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New Rules for Fitness Services: The Fair Trading (Code of Practice - Fitness Industry) Regulation 2003

All too often consumers unwittingly pay over money to a fitness centre without having signed a membership agreement or being made aware of the rules of the fitness centre, believing that the services will be provided exactly as promised. Then the centre suddenly closes down.

Governments in a number of states and territories have reacted to growing consumer complaints about centre closures and cancelled memberships by introducing mandatory Codes of Practice to replace voluntary industry Codes of Practice or, in the case of New South Wales, legislation regulating the fitness industry. While Queensland consumers do not appear to have experienced the same level of detriment as those in some jurisdictions, there have been enough centre closures and consumers left with worthless memberships to prompt the Queensland Government to introduce a mandatory Fair Trading (Code of Practice – Fitness Industry) Regulation under the Fair Trading Act 1989 (Qld), making available the remedies under that Act for a breach.

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1 INTRODUCTION

All too often consumers unwittingly pay over money to a fitness centre without having signed a membership agreement or being made aware of the rules of the fitness centre, believing that the services will be provided exactly as promised. Then the centre suddenly closes down.

Governments in a number of states and territories have reacted to growing consumer complaints about centre closures and cancelled memberships by introducing mandatory Codes of Practice to replace voluntary industry Codes of Practice or, in the case of New South Wales, legislation regulating the fitness industry. While Queensland consumers do not appear to have experienced the same level of detriment as those in some jurisdictions, there have been enough centre closures and consumers left with worthless memberships to prompt the Queensland Government to introduce a mandatory Fair Trading (Code of Practice – Fitness Industry) Regulation under the *Fair Trading Act 1989* (Qld), making available the remedies under that Act (eg damages, compensation, remedial orders) for a breach.

The Regulation replaces the voluntary Code for the fitness industry which has had limited success due to its lack of coverage and insufficient encouragement for centres to abide by its rules.¹

2 GROWTH OF THE FITNESS INDUSTRY

Consumer protection in the context of the fitness industry is a recent issue. The late 1980s saw a number of fitness centres closing, leaving clients stranded. As a consequence, the industry's reputation suffered and it was depressed into the 1990s.² However, a resurgence of interest in fitness has occurred over the past decade and the industry has been moving to cater to the needs of the new era of gym-goers. About 10% of Australian adults have some type of membership at a fitness centre compared with 8% in Britain and 7% in the United States and Australia has around 1,500 centres with a turnover of over \$700 million, compared with \$300 million 10 years ago.³ Queensland is estimated to have more than 500

¹ Queensland. Department of Equity and Fair Trading, 'Fitness Industry', *Discussion Paper*, 2000, pp 13, 14.

² Mark Abernethy, 'Healthy, Wealthy – and Why', *Bulletin*, 25 January 2000, p 45.

³ Abernethy, p 45.

centres, ranging from small non-profit organisations offering limited services and facilities, to big centres with a large number of members providing a wide range of services and facilities.⁴ Many fitness centres also offer personal services such as fitness assessments, nutrition advice and personal trainers. Many centres also cater for niche markets (eg Fernwood Female Fitness Centres for women only), and have child-minding and other facilities. The industry now embraces the concept of moderate exercise and holistic health, and caters to a more educated consumer.⁵

Fitness centres are generally keen to embrace higher standards in order to repair the damage to the fitness industry's image in the late 1980s caused by closures and injuries to clients by unqualified staff.⁶ Many fitness centres, including those in Queensland, now have accredited facilities and employ only people holding or attaining industry accreditation.

According to leaders in the fitness industry, Australia is ahead of many countries in the quality of services provided, approach of management, and the level of qualified staff. It is understood that until very recently, Queensland was the only state with an accreditation scheme for fitness centres.⁷ Despite this, cases of unanticipated centre closures and injuries to clients do occur and can only continue to harm the fitness industry. The industry is generally supportive of the Government's attempts to improve the level of consumer protection. After all, improved consumer confidence can only benefit the industry, even if poor operators are removed in the process.

3 BACKGROUND TO FITNESS INDUSTRY CODE OF PRACTICE

Fitness centre membership fees represent a significant outlay for many consumers, a number of whom are young and may not have engaged in transactions involving pre-payments of around \$300-\$600 in their lives. Few would be aware of their rights and entitlements as it is not often that there is any written membership agreement to formalise the arrangements.

