Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**
Consumer Protection

Fitness Industry Code of Practice Review

Public Consultation Paper

June 2018

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Although every care has been taken to ensure accuracy in the preparation of this paper, the information has been produced as a general guidance for persons wishing to make submissions to the *Fitness Industry Code of Practice Review 2018*. The contents of the paper do not constitute legal advice or legal information and do not constitute Government policy. This paper should not be used as a substitute for a related Act or professional advice.

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Terminology used in this paper

The following is a summary of key terms used in this consultation paper.

Key Terms	***Definition***
2017 Interim Code	Fair Trading (Fitness Industry Interim Code) Regulations 2017 (WA)
2018 Interim Code	Fair Trading (Fitness Industry Interim Code) Regulations (No. 2) 2017 (WA) – in force 1 Jan 2018 to 30 Jun 2018. Fair Trading (Fitness Industry Interim Code) Regulations 2018 (WA) – in force 1 Jul 2018 to 31 Dec 2018.
ABS	Australian Bureau of Statistics
APPs	Australian Privacy Principles
ACL	Australian Consumer Law. The ACL replaced previous Commonwealth, state and territory consumer protection legislation in fair trading Acts. The provisions are contained in Part XI and Schedule 2 of the *Competition and Consumer Act 2010* (Cwlth) (formerly the *Trade Practices Act 1974* (Cwlth). Relevant provisions are mirrored in the *Australian Consumer Law* (WA) which is a schedule to the *Fair Trading Act 2010* (WA).
ACT Fitness Industry Code	Fair Trading (Fitness Industry) Code of Practice 2009 (ACT)
Consumer Protection	Department of Mines, Industry Regulation and Safety – Consumer Protection Division
Cwlth	Commonwealth
FTA	*Fair Trading Act 2010* (WA)
QLD Fitness Industry Code	Fair Trading (Code of Practice – Fitness Industry) Regulation 2003 (QLD)
SA Fitness Industry Code	Fair Trading (Health and Fitness Industry Code) Regulations 2007 (SA)
SAT	State Administrative Tribunal, Western Australia

1. Introduction

The Western Australian Department of Mines, Industry Regulation and Safety - Consumer Protection Division (Consumer Protection) is currently reviewing the need or otherwise for industry specific regulation of the fitness industry in Western Australia and is seeking feedback from fitness services providers, consumers, industry associations and other interested parties as to the effectiveness and appropriateness of the existing regulation under the Fair Trading (Fitness Industry Interim Code) Regulations (No. 2) 2017 (WA). These regulations commenced on 1 January 2018 and set out the Fitness Industry Code of Practice 2018 (2018 Interim Code) in Schedule 1.[1]

Regulation of the fitness industry in Western Australia was last comprehensively reviewed in 2010. Since then there have been significant changes to the consumer law regulatory landscape, in particular, the introduction of the Australian Consumer Law (ACL). It is therefore timely to review existing state-based regulation of the industry to ensure that it is still necessary and appropriate in the context of a rapidly changing and growing fitness industry.

Attending a gym or fitness centre is the second-most popular form of physical activity for Australians (after 'walking for exercise' which is the most popular), particularly among consumers in the 18-34 age bracket. In an industry dominated by large fitness companies, consumers wishing to join a fitness centre or gym are faced with the task of comparing differing, and at times complex, membership agreements. These agreements are often accompanied by forms authorising recurring direct debits and clauses dictating when fees will be automatically debited. Termination of membership agreements can at times be a stressful process for consumers, depending upon the structure and finer details of the termination clauses. Consumer Protection's complaints data indicates that most of the complaints about the fitness industry relate to contractual issues.

Historically, it has been recognised by the Western Australian Government, as well as a number of other Australian jurisdictions, that consumers need to be protected from the inherent inequality in bargaining power when signing up for fitness services membership agreements. Past public consultation and research into problems arising from consumer losses suffered due to misconduct in the fitness industry in the early 2000s resulted in the introduction of compulsory fitness industry codes of practice under the respective *Fair Trading Acts* in the Australian Capital Territory, Queensland, South Australia, and Western Australia. [2]

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[1] The *Fair Trading (Fitness Industry Interim Code) Regulations (No. 2) 2017* (WA) are in force 1 January 2018 to 30 June 2018. The *Fair Trading (Fitness Industry Interim Code) Regulations 2018* (WA) are in force 1 July 2018 to 31 December 2018.

[2] *Fair Trading (Fitness Industry) Code of Practice 2009* (ACT); *Fair Trading (Code of Practice – Fitness Industry) Regulation 2003* (QLD); *Fair Trading (Health and Fitness Industry Code) Regulations 2007* (SA); *Fair Trading (Fitness Industry Code of Practice) Regulations 2010* (WA). NSW also introduced the *Fitness Services (Pre-Paid Fees) Act 2000*, which was later repealed and ceased on 3 August 2015.

In the same year that the Fair Trading (Fitness Industry Code of Practice) Regulations 2010 (2010 Fitness Industry Code) was gazetted, the ACL was also introduced into all Australian jurisdictions.[3] The ACL encompasses all the provisions governing the supply of goods and services to consumers, including misleading and deceptive conduct and unconscionable conduct by suppliers, unfair contract terms in consumer contracts, and guarantees relating to the supply of goods and services to consumers. The 2010 Fitness Industry Code has since been replicated and replaced by the Fair Trading (Fitness Industry Interim Code) Regulations 2017 (2017 Interim Code), then the 2018 Interim Code.

It is acknowledged that there is currently some overlap between a number of provisions of the 2018 Interim Code and the ACL, and the 2018 Interim Code may need to be streamlined to remove such overlap. It is also necessary for Consumer Protection to consider whether aspects of the 2018 Interim Code need to be retained in order to support high levels of consumer protection and confidence in the fitness industry.

This public consultation paper invites feedback and/or suggestions from any consumer, fitness services provider, industry association, or other interested stakeholder on:

1) current and emerging issues and types of fitness services being offered in the marketplace, and whether there is a need for mandatory industry specific regulation in Western Australia; and whether it should apply to the same or new additional types of service providers and fitness activities as those regulated by the 2018 Interim Code;

2) whether you have experienced a problem as a consumer with joining a fitness centre or gym, purchasing services from a fitness instructor or personal trainer, the terms of your membership agreement, and terminating your membership agreement – and how your problems were resolved;

3) whether you have experienced a problem as a fitness services provider with transactions with consumers, terms of membership agreements, consumers terminating their membership agreements – and how your problems were resolved; and

4) whether you believe the 2018 Interim Code provides appropriate mandatory regulation of the fitness industry, or how it can be improved.

[3] For the text of the ACL as it applies in Western Australia, refer to the *Fair Trading Act 2010* (WA), section 19 and *Competition and Consumer Act 2010* (Cwlth), Schedule 2.

2. How to have your say

Making a submission

You are invited to make a submission to this public consultation paper. The consultation period will be open for eight weeks from the date of this paper's publication.[4] There is no specified format for submissions. You are welcome to:

- write an email or letter outlining your views;
- respond to questions included in this paper; or
- complete a short survey at: www.dmirs.wa.gov.au/cp-consultations

Consumer survey at: www.surveymonkey.com/r/fitnessconsumer18
Fitness industry survey at: www.surveymonkey.com/r/fitnessindustry2018

For a complete list of all the questions, please refer to the Appendix at the end of this paper.

Who are you?

When making your submission please let us know whether you are a consumer, individual or corporate fitness services provider, industry association, government entity or other organisation.

Where to send submissions

Submissions can be mailed to:

Review of WA Fitness Industry Code
Department of Mines, Industry Regulation and Safety
Industry Regulation and Consumer Protection Group
Consumer Protection Division
Locked Bag 14
Cloisters Square WA 6850

Or emailed to: consultations@dmirs.wa.gov.au
Or made online to: www.dmirs.wa.gov.au/cp-consultations

Review updates

You can keep up to date with the progress of the consultation at www.dmirs.wa.gov.au/cp-consultations.

