

FREQUENTLY ASKED QUESTIONS

Legal



Mel Tempest recently interviewed Chelsea Davine (Associate) and Michael Castricum (Associate) from Velocity Legal, to cover off some of the most frequently asked legal questions during this uniquely challenging time. Here's what we learned.

Q Do clubs need to have their returning members sign a new membership agreement?

If it is 'business as usual' when a club re-opens, and you are still providing the exact same services as you were before the shutdown, then new membership agreements are unlikely to be required. However, the situation becomes more complex from a legal perspective if there have been any changes to the nature of the services provided after the shutdown (e.g. time limits on access to the gym, members only being able to do outdoor training or members now having access to outdoor training when they previously did not). With this in mind, we recommend that fitness business owners carefully analyse any changes to the nature of services provided

and implement a new membership agreement if there is any doubt.

In addition to the above, it would be prudent for club owners to update their membership agreements to expressly acknowledge some of the measures their health club is taking in light of COVID-19, and requiring the members to cooperate with those efforts. As a couple of examples, these terms may require members not to attend the premises with cold symptoms and sanitise equipment after use.

It is also worth keeping in mind that terms in a membership agreement that allow club owners to unilaterally change the terms of their membership agreements may be 'unfair contract terms' under the Australian Consumer Law. These laws offer a baseline level of legal protection for members entering into standard form contracts (e.g. a template membership agreement) by allowing a Court to deem certain 'unfair' terms void (i.e. not enforceable). The practical upshot of these laws here is that club owners should be careful not to rely upon unfair contract terms in order to amend membership agreements, especially if those inclusions would be 'unfair' terms. If in doubt, an easy way to avoid unilaterally amending the contract is to prepare a new agreement for the members to sign incorporating the new terms.

Q Are there any other specific legalities that club owners should be considering or taking care of, as they prepare to reopen?

As a preliminary comment, if there is anything that a club owner is not entirely comfortable with from a legal perspective – now is the time to sort it out.

In terms of a more COVID-19 specific comment, health and safety measures are likely to be in the spotlight in the coming months. One of the risks for club owners



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in this space is the 'tort of negligence', where inadequate measures to protect the health and safety of members can result in a legal claim. The most obvious example that comes to mind is someone catching COVID-19 while attending the gym and becoming seriously ill or dying as a result.

To minimise their legal risk, club owners should ensure that they are up-to-date and abiding by the most recent government announcements regarding COVID-19 and that appropriate hygiene and cleaning practices are in place in their clubs.

Given that there are a nearly infinite number of legal issues that could arise for fitness businesses, and that those issues are highly dependent on the unique situation, it is always the safest option to get legal advice on any specific concerns that club owners may have about reopening.

Q Are clubs legally allowed to reinstate billing at the same fee rate as prior to closing, once the doors open?

This will generally depend upon the terms of the individual membership agreements and any other representations club owners have made to members about

their use of the gym. For example, if a gym owner has promised unrestricted access to the club (such as 24 hour access), and a member cannot get access to the gym due to restrictions on the amount of people allowed in the gym at any one time, it is unlikely that club owners will be able to charge members the full fee as they are not fully providing the service. The same could be said if no classes are available when these are usually provided.

Club owners also need to balance the broader commercial realities of reinstating billing practices against the potential to lose those members that are uncomfortable with going back to gyms immediately, or who are unsatisfied with the modified services offered by the club.

Q Can clubs use COVID-19 as an excuse to increase prices?

The starting point from a legal perspective is once again the contract between the member and the business. The devil is in the detail, and different businesses will have different options depending on what they have included in their terms and conditions. So, the answer to this question would not be entirely clear cut and would largely depend upon the circumstances.

As a general rule, businesses in the fitness industry are allowed to set their own prices. The most relevant legislation which restricts this ability is the *Competition and Consumer Act 2010* (Cth) which covers (amongst other things) anti-competitive conduct (e.g.

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price fixing) and unconscionable conduct. The latter point is likely to be the most relevant to raising prices in the fitness industry due to COVID-19.

To meet the ‘unconscionable’ standard, the conduct must be against good conscience as determined by societal norms. This has generally required deliberate dishonesty which affects a particularly vulnerable or disadvantaged customer. The upshot here is that if the price charged could conceivably go against the good conscience according to societal norms, the price increase may be an issue. For context, an example of such unconscionable conduct could be blatant price gouging behaviour in relation to face masks or hand sanitiser.

From a more practical perspective, we anticipate that most gyms will run a pre-opening marketing campaign, which will put significant pressure on fitness businesses given that all of these campaigns may be running concurrently. We suspect that this will result in intense price competition and therefore it might be more challenging than ever to raise prices immediately after gyms are allowed to reopen, unless the offering provided by the relevant club has expanded.

To read more frequently asked legal questions relating to COVID-19 and the fitness industry visit the Insights page at www.velocitylegal.com.au

Please note: This is not advice. You should not act solely on the basis of the material contained in this article as it is of a general nature. Formal advice should be sought before acting in any of the areas covered in this article.

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