The main consumer protection issue is the unforeseen closure of a fitness centre where members with pre-paid memberships might be left out of pocket. Other concerns include the lack of any written membership agreements or the complexity

⁴ *Discussion Paper*, p 8.

⁵ Natalie Smith, 'The Fitness Industry: how healthy is it?', *SWEAT*, Queensland Office of Sport and Recreation, May-August 1998, p 14, p 16.

⁶ Smith, p 16.

⁷ Smith, p 17.

of any such agreement; misleading information being provided to potential customers; the quality and level of service and facilities provided by the centre; and the qualification of the centre's staff.⁸

3.1 POSITION PRIOR TO REGULATION

Prior to the Queensland Fitness Industry Code of Practice, (commencing in July 2003), the industry has not been subject to any industry specific legislative controls. Some consumer protection is provided to Queensland gym goers under the umbrella of the *Fair Trading Act 1989* (Qld) where fitness centres engage in practices such as unconscionable conduct; false or misleading representations concerning provision of services or equipment; bait advertising; or accepting money without being able to provide the service etc. In some instances, the fitness service supplier engaging in the conduct may be prosecuted and fined. However, consumer issues related specifically to fitness services (eg pre-payments, content of membership agreements, pre-payments) have not been specifically regulated.

Fitness Queensland is the State's peak industry association. It advises industry and Government about issues of concern and promotes the development and improvement of standards within the industry as a whole. Members of Fitness Queensland must abide by a voluntary Code of Practice, dealing with consumer protection issues such as membership fees and agreements. The body also administers an Accreditation Scheme which provides for industry standards governing matters such as staff qualifications, and operational procedures of member fitness centres.⁹

However, the effectiveness of the Code of Practice is limited by its voluntary nature. Although many large fitness centres are members (and accordingly bound by the Code) the level is only around 30% of all centres, with little representation in regional areas.¹⁰ Thus, it is ultimately a case of 'buyer beware' that the centre is a member of Fitness Queensland, so that the Code applies. There is no obligation on a centre to become a member nor any legislative sanctions for breaches.

⁸ *Discussion Paper*, Executive Summary, p ii.

⁹ *Discussion Paper*, p 13.

¹⁰ *Discussion Paper*, p 13.

3.2 DEVELOPMENT OF REGULATION

It is understood that it was the large number of fitness centre closures exposing members to loss of the unexpired portion of their memberships that was the major impetus for the Queensland Government and industry groups to embark on a major review of the industry with a view to regulation. By early 1995, it was recognised that the self-regulatory system had significant limitations and was unable to offer the level of consumer protection necessary. In July 1995, a working party of relevant stakeholders was formed to develop a draft Code of Practice.

The Queensland Office of Fair Trading (OFT) *Fitness Industry Discussion Paper*, developed in consultation with Fitness Queensland, was released by the then Minister for Fair Trading in April 2000. A draft Fitness Industry Code of Practice was included. Preference was given for the development of a mandatory Code of Practice as the most cost-effective and flexible means of addressing consumer protection issues as opposed to improved self-regulation and industry specific legislation.

The mandatory approach was regarded as consistent with that taken in the Australian Capital Territory (which appears to have the most detailed legislative requirements), and South Australia.¹¹ In the meantime, the New South Wales *Fitness Services (Pre-Paid Fees) Act 2000* commenced, setting strict rules regarding how fitness centres handle pre-paid membership fees. NSW also has a voluntary Code of Practice. Western Australia is currently considering the range of options available for controlling the fitness industry in that state.

In 2002, it was decided that the Code of Practice would be implemented via a Regulation under the *Fair Trading Act 1989* (Qld) (the Act). After further consultation with stakeholders, the Fair Trading (Code of Practice – Fitness Industry) Regulation 2003 (Qld) was gazetted on 11 April 2003 and will commence operation on 1 July 2003.

4 FAIR TRADING (CODE OF PRACTICE – FITNESS INDUSTRY) REGULATION 2003 (QLD)

The **Fair Trading (Code of Practice – Fitness Industry) Regulation 2003 (Qld)** provides (in s 3) that the Code of Practice in the Schedule to the Regulation is the Code of Practice about the fitness industry prescribed for the Act under s 88A.

Accordingly, the Schedule to the Regulation contains the ‘Fitness Industry Code of Practice’.

¹¹ *Discussion Paper*, p 14.