[4] For the closing date for consultation, refer to the website: www.dmirs.wa.gov.au/cp-consultations.

How input will be used

The information gathered from this public consultation will assist in assessing the various options outlined in this paper or raised by stakeholders, and developing proposals for consideration by the Government.

Information provided may become public

After the consultation period concludes, all responses received may be made publicly available on the Department of Mines, Industry Regulation and Safety website. Please note that because your feedback forms part of a public consultation process, Consumer Protection may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this consultation paper may be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become available to the public.

3. Australian participation rates and profile of the fitness industry

According to the Australian Bureau of Statistics (ABS) in its report on the *Participation in Sport and Physical Recreation in Australia, 2013–2014, 4177.0, Commonwealth of Australia, Canberra*, an estimated 60 per cent (11.1 million people) of the Australian population aged 15 years and over participated in sport and physical recreation at least once in the 12 months preceding their interview for that Report. Out of 45 physical activities reported upon, attending a fitness centre or gym was the second-most participated activity in Australia - 17.4 per cent of the population (comprising 15.9 per cent of all males and 18.9 per cent of all females).

In 2011–12 Australians in the 18–34 age bracket had the highest level of participation in fitness/gym activities at 28.9 per cent, whereas people in the 65 and over age bracket had the lowest level of participation in fitness/gym activities at 8.6 per cent.[5]

In 2009–10 the average annual Australian household expenditure on health and fitness studio charges was $1,186.70, out of the 613,000 households which reported expenditure on this item.[6] According to the *"Suncorp Cost of Being Fit Report"* published in 2015, Australians were spending about $8.5 billion per year on gym memberships, sports equipment and "the latest fitness trends".[7]

It is estimated that in 2016–17, fitness centres and gyms in Australia generated $2.1 billion in revenue and $237 million in profit; and encompassed 3,669 businesses.[8] In that same financial year, it is estimated that 44.2 per cent of the market share of the gyms and fitness businesses was taken up by the four largest companies: Anytime Australia Pty Ltd (Anytime Fitness) (14.0 per cent), Fitness First Australia Pty Ltd (12.6 per cent), Ardent Leisure Group (Goodlife Health Clubs) (9.2 per cent), and 24/7 Brands Pty Ltd (Jetts Fitness) (8.4 per cent).[9]

Research indicates that over the past five years, there has been a rapid expansion in the fitness industry of more affordable 24-hour, 7-days-per-week fitness centres and gyms (24/7 gyms). These gyms typically offer smaller premises, low levels of staffing, no group classes, lower fees, and simpler membership agreements. Their membership agreements can include free cancellations, no minimum terms, and options to pay by direct debit. A sizeable number of consumers have been moving away from traditional full-service gyms to 24/7 gyms. Due to market forces, some traditional gyms have been required to re-think their historical approach of locking consumers into long-term, expensive contracts and offer more flexible membership agreements.[10]

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[5] ABS, *"Participation in Sport and Physical Recreation, 2011–2012, 4177.0",* Commonwealth of Australia, Canberra.

[6] ABS, *"Sports and Physical Recreation: A Statistical Overview, Australia, 2012, 4156.0",* Commonwealth of Australia, Canberra. Note: these 2009–2010 figures are the most current from the ABS concerning expenditure on health and fitness studio charges in Australia.

[7] www.suncorp.com.au/about-us/news/media/australians-spend-big-fitness.html

[8] Magner L, *"IBISWorld Industry Report R9111 Gyms and Fitness Centres in Australia"*, November 2016, p. 3.

[9] ibid.

[10] ibid., pp. 4 & 6.

Increases in consumer discretionary income and leisure time in recent years, combined with growing awareness about the health benefits of regular exercise, contribute to a general upward trend in consumer attendance at fitness centres and gyms.[11]

Peak industry association Fitness Australia, which has "over 25,000 registered personal trainers, registered fitness instructors, fitness businesses and suppliers Australia-wide", provides its members with detailed policies and guidance materials.[12] Members are encouraged to abide by Fitness Australia's *"Business Principles and Guidance for Fitness Businesses"* which contain ten guiding principles such as the need for fitness businesses to:

- deliver health and exercise services with due care and skill;
- ensure the safety of its customers;
- ensure the suitability of its advice;
- communicate with customers in a clear, fair and not misleading manner; and
- treat customers and resolve their disputes clearly and fairly.[13]

These business principles complement many of the requirements in the 2018 Interim Code and encourage sound business practices among Fitness Australia's members. They are not, however, mandatory for all fitness services suppliers in Western Australia and Fitness Australia has limited ability to impose any regulatory sanctions should a member breach these principles.[14]

[11] Magner L, *"IBISWorld Industry Report R9111 Gyms and Fitness Centres in Australia"*, November 2016, p. 8.
[12] Fitness Australia, *"About Us"*, www.fitness.org.au/articles/about-us/597/17.
[13] Fitness Australia, *"Business Principles and Guidance for Fitness Businesses"*, https://fitnessaustralia-production.s3.amazonaws.com/uploads/uploaded_file/file/12977/FAUS667-Business_Guidelines-FC-Screen.pdf.
[14] ibid. p.2.

4. Current legislative framework: Fair Trading (Fitness Industry Interim Code) Regulations (No. 2) 2017

The 2018 Interim Code is divided into five divisions:

- Division 1 – Introduction;
- Division 2 – General rules of conduct;
- Division 3 – Disclosure;
- Division 4 – Membership agreements; and
- Division 5 – Complaint handling procedures.

This public consultation paper highlights clauses in each Division about which Consumer Protection is particularly interested in receiving feedback; compares Western Australia's laws with those in other Australian jurisdictions; discusses the application of the ACL to the fitness industry; summarises Consumer Protection complaints data; and proposes specific issues for stakeholders to consider. If you believe that there are additional issues arising in the fitness industry which may, or may not, be covered by the 2018 Interim Code, please add further comments at the end of your submission detailing these issues.

4.1. Division 1 - Introduction

4.1.1. Objectives – clause 1

The 2018 Interim Code has the following three objectives:

a) to ensure appropriate standards of service are maintained in the fitness industry; and
b) to encourage and maintain consumer confidence in the fitness industry; and
c) to support and promote the fitness industry.

Additional objectives in other jurisdictions' mandatory Fitness Industry Codes include:

- to ensure ethical and professional conduct in the fitness industry;
- to encourage people in the community to participate in regular physical activities; and
- to establish rights and obligations between suppliers and consumers.[15]

Question 1:
Do you believe the objectives of the 2018 Interim Code are appropriate, or should they be changed?

Please provide details in your response.

[15] See ACT Fitness Industry Code, clause 1; QLD Fitness Industry Code, clause 2.

4.1.2. Who and what does the 2018 Interim Code apply to? – clauses 2, 3 & 4

The 2018 Interim Code applies to a "supplier", who is a "person"[16] carrying on the business of supplying "fitness services", including a fitness trainer (but not an employee). For example, a supplier may be:

- an owner of a fitness centre who receives income, other than rent, for the provision of fitness services at a fitness centre;
- a franchisee of a fitness centre;
- a person operating a business as a personal trainer or fitness trainer; or
- a person operating a business as a fitness instructor.[17]

The whole 2018 Interim Code applies to owners and franchisees of fitness centres, and parts of the Code apply to personal trainers, fitness trainers, and fitness instructors.[18] A "fitness centre" is defined as an indoor facility primarily used for providing fitness services.[19] A "fitness service" includes:

a) exercise screening; or
b) an individual exercise programme; or
c) a group exercise programme; or
d) provision of fitness equipment at a fitness centre for use by clients.[20]

As set out in clause 3(2) of the 2018 Interim Code:

"A fitness service does not include:

a) a fitness service supplied by -
  (i) a person registered under the Health Practitioner Regulation National Law (Western Australia) in the medical profession; or
  (ii) a person registered under the Health Practitioner Regulation National Law (Western Australia) in the physiotherapy profession; or
  (iii) a sporting club or organisation, for the playing of, or training for, a sport; or
  (iv) an educational institution for exclusive use by staff or students; or
  (v) a person for the performance of, or training for, martial arts, dancing or ballet; or
b) where no other fitness service is supplied - the use of a spa bath, sauna bath, swimming pool or similar facility; or
c) a fitness service at a fitness centre provided for the sole purpose of medical rehabilitation; or
d) the hire of a court or other facility for the playing of sport".

