influence of alcohol or drugs. Provide a clock that is visible from the room. Install a duress alarm Ensure that appropriate temperature controls are in place and checked according to the manufactures recommendations. Ensure that seating is a safe distance from heating sources. Check maintenance and hygiene regularly as part of hazard identification 	
Items placed over or in close proximity of sauna heaters presenting a fire hazard	High		<ul style="list-style-type: none"> Use appropriate signage to warn members of fire hazard. 	
Injury due to faulty sauna equipment	Moderate		<ul style="list-style-type: none"> Ensure daily maintenance checks are performed on sauna Install a duress alarm. 	

Safety Hazard	Sample Risk Rating	Your Risk Rating	Control Measures	Comments <i>(eg. level of priority, effectiveness of implementation)</i>
Unhygienic practices in sauna/steam room	Moderate		<ul style="list-style-type: none"> Ensure members wear shorts and use a towel when in the sauna/steam room. Prohibit shaving in the sauna/steam room. No food or drink (except permitted in the sauna/steam room). Shower before using the sauna/steam room. 	
Solarium/Sun room				
Health risks associated with solariums	High		<ul style="list-style-type: none"> Ensure UV eye protection is worn. Ensure time restrictions for booths are posted and enforced. Ensure members sign a tanning booth waiver before use. Ensure signage is posted warning of the health hazards associated with the use of solariums. 	
Unhygienic practices	Moderate		<ul style="list-style-type: none"> Ensure beds and goggles are sanitised following usage. 	
Injury due to faulty equipment	Moderate		<ul style="list-style-type: none"> Ensure bulbs are regularly changed. Ensure electrical cords are in a good condition. Ensure a maintenance log is maintained. Ensure staff are aware of, and adequately trained in, emergency procedures. 	
Crèche area				
Access to Crèche area by gym members/outside	High		<ul style="list-style-type: none"> Ensure that only parents who have completed a registration form are allowed in the crèche area. Use appropriate signage to indicate that unauthorised access to Crèche area is not permitted. Ensure supervision of crèche and children at all times by qualified staff. Ensure that parents record their name and location in the centre on a sign in/sign out sheet. 	
Compliance with government regulations	Moderate		<ul style="list-style-type: none"> Ensure that all crèches comply with applicable state child care legislation and regulations. Ensure a working with children's check is performed on child care staff prior to employment. 	
Children wandering off from Crèche area	High		<ul style="list-style-type: none"> Use appropriate enclosures in Crèche area to prevent children wandering off. Ensure adequate supervision is provided for children in Crèche area. 	

Safety Hazard	Sample Risk Rating	Your Risk Rating	Control Measures	Comments <i>(eg. level of priority, difficulty of implementation)</i>
Injury to children in Crèche area	Significant		<ul style="list-style-type: none"> • Ensure Crèche area is designed in accordance with relevant Australian standards. • Perform a risk assessment of the Crèche area to identify any potential risks to children and implement adequate control measures. • Ensure cabinets, electrical outlets and other potentially harmful items are made child safe. • Ensure toys and equipment are appropriately maintained. • Ensure Crèche workers are trained in first aid (particularly child first aid). • Ensure adequate emergency/evacuation procedures are in place, and that all crèche staff have received appropriate training. • Ensure crèche staff follow incident/accident reporting procedures. • Ensure a policy exists regarding the provision of food and beverage by parents. 	
Outdoor Training				
Health risks due to outdoor training	High		<ul style="list-style-type: none"> • See health precautions listed under "General – All Fitness Businesses" section. • Ensure clients are aware of the type and level of training involved. • Liaise with health practitioners and follow modified training to accommodate known physical conditions. • Ensure that exercises match the client's fitness levels and continue to be safe once the client is fatigued. • Monitor clients for signs of excessive exertion or distress. 	
Collision with vehicles	High		<ul style="list-style-type: none"> • Only cross at intersections and obey traffic lights. • Wear highly visible clothing, including light coloured/reflective clothing conducting classes when dark. • Avoid use of MP3 players which can mask traffic warning sounds. • Ensure that there are an adequate number of trainers to maintain control of the group. (Refer to Fitness Australia for more information on acceptable group numbers). 	
Trips and falls including on uneven terrain, on wet surfaces and at night	Moderate		<ul style="list-style-type: none"> • Whenever possible, use areas that you are familiar with. • Conduct a preliminary inspection of the area to identify any significant hazards before starting training (see Safety Inspection Checklist) and advise clients accordingly. • Limit outside training when dark and/or take additional precautions as required. • Ensure clients have suitable footwear (eg. treads that are in good condition to prevent slipping). 	
Unsafe public equipment used in training (eg. public exercise stations, park benches, stairs, etc.)	Moderate		<ul style="list-style-type: none"> • Conduct a preliminary inspection of the area to identify any unsafe equipment before starting training (see Safety Inspection Checklist) and modify training accordingly. • Ensure that public equipment is not used unless it is specifically designed for exercise purposes (ie. exercise stations). 	
Injury to others in the area (eg. collision while running, hit by thrown ball, etc.)	Moderate		<ul style="list-style-type: none"> • Avoid exercise areas where others are likely to be, including: <ul style="list-style-type: none"> – Pathways – Playgrounds – Stairways • Ensure participants give way to the public at all times. 	