The object of the Code of Practice (the Code) is to

- ensure maintenance of appropriate standards of trading in the fitness industry;
- promote client confidence in the fitness industry;
- ensure the provision of fitness services to clients in an ethical and professional manner, taking into account clients' interests;
- establish rights and obligations between suppliers and clients for –
 - fitness services offered and supplied agreements, and
 - the disclosure of all information relevant to clients entering into agreements for fitness services: s 2.

4.1 COVERAGE

The Code seeks to have a wide coverage by virtue of the definition of '**fitness services**' and '**supplier**'.

A **fitness service** includes pre or post-exercise questionnaires or fitness assessments; a supervised or unsupervised exercise program; a group exercise program; a fitness program; or fitness equipment at a fitness centre: s 4. A number of services will not be covered by the Regulation and are set out in s 4(2). The excluded services include those such as licensed physiotherapists' services; school sports; doctors' services; services supplied by sporting clubs or organisations established to engage in competitive sport; the hire of a facility for playing sport; services for unsupervised outdoor activities; the use of certain aquatic facilities, or fitness facilities for hotel guests. Services at a fitness centre for the sole purpose of rehabilitation will not be subject to the Regulation.

A **supplier** is any individual or corporation in the business of supplying fitness services: see **Dictionary**. Examples are provided such as a fitness centre owner who provides fitness services for reward; a franchisee or manager of a fitness centre; and a personal trainer. It would not, however, cover an administrative staff member of a centre or an aerobics instructor at the centre.

Protection will be provided to people who are provided with a fitness service or who enter into a membership agreement with a supplier and even people who are making inquiries of a centre before they decide whether to enter into a membership agreement. All will be '**clients**' for the purposes of the Code.

4.2 FORCE OF THE CODE OF PRACTICE

Suppliers must comply with the provisions of the Code even if a client asks for something to be done that would be contrary to it. Contravention of the Code provides a ground for various actions under the *Fair Trading Act* –

- seeking an undertaking under the Act that the supplier not engage in further contravening conduct;
- obtaining an injunction to prevent further breaches;
- seeking a compensation order or other remedial order under the Act.

5 ISSUES DEALT WITH IN CODE OF PRACTICE

The Code sets out a number of provisions designed to deal with a number of consumer issues identified in the *Discussion Paper* relating to the provision of information to consumers, fees, and membership agreements. The features of the Code include –

- **general rules of conduct in Part 2** that aim to stop suppliers and employees from engaging in bad behaviour towards clients;
- a requirement to display a conspicuous **sign** warning of the need to advise the supplier about health risks;
- a requirement about standards and accuracy of **information** to be provided to clients and to ensure confidentiality of any personal information about a client (**Part 3**);
- requirements about **membership agreements (Part 4)** including full disclosure of all fees; a 48 hour cooling off period; that agreements are signed by both parties and set out clearly specified matters; fee pre-payments are limited to 12 months; and special requirements where the agreement predates the opening of the centre (eg no fees to be collected);
- rights and obligations regarding refunds and administration fees for **termination by the client** during the cooling-off period, or due to permanent sickness or incapacity, or other reason (**Part 4**);
- complaints handling procedures (Part 5).

5.1 UNFORESEEN CLOSURES AND LOSS OF PRE-PAID FEES

The closure of a fitness centre is a large concern for many customers who have pre-paid memberships and risk forfeiting the unexpired portion. Fitness centres may fail for many reasons. There might be an oversupply of centres in one area; a recognised 'chain' centre moves in with which existing centres are unable to compete; or a centre has rented premises and the lease is not renewed.

Although the fees for 12-month memberships vary considerably across the industry, the cost is generally about \$300 to \$600. The inducements to take longer memberships include discounts for longer terms (pay-as-you-go rates can be up to \$12 a session) or free access to services such as monthly fitness assessments. Some fitness centres even offer lifetime memberships, although this is more common in the USA than in Australia. However, the Queensland OFT has received advice that some centres have offered memberships for up to 10 years in the past.¹²

Most centres prefer up-front payment but some do allow periodic payments through direct debit facilities. The latter is the safest option for consumers because if the centre closes, customers can cancel those arrangements with their financial institutions. Customers should, however, check their accounts to ensure that payments do not continue to be deducted and if that occurs after the centre has been advised, a complaint should be made to the OFT. Credit card arrangements may be more difficult to unravel because the institution may, under the terms of the credit card agreement, have to seek cancellation approval from the fitness centre.

There can also be other costs besides the actual membership fee. Most centres have a 'joining fee' (up to \$100) for first-time members. Thus, a new member could pay around \$700 in total, meaning that if the centre goes broke during that first year, the loss is greater.