[16] A "person" means a natural person, public body, company, an association or body of persons whether corporate or unincorporated, 2018 Interim Code, clause 2.
[17] Department of Commerce, Government of Western Australia, *"Fitness Industry Guide to the Code of Practice – An Overview for the Fitness Industry"*, p. 3.
[18] ibid.
[19] 2018 Interim Code, clause 2.
[20] 2018 Interim Code, clause 3.

Fitness industry codes in the Australian Capital Territory, Queensland and South Australia also contain similar definitions of “supplier”, “fitness centre”, and “fitness services”.

Suppliers of fitness services within the fitness industry must comply with the provisions of the 2018 Interim Code, even if a client asks a supplier to do something contrary to the Code.[21]

Under the *Fair Trading Act 2010* (WA) (FTA), a contravention of the 2018 Interim Code is a ground for the Commissioner for Consumer Protection to apply to the State Administrative Tribunal (SAT) for various orders.[22] The Commissioner may:

- seek an order that a person cease contravening the Code (section 47 FTA);
- seek an order that a person rectify the consequence of a contravention of the Code (section 47 FTA); or
- take or defend, or assume the conduct or defence of, proceedings relating to a contravention of the 2018 Interim Code on behalf of a complainant (section 48 FTA).

In addition, the Commissioner may apply to the Supreme Court or District Court for:

- an injunction (section 100 FTA); or
- an order for compensation or another remedial order (section 105 FTA).

Question 2:
Do you believe the 2018 Interim Code applies to an appropriate group of persons, businesses, and fitness services in the fitness industry in Western Australia?

Question 3:
Should the scope of the Code be narrowed to apply to fewer people/businesses, or expanded to apply to more people/businesses?

Please provide details in your response.

4.2. Division 2 – General Rules of Conduct

4.2.1. Misleading and deceptive conduct – clauses 5, 6 & 8

Division 2 of the 2018 Interim Code contains a number of core requirements to be adhered to by fitness services suppliers, namely truthfulness, ethical conduct, and respect for client confidentiality. These were a necessary part of the first, original Fitness Industry Code which commenced operation in January 2005. With the commencement of the ACL in January 2011, Consumer Protection believes that a number of the ‘General Rules of Conduct’, which duplicate areas covered by the ACL, could be removed. Consumers and industry could still rely upon the generic

[21] Clause 4(2).
[22] Section 42(2).

provisions in the ACL regarding appropriate conduct by traders, which encompass and prohibit a much broader range of misleading and deceptive practices.

In addition, the ACL applies to all transactions between fitness services suppliers and customers, where such transactions are conducted “in trade or commerce”, and the customer meets the definition of “consumer” in the ACL.[23] Fitness services suppliers in breach of the consumer guarantees under the ACL may be liable for replacement of services, refunds, cancellation of contracts, and in some cases, compensation to the consumer for loss or damage.

Under the 2018 Interim Code, fitness services suppliers must not falsely:

1) claim that they, or their employees, have any particular qualifications, or membership or endorsement of an organisation or association;[24] or
2) advertise or make representations in order to solicit clients, when they know such statements are false.[25]

Fitness services suppliers must also take all reasonable steps to prevent their employees from making any such false representations.[26]

It is notable that clause 8 of the 2018 Interim Code covers situations where a supplier actually “knows” that their statements are false. This is narrower in scope than the nearest equivalent provisions in the ACL regarding misleading and deceptive conduct, namely sections 18, 29 and 34. For example, section 18 of the ACL states:

> *“(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”.*

In contrast to the 2018 Interim Code, section 18 of the ACL does not require actual knowledge by the supplier of the false nature of a statement. Conduct is in breach of the ACL if it is simply “likely to mislead or deceive”.

Section 29 of the ACL provides that:

> *“(1) 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: …*
>
> > *(b) make a false or misleading representation that services are of a particular standard, quality, value or grade, composition, style or model or have had a particular history or particular previous use; or …*
> > *(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or*
> > *(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation …” .*

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[23] See section 3(3): where subject to certain exceptions, a “*consumer*” is someone who pays less than $40,000 for the services; or the services are of the kind ordinarily acquired for personal, domestic or household use or consumption.
[24] Clauses 5 & 6.
[25] Clause 8.
[26] Clauses 5(2), 6(2) & 8(2).

In addition, section 34 of the ACL provides that:

> *"A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services".*

Pecuniary penalties can be imposed for contravention of these sections.

In effect, the provisions in the ACL prohibit all forms of misleading and deceptive conduct in relation to every aspect of the supply of a fitness service, not just those relating to qualifications, memberships and endorsements.

In the situation where a fitness services supplier is a:

- corporation within the meaning of the *Corporations Act 2001* (Cwlth); or
- any other body of persons, whether corporate or unincorporate,

and the supplier is convicted of an offence against the FTA, the FTA also creates vicarious liability on the part of its directors, employers, managers, secretaries and other people in similar positions.[27]

Employers and key personnel involved in managing and operating a fitness service supplier are therefore required to comply with all the consumer protection laws in Western Australia, otherwise they run the risk of prosecution and substantial penalties for breaching those laws.

Question 4:
In your experience, is specific industry regulation required to regulate fitness services suppliers' representations about:
- claims of membership or endorsement of organisations/associations;
- qualifications of staff; and
- general advertising?

Question 5:
Should clause 8 of the 2018 Interim Code be expanded to prohibit fitness services suppliers from making advertisements, representations or statements that are false or misleading, or likely to mislead?

Question 6:
For the purposes of streamlining the 2018 Interim Code, should clauses 5, 6 and 8 be deleted, and reliance placed solely upon the equivalent provisions in the ACL?

Please provide details in your response.

[27] FTA, section 95.

4.2.2. High pressure selling techniques, harassment or unconscionable conduct – clause 7

The use of high pressure selling techniques, harassment or unconscionable conduct for the purpose of entering in a membership agreement with a client is prohibited by clause 7 in the 2018 Interim Code. Suppliers at fitness centres must also take reasonable steps to ensure that their employees do not engage in such conduct. Similar clauses can be found in the ACT and QLD Fitness Industry Codes.[28]

The ACL contains detailed provisions in Part 2-2 prohibiting the use of unconscionable conduct by a person in the course of trade or commerce.[29] The general concept of unconscionable conduct is behaviour which is harsh and oppressive, and goes against good conscience. Section 20 of the ACL prohibits the use of "unconscionable conduct within the meaning of the unwritten law", that is, within the meaning of the common law. Sections 21 and 22 set out the prohibition against, and criteria for establishing, statutory unconscionable conduct. Under section 22 the matters to which a court may have regard to in determining such conduct include:

> *"(a) the relative strengths of the bargaining positions of the supplier and the customer; and*
> *(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and*
> *(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and*
> *(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and*
> *(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and*
> *(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and*
> *(g) the requirements of any applicable industry code; and*
> *(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and*
> *(i) the extent to which the supplier unreasonably failed to disclose to the customer:*
>
> > *(i) any intended conduct of the supplier that might affect the interests of the customer; and*
> > *(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and*
>
> *(j) if there is a contract between the supplier and the customer for the supply of the goods or services:*

[28] ACT Fitness Industry Code, clause 8; QLD Fitness Industry Code, clause 7.
[29] Part 2.2 – Unconscionable conduct.

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
(ii) the terms and conditions of the contract; and
(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
(l) the extent to which the supplier and the customer acted in good faith".