Safety Hazard	Sample Risk Rating	Your Risk Rating	Control Measures	Comments <i>(eg. level of priority, effectiveness of implementation)</i>
<p>Health risks from exposure to extreme weather conditions (eg. heat, cold, lightning, smog, dust)</p>	Moderate		<ul style="list-style-type: none"> • Check weather conditions beforehand. • Cancel class or make alternate arrangements (eg. exercising indoors) if conditions present a health risk. • If exercising outdoors, ensure that appropriate precautions are taken, such as: <ul style="list-style-type: none"> – Modifying the training to accommodate the conditions – Ensuring appropriate clothing is worn – Encouraging adequate hydration – Taking more breaks – Exercising in the shade where possible • Ensure that you are aware of anyone who may be particularly susceptible to adverse conditions (eg. asthma sufferers). • Ensure that appropriate first aid supplies are available (eg. a Ventolin inhaler for asthma attacks). 	
<p>Sunburn</p>	Moderate		<ul style="list-style-type: none"> • Encourage use of sunscreen and protective clothing. • Train in the shade where possible. 	
<p>Physical assault/robbery, especially if exercising in isolated areas</p>	Moderate		<ul style="list-style-type: none"> • Ensure that the group keeps together. • Identify and avoid high risk areas or times. • Identify and avoid any suspicious persons in the area. • Carry a mobile phone to call for help if required. • Ensure all valuables (e.g. keys, wallet etc) are locked up in a vehicle or safe place. • Carry a portable first aid kit at all times whilst off site. 	
<p>Attack by dog</p>	Moderate		<ul style="list-style-type: none"> • Identify and avoid areas where dogs are off leash. 	
<p>Insect bites and stings</p>	Low		<ul style="list-style-type: none"> • Be aware of any client allergies to insect bites (include this item on pre exercise screening). • Keep an appropriate first aid kit accessible. 	
<p>Manual handling demands from carrying equipment from the vehicle to the training site</p>	Low		<ul style="list-style-type: none"> • Park your vehicle as close as possible to the training site. • Limit the amount of equipment carried to the site. • Enlist others to assist in carrying equipment. • Ensure training is provided so that all staff use and promote suitable manual handling techniques. 	
<p>Complaints by others in the area</p>	Low		<ul style="list-style-type: none"> • Ensure that potential sources of complaints such as shouting, aggressive behaviour and loud music are minimised. • Ensure that the group size is not excessive (Refer to Fitness Australia for more information on acceptable group numbers). • Check with Council to ensure compliance with local requirements including: <ul style="list-style-type: none"> – The locations where fitness classes can be held – Permits and fees applicable – The type of activities allowed – The times permitted – Restrictions on the type of equipment to be used – The size of the group 	