It should be noted that many fitness centres facing closure do the right thing by their clients by refunding the unexpired part of the membership fee or by attempting to find alternative and convenient centres which will honour the unexpired portion of their membership and not charge a joining fee. However, this is not a widespread occurrence and is not feasible in all closure cases.¹³

¹² *Discussion Paper*, p 11.

¹³ *Discussion Paper*, p 11.

5.1.1 Code of Practice

The OFT *Discussion Paper* noted that while it is impossible to ensure that fitness centres do not close, there are ways in which the ensuing consumer detriment can be reduced. One is addressing the issue of long memberships, given the OFT's observation that membership structuring based on agreements of more than 12 months seemed to present difficulties for centres in servicing members over full membership periods. Another issue was agreements covering periods exceeding a centre's lease of the premises.¹⁴

Disclosure of Fees

Before a client enters into a membership agreement, the supplier must give him or her a clearly expressed written statement that complies with s 15 of the Code. Each and every fee that the client may be required to pay for the duration of the agreement must be disclosed, including details of the services to which they apply and when they must be paid. As mentioned earlier, many centres charge a 'joining fee' as well as a membership fee that may not be apparent until it is too late. The supplier must now disclose the amount of that fee as well. Any other fees, such as a fee for a service provided at the centre, must also be disclosed. Thus, if ongoing fitness appraisals are offered, the supplier must inform the consumer if the cost is not included in the membership fee.

If a fee applies because a client wants to terminate the agreement beyond the 48 hour cooling-off period (eg because they become ill or suffer a long injury), that must also be disclosed. Many centres will charge an administration fee and some will also charge a fee for terminating early. The maximum **administration fee** that a supplier can deduct from the membership fee is the lesser of \$75 or 10% of the membership fee.

Sometimes a client may have work transfers etc and wish to transfer their membership to a gym closer to their new workplace. If there is a fee to do this, that fee must be disclosed. More often, a client may go overseas or be unable to attend for some months and wish to suspend their membership. Any suspension fee must also be disclosed.

It is also necessary for a supplier to disclose details about the usual fee for a service if it is offered free or at a discount and whether or not the service has been restricted or decreased in quality.

¹⁴ *Discussion Paper*, p 11.

Length of Membership Agreements and Pre-Payments

Note that while suppliers are permitted to enter into membership agreements with clients that extend for longer than 12 months, the supplier must not seek **pre-payments** of fees for more than 12 months: **s 19**. This seeks to reduce the hardship caused to clients if a centre closes before the term of the agreement is completed. For example, if the agreement is for three years and the \$1,200 fee is payable by instalments, the supplier must only take \$400 in any 12 month period over the three years (representing one third of the total fees payable).

Some centres offer an **ongoing agreement** where there is an initial term but the agreement will continue beyond that term unless and until the client terminates it. In these situations, the supplier must ensure that the agreement states that it is an ongoing agreement and, apparently to ensure that the client's attention is drawn to this fact, must also have the client initial and date the condition. Also, at least 2 months before the end of the initial term, the supplier must give written notice to the client about when the initial term ends and that it will continue in operation until the client decides to terminate it: **s 20**.

The ACT Code of Practice does not permit memberships to exceed 12 months or a period that exceeds the unexpired period of any lease that the centre may have over the premises. The NSW legislation (see below) contains a similar proscription.

Agreements Pre-Dating Opening of Fitness Centre

The Code states that membership agreements can be entered into before the supplier's fitness centre opens but that no fee is payable until it does open. Upon entering into the agreement, the supplier is also obliged to inform the client when the centre is anticipated to be opened (and also inform the client if there is any change to that day) and that it may be inspected during the 48 day cooling-off period: **cls 21-23**.¹⁵ In the ACT, suppliers cannot sell memberships for centres that have not yet commenced providing services.

5.1.2 New South Wales - *Fitness Services (Pre-paid Fees) Act 2000*

The *Fitness Services (Pre-paid Fees) Act 2000* (the NSW Act) deals mainly with the issue of how a supplier deals with pre-paid fees that consumers make for the services it offers to provide before any or all of the agreed service is provided. The legislation essentially separates the pre-paid fee issue from the issue of length of the membership agreement, as it is the former that is really responsible for

¹⁵ The cooling-off period runs from the day the centre opens.

consumer financial detriment. It is this notion that the Queensland Code appears to have embraced in allowing agreements to extend beyond 12 months but not allowing suppliers to take pre-paid fees for longer than that period.