One option is to consider deleting clause 7 in the 2018 Interim Code, and relying solely upon Part 2-2 of the ACL to govern unconscionable conduct. Recent public consultation for the national review of the ACL indicates, however, that stakeholders have found proving unconscionable conduct to be problematic. Stakeholder feedback showed that the application of the unconscionable conduct provisions has been inconsistent among different courts, leading to a general reluctance to rely upon these provisions.[30] It is arguable that high pressure selling techniques and harassment are possibly simpler and more straightforward concepts for complainants to prove than unconscionable conduct. There may also be some merit in retaining clause 7 of the 2018 Interim Code to highlight to suppliers the need to act reasonably at all times when negotiating membership agreements.

If it is decided that clause 7 should be retained, it may be useful for the Fitness Industry Code to further define the meaning of "high pressure selling techniques" to provide clear guidance to suppliers and regulators. Alternatively, rather than defining this concept in the Fitness Industry Code, Consumer Protection may publish guidelines detailing examples of high pressure selling techniques which are to be avoided.

Question 7:
In your experience, is the fitness industry generally reasonable in its sales techniques when approaching prospective clients, and negotiating or signing up clients to membership agreements?

Question 8:
Have you ever experienced high pressure selling techniques, harassment or unconscionable conduct in the fitness industry?

Question 9:
Should clause 7 in the 2018 Interim Code be deleted, and reliance placed solely upon the unconscionable conduct provisions in the ACL?

[30] Consumer Affairs Australia and New Zealand, Commonwealth of Australia, 2017, *"Australian Consumer Law Review Final Report"*, p. 49.

Question 10:
Alternatively, should clause 7 be retained in order to retain a broader prohibition against unreasonable tactics when entering into membership agreements? Should the meaning of "high pressure selling techniques" be further defined in the Fitness Industry Code, or detailed in published guidelines?

Please provide details in your response.

4.2.3. Confidentiality – clause 9

Under clause 9 of the 2018 Interim Code, a supplier must not use, or disclose to another person, confidential information about a client obtained under the client's membership agreement. This requirement does not apply to information used or disclosed for a purpose authorised in writing by the client or that must be lawfully used or disclosed. Similar clauses appear in the ACT and QLD Fitness Industry Codes.[31]

Confidentiality is also governed in the fitness industry by the Commonwealth *Privacy Act 1988*. The Privacy Act applies to all private sector and not-for-profit organisations which handle 'sensitive information', of which health is one such type of information. Organisations providing 'health services' are those which engage in activities:

- assessing, maintaining or improving a person's physical health; and
- recording a person's physical health for the purposes of assessing, maintaining, improving or managing the person's health.[32]

As the majority of fitness services suppliers would fall within the Privacy Act's definition of health service providers, these suppliers must comply with all the Australian Privacy Principles (APPs). The APPs cover a wide range of topics including: open and transparent management of personal information; collection of, and notification of collection of, solicited personal information; dealing with unsolicited personal information; direct marketing; and quality, security, access and correction of personal information.[33]

As the Privacy Act comprehensively covers all health service providers' obligations in relation to client confidentiality, one option to consider is deleting clause 9 of the 2018 Interim Code.

Question 11:
In your experience, does the fitness industry generally maintain client confidentiality of all information gathered from membership agreements (e.g. bank account details, contact details) and health assessments?

[31] ACT Fitness Industry Code, clause 6(12); QLD Fitness Industry Code, clause 13.
[32] Office of the Australian Information Commissioner, *"Health Information and Medical Research"*, www.oaic.gov.au/privacy-law/privacy-act/health-and-medical-research.
[33] Office of the Australian Information Commissioner, *"Australian Privacy Principles – a Summary for APP Entities"*, March 2014, www.oaic.gov.au/resources/agencies-and-organisations/guides/app-quick-reference-tool.pdf.

Question 12:
Should clause 9 in the 2018 Interim Code be deleted, and reliance placed solely upon the Privacy Act 1988 (Cwlth) to govern client confidentiality?

Please provide details in your response.

4.2.4. Free or discounted services – clause 10

Clause 10 of the 2018 Interim Code provides that a supplier must not describe part of a membership as free or discounted if any programme offered in relation to the membership is increased in price, decreased in quality or is restricted in any manner as a result of the discounted price. This clause effectively prohibits specific types of misleading and deceptive conduct. A similar requirement exists in the ACT Fitness Industry Code.[34]

As discussed above, the ACL already contains a comprehensive, detailed set of provisions covering many different forms of misleading and deceptive practices by traders (see *"Part 2-1 – Misleading or deceptive conduct"* and *"Part 3-1 Unfair Practices, Division 1 False or misleading representations etc"*).

Feedback is sought on clause 10 and whether it should be retained or removed and reliance placed solely upon the misleading and deceptive conduct provisions in the ACL.

Question 13:
In your experience, is the fitness industry generally honest about the services and programmes offered with membership agreements, when a portion of the fees are free or discounted?

Question 14:
Should clause 10 of the 2018 Interim Code be deleted, and reliance placed solely upon the misleading and deceptive conduct provisions in the ACL?

Please provide details in your response.

[34] Clause 7(2).

4.3. Division 3 – Disclosure

4.3.1. Disclosure of information – clauses 11 & 12

Clauses 11 and 12 of the 2018 Interim Code provide more detailed requirements about specific items of information which must be provided to all clients. Clause 11 states:

> *"A supplier must —*
> *(a) ensure sufficient information is made available to a client about a fitness service to enable the client to make an informed decision about using the fitness service; and*
> *(b) ensure promotional material about a fitness service —*
> *(i) is truthful, accurate and unambiguous; and*
> *(ii) does not encourage unrealistic expectations of outcomes attainable from the fitness service; and*
> *(c) not knowingly make false or misleading comparisons with a fitness service supplied by another supplier; and*
> *(d) not make any false or misleading statements or representations relating to the cost of a fitness service; and*
> *(e) have available a copy of this Code for perusal by any client or potential client".*

Clause 12 states:

> *"Before a supplier enters into a membership agreement with a client, the supplier must —*
> *(a) give the client the opportunity to peruse a copy of the membership agreement and the rules (if any) of the fitness centre; and*
> *(b) in the case of a fitness centre that has commenced operating, allow the client the opportunity to inspect the fitness centre".*

Similar disclosure requirements can be found in the ACT and QLD Fitness Industry Codes.[35] In addition, they require copies of existing and new, amended rules to be displayed prominently for clients.[36]

For the most part, clauses 11 and 12 of the 2018 Interim Code appear sensible and necessary in order to ensure full disclosure of all aspects of membership agreements, rules, costs, facilities, and the 2018 Interim Code to prospective clients, before entering into membership agreements. One option to simplify the disclosure requirements, however, is to remove those sub-clauses prohibiting misleading and deceptive conduct and relying upon the equivalent provisions in the ACL.

[35] ACT Fitness Industry Code, clause 6; QLD Fitness Industry Code, clauses 10, 11 & 12.
[36] ACT Fitness Industry Code, clause 6; QLD Fitness Industry Code, clause 12.

Question 15:
In your experience, does the fitness industry generally disclose details of membership agreements, rules, facilities offered, the existence of the Western Australian Fitness Industry Code, and any other relevant information to help prospective clients decide to enter into membership agreements?

Question 16:
In your experience, is the fitness industry generally honest about fees and costs involved, realistic outcomes which can be achieved by fitness services, and comparisons with other fitness services suppliers?

Question 17:
Should the disclosure provisions of the 2018 Interim Code be amended to remove references to misleading and deceptive conduct, and reliance placed solely upon the misleading and deceptive conduct provisions in the ACL?

Please provide details in your response.

4.4. Division 4 – Membership agreements

The term "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"*.[37] It follows that all the provisions in Division 4 of the 2018 Interim Code apply only to fitness centre agreements.