Safety Hazard	Sample Risk Rating	Your Risk Rating	Control Measures	Comments (eg. level of priority, effectiveness of implementation)
Pools				
Exposure to electricity	High		<ul style="list-style-type: none"> Ensure all electrical installations are done in accordance with appropriate electrical safety standards and guidelines. Ensure no electrical equipment is used near the pool when the pool is in use. 	
Pool supervision, including for weak swimmers and/or misbehaviour	High		<ul style="list-style-type: none"> Develop and display rules of use. If possible, ensure that a qualified person is present to supervise pool use. If this is not possible, conduct a risk assessment to identify appropriate control measures required to address potential risks to swimmers. Ensure appropriate rescue equipment is available. 	
Entrapment due to excessive suction at outlets	High		<ul style="list-style-type: none"> Ensure that suction velocity does not exceed 5m/second. Provide at least 2 outlets to each suction line. Ensure that outlets cannot be covered by a single body. 	
Trip/fall hazards including: <ul style="list-style-type: none"> Walkway close to deep end of pool Abrupt changes in floor level Defective ladder to access pool Slippery pool floor finish 	Moderate		<ul style="list-style-type: none"> Restrict access to pool area. Ensure pool ladders are secure and well maintained. Ensure adequate slip resistance of floor finishes. Check for pooling of water on walkways. Ensure pool edge is well defined (eg. using contrasting colour). 	
First aid facilities (eg. adequate and/or accessible facilities, access for emergency vehicles, etc.)	Significant		<ul style="list-style-type: none"> Ensure adequate and readily available first aid facilities. Ensure stretcher access to pool area. 	
Placement of water depth signs	Moderate		<ul style="list-style-type: none"> Ensure accurate and clear water depth signage (pictorial where applicable). Ensure users with visual impairment are accommodated. 	
Excessive pool gradient i.e. greater than 1 in 15 or abrupt changes in water depth.	Moderate		<ul style="list-style-type: none"> Ensure that changes in depth are clearly visible. Pay particular attention to young children using the pool. 	
Hazards for disabled pool users	Significant		<ul style="list-style-type: none"> Ensure that those with special needs are identified and that adequate support is available to assist them. 	
Unsafe chemical storage	Significant		<ul style="list-style-type: none"> Ensure that the operators have been properly trained in the correct handling, storage and use of the chemicals. Ensure that procedures and supplies are in place to deal with chemical spillages. Ensure that an eye wash station is available. Ensure that the chemical storage area is kept locked and that there is adequate ventilation and lighting. 	

Appendix B

Adult Pre-Exercise Screening Tool

https://fitness.org.au/visageimages/adult_pre_exercise_screening_tool_1.pdf

ADULT PRE-EXERCISE SCREENING TOOL

This screening tool does not provide advice on a particular matter, nor does it substitute for advice from an appropriately qualified medical professional. No warranty of safety should result from its use. The screening system in no way guarantees against injury or death. No responsibility or liability whatsoever can be accepted by Exercise and Sports Science Australia, Fitness Australia or Sports Medicine Australia for any loss, damage or injury that may arise from any person acting on any statement or information contained in this tool.

Name: _____

Date of Birth: _____ Male Female Date: _____

STAGE 1 (COMPULSORY)

AIM: to identify those individuals with a known disease, or signs or symptoms of disease, who may be at a higher risk of an adverse event during physical activity/exercise. This stage is self administered and self evaluated.

Please circle response

1. Has your doctor ever told you that you have a heart condition or have you ever suffered a stroke?	Yes	No
2. Do you ever experience unexplained pains in your chest at rest or during physical activity/exercise?	Yes	No
3. Do you ever feel faint or have spells of dizziness during physical activity/exercise that causes you to lose balance?	Yes	No
4. Have you had an asthma attack requiring immediate medical attention at any time over the last 12 months?	Yes	No
5. If you have diabetes (type I or type II) have you had trouble controlling your blood glucose in the last 3 months?	Yes	No
6. Do you have any diagnosed muscle, bone or joint problems that you have been told could be made worse by participating in physical activity/exercise?	Yes	No
7. Do you have any other medical condition(s) that may make it dangerous for you to participate in physical activity/exercise?	Yes	No

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

I believe that to the best of my knowledge, all of the information I have supplied within this tool is correct.

Signature _____ Date _____

EXERCISE INTENSITY GUIDELINES

INTENSITY CATEGORY	HEART RATE MEASURES	PERCEIVED EXERTION MEASURES	DESCRIPTIVE MEASURES
SEDENTARY	< 40% HRmax	Very, very light RPE# < 1	<ul style="list-style-type: none"> Activities that usually involve sitting or lying and that have little additional movement and a low energy requirement
LIGHT	40 to <55% HRmax	Very light to light RPE# 1-2	<ul style="list-style-type: none"> An aerobic activity that does not cause a noticeable change in breathing rate An intensity that can be sustained for at least 60 minutes
MODERATE	55 to <70% HRmax	Moderate to somewhat hard RPE# 3-4	<ul style="list-style-type: none"> An aerobic activity that is able to be conducted whilst maintaining a conversation uninterrupted An intensity that may last between 30 and 60 minutes
VIGOROUS	70 to <90% HRmax	Hard RPE# 5-6	<ul style="list-style-type: none"> An aerobic activity in which a conversation generally cannot be maintained uninterrupted An intensity that may last up to about 30 minutes
HIGH	≥ 90% HRmax	Very hard RPE# ≥ 7	<ul style="list-style-type: none"> An intensity that generally cannot be sustained for longer than about 10 minutes

= Borg's Rating of Perceived Exertion (RPE) scale, category scale 0-10

ADULT PRE-EXERCISE SCREENING TOOL

STAGE 2 (OPTIONAL)

Name: _____

Date of Birth: _____ Date: _____

AIM: To identify those individuals with risk factors or other conditions to assist with appropriate exercise prescription. This stage is to be administered by a qualified exercise professional.