The NSW Act is a response to growing concern of consumers losing money when fitness centres closed down before the expiration of their memberships, despite the voluntary Code of Practice for Fitness Centres. It is understood that the NSW Department of Fair Trading has figures to show that 10 of that State's 400 fitness centres have closed since July 1998 (when the Code was introduced).¹⁶ Those centres were not signatories to the Code. In 1999, the Code underwent independent review overseen by the NSW Sports Advisory Council to ascertain whether it was achieving its consumer protection objectives and to identify ways in which to address specific consumer and industry issues, particularly in a context where only one-quarter of fitness centres were signatories to the Code.¹⁷ The NSW Act developed from the recommendations of that review and applies to agreements signed after March 2001.

Under the NSW Act, it is an offence for a supplier to seek or accept a pre-paid fee for a service for a period that exceeds 12 months or that exceeds the unexpired term of a lease, unless the supplier has informed the consumer when the lease will expire and the consumer acknowledges that notification in writing. It is possible for a membership agreement to exceed 12 months provided the pre-paid fee is not more than what proportion is payable for a 12 month period, as is the case under the Queensland Code.

In addition, a supplier must not seek or accept a pre-paid fee where –

- it is not intended at that time to commence to provide the agreed service within 3 months, or
- there are reasonable grounds of which the supplier is or ought reasonably to be aware for believing that the services will not be able to be provided within 3 months.

In any event, if the services are not provided within 3 months of the date on which a pre-paid fee is accepted, the supplier must refund the fee and the agreement is terminated under the Act.

¹⁶ New South Wales. Department of Fair Trading, Fitness Services (Pre-paid Fees) Regulation 2001, *Regulatory Impact Statement*, May 2001, p 6.

¹⁷ Hon John Watkins MLA, Minister for Fair Trading and Minister for Sport and Recreation, Fitness Services (Pre-paid Fees) Bill, Second Reading Speech, 1 November 2000, Hansard Extract, p 9550, downloaded from the Parliament of New South Wales website at <http://www.parliament.nsw.gov.au/>.

Suppliers who receive pre-paid fees must place the money in a trust account so that it is held exclusively for the consumer until the supplier starts to provide the service. The accounts and records thereof must be managed strictly in accordance with the prescribed requirements: s 11.¹⁸

The Queensland OFT *Discussion Paper* considered the option of introducing a trust account system, with or without accompanying specific legislation, but concluded that it would not be a cost-effective means of dealing with issues of primary concern and that it may contribute to cash flow problems for the many fitness centres that rely on advance payments.¹⁹ The NSW Government considered that the Regulations concerning the management of trust accounts were in accordance with standard accounting practices and, while there would be a medium level of business administration costs (paper burdens, bookkeeping expenses), those would be from the adoption of good business practices in any event. It was considered that the greater financial protection to consumers through demonstrated adoption by centres of good business practices in respect of accounting for trust money would pay off in terms of goodwill from increased consumer confidence.²⁰

The supplier may incur a fine of up to \$110,000 for a breach of the forgoing provisions. Any pre-paid fee that has been accepted or received by the supplier is a debt due to the consumer and recoverable in a court of competent jurisdiction.

Certain enforcement provisions of the NSW *Fair Trading Act 1987* also apply (eg public warning statements; written undertakings from suppliers concerning compliance that are enforceable in the Supreme Court). The NSW Act also provides for the appointment of investigators, issue of search warrants and powers of entry and inspection under the *Fair Trading Act* to apply to investigations under the NSW Act.

5.2 MEMBERSHIP AGREEMENTS

In addition to the concern about pre-paid fees under membership agreements, misunderstanding by consumers of their rights and obligations often creates problems. In addition, consumers may not be provided with adequate information before entering into the agreement about the nature of services to be provided and the conditions of the agreement to make an informed choice about whether to join up or not. There are also concerns about some of the marketing tactics adopted by

¹⁸ See also Fitness Services (Pre-paid Fees) Regulation 2001, Part 2, Division 2.

¹⁹ *Discussion Paper*, p 13.

²⁰ Fitness Services (Pre-paid Fees) Regulation 2001, *Regulatory Impact Statement*, May 2001, p 20.

some sections of the industry, particularly high-pressure telemarketing to sell memberships.

Problems also arise when, through no fault of the centre, a member wants to terminate the agreement and request a refund of their unused portion.

