

**PURSUANT TO
SECTION 218 of the AUSTRALIAN CONSUMER LAW (VICTORIA)**



ENFORCEABLE UNDERTAKING

The commitments in this Undertaking are offered to the Acting Director of Consumer Affairs Victoria by:

**FREEWAY FITNESS PTY LTD
(ACN 141 135 613)
of Lawler Draper Dillon
Level 12, 440 Collins Street, Melbourne VIC 3000**

– and –

KRISTIAN NATHAN WOODS

The Director

1. The office of the Director of Consumer Affairs Victoria (“the Director”) is provided for under section 107 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (“the ACLFTA”). The holder of that office is responsible for the administration of the ACLFTA and the Australian Consumer Law (“the ACL”), which has been enacted as a law of Victoria under Part 2-2 of the ACLFTA and is known as the Australian Consumer Law (Victoria) (“the ACL (Vic)”), together with Victoria’s other consumer protection legislation.
2. The Director, as a Regulator for the purposes of the ACL (Vic), may accept a written Undertaking pursuant to section 218 of the ACL (Vic) from any person in connection with any matter in relation to a contravention of the ACL (Vic), in respect of which the Director has a power or function, as a means of resolving contraventions of the ACL (Vic).
3. Mr Phil D’Adamo, the Acting Director of Consumer Affairs Victoria (“the Acting Director”) is the authorised delegate of the person who is the holder of the office of the Director of Consumer Affairs Victoria and is duly authorised to perform the functions of the Director including having the authority to enter into this Undertaking.

Freeway Fitness Pty Ltd

4. Freeway Fitness Pty Ltd ACN 141 135 613 (“the company”) is an Australian proprietary company limited by shares, which was registered on 15 December 2009. At all relevant times, the company had Lawler Draper Dillon, Level 12, 440 Collins Street, Melbourne VIC 3000 as its registered address and 1 Doveton Avenue, Doveton VIC 3177 as its principal place of business.
5. The company carries on business, in trade or commerce, as a gym and fitness centre.
6. Mr Kristian Nathan Woods (“Mr Woods”) is and was, at all times relevant to this Undertaking:
 - (a) a director and shareholder of the company; and
 - (b) the person responsible within the company for developing and enforcing the company’s policy in relation to the cancellation of membership agreements.

Legislation

6. On 1 January 2011, the ACL, as set out in Schedule 2 to the *Competition and Consumer Act 2010* (Cth), came into effect. Part 2.2 of the ACLFTA applies the ACL as a law of Victoria, which is known as the ACL (Vic).
7. Section 18(1) of the ACL (Vic) provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.
8. Section 29(1)(i) of the ACL (Vic) provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation with respect to the price of goods or services.
9. Section 151(1)(i) of the ACL (Vic) provides that a person commits an offence if, in trade or commerce, in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services, the person makes a false or misleading representation with respect to the price of goods or services.

Consumer Affairs Victoria Investigation

10. Since 20 February 2013, Consumer Affairs Victoria has received a number of complaints from consumers who were unable to cancel their membership agreements with the company such that they ended immediately on the expiry date of the minimum membership term expressed on their membership agreements with the company.
11. Membership agreements state that the required 28 days' notice to cancel can only be given after the minimum membership term has been completed. Consequently, the minimum membership term listed on each membership agreement is 28 days longer than the term specified in the membership agreements.
12. Consumers indicated to Consumer Affairs Victoria that when they attempted to provide the company with the required 28 days' notice to end their membership agreements on the expiry date of the minimum membership term, they were advised that such notice could only be provided after the minimum membership term had been completed.
13. Consumer Affairs Victoria has been informed that consumers were required to give the company notice of cancellation at a meeting with its representatives and that, in some instances, these meetings could not be obtained for up to several weeks, leaving consumers in a position of being unable to cancel their membership agreements until well after the minimum membership term.
14. On 7 April 2014, Consumer Affairs Victoria issued the company with a notice to produce information and documents under section 126 of the ACLFTA. The company responded on 9 April 2014.
15. The company's response to the notice confirmed that the company only accepts notice of cancellation after consumers' minimum membership terms have been completed. The response also provided information that Mr Woods is and was the person responsible within the company for developing and enforcing the company's policy in relation to the cancellation of membership agreements.
16. Consumer Affairs Victoria notes that the effect of the cancellation policy is that the minimum membership term is at least 28 days longer than what is specified in consumers' membership agreements. Accordingly, the minimum membership fee is also greater than the minimum amount consumers reasonably expected to pay upon entering into their membership agreements.

17. The Acting Director notes that since Consumer Affairs Victoria brought the above issues to the attention of the company, the company and Mr Woods have co-operated with Consumer Affairs Victoria staff and have shown a willingness to ensure that the company's membership agreements, policies and conduct comply with the ACL (Vic).

Contraventions of the ACL

18. A person who contravenes section 29 of the ACL (Vic) is liable, upon a proven contravention by a Court, to a civil pecuniary penalty in respect of each contravention, of not more than:

- (a) \$220,000 in the case of an individual; or
- (b) \$1.1 million in the case of a body corporate.

19. A person who contravenes section 151 of the ACL (Vic) is liable, on conviction, to a fine in respect of each offence, of not more than:

- (a) \$220,000 in the case of an individual; or
- (b) \$1.1 million in the case of a body corporate.