		RISK FACTORS																
1.	Age _____ Gender _____	≥ 45yrs Males or ≥ 55yrs Females +1 risk factor																
2.	Family history of heart disease (eg: stroke, heart attack) <table border="0"> <tr> <td>Relative</td> <td>Age</td> <td>Relative</td> <td>Age</td> </tr> <tr> <td><input type="checkbox"/> Father</td> <td>_____</td> <td><input type="checkbox"/> Mother</td> <td>_____</td> </tr> <tr> <td><input type="checkbox"/> Brother</td> <td>_____</td> <td><input type="checkbox"/> Sister</td> <td>_____</td> </tr> <tr> <td><input type="checkbox"/> Son</td> <td>_____</td> <td><input type="checkbox"/> Daughter</td> <td>_____</td> </tr> </table>	Relative	Age	Relative	Age	<input type="checkbox"/> Father	_____	<input type="checkbox"/> Mother	_____	<input type="checkbox"/> Brother	_____	<input type="checkbox"/> Sister	_____	<input type="checkbox"/> Son	_____	<input type="checkbox"/> Daughter	_____	If male < 55yrs = +1 risk factor If female < 65yrs = +1 risk factor Maximum of 1 risk factor for this question
Relative	Age	Relative	Age															
<input type="checkbox"/> Father	_____	<input type="checkbox"/> Mother	_____															
<input type="checkbox"/> Brother	_____	<input type="checkbox"/> Sister	_____															
<input type="checkbox"/> Son	_____	<input type="checkbox"/> Daughter	_____															
3.	Do you smoke cigarettes on a daily or weekly basis or have you quit smoking in the last 6 months? Yes No If currently smoking, how many per day or week? _____	If yes, (smoke regularly or given up within the past 6 months) = +1 risk factor																
4.	Describe your current physical activity/exercise levels: <table border="0"> <tr> <td>Sedentary</td> <td>Light</td> <td>Moderate</td> <td>Vigorous</td> </tr> <tr> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </table> <table border="1"> <tr> <td>Frequency sessions per week</td> <td>_____</td> <td>_____</td> <td>_____</td> </tr> <tr> <td>Duration minutes per week</td> <td>_____</td> <td>_____</td> <td>_____</td> </tr> </table>	Sedentary	Light	Moderate	Vigorous	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Frequency sessions per week	_____	_____	_____	Duration minutes per week	_____	_____	_____	If physical activity level < 150 min/ week = +1 risk factor If physical activity level ≥ 150 min/ week = -1 risk factor (vigorous physical activity/ exercise weighted x 2)
Sedentary	Light	Moderate	Vigorous															
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>															
Frequency sessions per week	_____	_____	_____															
Duration minutes per week	_____	_____	_____															
5.	Please state your height (cm) _____ weight (kg) _____	BMI = _____ BMI ≥ 30 kg/m ² = +1 risk factor																
6.	Have you been told that you have high blood pressure? Yes No	If yes, = +1 risk factor																
7.	Have you been told that you have high cholesterol? Yes No	If yes, = +1 risk factor																
8.	Have you been told that you have high blood sugar? Yes No	If yes, = +1 risk factor																

Note: Refer over page for risk stratification.

STAGE 2 Total Risk Factors =

9. Have you spent time in hospital (including day admission) for any medical condition/illness/injury during the last 12 months? Yes No	If yes, provide details
10. Are you currently taking a prescribed medication(s) for any medical conditions(s)? Yes No	If yes, what is the medical condition(s)?
11. Are you pregnant or have you given birth within the last 12 months? Yes No	If yes, provide details. I am _____ months pregnant or postnatal (circle).
12. Do you have any muscle, bone or joint pain or soreness that is made worse by particular types of activity? Yes No	If yes, provide details

STAGE 3 (OPTIONAL)

AIM: To obtain pre-exercise baseline measurements of other recognised cardiovascular and metabolic risk factors. This stage is to be administered by a qualified exercise professional. (Measures 1, 2 & 3 – minimum qualification, Certificate III in Fitness; Measures 4 and 5 minimum level, Exercise Physiologist*).