5.2.1 Code of Practice

A membership agreement is defined as *an agreement between a supplier and a client for the supply of fitness services by the supplier to the client at a fitness centre.*²¹

Part 4 of the Code seeks to address concerns about **membership agreements** in a number of ways. In addition, **Part 3** requires that, before a client enters into such an agreement, the supplier give the client a copy of the agreement, the rules of the centre, and any other information to enable the client to make an informed decision about entering into the agreement. They should also allow the client to inspect the centre. The rules of the centre must also be available for inspection at all times and any new rule or change to them has to be prominently displayed for 2 months: **s 12**.

Disclosure of Fees Before Signing

As noted earlier, all fees must be disclosed before a client enters into a membership agreement: **s 15**.

Content of the Membership Agreement

It is a requirement under **s 16** of the Code that the agreement is in clear, easily understandable written form and is signed by the client and by or for the supplier. Clients must be able to take a copy with them.

Clause 17 sets out the matters that the agreement must contain. Those include (but are not limited to) formal details, rights and obligations of each party including the right to terminate if the client becomes permanently ill or physically incapacitated, fee details, ability to terminate in other circumstances.

As many fitness centre operators would indicate, consumers do not always inform the staff of any restrictions or disabilities that may predispose them to injury or harm through undertaking particular programs, forms of exercise, or rigorous fitness assessments. Accordingly, under the Code, the agreement must state that the client has an obligation to inform the supplier in writing about any risk to the client's health that the client believes they may have if they participate in a fitness

²¹ See Dictionary in the Schedule to the Code of Practice.

service at the centre. Pursuant to **s 9** a **sign** has to be prominently displayed at the centre (eg at the reception counter) bearing the statement that if the person believes that there is a risk to his or her health by participating in a service, they must inform the supplier in writing about the risk. Another statement must also say that a **casual** client must assess their fitness level, ability to exercise and risk to health by participating in a service at the centre.

Cooling-Off Period

All membership agreements will incorporate a **48 hour cooling-off period** running from the day the client enters into the agreement. The agreement must specify the cooling-off period. However, if the centre has not yet opened, it generally runs from the day it opens: **s 14**. The ACT and NSW Codes of Practice provide for a cooling-off period of 7 days for memberships of 3 months or more.

A client may **terminate** the agreement during the cooling-off period by way of written notice: **s 24**. The client is entitled to a fee refund less the fee for any service he or she may have used and an administration fee. Those fees can be deducted only if they have been disclosed to the client (under s 15) before making the agreement.

5.3 TERMINATION OF MEMBERSHIP AGREEMENTS

In the past, many clients have been unsure or unaware of their rights and obligations in the event of being no longer able to avail themselves of a fitness centre's services through permanent sickness or incapacity, because they move interstate, or because they simply no longer want to use them. The OFT has reported an example of a person complaining that a supplier was continuing to deduct monthly payments after being requested by the client to cancel their membership due to injury preventing further exercise.²²

5.3.1 Code of Practice

Apart from termination during the cooling-off period (s 24), there may be other circumstances under which the client may wish to end a membership agreement.

A client may become **permanently sick or physically incapacitated**. Under **s 25** a client may terminate the agreement in such a case by way of written notice together with a medical certificate. Within 21 days of the termination the client is

²² Hon Merri Rose MP, Minister for Tourism, Minister for Racing and Minister for Fair Trading, 'Fitness industry bends to consumer protection', *Ministerial Media Statement*, 13 April 2003.

entitled to a refund of the proportion of the fees representing the unused part of the agreement less any fee for the use of a service not paid for and the relevant administration fee. It appears that temporary incapacity or illness would not be covered by s 25.

If the client wishes to end the agreement beyond the cooling-off period for reasons other than sickness or incapacity, they may do so in writing but may be required to pay a termination fee as stated in the membership agreement: **s 26**. The supplier must make every reasonable effort to respond quickly and fairly to the termination. In most cases, the agreement should state (see s 17(n)) the circumstances in which a client may terminate and their rights and obligations upon doing so.

5.4 GENERAL RULES OF CONDUCT

Other issues of concern are those such as suppliers of fitness service adopting high pressure tactics or misleading information or other unethical forms of behaviour in order to make a consumer join a fitness centre. In one case a woman aged 85 was told by a telemarketer that she had ‘won’ free membership and she passed it on to her daughter. Her daughter complained to the OFT that high pressure tactics were used to make her join and the membership, contrary to being free, was \$899.²³ Sometimes suppliers encourage unrealistic expectations where clients are frustrated when the weight loss and muscle toning from using a supplier’s ‘state of the art’ services do not produce ‘results in six weeks’ as promised.