Since the commencement of the first Western Australian Fitness Industry Code in January 2005, the nature and variety of fitness services offered in the fitness industry in Australia has evolved considerably. For example, peak industry body Fitness Australia observes that a reasonable number of consumers are *"committed long-term users"* of personal training services.[38] In addition, consumers are increasingly accessing fitness services which do not take place in a traditional gym. For example, consumers may choose to join online training programmes or outdoor 'boot-camp' group exercise classes which may require ongoing regular payment or substantial prepayment of membership fees. It is perhaps necessary to consider whether consumer protections contained in Division 4 be extended to membership agreements not relating to fitness centres.

Question 18:
In your experience, are there membership agreements being offered in relation to fitness services taking place online, outdoors or outside of fitness centres and gyms?

[37] Clause 2.
[38] Fitness Australia, *"Profile of the Fitness Industry in Australia – Fitness Industry Consumers"*, p. 15, https://fitnessaustralia-production.s3.amazonaws.com/uploads/uploaded_file/file/173496/FAUS843-Industry-Report-2016-Section-3-Digital.pdf.

Question 19:
Are these membership agreements fair, reasonable, and transparent in the fees payable and terms and conditions applicable?

Please provide details in your response.

4.4.1. Cooling off period and termination of agreements during cooling off period – clauses 13 & 19

Clause 13 of the 2018 Interim Code provides a cooling off period of 48 hours to clients in relation to membership agreements. The start date of the cooling off period varies according to the circumstances in which an agreement is formed. If a fitness centre has already opened, the cooling off period starts on the day of a client signing the membership agreement.[39] If a fitness centre has not yet opened, there are three scenarios with different start dates for the cooling off period:

1) if the fitness centre opens on the proposed opening day – the start date is the opening day;
2) if the fitness centre opens on a new opening day, and the fitness centre has not opened at the time the supplier notifies the client of the new opening day – the start date is the new opening day;
3) if the fitness centre opens on a new opening day and the fitness centre has already opened at the time the supplier notifies the client of the new opening day – the start date is the day the client receives notice that the fitness centre has opened.[40]

In effect, this clause ensures that all prospective clients receive the opportunity to physically inspect a fitness centre's premises and facilities, before making a decision about proceeding with a membership agreement, or otherwise.

It is to be noted that in each scenario above, the cooling off period commences at the beginning of the start date due to the provisions of the *Interpretation Act 1984* (WA). For example, if at 4pm on a Monday a client signed a membership agreement with a fitness centre which was already opened, the cooling off period would have commenced at the start of Monday. The cooling off period would then expire at the start of Wednesday. In effect, the client would have less than 48 hours to reconsider the membership agreement.

Under clause 19, clients may terminate a membership agreement without cause or reason, by giving the supplier written notice of termination, during the cooling off period. After receiving written termination, a supplier must refund to the client any fees paid, minus any reasonable administration charges and cost of fitness services already provided to the client. The supplier must pay the refund to the client within 14 days of the client terminating the agreement.

[39] Clause 13(1)(b).
[40] Clause 13(1)(a).

The QLD Fitness Industry Code confers a similar cooling off provision.[41] In contrast, the ACT Fitness Industry Code creates a longer cooling off period of 7 days for agreements of 3 months or more, and requires refund of fees within 7 days of notice of termination.[42]

Historically, the creation of a cooling off period in the Western Australian Fitness Industry Code has been one of the cornerstone protections of the Code. Perhaps due to the existence of clear-cut procedures relating to cancellation of contracts during a cooling off period, Consumer Protection received only seven consumer complaints (out of a total of 466 total consumer complaints about the fitness industry) in the five financial years between 2012-13 and 2016-17 relating to issues surrounding the cooling off period clauses. The majority of these complaints concerned consumers being charged fees despite cancelling their agreements during the cooling off period.

If it is determined that a cooling off period be retained in the Fitness Industry Code, it may be necessary to consider redrafting the cooling off period to ensure that clients receive at the very least the full 48 hours; or even extending the cooling off period if appropriate.

Question 20:
In your experience, does the Western Australian fitness industry generally comply with the cooling off provisions in the 2018 Interim Code? Are the cooling off provisions working well for consumers in allowing written termination within 48 hours?

Question 21:
Should the cooling off provisions be redrafted to ensure a full 48 hours is allowed or extended to a longer time period? What time period do you believe the cooling off period should be?

Please provide details in your response.

4.4.2. Form and content of membership agreements – clauses 14, 15, 16, 17, 18, 20

Suppliers of fitness services must ensure:

1) all membership agreements are in writing, and signed and dated by the client; and
2) all clients receive a true copy of their membership agreement immediately after they sign it.[43]

Almost identical requirements exist in the ACT, QLD and SA Fitness Industry Codes.[44]

[41] Clause 14.
[42] Clause 11.
[43] 2018 Interim Code, clauses 14 & 16.
[44] ACT Fitness Industry Code, clause 8(3), QLD Fitness Industry Code, clause 16; SA Fitness Industry Code, clause 7.

Suppliers must also abide by the requirements in clause 15 of the 2018 Interim Code which sets out what all membership agreements must state. This includes the following details:

> *"(a) the supplier's name and address;*
> *(b) in the case of a supplier that is a company, the supplier's Australian Company Number (ACN);*
> *(c) the supplier's and client's rights and obligations under the agreement;*
> *(d) the fitness service(s) to be provided under the agreement;*
> *(e) a statement in bold 14 point type that the agreement is subject to a 48 hour cooling off period;*
> *(f) the procedure set out in clause 19 for terminating the agreement during the cooling off period;*
> *(g) the date and time at which the cooling off period starts and ends;*
> *(h) the circumstances (other than under clause 19) under which the client or supplier may terminate the agreement and the procedure for terminating the agreement;*
> *(i) the administrative charge (if any) the client must pay to the supplier if the client terminates the agreement —*
>> *(i) during the cooling off period; or*
>> *(ii) for any other reason allowed by the agreement;*
>
> *(j) all fees and charges payable under the agreement and, where separate fees are payable for a particular service, the amount of the fee or charge and the service to which the fee or charge relates;*
> *(k) the method of payment;*
> *(l) where the agreement is entered into before the supplier's fitness centre opens — the proposed opening day;*
> *(m) in the case of an ongoing agreement, the following statement in bold point type located in a box within the agreement —*
>
> ***This is an ongoing membership agreement. The agreement will continue until it is terminated by either you or the supplier in the way described in the agreement.***
>
> ***If an automatic debit arrangement is in place, membership fees will continue to be debited from your credit card or account until the arrangement is cancelled by you or your fitness centre notifying your bank or credit provider. If you terminate the agreement or stop the automatic debit arrangement in a manner not described in the agreement, then you may be liable to the fitness centre for damages for breach of contract".***

"Ongoing agreements" in clause 15 are defined as membership agreements that do not end unless the client or the supplier terminates them.[45] Other Australian Fitness Industry Codes contain similar requirements for membership agreements, with some additional items, including:

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[45] Subclause 15(2).