	RESULTS	RISK FACTORS
1. BMI (kg/m ²)		BMI ≥ 30 kg/m ² = +1 risk factor
2. Waist girth (cm)		Waist > 94 cm for men and > 80 cm for women = +1 risk factor
3. Resting BP (mmHg)		SBP ≥ 140 mmHg or DBP ≥ 90 mmHg = +1 risk factor
4. Fasting lipid profile*		Total cholesterol ≥ 5.20 mmol/L = +1 risk factor HDL cholesterol > 1.55 mmol/L = -1 risk factor HDL cholesterol < 1.00 mmol/L = +1 risk factor Triglycerides ≥ 1.70 mmol/L = +1 risk factor LDL cholesterol ≥ 3.40 mmol/L = +1 risk factor
5. Fasting blood glucose*		Fasting glucose ≥ 5.50 mmol = +1 risk factor
		STAGE 3 Total Risk Factors = <input type="text"/>

RISK STRATIFICATION

Total stage 2
or
Total stage 3
Plus stage 2 (Q1 - Q4)



≥ 2 RISK FACTORS – MODERATE RISK CLIENTS
Individuals at moderate risk may participate in aerobic physical activity/exercise at a light or moderate intensity (Refer to the exercise intensity table on page 2)

< 2 RISK FACTORS – LOW RISK CLIENTS
Individuals at low risk may participate in aerobic physical activity/exercise up to a vigorous or high intensity (Refer to the exercise intensity table on page 2)

Note: If stage 3 is completed, identified risk factors from stage 2 (Q1-4) and stage 3 should be combined to indicate risk. If there are extreme or multiple risk factors, the exercise professional should use professional judgement to decide whether further medical advice is required.

Appendix C

Template: Medical Guidance/Information Form

<https://fitness.org.au/exercisereferrals.html>

COMPANY LETTERHEAD (Including Address and Logo)

Practitioner Name

Clinic

Address

Suburb State Postcode

Referral Date:

Dear Practitioner Name,

Re: Client Name: Insert Client Name

Client Address: Insert Client Address

Client DOB: Insert Client DOB

My/our client **Insert Client Name** has presented to our **business/service/facility** with the goal of **XYZ**.

Client's Name's information and measurements recorded during pre-exercise screening include the following:

Current Physical Activity level	Sessions / week Minutes / week Intensity (low/mod/high/vig)	Notes:
Resting HR		<ul style="list-style-type: none"> – Include bullet point details of any signs or symptoms of cardiovascular, metabolic or respiratory disease, or other medical issues identified in APSS results. – Attach copy of completed APSS tool – Include any details of other practitioners treating the client
Resting BP		
Weight		
...		