5.4.1 Code of Practice

Under **Part 2** of the Code a supplier or their employee must not –

- falsely claim membership or endorsement of an organisation or association;
- engage in high pressure tactics, harassment (eg threatening or intimidating a client), or unconscionable conduct (examples of which are provided in s 7) to get a client to enter into a membership agreement;
- solicit clients through false or misleading advertisements or communications or make deliberately false or misleading comparisons with fitness services provided by another supplier.

²³ Hon Merri Rose MP, ‘Fitness industry bends to consumer protection’.

Note also that s 10 in Part 2 imposes quite rigorous standards concerning accuracy of promotional material and about it not encouraging unrealistic expectations about the outcomes of using the facilities.

5.5 COMPLAINTS HANDLING PROCEDURES

Part 5 of the Code provides that suppliers must make reasonable efforts to resolve client complaints about the supply of a fitness service under a membership agreement quickly and fairly. The supplier must also enable the client to avail themselves of the supplier's own complaints handling procedures or those of the industry organisation. The procedure has to be simple and easy to use and comply with relevant Australian Standards concerning complaints handling.

The ACT Code of Practice contains a comprehensive complaints resolution procedure. If a complaint cannot be resolved between the client and supplier, or it is a complaint by another supplier, the complaint can be dealt with by a Complaints Resolution Committee set up by the Code. It comprises an independent chair, fitness industry representative and consumer representative. It has sanctioning powers where it determines that a supplier has breached the Code. Those includes requiring refunds be given or for the supplier to correct any offending promotional material that may have given rise to the complaint.

5.6 CONFIDENTIALITY OF CONSUMER INFORMATION

Confidentiality of personal information has become an important issue, particularly in relation to disclosing personal details for mailing lists etc. Fitness centres generally have on record many such personal details of members, particularly names, residential addresses and phone numbers and information regarding the health matters (medical records and certificates).

Under the Code, disclosure by a fitness centre of any personal information about a consumer will be, or is, forbidden unless authorised, in writing, by the consumer. Similar obligations exist under both the NSW and the ACT Codes.

6 AUSTRALIAN CAPITAL TERRITORY FITNESS INDUSTRY CODE OF PRACTICE

The ACT Code of Practice 1999 (ACT Code) is a mandatory Code under the *Fair Trading Act 1992* (ACT). It is very comprehensive and, apart from regulating the contractual aspects of fitness services, as is the case under the Queensland Code of

Practice, the ACT Code also deals with standards of fitness centres and qualifications of staff at the centres.²⁴

The aspects of the ACT Code dealing with membership agreements appear almost identical to the Queensland Code. Similar obligations are imposed on suppliers regarding accuracy of promotional material, disclosure of relevant information, rules of the centre etc to enable an informed decision about membership to be made, and about the content of agreements and disclosure of all fees payable. However, there are a number of additional matters regarding client safety that the ACT Code covers. Those are –

- the supplier must ensure that employees are qualified to provide the service they are employed to provide;
- the supplier must ensure that there is an appropriately qualified person to supervise the provision of all services at the centre at all relevant times;
- the supplier must ensure that adequate public liability insurance and professional indemnity insurance is maintained;
- consumers intending to enter a membership agreement and casual visitors intending to use a fitness exercise or service must complete a fitness centre questionnaire regarding their participation risks which is then assessed by a qualified person. Full disclosure is required. If the questionnaire indicates a risk, no fitness service should be supplied to the consumer without medical evidence that consumer is not at risk and an appropriately qualified person advises the consumer in relation to an appropriate fitness program;
- before providing services to a casual, the supplier must inquire into the casual's possible health risks and may require indemnification by the casual;
- fitness centres must meet required Code standards regarding cleanliness of facilities and equipment; equipment must comply with Australian Standards Association safety standards, be mechanically sound and regularly serviced. Adequate warning notices about proper use of pieces of equipment must be prominently displayed. Numbers should be restricted in floor classes to maintain safe working space and resistance training areas should contain safe working space. Ventilation should be kept at a comfortable level;
- staff providing fitness services must be qualified to do so by being registered by the Australian Fitness Accreditation Council or Fitness ACT²⁵ and providing

²⁴ Note that suppliers may apply for an exemption from the application of parts or all of the ACT Code.

service at a level appropriate to that registration; the supplier must not make false representations to consumers about such persons' qualifications. A trainee gaining experience at a centre to become registered must be supervised by a person qualified to provide the relevant service.