- “periodic billing agreements” (i.e. ongoing agreements) to be structured by a supplier to have a reasonable proportional relationship to any term or annual membership rate offered, and to not be structured so as to discourage consumers from selecting this membership option;[46]
- compulsory banking of pre-paid membership fees into a solicitor’s trust account, where fitness services have not yet been provided by a supplier;[47]
- compulsory disclosure in writing by a client about any belief that there may be a risk to the client’s health when using the fitness services at a fitness centre;[48] and
- a right for a client to terminate a membership agreement due to the client’s permanent sickness or physical incapacity.[49]

Under clause 17 of the 2018 Interim Code, a supplier who enters into a membership agreement with a client:

- for a term or more than 12 months; or
- on an ongoing basis

must not accept more than 12 months’ payment in advance. Similar limitations can be found in the three other Australian Fitness Industry Codes.[50]

In circumstances where a lease on a fitness premises has less than 12 months before it is due to expire without an option to renew the lease for a further period, a supplier in Western Australia must not sell or renew a membership agreement for a period that exceeds the unexpired period of the lease.[51] This provision is designed to protect consumers from suppliers selling services, located at a particular place, which they cannot guarantee to deliver. Suppliers in the ACT are also subject to a similar provision.[52]

When a client in Western Australia wishes to terminate their membership agreement (in a situation other than during a cooling off period), they must put a request to the supplier. The supplier is then obliged to respond to the client’s request within 7 days, as well as make a record of the client’s request.[53] Suppliers in QLD are subject to a similar provision.[54]

Effectively, the clauses in Division 4 of the 2018 Interim Code encompass fundamental consumer protections concerning the offering, negotiating, signing, maintaining, and termination of membership agreements. They ensure that all membership agreements in relation to fitness centres in Western Australia contain a minimum amount of information for prospective consumers, as well as provide contractual guidance to fitness services suppliers. They allow consumers 48 hours[55]

[46] ACT Fitness Industry Code, clause 8(7).
[47] ACT Fitness Industry Code, clause 8(8).
[48] QLD Fitness Industry Code, clause 17(b).
[49] QLD Fitness Industry Code, clause 17(k).
[50] ACT Fitness Industry Code, clause 8, QLD Fitness Industry Code, clause 19, SA Fitness Industry Code, clause 4.
[51] 2018 Interim Code, clause 18.
[52] ACT Fitness Industry Code, clause 8(9)(b).
[53] 2018 Interim Code, clause 20.
[54] QLD Fitness Industry Code, clause 26.
[55] Although due to the application of the *Interpretation Act 1984* (WA), a consumer may in practice have less than 48 hours to consider their membership agreement. See discussion relating to “clause 13 – Cooling off period” above.

after signing a membership agreement to carefully reconsider their decision, ideally in the absence of any perceived 'pressure' from the supplier. Importantly, they limit the ability of suppliers to accept more than 12 months of fees upfront from consumers, thereby limiting the potential amount of loss to be suffered by consumers in the event of a supplier closing down. Consumers are also alerted to the need to terminate any direct debit arrangements, in the event of a termination of membership agreement.

Question 22:
In your experience, does the Western Australian fitness industry generally comply with the provisions in Division 4 of the 2018 Interim Code regarding membership agreements?

Question 23:
Are the provisions restricting prepayment of membership fees to no more than 12 months in advance working well for consumers and the fitness industry?

Question 24:
How are fitness membership payment plans currently structured and how common are 12-month fitness membership agreements?

Question 25:
Are the provisions preventing a fitness centre from selling a membership agreement which extends beyond the expiry of its lease working well for consumers?

Please provide details in your response.

Unfair contract terms

In addition to the 2018 Interim Code, contractual terms in standard membership agreements are regulated by the 'unfair contract terms' provisions in Part 2-3 of the ACL.[56] These provisions allow a term in a standard form contract to be deemed void, if it is unfair. Either an individual, or an ACL regulator (e.g. Consumer Protection in Western Australia), can apply to a court to have a contractual term declared unfair and void. If a court makes such a declaration, then that contractual term will be void in that particular contract as well as all the standard form contracts entered into by the business in question.[57] According to section 24 of the ACL,

> *"[a] term of a consumer contract is unfair if:*
> *(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
> *(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*
> *(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on".*

[56] Sections 23 to 28.
[57] Australian Competition and Consumer Commission, 22 April 2016, *A Guide to the Unfair Contract Terms Law*, p. 7.

An example of an unfair contract term in a fitness centre membership agreement would be a unilateral variation clause, such as one allowing a fitness centre operator to unilaterally change the location of the centre to a new one far from its original location. Such a term can be found to be unfair because *"it is a term to which the consumers' attention is not specifically drawn, and which may operate in a way which the consumer may not expect and to his or her disadvantage"*: *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims) [2008] VCAT 2092*.[58]

If the provisions in the 2018 Interim Code in relation to membership agreements were to be removed, and reliance placed wholly on the unfair contract terms provisions in the ACL, complainants could be left with the more expensive and time-consuming option of seeking unfair contract terms to be declared void by the courts. By contrast, retaining provisions in the 2018 Interim Code concerning membership agreements allows the Commissioner for Consumer Protection to seek remedies for breaches before the SAT, including seeking redress on behalf of a consumer.[59]

Consumer complaints about cancellation of membership agreements

Over the last five financial years between 2012–13 and 2016–17, Consumer Protection received 466 complaints about the fitness industry. Issues surrounding cancellation of existing membership agreements formed the highest percentage of overall consumer complaints. More specifically, 183 out of 466 consumer complaints about the fitness industry (i.e. 39 per cent) concerned membership cancellation issues. These included:

- 54 complaints involving consumers being dissatisfied with the conditions of cancellation;
- 51 complaints involving consumers being charged fees, despite cancelling their membership;
- 50 complaints where the supplier failed to act upon the consumer's request for cancellation;
- 19 complaints where a fixed-term contract was rolled over into an ongoing agreement without a consumer's knowledge or consent; and
- 9 other cancellation complaints.

The majority of complaints concerned ongoing agreements.

The 54 consumers who were dissatisfied with the conditions of cancellation typically referred to excessive exit fees, or an overly long notice period (in some cases, as long as 3 months) required by the supplier before membership fees would cease to be charged. Consumers often considered such conditions to constitute unfair contract terms, of which they were not made aware upon commencement of the membership contract.

[58] Australian Competition and Consumer Commission, March 2016, *"Unfair Contract Terms: A Guide for Businesses and Legal Practitioners"*, Canberra, p. 15.
[59] For a summary of the remedies, refer to part 4.1.2 in this Public Consultation Paper.

51 complaints concerned suppliers continuing to periodically charge membership fees (typically direct debits or credit card charges) despite the consumer having cancelled their membership. Consumers in this category typically lodged their complaint with Consumer Protection following unsuccessful attempts to have the supplier refund incorrectly charged fees and cease further payments.

Of considerable concern is the existence of 50 complaints reporting the supplier's failure to cancel a membership contract, and consumer allegations of the supplier's deliberate unwillingness or neglect to implement a clear request from the consumer to cancel a membership agreement. As a consequence, many consumers reported they continued to be charged fees by the supplier, as they were still considered to have membership status.

While most consumer complaints were made concerning ongoing agreements, several complaints presented issues unique to fixed-term membership agreements. There were 19 complaints citing the supplier's prolongation of fixed-term membership without the consumer's knowledge or consent. Typically, consumers expected to be relinquished from the terms of fixed-term contract and further payments when the contract lapsed rather than to take active steps to cancel the contract.

The large number of consumer complaints surrounding the termination of membership agreements, and the considerable financial detriment to consumers in the form of wrongful or unauthorised continuing deduction of membership fees suggests that there is a continuing need for government oversight of the fitness industry.

Question 26:
In your experience, does the Western Australian fitness industry generally provide reasonable termination clauses in its membership agreements; act upon termination requests in a timely and effective manner; and comply with requirements for termination?

Please provide details in your response.

Consumer complaints about general membership agreement issues

Over the last five financial years between 2012–13 and 2016–17, consumer complaints about membership fees and general contractual issues comprised the second highest category of overall consumer complaints about the fitness industry to Consumer Protection. This category of 175 out of 466 fitness industry-related complaints included:

- 101 complaints where a fitness centre suddenly closed without notice;
- 30 complaints where the fitness services supplier incorrectly charged members;
- 19 complaints where consumers were dissatisfied with changes to the terms and inclusions in a membership agreement;
- 5 complaints where consumers were dissatisfied with changes to the terms and inclusions in a membership agreement due to a change in ownership of the fitness service supplier; and

- 20 complaints about other fee-related and membership issues.

The majority of the 101 complaints about the sudden closure of a fitness centre arose out of two closures – one in February 2017 and one in January 2014. Many consumers lodged complaints seeking compensation for the loss of prepaid membership fees.