Footnotes

- ¹ This research is published as # set out details of JLM reference #.
- ² Seven sessions were held in total: Sydney (2), the Gold Coast, Ballarat, Rockhampton and Adelaide (2).
- ³ See Keyzer, P., Johnston, J., Pearson, M., Rodrick, S., & Wallace, A. (2013). The courts and social media: what do judges and court workers think? *Judicial Officers' Bulletin*, 25(6), pp. 47-53.
- ⁴ Delbecq, A. L., & Ven, A. H. (1971). A Group Process Model for Problem Identification and Program Planning. *The Journal of Applied Behavioral Science*, pp. 466-91.
- ⁵ Australian Bureau of Statistics (2012). 4156.0 - Sports and Physical Recreation: A Statistical Overview, Australia, 2011-2012. [online] Retrieved from: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4156.0> [Accessed: 3 Mar 2014].
- ⁶ Australian Bureau of Statistics (2007). 4177.0 - Participation in Sports and Physical Recreation, Australia, 2005-06. [online] Retrieved from: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4177.02005-06?OpenDocument> [Accessed: 3 Mar 2014]
- ⁷ Australian Bureau of Statistics (2012). 4156.0 - Sports and Physical Recreation: A Statistical Overview, Australia, 2011-2012. [online] Retrieved from: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4156.0> [Accessed: 3 Mar 2014]. The Nielsen: Les Mills Global Consumer Fitness Survey of 4,600 people across 13 countries showed that 27% of adults attend a fitness facility and that 61% of people who exercise regularly are engaged in fitness activities; outranking walking, team sports, cycling, running or swimming ('Fitness: The World's Biggest Sport', www.lesmills.com. [Accessed 24 March 2014].
- ⁸ Australian Sports Commission, *Participation in Exercise, Recreation and Sport*, 2009, 34.
- ⁹ Ibid, 35.
- ¹⁰ Ibid.
- ¹¹ Finch, C., Donaldson, A., Mahoney, M. & Otago, L. (2009). Who chooses to use multi-purpose recreation facilities for their physical activity setting?. *Sport Health*, 27 (2), p. 16.
- ¹² Han, J.C., Lawlor D.A. & Kimm S.Y. (2010). Childhood obesity, *Lancet*, 375 (9792): 1737-1748.
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- ¹⁴ Han et al, Ibid, 1743
- ¹⁵ Deloitte Access Economics and Fitness Australia, *The Australian Fitness Industry Report 2012*, September 2012
- ¹⁶ Stolz, 2010#.
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- ¹⁹ Ibid.
- ²⁰ Ibid.
- ²¹ Arthritis Australia. (2014). Time to Move: Arthritis. A national strategy to reduce a costly burden, p 4; Muthuri SG, Hui M et al., 2011. What if we prevent obesity? risk reduction in knee osteoarthritis estimated through a meta-analysis of observational studies. *Arthritis Care & Research*; 63(7): 982-990; Hunter DJ, 2011. Lower extremity osteoarthritis management needs a paradigm shift. *Br J Sports Med* 2011; 45:283-288.
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- ²⁴ Access Economics. (2009). *Let's Get Physical: The Economic Contribution of Fitness Centres in Australia*. [online] Retrieved from: https://secure.ausport.gov.au/__data/assets/pdf_file/0007/459880/FitnessAust_EconomicContributionFitnessCentresAustralia.pdf [Accessed: 3 Mar 2014].
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- ²⁷ Spengler, J. O., Connaughton, D. & Pittman, A. T. (2006). *Risk management in sport and recreation*. Champaign, IL: Human Kinetics.
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- ²⁹ Quinn, E. (2013). *How not to exercise*. [online] Retrieved from: http://sportsmedicine.about.com/od/injuryprevention/a/Unsafe_Exercise.htm [Accessed: 3 Mar 2014].
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- ³⁴ *Competition and Consumer Act 2010* (Cth), s 139A.
- ³⁵ McDonald, B. (2005). Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia. *Sydney Law Review*, 27 (3), pp. 443-482.
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- ⁵⁶ *Civil Liability Act 2003* (Qld). Available at http://www.austlii.edu.au/au/legis/qld/consol_act/cla2003161/.
- ⁵⁷ David Thorpe, Antonio Buti, Chris Davies, Saul Fridman and Paul Johnson, *Sports Law*, Oxford University Press, 2009, 148-149.
- ⁵⁸ E Wright, *National Trends in Personal Injury Litigation: Before and After 'Ipp'*, commissioned by the Law Council of Australia, 26 May 2006.
- ⁵⁹ Parliamentary Debates (Hansard), 8 May 2002, 1764, quoted in Thorpe et al, 148.
- ⁶⁰ Op cit., Thorpe et al, 148.
- ⁶¹ E Wright, op. cit., 3.
- ⁶² Available at: http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/
- ⁶³ A process of 'harmonisation' since 2011 means that the jurisdictions of the Commonwealth, the ACT, the NT, NSW, Queensland, Tasmania and South Australia have now nearly identical legislation. Very similar duties, however, also apply in Victoria and Western Australia. For the purposes of this book, the Commonwealth Act will be quoted. Sections in the other harmonised jurisdictions are identical.
- ⁶⁴ For example, If a person was walking through a park and was knocked over by the participants in a boot camp exercise, for instance, this too may give rise to liability.
- ⁶⁵ *Work Health and Safety Act 2011* (NSW), s 31. Also Risk Logic & Fitness Australia (2012). *A work health and safety guide for fitness businesses*. [online] Retrieved from: https://fitness.org.au/visageimages/2012_Online_Forms/Work%20Health%20&%20Safety%20Guidelines%20August%202012.pdf [Accessed: 9 Mar 2014].
- ⁶⁶ This research is published as # set out details of JLM reference #.
- ⁶⁷ Seven sessions were held in total: Sydney (2), the Gold Coast, Ballarat, Rockhampton and Adelaide (2).
- ⁶⁸ See Keyzer, P., Johnston, J., Pearson, M., Rodrick, S., & Wallace, A. (2013). The courts and social media: what do judges and court workers think? *Judicial Officers' Bulletin*, 25(6), pp. 47-53.
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- ⁹⁹ Rachel Clements, 'Managing mental health is key to organisational risk management', 2013, 65(3) *Keeping good companies: Journal of Chartered Secretaries Australia* 139-145.
- ¹⁰⁰ Mental health Council of Australia, 2007, *Factsheet – Statistics on Mental Health*.
- ¹⁰¹ Ibid.
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- ¹¹⁰ 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, e.g., 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.
- ¹¹¹ 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.
- ¹¹² NB: However, 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 lists contact details for Fitness Australia itself. Further, the NSW Fair Trading website refers to Fitness Australia only, not Fitness NSW.
- ¹¹³ Ibid.