Since April 2002, there have been 32 complaints about fitness suppliers in the ACT. Those relate mainly to contractual aspects of the Code such as continuing to collect membership fee payments (eg through direct debiting) after termination of the agreement.²⁶ Few complaints have been made regarding standards of fitness centres and the ACT OFT finds that these aspects of the Code are the most difficult to monitor.

7 NEW SOUTH WALES CODE OF PRACTICE FOR FITNESS CENTRES

The NSW Code of Practice for Fitness Centres (NSW Code) is a voluntary industry code that covers consumer issues regarding services supplied at fitness centres whereas the *Fitness Services (Pre-Paid Fees) Act 2000*, discussed earlier, relates solely to payment of fees prior to being provided with services and management of those fees. Fitness centres must comply with the NSW Code when they become members of FitnessNSW, the peak industry body, which also administers the Code.

The NSW Code contains provisions regarding the membership agreement which are similar to those in the Queensland Code. It also requires that consumers be given the option of monthly billing. Note that a consumer can, in addition to terminating the agreement and getting a refund for permanent physical incapacity, defer the balance of the membership if the consumer becomes temporarily incapacitated. Other features include –

- centres must have appropriately qualified staff to provide services, one of whom must be available at all times;
- consumers must complete a pre-exercise questionnaire regarding health risks;
- centres must maintain high standards of cleanliness, and comply with occupational health and safety regulations;
- equipment must be mechanically sound, operated appropriately and serviced regularly; exercise areas must contain adequate safe working space and

²⁵ Fitness ACT is the peak industry body for the ACT.

²⁶ Telephone communication with Mr K Bell from the ACT Office of Fair Trading.

suppliers must ensure that user numbers do not hinder safe and effective use of equipment;

- suppliers must maintain adequate public liability insurance and professional indemnity insurance;
- the centre must provide a fully equipped first aid kit;
- suppliers must display their current Certificate of Accreditation.

APPENDIX A – MINISTERIAL MEDIA STATEMENT

Hon Merri Rose MP, Minister for Tourism, Racing and Fair Trading

13 April 2003

Fitness Industry bends to consumer protection

A new Code of Conduct for the fitness industry, which includes the provision of cooling-off periods, will come into effect in Queensland on July 1, Fair Trading Minister Merri Rose announced today.

Ms Rose said the Code would dramatically boost consumer protection, as well as promoting client confidence and safety in the industry.

"The Office of Fair Trading received dozens of complaints from consumers last year about gyms and fitness centres," she said.

"Most relate to consumers being locked into unfair contracts and the use of false and misleading advertising to promote gym memberships.

"The new Code addresses these concerns by establishing rights and obligations between fitness service suppliers (fitness centres, gyms, personal trainers and employees) and their customers."

The Code requires all contracts to be in writing and signed by both the client and the supplier.

Other key features include:

- a 48 hour cooling-off period for new agreements;
- full fee disclosure in all fitness agreements;
- a limit on the amount of upfront fees paid to a supplier in one year;
- a ban on the collection of fees by new fitness centres before they open for business; and
- the right for a consumer to terminate an agreement due to permanent incapacity.

"Fitness Queensland, the major industry stakeholder, supports the Code fully," Ms Rose said.

"One of the main objects of the Code is to promote client confidence and safety in the fitness industry.

"This industry is worth millions of dollars and it is appropriate there be regulation of fitness service providers. Those who are doing the right thing by their customers will welcome its introduction."

Examples of complaints lodged with Fair Trading:

- an 85-year-old woman was told by a telemarketer that she had 'won' a free gym membership. She passed it on to her daughter who claimed high pressure tactics were employed to make her join and that the membership was not free and in fact cost \$899.
- a trader was still deducting monthly payments despite a request by the consumer to cancel membership due to injury preventing further exercise.
- a consumer who paid for a 12-month membership. Four weeks later the gym closed. The trader offered to transfer membership to another gym but this wasn't acceptable to the consumer - they wanted a refund.

"A number of gym closures in recent years have resulted in consumers losing significant amounts of money in prepaid memberships, some of which were up to five years in length," Ms Rose said.

"The new Code will help protect people from such losses in the event of a business failure."

Anyone who breaches the Code will face a number of enforcement provisions contained in the Fair Trading Act, including enforceable undertakings, injunctions and orders for compensation.

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