The 30 complaints prompted by suppliers overcharging members were attributed to a diverse range of circumstances. These included: consumers being charged fees higher than those agreed to; and being charged fees for periods of time when consumers had requested a temporary membership pause. These complainants typically sought to have these fees refunded to them.

A total of 24 complaints were prompted by consumers' dissatisfaction with changes to the inclusions of membership agreements. These included changes to opening hours, group exercise classes and crèche facilities. Consumers typically sought refunds for fees or to be released from their contracts without cost, claiming that the decision to enter membership agreement with a certain fitness supplier was conditional upon the provision of certain services.

Consumer complaints about facilities and standards of service

Out of the previous five financial years' total (between 2012–13 to 2016–17) of 466 consumer complaints about the fitness industry, 74 specifically concerned issues related to the facilities and standard of services provided. These included:

- 51 complaints that fitness services were not as described;
- 16 complaints that the conditions of the facility were not satisfactory;
- 4 complaints that the change in fitness centre location was not satisfactory; and
- 3 complaints about other facilities and standards of services issues.

The first group of 51 complaints typically concerned consumers who were dissatisfied with fitness centre services such as internally provided personal trainers and group exercise classes. At times, certain fitness services were not provided, and there was inadequate explanation for the lack of provision.

Fitness services providers which were not gyms (e.g. individual personal trainers) were also the subject of many of the 51 complaints.

The second category of 16 complaints concerned consumers who were dissatisfied with the physical aspects of the environment in which the supplier provided fitness services. Aspects of fitness centres that consumers complained about included: safety standards, cleanliness and temperature. These consumers usually sought the refund of fees, or to be relinquished from their membership agreements without cost.

Consumer complaints about commencing membership agreements and cooling off issues

Over the past five financial years between 2012–13 and 2016–17 Consumer Protection received 34 consumer complaints about issues arising when entering into membership agreements. These included:

- 12 complaints that a free “trial” membership agreement rolled over into a full membership agreement without the consumer’s knowledge or consent;
- 9 complaints where the fitness services supplier used excessive pressure or unreasonable sales practices to coerce the consumer to enter into a membership agreement;
- 6 complaints where a consumer was charged fees, despite cancelling their membership agreement during the cooling off period; and
- 7 complaints about other pre-membership issues.

Departmental complaints following Consumer Protection’s pro-active inspections

In addition to receiving consumer complaints about the fitness industry, Consumer Protection conducted pro-active inspections and audits of fitness services suppliers’ operations.

Over the last five financial years between 2012–13 and 2016–17, Consumer Protection initiated 66 departmental complaints as follows:

- 61 complaints where membership agreements breached clauses in the Western Australian Fitness Industry Code;
- 3 complaints where the fitness services supplier used unreasonable tactics to procure a membership agreement;
- 1 complaint concerning unfair contract terms; and
- 1 complaint concerning other issues.

Many membership agreements were found to have breached the requirements of Division 4 of the Western Australian Fitness Industry Code, such as mandatory terms, type-face and formatting.

Policy discussion

The diversity of complaints highlights the prevalence and types of issues faced by consumers when dealing with fitness services suppliers and membership agreements. They show that consumers can suffer significant loss and detriment when fitness services suppliers fail to follow the terms of membership agreements, fail to provide satisfactory standards of fitness services and facilities, change characteristics of the fitness services and facilities provided part-way through a period of membership, experience a change in ownership, or suddenly close down.

To some extent, the ACL provides avenues for redress for consumers in the form of consumer guarantees applying to services. Part 3-2 of the ACL sets out three main consumer guarantees, that a supplier must provide services:

- with due care and skill;
- which are fit for a particular purpose; and
- which are provided within a reasonable time for supply.[60]

In the context of the fitness industry, fitness services suppliers must therefore ensure:

- their staff are appropriately trained and qualified, and possess the requisite knowledge to provide health assessments, group classes, and personal training instruction;
- facilities and equipment are of a sufficiently high standard and in good working order, in order to allow consumers to exercise safely and competently; and
- facilities are open, equipment is available, and classes/instructions are provided to consumers as promised.

In addition, there is a general prohibition in section 34 of the ACL against misleading conduct as to the nature of services being provided. This section states: *"[a] person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of services"*. Section 36 of the ACL also prohibits persons from accepting payment for goods or services if, at the time of the acceptance:

- the person intends not to supply the goods or services;
- the person intends to supply goods or services materially different from the goods and services promised to the consumer; or
- the person knew, or ought to reasonably have known, that they could not supply the goods or services within a reasonable time.

Pecuniary penalties may be imposed on persons who contravene these sections of the ACL.

Consumers have the option of using these provisions of the ACL when complaining about fitness services and facilities being unsatisfactory compared to what was described, decreasing in quality, delayed in delivery, no longer available, or offered in a substantially different location.

The ACL does not, however, provide the level of detail and tailoring to specific issues in the fitness industry and membership agreements that an industry-specific code can provide. Consumer Protection is interested in feedback from stakeholders as to whether there is a continuing need for the Western Australian Fitness Industry Code to regulate membership agreements and the relationship between fitness services suppliers and consumers.

[60] Sections 60-62.

Question 27:
In your experience, does the Western Australian fitness industry offer reasonably worded membership agreements, charge all fees correctly, and provide all the services and facilities agreed upon?

Question 28:
What avenues are currently available to, or should be made available to, consumers who suffer financial loses when fitness centres close down?

Please provide details in your response.

Other potential areas for regulation

Research into fitness industry regulation across Australia indicates that additional clauses could be incorporated into a future Western Australian Fitness Industry Code, if considered necessary and appropriate. These include:

- compulsory disclosure by fitness service providers of the existence and availability of the Western Australian Fitness Industry Code to consumers;
- an undertaking by fitness services providers to take all reasonable steps to ensure services offered under membership agreements are ordinarily available to consumers;
- a requirement that suppliers ensure their employees are appropriately qualified, or supervised by an appropriately qualified person; and that all employees are aware of and understand the Western Australian Fitness Industry Code;[61]
- requirements about safety and standards of fitness centre premises and fitness equipment provided;[62]
- compulsory disclosure by fitness services providers of impending substantial changes to fitness services, fitness centre rules, facilities and ownership structures (and ability for consumers to renegotiate/terminate their membership agreements in the event of fundamental changes);
- strengthening requirements for ongoing agreements (e.g. termination procedures which do not impose a financial penalty on consumers, and restricting the maximum notice period for termination);[63]
- provision for membership deferment or refund of fees due to sickness or physical incapacity of a consumer;[64] and
- prohibiting fitness services suppliers from failing to action legitimate client requests for lawful termination of membership agreements, and prohibiting wrongful and unauthorised debiting of membership fees.

You are invited to comment on the benefits to consumers, effect on business, and practical aspects of complying with any or all of these clauses. Ideas and suggestions for any additional areas of, or reduction in, regulation of the fitness industry are sought.

[61] See ACT Fitness Industry Code, clause 6 as an example.
[62] See ACT Fitness Industry Code, clause 13 as an example.
[63] See SA Fitness Industry Code, clause 4 as an example.
[64] See ACT Fitness Industry code, clause 12; and QLD Fitness Industry Code, clause 25.

Question 29:
Do you believe the 2018 Interim Code should be amended to include new clauses in relation to compulsory disclosure, competency of staff, safety standards, termination procedures, membership deferment, prohibitions, and closure of fitness centres?

Please provide details in your response.