¹¹⁴ 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.

¹¹⁵ NB: See, however, above n 104.

¹¹⁶ Gojanovic, B., Feihl, F., Liaudet, L., Gremion, G. and Waeber, B. 2011. Whole body vibration training elevates creatine kinase levels in sedentary subjects. *Swiss Med Wkly*, 141 p. 13222.

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¹²³ Employees may also be injured by careless conduct of fitness service providers and may sue in negligence or, more likely, be entitled to workers' compensation. The position of employees will be discussed in another report.

¹²⁴ Compare the framework set out by Deane J in *Jaensch v Coffey* (1984) 155 CLR 549, 585–6. It should be noted, however, that the various elements and the questions that arise under each are not entirely distinct. The elements overlap and interact: see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 487 per Brennan J.

¹²⁵ *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7.

¹²⁶ There is even an argument that an occupier may be liable for the acts of a contractor, such as a tradesperson. This may be a consequence of a special rule of law that imposes a 'non-delegable' duty on occupiers of premises, but there is real doubt about whether such a rule applies in Australian law to occupiers. See Luntz et al, [7.5.13] and [17.5.20]. In the (unlikely) event that this principle still applies, then the fact that certain careless conduct was engaged in by a contractor does not excuse the occupier from liability if such work makes the premises unsafe. So, e.g., if a tradesperson repairs lighting on the premises and carelessly fails to properly screw the light fittings, such that the lights fall on a client, the occupier may be liable. If such a special rule does not apply, then the occupier would not be liable. If, however, the repairs were done by an employee of the fitness centre, then the fitness operator would be vicariously liable.

¹²⁷ [2010] NSWSC 1130.

¹²⁸ [2011] NSWCA 63, [123].

¹²⁹ *Strong v Woolworths Ltd* [2012] HCA 5.

¹³⁰ See, e.g., CLA (NSW) s 5R.

¹³¹ See, e.g., CLA (Vic) s 26.

¹³² See *Imbree v McNeilly* (2008) 236 CLR 510, 536 [81], joint judgment of Gummow, Hayne and Kiefel JJ, Gleeson CJ and Crennan J agreeing.

¹³³ *Ibid* 535-6, [79].

¹³⁴ Compare the *Ipp Report*, [7.21]-[7.24], pp 107-108, which notes this community apprehension, but concludes that 'there are no compelling arguments for such an exemption' [7.24]. See also Villa, above n 5, 1st ed, 276-7.

¹³⁵ *Civil liabilities Act 2002*(NSW) s 57.

¹³⁶ *Civil Liabilities Act 2002* (WA) s 5AD (3).

¹³⁷ [2000] QDC 215.

¹³⁸ Van Der Smissen, B. (1990). *Legal liability and risk management for public and private entities* (Vol. 2) Cincinnati: Anderson Pub. Co.

¹³⁹ Spengler, J. O., Connaughton, D. and Pittman, A. T. 2006. *Risk management in sport and recreation*, pp. 86-87. Champaign, IL: Human Kinetics.

¹⁴⁰ [2011] NSWCA 63.

¹⁴¹ *Uniform Civil Procedure Rules 1999* (Qld) r 681(1).

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¹⁴³ [2009] NSWCA 46.

¹⁴⁴ *Is anybody at home? How to suit proof your 24 hour 'key club'*:

http://www.clubinsurance.com/articles_247Clubs.html. Retrieved: 14/3/2014.

¹⁴⁵ See, e.g., 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].

¹⁴⁶ See, e.g., Seddon and Ellinghaus, [1.67] – [1.71]; [10.36] – [10.61].

¹⁴⁷ 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.

¹⁴⁸ See, e.g., *E v Australian Red Cross Society* (1991) 27 FCR 310; 99 ALR 601.

¹⁴⁹ Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill No 2 2010, p 3.

¹⁵⁰ *Australian Consumer Law 2010 (Cth)*.s 3 (3).

¹⁵¹ *Ibid*, s 60.

¹⁵² There is also a guarantee that services be supplied within a reasonable time (s 62 ACL).

¹⁵³ 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.

¹⁵⁴ (2006) 17 NTLR 83; [2006] NTSC 4.

¹⁵⁵ 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.

net.au/PublicPapers/October_2005,_Sound_Education_in_Law,_Occupier_s_Liability_for_Criminal_Acts_of_Third_Parties.html [Accessed: 4 Apr 2014].