20. The Acting Director considers that by specifying a minimum membership term on its membership agreements and by not allowing consumers to end their membership agreements immediately upon the expiry of the minimum membership term expressed on their membership agreements, the company and Mr Woods have contravened sections 18(1), 29(1) and 151(1) of the ACL (Vic).

Acknowledgment of the Breach

21. Mr Woods, on behalf of the company, acknowledges that since the creation of the cancellation policy outlined above, the company has contravened sections 18(1), 29(1) and 151(1) of the ACL (Vic) by not allowing or providing a method for consumers to end their membership agreements with the company immediately upon the expiry of the minimum membership term expressed on their membership agreements.

22. Mr Woods acknowledges personally that, at all times since the creation of the cancellation policy outlined above, he was involved in the company's contraventions of sections 18(1), 29(1) and 151(1) of the ACL (Vic) by not allowing or providing a method for consumers to

end their membership agreements with the company immediately upon the expiry of the minimum membership term expressed on their membership agreements.

23. The company and Mr Woods seek to address the contraventions that they have acknowledged by offering this Undertaking to the Acting Director.

Undertaking

24. Mr Woods, personally and on behalf of the company, undertakes to the Acting Director, pursuant to section 218 of the ACL, that the company will:

- (a) amend its cancellation policy such that consumers are able to end their membership agreements immediately upon the expiry of the minimum membership term expressed on their membership agreements, including providing for notice of cancellation to be accepted prior to the end of any minimum membership term;
- (b) amend the wording of its membership agreements such that consumers are able to end their membership agreements immediately upon the expiry of the minimum membership term expressed on their membership agreements, including providing for notice of cancellation to be accepted prior to the end of any minimum membership term;
- (c) allow consumers who entered into a membership agreement prior to the company entering into this Undertaking to have access to the same policy and procedures that are created as a result of the amendments made with respect to sub-paragraphs (a) and (b) above, such that they are able to cancel their membership agreements immediately upon the expiry of the minimum membership term expressed on their membership agreements;
- (d) use its best endeavours to contact all current members who entered into a membership agreement prior to the company entering into this Undertaking, to advise them that:
 - i. the company offered an Undertaking to the Acting Director in relation to its cancellation policy and procedures;
 - ii. despite any statement to the contrary, consumers are now able to end their membership agreement to coincide with the expiry of the minimum membership term expressed on their membership agreements;

- iii. amended cancellation policies and procedures have been developed and that consumers are able to use them, including an explanation of the policies and procedures developed with respect to sub-paragraphs (a) and (b) above, and
 - iv. a copy of the Undertaking is registered and available for public inspection on Consumer Affairs Victoria's website; and
- (e) display a poster of no less than A4 size in a prominent place at the reception desk of each place of business at which the company provides gym and fitness services, which states that:
- i. the company offered an Undertaking to the Acting Director in relation to its cancellation policy and procedures;
 - ii. despite any statement to the contrary, consumers are now able to end their membership agreement to coincide with the expiry of the minimum membership term expressed on their membership agreements;
 - iii. amended cancellation policies and procedures have been developed and that consumers are able to use them, including an explanation of the policies and procedures developed with respect to sub-paragraphs (a) and (b) above, and
 - iv. a copy of the Undertaking is registered and available for public inspection on Consumer Affairs Victoria's website.

25. Mr Woods acknowledges that if the Director, or the Director's authorised delegate, considers that he or the company has breached any of the terms of this Undertaking, without limiting any other available enforcement action, an application may be made to a Court for an order under section 218(4) of the ACL (Vic).

Commencement of the Undertaking

26. This Undertaking commences ("commencement date") on the day:

- (a) the Undertaking is signed by Mr Woods personally and on behalf of the company; and
- (b) the Acting Director accepts and signs the Undertaking.

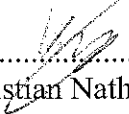
27. This Undertaking remains in effect for a period of five (5) years from the day it comes into effect, unless earlier varied or withdrawn by the Director (or an authorised delegate of the Director).

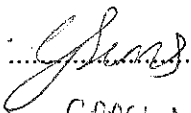
Public Nature of Undertaking


28. Mr Woods, personally and on behalf of the company, acknowledges that:

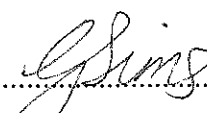
- (a) pursuant to section 200 of the ACLFTA, the Acting Director will register this Undertaking in the Register of Undertakings on the Consumer Affairs Victoria website and the Undertaking will be available for public inspection;
- (b) the Director (or an authorised delegate of the Director) and/or the Minister for Consumer Affairs Victoria may, from time to time, publicly refer to this Undertaking; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

EXECUTION

Signed by: 
Mr Kristian Nathan Woods

In the presence of: Witness: 
(PRINT NAME) GRACI-MARTE SIMS

Signed by:  *Kristian Woods*
FREEWAY FITNESS PTY LTD (ACN 141 135 613)

In the presence of: Witness: 
(PRINT NAME) GRACI-MARTE SIMS

Accepted by the Acting Director of Consumer Affairs Victoria pursuant to section 218 of the ACL (Vic).

DATED: *21 July* 2014



Mr Phil D'Adamo
Acting Director of Consumer Affairs Victoria