4.5. Division 5 – Complaint handling procedures

4.5.1. Complaints by clients – clause 21

The 2018 Interim Code sets out clear procedures for handling client complaints. Clause 21 stipulates that:

> *"(1) [a] supplier must make every reasonable effort to resolve quickly and fairly a complaint made by a client about the supply of a service offered or provided under a membership agreement with the supplier.*
> *(2) Information on how to lodge a complaint must be readily available to a client.*
> *(3) A supplier must ensure that, in handling complaints –*
> *(a) a record of the complaint is placed on file; and*
> *(b) the receipt of the complaint is acknowledged within 7 days".*

Consumer Protection advises fitness services suppliers that the Fitness Industry Code establishes the minimum standards for complaints handling procedures, and suppliers are free to offer higher standards as long as they are consistent with the requirements in the Fitness Industry Code. Suppliers are encouraged to establish complaint handling procedures in order to reduce disputes and improve the public perception of the fitness industry.[65] The ACT and QLD Fitness Industry Codes similarly contain complaints handling responsibilities for suppliers.[66]

The relatively high volume of consumer complaints about the fitness industry in Western Australia received by Consumer Protection over the last five financial years between 2012–13 to 2016–17 appears to support the continued need for mandatory complaints handling procedures.

Question 30:
In your experience, does the Western Australian fitness industry demonstrate clear, written and effective complaints handling procedures for consumer complaints?

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[65] *"Fitness Industry Guide to the Code of Practice: An Overview for the Fitness Industry"*, www.commerce.wa.gov.au/sites/default/files/atoms/files/fitnessindustrycodeofpractice.pdf, Western Australia, p. 15.
[66] ACT Fitness Industry Code, clause 17, QLD Fitness Industry Code, clauses 27-28.

Question 31:
Does the fitness industry make every attempt to resolve each consumer complaint quickly and fairly?

Question 32:
Do you think that there is a continuing need to mandate a complaint handling procedure for the fitness industry?

Please provide details in your response.

5. Cost of regulation of the fitness industry in Western Australia

All policy proposals having a social and financial impact on the community, small businesses, industry and government must meet stringent reporting and approvals processes administered by the Better Regulation Unit, Department of Treasury, Western Australia.

One of the fundamental aspects of obtaining approval for policy change is quantifying the costs of regulation on businesses, government and the community. Consumer Protection is interested in receiving feedback from all stakeholders on the current costs of complying with the 2018 Interim Code, and anticipated costs arising from any of the proposals in this consultation paper.

Question 33:
In your experience, what are the costs of complying with the 2018 Interim Code?

Please provide details in your response.

6. Appendix – List of questions

#	Questions	Topic	Code Clause	Para-graph
1	Do you believe the objectives of the 2018 Interim Code are appropriate, or should they be changed? Please provide details in your response.	Objectives	1	4.1.1.
2 3	Do you believe the 2018 Interim Code applies to an appropriate group of persons, businesses, and fitness services in the fitness industry in Western Australia? Should the scope of the Code be narrowed to apply to fewer people/businesses, or expanded to apply to more people/businesses? Please provide details in your response.	Who and what does Code apply to?	2, 3, 4	4.1.2.
4 5 6	In your experience, is specific industry regulation required to regulate fitness services suppliers' representations about: - claims of membership or endorsement of organisations/associations; - qualifications of staff; and - general advertising? Should clause 8 of the 2018 Interim Code be expanded to prohibit fitness services suppliers from making advertisements, representations or statements that are false or misleading, or likely to mislead? For the purposes of streamlining the 2018 Interim Code, should clauses 5, 6 and 8 be deleted, and reliance placed solely upon the equivalent provisions in the ACL? Please provide details in your response.	Misleading and deceptive conduct	5, 6, 8	4.2.1.
7 8 9 10	In your experience, is the fitness industry generally reasonable in its sales techniques when approaching prospective clients, and negotiating or signing up clients to membership agreements? Have you ever experienced high pressure selling techniques, harassment or unconscionable conduct in the fitness industry? Should clause 7 in the 2018 Interim Code be deleted, and reliance placed solely upon the unconscionable conduct provisions in the ACL? Alternatively, should clause 7 be retained in order to retain a broader prohibition against unreasonable tactics when entering into membership agreements? Should the meaning of "high pressure selling techniques" be further defined in the Fitness Industry Code, or detailed in published guidelines? Please provide details in your response.	High pressure selling techniques, harassment, unconscionable conduct	7	4.2.2.

#	Questions	Topic	Code Clause	Para-graph
11 12	In your experience, does the fitness industry generally maintain client confidentiality of all information gathered from membership agreements (e.g. bank account details, contact details) and health assessments? Should clause 9 in the 2018 Interim Code be deleted, and reliance placed solely upon the Privacy Act 1988 (Cwlth) to govern client confidentiality? Please provide details in your response.	Confidentiality	9	4.2.3.
13 14	In your experience, is the fitness industry generally honest about the services and programmes offered with membership agreements, when a portion of the fees are free or discounted? Should clause 10 of the 2018 Interim Code be deleted, and reliance placed solely upon the misleading and deceptive conduct provisions in the ACL? Please provide details in your response.	Free or discounted services	10	4.2.4.
15 16 17	In your experience, does the fitness industry generally disclose details of membership agreements, rules, facilities offered, the existence of the Western Australian Fitness Industry Code, and any other relevant information to help prospective clients decide to enter into membership agreements? In your experience, is the fitness industry generally honest about fees and costs involved, realistic outcomes which can be achieved by fitness services, and comparisons with other fitness services suppliers? Should the disclosure provisions of the 2018 Interim Code be amended to remove references to misleading and deceptive conduct, and reliance placed solely upon the misleading and deceptive conduct provisions in the ACL? Please provide details in your response.	Disclosure of information	11, 12	4.3.1.
18 19	In your experience, are there membership agreements being offered in relation to fitness services taking place online, outdoors or outside of fitness centres and gyms? Are these membership agreements fair, reasonable, and transparent in the fees payable and terms and conditions applicable? Please provide details in your response.	Membership agreements		4.4
20 21	In your experience, does the Western Australian fitness industry generally comply with the cooling off provisions in the 2018 Interim Code? Are the cooling off provisions working well for consumers in allowing written termination within 48 hours? Should the cooling off provisions be redrafted to ensure a full 48 hours is allowed or extended to a longer time period? What time period do you believe the cooling off period should be? Please provide details in your response.	Cooling off period & Termination during this period	13, 19	4.4.1.

#	Questions	Topic	Code Clause	Para-graph
22 23 24 25	In your experience, does the Western Australian fitness industry generally comply with the provisions in Division 4 of the 2018 Interim Code regarding membership agreements? Are the provisions restricting prepayment of membership fees to no more than 12 months in advance working well for consumers and the fitness industry? How are fitness membership payment plans currently structured and how common are 12-month fitness membership agreements? Are the provisions preventing a fitness centre from selling a membership agreement which extends beyond the expiry of its lease working well for consumers? Please provide details in your response.	Form & content of membership agreements	14, 15, 16, 17, 18, 20	4.4.2.
26	In your experience, does the Western Australian fitness industry generally provide reasonable termination clauses in its membership agreements; act upon termination requests in a timely and effective manner; and comply with requirements for termination? Please provide details in your response.	Consumer complaints about cancellation issues		4.4.2.
27 28	In your experience, does the Western Australian fitness industry offer reasonably worded membership agreements, charge all fees correctly, and provide all the services and facilities agreed upon? What avenues are currently available to, or should be made available to, consumers who suffer financial loses when fitness centres close down? Please provide details in your response.	Consumer complaints about general membership issues		4.4.2.
29	Do you believe the 2018 Interim Code should be amended to include new clauses in relation to compulsory disclosure, competency of staff, safety standards, termination procedures, membership deferment, prohibitions, and closure of fitness centres? Please provide details in your response.	Other potential areas for regulation		4.4.2.
30 31 32	In your experience, does the Western Australian fitness industry demonstrate clear, written and effective complaints handling procedures for consumer complaints? Does the fitness industry make every attempt to resolve each consumer complaint quickly and fairly? Do you think that there is a continuing need to mandate a complaint handling procedure for the fitness industry? Please provide details in your response.	Complaints by clients	21	4.5.1.
33	In your experience, what are the costs of complying with the 2018 Interim Code? Please provide details in your response.	Cost of regulation of fitness industry		5.

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DP1484/2016/ May 2018/ Online