¹⁸³ Lisa Whitehead, *Raids link police with organized crime*, Australian Broadcasting Corporation, 9 October 2013. In this report, the Chief Executive Officer of the Australian Crime Commission referred to the illegal sale of steroids among people who work in security, the police, the military and secondary schools as “an ever expanding market” and that a major source of revenue for criminal organizations is the illegal distribution and sale of steroids.

¹⁸⁴ ‘Former Bandido John Fahey bailed over Burleigh Heads gym brawl’, *Gold Coast Bulletin*, 29 January 2014.

¹⁸⁵ ‘Personal trainer busted breaking into client’s truck during workouts’, *New York Daily News*, 6 March 2014; ‘Gang stole from gym lockers’, *The Bolton News*, 15 March 2014.

¹⁸⁶ Richard Chin, ‘After Roseville gym brawl, three charged’, *Twin Cities.Com*, March 6 2014.

¹⁸⁷ ‘Former Bandido John Fahey bailed over Burleigh Heads gym brawl’, *Gold Coast Bulletin*, 29 January 2014.

¹⁸⁸ Aaron Langmaid, Wayne Flower and Mark Buttler, ‘Second man arrested in connection to death of Melbourne gym owner’, *Herald Sun*, 18 December 2013.

¹⁸⁹ *Ibid.*; Victor Blackwell and Devon Sayers, ‘Gym mat death: scene pics point to foul play, expert says’, *CNN International Edition*, 9 October 2013.

¹⁹⁰ Olivia Wannan, ‘Anger at filming in gym shower’, *stuff.co.nz*, 2 July 2013.

¹⁹¹ ‘Lewd act outside youth gym’, *The Pueblo Chieftain*, 19 September 2013.

¹⁹² Bob Heye, ‘Police: sex offender changes name, rejoins gym where crime occurred’, *KATU News*, 9 January 2012.

¹⁹³ ‘Former Bandido John Fahey bailed over Burleigh Heads gym brawl’, *Gold Coast Bulletin*, 29 January 2014.

¹⁹⁴ Rania Spooner and Nino Bucci, ‘Police arrested after drug raids on homes’, *The Age*, 9 October 2013.

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¹⁹⁷ *Anti-Discrimination Act 1977* (NSW), s 7.

¹⁹⁸ Information from Humanrights.gov.au. 2014. *Federal Discrimination Law: Chapter 1 - Introduction / Australian Human Rights Commission*. [online] Available at: <http://www.humanrights.gov.au/federal-discrimination-law-chapter-1-introduction> [Accessed: 4 Apr 2014].

¹⁹⁹ See, for example, Division 2 of Part 5 of the *Age Discrimination Act 2004* (other than section 52); or Division 4 of Part 2 of the *Disability Discrimination Act 1992*; or subsection 27(2) of the *Racial Discrimination Act 1975*; or section 94 of the *Sex Discrimination Act 1984*.

²⁰⁰ See, for example, the *Anti-Discrimination Act 1977* (NSW) s.20D. This conduct carries a maximum prison sentence of 6 months. Similar legislation exists in South Australia, the ACT, Queensland and Victoria.

²⁰¹ Eickhoff-Shemek and Deja, 2002, 2006 & 2008.

²⁰² Patrick Keyzer, ‘Legal Risk management in the Australian Fitness Industry: Identifying the Public Law Risks’, *Injury Prevention* 2012, 18 (Supplement 1), A 37.

²⁰³ John Wilson, ‘A Mutual Problem? The perils of Facebook for employers and employees alike’ (292) 226 *Ethos* 14-15.

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http://www.ausport.gov.au/__data/assets/pdf_file/0009/115587/4._Racial_discrimination_information_sheet.pdf.
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14. ²⁰⁷ Darcy, S. 2011. *Fitness for All. Reps: The Official Publication of Fitness Australia*, Iss. 14 pp. 13-
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- ²⁰⁹ Available at http://www.ausport.gov.au/__data/assets/pdf_file/0003/480072/1_-_Inclusion_in_Sport_Factsheet.pdf.
- ²¹⁰ *Sex Discrimination Act 1984* (Cth), s 22(1).
- ²¹¹ *Aldridge v Booth* (1988) 80 ALR 1, 5.
- ²¹² *Ibid*, s 42(1).
- ²¹³ *Ibid*, s 42(2).
- ²¹⁴ *Age Discrimination Act 2004* (Cth), s 3.
- ²¹⁵ Eickhoff-Shemek, 2005.
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